IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 6 OF 2020

(Arising from Commercial Case No. 116 of 2016)

BETWEEN

NIC BANK TANZANIA LIMITED.....APPLICANT

Versus

IIIRJI ABDALLAH KAPIKULILA.....RESPONDENT

Last Order: 16th April, 2020

Date of Ruling: 27th May, 2020

RULING

FIKIRINI, J.

This application by the applicant, NIC Bank Tanzania Limited, is brought by a way of chamber summons under section 11 (1) of the Appellate Jurisdiction Act (the AJA), Rule 2(2) of the High Court (Commercial Division) Procedure Rules (the Rules), section 95 of the Civil Procedure Code, Cap 33. R.E 2002 (the CPC) and any other enabling provision of the law seeking the following reliefs:

1. This Honorable Court be pleased to extend time for the applicant to give notice of the intention to appeal from the ruling and decree in respect of Commercial Case No. 116 of 2016;
2. This Honorable Court be pleased to grant the applicant an extension of time to file an application for leave to appeal against ruling and decree in respect of Commercial Case No. 116 of 2016;
3. This Honorable Court be pleased to grant the application of extension of time for submitting the letter requesting from the High court of Tanzania (Commercial Division) at Dar Es salaam certified copies of the proceeding, ruling and decree in Commercial Case No. 116 of 2016;
4. Cost of this application be provided for; and
5. Any other orders that this honorable court may be deem fit to grant.

Affidavit of Mr. Richard Eusabio, Principal Officer of the applicant supported the application and the affidavit of Mr. Hirji Abdalah Kapikulila, the respondent opposed the application. At the hearing Mr. Makarios Tairo appeared for the applicant while the respondent enjoyed the legal service of Mr. Octavian Mshukuma. Parties consented for the matter to be argued by a way of written submissions.

The background to this application rests on the Commercial Case No. 116 of 2016, in which the applicant sued the respondent for recovery of loan amounting Tshs.

160,562,539.53/=, and sought a Court order to sale three Yutong buses, the property of the respondent with registration numbers T988 CRP, T662 DBV and T278 DFA to compensate the loan.

The applicant alleged that initially the respondent had acknowledged the amount and promised to repay but could not fulfill the promise. However, the applicant failed to bring her witness Mr. Richard Eusabio, to prove her case. And after several adjournments and still the applicant could not bring her witness, on the 11th October 2018, when the matter came for hearing and again the witness was not there, the applicant's evidence through the said witness was struck out under Rule 56 (2) of the Rules, and the suit was dismissed under Order XVII Rule 3 of the CPC, for failure to produce evidence.

Following the dismissal order the applicant by a way of notice of motion under the provision of section 4(3) of the AJA, sought for the revision to the Court of Appeal of Tanzania. And the respondent on the other hand alleged that during the pendency of the application for the revision at the Court of Appeal the applicant sold the motor vehicles mentioned above without the Court order to recover the claimed amount. The application for the revision before the Court of Appeal was struck out for being incompetent.

Back to this Court, the applicant is now by a way of chamber summons under section 11 (1) of the AJA, seeking of an extension of time to give notice of her intention to appeal from the ruling and decree in respect of Commercial Case No. 116 of 2016, based on argument that this Court was vested with discretionary powers. The decision intended to be appealed governed by Rule 83 (1) and (2) of the Tanzania Court of Appeal Rules, 2009, GN. No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019, GN. No. 344 of 2019 (the CAT Rules, 2019), was delivered on 11th October, 2018, whereby the last date to file notice of appeal was 10th November, 2018, of which by filing on 23rd January, 2019 the applicant was already out of time for the reasons to be expressed below. Moreso, the intended to be appealed decision was appealable under section 5 (1) (c) of AJA but after compliance to the mandatory requirement as provided under Rule 45 (a) of the Court of Appeal Rules, 2009, GN. No. 368 of 2009 as amended by Tanzania Court of Appeal (Amendments) Rules, 2017, (GN. No. 362).

The third prayer by the applicant, in respect of a letter requesting for certified copies of the relevant documents for the purpose of the intended appeal, was predicated upon Rule 90 (1) (a) (b) & (c) and (2) of GN. No. 362 and CAT Rules 2019.

Mr. Tairo, for the applicant assigned the following reasons in persuasion of grant of the application. *One*, that the delay was not caused by negligence or inaction in

pursuing her rights and handling of the matter relating to challenging the High court decision. *Two,* that the delay was caused by technical and not the actual delay as averred in the applicant's affidavit, that having secured the required copies of the Court ruling and order on 10th January, 2020, from 13th January, 2020, internal processes and consulting her lawyers for determining the way forward, was taking place. *Three*, that the decision of the High court was tainted with illegalities including legitimacy of jurisdiction, principle of evidence and constitutional rights of the applicant. *Four,* that it was in the interest of justice that that decision in Commercial Case No. 116 of 2016 to be referred to the Court of Appeal by way of an appeal with the view of ascertaining the correctness or otherwise leading to ensuring that justice was done to all parties concerned.

Admitting that grant of an extension of time was entirely in the discretion of the Court he cited the case of **Benedicto Mumelo v Bank of Tanzania, Civil Appeal No. 12 of 2002, Court of Appeal of Tanzania at Dar es salaam** in support. Submitting on what amounts to sufficient cause, which has not been defined he referred this Court to the following cases in support: **Tanga Cement Company Limited v Jumanne D. Masangwa and Amosi A. Mwalwanda, Civil Application No. 6 of 2001** and **Joseph Paul Kyauka Njau & Another v Emmanuel Paulo Kyauka Njau & Another, Civil Application No. 7 of 2016**

and **Lyamuya Construction Company Limited v Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010.**

Considering the delay was technical rather than actual, he cited several cases including: **Fortunatus Masha v William Shija and Another (1997) T.L.R 154; Vodacom Tanzania Public Co. Ltd v Commissioner General (TRA), Civil Appeal No. 465/20 of 2019** and the case of **Fwanda Limited v Marmo E Granito Mines (T) Ltd, Miscellaneous Land Application No. 1 of 2019.**

Concluding his submission, it was Mr. Tairo's submission that the order sought in the chamber summons be granted and the applicant be allowed to file a notice of appeal and leave be granted to appeal to the Court of Appeal.

The respondent strongly contested the application through the written submission filed by Mr. Octavian Mshukuma. In his submission he addressed the cited cases of **Benedict Mumelo; Paulo Kyauka** and **Lyamuya Construction** (supra) as different to the situation in the application at hand. The delay in **Mumelo** (supra) case was occasioned by the Court's failure to supply the respondent with necessary documents for appeal purposes. While in **Paulo Kyauka's** case (supra) the application was dismissed by the Court of Appeal of Tanzania because the applicants failed to account for their delay in lodging their application. Discussing the **Lyamuya's case** (supra) and canvassing through the four (4) ingredients

established, it was Mr. Mshukuma's submission that: one, the applicant has not given a valid explanation accounting for the said delay. Paragraph 11 of the affidavit which the applicant wanted the Court to believe that delay has been accounted for, did not give such an account. Strictly, the applicant was required to account for each day of the delay from the date the case was dismissed which was on 11th October, 2018, to the date of this application which was filed on 23rd January 2020. To strengthen his position, he cited the case of **Elfazi Nyatega and 3 Others v Caspian Mining Limited, Civil Application No. 44/08 of 2017 at page 10 & 11.**

Two, he further submitted that, the applicant's delay was extremely inordinate because from the date of dismissal of matter to the date of filing this application there were about unexplained 16 months which was approximately 480 days or a year and a half. Three, Mr. Mshukuma, submitted that the applicant's application was pure case of absence of diligence, presence of apathy and existence of sloppiness in the prosecution of the action that the applicant has taken. Although under paragraph 9 of the applicant's affidavit the applicant denied any negligence on its part and states that the delay was caused by technical and not actual delay arising out of the nature and circumstances of Commercial Case No. 116 of 2016. The alleged technical delay was not shown in any way by the applicant, submitted the counsel. In additional he submitted that the applicant has exhibited a high

degree of negligence because he did not want to initiate an appeal until the Court of Appeal ruling dated 3rd January, 2020. In the case of **Ngao Godwin case** (supra), it stressed and held that ignorance of law has no any excuse.

Four, Mr. Mshukuma further submitted that, there was no reason such as existence of illegality shown by the applicant in her affidavit which just stated, the decision of this Court was tainted with illegalities without pointing them out. The principles in the **Lyamuya** case (supra) which have been relied upon by the applicant did not fall squarely within the ambit of the present case, the counsel maintained. Based on the principles laid down in the case **Ngao Godwin** (supra), the present matter should as well be determined.

In his submission regarding the relevant facts which must be taken into account in deciding the extension of time, Mr. Mshukuma, cited the case of **Mbogo v Shah (1968) EA.** That all relevant factors must be taken into account in exercising the discretion when granting or not granting an extension of time.

On the point of illegality, he submitted that the issues of illegalities were not clearly visible on the face of the record. The applicant was given ample time to bring his witness before the Court and testify but it failed and all Court efforts were in vain. Fortifying his position, he referred the Court to the case of **Lyamuya** case (supra), in which the Court held that:

" Illegality claimed must be apparent on the face of record "

In the present application the alleged illegalities were not apparent on the face of the record but rather it was arrived at by a long drawn argument or process. The fact that the judge did not assign reason it was the counsel's submission, that all parties were present and knew that the predecessor judge was transferred to another station and never challenged the re-assignment of the case to the successor judge.

In additional, he submitted that the subject matter in the present application and Commercial Case No. 116 of 2016, between the parties, were the motor vehicles the property of the respondent, which were disposed by a way of sale by the applicant without Court order. The applicant should have preferred this application before the sale of the subject matter. Disputing the chances of success, it was his submission that the applicant was given ample opportunity in five consecutive times to prosecute her case but refused to do so and consequently the applicant case was dismissed on account of applicant's own negligence. And the fact that applicant opted to file revision does not hold water in the circumstance.

Submitting on prejudice, it was the counsel's submission that the applicant should not be granted extension of time because the applicant has not shown good cause to move this Court to exercise its judicial discretion.

In brief rejoining submission, Mr. Tairo, submitted that the technicality pointed out was on the fact that the appeal should arise out of Commercial Case No.116 of 2016, due to the fact that the main case which was dismissed while the counter claim was yet to be determined. Responding to the issue of illegalities he submitted giving three reasons, *one,* was legitimacy of jurisdiction of the High Court following the change of a judge in Commercial Case No. 116 of 2016 without assigning reasons or justification. *Two*, the legality of subjecting the applicant's constitutional rights to fully prosecute the main case and the right to a full hearing in the counter-claim to subsidiary legislation, and *three,* the legality of subjecting principles of evidence on appearance of witnesses as provided by acts of the Parliament especially in the Tanzania Evidence Act, Cap. 6 R. E 2002, which provides for competency and compellability, to subsidiary legislation.

Discussing the issue of technical delay, he argued that paragraph 9 of the affidavit stated that delay was caused by technical and not actual delay. To buttress his position, he cited the case of **M.B Business Limited v Amos David Kassanda and two Others, Civil Application No. 48 of 2018,** where the Court of Appeal had this to say;

> " *the termination of initial application for revision due to incompetence arose from omission from record of certain core*

documents by the applicant certainly amounts to an excusable technical delay"

This, according to Mr. Tairo, indicated that the applicant took steps to pursue her rights but could not go to the end because of technicality. Disputing the issue of subject matter, he submitted that the subject matter in this application was extension of time for processing an appeal in respect of Commercial Case No. 116 of 2016, and not motor vehicles. The submission on legal status of the subject matter, it was his submission that the stated case was beyond this application because in the intended appeal, which was struck out, the incompetence arose from omission from the record of certain core documents by the applicant which amounted to an excusable technical delay.

Concluding his submission, it was Mr. Tairo's submission that the respondent did not demonstrate the degree of prejudice he will be exposed to if the application was granted. To the contrary the applicant will be seriously prejudiced if the application was refused as its constitutional rights to appeal will be curtailed despite of the existence of justifiable reasons for extension of time.

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

It is not in disputed at all that the Court has been vested with unfettered discretion to grant any relief brought before it so long as it has jurisdiction and is mindful of exercising such discretion judiciously. It is further not in dispute that there is no any unique definition on what amounts to sufficient reason meriting granting of an extension of time. However, through the long list of cases standard has been set on what amounts to sufficient reason. In the case of **Benedict Mumelo** (supra), the Court faced with the scenario stated that:

> *"Extension of time is entirely in the discretion of the court and the same can be granted upon sufficient cause for the delay"*

It is also uncontroverted that once there is good cause for the delay, a prudent party may safeguard her interest by applying for an extension of time as it was held in the case of **Mrs. Kamiz Abdullah M. D. Kermal v Registrar of Buildings & Another (1988) T.L. R 199.**

This application was timely filed based on the fact that the Court of Appeal delivered its ruling of striking out the application on the 3rd January, 2020 followed by this application on 23rd January, 2020. When the matter was before the Court of Appeal, was well within time and hence the Court proceeding entertaining it. After striking out the application, the effect is a fresh notice of appeal had to be filed. And since the time of filing the said notice could have elapsed, an application for

an extension of time cannot be avoided. In the case of **Fortunatus Masha** (supra) distinguishing between technical and actual delay, the Court considered the delay to be technical rather than actual, in this sense that initially the applicant had acted promptly. Only that the application was struck out. This stance was echoed in the **Vodacom Tanzania Public Co. Ltd** (supra), the position I fully embrace.

Whilst, in agreement that rules of the courts must be obeyed and in order for the time to be extended there must be material information placed before the court for it to assess as pointed out in **Ratma v Cumarasamy & Another (1964) 3 ALL ER 933,** in this application the applicant has been promptly active and diligent by immediately filing this application after the Court of appeal has struck out his application for revision. But having stated so, it must be borne in mind that the Court cannot exercise its discretion where the applicant had at all the material time in her hands but opted to sleep on her rights until it was too late.

In addition, I find that the applicant has raised three (3) issues of illegalities she would wish the Court of Appeal to address. This includes, **one,** legitimacy of jurisdiction of the High court after change of judge in Commercial Case No. 116 of 2018, on one hand and re- assignment of another judge without any reasons. **Two,** the legality of subjecting the applicant's rights to prosecute the main suit fully and the right to full hearing in the counter-claim, after the witness statement of Michael Clement Benedict Kiwanga was struck out, pursuant to Rule 56 (2) of the Rules,

which impacted the applicant's evidence in respect of the counter-affidavit, since Michael was her sole witness. **Three,** reliance of subsidiary legislation in place of Act of the Parliament an especially the Tanzania Evidence Act, Cap. 6. R. E. 2002.

Considering the fact that the application for extension of time was filed within the prescribed time as well considering there are issues of illegalities raised, which needs Court of Appeal interference, and subscribing to the decision in **The Principal Secretary, Ministry of Defence and National Service v Duram P. Valambhia [1992] T. L. R. 387**, I find the application deserve granting.

In the view of the above, I find this application for extension of time within which to file notice of appeal out of time and for leave to appeal to the Court of Appeal has merits, and proceed to grant it with no costs. It is so ordered.

P.S FIKIRINI

JUDGE

27th MAY, 2020