IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

CIVIL APPLICATION NO. 496/06 OF 2023

MBEYA CITY COUNCIL.....APPLICANT

VERSUS

TANZANIA BUILDING WORKS LTD.....1ST RESPONDENT

COMMERCIAL BANK OF AFRICA.....2ND RESPONDENT

JUBILEE INSURANCE COMPANY OF TANZANIA LTD.....13RD RESPONDENT

[Application for Extension of time to lodge supplementary record of appeal out of time from the order of the Court of Appeal at Mbeya]

(Lila, Kitusi and Mashaka, JJA.)

dated the 6th day February, 2023

in

Civil Appeal No. 380 of 2020

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RULING

6th &13th December, 2023

KAIRO, J.A.:

In this application the applicant is seeking for the following orders:

(a) extension of time to lodge supplementary record of appeal out of time from the order of the Court in Civil Appeal No. 380 of 2020 dated on 6th February, 2023,

(b) Any other relief as the Court shall deem fit to grant.

The application is by way of notice of motion preferred under rule 10 and 48 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

It is supported by an affidavit sworn by Joseph Tibaijuka, the learned State Attorney who represented the applicant in Civil Appeal No. 380 of 2020 into which the supplementary affidavit is to be incorporated.

Only the 3rd respondent filed an affidavit in reply which was affirmed by her advocate, one Shehzada Walli. Together with the affidavit in reply, the 3rd respondent also raised a preliminary objection on point of law (the PO), the notice of which was filed on 22nd June, 2023 to the effect that the application is incurably defective for containing an affidavit that has hearsay statements of facts in paragraphs 5 and 11 and want of a valid verification. Thus, the same should be dismissed with costs.

At the hearing of the application Ms. Lucy Kimaryo assisted by Mr. Joseph Tibaijuka, both learned State Attorneys represented the applicant. Mr. Baraka Mbwilo, learned counsel appeared for the 1st respondent while Mr. Shehzada Walli, learned counsel represented the 3rd respondent and was also holding a brief of Mr. Henry Chaula, learned counsel for the 2nd respondent.

As per the practice of the Court, once a preliminary objection is raised in an appeal or application, the Court is required to dispose it first,

before embarking on determining the substantive appeal or application on merit. In the same vein, I will first determine the PO raised which was also supported by the rest of the respondents. For expeditious disposal of the matter, the Court ordered the parties to submit for and against both the PO raised and the substantive application. In the circumstances the PO is sustained, the matter will end there, but if overruled, the Court will proceed to determine the application on merit.

In his submission Mr. Walli submitted that the PO raised is a pure point of law as per the guiding principle in the famous case of **Mukisa Biscuit Manufacturing Co. LTD vs Westy End Distributors LTD** [1969] EA 696.

Elaborating, he contended that paragraphs 5 and 11 of the supporting affidavit contain hearsay statements of facts which the applicant ought to have filed supporting affidavits as regards the stated facts therein. He went on to argue that the applicant also ought to have disclosed the source of the said information at the verification clause. To support his arguments, he cited the Court's decision of **Mzee Mohammed Akida And 7 Others vs Low Shek Kon And 2 Others,** Civil Application No. 481/17 of 2017 (unreported). According to him, the said omissions contravened Rule 49 (1) of the Tanzania Court of Appeal

Rules 2019 (the Rules) which prescribes that every formal application to the Court is to be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts. Mr. Walli contended further that even if the Court would decide to expunge the offensive paragraphs, stillthe remedy cannot rescue the application as the affidavit will be rendered incurably defective, as such, the application will have no limbs to stand on. He thus prayed the Court to strike out the application with costs.

As a response, Ms. Kimaryo emphatically denied the argument that paragraphs 5 and 11 contain hearsay facts. It was her contention that the deponent was capable of proving the facts contained therein, being the person who heard the same. Thus, in line with the principles of direct evidence as stipulated in section 62 (1) (b) of the Evidence Act, Cap 6 R.E. 2022 (the Evidence Act). Elaborating further, the learned State Attorney submitted that the deponent was the one who was told to make a follow up in the registry of the Court of Appeal and further was the one who was told as per paragraph 11 that the original file in respect of Civil Case No. 10 of 2016 had already been received at Mbeya Court of Appeal sub registry from the main registry at Dar es salaam. As such, she

contended, having personally heard the stated facts, the deponent was the right and proper person to depone to the affidavit, as he did.

Distinguishing the cited case of **Mzee Mohammed Akida And 7 Others**, Ms. Kimaryo argued that, since it was submitted by the applicant that the reason for delay was failure by the intern to serve the respondents with the notice of appeal within the prescribed time after filing the same in Court, the said averments amounted to material fact that goes to the root of the reason for delay, upon which an affidavit was supposed to be sworn by the said intern to verify the same. Unlike in the case at hand, the contentious paragraphs are simply statements of facts showing part of the efforts made by the deponent in following up the documents, thus material facts which were within the knowledge of the deponent which do not go to the root of the cause of delay. As a conclusion however, Ms. Kimaryo submitted that in the circumstances the Court would agree with Mr. Walli's arguments, the consequence will be to expunge the contentious paragraphs and according to her, the move will be inconsequential to the status of affidavit as well as to the entire application, contrary to what was submitted by Mr. Walli. She thus, prayed the Court to find the raised PO unmerited and overrule it so that the application can be heard on merit.

In his rejoinder, Mr. Walli repeated his submission in chief.

The issue for determination is whether or not the PO is meritorious. It was the contention of Mr. Walli that paragraphs 5 and 11 of the supporting affidavit contain hear say facts, thus offensive to the principles guiding oral evidence. According to him, the applicant was supposed to attach affidavits of the registry officers who relayed the stated facts therein to corroborate the deponent's averments, in the absence of which, the affidavit is rendered incompetent. In the same vein, the whole application crumbles.

I will start with the principles guiding oral evidence. It is trite law that all facts except the contents of a document may be proved by oral evidence (section 61 of the Evidence Act). Likewise, an affidavit being statements of fact can also be proved in the provided manner. As the main guiding principle, the concerned oral evidence has to be direct. Section 62 (1) clarifies the manner in which oral evidence can be said to be direct. It states:-

> *"62 (1) Oral evidence must, in all cases whatever, be direct; that is to say-*
>
> *(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it,*

(b) If it relates to a fact which could be heard, it must be the evidence of a witness who says he heard it,

(c) If it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner

(d) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds it on those grounds...."

For ease of reference, I will also reproduce the paragraphs in contention as follows:

"5. That on 17th March, 2023 when I made a follow up of the letter in the Registry of the High Court, I was told to make the follow up in the Registry of the Court of Appeal

11. That on 18th day of May, 2023, I made the follow up in the sub registry office of the Court of Appeal at Mbeya and I was told that they have already received the original file of the Civil Case No. 10 of 2016 from the main registry at Dar es Salaam"

Looking at the quoted paragraphs, they are the statements which were directly told to the deponent who in turn heard the same in his

personal capacity. They are therefore in line with section 62 (1) (a) of the Evidence Act in my opinion. In that regard, the statements, cannot be hearsay as argued by Mr. Walli, with much respect and therefore, no further affidavit was necessary to corroborate what the deponent heard contrary to what was argued.

The learned counsel also argued that the formal application to the Court is required to be supported by one or more affidavits of the applicant or some other persons having knowledge of the facts, to which I agree and hasten to add that the said requirement has been complied with in this application by having a supporting affidavit of the deponent who heard the statements of the said facts and accordingly so deponed. On those bases, the question of the paragraphs to contain hearsay statements of facts is a misconception, and in the same vein, the cited case is distinguishable as rightly argued by Ms. Kimaryo.

At the end, I find the PO raised without merit and is accordingly dismissed with costs.

I now turn to determine the substantive application before me.

When invited to submit in support of the application, Mr. Tibaijuka first prayed to adopt the notice of motion and the supporting affidavit as part of his oral submissions. He stated that the application has originated

from the Court order in Civil Appeal No. 320 of 2020 dated 6th February, 2023. According to the order, the applicant was required to file a supplementary record of appeal to incorporate the proceedings and certified copies of the exhibits tendered during the trial of the case which decision's is subject to challenge in Civil Appeal No. 320 of 2020 (High Court Civil Case No. 10 of 2016), within 60 days from the date of the order.

It all started when the 1st respondent raised a PO during the hearing of the said appeal to the effect that the record of appeal was incomplete, the fact which was conceded by the applicant. To comply with the order, Mr. Tibaijuka deposed that he wrote a letter to the High Court Registry requesting it to prepare the complete proceedings and certified copies of the exhibits tendered during trial. But when he made a follow up of the letter on 17th March, 2023, he was told to follow up with the Registry of the Court.

He went on to submit that, since he was assigned some cases in the session of the Court in Iringa, the process which took him four days from 20th March, 2023, he made a follow up of the original case file at the sub registry of the Court in Mbeya from 27th to 31st March, 2023. However, he was again told by the registry officer of the Court to follow up the file at

the main Registry of the Court and attached the affidavit of the said registry officer accordingly, to support his deposition.

Mr. Tibaijuka went on to depose that he went to Dar es Salaam to make the follow up as advised on 10th May,2023 that is after three weeks as in between there was Easter Vacation for the Court from 1st April up to 11th April 2023. Besides, he was to wait for the approval of the said safari to Dar es Salaam together with the financial support from his employer. Meanwhile, the 60 days' time to file the supplementary record had already been expired on 6th April, 2023. He also deposed that he found the concerned file after reaching the Court Registry and upon perusal of the same, he realized that the proceedings were not yet typed to its completion. He therefore wrote another letter to the High Court Registry on 19th May, 2023 requesting the complete typed proceedings together with the certified exhibits tendered during trial, and further to return the said original case file to Mbeya Court Registry. He went on to state that, he was however, told that the case file had already been returned to the Court Registry in Mbeya from Dares salaam when he made a follow up with the Mbeya Court sub registry on 18th May, 2023. Basing on the said information, Mr. Tibaijuka decided to prepare and file this application on

29th May, 2023 praying for the extension of time to lodge the supplementary record of appeal, as earlier stated.

According to him, the grant of the application will not be prejudicial to any part, instead, it will pave way for the Court to proceed with the hearing of the appeal which remains pending before the Court. He thus prayed for an extension of 90 days to file the said supplementary record in the circumstance the Court will allow the application due to the coming Court vacation effective 15th December, 2023 until end of January, 2024.

Mr. Mbwilo on his part had no objection to the prayer. He was however uncertain if the Court has the mandate to grant more days than the 60 days previously granted to the applicant.

In riposte, Mr. Walli prayed to adopt his affidavit in reply filed in 21st June, 2023 opposing the application. He was emphatic that the applicant has not exhibited sufficient cause to move the Court to exercise its discretion and grant the extension of time sought. He put reliance on the Court's decision in **Benedict Mumello vs Bank of Tanzania,** Civil Appeal No. 12 of 2002 (unreported). It was his contention that the delay was the result of negligence, carelessness and lack of diligence on the part of the applicant. In clarification, he submitted that the applicant wrote the letter requesting for the proceedings and certified copies of the

exhibits tendered on 16th February, 2023 as per paragraph 4 of the supporting affidavit, while knowing that they had only 60 days to file the supplementary record. But further to that, the applicant made the first follow up on 17 March, 2023 which shows lack of diligence on the part of the applicant.

Ignoring the affidavit attached as per paragraph 7 of the supporting affidavit verifying the follow up made by the applicant, Mr. Walli wondered how could the applicant saw the importance of attaching the said affidavit but failed to do the same as regards the depositions in paragraph 5 and 11 of the supporting affidavit. According to him, the omission shows lack of diligence and raises a question mark as to whether the applicant really followed up the requested documents. He also disputed the veracity of the averments of Mr. Tibaijuka in paragraph 6 for the reason that there was neither summons from the Court nor travelling tickets to verify that he went for the said Court session in Iringa.

Refuting the reason deposed to in paragraph 9, the learned counsel wondered why the deponent did not request for the approval and the funds from the employer when the order was given by the Court, considering the urgency of the matter which was well known to him in his capacity as State Attorney. As such, the reason does not constitute

sufficient cause as well. He listed the conditions that justify the establishment of sufficient cause as stipulated in **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) as follows: -

> *"(a) the applicant must account for all the period of delay*
>
> *(b) the delay should not be inordinate*
>
> *(c) the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and*
>
> *(d) the presence of 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."*

Applying the listed conditions to the depositions in the supporting affidavit, Mr. Walli argued that the applicant accounted for some days while living others unaccounted. Elaborating, he listed the following examples of unaccounted days, **one;** the days from 7th April, 2023 when the 60 days given lapsed, **two;** the blanket statement on the lapse of three weeks of waiting for the permission and assistive funds for travel as

per paragraph 9 and 10 of the supporting affidavit without showing when the approval and funds were given, **three;** the applicant in paragraph 12 stated 18th May, 2023 to be the time when he begun the preparation of this application, but did not state the number of days used in the process. He argued that it is trite that even a single day of delay has to be accounted for, otherwise the requirement to prescribe time within which a certain act is to be conducted becomes useless. He thus concluded the first condition was not met.

For the second condition as per **Lyamuya's** case, the learned counsel argued that the applicant's failure to account for the days delayed as above shown resulted into inordinate delay in abiding with the order of the Court. Therefore, the applicant depicted negligence, apathy and lack of diligence contrary to the third condition in **Lyamuya's** case.

Reacting on the 90 days extension of time prayed by the applicant, Mr. Walli argued that since in paragraph 12 the applicant has deposed that the original case file has already been returned to the Court's sub registry in Mbeya, then the supplementary record can be filed forthwith. In his view therefore, extension of 30 days shall suffice in the circumstance the Court finds appropriate to grant the application.

Otherwise, he prayed the Court to find the application is without merit and dismiss it with costs.

In rejoinder, Ms. Kimaryo submitted that following the Court order, the applicant had a duty to write to the High Court and requested for the stated documents, which duty, she fulfilled on 16th February, 2023. She went on to argued that upon such compliance, the applicant had no obligation to make a physical follow up. However, since the applicant was in dire need of expeditious determination of the appeal, she decided to make all those physical follow-ups on the required record in Mbeya Court sub registry as well as the Registry of the Court in Dar es salaam at her own costs in terms of financials and time. Ms. Kimaryo prayed the Court to recognize and consider the efforts to amount to diligence on the part of the applicant.

Regarding the omission to apply for the permission and funds for travelling purpose from the employer immediately after the Court order, the learned State attorney argued that it was not anticipated that getting the said documents would be difficult. According to her, the applicant thought that she would soon be informed by the registrar when to go to collect them after writing a request letter.

Regarding the failure to attach a proof of travel, Ms. Kimaryo contended that its undeniable fact that the applicant is under the mercy of the High Court Mbeya Registry to get the requested documents. As such, whether or not Mr. Tibaijuka travelled is inconsequential. She refuted the contention that the delay was inordinate instead she argued that the same to be technical and the applicant is not to be blamed for it.

As regards the 90 days extension request, the learned State Attorney insisted that considering that the Court will be in vacation till the end of January and the fact that the typing of the proceedings is not completed yet, 90 days extension is reasonable as the applicant would not be able to get further extension if she will fail to abide with the time to be given. For the interest of justice therefore, she prayed the Court to grant extension of 90 days requested.

Having dispassionately gone through the record of the application and having heard the rival arguments of the parties, the issue for the Court's determination is whether this application is meritorious.

It is a settled legal position that the grant of extension of time is the discretion of the Court and in terms of rule 10 of the Rules, the Court may exercise its discretion and extend time upon being satisfied that there is sufficient ground or good cause to do so. However, what constitute good

cause has not been codified though this Court has, in various instances, stated a number of factors to be considered, these includes; whether or not the application has been brought promptly; a valid explanation for the delay and whether there was diligence on the part of the applicant. [See **Lyamuya's case** (supra), **Tanga Cement Company Limited vs Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001, **Zahara Kitindi and Another vs Juma Swalehe and Nine Others,** Civil Application No. 4/05 of 2017 (both unreported). The stated principles will guide the Court in determining this application.

As could be discerned from the applicant, the main ground for the delay is failure to be supplied with the requested documents ordered by the Court to be incorporated in Civil Appeal No. 380 of 2020 as supplementary record of appeal. The reason was disputed by the 3rd respondent arguing that no sufficient cause was not exhibited by the applicant to warrant the grant the extension sought.

Ther is no dispute that the applicant wrote a letter to the High Court Registry requesting for the documents concerned on 16th February, 2023, that is 10 days from the date of the order. In a move show the negligence of the applicant, Mr. Walli questioned the time taken until when the applicant wrote the letter. However, I am convinced that the said step

was taken promptly in the circumstance of this case. I am fortified in this position by the case of **Dar es Salaam City Council vs Jayantilal P. Rajani,** Civil Application No. 27 of 1987 (unreported) wherein the applicant who applied for the proceedings and judgment for appeal purpose after 14 working days from the date of the decision subject to appeal was considered prompt enough to warrant his grant of extension of time. But further to that, throughout the supporting affidavit the applicant exhibited steps taken and the efforts made to follow up with the High Cout and the Court on the requested documents to enable the applicant file them within the given time. These included writing reminder letters as well as physical follow ups. I understand that Mr. Walli dismissed the stated efforts arguing the same to be insufficient to move the Court to exercise its discretion and extend time.

I paused to ask whether the applicant had the legal duty to make the stated follow-ups after writing the request letter. Without hesitation the answer is in the negative. In my view, requesting for the documents within 10 days from the date of the order and latter making a follow up by letters and physically, despite having no obligation to do so, and finally preparing and lodging this application 8 days later after being informed on the return of the original case file to Mbeya Court sub registry,

collectively depicts nothing, but diligence on the part of the applicant in my opinion, contrary to what was argued by Mr. Walli, with much respect.

Mr. Walli also argued that all the conditions for sufficient cause operates against this application. However, with much respect I am not prepared to purchase the contention. This is because all the follow up made were over and above the applicant's obligation which was long fulfilled by writing a letter to the High Court Registry on 16th February, 2023, as such he was not the one to blame. To say the least, the delay was caused by the failure of the High Court to supply the requested documents in time.

As for the cited case of **Benedict Mumello**, its analysis supports the applicant's case than the respondent's in my view, considering that all the efforts done by the applicant were over and above what she was required to do as rightly argued by Ms. Kimaryo.

There is also another complaint by Mr. Walli as to why Mr. Tibaijuka did not apply for the permission and assistive funds immediately after the order of the Court. Suffice to state that, I agree with the argument of Ms. Kimaryo that the difficult to obtain the requested documents was beyond their contemplation, considering that other documents were already

supplied to the applicant and subsequently filed Civil Appeal No. 380 of 2020. As such, I find the complaint without base. I dismiss it.

Basing on what was discussed above, it is my considered view that the delay was with sufficient cause. Consequently, the application is meritorious and it is hereby granted.

On the question of days to be enlarged, suffice to state that I have holistically considered all of arguments and I am of the view that 60 days extension will meet the demand of justice. In fine, the applicant is ordered to file the supplementary record within 60 days from the date of this ruling. Costs to be in the cause.

It is so ordered.

DATED at **MBEYA** this 12th day of December, 2023.

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of December, 2023 in the presence of Mr. Joseph Tibaijuka, learned State Attorney, representing the applicant also holding brief for Mr. Baraka Mbwilo, learned Advocate for the 1st respondent, and in absence of the 2nd and 3rd Respondent is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL