

IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
DAR ES SALAAM

MISC COMMERCIAL APPLICATION NO 300 OF 2017

BETWEEN

IAN PATTIE ASSOCIATES LTD -----APPLICANT

VERSUS

WELLWORTH HOTELS AND LODGES -----RESPONDENT

RULING

SONGORO, J

Ian Pattie Associates Ltd the applicant filed an application under Section 11 (1) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] applying for an order of extension of time within which to file a Notice of Appeal to the Court of Appeal to challenge Ruling and orders of Hon Nyangarika J dated 20th November 2013 in the Misc Commercial Cause No 1 of 2013. The applicant application is supported by an affidavit sworn by Mr. Rosan Mbwambo, Learned Advocate of the applicant.

In response to the application, Mr Zulfikar Ismail the director of the Respondent's company filed a counter affidavit opposing the application on ground that, applicant has not assigned sufficient reasons to enable the court to grant an extension of time.

More the Respondent also opposed the application that, there has been a long delay in filing the present application. So he prayed that, the application should not be granted.

In the light of the application, the court invited both counsel to pursue the application. So Mr Heri Kauke Learned Advocate appeared for the applicant, and Ms. Involata Wangoma Learned Advocate appeared for the Respondent.

To start with Mr Kauke, relying on the affidavit of Mr. Rosan Mbwambo he informed the court previously Well worth Hotel & Lodges Ltd the Respondent filed a petition challenging the arbitral award in Commercial Application No 1 of 2013.

Next, the counsel stated on 20/11/2013 the court in its ruling made an order nullifying the Arbitral Award. The applicant was aggrieved by the decision of the court and on the 4/12/2013 he issued a notice of appeal, and then filed a Memorandum of Appeal which was registered as Civil Appeal No 99 of 2014.

The applicant counsel then explained that, however, on 30/8/2017 the applicant appeal was struck out with costs on the ground that, the record of appeal was incomplete because it lacks letter applying for copies of the proceedings, ruling and drawn order was relevant in determining the applicant appeal before the Court of Appeal. So, on 19th September 2017 the applicant filed the present application for extension of time. In view of what took place in the Court of Appeal, the applicant state that, he is now applying for an order of extension of time to file a notice of appeal after their appeal was struck out on technical reasons.

The applicant admitted in his submission that, he delayed to file a notice of appeal because he pursued an appeal but due to the fact was supplied with incomplete documents and his attempts to appeal was not successful because he did not annex to his appeal a copy of the letter applying for court ruling and drawn order.

The counsel then explained that, it was stated by the Court of Appeal in the case of Imelda Omari and 18 others Versus Tanzania Post Corporation Civil Appeal No 98 of 2006 at page 3 that, a letter applying for ruling of the court was not essential documents in terms of Rules 99(1) of the Court of Appeal Rules.

The counsel then argued that, since he was supplied with defective proceedings, and that, is sufficient reason for granting an extension of time. It was the argument and submission of Mr Kauke that, the delay in filing proper appeal was caused by their own negligence, He also requested the court to take note of Article 107 of the Constitution of the United Republic of Tanzania which insist that, court should not use technicalities to defeat justice but must dispense justice. Finally the counsel prayed to the court to grant an extension of time to lodge a notice of appeal out of time.

In reply to the application, Ms. Involata Wangoma, Learned Advocate of the Respondent opposed the application and stated that, the Court of Appeal in the case of Lyamuya Construction Ltd Versus Board of Trustee of Young Women Christian of Tanzania Civil Application No 2 of

2010 laid down the guidelines under which a court may consider and grant an application for extension of time

She then explained that, according to the said ruling in the event there is a delay in filing the application, the delay should be accounted for.

The counsel then explained that, the applicant must show diligence in pursuing the application and not apathy. Respondent counsel then alerted the court that, the Judgment of commercial court which applicant sought to challenge was delivered on 20/11/2013 by Hon Nyangarika J (as then was).

She then argued that, the Judgment was delivered almost five years ago, and there has been a long delay. Then the counsel drew the attention of the court to a ruling in the Miscellaneous Application No 206 of 2016 between Dr. Abraham Mengi and KM Prospecting Limited and others where the court refused to grant an extension of time because there was a delay of year. It was the views also of Ms. Involata that, the applicant were negligent in not filling the present application timely.

Then relying on the decision in the case of TPA versus Flour Mills (Unreported) at Page 23 where it was stated that, if there is no reasonable cause extension of time should not be granted and the application out to be dismissed. It was the prayer of the applicant counsel that, since there is no good reason the application be dismissed.

In rejoinder, Mr Kauke reminded the court that, has demonstrated in paragraph 12 of the applicant affidavit of Mr. Mbwambo that, there was irregularity which requires an extension of time. Also the applicant claim that, he was pre-occupied by other proceedings, therefore he did not sleep on his right.

On the delay the applicant replied that, the matter was referred to the Court of Appeal and was struck out and the Court of Appeal did not find if the applicant was negligent. And on the mistake found by the Court of Appeal, the applicant stated the blame may not go to the applicant. All in all the applicant applied for an order of extension of time.

The court has subject the arguments of the applicant and respondent into close scrutiny and find the remedy of extension of time is always available to a party who acted diligently but due to good or sufficient cause has failed to pursue his right of filing the relevant cause of action on time.

Now turning the present application the court finds the applicant was aggrieved by the decision of this court in Misc Cause No 1 of 2013 and promptly issued a Notice of Appeal and filed a Memorandum of Appeal.

Next, the court find a notice of appeal to the Court of Appeal which was timely issued on 4th December 2013, elapsed while the applicant was pursuing Civil Appeal No 99 of 2014 in the Court of Appeal. It seems to me that, since the requisite time of filing a notice of appeal expired while the applicant was pursuing Civil Appeal No 99 of 2014 before the Court of Appeal, it was not legally practicable for the applicant to file a another valid notice of appeal within requisite time of 30 days from the date of the ruling which applicant sought to appeal against.

It is my view that, taking into account the applicant requisite time of filling a second valid notice of appeal expired while pursuing his appeal which was struck out, that, appears to me as sufficient cause which prohibited and obstructed the applicant from filing a second valid notice of appeal to the Court of Appeal. Due to the fact that, the applicant was obstructed from filing a second valid notice of appeal because he was engaged in the court proceedings before the Court of Appeal, it appears to me that, is sufficient cause under which the court may exercise its discretion and grant an extension of time.

The situation would have been differently if the applicant after the decision of Misc Commercial Cause No 1 of 2013 dated 20th November 2013 which was delivered by Hon. Nyangarika J (as then was) would have just sit down, idle, without doing nothing. Then the blame of not being diligently would have been obvious. But by promptly filing a notice of appeal, and memorandum of appeal which were ultimately struck out, that, convinces the court that, the applicant was diligently pursuing his right of appeal. On the concerned that, their appeal was struck out, the court is mindful that, there is always second bite which a party may pursue an appeal to the Court of Appeal for the second time.

On the concern that, there was a delay, I have considered that, point and when the Civil Appeal No 99 of 2014 was struck out on 30/8/2017 the applicant filed the present application on 19/9/2017. In my simple calculation from a day the appeal was struck out to the day the present application was filed he consumed a period of 20 days to file the present application.

Bearing in mind that, the applicant has to wait and annex some documents from the Court of Appeal to support his current application, by consuming 20 days to file the present application of extension of time, it seems to me by nature of the application it was necessary for the applicant to secure documents from the Court of Appeal which will support his application. Equally I find the applicant took reasonable period of time in filing the present application from the date his appeal was struck out. So I find there was no long delay in filing the present application which may justify the refusal.

All points considered I find taking into account the applicant requisite of issuing a notice of appeal, expired while, he was pursuing other litigation that, in my view is sufficient cause which may warrant the court to grant an extension of time within which to file a notice of appeal to the Court of Appeal. All points considered, I hereby pursuant to Section 11 (1) of the Appellate Jurisdiction Act Cap 141 [R.E 2002] grant applicant an extension of 14 days to file a notice of appeal. On the costs, I order each party to bear his own costs.

Dated and Delivered at Dar es Salaam this 12th day of June 2018


H.T. SONGORO
JUDGE



The Ruling was delivered in the presence of Heri Kauke Learned Advocate of the applicant and Ms. Involata Wangoma, Learned Advocate of the Respondent