

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

CIVIL APPLICATION NO. 12 OF 2015

MZA RTC TRADING COMPANY LIMITED.....APPLICANT

VERSUS

EXPORT TRADING COMPANY LIMITED.....RESPONDENT

**(Application 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. 1 of 2014**

RULING

25th & 27th October, 2016

MASSATI, J.A.:

This application for extension*of time is taken out under Rules 10 and 47 of the Tanzania Court of Appeal Rules, 2009 (the Rules) for filing a notice of intention to appeal to this Court against the decision of the High Court (Commercial Division) in Commercial Appeal No. 1 of 2014.

Apparently this is not the first attempt. The applicant had earlier on lodged a notice of appeal to challenge that decision, which was struck down by this Court after it was convinced that the applicant had failed to institute the appeal within the prescribed time. Again in Civil

Application No. 15 of 2014 the applicant applied for extension of time to apply for leave, which was also dismissed.

The notice of motion is supported by the affidavit of CHAMA A. MATATA. We find paragraphs 5 and 6 of the affidavit crucial, but paragraphs 7 and 8 even more crucial for determination of the present matter. In paragraph 7 the applicant avers that his earlier attempt to apply for leave to appeal to this Court was dismissed by the High Court (Commercial Division) on 14th November, 2014. In the next paragraph 8, the applicant proposes what he considers to be "significant points of law for determination by the Court. The two issues may be paraphrased as; first, the burden of proof in a case of sale of goods; and two whether the High Court (Commercial Division) has jurisdiction to entertain appeals from Courts of Resident Magistrate.

The respondent did not file any affidavit in reply, but both parties proceeded to file written submissions to assist the Court in the determination of the application. At the hearing of the application, Mr. Chama Matata learned counsel appeared for the applicant, and Mr. Constantine Mutalemwa learned counsel appeared for the respondent.

They jointly agreed to adopt their respective written submissions in support of their positions.

In his written submission, Mr. Matata submitted that the issues of burden of proof in sales of goods, and the jurisdiction of the High Court (Commercial Division) were crucial for determination by the Court and constitute good grounds for extension of time. He relied on the **PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE v. DEVRAM VALAMBHIA** (1992) TLR 186, and **RICHARD JULIUS RUKAMBURA v. ISSACK NTWA MWAKAJILA**, MZA Civil Application No. 3 of 2004 (unreported).

But Mr. Mutalemwa, learned counsel for the respondent, would hear none of this. He submitted in his written submission that the Court lacked jurisdiction to extend time for filing a notice of appeal, under Rule 10 after the same had been refused by the High Court under section 11(1) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002. He went on to submit that once extension of time to file a notice of appeal is refused by the High Court, the applicant does not enjoy the privileges of a second bite, so to speak, as in the case of leave to appeal. In short, the learned counsel was of the view that this Court had no jurisdiction to

entertain the application and cited several decisions of this Court to support his view; which includes **MKUNAZINI SHIPPING ENTERPRISES & MKUNAZINI GENERAL TRADER vs. SAID KHAMIS HAMID**, ZNZ Civil Application No. 05 of 2012, **ALOYCE MSELE vs. CONSOLIDATED HOLDING CORPORATION**, Civil Application No. 1(B) of 2009 (both unreported). He thus prayed that the application be dismissed as it was misconceived.

But, he went on, if I were minded to consider it, it was his view that the alleged issues of law were not significant. For instance, he argued, the issue of burden of proof could be resolved and was resolved on the basis of section 115 of the Evidence Act. It was not therefore a point of law worth taking to the Court to warrant extension of time. He cited the very decision relied upon by the applicant; that is: **LYAMUYA CONSTRUCTION CO. LTD. v. BOARD OF TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010 (unreported).

As regards, the jurisdiction of the High Court (Commercial Division) in civil appeals from subordinate Courts, Mr. Mutalemwa relied on the High Court Registries Rules, 2005 which established the

Commercial Division of the High Court as amended by GN. 427 of 2005 which confers on the Division both original and appellate jurisdiction over cases of a commercial significance. Therefore parties who had cases of commercial significance in subordinate courts had an option to appeal to the ordinary registry or the Commercial Division of the High Court. So, he concluded, the question of the High Court (Commercial Division) jurisdiction is now well settled, and need not justify an extension of time to be taken to the Court. He therefore prayed that the application be dismissed for want of merit.

The points raised by Mr. Mutalemwa that this Court lacks jurisdiction to entertain the application have already been dealt with by sister Mjasiri, JA, who first sat to hear the application. It was posed as a preliminary objection. In her considered ruling, my sister learned justice, dismissed the said preliminary objection with costs, and ordered that the application for extension of time be set down for hearing on merit. I have no jurisdiction to revise and overrule that decision. So, I will ignore the first part of Mr. Mutalemwa's argument and assume that I have jurisdiction to hear this application.

An application for extension of time for the doing of any act authorized by the Rules, under Rule 10 of the Rules, is on exercise in judicial discretion. Citing **BLACK'S LAW DICTIONARY** (6th ed.) in **MWITA s/o MHERE AND IBRAHIM MHERE v R** (2005) TLR 107 this Court observed that:

"judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law the Court has to demonstrate however briefly, how that discretion has been exercised to reach, the decision it takes."

Case law has established that before the Court exercises its discretion under Rule 10 it must have sufficient material before it to account for the delay. The applicant must also show diligence in prosecuting the intended action. And true, time could also be extended if the Court feels that there is a point of law of sufficient importance, such as the illegality of the impugned decision. (See **THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE vs. DEVRAM VALAMBHIA** (1992) TLR. 387 **SHANTI vs. HINDOCHIE AND OTHERS** (1973) EA 207, **VIP ENGINEERING AND MARKETING**

LTD. AND OTHERS v. CITIBANK (T) LTD, (Consolidated Civil References Nos. 6, 7 and 8 of 2006 (unreported)).

In the present case, with regard to the delay, I would note that the application for extension of time to file a notice of appeal was dismissed by the High Court (Songoro, J.) on 30/3/2015. This was done under section 11(1) of the Appellate Jurisdiction Act. With respect, since a notice of appeal is a creature of the Rules, specifically, Rule 83(1) I think this Court can also extend time for filing it under Rule 10. Under Rule 83(1) a notice of appeal may be lodged within 30 days.

As the application in this case was dismissed on 30/3/2015, the applicant was legitimately expected to account for the delay between that date and 13/4/2015 when he lodged the present application. There is no such material in the affidavit. So two weeks have not been accounted for.

The other reason advocated for extension of time is that the legality of the impugned decision, derived from lack of jurisdiction and misdirection on the point of burden of proof. I agree with Mr. Mutalemwa, that there is little merit in this ground. As I said in **LYAMUYA CONSTRUCTION CO. LTD's** case, not every point of law

will necessarily carry the day in an application for extension of time. The point of law must be of such significance as to warrant the attention of the Court of Appeal. The question of the High Court (Commercial Division)'s appellate jurisdiction is well set out in rule 5 of the High Court Registries Rules. I don't think this Court would sit to strike down that rule. The question of burden of proof is one that shifts according to the circumstances of each case. Section 115 of the Evidence Act cited by Mr. Mutalemwa is well placed.

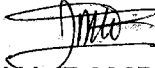
So, for all the above reasons I conclude that the applicant has failed to convince me that he deserves any extension of time to file a notice of appeal. The application therefore fails and is dismissed with costs.

DATED at MWANZA this 25th day of October, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL