IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 62/16 OF 2018

BARCLAYS BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

1. **TANZANIA PHARMACEUTICAL INDUSTRIES**
2. **RAMADHANI MADABIDA**
3. **SALUM SHAMTE**
4. **ZARINA MADABIDA**

..... RESPONDENTS

(Application for extension of time arising from the Ruling and Order of the High Court of Tanzania, Commercial Division at Dar es Salaam

(Hon. Nchimbi, J)

dated the 2nd day of June, 2014
in
Commercial Case No. 147 of 2012

RULING

8th April & 24th May, 2019

KOROSSO, J.A.:

This application was filed by way of notice of motion, supported by two affidavits, one sworn by Mpaya Kamara, learned Advocate representing the applicant, and the second affidavit affirmed by Dilip Kesaria, learned Advocate. The application is made pursuant to Rules 2 and 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The applicant is moving the Court so as to be granted extension of time to move the Court to revise

the Decision (Ruling and Order) of the High Court of Tanzania, Commercial Division at Dar es Salaam (Hon. Nchimbi J.) dated 2nd June 2014 in Commercial Case No. 147 of 2012, where the applicant's suit was dismissed upon failure to file witness statements and costs.

The application is predicated upon two main grounds. First, that there was illegality in the Ruling of the High Court, Commercial Division (Hon. Nchimbi J.) dated 2nd June 2014. The applicant was dissatisfied and aggrieved with the dismissal of the suit which ponded an impetus to find the need for this Court to examine and give proper directions in the interest of justice. Second ground being, that the delay was not inordinate, nugatory or due to negligence. Apart from the notice of motion and supporting affidavits and annexures, the applicants also filed written submissions. On the part of the respondents, they filed a reply to the affidavit sworn by Dennis Msafiri, learned Advocate representing the respondents and written submissions.

On the day of hearing, the applicants were represented by Mr. Dilip Kesaria and Mr. Mpaya Kamara, learned Advocates respectively, and on the part of the respondents they were represented by Mr. Dennis Msafiri, Learned Advocate.

A brief summary of the background to this application as discerned from the affidavits before the Court, is that in the High Court, Commercial Division, Commercial Case No. 147 of 2017, was instituted by the applicant against the respondents. That on 2nd of June 2014, the said suit was dismissed with costs on the ground that the applicant failed to prosecute the case when it came up for hearing on the 14th of May 2014. The Court arrived at this decision, holding that the applicant failed to comply with Rules 48 and 49 of the High Court (Commercial Division) Procedure Rules, 2012, providing for witness statements to be filed as evidence in chief in support of claims, within seven days of completion of mediation.

Following the dismissal of the suit, the applicant lodged a Notice of Appeal, and thereafter lodged an appeal to challenge the decision related to dismissal of their suit, upon being granted leave to appeal to the Court of Appeal. The Appeal was registered as Civil Appeal No. 87 of 2015. Copies of all these documents were part of the Court records tendered as annexures to the affidavit by Mpaya Kamara, Learned Advocate.

The applicants appeal, on the date fixed for hearing, was confronted with four preliminary points of objection from the respondents. Subsequent. The relevant Ruling was delivered on the 10th of October 2017, and having

upheld one preliminary point of objection, raised by the respondents, that the record of appeal were incomplete and thus in violation of Rule 96(1)(d) and (h) of the Rules. The appeal was consequently struck out with costs. In the said Ruling, the Court never really addressed the merits of the appeal in any context.

The applicants allege that the Courts silence on whether the applicants remedy was either to prefer an appeal as it has done or to proceed by way of seeking revision, let the applicant with uncertainty as to the recourse to take. Thereafter, applicants counsel submitted that, they went through a process of reflections, research and consultations amongst the counsels for the applicants, which led them to advice their counsel on the need to undertake a different course of remedy, approved by their client and henceforth started to pursue a course for a different remedy. The said remedy is revision, deciding this was the most appropriate remedy for the applicants to challenge the disputed Ruling of the High Court, Commercial Court Division.

With regard to the application before the Court, the applicants counsel through their written submissions, affidavits supporting the application and oral submission, contend that they have showed good cause for the delay in

filing the application within time specified. Arguing that they have managed to demonstrate that the applicant has meticulously accounted for each day of delay. That they have succeeded as expounded by various decisions, such as, **Shanti v. Bindocha and others** (1973) EA 207, to demonstrate that the delay to file the application for revision on time, was not occasioned by any dilatory conduct on the part of the applicants.

The applicant counsel stated further that the applicant, through the filed affidavits in support of the application, has revealed that all the available remedies were timely pursued. The counsel cited the case of **Horizon Coaches Limited v. Rurangaranga and another** (2010) EA 77, a case from Uganda, to bolster his assertions. In the said case, the Court stated that, where there is excessive delay, the Court has to be satisfied that there is an adequate excuse for the delay or that the interest of justice are such as to require the indulgence of the Court upon such terms that the Court considers just. Thus, the applicant's counsel sought this Court to be guided by the position of the Court in the said decisions. Arguing that, considering all these factors and the explanations for the delay expounded in the affidavits supporting the application, the Court should thus find the delay

excusable, and in the interest of justice, find the indulgence of the Court is warranted.

The applicant's counsel also extended another ground for the Courts consideration, arguing that another reason being that the Hon. Trial Judge's act of sanction against the applicant', upon the applicant failure to file witness statements in line with the Rules, and dismissing the suit for want of prosecution, was erroneous and needs to be examined by the Court of Appeal. Contending that the legality or correctness of the decision of the Hon. Trial Judge, and the reasons stated therein the Ruling for reaching that decision, on failure to file witness statements, needs to be examined by this Court hence the prayer which intends to lead to an order for revision.

On the point of their being illegality in the Ruling by the trial Court, warranting revision, the applicant counsel presented areas of the decision which will need to be examined and considered:

i. The need for the Court of Appeal Tanzania to determine whether the trial Judge misdirected himself in dismissing the suit as he did rather than granting an order for extension of time to enable the applicant to file its witness statements, and

ii. That in the absence of any express provision in the High Court Commercial Division Procedure Rules 2012 spelling out clearly the consequence of failure by a party to file witness statements within the time fixed by the rules, then it is opportune that the Court of appeal be invited to explore the situation and determine accordingly.

It was the applicants submission that the Court of Appeal will be able to determine the above two issues and to examine the correctness and/or legality of the trial Judge's decision in the applicants intended revision, of which to be able to have that opportunity, the current application seeks for extension of time. The applicant's counsel also submitted that, whilst there is no question that the discretion on whether or not to grant extension of time rests on this Court, the Court should consider that the applicant has throughout the life of the case, acted diligently in pursuit of justice, from the time the suit was dismissed.

The respondent on the other hand, submitted that the Ruling by the Hon. Trial Judge was in line with the High Court (Commercial Division) Procedure Rules 2012, GN No. 250 of 2012 which came into force on the 13th July 2012 the Rule requires parties to the suit, that is, the plaintiff and

defendants, now the applicants and respondents respectively, to file written statements within seven days of completion of mediation. That while the respondents duly filed the witness statements, the applicants failed to do so, hence the said impugned Ruling. The respondent counsel contended that the act of failing to file the witness statements, was an act of negligence on the part of the applicants. Arguing that the applicants never sought for extension of time when they appeared in Court after Mediation, such as on 2nd September 2013, when the applicants prayed for extension of time for lifespan of the suit only.

The counsel for the respondents submitted further that the negligence continued on the part of the applicants, since while the Ruling was delivered on the 2nd June 2014, and a notice of appeal was lodged on the 16th of June 2014 by the applicants, and together a formal application of leave to appeal to Court of Appeal was also filed and a request for a copy of the record of proceedings in the high Court, Ruling and a Drawn Order, as well as a certificate of Delay. But that despite this, what was filed in the Court of Appeal, as part of the record of appeals was a Decree and not a Drawn Order. This was one of the factors which led to the appeal being struck out for having improper Court records. The counsel for the respondents, finds

this another black mark on the part of the applicant's, that this factalso should be taken as negligence. His argument being that the counsels for applicants did not exercise proper care leading to them being served with Decree instead of the Drawn Order they had requested.

The respondents further submitted that the period for applying for revision lapsed on the 1st of August 2014, due to what they call negligence on the part of the applicants. The counsel for respondents asserted that the applicants failed to exercise proper care, by even confusing the proper action to take and advice their clients accordingly. Since instead of resorting to revision they proceeded to channel the course of an appeal, which was a futile exercise, and thus led to expiry of the period allowed to institute a revision application. The respondents contend that the applicants have failed to fully account for the delay in making the present application, taking into consideration the fact that the Drawn Order was extracted a long time prior to 27th February 2018.

On the applicants second ground submitted, that there is an issue of illegality, in the decision by the trial Court to dismiss the suit. The argument being that the trial Judge did exercise his jurisdiction improperly by dismissing the suit for want of prosecution, in the absence of a provision of

law sanctioning such recourse. The respondents counsel argued that, this point should not be given any consideration by the Court, since it is an afterthought. Basing his argument on the fact that the said ground was never raised as a ground of appeal in Civil Appeal No. 87 of 2015, which was lodged by the applicants in this Court. The respondents thus argued that the application for extension of time should be dismissed, for failure to show good cause, and that the delay was caused by negligence, ignorance of law, inaction and laxity on the part of the applicants.

The Court has considered the affidavits and annexures thereto, written submissions and oral submissions and also all the cited cases before the Court. The Court appreciates the industry in the presented case law, and well researched arguments from the learned counsels for the applicants and respondents, which assisted the Court to a great extent. Having considered what has been presented and is part of the Court records, I find, the main issue for consideration and determination, is whether the applicant has shown good cause warranting grant of extension of time to file an application for revision.

Rule 10 of the Tanzania Court of Appeal Rules 2010, provides that, grant of extension of time is within the discretion of the Court. That when

considering whether or not to grant the application sought, the Court must be satisfied that the applicant has presented good or sufficient reasons for the delay to file the application on time. Rule 10 for ease of reference we import the same, which reads:

> *"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."*

There are various decisions that have addressed the issue of determination of whether or not good cause has been exhibited, and it is within the discretion of the Court. A case in point is, **Alliance Insurance Corporation Ltd vs. Arusha Art Ltd**, Civil Application No. 33 of 2015 CAT (unreported). In this case the Court stated that:

"Extension of time is a matter for discretion of the Court and that the applicant must put material before the Court which will persuade it to exercise its discretion in favour of an extension of time".

It is also well settled, that in an application for extension of time, where the applicant has demonstrated good cause, the Court is duty bound to exercise judicial discretion under Rule 10 of the Rules.

In the case of ***Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women Christian Association of Tanzania***, Civil Application No.2 of 2010 (unreported). The following guidelines were formulated in considering what amounts to good cause:

"(a) The applicant must account for all days of the 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.

(d) If the court feels that there are other reasons,

such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged".

Looking at the actions taken by the applicant's counsel from the time the impugned Ruling was delivered, which is what concerns this Court in this application. There is no doubt in my mind that, that there are elements of lack of seriousness on the part of the applicants in pursuing proper recourse and justice in this matter. First, looking at the affidavits, paragraph 5 of the affidavit sworn by Mpaya Kamara para 6 in the one affirmed by Dilip Kesaria, they all concede to have first proceeded to an appeal. One wonders under the circumstances whether this was the best possible move and whether if the counsels had carefully considered all the pertinent options for their client prior to the remedy they proceeded to first. There is no doubt that appeal process which the applicants had taken initially is a factor which delayed the process of seeking revision as a remedy. The confusion can also be seen in paragraph 11 of Mpaya Kamara's affidavit and paragraph 11 of Dilip Kesaria's affidavit. Though no one can doubt it was also in pursuit of justice in one way, but much more was expected of the, counsels for the applicant. One is also not clear how the contents of paragraph 13 of the affidavit sworn by

Dilip Kesaria, in any way expresses pursuant of the most appropriate recourse for the applicants.

As expounded by the respondents counsel. The actions taken by the applicants from the time the impugned Ruling was delivered cannot be said did in any way further the cause of justice for the applicants. The Court understands that they did not just sit, but that some actions were taken, though I find, the said actions cannot be said or separated from acts which were borne of lack of care, that is negligent acts. When considering they are the ones who led delay in filing an application for revision a remedy which was resorted to in the end. Therefore, I am not satisfied that the applicant has managed to show due diligence in the pursuit of justice, though some efforts can be discerned from their actions and thus the first ground, I find fails.

I proceed to address the second ground, that is, the issue of illegality in the impugned Ruling, raised for consideration of the Court. The position exposed in various decisions, where the ground of illegality of the impugned decision is raised, is clear. In the case of **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited,** Consolidated Civil Reference No. 6, 7 and 8 of 2006, it was held:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay".

The issue was also considered in the case of **Tanesco vs. Mufungo Leornard Majura and 15 Others**, Civil Application No 94 of 2016, Court of Appeal at Dar es Salaam (Unreported), where it was stated:

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court"

While the submissions of the learned counsel for the respondents on this issue have been considered, that this ground was an afterthought, since

it was not raised in the appeal that was struck out, it is important to understand that a matter of legal stance and which may raise legal implication or otherwise described as a point of law can be raised at any time. The issue under consideration, of concern for the applicants is the fact that the Ruling by the trial Judge, was based on determination of a matter based on interpretation of Rules, which do not provide a clear way forward where there is non-compliance of the specific Rule requiring parties to submit witness statements, and thus the applicants claim, that the dismissal of the suit was unwarranted and illegal. The respondents have not in any way challenged this concern on the said provisions and interpretation apart from addressing the issue in general context.

In this case, based on the submissions and affidavital evidence before the Court, and bearing in mind that the issues which have been provided, that is, those which have led to this application and are intended for consideration in the intended revision. Which is intended to pursue further possible direction by this Court to address perceived errors that led to the impugned Ruling of the trial Court, I find to be a good cause cause. Clearly under such circumstances, as what was held in **Jehangir Aziz Abdulrasul**

vs. Balozi Ibrahim Abubakar and Another, Civil Application No. 79 of 2016 (Unreported)

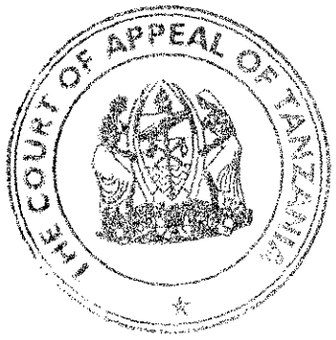
> *"the Court has a duty even if it means extending the time for the purpose of ascertaining the point and to take appropriate measures".*

In that regard, I find that the ground on illegality of the decision is a good cause to warrant grant of extension of time sought in the present application. The respective application for revision must be filed within thirty (30) days from the date of this Order. Costs to be in the main application. It is so ordered.

DATED at **DAR ES SALAAM** this 27th day of April, 2019.

W.B. KOROSSO
JUSTICE OF APPEAL

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



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL