IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 512/2 OF 2016

ALLIANCE INSURANCE CORPORATION ..... APPLICANT

VERSUS

ARUSHA ART LIMITED ..... RESPONDENT
(Application for extension of time to file an appeal against the judgment and decree of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

dated the 5th day of June, 2015
in
Civil Case No. 27 of 2012

RULING

1st & 3rd March, 2017

MWAMBEGELE, J.A.:

By Notice of Motion, the applicant is seeking an order of this Court to enlarge time within which to file an appeal against the judgment and decree of the High Court (Mwaimu, J.) in Civil Case No. 27 of 2012. The Notice of Motion has been taken under the provisions of, *inter alia*, rule 10 of the Tanzania Court of Appeal Rules, 2009 and supported by an affidavit duly sworn by Erick Kamaka Mushi; the applicant's principal officer.

The application was argued before me on 01.03.2017. It was argued *exparte*, the respondent having been failed to file any written submissions and having failed to enter appearance despite being properly served. The summons shows that the respondent was served through Albert Gasper Msando of Gabriel and Co. Attorneys at Law, Plot No. 39 Engira Road, Themi, Arusha and duly stamped with an impression which reads "RECEIVED 14.02.2017". On the reasons, the Court granted the prayer of Dr. Alex Thomas Nguluma, the learned counsel who appeared for the applicants, to proceed with the hearing of the application in the absence of the respondent under sub-rule (10) of rule 106 of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules) .

Dr. Nguluma, learned counsel, having adopted the affidavit supporting the Notice of Motion and the written submissions earlier filed pursuant to rule 106 (1) of the Rules, was very brief in his oral submissions but to the point. The learned counsel amplified the written submissions that the present application was filed because the time provided by the Rules had expired for the reasons not within the control of the applicant and which reasons are described in the affidavit of Erick Kamaka Mushi filed in support of the application. He stated

that when preparing the documents of appeal, having received from the High Court the impugned judgment and decree, record of the proceedings and exhibits as well as the Certificate of Delay, it was discovered that four exhibits admitted in evidence at the trial were missing. Strenuous efforts were made by the applicant to be availed with the missing exhibits to no avail. As of today, he submitted, only two of the four missing exhibits have been availed to the applicants.

As rightly submitted by Dr. Nguluma, learned counsel, the affidavit in support of the Notice of Motion has ascribed the reason why the appeal could not be filed in time to the fact that in the process of compiling the record of the intended appeal, it was learnt that some of the exhibits tendered and admitted in evidence at the hearing of the decision intended to be challenged were missing from the list of exhibits supplied to the applicant by the High Court. It is deposed that the Notice of Appeal was filed well in time on 12.06.2015, requested the copies of proceedings, judgment and decree of the decision intended to be challenged through a letter of the same date and a reminder letter dated 10.09.2015. The applicant deposes further that the documents were supplied to her on 02.09.2015 together with a Certificate of Delay by the Deputy Registrar but four exhibits were

missing which made the filing of the appeal in time impossible. In view of this, and the applicant having realized that time to appeal was about to run out and the likelihood of getting the missing exhibits was narrow, the present application was preferred.

I have dispassionately considered the applicant's reasons for delay as gleaned in the Notice of Motion, affidavit of Erick Kamaka Mushi supporting it as well as the arguments by Dr. Nguluma, learned counsel for the applicant before me during the hearing on 01.03.2017. I wish to state at this juncture that applications for extension of time within which to perform any act in legal proceedings are controlled by the provisions of rule 10 of the Rules under which the present application has, *inter alia*, been made. For easy reference, I find it apt to reproduce rule 10 hereunder:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before*

or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

It is apparent that an application for enlargement of time within which to take any step in legal proceedings is entirely in the discretion of the court to grant or not to grant it. It is also settled law that extension of time may only be granted where it has been sufficiently established by an applicant that the delay was with sufficient cause – see: **Mumello v. Bank of Tanzania** [2006] 1 EA 227 (a case referred to me by the learned counsel for the applicant), **Kalunga and Company Advocates v. National Bank of Commerce** [2006] TLR 235 and **Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported), to mention but a few. In **Kalunga and Company, Advocates**, for instance, a single judge of this Court, when faced with an identical situation, observed:

"This court has discretion to extend time but such extension ... can only be done if 'sufficient reason' has been given".

It has been stated time and again that what amounts to "sufficient reason" or "good cause" has not been defined under the Rules. This is so because extension of time being a matter within the Court's discretion cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case – see: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited,** Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda,** Civil Application No. 6 of 2001, both unreported decisions of the Court. In **Tanga Cement** (supra), for instance, this court, referring to its unreported earlier decision of **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, observed:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account,

including whether or not the application has been brought promptly; the absence of any explanation for delay, lack of diligence on the part of the applicant".

It should be stressed here that the discretion of the Court in extending time is judicial and therefore has to be exercised judicially; not according to the whims of a person. As observed in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), from decided cases on the point, the following principles may be formulated:

"(a) The applicant must account for all the period of delay;

(b) The delay should not be inordinate;

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

[See also: **Yusufu Same & Anor v. Hadija Yusufu,** Civil Appeal No. 1 of 2002 (unreported)].

Applying the foregoing principles to the case at hand, as already alluded to above, the applicant, through the affidavit supporting the application, the written submissions as well as the oral submissions before me at the hearing of this application, has stated that in the process of compilation of the record of the intended appeal, it was discovered that four exhibits tendered and admitted in evidence at the hearing of the impugned decision were missing from the exhibits supplied to the applicant by the High Court thereby making it impossible to file the intended appeal. As she was running short of time, the applicant decided to proffer the present application. As rightly stated by the applicant, lack of tendered exhibits in the record

of appeal renders the appeal incompetent and the applicant has rightly cited the order of this court in **Mr. Robert Schel Tens & another v. Mr. Baldev Norataram Varma & 2 others**, Civil Appeal No. 24 of 2007 to that effect. In that case, the application was found incompetent and consequently struck out for failure of the record of appeal to contain all documents put in evidence at the hearing thereby offending against the mandatory provisions of rule 96 (1) (f) of the Rules.

The respondent, as already said, did not file her reply submissions. However, in the affidavit in reply, she does not attack the contents of the affidavit supporting the application; the deponent simply notes the contents thereof. And, to clinch it all, at para 3 of the three-paragraph affidavit in reply, the applicant supports the application. The contents of the said para 3 are to the following effect:

> "It is for the foregoing reasons; I submit this affidavit in reply in support of the application".

In the circumstances, it is my well considered view that the grounds upon which the present application is premised fall within the

realm of circumstances beyond the applicant's control. It is, in my view, the High Court which is to blame for not supplying the exhibits to the applicant in the requisite time. In sum, I am satisfied that the applicant has demonstrated to the satisfaction of the Court that she is entitled to the extension sought. The course of action taken by the applicant is what a vigilant litigant would have done. I would therefore grant this application.

Before penning off, I wish to state that I have taken note of Dr. Nguluma's statement from the bar to the effect that the applicant has been supplied with two of the missing exhibits; she is yet to be supplied with only two of them and for that reason, he has beckoned the Court, should it grant the application as done, to order that the appeal shall be filed within a fortnight of the supply of the rest of the document. I have considered this prayer and, respectfully, find myself loathe to grant it for two main reasons; first, such detail is missing in the Notice of Motion and its flanking affidavit deposed in support of the application hence it is a statement from the bar which is unacceptable and; secondly, even if I would have accepted the statement, I would not have granted the prayer, for, the order would be like an empty cheque to survive "eternally" until the two remaining exhibits are

availed to the applicant. This course, I am afraid, would not have encouraged expeditious approach to the matter; a course of which I am not prepared to be part.

As an extension to the foregoing arguments, and more importantly, the Court has no mandate to set a timeframe in contravention of what is provided by law – see: **Robert John Mugo v. Adam Mollel**, Civil Appeal No. 2 of 1990, **Betty Mbapa v. Dipak Vessa and Joseph Moshi**, Civil Appeal No. 48 of 2010; both are unreported decisions of the Court. In **Betty Mbapa**, for instance, it was observed:

> *"Neither the High Court nor this Court for that matter, has jurisdiction to set a limit for the lodging of the notice of appeal beyond the prescribed period or in violation of the express provisions of the law".*

The prescribed period in the case at hand is, as per rule 90 of the Rules, sixty (60) days. That is therefore the period of extension which the Court is legally bound to give. In view of this, granting the application and ordering that the intended appeal should be filed within

fourteen (14) days of the supply of the remaining two exhibits as prayed by Dr. Nuguluma, would, in the light of **Betty Mbapa**, be going against the letter of the law. I think this suffices to demonstrate why I would not have granted Dr. Nguluma's prayer even if I had accepted his statement from the bar.

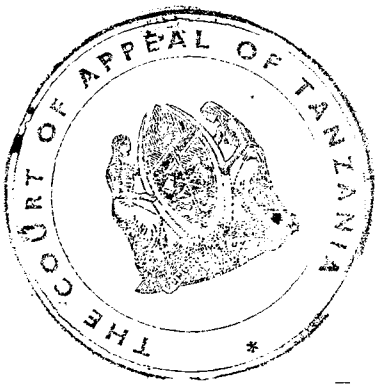
In the end of it all, this application is allowed and the applicant is given sixty (60) days, reckoned from the delivery of this ruling, within which to file her intended appeal. No order is made as to costs.

Order accordingly.

DATED at **ARUSHA** this 3rd day of March, 2017.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL