IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 47/08 OF 2020

1. **SHELINA JAHANGIR**
2. **JAHANGIR TEJANI**
3. **KIRITKANT K. PATTNI** ..... **APPLICATIONS**
4. **FIROZI TEJANI**
5. **ZULFIKAR TEJANI**

VERSUS

NYAKUTONYA N.P.F. COMPANY LIMITED ..... RESPONDENT

(Application for an extension of time to institute an appeal against the Ruling of the High Court of Tanzania at Mwanza)

(Rweyemamu, J.)

dated the 29th day of September, 2005
in
Civil Appeal No. 47 of 1997

RULING

1st December, 2021 & 10th February, 2022

KAIRO, J.A.:

This is an application for enlargement of time to lodge an appeal against the decision of the High Court of Tanzania at Mwanza dated 29th September, 2005. The application is by way of notice of motion taken out under the provisions of Rules 10 and 48 (1) and (2) read together with Rule 90 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit affirmed by Mr. Dilip Kesaria, the advocate representing the applicants. In addition, the applicant has filed written submission to illustrate his application. In reply, Mr. Japhet

Pima Nyakutonya, authorized agent representing the respondent has resisted the application and filed a written submission in opposition. For a better appreciation of the issues in contention, I have found it necessary to give a brief factual setting giving rise to the application.

The respondent instituted Civil Case No. 71 of 1992 at the High Court, Mwanza claiming TZS. 12,000,000/= against the applicants. His Lordship Masanche, J. (as he then was) transferred the case to the Resident Magistrate's Court of Mwanza on the ground that the claimed sum was under the pecuniary jurisdiction of the Resident Magistrate's Court. Pursuant to the transfer order, the suit registered as Civil Case No. 106 of 1994 was determined *exparte* in favour of the respondents on 22nd day of November, 1994. The applicants attempted to set aside the *exparte* judgment but it was denied by the trial court on 18th August, 1995.

An appeal at the High Court against the refusal by the trial court was dismissed by the late Rweyemamu, J. in Civil Appeal No. 47 of 1997 for want of prosecution on 29th September, 2005. Undaunted, the applicants filed an application to set aside the dismissal order but the same was similarly dismissed on the ground that the proper remedy was

to appeal and not to apply to set aside the dismissal order of the High Court.

The applicants returned to the High Court and filed an application for extension of time to pursue an appeal, which was again dismissed on 15th October, 2013. Still adamant, the applicants applied before the Court for an extension of time to appeal out of time in Civil Application No. 186 of 2015. They basically sought for two distinct orders in the said application: - **First;** an extension of time to lodge their notice of appeal and **second** to file leave to appeal to the Court. Both prayers were granted on 30th May, 2016. It was further ordered that the applicants lodge both the notice of appeal and apply for leave to appeal to the Court within 30 days from the date of the order. The applicants lodged the notice of appeal on 23rd June, 2016 and on the same date they wrote a letter to the Registrar of the High Court at Mwanza requesting to be supplied with certified record of the proceedings, decision and drawn order in Civil Application No. 47 of 1997. Further, the applicants also applied for leave to appeal to the Court in Miscellaneous Application No. 91 of 2016 which was granted on 15th December, 2017. It is further on record that, the Registrar issued a certificate of delay excluding the period from 23rd June, 2016 to 8th March 2019 from computation of the

time to appeal. Nevertheless, on 3rd May 2019 the applicants decided to institute this application seeking for an extension of time to lodge their appeal.

At the hearing before me, all of the applicants were represented by Mr. Kesaria as earlier intimated, while the respondent was represented by Mr. John Seka, learned counsel.

The ground for this application as set out in the notice of motion is that the applicant is not entitled to rely upon the saving provision of Rule 90 (1) of the Rules to exclude time notwithstanding the issuance of the certificate of delay.

In his submission, Mr. Kesaria submitted that the applicants are seeking for an extension of time to lodge their appeal because the certificate of delay is incompetent and cannot be reckoned for exclusion of time under the proviso to Rule 90 (1) of the Rules following the decision of the Court in **Geita Gold Mine Limited vs. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 39 of 2017 (unreported). Referring the cited case, he argued that in order to rely on the certificate of delay, the applicant has to request for the necessary documents for appeal purposes from the Registrar within 30 days from the date of the decision to be challenged.

He elaborated further that the applicants were granted extension of 30 days to lodge the notice of appeal and apply for leave to appeal on 30th May, 2016 and promptly did so as ordered. He also claimed that on the 23rd June, 2016 the applicants requested from the Registrar for the proceedings, impugned ruling and order in respect of Civil Appeal No. 47 of 1997 to enable them lodge the intended appeal. He went on that the applicants were granted leave on 15th December, 2017, that is, 18 months later. He claimed further that the applicants were issued with the certificate of delay pursuant to Rule 90 (1) of the Rules which excluded the period from 23rd June, 2016 to 8th March, 2019; that is almost three years later since the extension of time was granted.

Mr. Kesaria submitted further that, according to the certificate of delay, the allowable 60 days within which to file the intended appeal was to lapse on 7th March, 2019. He contended that by that time, the applicants were in possession of all the documents prescribed in Rule 96 (1) of the Rules to enable them file it, but they were prevented from so doing for lack of a valid certificate of delay following the decision in **Geita Gold Mines Ltd** (supra). He therefore argued that the delay was technical. He claimed that to be the reason why the applicants decided to institute the application on 3rd May, 2019, four days before the lapse

of 60 days. As such, the delay was not caused by the negligence of the applicants as all along they have been diligent in the pursuit of the intended appeal. Mr. Kesaria attributed the delay to the High Court which he contended to have taken 18 months to grant the applicants' application for leave and three years to issue the applicants with a certificate of delay. He also added that the respondent will not be prejudiced by granting this application in any way and further stated that the illegality which made the Court grant the prayers for the extension of time in Application No. 186 of 2015 remains to date. He cited the cases of **Thuo vs. Kenya Commercial Bank** [2006] IEA 398, **Mutiso vs. Mwengi** [1999] 2 E. A. 23 and **Shanti vs. Hindocha** [1973] E. A. 208 to bolster his arguments. He concluded that, the application is meritorious and beseeched the Court to grant it with costs.

In his reply, Mr. Seka conceded that basing on the issued certificate of delay, the applicants had until 7th May, 2019 to file their intended appeal. He also noted that, the application at hand was filed on 3rd May, 2019, that is four days before the deadline to lodge the intended appeal. He argued, since Mr. Kesaria had stated that the applicants had in their possession all the necessary documents to enable the lodging of the appeal, there was nothing that prevented them from

lodging the same. Mr. Seka contended that, the excuse of having an invalid certificate of delay as a ground for seeking an extension of time is therefore not applicable in the circumstance. According to him, the notice of motion in the matter at hand was filed pre-maturely as the applicants had until 7th May, 2019 to lodge the intended appeal. He concluded that Mr. Kesaria did not demonstrate why he rushed to file the application while he had four days ahead of him to lodge the appeal.

In his further submission, Mr. Seka admitted that the decision in **Geita Gold Mine Limited** (supra) has rendered the issued certificate of delay redundant, the situation which would have formed the basis to apply for an extension of time by the applicants which according to him, could have been applied even after lodging the notice of appeal. To wind up, Mr. Seka prayed the costs to be in the cause if the Court finds the application meritorious.

In rejoinder, Mr. Kesaria contended that, Mr. Seka contradicted himself by admitting that the certificate of delay was rendered redundant following the decision in **Geita Gold Mine Limited** (supra). However, on the other hand, he was relying on the same certificate of delay to foster his argument that the applicants were required to file their appeal by 7th May, 2019. Mr. Kesaria elaborated that if the

applicants would have filed the appeal by 7th May, 2019 relying on the issued certificate of delay, the Court basing on the decision in **Geita Gold Mine Limited** (supra) would have *suo moto* resolved that the appeal was incompetent and struck it out. On the other hand, if the applicants would have lodged the appeal without referring to the certificate of delay issued, the 60 days within which lodge file it would have started to run from the date when the notice of appeal was lodged that is 23rd day of June, 2016, which means, the appeal would have been time barred.

Further, Mr. Kesaria contended that, Mr. Seka's argument that the applicants should have filed an application for extension of time after lodging the notice of appeal is correct and that is why the applicants have filed this application under Rule 10 of the Rules as they are not allowed to rely on the issued certificate of delay. He therefore reiterated his prayer to have this application granted.

Having considered the parties' submissions, the issue which calls for the Court's determination is whether the applicants have shown good cause to warrant the sought extension of time to file the appeal. The law is settled that, good cause is a pre-requisite for the exercise of the Court's power under Rule 10 of the Rules.

As a matter of general principle, it is the discretion of the Court to grant an extension of time. However, that discretion is judicial, and so it must be exercised according to the rules of reason and justice. Various factors are taken into account when determining what constitutes good cause. Among the factors were stated in **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). These are; to account for all period of delay which should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. See: **Tanga Cement Company Limited vs. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 and **Ludger Bernard Nyari vs. National Housing Corporation**, Civil Application No. 372/01 of 2018 (both unreported).

The impugned decision which the applicants seek to challenge was delivered on 29th September, 2005. As averred in his affidavit as well as his submission, Mr. Kesaria has argued that the applicants were diligent in pursuing the matter. He attributed the delay to have been caused by

the High Court at Mwanza which took 33 months to issue the applicants with the requested relevant documents for appeal purpose and 18 months to grant them the requisite leave to appeal.

According to the notice of motion, the ground for seeking an extension of time is that, the applicant cannot rely upon the saving provision of Rule 90 (1) of the Rules despite the issuance of the certificate of delay. It is Mr. Kesaria's argument that though the certificate of delay excluded the period from 23rd June 2016 to 8th March 2019 which according to him means, the applicants were in a position to file the appeal before the lapse of the allowable 60 days, but the applicants were prevented by the decision in **Geita God Mine Limited** (supra) which required the applicants to request from the Registrar for the copies of the proceedings within 30 days from the date of the decision to be challenged.

It is true as rightly submitted by both learned counsel that according to the decision in **Geita Gold Mine Limited** (supra), the applicants were to apply for the copies of the proceedings of the matter to be challenged within 30 days from the decision date, to which they did not.

Mr. Kesaria seems to suggest that if it was not for the decision in **Geita Gold Mine Limited** (supra), the applicants would have been allowed to rely on the issued certificate of delay as the requirement to apply from the Registrar for the copies of the proceedings within 30 days would not have been there. With due respect, I do not agree with his argument. In the cited case, the Court simply applied the saving in Rule 83 (1) of the Tanzania Court of Appeal Rules, 1979 applicable by then before the amendment by GN. No. 368 of 2009 which was similar with the saving in Rule 90(1) of the Rules applicable currently. The said Rule 83 (1) stated that:

> *"83 (1) Subject to the provision of Rule 122, an appeal shall be instituted by lodging in the appropriate registry, within 60 days of the date when the notice of appeal was lodged;*
> *(a). NA*
> *(b). NA*
> *(c). NA*
> *(d). NA*
> ***Save that where an application for a copy of the proceedings in the High Court has been made within 30 days of the decision against which it is desired to appeal,*** *there shall in computing the time within which the appeal is to be instituted, be excluded such time*

as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant. (Emphasis added)

On that account, it is a misconception that the applicants cannot rely upon the issued certificate of delay because of the said decision as claimed by Mr. Kesaria. I am saying so because the condition for the applicants to benefit with the saving provision of Rule 90(1) was similar with the saving provision under Rule 83(1) of the Tanzania Court of Appeal Rules, 1979.

Though it is true the applicants could not rely on the issued certificate of delay by the Registrar for incompetency, but it is not correct that the said incompetence was because of the decision in **Geita Gold Mine Ltd** (supra). Rather it was due to lack of mandate on the part of the Registrar to issue it after the failure by the applicants to apply for the copies of the proceedings within 30 days since the delivery of the decision to be challenged. In other words, Mr. Kesaria's action to request for the said documents from the Registrar on 23rd June, 2016 was a nonstarter from the very beginning as 30 days within which to apply for them had long passed since the decision date which was 25th September, 2005.

It is on record that the applicants sought for leave to appeal after being granted the extension of time to file the same and the leave was granted on 15th December, 2017. I am aware that 60 days within which to lodge the intended appeal had lapsed before the application for leave to appeal was granted which would have entitled the applicants to apply for the extension of time to appeal. However, in my view, the application was to be filed after the grant of the leave on 15th December, 2017 while this application was filed on 3rd May, 2019, that is over 16 months later. There was no reason exhibited by Mr. Kesaria for such inordinate delay. The failure to account for 16 months does not depict sense of diligence on the part of the applicants in pursuing their case as claimed by Mr. Kesaria. To say the least, the omission depicts sloppiness and negligence on their part. The Court has held time and again that negligence or lack of diligence constitutes no sufficient reason to warrant the grant of an extension of time. In **William Shija vs. Fortunatus Masha** (1997) T.L.R. 213 at page 219 the Court held that negligence on the part of the counsel is not sufficient reason for extending time under Rule 8 of the Rules (now Rule 10 of the Rules).

With regards to the three East African cases cited by Mr. Kesaria to back up his arguments, suffices to state that, they all explain the

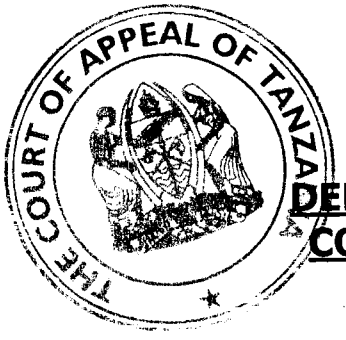
factors for consideration before the Court can exercise its discretion of either to grant or not to grant an extension of time to which I squarely agree with. However, in the application at hand, the applicants have shown lack of diligence in pursuing their case, as such the cited cases cannot salvage the application at hand with much respect.

In conclusion, the applicants have failed to demonstrate any good cause that would entitle them the sought extension of time. This application fails and is accordingly dismissed with costs.

DATED at **DAR ES SALAAM** this 10th day of February, 2022.

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 10th day of February, 2022 in the presence of Ms. Jasbir Mankoo learned counsel for the applicants who is also holding brief for Mr. John Seka, learned counsel for the respondent, is hereby certified as a true copy of original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL