

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO 449/16 OF 2016

D. N. BAHRANI LOGISTICS LTD1st APPLICANT

DAD KARIN B. NURMOHAMED 2nd APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD1st RESPONDENT

KAM COMMERCIAL SERVICES2nd RESPONDENT

**(Application for Extension of time to file Notice of Appeal from the
decision of the High Court of Tanzania, Commercial Division,
at Dar es Salaam)**

(Makaramba, J.)

dated the 05th day of August, 2011

in

Commercial Revision No. 1 of 2010

RULING

24th April, & 5th June, 2017

MWANGESI, J.A.:

By way of notice of motion made under the provision of Rule 10 of the Court of Appeal Rules, 2009 hereinafter referred to as the Rules, the applicants have applied for extension of time within which they can file a notice of appeal and application for leave to appeal out of time. The application is supported by sworn affidavit of Mr. Dad Karim B. Nurmoahamed, who happens to be the principal Officer of the first applicant

and himself, being the second applicant. On their part, the respondents have filed an affidavit in reply, which has been sworn by M/s Madina Chenge wherein, the application by the applicants is resisted.

When the application was called on for hearing on the 24th day of April 2017, Mr. Jethro Turyamwesiga learned counsel, did appear for the applicants, whereas the respondents, had the services of Mr. Gaspar Nyika learned counsel. In his submission to amplify the application, Mr. Jethro Turyamwesiga did request the Court to wholly adopt the affidavit that has been filed in support of the application plus its annexes to form part of his submission. He did inform the Court that, the appeal that had earlier on been preferred to this Court by the applicants was struck out on the reason that, it was incompetent. Nonetheless, it was the observation of the Court that, the applicants were at liberty to institute a fresh appeal upon rectifying the anomalies that were pointed out by the Court. And regard being to the fact that, the applicants were already time barred to lodge their appeal after delivery of the ruling which did strike out their earlier appeal, they did institute the application at hand.

The learned counsel for the applicants did submit that, the applicants did first attempt to obtain extension of time from the High Court. However,

their application was dismissed on the reason that, the grounds which were advanced to account for the delay were insufficient. Mr. Turyamwesiga did argue that, the reasons which were pointed out by the Court in the appeal that was struck out were occasioned by mere human errors, which in his view did constitute sufficient cause. He did term such errors to be technical ones which are different from actual errors as discussed in detail in the case **Fortunatus Masha Vs William Shija** [1997] TLR 154. He did humbly ask the Court to follow suit to its earlier decision, where it was held that, where an applicant files an appeal that turns to be defective and as a result it gets struck out, the High Court should grant extension of time because, such delay is a mere technical in that, it has been occasioned by an oversight, which cannot be equated to negligence. In that regard therefore, he did humbly ask the Court to grant the application by the applicant for extension of time.

In rebuttal to what has been submitted by his learned brother, Mr. Gaspar Nyika learned counsel for the respondents, did as well request the Court to adopt wholly the affidavit that has been sworn in reply. In his view, no sufficient reasons have been disclosed by the applicant to move the Court to grant the sought relief for extension of time. He did therefore

urge the Court to dismiss the application for want of merit with costs. In fortification to his stance, the learned counsel for the respondent did refer the Court to the decisions of this Court in the cases of **Mumello Vs Bank of Tanzania** [2006] 1 EA 227, **Godwin Ndewesi and Karoli Ishengoma Vs Tanzania Audit Corporation** [1995] TLR 200 as well as **Calico Textile Industries Ltd Vs Pyaraliesmail Premji** [1983] TLR 28.

What stands for me to resolve in the light of the submissions of the learned counsel for both sides above, is whether the applicants have managed to disclose sufficient grounds to warrant the Court to grant the sought relief of extension of time. The provision under which the application has been preferred bears the following wording that is;

*"The Court may, **upon good cause shown**, extend the time limited by these Rules or by any other decision of the High Court or tribunal, 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 reference to that time as so extended."*

Going by the wording in the above quoted provision of law, it is evident that, this Court is conferred with discretionary powers to extend time in addition to the one stipulated under the law, for the doing of any act. Nonetheless, such discretionary powers, have to be exercised by the Court judiciously upon sufficient reasons being given as to why, there was failure to do the act within the time stipulated under the law. The decision of this Court in the case of **Mumello Vs Bank of Tanzania** [2006] 1 EA 227 shades some light on the exercise of such discretional powers when it held thus:

"It is trite law that, an application for extension of time is entirely in the discretion of the Court to grant or refuse it. And an extension of time may only be granted where it has been sufficiently established that, the delay was with sufficient cause."

As to what is meant by **sufficient cause** or **good cause** has not been defined by any provision of law. In that regard therefore, guidelines have to be sought from previous decision of the Court. In the case of **Regional Manager, Tanroads Kagera Vs Ruaha Concrete Company Limited** Civil Application No. 96 of 2007 (unreported), this Court did discuss

about **sufficient cause**, which was contained in Rule 8 of the repealed Court of Appeal Rules, 1979, which is similar to **good cause**, as contained in Rule 10 of the current Court of Appeal Rules, 2009, and it stated thus:

*"What constitutes **sufficient cause** cannot be laid down by any hard and fast rules. This must be determined by reference to all circumstances of each particular case. This means that, the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend time limited by the Rules."*

The Court did move further by seeking some inspiration from the decision of the Privy Council in the case of **Ratman Vs Cumarasamy and Another** [1964] All 3 933, in which it was held that:

"The rules of the Court must, prima facie be obeyed, and, in order to justify a Court extending the time during which some step in procedure requires to be taken, there must be some material on 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 provide a time-table for the conduct of litigation."

In line with what was held in the above cited decisions, I am enjoined to gauge if there is any material that has been placed before me in the instant application, to move the Court to grant the sought relief of extension of time. The material which has been placed before the Court in so far as the application at hand is concerned is the affidavit of the applicant. To appreciate the weight of the grounds, I hereby reproduce the paragraphs of the affidavit of the applicant in support of the application verbatim:

I DAD KARIM B. NURMOHAMED an adult moslem and resident of Dar es Salaam DO HEREBY AFFIRM and state as follows:-

1. That I am the Principal Officer of the first applicant and the second applicant herein hence I am conversant with the facts of this application.
2. That the applicants filed a suit against the respondent in the district court of Temeke vide civil case No. 38 of 2010.
3. That the respondent applied in the High Court Commercial Division for revision whereby the proceedings and orders of the district court were quashed and set aside.
4. That the applicants were aggrieved by the decision of the High Court commercial division and filed an appeal to this Court vide Civil Appeal No. 81 of 2011, which was struck out on the 20th June 2016.

5. That I have been informed by Mr. Jethro Turyamwisiga, Advocate that, the effect of striking out an appeal is that, the notice of appeal is also struck out together with the record.
6. That I was advised by the same Advocate that, the remedy is to apply for extension of time to file notice of appeal and application for leave to appeal lead (sic) in the Court.
7. That I heeded to the advice of the said Advocate and made an application to the High Court vide Commercial Application No. 124 of 2016.
8. That the application mentioned in paragraph 7 above was dismissed on the 05th October 2016.
9. That, I have been advised by Advocate Mr. Jethro Turyamwesiga to make an application for extension of time in this Court as the High Court dismissed the application for extension of time.

It is an open secret that, throughout the paragraphs of the affidavit above quoted, there is none, which has attempted to give reasons as to why the appeal intended to be lodged after extension of time has been granted was not filed within the time prescribed by the law. The implication which one gets is that, there was basically no reason for the delay. In his submission to amplify the application, learned counsel Mr. Jethro Turyamwesiga did inform the Court that, the delay was due to oversight relying on the holding of this Court in **Fortunatus Masha Vs William**

Shija (*supra*). Nevertheless the ground purported to be backed up by the cited authority, is nowhere to be seen in the affidavit of the applicant. Since such ground was just raised from the bar, the authority that has been cited turns to be of no assistance at all.

On the basis of the foregoing, it is my holding that, there has been no any material placed before the Court to move it to exercise its discretionary powers as provided under the provision of Rule 10 of the Court of Appeal Rules. As it was for the High Court, the application by the applicants for extension of time is rejected and it is accordingly dismissed for want of merit. The respondent will have its costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 01 day of June 2017.

S.S. MWANGESI
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL