

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 53 OF 2017

(Arising from Miscellaneous Commercial Application No. 414 of 2017)

MEGA BUILDERS LIMITED.....APPLICANT

Versus

DPI SIMBA LIMITED.....RESPONDENT

Last Order: 27th Apr, 2020

Date of Ruling: 24th June, 2020

RULING

FIKIRINI, J.

This application by way of chamber summons has been brought under Rule 45 (a) of the Tanzania Court of Appeal, Rules, 2009 as amended by Rule 6 of the Tanzania Court of Appeal (Amendments) Rules, 2017 (the Court of Appeal Rules) and Order XLIII Rule 1 (2) of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), seeking for leave to appeal to the Court of Appeal.

The affidavit of Mr. Balbir Malik Singh which accompanied the application stated that the ruling was delivered on 29th April, 2019 but its availability to the applicant was delayed until 06th May, 2019, and that this application was filed on 3rd June,

2019, after lodging a notice of appeal on 13th May, 2019 and serving the respondent on 14th May, 2019.

Objecting to the application, the respondent filed counter-affidavit through Mr. James Betram Mlambo, Principal Officer of the respondent. The respondent also filed a notice of preliminary points of objection on two grounds:

- (i) That, the applicant's application is time barred,
- (ii) That, the applicant's application is incompetent for non-citation of enabling provision of the law.

Parties were ordered to file written submissions in arguing the preliminary points of objection, as the law and practice would require they be disposed of first to pave way for hearing and determination of the actual application in the event the preliminary points of objection are overruled. The filing schedule was as follows: that the respondent files its written submission by or on 12th May, 2020, reply written submissions by the applicant by or on 26th May, 2020 and rejoinder if any by or on 3rd June, 2020. This was to be followed with a ruling set for 24th June, 2020. Mr. Balbir Malik Singh, fended for himself and filed own written submission in opposing the preliminary point of objection raised on 26th May, 2020, whereas Mr. Shukran Elliot Mzikila learned counsel filed one on behalf of the respondent, on 11th May, 2020 and rejoinder on 2nd June, 2020.

It was Mr. Mzikila's submission on the first point related to time bar, that the applicant governed by Rule 45 (a) of the Court of Appeal Rules, as amended was supposed to file her application for leave within thirty (30) days from the date of the ruling which was 29th April, 2019, instead the applicant filed this application on 3rd June, 2019, which was three (3) days beyond the prescribed time and without Court leave. Also the applicant has not pointed out what caused the delay in the affidavit in support. Against that the respondent prays for the dismissal of the application for being time barred.

On the second point that this Court has not been properly moved, Mr. Mzikila, argued that the court was not properly moved because the decision being appealed was decline by this Court to grant stay of execution on a consent decree, thus the application ought to have been preferred under section 5 (2) (a) (i) of the Appellate Jurisdiction Act, Cap. 141 (the AJA), which was not cited.

Based on the two (2) preliminary points of objection he prayed for the application be dismissed with costs.

The applicant in her brief submission through Mr. Singh, asserted that the objection was devoid of merits. Substantiating his position, he submitted that after obtaining the copy of the ruling on 6th May, 2020, he had to study it to make an informed decision, and after understanding the decision on 3rd June, 2020

proceeded to file this application. Absolving the applicant from any omission, he referred this Court to section 19 (5) of the Law of Limitation Act, Cap. 89 R.E. 2002 (the Law of Limitation), that the court was empowered to exclude any period in an application, like this one, where it is satisfied that it was necessary for the applicant to obtain a copy of the proceedings/ruling before making an application.

The second point, on non-citation of the enabling provisions of the law, it was his submission that the cited provision vested discretionary powers on this Court to grant leave to appeal to the Court of Appeal. On the submissions he urged the Court to overrule the objections with costs.

In a brief rejoinder, Mr. Mzikila, challenging the assertion that the applicant had to study the ruling first before filing this application, he submitted the account never featured in the applicant's affidavit, thus was devoid of merits, that the law was very clear on time frame within which the applicant was supposed to file her application. Otherwise the law could have been silent on period within which the filing can be done leaving it to each applicant depending on their own will and whims. The applicant had pointed out when the decision was made, ruling obtained and this application filed, which in between had ample time but opted to ignore the requirement of the law and filed this application out of time and without leave of this Court.

Indeed, the Court is vested with discretionary powers when it comes to granting the application of this nature. However, the discretionary powers vested in this Court are a must that they be exercised judiciously. It is also required that all relevant factors are to be considered. There is a long list of authorities on that aspect but to name a few are: **Alliance Insurance Corporation Ltd v Arusha Art Ltd, Civil Application No. 33/2015, Court of Appeal of Tanzania** and **Losero v Mwarabu, Civil Application No. 10 of 2015.**

And for that to take place the Court has to be furnished with sufficient information from which it can deduce sufficient reason for the delay in timely filing of the application. There is so far no exact definition as what amounts to “sufficient cause” but over time the Court of Appeal has been explaining and interpreting different scenario trying to put together what could possibly be counted as “sufficient cause” Again there is a long list of decisions which include the cases of: **Benedict Mumello v BOT, CAT, Civil Appeal No. 12 of 2002, (unreported) p. 5 -6; Tanga Cement Company Ltd v Jumanne D. Masangwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001 (unreported); Yusuph Same and another v Hadija Yusuph, Civil Appeal No. 1 of 2002, Shanti v Hindocha and Others [1973] EA 207, and Haidar Thabit Kombo & 10 Others v Abbas Khatib Haji & Another, Civil Application No. 2 of 2006 (unreported),** to mention a few.

This is regardless of the amount of the delayed time, since even a delay in a single day can be adversely judged whereas delay of several days albeit with valid reasons can lead to granting of the application. The following cases have all discussed the point: **Bushfire Hassan v Latina Lucia Masanya, Civil Application No. 3 of 2007, CAT (unreported)**, **Wambele Mtumwa Shaban v Mohamed Hamis, Civil Reference No. 8 of 2016 (unreported)** and **Lyamuya Constraction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT at Arusha (unreported)**. And in all these decisions the Court underscored the importance of advancing sufficient reasons for the delay by stating that:

“Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.”

Coming back to the present application the reason advanced by the applicant are that after receiving a copy of ruling on 06th May, 2019, which by then only six (6) days had elapsed, the applicant gave herself time to go through the ruling before deciding whether she would wish to appeal the decision or not. This account, besides not being persuasive considering the time taken alleged to study the ruling, was not pleaded in the affidavit. The justification surfaced in the written submission which I consider as an afterthought.

This point is thus sustained.

The second point that this Court has not been properly moved for failure to cite the enabling provision, there is a distinction between an enabling and prescribing provision as elucidated in the Court of Appeal decision in the cases of **Hassan Sunzu v Ahmad Uledi, Civil Reference No. 8 of 2013 CAT, at Tabora p. 3.** and **Awiniel Mtui & Others v Stanley Ephata Kimambo, Civil Application No. 19 of 2014, CAT at Arusha, p. 5-6 (both unreported).** Whilst Rule 45 (a) of the Court of Appeal Rules, 2009 as amended by Rule 6 of the Court of Appeal (Amendment) Rules, GN. No. 362 of 2017, is undoubtedly a procedural law, section 5 (2) (a) (i) of AJA, is the provision clothing the Court with the jurisdiction to entertain and determine a matter before it. Citing of the procedural law though important but its non-citation cannot result into rendering the matter before the Court incompetent, unlike failure to cite the enabling provision.

This point is also sustained.

The applicant's move of moving the Court seeking for leave to appeal to the Court of Appeal, without first seeking and obtaining an extension of time to do so, renders the application incompetent and the remedy fitting the situation is none other than dismissing the application. The reason advanced on illegality undoubtedly can pass as sufficient reason even where the delay is of a long time.

The cases **Principle Secretary Minister of Defence and National Service v Dervam Valambhia** [1991] T.L.R 387, **VIP Engineering & Marketing Limited and 2 Other v City Bank Tanzania Limited**, Consolidated Civil References No 6, 7 and 8 of 2006 (unreported) and **Etiennes Hotel v National Housing Corporation**, Civil Reference No. 32 of 2005, CAT at DSM (unreported). This can nevertheless occur or advanced as a ground warranting an application of extension of time, which is unfortunately not the case here, given the reasons.

In short, the preliminary points of objection raised are meritorious and I hereby sustain them and proceed to dismiss the application under section 3 (1) of the Law of Limitation, Cap. 89 R.E. 2002 with costs. It is so ordered.



P.S. FIKIRINI

JUDGE

24th JUNE, 2020