IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 5 OF 2005

BETWEEN

GIBB EASTERN ARICA LTD.....APPLICANT

VERSUS

SYSCON BUILDERS LTD. AND TWO OTHERS...RESPONDENTS

(Application for Extension of Time to serve and to Ammend Notice of Appeal of the High Court of Tanzania at Dar es Salaam (Comm. Div.)

(Kalegeya, J.)

dated the 1st day of October, 2004

in

Comm. Case No. 84 of 2003

RULING OF THE COURT
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NSEKELA, J. A.

I have before me a notice of motion expressed to be brought under rules 8 and 104 of the Tanzania Court of Appeal Rules, 1979 for orders that –

1. This Honourable Court be pleased to extend the time within which to serve the Notice of Appeal on the respondents out of time.
2. This Honourable Court be pleased to allow the applicant to amend the Notice of Appeal.

The notice of motion is supported by two affidavits, sworn by Peter Claver Bakilana, learned advocate and the second one sworn by Remigia Nyebwaki, a Secretary of Haki Law Chambers.

The affidavit evidence before the Court shows that judgment and decree which is sought to be appealed against was delivered on the 1.10.2004 and the notice of appeal was lodged on the 13.10.2004. For reasons which will become apparent later or in the course of this Ruling, the notice of appeal was not served upon the respondent within seven days as prescribed under Rule 77 (1) of the Court Rules, hence this application for enlargement of time to serve

the notice of appeal upon the respondent out of time. Perhaps at this juncture, I should reproduce paragraphs 2, 3 and 4 of the affidavit in support sworn by Mr. Bakilana. It provides –

"2. That judgment in the High Court Commercial Division case No. 84 of 2003 was delivered on 1st day of October, 2004 and the applicant / 2nd defendant lost the case.

3. That the applicant / 2nd defendant expressed their intention to appeal to the Court of Appeal against the judgment of the High Court and therefore I prepared the Notice of Appeal which on day of October, 2004, I instructed Miss Remigia Nyebwaki the office secretary to file it in the High Court Commercial Division.

4. That I never communicated again to our secretary about the Notice of Appeal until on 16th day of October, 2004 when I was preparing a letter to Commercial Court asking for copies of proceedings, judgment and decree when I discovered that the copy of Notice of Appeal filed in our case file does not

> indicate anywhere that it was served on Law Associates Advocates for the respondents. On asking our secretary, she said that she inadvertently did not serve the copy of Notice of Appeal on the advocates for the respondents. On further examining the Notice of Appeal I noticed that it was wrongly titled, instead of titling it IN THE COURT OF APPEAL OF TANZANIA it was titled in THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION which mistake requires to be corrected."

In his erudite submissions before the Court, Mr. Mfalila, learned advocate for the applicant advanced a number of reasons in support of the prayer to enlarge time to serve notice of appeal on the respondent. He correctly submitted that the notice of appeal was lodged in time on the 13.10.2004 but inadvertently, he claimed that the office secretary, Miss Remigia Nyebwaki, who was not versed in court procedures, did not serve the notice of appeal on the respondent in terms of rule 77 (1) of the Court Rules. When Mr. Bakilana became aware of the error, remedial measures were put in

place to put the appeal back on its rails. The error, the learned advocate contended, was occasioned by the inexperience of the office secretary in court procedures. Secondly, Mr. Mfalila submitted that the intended appeal stood overwhelming chances of success, and cited the case of Principal Secretary, Ministry of Defence and National Service v. D. P. Valambia (1992) TLR 387 at page 402 F – G. Thirdly, the learned advocate submitted that the appeal involves a very huge sum of money and the applicant should be given a chance to be heard. At the end of the day, Mr. Mfalila was of the view that a wide interpretation should be given to "sufficient reason" so as to include "mistake, oversight of counsel" in order to meet the justice of the case.

Mr. C. Tenga, learned advocate for the first respondent strongly resisted the application. He submitted that Mr. Bakilana, learned advocate, on the 16.10.2004 became aware of the fact that a copy of the notice of appeal in their case file did not indicate that it had been served upon the learned advocates for the respondents. The learned advocate did not take any action until the 14.1.2005 when this notice

of motion was filed in this Court. This was about eighty seven (87) days after Mr. Bakilana had become aware that the purported notice of appeal had not been served on the respondents. Mr. C. Tenga was of the view that this was inexcusable delay which cannot be condoned. To bolster up his case, the learned advocate referred to the case of **Inspector Sadiki and Others v. Gerald Nkya** (1997) TLR 290.

To complete the picture, I take the liberty to quote the relevant paragraphs from Miss Remigia Nyebwaki's affidavit in support of the application –

> 3. That on Wednesday, 13th October 2004, around 10.00 a.m. I took the Notice of Appeal and proceeded to Commercial Court where I filed it by paying court fees. I left the Notice of Appeal there as it was not yet signed by the Registrar. I was informed by staff of the Commercial Court Division, information which

I believe to be true that I could come back later in the afternoon on the same day or on Friday 15th because 14th October 2004 would be a public holiday "Nyerere Day".

4. That on Friday, 15th October, 2004 around 12.30 p.m. I went to the Commercial Court to collect the Notice of Appeal and found the Registry Officer Mr. Rashid was out of the office, he was at the mosque. I waited for him for about two hours but didn't come back. I left there at 2.35 p.m. without having the said document.

5. That on Monday, 18th day of October 2004, again went to the Commercial Court and succeeded to collect the signed Notice of Appeal from Mr. Rashid, I gave (sic) only one copy of the notice instead of two. I tried to ask for another copy but Mr. Rashid told that one copy is enough for you (me). I came

back to my office and filed that Notice of Appeal in its file without serving a copy of it on Law Associates, Advocates for the respondent and put the file on my boss's desk – Mr. Bakilana.

6. That on or about 19th day of October 2004 Mr. Bakilana asked me whether I had served the copy of the Notice of Appeal on Law Associates, Advocates and it was then that I realized that I had not done so.

7. That my failure to serve the Notice of Appeal on Law Associates, Advocates was due to oversight on my part".

As Mr. Mfalila, learned advocate, correctly submitted, judgment which is being appealed against was delivered on the 1.10.2004 and the notice of appeal was lodged within the prescribed period in the High Court on the 13.10.2004. The learned advocate however readily conceded that the applicant did not comply with Rule 77 (1)

of the Court Rules for failing to serve a copy of the notice of Appeal on the respondent within seven (7) days after lodging the notice of appeal in the High Court. The cut – off date would have been the 20.10.2004. This takes me to Rule 8 of the Court Rules which reads –

> "(8) The Court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time as extended".

The Court has wide discretion to extend time even where the time limited for serving notice of appeal on the respondent has

already expired. Under rules 8 and 77 (1) the applicant must show sufficient reason as to why he did not serve notice of appeal within seven (7) days of the lodgement of the notice of appeal. Two competing principles are involved in an application of this nature which the court has to consider.

In **Costellow v. Somerset County Council** (1993) IWLR 256 Sir Thomas Buigham, M. R. had this to say at page 263 –

> "The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of

> procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate".

And in the case of **Ratman v. Cumara Samy** (1965) IWLR 8 at page 12 the Privy Council, in appeal from Nalaya, stated thus -

> "The rules of court must be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation".

In the instant case a secretary of Haki Law Chambers, one Remigia Nyebwaki was duly instructed by Mr. Bakilana, learned advocate, to file notice of appeal against the decision of Dr. Bwana, J. She lodged it on the 13.10.2004 but did not take a second copy of the notice of appeal with her because allegedly one Mr. Rashidi was out of the office. She managed to get it on the 18.10.2004. That may well have been the case, but in my view, it was imperative to have an affidavit of Mr. Rashidi to back up her explanation. The critical information in paragraph 3, 4 and 5 is hearsay evidence. If this "evidence" is discounted, there is no affidavit evidence before the Court as to why the respondents were not served with notice within the prescribed time in terms of rule 77 (1) of the Court Rules.

Let me turn my attention to Mr. Bakilana's affidavit. The learned advocate seems to throw the blame or the Secretary. Needless to say, this Court is least interested, if at all, in the allocation of responsibilities in Haki Law Chambers. Mr. Bakilana became aware that the notice of appeal had not been served on the respondent on the 16.10.2005. Fair enough, the seven days had not

expired as yet reckoned from the 13.10.2005 when the notice of appeal was lodged. At least the applicant had a signed notice of appeal on the 13.10.2005 and a photocopy thereof could have been served on the respondent. This line of action was not pursued. On the 18.10.2005 another copy then was available from Mr. Rashidi and two days had remained before the expiry of the seven days. There is no explanation forthcoming from the applicant! The notice of motion was filed on the 14.1.2005. There is no explanation whatsoever from Mr. Bakilana as to what he did to salvage the situation from the 17.10.2004 to the 13.1.2005. He is the learned advocate who had the conduct of the matter in the High Court and who had prepared the incorrect notice of appeal. In my view, Mr. Bakilana's affidavit is seriously flawed. There is a big gap from the 19.10.2004 to 13.1.2005 for which no explanation has been offered at all. As stated before Remigia Nyebwaki valiantly tried to explain her endevours to obtain a signed notice of appeal from 13.10.2004 to 18.10.2004 from one Mr. Rashidi. There is no affidavit evidence from Mr. Rashid to confirm the purported facts in her affidavit. Her affidavit evidence is consequently of little, if any, evidential value in

this application.

On his part, Mr. Bakilana, learned advocate who apparently had the conduct of the case in the court below, became aware of the fact that the notice of appeal had not been served an the respondents, three days after the lodgement of the notice of appeal. Yet it has taken 87 days to file notice of motion seeking extension of time to serve the said notice of appeal. What is worse, the explanation given relates to the period from the 13.10.2004 up to the 18.10.2004. There is a conspicuous lacuna from the 19.10.2004 to the 13.1.2005 which is crying for a satisfactory explanation. Once a party is in default (as the applicant herein was) it was incumbent for the applicant to place before the Court the necessary and relevant material to satisfy the Court that despite the default, the discretion should nevertheless be exercised in their favour. The applicant has to account satisfactorily the delay in serving the notice of appeal. The applicant, unfortunately, has not in my view, discharged this burden. I am satisfied that there are no reasons before the Court, let alone sufficient reasons, for the failure by both Miss Remigia

Nyebwaki and Mr. Peter Bakilana, learned advocate, to serve the respondents with the notice of appeal in terms of rule 77 (1) of the Court Rules.

It will be recalled that Mr. Mfalila also submitted that the application for extension of time should not be refused because the applicant had overwhelming chances of succeeding if the appeal is heard on its merits. Indeed, this is one of the factors to be taken into consideration in application No. MB. 2 of 1981 **Chrisant Majiyatanga Mzindakaya and Gilbert Louis Ngua**, a single judge of this Court (late Nyalali, C. J.) made the following pertinent observations when considering whether or not an intended appeal stands a reasonable chance of success. He stated thus –

> "The question arises whether the intended appeal stands a reasonable chance of success. In answering this question I am not required to re – evaluate the evidence adduced in support of the petition since that is the work

> of the Court of Appeal when actually hearing a first appeal. I am not hearing the intended appeal in these proceedings. In my view I am required to see whether there are non – directions or misdirections on the evidence or on the law, and whether there are irregularities affecting the proceedings of the court below and to decide whether on the basis of such non – directions or misdirections or irregularities, the intended appeal stands a reasonable chance of success."

Whatever the merits or otherwise of Mr. Mfalila's submissions on this point, this ground it not reflected in the notice of motion as required under rule 45 (1) and (2) of the Court Rules. (See: (CAT) Civil Application No. 66 of 1998, **Miroslav Katik Vesra (ii) Paladin Ingra and Ivan Makobrad *(unreported)***. It is therefore not surprising that both affidavits in support of the notice of motion did not contain any statements of the nature of the judgment and the

reasons for desiring to appeal against it. This would enable the Court to determine whether or not a refusal of the application would cause injustice.

In view of the conclusion, I have reached, there is no need for me to consider and determine the prayer to amend the notice of appeal.

The application is accordingly dismissed with costs.

DATED at DAR ES SALAAM this ..... day of ....., 2005.

JUSTICE OF APPEAL