

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 88 OF 2016

MANSOOR DAYA CHEMICALS LTD.....APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE.....RESPONDENT

**(Application for Extension of time to file apply for
Revision from the decision of the High Court
of Tanzania at Dar es Salaam)**

(Makaramba, J.)

**Dated 7th day of December, 2015
in
Commercial Case No. 3 of 2014**

RULING

6th & 13th September, 2016

MASSATI, J.A.:

By a notice of motion filed under Rule 10 of the Court of Appeal Rules 2009 (the Rules), the applicant is seeking for extension of time within which to file an application for revision of the proceedings of the High Court (Commercial Division, Dar es Salaam) in Commercial Appeal No. 3 of 2014. It is supported by the affidavit of Ms S.M. Daya. With leave of the Court the applicant also filed a supplementary affidavit on 31/8/2016.

The respondents were duly served. They did not file any affidavit in reply. Instead on 27th June, 2016 through Ms. IMMA, Advocates they filed a notice of preliminary objection to the affect that the application did not comply with Rule 48(2) of the Rules, and therefore incompetent.

When the application was called on for hearing on 29th August, 2016 the respondent did not enter appearance to agitate the preliminary objection. It was therefore difficult for the Court to go into and determine the preliminary objection. On the other hand, the applicant was represented by Ms. Sakerhanoo M. Daya, learned counsel. Due to the respondent's non- appearance on that day, I allowed the application to be argued *ex parte*. But instead, Ms. Daya applied for leave to file a supplementary affidavit before proceeding with the hearing. I granted a short adjournment to enable her do so. The *ex-parte* hearing therefore resumed on 6/9/2016.

At the hearing, Ms Daya adopted her two affidavits and written submission. According to the affidavit and supplementary affidavit, what comes out clearly is that prior to the present counsel,

the appeal at the High Court was handled by another firm of advocates. Judgment was handed down on 7th December 2015. The previous firm advised against any appeal. But as the applicant was not content with the said advice she instructed the present counsel.

The present counsel immediately filed a notice of appeal, and an application for leave, which were however, later withdrawn in preference to the intended application for revision. The major ground for seeking extension of time, according to Ms Daya, was that of jurisdiction; in that as the case decided by the Resident Magistrate was based on a tort, and not a commercial dispute, the High Court (Commercial Division) had no jurisdiction to entertain the appeal. She wound up by submitting that there was no negligence or inaction on the part of the applicant.

In the course of the hearing, I was curious on two points, which I asked Ms Daya to address me. The first question was whether, the notice of motion fully complied with Rule 48(1) of the Rules, as no grounds are stated there. To that, she submitted that the notice substantially complied with form "A" to the First schedule to the

Rules; and that even if there are no grounds expressly stated in the notice itself, they are sufficiently displayed in the affidavits. The second question I posed to her was, whether it was proper for her to take the revision route, instead of an appeal she had begun and withdrawn. Her short answer was that it was for the full Court sitting in revision, to determine whether the application was properly before the Court, and not for a single Justice. Furthermore if I really needed an answer, it was that the applicant felt that it had no automatic right of appeal.

Ms Daya was emphatic that the question of the High Court's jurisdiction was so overwhelming that it had to be brought to the attention of the Court. Ms Daya referred to me the decision of this Court in **TRANSPORT EQUIPMENT LTD V DEVRAM P. VALAMBHIA** (1995) TLR 161 to strengthen her argument that she had a good case for revision.

In an application for extension of time under Rule 10 of the Rules, an applicant is required to show good cause why time should be extended. What is a good cause is a question of fact, and this

may vary with the circumstances of each case. But it is common ground that in such an application the applicant must show:-

- (i) The length of the delay
- (ii) The reasons(s) for the delay that would account for each day of delay.
- (iii) If there is an arguable case.

An application under section 4(3) of the Appellate Jurisdiction Act Cap 141 RE 2002, (and Rule 65(4) of the Rules,) is to be lodged within 60 days from the date of the decision sought to be revised. In the present case, the High Court decision was handed down on 7/12/2015. The present application was lodged on 29th March 2016. I would not reckon the delay of three months as unreasonable, or inordinate.

After December 7, 2015 the applicant lodged a notice of appeal on 21st December 2015, and an application for leave to appeal on 28th December 2015. However on 26th February, 2016, the applicant applied to withdraw the notice of appeal. The application for leave to appeal in the High Court having been found wanting, it was finally

dismissed on 18th May, 2016, and the Notice of Appeal was withdrawn on 3rd March, 2016. All the information is in the two affidavits which have not been controverted. On a balance of probabilities, I have to find that the applicant has disclosed the reasons and satisfactorily accounted for the delay.

The question whether or not there is an arguable case is a tricky one. There is always a temptation for one to venture beyond one's territory.

As I posed above, two questions of law leapt to my mind as I was hearing this application. The first was on the competency of the application for failure to state the grounds in the notice of motion. The second was on the propriety of the intended application for revision.

It is unfortunate that I have not had advantage of mature arguments on these points from both sides, and Ms. Daya's submission was without the benefit of any authority. On the point of failure to state the grounds in the notice of motion, I am aware that there exist authorities of this Court that advocate both sides. There

are those which pronounce that failure to state the grounds is fatal; (See for instance **REGISTERED TRUSTEES OF JOY IN THE HARVEST Vs HAMZA SUNGURA**, Civil Application No. 1 of 2007 (unreported) **COMMISINOR GENERAL TRA Vs PPF** Civil Application No. 73 of 2005 (unreported). But there are also those which support Ms Daya's contention that the defect is curable if the grounds can be discerned from the affidavits. (**VIP ENGINEERING AND MARKETING LTD Vs SAID SALIM BAKHRESA LTD**, Civil Application No. 47 of 1996 and **ZANZIBAR SHIPPING CORPORATION Vs MKUNAZINI GENERAL TRADERS, ZNZ** Civil Application No. 6 of 2005 (both unreported) I would go along with the second school of thought. I am of the view that although it is desirable to state the grounds in the notice of motion, it would not be fatal to an application if the same can be scouted in the affidavit. On that view, I find solace in the reasoning of this Court in **THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE Vs DURAM P. VALAMBHIA** (1992) TLR. 387 at P. 395 where the Court said:-

"a notice of motion and the accompanying affidavit are in the very nature of things

complementary to each other and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the basis of that, it is clear what relief is being sought, then the Court should proceed to consider and determine the matter regard being had to the objection if any raised by the opposite party”

In the present case, as I have tried to demonstrate above, the applicant's grounds for the notice of motion are that the High Court (Commercial Division) lacked jurisdiction to adjudicate on the appeal arising from a case of a tortious nature. This ground comes out clearly in paragraphs 7 and 9 of the affidavit and paragraph 6 of the supplementary affidavit. I must however admit that on this score I am at a disadvantage for not hearing what was in the respondent's mind in her preliminary objection, but that is a self-inflicted injury which the respondent is to blame.

The second point of law is whether, it would be appropriate in an application for extension of time to determine whether the route

taken by an applicant is proper. Seemingly, this may fit perfectly in the matrix of whether or not there is an arguable case. I am however, contended that, whereas the formulation that whether or not the High Court had jurisdiction to determine an appeal from a suit on tort, may constitute a good cause for extension of time, I am satisfied that it is for the full Court to determine whether or not the route taken by the applicant, that is to say, by taking a revision, instead of an appeal, is proper.

Having considered all the circumstances of this case I allow the application. Time is extended to the applicant to file an application for revision. The application is to be lodged within 60 days from the date of this decision.

DATED at DAR ES SALAAM this 7th day of September, 2016.



S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original


E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL