IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA
MISC. COMMERCIAL APPL. NO.03 OF 2021

SUSAN SAMSON NAKEMBETWA .....APPLICANT

Versus

IMPERIUM INSURANCE BROKERS CO.LTD.1ST RESPONDENT
RESOLUTION INSURANCE CO. LTD.....2ND RESPONDENT

RULING

Last Order: 22/07/2021.
Date of Ruling: 23/07/2021.

NANGELA, J.:

The Applicant herein, has approached this Court by way of a Chamber Summons drawn and filed under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019 and supported by an affidavit, seeking for the following orders, namely, that:

1. this honourable Court be pleased to allow the Applicant to file a Notice of Appeal out of time in respect of the decision of Commercial Case No.16 of 2018, delivered by Hon. G.N Barthy, RM on the 5th day of Devember 2019 in the District Court of Nzega, at Nzega;

2. this honourable Court be pleased to grant any other relief as may deem fit and/or just to grant.

The Application filed by the Applicant herein has been opposed by the 2nd Respondent who filed a counter affidavit on the 19th day of May 2021. So far I see no counter affidavit of the 1st Respondent. On the 22nd day of July 2021, the matter was set for hearing.

At the hearing, Mr Musa Chemu, learned advocate represented the Applicant while Mr Sylvester Mulokozi and Said Nyawambura, learned advocates appeared for the 1st and 2nd Respondents respectively.

In the course of submissions, Mr Chemu submitted that, the Applicant's prayers are for her to be granted leave to file a notice of appeal out of time. He contended that, the Applicant's delay is attributed by the fact that, she timely filed an appeal at the High Court, Tabora Registry, but without first lodging a notice, and, that, the mistake was not of her but of the Advocate. That being the case, it was Mr Chemu's submission that, a preliminary objection (PO) was raised in Court and following that PO which was conceded to by the Applicant, the matter was struck out.

In efforts to pursue for her rights, it was contended, the Applicant filed, yet another application in this Court, which, nevertheless, was struck out as it was found to be

incompetent. He contended, therefore, that, the Applicant has subsequently filed this Application.

According to Mr Chemu, while the decision sought to be appealed against was issued on 5th December 2019, the Applicant lodged the initial appeal which was struck out timely, only that, the Notice was lacking due to the oversight mistake of her advocate. Relying on the decision of the Court of Appeal in the case **Kambona Charles (as administrator of the estate of the late Charles Pangani) vs. Elizabeth Charles**, Civil Appl. No. 529/17 of 2019 (unreported), Mr Chemu contended that, the oversight by the Advocate was a human error.

Relying on another decision of the Court of Appeal, in the case of **Standard Chartered Bank (Tanzania) Ltd vs. Bata Shoe (T) Co. Ltd**, Civil Appl.No.101 of 2006 (unreported), it was Mr Chemu's submission that, the Applicant' application should be granted. In that case cited by Mr Chemu, the Court of Appeal considered the issue of inadvertent act on the part of the advocate and, on exceptional reasons, granted extension of time.

Mr Chemu contended, therefore, that, the Applicant has all along shown efforts to see to it that her Appeal is heard on merits and justice delivered, since; not granting her opportunity will greatly cause her an irreparable loss.

For his part, Mr Mulokozi who appeared holding briefs of Mr Kinabo, for the 1st Respondent, rose to oppose the granting of the application. However, as earlier noted herein above, the 1st Respondent did not file a Counter Affidavit. I raised that issue with him and his response was that he had legal issue which he wanted to address though he conceded that initially there was no counter affidavit filed.

In my view, where a party fails to file his/her counter affidavit, the appropriate inference which needs to be drawn from that fact is that, the 1st Respondent does not oppose the application. That is appropriate position to take because, it is a well settled rule that, in civil proceedings the court may draw adverse inferences from a party's decision not to give or call evidence as to matters within the knowledge of the party or of witnesses who, it is reasonable to conclude, would have given evidence if asked to do so.

In principle, an affidavit stands as evidence in court and, where one is expected to file a counter affidavit, but fails to do so, the implication or inference to draw from his failure or inaction is that, he has admitted the facts adduced in the affidavit or does not wish to oppose an application.

As such, the 1st Respondent cannot be allowed to enjoy the rights he had in the first place forfeited. See, for that matter, the case of **Emmanuel Gidahotay vs. Gambanyashita Muhale,** Misc. Land Application No.41 of

2017, HC (Arusha District Registry) (unreported) and **Mosess Ndosi vs. Suzana Ndosi,** Misc. Land Application No.117 of 2013 (unreported).

As regards submissions by the 2nd Respondent, when Mr Said Nyawambura, learned advocate, took the floor to address this Court, he contended that, the Court of Appeal has set out factors which an Applicant must satisfy, and which are not satisfied herein, before an application for extension of time can be granted. One of those factors is that, the Applicant has to account for each day of delay.

To support that submission, Mr Nyawambura placed reliance on the decisions of the Court of Appeal in the cases of **Bruno Wenceslaus Nyalifa vs.The Permanent Secretary Ministry of Home Affairs and Attorney General,** Civil Appeal No.82 of 2017, (unreported) and **Ngao Godwin Losero vs. Julius Mwarabu,** Civil Appl. No. 10 of 2015, (unreported).

In his submission, he told this Court that, the decision sought to be challenged by way of an appeal, was issued on the 5th of December 2019. Citing rule 69(4) of the High Court (Commercial Division) Procedure Rules, 2012 G.N. No.250 of 2012, (as amended in 2019), Mr Nyawambura contended that, the notice ought to have been filed on the 19th December 2019, a fact which was not done. Instead, he argued, the Applicant filed a Memorandum of Appeal in

Court on the 24th December 2019, which was struck out on November 18, 2020.

In a further submission, Mr Nyawambura stated that, the application which the Applicant filed in this Court, subsequent to the striking out of the appeal on the 18th November 2020, was as well struck out for being incompetent on 13th April 2021, and, the Applicant approached this Court with the current application, a month later. In view of such delay, he contended that, the prayers sought should not be granted.

In a brief rejoinder, Mr Chemu rejoined that, in his view, the delay by the Applicant was not inordinate delay but that, the Applicant was preparing for the various applications he had filed in court. He stated that, the Applicant's efforts to act promptly should be noted, not from when the subsequent applications were struck out, but from the very time when the decision sought to be challenged was issued. He contended, therefore, that, the Applicant acted promptly within the time of filing her appeal though there was the skipping of the step of filing notice of appeal.

Further, Mr Chemu rejoined that, the issue of length of delay was discussed in the **Kambona's case** (supra) which he has relied on, in support of his position. He emphasized, therefore, that, the delay was not in ordinate

delay but reasonable one. As regard whether he had shown any illegality of the decision sought to be appealed against, Mr Chemu contended that, the affidavit of the Applicant is clear on that point.

Finally, Mr Chemu was of the view that, considering the nature of the matter before this Court and in the interest of justice, the Applicant should be allowed to file the requisite notice of appeal out of time and lodge her appeal to be heard on merit.

I am grateful to the learned advocates for the authorities availed to me. Having heard their oral submissions, the issue I am called upon to address is whether the Applicant has disclosed sufficient cause warranting this Court to grant the prayers she has sought in her chamber application.

As a matter of principle, however, an applicant seeking for extension of time having failed to act or do a certain legal act, must disclose **"sufficient cause"** regarding why he was unable to do that act within the prescribed time. Section 14 (1) of the Law of Limitation Act, Cap.89 R.E.2019 requires such kind of disclosure of sufficient cause. The Act, however, does not provide for a statutory definition of what amounts to **"sufficient cause"**.

Even so, the expression 'sufficient cause' as employed by the legislature in s.14 (1) of the Law of Limitation Act, is

adequately elastic to enable the Court to do substantial justice to parties by disposing of matters on merits.

Indeed, in the case of **Felix Tumbo Kisima v TTC Ltd and another- CAT** Civil Appl.No.1 of 1997 (unreported), a Single Justice of the Court of Appeal stressed that;

> "the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step, and depending on the overall circumstances surrounding the case, extension of time may be granted even where there is some element of negligence by the applicant's advocate ...."

Similarly, in that same case, the Court of Appeal was of the view that, *"in assessing the cause of delay, the Court considers overall circumstances surrounding the case."*

It is clear to me, therefore, that, factors, such as the reasons for the delay, the length of the delay, the chances of success of the intended application or whether there is any allegation of illegality of the decision being challenged,

are, but part of what the Court may take into account, but it does not mean that their list is exhaustive. See the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of YWCA Tanzania,** Civil Application No.2 of 2010 (unreported).

In the instant application, the Applicant's contention is, if I understood him properly, that, the delay to file was partly contributed to by the Advocate's failure to file a notice prior to the filing of the Memorandum of Appeal which ended up being struck out. Otherwise, the Applicant has maintained that she acted promptly.

Indeed, the issue of acting inadvertently on the part of the advocate was, considered in the case of **Standard Chartered Bank (Tanzania) Ltd v Bata Shoe (T) Co. Ltd,** Civil Appl.No.101 of 2006 (unreported), relied upon by the learned counsel for the Applicant.

I that case, the learned advocate had overlooked serving the Respondent's counsel with certain requisite documents, hence, occasioning a delay. The Court was of the view that, generally speaking, inadvertence is not a sufficient cause for enlargement of time.

However, relying on its other previous decision in the case of **Michael Lessani Kweka vs. John Eliafe,** [1997] TLR 152, at page 153, the Court stated that:

> "…. Although generally speaking a plea of inadvertence is not sufficient,

> nevertheless...., extension of time may be granted upon such plea in certain cases, for example where the party putting forward such plea is shown to have acted reasonably diligently ...and ... promptly to seek remedy ...."

In this instant application, there is no doubt that the plea of inadvertence has been put forward by the Applicant. I do find it to be the case given that, the learned counsel for the Applicant has relied on the case of **Standard Chartered Bank (T) Ltd** (supra) to support his submission. The question that follows, therefore, is whether the Applicant acted reasonably diligently and promptly in seeking the remedy she was chasing after. This is a question of fact to be decided on the basis of an objective approach.

Support for that position may be persuasively drawn from the decision of the Supreme Court of Queensland in the case of **Albrecht vs. Ainsworth & Ors** [2015] QCA 220. The facts of that case a fairly brief. In that case, the Applicant and the respondents, together with others, were owners of homes in an architectural award-winning multi dwelling complex called- the *Viridian Noosa Residences*.

It happened that the Applicant wanted to extend the deck area of his home but could do so only if the body

corporate in an extraordinary general meeting approved the proposal in his motion without dissent and amended its community management statement to grant him exclusive use of the common property airspace between his existing deck spaces.

When an extraordinary general meeting was convened, seven (7) out of 23 owners voted for the motion, seven (7) voted against, one (1) abstained and the remainder did not vote. The applicant applied for a referral to an adjudicator and sought orders that, effect be given to his motion. The adjudicator granted his application and made the orders sought.

The respondents appealed to the Queensland Civil and Administrative Tribunal Appeals ("QCATA") against the decision of the adjudicator. The QCATA allowed the appeal and set aside the adjudicator's orders. Subsequently, the applicant, applied for leave to appeal on a question of law to the Court, contending that, the appeal to the QCATA should have been dismissed.

In addressing the issue of acting reasonably, the Supreme Court agreed with the adjudicator that:

> "...the test was objective, requiring a balancing of factors in all the circumstances according to the ordinary meaning of the term reasonable, ... a term which should

be given a broad, common sense meaning."

Reverting to the current application, it is clear that, the Applicant lodged her Appeal on the 24th December 2020 following the decision of the lower court which was handed down on the 5th of December 2020. It should be noted, however, that, had she complied with the requirements of Rule 69 (4) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended), she would have been required to lodge a notice on the 19th December 2020 as correctly stated by the learned counsel for the 2nd Respondent.

It is an open secret, therefore, that, that stage of notice was not complied with and the Appeal lodged got struck out. However, if all parameters are looked at, from the date she filed the Appeal on the 24th December 2020, one would notice that, the Applicant was already late by two days only (given that 21st of December 2019 was a Saturday and 22nd December 2019 was Sunday).

That fact means, that, had that which was filed in Court been the requisite Notice, the Applicant would have been late by two days only, which, in my view, would not or cannot be said to amount to an inordinate delay. I hold so, because, in the case of **Hamis Mohamed v Mtumwa Moshi,** Civil App. No. 526 of 2019, for instance, it was held

that a period of 5 days' delay was not an unwarranted delay. Likewise, in the case of **Samson Kishosha Gabba vs. Charles Kingongo Gabba [1992] TLR 133 at 136,** this Court made a finding that a delay of 5 months was not an alarming period. It means, therefore, that, depending on the circumstance of each case, the Court can still condone a particular delay which hindered a party to act within time.

In general, and, from the look of things and the timing when the filings were to be made, it is clear to me that, the Applicant cannot be said to have acted unreasonably. However, what comes clear to me is that, her advocate acted in an inadvertent manner, thereby throwing the Applicant into the mess she finds herself in. That being the case, can that inadvertent conduct of the advocate be condoned?

In the case of **Puma Energy vs. Karim Aziz Banji, Misc. Commercial Application No.161 of 2019 (unreported),** this Court, citing the Indian case of **B. Madhuri Goud vs B. Damodar Reddy, 2012 (12) SCC 693,** was also of the view that:-

> "If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona

fides, then it may condone the delay."

Taking into account the views stated in the **Michael Lessani Kweka** (supra) and since, in the circumstance of this case, it is clear that, it is the Applicant's counsel who messed up the matter in his own hands, I would not, in the interest of justice, lay blames on the shoulders of the Applicant but would condone the inadvertence shown by the advocate, stating, however, that, the tendency should be avoided.

On the other hand, there is also another point to consider, which is the delay was occasioned after the several other applications filed in Court by the Applicant had been struck out. Mr Nyawambura submitted that, the Applicant was late by a month. As I stated herein, it all depends with the facts of each case, since, as I indicated, in the **Samson Kishosha Gabba vs. Charles Kingongo Gabba [1992] TLR 133 at 136**, this Court made a finding that a delay of 5 months was not an alarming period.

Besides, the number of days spent in Court, are technically not to be counted. Mr Chemu had submitted that, the counting should be from critical in respect of the days spent after the issuance of the decision of the lower Court on the 5th of December 2021. I think that, that is a correct approach since, there rest of the days were days

spent in court's corridors and that is explainable on technical approach.

In the cases of Tanzania **Fish Processors Ltd v Eusto K. Ntagalinda, Civil Appl.No.41/08 of 2018, (CAT) (Mwanza) (Unreported), Zahara Kitindi and Dominic B. Francis v Juma Swalehe & 9Others, Civil App. No.4/05/2016, CAT, at Arusha (Unreported),** and **Yara Tanzania Limited v DB Shaprya &Co. Limited, Civil Application No.498/16/ of 2016, CAT, Mwanza, (unreported),** the Court of Appeal made a distinction between "*technical delay*" and "*actual delay*", making it plain that, days spent on Court corridors can be technically be condoned and should not be counted when considering that a delay was inordinate or not.

From a holistic approach to the assessment of this application, therefore, I am, in particular, forced to reiterate what Hon. Justice Muruke, J., said in the **Ghania Kimambi v Sherack Ruben Ngambi,** Misc. Application No.692 of 2018 (unreported). In that case, her Ladyship was of the view that:

> "It sounds unfair and inequitable... for a party to a civil litigation to be punished for an error committed by the advocate.... Throughout history, courts have assumed the position of custodian of justice...."

Taking the cue from the above, I am inclined to grant the prayers sought by the Applicant in this Application. In the upshot, this Court settles for the following orders, that:

(i) The Applicant prayer to be allowed to file a Notice of Appeal out of time in respect of the decision of Commercial Case No.16 of 2018, delivered by Hon. G.N Barthy, RM on the 5th day of Devember 2019 in the District Court of Nzega, at Nzega, is hereby granted;

(ii) the Applicant is to file the Notice, without failure, within fourteen (14) days from the date of this ruling;

(iii) Each party shall bear its own Costs

It is so ordered.

DATED AT MWANZA ON THIS 23RD JULY 2021

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HON.DEO JOHN NANGELA
JUDGE
High Court of the United Republic of Tanzania
(Commercial Division)