IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 144 OF 2018

(Arising from Commercial Case No.37 of 2016 and Miscellaneous Commercial Cause No.55 of 2016)

YARA TANZANIA LIMITED.....APPLICANT

VERSUS

DB SHAPRIYA & CO.LIMITED.....RESPONDENT

RULING

B.K.PHILLIP,J

This ruling is in respect of an application for extension of time within which the applicant can file a notice of intention to appeal to the Court of Appeal of Tanzania. It is made under the provisions of section 11(1) of the Appelate Jurisdiction Act, Cap 141 R.E. 2002 and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002. The applicant prays for the following orders:-

i. That this honourable court be pleased to issue an order extending time within which the Applicant can file her Notice of intention to appeal to the Court of Appeal of Tanzania against an Order of this Honourauble Court, Hon. Songoro, J dated 19th May, 2016 in Misc. Commercial Cause Number 55 of 2016 and Commercial Cause No. 37 of 2016.
ii. Costs for this Application be provided for.
iii. Any other relief(s) this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit deponed by the learned Advocate Nuhu Mkumbukwa who appeared for the applicant. In his affidavit, Mr. Nuhu, stated the background to this application and the reasons in support of the application. The learned advocate Roman Masumbuko deponed a Counter affidavit and supplementary Counter by leave of this court, both in opposition to the application. Mr. Nuhu also filed a reply to the supplementary counter affidavit.

A brief background to this application is that in 2016 the respondent herein filed a case against the applicant vide Commercial Case No.37 of 2016. Upon being served with the plaint, the applicant filed an application for temporary injunction vide Misc. Commercial Application No. 55 of 2016. When the said application was called in court for hearing, the applicant's advocate prayed for an order for stay of the proceedings of both Commercial Case No 37 of 2016 and the application for temporary injunction on the ground that the parties had signed an contract in which they agreed to refer their disputes to arbitration. Consequently this court (Songoro J as he then was) stayed the proceeding in Commercial Case No 37 of 2018 and Misc. Commercial Application No. 55/2016 for 30 days pending the arbitration processes as was prayed by the applicant's advocate. After the expiry of thirty days, the matter was called again in court. The court noted that the parties had not initiated any arbitration proceedings, consequently on 19th May 2016, the court ordered that Commercial Case No. 37 of 2016 and Misc. Commercial Application No. 55/2016 should proceed to be heard. The applicant was aggrieved by the aforesaid order, thus lodged an application against the same at the Court of Appeal of Tanzania vide Civil Application No 211 of 2016 which was struck out by the Court of Appeal of Tanzania for failure to cite the relevant provision of the law, that section 4(3) of the Appellate Jurisdiction Act, 1979.

The applicant thereafter applied for extension of time within which to make a fresh application for revision the same was heard and granted then the applicant filed another application for revision vide Civil Application No. 345/16 of 2017 which was struck out on the ground that the impugned order of the High Court was appealable, following the preliminary objection raised by the respondent's Advocate. Thus, this application is another attempt by the applicant to obtain an extension of time to file a notice of appeal for the purpose of initiating the process for appealing against the order of this court dated 19th May, 2016.

It is also in the court's record that while the above mentioned appeal No. 345/16 of 2017 was pending before the court of Appeal, the applicant's advocate did file an application for stay of proceedings in Commercial case No 37 of 2016 and vide Misc application No. 92 of 2016, the same was struck out by this court (Hon. Mruma J,) for being overtaken by events.

Submitting for the application Mr. Nuhu starting by adopting the contents of his affidavit, the reply to the supplementary counter affidavit and his skeleton arguments filed in court. He proceeded to argue that the delay in this application is a technical delay since from 19th May 2016 up to 6th June 2018 the applicant has been pursuing her rights in the Court of Appeal of Tanzania, where initially she filed an application for revision, (Civil Application No. 211 of 2016) which was struck of on 25th November 2016 due to non- citation of the law, thereafter she filed Civil revision No. 345/16 of 2017 which was struck on 6th June 2018 on the reason that the decision in question was appealable.

Mr. Nuhu Contended that the applicant has been diligently pursuing her rights. To cement his arguments he referred this court to a number of cases including the following cases; **Fortunatus Masha Vs William Shija and another (1997) T.L.R 154,** in which the Court of Appeal said "*A distinction has to be drawn between cases involving real or actual*

delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant has acted immediately after pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted" , **Belinda Murai & others Vrs Amos Wainaina (1978) LLR 2782 (CALL),** and **Harnam Singh and another Vrs Mistri (1971) EA 122.**

Furthermore Mr. Nuhu submitted that the order intended to be appealed against is tainted with illegality and irregularities and proceeded to argue that this application is ought to be granted to pave way for the said illegality to be dealt with by the Court of Appeal. He referred this Court to the case of **The Principal Secretary Ministry of Defense and National Services Vrs Devram Valambia (1992) T.L.R 185** and **The Registered Trustees of Joy in Haverst Vrs Hamza Sungura, Civil Application No 131 of 2009,** (unreported) in which the Court of Appeal granted an application for leave to appeal and said the following:-

> *"For this reason alone we are enjoined to grant this application for the purposes of enabling the Court, eventually, to ascertain the existence or otherwise of the alleged illegality and if it be established to take the necessary appropriate measures to put the matter and the records straight: see,* ***PRINCIPAL SECRETARY, MINISTRY OF DEFENCE V. VALAMBHIA*** *[1992] T.L.R. 185. The applicant to file the intended application for leave within fourteen days of the date of the order. Each party to bear its/his own costs".*

In addition to the above, it was the contention of Mr. Nuhu that the applicant has been diligently pursuing her rights and lodged this application on 20th June 2018 timely without any delay, after obtaining the copy of the ruling for the dismissal of her Application for revision at the Court of Appeal on 12th June 2018. To cement his arguments he referred this Court to the

case of **Benedict Mumello Vrs Bank of Tanzania, Civil Appeal No.12 of 2002** (unreported) **and Michael Lessani Kweka Vrs John Eliafye (1977) T.L.R 152.** Mr. Nuhu was of the view that granting this application will not be prejudicial to the respondent, since according to his views, the intended appeal is concern with a significant issue on the law pertaining to Arbitration and practice.

As regards the allegations that Arbitration that was conducted in London which was raised in the supplementary affidavit by Mr. Roman, Mr. Nuhu argued that the arbitral award made in London has no bearing in this matter. He told this court that the award has been filed in this Court vide Misc Commercial Application No.11 of 2018 and the respondent has already filed an application to challenge the said arbitral award. He was of the view that it is not proper to mix this matter with the issues pertaining to the said arbitral award, which was a partial award, he contended.

As regards the concern on the appeals pending at the Court of Appeal against the default judgment in Commercial case No 37 of 2016 and the ruling in Misc Commercial Application No 92 of 2016 which were raised by Mr. Roman in the supplementary counter affidavit, Mr. Nuhu submitted that the appeal on default judgment was issued after the filing of this application. Mr. Nuhu argued vigorously that the issues in the intended appeal is in respect of the order of this court dated 19th May 2018. He reminded this Court that there is a ruling of the Court of Appeal to the effect that this Court's order dated 19th May 2018 is appealable.

Lastly, Mr. Nuhu submitted that, in event for whatever reasons, if this court finds that this application has to await the outcome of the appeals pending at the Court of Appeal then, the appropriate order to be issued by this court is an order for stay of the proceedings of this application pending the determination of the appeals at the Court of Appeal. He referred this Court to the case of **Simon Group Ltd & another Vrs Nyanza Cotton Oil**

Company Commercial case No. 151 of 2016, (unreported), in which this court issued an order for stay of proceeding to await the decision of the Court of Appeal.

In rebuttal Mr. Roman, started by subscribing to the alternative prayer made by Mr. Nuhu for stay of the proceedings of this application pending the decision of the Appeal pending at the Court of Appeal, then, he proceeded to adopt the contents of his counter affidavit , supplementary counter affidavit and skeleton arguments. Mr. Roman submitted that the respondent have already filed an application for stay of the application for registration of the Arbitral award vide Misc Commercial Application No. 48 of 2018. Furthermore, he contended that in view of the existence of the pending appeals at the Court of Appeal it is legally not correct to have parallel proceeding on the same matter at this Court and the Court of Appeal. He contended that this application is overtaken by events.

As regards the merit of this application, Mr. Roman submitted that as per the provisions of Rule 11(1) of the Appelate Jurisdiction Act, cap 141, R.E. 2002, requires the applicant to adduce sufficient reasons for the delay in filing the notice of appeal. Furthermore, he submitted that the test on what amounts to sufficient cause depends on the facts of the individual case. To cement his argument he referred this court to the case **Badru Issa Badru Vrs Omari Kilendu & another , Civil Application No. 164 of 2016, CAT ,Dar es Salaam,**(unreported) in which the court held that matter to be taken into account in granting or not granting an application for extension of time are; the length of delay, the reason for the delay, the degree of prejudice to the respondent and chances of the appeal succeeding.

Furthermore, Mr. Roman submitted that the order of this Court intended to be appealed against was issued on 19th May 2016 and this application was filed on 20th June 2018. He contended that in total there is a delay of

more than two years which can be attributed either to the negligence of the applicant's advocate or ignorance of the law. It was the contention of Mr. Roman that all of the applicant's application filed at the Court of Appeal were struck out due to the negligence and ignorance of the law on part of the applicant's advocate .He strongly submitted that it is the position of the law that ignorance of the law cannot be an excuse for extension of time. He referred this court to a number of cases which I cannot mention all of them here but includes the case of **Calico Textile Industries Ltd Vrs Pyaraliesmail Premji (1983) TLR 28,** in which the court said that failure of a party's advocate to check the law is not sufficient ground for allowing an appeal out of time. Mr. Roman held a view that likewise, in this case the applicant's advocate has been at the Court of Appeal more than once due to lack of diligence in prosecuting this case. He invited this court not to condone what he alleged as the negligence of applicant's advocate by dismissing this application. He insisted that this court has a duty to insure that parties abide to the laws and procedure, and in no way it should allow filing of uncalled for multiple applications.

In addition to the above, Mr. Roman submitted that the respondent has been prejudiced for the delay in completion of this matter because the applicant has been filing multiple applications in respect of this matter. He submitted that the order sought to be appealed against was made in the course of proceedings in Commercial Case no 37 of 2016 and Misc Commercial Cause No. 55 of 2016. The applicant has already filed a notice of appeal against the entire decision of this court in Commercial Case No. 37 of 2016 and has also filed a notice of Appeal against the decision in Misc. Commercial cause No. 92 of 2016 which sought to stay the proceeding in favour of the Arbitration processes. Moreover Roman submitted that the applicant has filed two appeals at the Court of Appeal namely Civil Appeal No. 244 of 2018 and 245 of 2018 which seek to overturn the decision of this court in Commercial case No. 37 of 2016 and Misc. Commercial Cause No. 92 of 2016 respectively. The copies of the

memorandum of appeal in respect of the aforesaid appeal have been attached to Mr. Roman's supplementary Counter Affidavit.

In addition to the above Mr. Roman contended that the applicant has filed an application for the registration and enforcement of the Arbitral award related to the matter at hand. He was of the view that the applicant cannot seek an opportunity to overturn the order of this court dated 19th May 2016 which allowed the suit to proceed while the ICC has already delivered the award in the arbitration proceedings related to the same matter.

Lastly, Mr. Roman submitted that there is no any chances of success of the intended appeal, since there is already a default judgment which has not being set aside. He contended that the Court of Appeal cannot entertain the appeal unless the application to set aside the default judgment has been refused by this Court. As regards the illegality of the order sought to be appealed against, Mr. Roman submitted that, the alleged illegality is one of the ground of appeal in the memorandum of appeal filed by the Mr Nuhu vide Civil appeal No. 245 of 2018 that is pending for hearing at the court of Appeal of Tanzania, thus , he was of the view that the issue of illegality cannot be entertained again in the intended appeal as it is will decided in the pending appeal aforesaid. He prayed this application to be dismissed, alternatively the same be stayed pending the decision of Civil Appeal No. 244 of 2018 against the decision of this court in Misc Civil Application No 92/2016 and Civil Appeal No. 245 of 2018 against the default judgment in Commercial case No 37 of 2016 since the aforesaid pending appeals are related to the matter in intended to be appealed against if the extension of time sought is granted.

In rejoinder, Mr. Nuhu, submitted that the alternative prayer for stay of proceedings in this application is not an admission that the pending appeals at the Court of Appeal are related to the intended appeal the

subject of this application. As regards the decision in the case of **Badru** (supra) he said that it does not overrule the decision of the Court of Appeal in the case of **Fortunatua Masha** (supra). He contended that in this application there is no any negligence committed by the applicant's Advocate and that in some circumstances negligence of a counsel can be a good reason for extension of time. Mr. Nuhu also, was of the view that the intended appeal has chances of success and the respondent cannot be prejudiced by the same.

I have dispassionately analyzed the submissions made by the learned advocates appearing herein as well as perused the courts records and noted that both counsels are in agreement that an order for extension of time is a discretional order, granted upon showing sufficient reasons for delay. What amounts to sufficient reasons have not been defined, however in determining whether the reasons adduced by the applicant are sufficient, courts have been taking into considerations different factors such as period of delay and diligence of the parties, just to mention a few [see the case of **Benedict Muneilo vrs. Bank of Tanzania Civil Appeal No. 12 of 2002** (unreported)]. Before making the determination on whether the reasons for delay adduced by the applicant's advocate are sufficient or not, in my considered opinion, I think, I need to start by making determinations on whether this application is tenable because in his submissions Mr. Roman's raised issues/arguments to the effect that this application is overtaken by events hence not tenable on the grounds that Commercial case No. 37 of 2016 where it originates from was decided and a default judgment entered and thereafter the applicant's advocate lodged an appeal against it, and the grounds of appeal in the memorandum of appeal filed at the Court of Appeal of Tanzania challenges the order of this court dated 19th May 2016 which is the subject of this application. Together with the above, there is an alternative prayer for stay of proceedings which I have mentioned herein above and in my opinion it also requires this court to determine whether the pending

appeals at the Court of Appeal have any similarity or direct bearing this application.

It is a common ground that Commercial case No 37 of 2016 in which this application originates from, was decided and a default judgment was entered against the applicant. The applicant has already appealed against that decision vide Civil Appeal No 245 of 2018. Ground Numbers 7 and 8 in the Memorandum of Appeal in respect of the said appeal read as follows;

> *"7. That the High Court (Commercial Division) erred in law and fact by confusing parties and holding that the Appellant did not do anything to comply with court order to pursue arbitration within 30 days despite reminders from Respondent.*
>
> *8. That the High Court (Commercial Division) erred in law and fact in holding that the Appellant, in her capacity as the intended respondent in the Arbitration, failed to take efforts to have the dispute referred to Arbitration after the Court has stayed the suit for 30 days".*

The intended memorandum of appeal which is the subject of this application that has been attached to the affidavit in support of this application as annexture YARA 7, contains six grounds of appeal. The 1st and 2nd grounds of appeal read as follows;

> *"1. That the Commercial Court erred in law in holding, that the Applicant was also duty bound to initiate the Arbitration after the Court has stayed the Suit for 30 days.*
>
> *2. That, the Commercial Court erred in law and fact in holding, that the Applicant, in her capacity as the intended Respondent in the Arbitration, failed to take efforts to have the dispute referred to Arbitration after has stayed the suit for 30 days."*

This court in its order dated 19th May 2016 which is the subject of this application, said the following;

"So to conclude and clarify on the issue of whom between the plaintiff and defendant had an obligation of initiating Arbitration Process before and even after the Court order the court finds as explained above, the answer is both Parties are under joint obligation to initiate and pursue arbitration process. None of the parties may shift any obligation stated in the Arbitration clause to the other. Bearing mind that the court offered 30 days to both parties, and each party has explained to the court that he did not take any initiative to initiate arbitration process, because was thinking that it is responsibility of the other, and then it is obvious the initiative was not taken.

*To conclude on the Applicant and Respondents points and arguments on who was supposed to refer a dispute to Arbitration, the court decides it was a joint responsibility of both parties. Both parties they have return to the court with answers that no initiative has been taken and they are not willing to go to Arbitration.....**In view of the above, and that fact that parties are no longer interested to go for arbitration as per their contract and arbitration clause, the court finds, that it has no reason to stay the hearing of the Application for temporary injunction and the main suit and it orders that the hearing of the Application is hereby fixed on the 20/5/2016 at 9.00am."***

(Emphasis is added)

From the above quoted grounds of appeal lodged by the applicant's advocate vide Civil Appeal No. 245 of 2018, pending for hearing and the decision of this court in the said application No 55 of 2016, it is evident that the order of this court whose leave to appeal is sought is the subject of the appeal pending at the Court of Appeal vide Civil Appeal No. 245 of 2018. No wonder Mr. Nuhu made the alternative prayer for stay of proceedings of this application since it is obvious that whatever is going to be decided by the court of Appeal in the pending Civil Appeal No 245 of

2018 will in effect make a determination as to whether or not the order of this court dated on 19th May 2016 was proper. As I have demonstrated herein above, the grounds in the intended Appeal are similar to the ones pending at the Court of Appeal in the said Civil Appeal No 245/2018. It is my settled opinion that in the circumstances, the intended appeal is rendered redundant. I am inclined to agree with Mr. Roman that, under the circumstances, the intended appeal is untenable for being overtaken by events.

I have taken into consideration the alternative prayer for stay of the proceedings in this application, made by Mr. Nuhu and supported by Mr. Roman. With due respect to the learned advocates, that prayer has no merit since, in my considered view, the decision that will be made by the Court of Appeal in the said Civil Appeal No. 245 of 2018, be it dismissal or allowing the appeal, will not give a room for pursuing the intended appeal, since that decision in effect will make a finding whether the court order dated 19th May 2016, was erroneous or not. It is my settled view that the Court of Appeal cannot entertain another appeal on the same issue/matter.

Moreover, even if the said Civil Appeal No.245/2018 would be struck out for whatever reasons, still the intended appeal subject of this application cannot be entertained because the main case, that is Commercial Case No 37 of 2016 has already been decided. The order of this court intended to be appealed against under the current circumstances cannot be separated from the main case as it is dependent on it. The dispute that was supposed to be referred to arbitration has already been decided, therefore so long as the default judgment still exists, any move to challenge the order of this court dated 19th May 2016 will be a futile exercise as there is nothing to be referred to arbitration. In my considered opinion, the only decision worth challenging is the decree of this court in Commercial Case No 37 of 2016 which takes on board the decision of this court in Civil Application No. 92/2016. It has to be noted that, the order of this court dated 19th May

2016 was in respect of both Misc. commercial Cause No. 55/2016 and Commercial case No. 37 of 2016 that is why the chamber summons in this application indicates clearly that, the order sought is for extension of time to file notice of appeal against the order of this court dated 19th May 2016 in Misc. Commercial Cause No 55 of 2016 and Commercial Case No. 37/2016,but the appeal in respect of Commercial Case No 37/2016 has already been filed at the Court of Appeal Vide Civil Appeal No 245/2018.

I have read the case of **Simon Group** (supra), with due respect to Mr. Nuhu, that case is distinguishable from the case at hand since in this case the order intended to be appealed against is overtaken by events as demonstrated herein above, while in the case of Simon Group (supra), the court stayed the proceedings to await the decision of the Court of Appeal in respect a Commercial case No.1 of 2012 as a notice of appeal against the decision of this court in Commercial Case No.1 of 2012 had already been filed and one of the prayers in the plaint was for setting aside the decision of the court in the said Commercial case No 1 of 2012. The scenario in this case is quite different.

Also, wish to point out that, as correctly argued by Mr. Nuhu, as per the decision of the Court of Appeal in the case of **Yara Tanzania Limited Vrs DP Shapriya & Company Limited, Civil Application No 345/16 of 2017** (unreported), the ruling of this court order dated 19th May 2016 was held to be is appealable, however, that decision was made on 31st May 2018, by that time the default judgment in the main case (Commercial Case No 37 of 2016) was not yet made, since the same was made on 30th August 2018 and obviously at that time there was no appeal pending against the main case (Commercial Case No. 37 of 2016) as it is the situation now. What I am trying to demonstrate here is that what transpired after the decision of the Court of Appeal in the said Civil Application No 345 of 2017 has rendered the intended appeal redundant for being overtaken by events. What I have narrated herein above explains the reasons why the applicant's advocate had to file application No. 92 of

2016 for the stay of proceedings in Commercial Case No 37 of 2016, I trust he was aware that once Commercial Case No. 37 of 2016 is heard and determined, the applications intended to move this court to allow the parties to go back to Arbitration processes will become redundant, unfortunately, the application for stay of proceedings aforesaid did no sail through.

The above being said, I do not see any plausible reasons to make any determination on the reasons for extension of time adduced by Applicant's Advocate, since the intended appeal is overtaken by events, thus rendered redundant. In the upshot, I hereby strike out this application with costs.

Dated at Dar es Salaam this 4th day of September 2019.

B.K. PHILLIP

JUDGE