IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 498/16 OF 2016

YARA TANZANIA LIMITED .....APPLICANT

VERSUS

DB SHAPRIYA & CO. LIMITED .....RESPONDENT

[Application for Extension of time to file an application for Revision arising from the Decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Songoro, J.)

Dated the 19th day of May, 2016
in
Misc. Comm. Case No. 55 of 2016 and
Comm. Case No. 37 of 2016

RULING

5th May & 12th June, 2017

MWAMBEGELE, J.A.:

This is a ruling in respect of an application for extension of time within which to institute an application for revision of the decision of the Commercial Division of the High Court of Tanzania (Songoro, J.) in Miscellaneous Commercial Case No. 55 of 2016 and Commercial Case No. 37 of 2016. The application has been made by Notice of Motion taken out under the provisions of rules 10 and 4 (1) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth "the Rules"). It is supported by an affidavit duly sworn by Nuhu

Mkumbukwa; an advocate of the High Court and courts subordinate thereto save for the Primary Courts, and resisted by an affidavit in reply duly sworn by Dipackumar Kotak; principal officer of the respondent company.

The application was argued before me on 05.05.2017 during which the applicant and respondent had, respectively, the services of Mr. Nuhu Mkumbukwa and Mr. Roman Masumbuko; both learned counsel. Both learned counsel had earlier filed their respective written submissions as required by the Rules and which, at the hearing, they sought to adopt together with the affidavit and affidavit in reply they earlier filed insupport and resistance of the application respectively.

The learned counsel for the applicant had the following six grounds basing on which he thought the applicant was entitled for the grant of the orders sought:

1. *That he applicant has been honestly and diligently prosecuting the application for Revision; Civil Application No. 211 of 2016 between the parties herein which was struck out on a technicality – non-citation of the enabling provision of the law;*

2. *That there are conflicting decisions of the Honourable Court regarding what provisions are sufficient for moving the Honourable Court to exercise revisional jurisdiction, and the applicant had relied on one of them;*
3. *That the ruling and order that are sought to be revised are legally problematic;*
4. *That there are serious irregularities and points in the ruling and order of the High Court Commercial Division meriting the intervention of this Honourable Court;*
5. *That the applicant has been diligent in lodging this application timely since the striking out of Civil Application No. 211 of 2016 between the parties herein; and*
6. *That the respondent will not be prejudiced by the granting of this application.*

Let me state at his juncture that at the hearing, the learned counsel for the applicant amplified all the six grounds. So did the learned counsel for the respondent in reply. However, for reasons that will become apparent in this ruling, I think the application can be disposed of on only the first ground.

Amplifying the first ground in the written submissions in support of the application earlier filed, which ground has been reproduced above together with others, the learned counsel for the applicant submitted that the applicant is applying for extension of time in the present application because the previous application was struck out by the Court on account of a technicality. Since the applicant was not late in filing that application and since the applicant was very fast to file the present application after the previous one was struck out, he submitted, that is good reason for extension of time. To buttress this proposition, the learned counsel cited two decisions of the Court of Appeal of Kenya; **Savings and Loan Kenya Ltd v. Onyacha Bwomonte**, Civil Appeal (Application) No. 70 of 2004 and **Belinda Murai & others v. Amos Wainaina**, Civil Application No. 9 of 1978 in which it was underlined that the court should keep the doors of justice open as they (the courts) exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. The learned counsel also cited the case of **Fortunatus Masha v. William Shija and Another** [1997] TLR 154; the decision of the Court, in which it was held that a party cannot be penalized twice having penalized already by striking out an incompetent appeal.

Responding on the first ground, Mr. Masumbuko for the respondent argued that in an application for extension of time, what is relevant is to show good cause. He stated that in applications of this nature it behoves the applicant to show four points: the length of delay, the reasons for delay, whether there is an arguable point for extension to be granted and the degree of prejudice to the respondent. In the instant application, the learned counsel submitted, the applicant has not shown good cause for the delay. He submitted that what is apparent from the applicant's submissions is sheer negligence and ignorance of the law which have never been good reasons for extension of time. He cited **Wankira Bethel Mbise v. Kauka Foya**, Civil Application No. 63 of 1999 (unreported) in which it was held that ignorance of the law is neither a defence nor does it constitute sufficient reason for extending time.

Adverting to the case of **Fortunatus Masha**, the learned counsel stated that the case is not applicable in the situation at hand. He argued that the applicant has failed to interpret correctly the ruling of the Court which struck out the application for extension of time. Failure to cite an enabling provision to move the court is not just a

technicality but rather exhibits ignorance of the law which goes to the root of the application, he argued.

As for the length of delay, the learned counsel submitted that it is one year now since the decision was made on 19.05.2016. The learned counsel cited **Village chairman Igembya Village and others v. Bundala Maganga**, Civil Application No. 5 of 2014 (unreported) in which it was said at page 2 of the typed judgment that an incompetent application is similar to a non-existent application and therefore cannot be adjourned. In Civil Application No. 211 of 2016 which was struck out, he stated, the Court ruled out that failure to cite section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 was an incurable irregularity and accordingly struck out the application. That is to say, having been struck out, Civil Application No. 211 of 2016 is as good as it has never existed, he argued.

Rejoining, Mr. Mkumbukwa, reiterated the contents of the affidavit in support of the Notice of Motion to the effect that the applicant is not seeking to challenge the decision which struck out the application for revision. He insisted that the applicant acted promptly in taking requisite steps as the decision complained of was given on

19.05.2016 and the application for revision was filed on 28.07.2016 and struck out on 23.11.2016 and the present application was filed on 06.12.2016.

Referring to the **Igembya** case, the learned counsel stated that the case is irrelevant to the present instant because it was dealing with an application for adjournment. With regard to the previous application for revision which was struck out, he stated that they are not seeking to correct it but that the striking out was not caused by the applicant's negligence.

I have considered the learned arguments by the learned counsel for the parties in respect of the first point of objection. I must confess that both learned counsel have tenaciously presented their arguments. I commend the learned counsel for the good work well done. For this, the learned counsel have made the task on my part easy. In the circumstances, the determination of the first point will not detain me.

The learned counsel for the parties are at one that the decision of the Court striking out Civil Application No. 211 of 2016 for non-citation of the enabling provision of the law was made on 23.11.2016. Immediately thereafter; that is, on 06.12.2016, the applicant filed in

this Court the present application. That was in less than a fortnight and in my view prompt enough within which the applicant had taken steps to rectify her mistake. The speed employed suggests that the applicant was serious in seeking to challenge by way of revision the decision of the High Court.

The period of delay between date of the decision of the High Court on 19.05.2016 sought to be challenged by way of revision and 23.11.2016 when it was struck out for being incompetent, can conveniently be termed as a "technical delay" within the meaning of the decision of the Court in **Fortunatus Masha** (supra); a case relied upon by the applicant. In another case of **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017 (unreported), the Court had an opportunity to grapple with an akin situation and granted extension of time basing on the reasoning in **Fortunatus Masha**. In **Fortunatus Masha**, in allowing an extension, the Court observed at p. 155:

> ***"... a distinction should be made between cases involving real or actual delays and those like the present one***

which only involve what can be called technical delays *in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it.* ***The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.*** *In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*

[Emphasis supplied].

Reverting to the case at hand, in the light of **Fortunatus Masha**, the filing of Civil Application No. 211 of 2016 without citing enabling provisions of the law, having been duly penalized by striking it out, cannot be used yet again to determine the timeousness of applying for filing the fresh application. Mr. Masumbuko is of the view that in the light of the **Igembya** case, an incompetent application is similar to a non-existent application and therefore, he seems to argue, it should not be considered in the application at hand. I may agree but not without qualification. As rightly stated by Mr. Mkumbukwa, the **Igembya** case was dealing with a prayer for an adjournment of an incompetent application and the Court was such a view that it could not adjourn the incompetent application. The observation by the Court to the effect that "an incompetent application is similar to a non-existent application" would be reasonably applicable in the situation obtaining in that application in which a prayer was being made to adjourn an incompetent application. That is the reason why the Court said:

> *"An incompetent application is similar to a non-existent application, and cannot therefore be adjourned".*

It is not in dispute that the present application is not one for adjournment. It is an application for enlargement of time anchored on the reason that the applicant delayed to file the application for revision because she was diligently prosecuting Civil Application No. 211 of 2016 which was struck out. In my considered view, the application which was struck out, may be an incompetent one and perhaps non-existent within the context of the **Igembya** case but can be used to grant an extension of time like in the present instant. The applicant was prompt enough to make amends after the previous application was struck out; within just a fortnight.

In the circumstances, I am satisfied that the applicant has brought to the fore good cause why she should be granted an enlargement of time within which to once again lodge an application for revision. As this ground only disposes of the application, I will not determine the rest of the grounds. I would grant the application basing on the first ground only.

For the avoidance of doubt, I am aware that **Fortunatus Masha**, the reasoning of which has made the present application succeed, was about failure to file an appeal in time because a party was

prosecuting another appeal which was struck out on technicalities. However, I am positive that that principle holds true to applications as well and can thus be applicable also to the present situation.

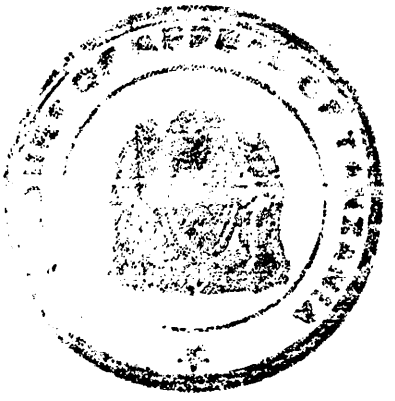
In the end of it all, the present application is allowed. The applicant is to file the intended application for revision within sixty (60) days of pronouncement of this ruling. The circumstances of this case are such that there should be made no order as to costs. I therefore make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 12th day of June, 2017.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL.