

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 125 OF 2020

BETWEEN

MS FARHIA ABDULLAH NUR.....APPLICANT

Versus

ADVATECH OFFICE SUPPLIES LIMITED.....1stRESPONDENT

BOLSTO SOULUTION LIMITED.....2nd RESPONDENT

Last Order: 16th Feb, 2021

Date of Ruling: 10th Mar, 2021

RULING

FIKIRINI, J.

This application was brought by Ms. Farhia Abdullah Nur by a way of chamber summons under section 11 (1) of the Appellate Jurisdiction Act Cap 141 R.E 2019 (the AJA), section 95 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC), Rule 45 (b) of the Tanzania Court of Appeal Rules (the Rules) and Rule 2(2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended (the Commercial Court Rules), seeking for the following orders:

1. That, this Court be pleased to extend time for the applicant to give notice of intention to appeal from the ruling and order of the Court in respect of Commercial Case No. 167 of 2014 dated 3rd May, 2017.

2. That, subject to the grant of the prayer above, this Court be pleased to grant the applicant extension of time to file an application for leave to appeal to the Court of Appeal against ruling and order of the Court dated 3rd May 2017 in respect of Commercial Case No. 167 of 2014.
3. That, this Court be pleased to grant the application for extension of time for submitting to the Registrar, High Court (Commercial Division) letter asking for the proceeding, ruling, order, judgment and decree and certified exhibits in the Commercial Case No. 167 of 2014 and serve the same to the respondents.
4. Costs of the application be provided for.
5. Any other reliefs this court may deem fit.

The application is supported by an affidavit and reply to the counter affidavit sworn by Farhia Abdullah Nur, while the counter affidavit of Hassan Kiangio, advocate and Principal Officer of the 1st respondent opposed the application.

Mr. Deogratias Kiritta Lyimo learned counsel appeared for the applicant, Mr. Selemani Almasi learned counsel appeared for the 1st respondent, and whereas the 2nd respondent did not enter appearance. Both counsels adopted the affidavit, counter affidavit and reply to the counter

affidavit to support their oral submissions. Mr. Lyimo also adopted his skeleton argument filed under Rule 64 of the Commercial Court Rules while that of Mr. Almasi having been belatedly filed was expunged from the records.

In his submission Mr. Lyimo pleaded to the Court to use its exclusive discretion and grant this application as prayed under the chamber summons, as the delay is supported by good cause. He supported his assertion by referencing to paragraphs 19, 20, 21, 22, 23, 24 & 25 of the affidavit in support of the application, in which the cause for the delay in filing the appeal from 3rd May, 2017 had been explained, when the order and the ruling to be appealed against was made, to 12th August 2020 when this application was filed. Submitting on the delay referred under paragraph 21 of the reply affidavit, it was Mr. Lyimo's submission that the reason for the delay has been explained. And added by arguing further that in actual fact the delay was rather technical than actual, and that this was a fact for having not disputed by the 1st respondent.

Describing further on the cause of delay, he urged the Court during its determination of the application to also consider that all along the applicant has been in the Court corridors in pursuit of justice, it has also

to consider the applicant was not a party to the suit, and that the judgment debtor who is the 2nd respondent in this application has always been present doing business in Tanzania, and that the 1st respondent was aware, and yet did not want to execute the decree against the 2nd respondent.

Fortifying his stance, he cited the case of **NIC Bank (T) Limited v Hirji Kapikulila, Miscellaneous Commercial Application No. 6 of 2020**, in which he believed its facts were more or less the same. In that case the Court ruled that before granting such application it has to be satisfied that; **one**, whether the application was made promptly without inordinate delay, and **two**, whether sufficient cause under Rule 10 of the Court of Appeal Rules has been satisfied. Also the counsel referred the case of **Bharya Engineering & Contracting Co. Ltd v Hamoud Ahmed Nassor, Civil Application No. 32/81 of 2017 at p.7** that in the said case the Court of Appeal reiterated that each day of delay be explained and the application filed promptly, as well as in **Selemani Juma Masala v Sylvester Paul Masha & Another, Civil Application No. 210/01 of 2017**.

Clarifying on the Court of Appeal decision, Mr. Lyimo submitted that the decision in Civil Revision No 261/16 of 2017 was delivered on 3rd August,

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2020 and copy supplied to him on 7th August, 2020. Three days later, he filed Miscellaneous Commercial Application No. 126 of 2020. The three days left unexplained was for the preparation. A copy of Court of Appeal ruling was annexed to the affidavit as annexure "FAN-6".

Countering on the interpretation made to the averment under paragraph 27, that the applicant has raised illegality as among the grounds to support the application, he stated that illegality was one of the grounds of appeal to the Court of Appeal in the event the application is granted and the appeal filed and not in support of the present application.

Winding up his submission, Mr. Lyimo stressed that, based on the affidavit, reply to the affidavit and the oral submissions he made, the application was meritorious and prayed the same to be granted.

Mr Selemani, in objecting to the grant of the application, disputed the applicant's submission that, the assertions in paragraphs 21 and 26 were not true while paragraphs 10 and 11 in the counter affidavit clearly disclosed and replied to the applicant's allegations. On paragraph 27, Mr. Selemani admitted that it was upon the Court's discretion to grant or refuse to grant of the application. However, in doing so the Court has to look the reasons for the delay. Citing the case of **Omary Ally Nyamalege (as Administrator of Estate of the late Seleman Ally**

Nyamalege) & 2 Others v Mwanza Engineering Works, Civil Application No. 94/08 of 2017, in which the Court of Appeal held that, before granting extension of time, the Court must look whether the point of law raised is of sufficient importance and must be apparent on the face of record such as the question of jurisdiction and not an outcome to be discovered by long drawn arguments. In the present circumstance this Court has therefore to look on whether the point of law raised under paragraph 27 met the test in the cited case.

Contesting the reasons for the delay submitted by the applicant, it was Mr. Selemani's submission that, the applicant was negligent and not diligent enough to pursue the appeal from the beginning when the decision was delivered on 3rd May, 2017, instead of an appeal, opting for a revision as stated under paragraph 28 of the applicant's affidavit. He thus urged the applicant's recourse to proper forum or remedy should not be considered as a technical delay. From the start the applicant was supposed to resort to a proper remedy which was appeal. And had that been struck out for any incompetence then that could have been considered as a technical delay, argued Mr. Selemani.

Concluding his submission, he submitted that, since the revision application filed before the Court of Appeal by the applicant was not

defective; it was the counsel's submission that, the application has no merit and prayed for it to be dismissed with costs.

Mr. Lyimo in his rejoining submission reiterated his submission that, paragraph 19-26 explained about the reasons for the delay and paragraph 27 of the affidavit in support of application gave the Court glimpse of the intended appeal and the grounds raised were point of law apparent on the face of record. He went on submitting that, one of them was whether the applicant who was not a party and who has resigned before the case has been instituted was entitled to be arrested and committed to prison as a civil prisoner on behalf of the company.

Submitting on whether the delay was technical delay or not, it was the applicant submission that, the Court needed to look on whether the delay was justified. Maintaining his submission, it was Mr. Lyimo's submission that, the delay to file an extension of time was technical in the sense that, the applicant was in the Court corridors fighting for justice in her favour. Whether the forum was right or wrong was immaterial and the only consideration was whether while she was in the Court of Appeal pursuing revision, if she could as well have filed an appeal.

Winding up his submission, he prayed the application to be granted and the 2nd respondent will not be prejudiced in anyhow.

I have given due consideration to the rival submissions and the most pertinent question for determination is **whether the applicant has displayed reasonable or sufficient reasons warranting grant of the application.**

It is trite law that grant or refuse to grant the application of this nature is entirely at the Court discretion. The only caution to be made is, the discretion must be exercised judiciously and according to the rules of reasons and justice. **In the case of Attorney- General v Anyang' Anyang' Nyon'go and Others [2017]1 EA 12** it was held that:

"Judicial impartiality is the bedrock of every civilized and Democratic judicial system. The system requires a Judge to adjudicate dispute before him impartially without bias in favour of or against any party to the dispute."

In order for the Court to judiciously exercise its discretionary powers the applicant is tasked with duty of advancing 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. In so doing, and considering that there is in fact no exact definition of what

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amounts to sufficient reason, the Court of Appeal has over time come up with a number of conditions or criteria for the Court to assess in order for the application to be granted or not. In the case of **Regional Manager Tanroads Kagera v Ruaha Concrete Company Limited, Civil Application No. 96 of 2017**, the Court in discussing sufficient cause held that:

"What constitute sufficient reason must be determined by reference to all circumstances of each particular case. This means 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. [Emphasis mine]

It is well a settled legal position that, where a delay is caused by good reasons, a prudent party may safeguard his interest by applying for extension of time. **See: Mrs Kamiz Abdullah M.D Kermal v Registrar of Bulding & Another [1988] T.L.R 199.**

In this application, the applicant has assigned two reasons: **one**, that the delay was technical and not actual, in the sense that all along the applicant was in the Court corridors fighting for justice in her favour,

and **two**, that the application was filed promptly and each day of the delay was accounted for.

Let me start with the first point that, the delay was technical delay and not actual in the sense that all along the time he was in the court corridors fighting for justice in her favour. Examination of the Court records evidently and without dispute revealed that the ruling of this Court was delivered on 3rd May, 2017. Aggrieved the applicant filed for revision in the Court of Appeal on 20th June, 2017. The decision in that regard was delivered on 3rd August, 2020. The copy was supplied to the applicant on 7th August, 2020. This was followed by the Commercial Application No. 126 of 2020, filed before this Court on 12th August 2020. Counting from 7th August 2020 up to 12th August 2020, it is five days of delay which the applicant contended that those days were used in preparation of application.

Also it is undisputed fact that at all the material times the applicant was at the Court corridors fighting for justice, the fact which is not disputed by the 1st respondent. In the case of **Joseph Paulo Kyauka & Another v Emmanuel Paulo Kyauka & Another, Civil Application No. 7 of 2016**, Court of Appeal observed that the Court is not only observing the length of delay but the reasons. Once there is sufficient

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evidence that the delay was not caused by the applicant, the Court should not overlook that.

Looking at the accounting of each delayed day, in its totality it is certain that this application was filed promptly and each day of the delay was accounted for, including the five days spent in preparation. The five days in actual fact included weekends as well.

Mr. Almasi's that this Court in reference to the cited case of **Omary Ally Nyamalege** (supra) should look on whether the point of law raised was of sufficient importance and that it must be apparent on the face such as the question of jurisdiction and not the one to be drawn from long argument, although applicable but weighing the circumstances pertaining to the present application, I find they outweigh Mr. Almasi's submission. Thus the applicant's averment that she had already resigned at the time the Commercial Case No. 167 of 2014 was instituted need be resolved. And that can only happen once the applicant has been given opportunity to do so. The best way for that to occur is through the present application and of course if and when an appeal has been lodged and she be heard.

Mr. Almasi has as well imputed the applicant to have been negligent and not being diligent enough as instead of pursuing for an appeal she opted

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for revision while the decision was fit for an appeal. This point is as well valid but again, choosing that over granting this application for extension will in all senses be denying the applicant the opportunity to be heard. For the interest of justice, the opportunity is deserved granting. **See: Samwel Sichone v Bulebo Hamisi, Civil Application No. 8 of 2015.**

I thus overrule Mr. Almasi's position and submission urging the application for extension of time not to be granted.

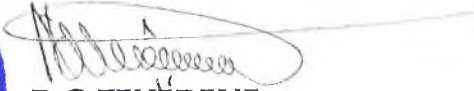
Another reason assigned by the applicant, was that there was illegality apparent on the face of records to the extent that, the applicant who was not a party to the case, and who has resigned from the 2nd respondent who was the judgment debtor and who was supposed to be arrested and committed to prison as a civil prisoner, has been left untouched and instead the applicant being the one pursued. This assertion by the applicant that she was not a party to the case needs to be looked at. And the only way is for her to be given room to prove that at that particular time when she was arrested she had already resigned from the 2nd respondent's company. This is among the reasons which need to be resolved before the Court of Appeal and the applicant will not get that opportunity without being given an extension of time.

The Court in balancing its noble duty of dispensing justice to all, have to carefully weigh between the granting and not granting the application. in the case of **Benedict Kimwaga v Principal Secretary Ministry of Health, Civil Application No. 31 of 2000**, it was held that:

"...procedural irregularities have been considered sufficient reason to grant extension of time, even when the applicant has not shown reasonable cause for delay."

In the view of the above, I find the application for extension of time with merits and I do allow it with costs. It is so ordered.




P.S FIKIRINI
JUDGE
10th MARCH, 2021