IN THE COURT OF APPEAL TANZANIA
AT MWANZA

(CORAM: MBAROUK,J.A.,MUSSA,J.A., And JUMA, J.A.,)

CIVIL APPLICATION NO. 10 OF 2014

EXPORT TRADING COMPANY LIMITED.....APPLICANT
VERSUS
MZARTC TRADING COMPANY LIMITED.....RESPONDENT

(An application arising from the decision of the High Court of Tanzania (Commercial Division), at Mwanza,

(Makaramba,J.)

Dated the 1st day of April, 2014
in
Commercial Appeal No. 01 of 2014

RULING OF THE COURT

11th & 17th September, 2014

MUSSA, J. A.:

By Notice of Motion, the applicant, a limited company, is moving the Court for orders that the Notice of Appeal lodged by the respondent on the 4th April, 2014 be struck out and consequently the same be deemed to have been withdrawn on account that the respondent has failed to institute the appeal within the sixty days prescribed by the Tanzania Court of Appeal Rules, 2009 ("the Rules").

The application is accompanied by an affidavit, duly sworn by Mr. Constantine Mutalemwa, the learned advocate for the applicant. In

addition, Mr. Mutalemwa has lodged written submissions in support of the application in terms of Rule 106(1) and (2) of the Rules. The applicant's quest has been countered by the respondent, also a limited company, through an affidavit in reply sworn by a certain Jacob Bushiri who is the General Manager of the respondent. It is, perhaps, an opportune moment to apprise that the respondent also has the services of a learned advocate, namely, Mr. Chama Matata. Counsel for the respondent has just as well lodged written submissions in reply. To appreciate the nature, essence and the respective themes of the rival learned contentions, it is necessary to explore the factual background giving rise to the matter at hand.

It is beyond question that the application under our consideration originates from Civil Case No. 07 of 2010 which was instituted and determined in the Resident Magistrate's Court of Mwanza. In the original suit, the respondent emerged successful in her claim against the applicant over non-delivery of a consignment of 40 tons of rice, allegedly, owing to the former on account of a sale agreement. The applicant was aggrieved and, on appeal to the High Court (Commercial Division), the trial court's verdict was reversed in a judgment that was handed down on the 1st April, 2014 (Makaramba, J.) It was, then, the respondent's turn to lock

horns with the decision of the High Court and, accordingly, on the 4th April, 2014 she duly filed a Notice of Appeal to this Court. Nonetheless, it is noteworthy, the respondent did not beef up her Notice of Appeal with an application for a copy of the impugned proceedings in terms of the proviso to sub-rule 1 of Rule 90 of the Rules. Before us, Mr. Matata conceded that much.

In the meantime, having lodged the Notice of Appeal, the respondent, contemporaneously, set in motion the wheels of justice towards obtaining the requisite leave of the High Court ahead of mounting the desired appeal to this Court. Unfortunately, her initial quest was adjudged incompetent and struck out on the 30th April, 2014 (Nyangarika, J). Undaunted, the respondent refreshed the bid for leave in another application lodged in the High Court on the 12th May, 2014. But, as fate would have it, on the 6th June, 2014 the attempt was befallen by the same misfortune of being shown the exit door on account of incompetency (Nchimbi,J). From the respondent's affidavit in reply there is a detail to the effect that she, seemingly, refreshed her ill-fated bid for leave on the 11th June, 2014 in Misc. Civil Application No. 7 of 2014 which is presently pending in the High Court.

Thus, from the foregoing backdrop, the applicant preferred the matter under our consideration. From the very outset of the hearing, counsel for the respondent sought the directions of the Court with respect to the sustainability of the written submissions filed by his friend in support of the application. Incidentally, in his written submissions, Mr. Matata raised concern that the submissions of his adversary fell short for not disclosing the material facts and the issues arising therefrom for the determination of the Court. We invited either counsel to argue the raised concern simultaneously with the main application and proposed to dispose of both matters, if need be, in the course of our final deliberations.

In this regard, the learned counsel for the respondent reiterated his contention that the entire submissions of the applicant consist of legal arguments and, according to him, there is no mention of the material facts and the issues arising therefrom. Mr. Matata contended that the applicant's submissions are contrary to the provisions of sub-rule 2 of Rule 106 of the Rules which imperatively requires every written submission to, *inter alia,* contain a concise statement of the material facts as well as the issues arising therefrom. In the result, counsel urged, the non-compliance constitutes sufficient reason for the Court to refuse to entertain the

submissions in accordance with sub-rule 4 of Rule 106 of the Rules. To that extent, Mr. Matata suggested, the Court should direct the applicant to revisit the submissions and make necessary adjustments, changes, clarifications or amendments, as the case may be, in terms of sub-rule 5 of Rule 106 of the Rules.

In reply, Mr. Mutalemwa briefly countered the submission with the contention that the material facts as well as the issues arising therefrom, are clearly discernible from his written submissions. In elaboration, counsel for the applicant contended that in the applicant's submissions, the nature, essence and background of the application is stated with clarity, just as is the case with the sole issue of contention arising from the factual background.

For our part, we have dispassionately weighed the learned rival contentions in the light of the impugned submissions of the applicant. To say the least, to us, albeit briefly, both the facts material to the application and the issues arising therefrom are well constituted in the applicant's written submissions. As regards the factual setting material to the application it was disclosed in the submissions in part:-

"...the judgment of the High Court of Tanzania (Commercial Division) in Commercial Appeal No. 01 of 2014 was pronounced by Hon. Justice Makaramba on 01.4.2014 and thereafter the Respondent filed its Notice of Appeal in the sub-registry of this Honourable Court at Mwanza on 04/04/2014 and the said Notice of Appeal was duly served to the applicant on 09/04/2014. Further, we submit that the Respondent did not apply in writing to the Registrar of the High Court of Tanzania (Commercial Division) to be availed with proceedings and therefore the prescribed time of sixty days for filing the appeal continued to be counted and the said period expired on 03/06/2014".

As regards the issue of contention accompanying the application, the learned counsel for the applicant wrote:-

"....the sole supportive ground to the order/relief being sought is that the Respondent has failed to file an appeal within sixty (60) days after the lodgment of the

Notice of Appeal and as such the said statutory period expired on 03/06/2014".

It may be that the submissions were not crafted in the best of styles but; from the foregoing extracts, the factual setting as well the conceived sole issue of contention are clearly readable. To that extent, the submissions of the applicant met the requirements of Rule 106 of the Rules and, accordingly, we are disinclined to the invitation of Mr. Matata to discount them.

Coming to the application, Mr. Mutalemwa adopted his written submissions and referred us to Rule 90 (1) and (2) of the Rules which stipulate:-

" *(1) subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged with –*

a) a memorandum of appeal in quintuplicate;

b) the record of appeal in quintuplicate;

c) security for the costs of the appeal;

save that where an application for a copy of the proceeding in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant.

(2) An appellant shall not be entitled to rely on the exception to sub-rule (1) unless his application for the copy was in writing and a copy of it was served on the Respondent".

Reflecting on the extracted provision, the learned counsel for the applicant contended that owing from the detail that the respondent did not at all apply for a copy of the impugned High Court proceedings, she was not entitled to benefit from the proviso to sub-rule 1. That being so, Mr. Mutalemwa charged, the sixty days began to run against the respondent on the date she filed the Notice of Appeal and, as of present, the prescribed time has long elapsed. In the end result, counsel submitted,

the respondent should be deemed to have withdrawn her notice in terms of Rule 91 (a) of the Rules and, accordingly, the application be allowed with costs. To bolster his contention, Mr. Mutalemwa referred to us the decision of this Court in the case of **Mrs. Kamiz Abudallah M.D. Kermal Vs The Registrar of Building and Miss Hawa Bayona [1988] TLR 199 (CA).**

In response, Mr. Matata insistently reminded that the respondent is prosecuting an application for leave to appeal against the decision which is still pending in the High Court. To that extent, he suggested, this application is premature as the respondent's quest for leave to appeal is yet to be determined. The learned counsel sought to distinguish the cited decision of ***Kamiz*** (supra) on the basis that in that case, the Court was addressing an appeal which was filed out of time subsequent to the appellant obtaining leave to appeal; whereas, in the situation at hand, the appeal is yet to be filed and neither has the respondent obtained leave from the High Court. As regards the provisions of Rule 90 (1) of the Rules which imperatively requires an appeal to be instituted within sixty days from as the date of the Notice; Mr. Matata went so far as to suggest that the provision was not designed to bind a second appeal which, of

necessity, requires leave of the High Court prior to its lodging. In the premises, counsel for the respondent impressed on us to dismiss the Notice of Motion with costs.

In our approach toward the determination of this application, we propose, in the first instance to reflect, in detail, on the much mentioned case of ***Kamiz*** (supra). In that case, the appellant was aggrieved by an *ex parte* order of the High Court granting stay of execution of a decree. Subsequently, she lodged a Notice of Appeal to this Court and successfully obtained leave, from the High Court, to appeal against the order. She, however, lodged her appeal about three months from the date when she filed the Notice of Appeal. When the appeal was called on for hearing, a preliminary point of law arose to the effect that the appeal was incompetent for not being filed within the prescribed period of sixty days. It was argued by counsel on behalf of the appellant that the delay resulted from the fact that leave to appeal was belatedly obtained which in itself amounted to good cause as the appeal could not have been instituted ahead of the High Court granting the leave. In response, the Court made the following observation:-

"We appreciated the logic of this argument but, with due respect to learned counsel, this logic must be applied within the context of the law. The law provides not only for the period within which an appeal must be instituted, but provides also for a situation where there may be good cause for the delay in instituting the appeal within the prescribed 60 days. For instance, where the delay is due to the time taken in preparing the record of appeal, such time certified by the Registrar of the High Court will be excluded in computing the prescribed period, provided of course, a copy of the proceedings is applied for in writing within 30 days of the judgment or order appealed against, and the application is copied to the other party. ***Furthermore, where the delay in instituting the appeal is caused by other good reasons, a prudent party to the proceedings may safeguard its position by applying for extension of any period prescribed for the doing of any act under Rule 8 of the Tanzania Court of Appeal rules. It was thus open for the appellant in this***

case, particularly at the time when applying for leave and the certificate of the High Court, also to apply to this Court to extend or to enlarge the period prescribed under Rule 83."

(Emphasis supplied).

A remark is, perhaps, well worth that in the foregoing observation, the Court had reference to Rules 8 and 83 of the revoked Tanzania Court of Appeal Rules, 1979 which, respectively, similarly correspond to the present Rules 10 and 90. True; in ***Kamiz*** the court was specifically addressing an appellant who sought to justify the delay in instituting her appeal with the fact that the leave of the High Court was belatedly granted. But, it is our well considered view that the broad statement of principle enunciated in ***Kamiz,*** equally binds a desirous appellant, as the one at hand, who seeks to take refuge in the fact that the application for leave to appeal is yet to be determined. As it were, it was open for the respondent herein to, simultaneously, seek enlargement of the period prescribed for instituting the appeal at the time when she was applying for the leave of the High Court. This is the more so particularly given the fact that Rule 90 (1) of the Rules requires all appeals to be instituted within a

period of sixty days save for the qualification expressed under the proviso. In this regard, we should go further and decline Mr. Matata's invitation for this Court to find that a second appeal is not contemplated by the Rule. It will be unrealistic, we should add, to predicate the lodging of an appeal with the proceedings for leave which may, after all, be delayed, as seems to be the case here, on account of lack of diligence on the part of the desirous appellant.

To this end, in the matter under our consideration, the respondent who is the desirous appellant did not apply under Rule 90(1) of the Rules, for the impugned record of the High court so as to safeguard herself against a belated institution of the appeal. Furthermore, she has not sought under Rule 10 of the Rules, enlargement of the period of sixty days prescribed for instituting the appeal. Having failed to take either of the two courses of action, the respondent only has herself or his advocate to blame for the delay in instituting the appeal. As to what are the attendant legal consequences, we need only reproduce the provision of Rule 91 (a) of the Rules:-

"If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time-

(a) he shall be deemed to have withdrawn his notice of appeal *and shall, unless the court order otherwise, be liable to pay the costs of any persons on whom the notice of appeal was served arising from that failure to institute the appeal;" (Emphasis supplied).*

The bolded expression tells it all: The effect of a default in filing an appeal within the prescribed time boils down to a withdrawal of the Notice of Appeal. Time and again, this Court has, consistently, reiterated the position (see **Kamiz** (supra) as well as Civil appeal No. 10 of 1988 - **Enock Chacha V Mwanza Fishment Manufactures Ltd;** Civil Appeal No. 13 of 1984 – **Wile Mkandala V Philip Chilla; and** Civil Application No. 4 of 2009 - **Amina Aden Ally V Garta Mohamed)** (all unreported).

In the end result we, accordingly, find and order that, for her default in instituting the appeal within the prescribed sixty days, the respondent is

deemed to have withdrawn her Notice of Appeal. Thus, the application is allowed with costs.

DATED at **MWANZA** this 16th day of September,2014.

M. S. MBAROUK
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL