

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 6 OF 2018

(Arising from Commercial case No. 82 of 2009)

SKYLAND ACROSS FREIGHT.....APPLICANT

VRS

CHINA HENAN INTERNATIONAL

COOPERATIVE GROUP CO. LTD.....RESPONDENT

RULING

B.K. PHILLIP, J

The applicant herein lodged this application under the provisions of section 11(1) of the Appellate Jurisdiction Act, Cap 141 ,R.E. 2002. It is supported by an affidavit sworn by the learned advocate Gabriel Simon Mnyele who appeared for the applicant. The learned Advocate Wilison Ogunde who appeared for the respondent filed counter affidavit in opposition to the application. The applicant is praying for the following orders;

- a) That this hounourable Court may be pleased to extend time to the Applicant to file notice of appeal to the Court of Appeal against the judgment and decree of this court dated 20th February, 2013 before

Honourable Mruma J, and for requesting for Proceedings, Judgment and decree out of time.

b) Cost be ordered to be in the course.

The affidavit in support of the application reveals that, the applicant filed a suit against the respondent claiming for specific damages and USD 163,302.81 being value of undelivered goods, cost of freight and insurance in respect of container PCIU 33178594. The judgment for the aforesaid case was delivered on 20th February 2013. The applicant being aggrieved by the said judgment appealed to the Court of Appeal of Tanzania vide Civil Appeal No. 70 of 2013, which was struck out on 15th June 2017 for being accompanied with a defective decree that was not dated. Thus, the applicant lodged this application to start the process for appealing to the Court of Appeal afresh as is still aggrieved with the decision of this court.

I ordered this application to be disposed of by written submissions. In his written submission the learned Advocate Gabriel Mnyele submitted that under the provisions of section 11(1) of the Appellate Jurisdiction Act, Cap. 141, R.E 2002 (hereinafter to be referred to as "Cap 141") this court has discretionary powers to grant the extension of time sought by the applicant. Mr. Mnyele submitted further that the aforesaid discretionary powers of this Court has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. Mr. Mnyele contended that what amounts to sufficient cause has not been specifically defined, however, factors that are normally taken into account

are such as whether or not the application has been brought promptly, absence of any valid explanation for the delay and being late to be supplied with copies of judgment and decree. Mr. Mnyele referred this court to the case of **Benedicto Mumello Vrs Bank of Tanzania, Civil Appeal No 12 of 2002**, to buttress his argument.

In addition to the above, Mr. Mnyele contended that in the application in hand the applicant's appeal was struck out on the ground that the decree supplied to the applicant was defective, thus the reason that led to the striking out of the applicant's appeal was not occasioned by the applicant and that is sufficient cause for the delay in filing the Notice of Appeal.

Mr. Mnyele contended further that the categories of "sufficient reason" are not closed, to cement his arguments he referred this court to the case of **Martha Daniel Vrs Peter Thomas Nko(1992) TLR 359**, in which the Court granted the applicant extension of time to file an appeal out of time in an appropriate Court after the first appeal was voluntarily withdrawn for being filed in a wrong court and the case of **Rajabu Kadimwa Ng'eni & another Vs Iddi Adam (1991) TLR 38**, in which chance of success of the intended Appeal was considered to be a sufficient reason. Mr. Mnyele contended that, likewise the intended appeal has high chances of success. He prayed this application to be allowed.

In rebuttal the learned Advocate Methuselah Boaz Mafwele, submitted that counting from 15th June 2017, the date on which the applicant's appeal at

the Court of Appeal was struck out and 15th January a date on which this application was filed, there is a delay of seven (7) months which is about 270 days. Mr. Mafwele contended that the applicant has not accounted for the said delay of seven (7) months which is an inordinate delay. Mr. Mafwele referred this court to the case of **Lyamuya Construction Compnay Ltd Vrs Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010,CAT at Arusha**, in which the Court of Appeal, dismissed an application for extension of time for failure to account for a delay of twenty five days (25). The court said that such a delay cannot be ignored and the failure to account for the delay made the applicant's diligence questionable. Mr. Mafwele insisted that since there is no single paragraph in the affidavit in support of this application explaining the above mentioned delay of seven months, the applicant has been negligence. He invited this court to strike out the application with costs.

In his rejoinder Mr. Mnyele reiterated his submission in chief and submitted that the law does not stipulate the time for filling an application for extension of time under the provisions of section 11(1) of cap 141. He submitted that the case of **Lyamuya** (Supra) is distinguishable from the instant application, since the delay was caused by the Court itself. He referred this court to the case of **Tanzania Sewing Machines Company Limited Vs Njake Enterprises Limited, Civil Application No.6 of 2007** (Unreported) in which the court granted extension of time for filing notice of appeal on the ground that the trial Court's omission to issue a

properly signed decree to the applicant occasioned the delay in reinstituting the notice of Appeal, thus the applicant was not supposed to be held liable for the delay. Mr. Mnyele was of the view that the applicant has demonstrated sufficient reasons to warrant the prayer in the applicant to be issued.

It is a common ground that an application for extension of time like the one in hand is under the discretionary powers of this court and the same have to be exercised judiciously. In an application of this nature, the applicant's task has been always to establish sufficient reasons for the delay. There are no hard and fast rule on what constitutes "*sufficient reasons*" (See the case of **Benedict Mumello** (supra). In determining whether sufficient reasons have been established or not, courts have been taking into consideration a number of factors such as magnitude of delay and the applicant's diligence in pursuing the matters and whether by granting the application the other party will be prejudiced, just to mention a few. The list of factors to be considered is not exhaustive. The position of the law is that the applicant has to account for each day of delay.

In this application there is no dispute that the applicant's appeal at the Court of Appeal was struck out on 15th June 2017 and this application was filed on 15th January 2018 as correctly submitted by Mr. Mafwele, the affidavit in support of the application has not provided any reason for the lapse of seven months from 15th June 2017 to the date of filing this application, that is 15th January 2018. The only explanation that can be

discerned from the affidavit in support of the application is that the appeal was strike out due to being accompanied with a defective decree which was supplied to the applicant by the court, thus the delay was caused by the court itself. With due respect to Mr. Mnyele, the period that the applicant must account for each day of delay is one after the appeal was struck out at the Court of Appeal, since the period spent in prosecuting the appeal at the Court of Appeal is justifiable and any fault done by the applicant in respect of the appeal was penalized by the Court of Appeal by striking out the appeal thus the applicant cannot be penalized twice for any fault in that period if any (see the case of **Fortunatus Masha Vrs William Shija and another (1997) TLR 154**). I am inclined to agree with Mr. Mafwele that the applicant has not accounted for the said delay of seven months at all.

The case of **Martha Daniel** (Supra) cited by Mr. Mnyele in his submission is distinguishable from the case at hand as it involved a lay person, likewise the case of **Benedict Mumello** (supra) is distinguishable from the case at hand as it involved the court's delay in supplying the applicant with the copy of the proceeding and judgment, and also the applicant was supplied with two copies of decrees containing different material particulars, which is not case in this application. No such reasons have been pleaded by the applicant. As regards the case of **Rajabu Kadimwa** (supra) which was also cited by Mr. Mnyele, the court dismissed the application for extension of time despite that fact that the delay was not inordinate because it was of the view that the appeal was bound to fail, I noted that in the case of

Rajabu Kadimwa (supra) the court considered first the magnitude of the delay, thus the chances of success cannot be a sole reason to grant an extension of time in the absence of sufficient reason for the delay and in particular where the delay is ordinate as it is in the application at hand.

In the case of **Lyamuya** (supra) the Court of Appeal while dealing with an application for extension of time had this to say;

"As a matter of general principle, it is in the discretion of the court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:-

- (a) The applicant must account for all the period of delay*
- (b) the delay should not be in ordinate*
- (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 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".*

From the foregoing it is my settled view that the applicant has failed to account for each day of delay for the seven months that lapsed from the date the his appeal was struck out at the Court of Appeal to the date of

filing this application, thus his diligence in pursuing the matter is questionable. I therefore dismiss this application with costs.

Dated at Dar es Salaam this 23rd day of April, 2019.



A handwritten signature in blue ink, appearing to read "B.K. Phillip", written over a horizontal line.

B.K. PHILLIP

JUDGE