IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 530/16 OF 2018

1. **METRO PETROLEUM TANZANIA LIMITED**
2. **BILL KIPSANG ROTICH**
3. **FLORENCE CHEPKOECH**
4. **PREMIUM PETROLEUM COMPANY LIMITED** ..... **APPLICANTS**

VERSUS

UNITED BANK FOR AFRICA ..... **RESPONDENT**

(Application for extension of time to institute appeal from the ruling of the High Court of Tanzania (Commercial Division) at Dar es Salaam Registry)

(Songoro, J.)

dated the 24th day of July, 2015
in
Misc. Commercial Application No. 96 of 2015

.....

RULING

11th & 14th June, 2019

KITUSI, J.A.:

The applicants are judgment debtors in Commercial Case No. 98 of 2014 that proceeded *ex parte* and determined against them on 24th July, 2015 by the Commercial Division of the High Court at Dar es Salaam. This is an application by the said applicants, for extension of time to lodge an appeal against the decision of the said Commercial Division, not in the said Commercial Case No. 98 of 2014, but in Miscellaneous Commercial

Application No. 96 of 2015. The application is by Notice of Motion under Rules 10, 28 and 48 (1) of the Tanzania Court of Appeal Rules, 2009, the Rules, and it is supported by an affidavit of James Andrew Bwana.

The application is contested, as demonstrated by an affidavit in reply that has been taken by Aloys Bahebe, although most of the historical facts are matters of common ground except a few. Notably, while the applicants allege that hearing of Commercial Case No. 98 of 2014 proceeded *ex parte* without proof of service, the respondent maintains that all options of service were utilized, including that of courier services by DHL Tanzania Limited. But that is beside the point at the moment.

Relevant to the instant application is that through an issue of the East African Newspaper of 18-24 October, 2014, the applicants, three of them based in Kenya, became aware of the decree against them in Commercial Case No. 98 of 2014, and they sprang into action.

First, and this is averred in paragraph 7 of the affidavit, they filed Misc. Commercial Application No. 292 of 2014 for extension of time to apply for an order of setting aside the default judgment and decree. This application was struck out on 23rd March, 2015, the High Court having sustained a point of preliminary objection raised by the respondent.

However, the applicants went back with another application, Misc. Commercial Application No. 96 of 2015, this time seeking both extension of time to apply for setting aside the default judgment and decree, as well as applying to have the default judgment and decree set aside. This application was dismissed on 24th July, 2015.

In the affidavit in reply (paragraph 7), the respondent does not dispute the facts regarding the two applications and their fate.

The applicants were aggrieved by the dismissal of Misc. Commercial Application No. 96 of 2015 and on 7th August, 2015 they lodged a Notice of Appeal at the Commercial Division of the High Court. The essence of this application is that after filing the Notice of Appeal, and that was done within time, they did not lodge the intended appeal within time. So, the present application aims at explaining the delay in order to persuade me exercise the discretionary powers under Rule 10 of the Rules, to order extension of time to lodge the intended appeal.

Apart from the affidavits as earlier referred to, the parties filed written submissions in accord with Rule 106 of the Rules.

When the application came up for hearing, this being under a certificate of urgency, Mr. James Bwana, learned advocate, appeared for the applicants, while Mr. Aloys Bahebe, learned advocate, appeared for the respondent. After adopting the contents of their respective affidavits and written submissions counsel made animated oral submissions in support of their respective positions.

To begin with, Mr. Bwana submitted that the applicants duly filed a Notice of Appeal at the High Court Commercial Division, but the same could not be served on the respondent within 14 days as required by law because the Registry of that Court did not return to the applicants the endorsed copy within time. When the Registry eventually returned it to the applicants 47 days later, they had missed the statutory boat for, 14 days had elapsed.

The applicants had to file an application for extension of time within which to serve the respondents and this was granted on 1st September, 2016, the very day it was called for hearing. On 2nd September, 2016 Mr. Bwana applied for a copy of that ruling so as to include it in the record of appeal. This however posed another challenge.

The copy of the ruling delivered on 1st September, 2016 was supplied to Mr. Bwana on 12th November, 2018, that is, 18 months later. Incidentally Mr. Bwana had with him a certificate of delay issued by the Deputy Registrar Commercial Division excluding the period up to 21st March, 2017. By the turn of events however, this certificate was no longer useful to the applicant on 12th November, 2018 because its life span ended on 21st March, 2017.

The above, according to Mr. Bwana, justifies his resort to the present application for extension of time. Citing Rule 96 (1) (j), the learned counsel submitted that a Notice of Appeal is an important document in the Record of Appeal, and where it has not been served on the other party within 14 days, then the order granting extension of time to serve it outside that period, becomes equally important.

Then Mr. Bwana demonstrated his awareness of what is expected of the applicant in an application for extension of time such as this. He submitted that he has to show good cause, and provided a menu of what good cause means.

First, he has to account for each day of the delay. Mr. Bwana submitted that the last document for lodging the appeal was obtained on

23rd November, 2018 (Drawn Order Annexure 17) and this application was filed 7 days later. He submitted that 7 days is not an unreasonable delay. **Secondly**, the delay should not be inordinate, to which he provided the answer similar to that of the first condition. **Thirdly**, there should be evidence of diligence on the part of the applicant. Mr. Bwana submitted in relation to this, that he wrote three letters of follow ups at the Commercial Court and that there were also follow ups at this Court.

Lastly, Mr. Bwana submitted that there is a point of illegality involving non-compliance with the law regarding service of a party who resides in Kenya. He submitted that the second, third and fourth applicants are based in Kenya.

A number of decisions were relied upon by Mr. Bwana to support his submissions that he has established good cause. These include **Benedict Mumelo V. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported); **Bharya Engineering & Contractors Co. Ltd V. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (unreported) and; **Ngao Godwin Losero V. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported).

When it was Mr. Bahebe's turn he pointed out an error on the Notice of Motion which cites this application as being an *"Appeal from the Ruling of the High Court (Commercial Division ..."* I am tempted to deal with this matter instantly. The counsel for the applicant conceded to it and cited human error as the reason. He however prayed that the error should be ignored as being inconsequential, citing the newly introduced overriding principle Rule.

My settled view is that even without the introduction of section 3A in the Appellate Jurisdiction Act, Cap 141 R.E. 2002 through the Written Laws (Miscellaneous Amendments) Act, 2017 Act No. 4 of 2017, I would not have found the application defective simply because of that error. To do that would have meant turning a blind eye to Rule 2 of the Rules which provides:-

> *"In administering these Rules, the Court shall have due regard to the need to achieve substantive justice in the particular case."*

Therefore, the typographical error in the citing of the application, though legitimately raised by Mr. Bahebe, does not invalidate the

application because everything else shows that what is before me is an application.

Back to the merits of the application, Mr. Bahebe submitted in alternatives, in my view, although he did not expressly say so.

First, he submitted that there was nothing wrong in the certificate of delay issued by the High Court and offered counsel to me that, by entertaining this application I am being made to perform the duty of the Registrar, that of computing the time to be excluded. He further submitted that the applicants ought to have gone back to the Deputy Registrar High Court to ask for an amended certificate of delay.

Then, and I think this was submitted in the alternative, the learned counsel submitted that if the applicant chose to apply for extension of time instead for seeking amendment of the certificate of delay, he ought to have made the application before the High Court. As a third alternative, the learned counsel submitted that it was enough under Rule 96 for the applicants to file the Notice of appeal and that proof of service of that Notice on the other party is not a requirement under that Rule. Again he submitted that if the copy of ruling extending time was necessary, the applicant could have filed a supplementary record.

Lastly, on the alleged illegality, counsel submitted that whether or not service was legally effected is not an issue presently.

In rejoinder, Mr. Bwana submitted that once a Notice of Appeal is lodged the jurisdiction of the High Court on that particular matter ceases. He therefore submitted that he could not have gone back to the High Court to seek extension of time. He pointed out that there was nothing wrong with the certificate of delay so there was no point of getting it amended.

As for the suggestion that he could have filed a supplementary record, counsel submitted that, such option is only available to the respondent, citing the case of **Jaluma General Supplies Ltd V. Stanbic Bank (T) Ltd,** Civil Application No. 34 of 2010 (unreported). He submitted further that he was aware of Rule 96 (6) permitting a party to file a missing document, but he could not have risked taking that option when that Rule requires the filing to be within 14 days after filing the record of appeal. In other words, he submitted, how would he have known that the copy of Ruling would have been available within those 14 days?

Winding up, Mr. Bwana submitted that for illegality to form a basis for extending time, the point must be apparent and of sufficient importance.

Having heard the rival arguments, I am satisfied that in the determination of this application, I am eventually required to consider a very narrow landscape. That is, the applicants were aggrieved by the decision in Misc. Commercial Application No. 96 of 2015 and lodged a Notice of Appeal with a view to challenging that decision. However, they did not lodge the appeal within 60 days from the filing of the Notice as required by Rule 90 (1) of the Rules. Two questions must be resolved; **one**, whether this application is tenable and; **two**, whether the application is meritorious. Obviously the second question will only be addressed if the first question is answered affirmatively. The first question is a result of Mr. Buhebe's suggestion that the application ought to have been filed at the High Court.

I will commence with the first question, a simple one in my view. My reading of the submissions tells me that the period excluded by the certificate of delay expired, so I find the submission that the applicants could have it amended, quite surprising, because it suggests tampering

with it. I also uphold Mr. Bwana in his submission that he could not have filed the application for extension of time at the High Court having lodged the Notice of Appeal. The powers of the High Court to extend time reside in Section 11 of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. These are limited to extending time to file Notice of Appeal, application for leave to appeal and application for a certificate on a point of law. The situation at hand is not covered by Section 11 of the Act.

On the basis of the foregoing, I find this application to be tenable and Mr. Bahebe's argument misconceived.

So, the next question is whether the application has merits. That the applicant has to show good cause, is settled by statute (Rule 10) and caselaw. Apart from those cited by Mr. Bwana that is, **Bharya Engineering** (supra) **Benedict Mumello** (supra) and **Ngao Godwin Losero** (supra), there are many others. They include **Lyamuya Construction Company Limited V. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported) and; **Hassan Bushiri V. Latifa Lukio Mashayo**, Civil Application No. 3 OF 2007 (unreported).

The underlying factors are the same as those restated in the case of **John Lazaro V. Republic**, Criminal Application No. 34/4 of 2017 (unreported) in which **Lyamuya Construction Company** (supra) was referred to. They are the very factors Mr. Bwana cited in his submissions.

The respondent's counsel has not challenged the submissions by Mr. Bwana that he has complied with the factors that have been developed by caselaw. In real sense in my conclusion, the reason for the delay in this case seems to be what has been termed as technical. See the case of **Bharya Engineering & Contractors Co. Ltd** (supra) and; **Tanzania Fish Processors Limited V. Busto K. Ntagalinda**, Civil Application No. 41/08 of 2018 (unreported).

In the former case, Mwambegele, J.A. considered an array of cases on technical delays before pronouncing his position. These include; **Fourtunatus Masha V. William Shija and Another** [1997] TLR 154; **Salvand K. A. Rwegasira V. China Heman International Group Co. Ltd**, Civil Reference No. 18 of 2006; **Zahara Kitindi & Another V. Juma Swalehe & 9 Others**, Civil Application No. 4/05 of 2017; **Yara Tanzania Limited V. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016 (unreported).

Then the learned Justice stated:-

> *"I subscribe to the view taken by the Court in the above cases. The applicant in the present application having been duly penalized by striking out Civil Appeal No. 148 of 2015 and dismissing Miscellaneous Civil Application No. 20 of 2016 as well as striking out Civil Application No. 148 of 2015, the same cannot be used yet again to determine the timeousness of applying for filing the fresh notice of appeal in a bid to file a fresh appeal."*

Similarly in this case one cannot blame the applicants as being the authors of the delay in view of the unchallenged fact that for some unknown reason, it is the Court Registry that would not supply them with the copy of the Ruling in time. I accept Mr. Bwana's argument that the Ruling was an important document to explain why the notice of appeal was served beyond the statutory 14 days.

With that, it is my conclusion that the applicants have discharged their duty to show good cause for the delay. As the applicants have

already made their case, I need not deliberate on the point of illegality which, I am afraid, is not as clear as the principle would require.

Accordingly the application is granted. The applicants are given 60 days from the date of this order within which to lodge the intended appeal. Costs to be in the cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of June, 2019

I. P. KITUSI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL