IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO 24 OF 2020

(Arising from Miscellaneous Commercial Cause No. 9 of 2018)

BETWEEN

MAHAWI ENTERPRISES LIMITED .....APPLICANT

Versus

SERENGETI BREWERIES LIMITED..... RESPONDENT

Last Order: 30th July, 2020

Date of Ruling: 26th Aug, 2020

RULING

FIKIRINI, J.

This application by a way of chamber summons for extension of time within which to file a notice of appeal to the Court of Appeal against the ruling of this Honourable Court in Miscellaneous Commercial Cause No. 9 of 2018, dated 26th September, 2019, was made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA), Rule 47 of the Court of Appeal Rules, 2009 GN No. 368 (the CAT Rules) and any other enabling provision.

The application was supported by an affidavit of one Mr. Joseph Mahawi, the applicant's Principal Officer. In his affidavit Mr. Mahawi deponed that the delay in

filing timely notice of appeal was after effect of the dilatory actions of the applicant's former counsel, whom the applicant had trusted, could do the work diligently.

Upon service the respondent through Ms. Lucia Minde, in her counter-affidavit deposed that, the applicant was equally responsible for not ensuring the notice of appeal was timely filed, and for that reason, this application should not be granted.

During the hearing the applicant was represented by Mr. Edwin Hezron learned counsel while the respondent enjoyed the legal service of Mr. Nuhu Mkumbukwa learned counsel.

The application was argued by way of written submissions under the following filing schedule: that the applicant to file their written submissions by or on 8th July 2020, reply written submission by or on 24th July 2020 and rejoinder if any by or on 29th July 2020. This was to be followed by ruling scheduled for 26th August, 2020.

In his submission Mr. Hezron admitted that, grant of extension of time should be upon justification, which included good cause or sufficient cause, and not only depending on accounting for the delay but also on each particular circumstance surrounding the case. To buttress his position, he cited the cases of **Republic v**

Yona Kaponda & 9 Others (1985) T.L.R 84 and **Amani Center for Street Children v Construction Company Limited, Civil Application No. 105 of 2013.**

He went on submitting that this Court has wide discretion to grant or refuse to grant extension of time. What matters is the exercise of the judicial discretion which should not be subjectively or by rigid rule of thumb but in principle and manner in accordance with the reason and justice by weighing and balancing all the relevant factors which appeared from the material before the Court. Supporting his position, cited the case of **Kalunga and Company Advocate v National Bank of Commerce Ltd (2006) TLR 235** in which it was held that:

> *"Under rule 8 of the Court of Appeal Rules, 1971 the court has wide discretion to extend time where the time has already expired, but where there is inaction or delay on the party of the applicant, there ought to be some kind of explanation or material upon which the court may exercise the discretion given."*

Additionally, Mr. Hezron submitted that, the extension of time should be granted where a party to the case has acted expeditiously to remedy the mistake after it has been discovered, citing the case of **Michael Lessani Kweka v John Eliafye (1997) T.L.R 152,** in support in which it was held that:

"Although *general speaking a plea of in advertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in a certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it.*"

Submitting on reason for extension of time to be granted, he accounted the cause for the delay to be genuinely a mistake on the part of the applicant's former counsel and once that was discovered the applicant immediately sought the change of advocate to remedy the situation by filing an extension of time for filing notice of appeal. Pressing on the grant of the application, the counsel submitted that it was reasonable to allow the applicant to appear before this Court requesting for extension of time since he was prevented by the conduct of his former advocate. Mistake of the counsel should not be blamed on litigant unless both were out to mislead the Court, he argued.

Extending his submission, he submitted that, the applicant should not permanently be deprived of her right of putting forward her case by the reason of the default of his professional advisor. Litigants do not have control over how the instructions they give to the advocates were carried out, because the latter as a legal expert was presumed to know the law, procedure and practice of the Court and where the

advocate blunders in carrying out instructions, the innocent litigant should not be made to suffer the consequences of that blunder.

Maintaining his stance on innocence of the applicant, he submitted that, where the applicant instructed a lawyer in time, his right should not be blocked and penalized on the grounds of the lawyer's negligence or omission to timely take action. The vigilant applicant should not be penalized for the fault of his counsel whose actions he had no control and for the mistakes committed. Supporting his position, he cited the case of **Ghania Kimambi v Shedrack Ruben Ng'ambi, Miscellaneous Application No. 692 of 2018, High Court of Tanzania, Labour Division at p. 4.**

In the instant case, the applicant advocate was better placed to know the mandatory requirements for compliance with the requirement of filing the notice timely. The right to appeal has always been a well-protected right in the Constitution and was also the cornerstone of the rule of law. It would be injustice to deny an applicant the pursuit to its rights on the blunder of his former lawyer, argued the Counsel.

Concluding his submission, he submitted that, the previous counsel requested for copies of ruling and drawn order, but what occurred was a matter of mix up of the two, instead of annexing Commercial Cause No. 9 of 2018, the counsel mistakenly annexed the letter presented requesting the documents. The mix up of them, though happened, but was not prejudicial to the respondent anyhow.

Based on the above submissions, Mr. Hezron urged that the order sought in the chamber summons be granted and applicant be allowed to file a notice of appeal and leave to appeal to the Court of Appeal.

The respondent contested the application through the written submission filed by Mr. Mkumbukwa learned counsel. It was his submission that, the Court of Appeal under Rule 83 (1) and (2) requires any person who desires to appeal to the Court to lodge a written notice in duplicate with the Registrar of the High Court, within thirty (30) days from the date of the decision against which it was desired to appeal. In the matter at hand, the decision in which the applicant intended to appeal was delivered on 26th September, 2019 and the applicant was obliged to file their notice of appeal by 26th October 2019, which they did not observe until on 2nd March 2020, that is when they filed an application for extension of time to file a notice of appeal. Mr. Mkumbukwa submitted further that, moreover, the evidence shows that the ruling in Commercial Cause No. 9 of 2018, was delivered in the presence of the applicant's advocate one Mr. Claudio Chundo, connoting he was aware of the delivery date and hence present.

Section 11 of the AJA confers powers to this Court to extend time for giving notice of intention to appeal. However, it is general principle that the applicant has to establish sufficient cause for the lateness which includes explaining for each and every day of delay. No explanation has been provided regarding the accounting of

each day of delay from 26th October 2019 to 2nd March, 2020, when the application was filed. To strengthen his position about the need to account for each day of delay he cited the case of **Mutiso v Mwangi [1999] E.A at p. 232, Thuo v Kenya Commercial Bank Limited [2006] at p. 399, Lyamuya Construction Company Limited v Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 at p. 6, Vodacom Foundation v Commissioner General TRA, Civila Application No. 107 of 2017** and **Serengeti Breweries Limited v Bahati Baltazar Malisa, Civil Application No. 158 of 2017 at p. 10 & 11**

Submitting on the issue of sufficient cause, Mr. Mkumbukwa submitted that, the applicant alleges was late to lodge a notice of appeal because his former advocate was waiting to be availed with copies of ruling and drawn order. It is essential to note that, there was no evidence proving that the applicant had taken the necessary steps to obtain the said copies of the ruling and drawn order that has been attached to support such allegation. Annexure TA-1 which has been attached to the application was a letter requesting for ruling which was not in respect of Commercial Cause No. 9 of 2018, hence the said letter was irrelevant, argued Mr. Mkumbukwa.

Discussing on discretionary powers to grant extension of time, Mr. Mkumbukwa submitted that the power can only be exercised, where sufficient reasons for delay

has been demonstrated; length of the delay; accounting on each day of the delay; that the application for extension of time was filed promptly; exhibiting of diligence on the part of the applicant; degree of prejudice and chances of the appeal succeeding were the factors to be considered as stated in various Court decisions. Supporting his position, he cited the cases of **Benedict Mumello v Bank of Tanzania, Civil Appeal No. 12 of 2002,** which cited the case of **Tanga Cement Company Limited v Jumannne D. Massagwa & Another, Civil Application No. 6 of 2001,** with approval. Other cases referred by Mr. Mkumbukwa were **Mutiso v Mwangi [1992] 2 EA, p. 232; Thuo v Kenya Commercial Bank Limited [2006] p. 399; Lyamuya Construction Company Limited v Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported) p. 6; Vodacom Foundation v Commissioner General TRA, Civil Application No. 107/20 of 2017 (unreported); Motto Matiko Mabanga v Ophir Energy PLC and 2 Others, Civil Application No. 463/01 of 2017 (unreported) p. 7; Serengeti Breweries Limited v Bahati Baltazar Malisa, Civil Application No. 158/5 of 2017 (unreported) p. 10-11; Attorney General v Tanzania Ports Authority & Another, Civil Application No. 87 of 2016** which cited with approval **Zuberi Nassor Moh'd v Mkurugenzi Mkuu Shirika la Bandari Zanzibar, Civil Application No. 93/15 of 2018 (unreported).**

He further submitted that, several cases have set out factors, which should be taken into account by the Court, while determining an application for extension of time. To strengthen his position, he cited the case of **Shanti v Hindocha (1973) E.A. p. 209.** In that case faced with the challenge the Court held that:

> *"The position for extension of time is entirely different from that of an application for leave to appeal. He is concerned with showing sufficient reason why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his part."*

On the strength of his submission, the counsel submitted that, the ground raised by the applicant which was delay by his advocate was baseless and that it was a technic by the applicant to elicit sympathy from this Court. Bolstering his stance, he cited the case of **Mariaria & Others v Matundura [2004] E.A 163,** where the Court declined to be required to act on sympathy when it stated:

> *"Even sympathy alone would not assist a party. Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent."*

Discussing the cited cases by Mr. Hezron as distinguishable, starting with the case of **Republic v Yona** (supra), Mr. Mkumbukwa submitted that, the matter had public importance and the advocate was not negligent while in the case at hand the applicant was negligent in pursuing the matter. Likewise, in the case of **Kalunga** (supra) the Court had observed two things: *one*, the length of delay which was seven days, and *two*, the intended appeal was due to the fact that, the applicant was not granted the right to be heard at all hence the merits of the intended appeal, which was completely different with the circumstance in present case whereby the applicant has 127 days of delay which have not been accounted for and the intended appeal has no merits since the applicant was heard and failed to prove his claims.

In the case of **Michael Lessani** (supra), the applicant was active whereas, in the present case the applicant was negligent and inactive, and no good reason for failure to file notice of appeal and even blame placed on the applicant's advocate for being negligent which yet, was not sufficient reason and that did not account for such long delay.

More to his submission, Mr. Mkumbukwa submitted that the applicant should not be granted extension of time because she failed to exercise her right diligently and failed to adduce sufficient reason for delay, thus by granting prayers sought, the

respondent will be deprived her right of enjoying her award and making her incur further costs in defending the appeal and application.

He concluded by submitting that litigation must come to an end, and what this Honourable Court should do is to decline the application and dismiss the same as baseless application.

In rejoining submission, Mr. Hezron, admitted that the ruling was delivered in the presence of Mr. Claudio Msando in whose power the timely notice of appeal was to be filed but was not, and that is why now the applicant was crying for the failure to act timely not to be blamed on her. As for the letter TA-1, he submitted was a slip of the pen, where he supposed to write 9 instead he wrote 4, but the deserved ruling was availed to the applicant based on the letter.

On the issue of accounting each day of delay, he submitted that, the delay has not been caused or contributed to by dilatory conduct on the applicant's part. Maintaining his stance, he stated that there were other reasons and all these are matters of degree, referring to the cited case of **Yona Kaponda** (supra), where the Court pointed out that that:

> *"not every circumstances of the case demand to account each day of delay."*

Denouncing that the intention to file notice with intention to appeal was mere afterthought and that the intended appeal has no merit, he said that sounded unprofessional because an appeal was a Constitutional right and the appeal was never filed. Therefore, this Court cannot determine merits of the appeal which was not even before it. Additionally, it was not proper to deal with the appeal at this stage since it was the matter of another jurisdiction, argued the Counsel.

Responding to the issue of prejudice, he submitted that, a person aggrieved by the decision or determination of the High court, has a right of appeal to the Court of Appeal. A party cannot be prejudiced merely because an aggrieved party preferred an appeal. He insisted that the applicant's rights should not be blocked on the grounds of her advocate's negligence or omission to comply with the requirements of the law. Only upon adducing of sufficient reason, a Court can then consider just an application and proceed to grant it or not. Elucidating more, he submitted that the object of courts was to decide the rights of the parties and not to punish them for mistake made in the conduct of their cases. The court ought to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy.

Indeed, it is a general principle that, the purpose of the courts is to decide the rights of parties and not to punish them for the mistakes made in their conduct of their cases, rather correct them if that can be done without causing injustice to the other

party, since Courts do not exist for the sake of disciplining parties but for the sake of deciding on the matters in controversy. However, this principle, whilst encouraged but does not mean or cannot be applied irrationally, otherwise there would be no point of having rules of procedure in place. By observing the procedure in place it does not mean punishing parties, but placing them in the right spot and reminding them that law and procedure in place should be abided with. **See: Mwaitenda Attobakile Michael v Interchick Company Ltd, Civil Application No. 218 of 2016, CAT-p.9.** There are a number of implications if that is not observed, one being negating the existence of those laws and procedures, and if that is allowed chances are, dispensation or administration of justice will be chaotic. And I do not think anyone in their right mind would desire that. Therefore, in order to achieve justice, the principle must be weighed against the rules of procedure in place, and that is what I will be doing.

In the application of this nature, whether to grant or to refuse grant is entirely at the Court's discretion. The only caution to be made is that the discretion must be exercised judiciously and according to the rules of reason and justice. The cases of **Kalunga** (supra) and **Allience Insurance Corporation Limited v Arusha Art Limited, Civil Application No. 33 of 2015,** have both underlined thissettled legal position. And this can occur upon the Court being furnished with material facts

which discloses sufficient cause or reason, upon which the Court can use in determining whether to grant the application for extension of time before it or not.

The sole issue for determination is whether the applicant has displayed sufficient reasons warranting grant of the application.

The applicant is tasked with a duty to advance sufficient reason as to why more time should be granted when the time already prescribed could not be wisely used prompting an application for extension of time. It is difficult to define what amounts to sufficient cause, however, in the case of **Regional Manager, Tanroads Kagera v Ruaha Concrete Company Limited, Civil Application No. 96 of 2017 at p. 6,** the Court has illustrated what should be considered as sufficient cause when it held:

> *"What constitute sufficient reason must be determined by reference to all circumstances of each particular case. This means the applicant must place before the court material which will move the court to exercise its discretion in order to extend time limited by the Rules."*

In the present application, the applicant has assigned only one main reason, that his former advocate failed to act diligently by not lodging a notice of appeal and this was due to the fact that, his former advocate was waiting to be availed with copies

of ruling and drawn order in respect of Commercial Cause No. 9 of 2018. According to the applicant that was sufficient reason. This assertion is nonetheless not supported by the Court records. The decision in Commercial Cause No. 9 of 2018 was delivered on 26th September, 2019, in the presence of the applicant's counsel hence aware of the decision. Going by the date the decision was made, the applicant was obliged to file her notice of appeal by 26th October 2019, this did not occur until on 2nd March 2020, which is almost five months or 127 days from the date when the decision was delivered to the date when the application for extension of time was filed. Or counting from the date the copies requested were availed which was on 17th November, 2019, still the applicant was delayed for almost 3 months and some days or to be precise 106 days, which is still unaccounted for.

In the letter requesting copies of ruling and drawn order, dated 5th October, 2019, annexed as TA-1 to the affidavit in support, the letter depicted the same names of the parties but different case number with different date of the decision, which is Commercial Case No. 4 of 2018 alleged to have been delivered on 25th September, 2019 while the correct one is Commercial Cause No. 9 of 2018 in which the decision was delivered on 26th September, 2019. That might seem as a minor omission but could be a serious one which caused the delay. The former counsel might have been waiting to be availed with copies of ruling and drawn order which never existed before the Court in the way has been portrayed in annexture TA-1.

The letter has therefore, been misleading and since no explanation has been given that is indeed negligence act caused by the applicant counsel, in which as averred by the applicant had no any control over it.

The applicant despite admitting that the copy of the said ruling and drawn order were availed on 17th November, 2019, and when the former advocate was asked to file a notice of appeal he told the applicant that, they were out of time to file the notice of appeal. Whereas there is this admission, but the applicant has failed to inform the Court the following: one, when did the applicant approach the former counsel to inquire if the notice of appeal has been lodged and when was she informed that time had already elapsed so it needed filing for an application for an extension of time. Two, the Court was not informed when was, this new found counsel approached so as to take over the matter. These were important information to be placed before the Court so that it can weigh if there was slackness in acting on the applicant's part as well.

As submitted by Mr. Mkumbukwa, the submission I agree to, that, the counsel's negligence is not a good cause for an extension of time because it is settled principle that, those who come to courts of law must not show unnecessary delay but great diligence. **See: Dr. Ally Shabhay v Tanga Bohora Jamaat** and **Umoja Garage v National Bank of Commerce [1997] T.L.R. 109.**

Taking essential steps in the performance of an act by a party whose duty is to perform that fundamental necessary action demanded by the legal process subject to the permission of the court is not only crucial but of basic importance. If the action is not performed according to the prescribed law, then whatever legal process which has been done before becomes nullity as against the party who has the duty to perform the act. In the case of **Ratma v Cumarasamy & Another (1964) ALL ER 933,** it was held that:

> *"Rules of the court must be obeyed and in order for the time to be extended, there must be a material information placed before the court for it to assess."* [Emphasis mine]

The Court of Appeal Rules, under Rule 83 (1) and (2) requires that within thirty (30) days, any person requiring to appeal to the Court of Appeal has to lodge a written notice in duplicate with the Registrar of the High Court. The rule has not prescribed the requirements of the copy of judgment or ruling. Appreciating that the applicant might not have known this and that she should not permanently be deprived of her right of putting forward her case by the reason of the default of her advocate and also the fact that litigants do not have control over how the instructions they give to the advocates are carried out, yet I find it difficult to examine the present application in that light. I do agree that advocates are officers

of the Court who are supposed to act diligently, this nevertheless does not exclude the applicant to make follow up on its matter. This is moreso, especially considering that the applicant must at some point to have been informed of the Court decision dated 26th September, 2019. From the said ruling stemmed the issue of appealing the decision. I do not want to believe preferring an appeal was the former advocate's decision alone, rather in consultation with the applicant. Since the applicant was on notice or made aware of the decision and an appeal was an option preferred, close follow up was expected. Reading from the affidavit or even the submission that followed there was no any evidence that the applicant bothered. The applicant could not even provide a date when she learnt from the former advocate that they were out of time to file notice of appeal or when the newly found advocate was engaged. This information would have assisted the Court to find out the applicant's seriousness in following up on her case.

Aside from what has been highlighted above, the applicant has not accounted for the delay from 26th October, 2019 or at least from 17th November, 2019 when the copies were availed to her as averred in paragraph 4 of the affidavit in support, to the 2nd March, 2020, when the application for the extension of time was filed by the applicant. In the cases of **Mumello; Tanga Cement; Mutiso Mwangi; Thuo; Lyamuya Construction Company Limited; Vodacom; Motto Matiko; Serengeti Breweries Limited** and **Attorney General v TPA** which cited with

approval **Zuberi Nassoro Moh'd** (supra) the applicant is obliged to accomplish a number of things for her application to be considered favourably. In all the above cited cases the Court observed several factors including but not limited to, the fact that though the term sufficient cause has no exact definition but factors such as promptness in filing the application, valid reason for delay of even a single day has to be accounted for, that there should not be lack of diligence on the applicant's part, the chances of the appeal succeeding and even degree of prejudice to the respondent, otherwise there would be no point of having rules with prescribed periods within which certain steps have to be taken.

The applicant has miserably failed to account for each day of the delay as well as to support the claim that she acted promptly as the Court was not availed with the information as to when she was informed they were out of time to file the notice of appeal and also as to when she secured a replacement of the advocate to enable this Court assess the situation in a manner she desired.

The Court is undoubtedly tasked with duty of dispensing justice and once there is no prejudice which will be suffered then should consider in favour of granting the application. In this application however, though there was no prejudice *per se* pointed out but even not enjoying the fruits of the decision in favour of the party who has won is prejudice.

Besides, prejudice, the applicant also brought on board application of the Constitution, though no specific provision of the Constitution, but assuming and looking at Articles 13 (6) (a) which insist on a principle that parties should be accorded opportunity to be heard and 107A (2) (e) which stressed on doing away with technicalities, but logically that did not mean that parties should avoid prescribed procedures, as concluded in the case of **Francisca Mbakileki v Tanzania Harbors Corporation, Civil Reference No. 14 of 2004, CAT at DSM (unreported).** Moreover, in the present case it is not that the applicant has been denied right to be heard, she has been heard twice, at the Arbitral proceedings and before this Court when she contested the award. It is therefore not correct, in my view for the applicant to draw the Court into sympathy game based on the principle of right to be heard. It has to be remembered right and obligation go hand in hand.

In the view of the above, I find the application for extension of time to file notice of appeal out of time, devoid of merit and proceed to dismiss it, with costs. It is so ordered.

P.S FIKIRINI

JUDGE

26th AUGUST, 2020