IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPLICATION NO. 132 OF 2015

MABIBO BEER WINES & SPIRITS LIMITED ..... APPLICANT

VERSUS

1. FAIR COMPETITION COMMISSION
2. LUCAS PIUS MALLYA
3. S. H. AMON ENTERPRISES CO. LTD. ..... RESPONDENTS

4. TANZANIA REVENUE AUTHORITY ..... NECESSARY PARTY

(Application for revision of the Order of the Fair Competition Tribunal at Dar es Salaam)

(Z. K. Mruke, Chairperson, N. L. Tenga, O. Kyauke, Members,)

dated the 24th day of April, 2015
in
Tribunal Application No. 8 of 2013 (and the **proceedings Pending in Tribunal Taxation Reference No. 8 of 2014)**

.....

RULING OF THE COURT

9th & 25th October, 2018

MUSSA, J.A.:

The applicant seeks to revise an order of the Fair Competition Tribunal dated the 24th April, 2015 in Tribunal Application No. 8 of 2013 as well as the pending proceedings in Tribunal Taxation Reference No. 8 of 2014.

The application is by way of a Notice of Motion which is predicated on section 4 (3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Edition 2002 of the laws. Additionally, the applicant seeks to rely on Rules 2, 4 (1), 4 (2) (a), 4 (2) (b), 4 (2) (c), 48, 49 (1), 65 (1), 65 (2) and 65 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application has been resisted by the first and second respondent upon several sets of preliminary points of objection but, relevant to the situation at hand, is the one filed by the second respondent on the 28th November, 2016 which alleges that the Notice of Motion was belatedly filed.

When the application was placed before us for hearing, the applicant was represented by Mr. Respicious Didace, learned Advocate, whereas the first respondent had the services of a consortium of learned Advocates, namely, Dr. Deo Nangela, Mr. Lighton Mhesa, Ms. Celina Mloge and Mr. David Mawi. The second respondent entered appearance through Mr. James Bwana, also learned Advocate, whereas the necessary party had the services of Ms. Consolata Andrew.

The third respondent defaulted appearance despite being duly served on the 28th August, 2018. We note that when the application was earlier called on for hearing on the 22nd November, 2016 the same situation

recurred and the Court ordered the hearing to proceed *ex parte* as against the third respondent. We, accordingly, took the same stance and proceeded with the hearing.

At the very outset, Mr. Didace rose to concede to the preliminary objection which was raised by the second respondent to the effect that the application is time barred. Having conceded that much, Mr. Didace beckoned upon us to strike out the application. But, as a gesture of good will in the wake of the concession, the learned counsel for the applicant prayed that there should be no order as to costs.

In response, Dr. Nangela for the first respondent welcomed the concession but pressed to be awarded costs. Mr. Bwana for the second respondent took a similar stance but, in addition, he prayed that the application should not be struck out as prayed by Mr. Didace: It should rather be dismissed and, to fortify his contention, the learned counsel for the second respondent referred to us to the decision of the Court in the unreported Civil Application No. 3 "A" of 2006 – **Dominic Nkya and Another vs Cecelia Mvungi and Two Others**. As regards the necessary party, Ms. Andrew had no objection to the concession, without more.

In a brief rejoinder with respect to the controversy raised by Mr. Bwana that the application should be dismissed rather than being struck out, Mr. Didace sought to distinguish the case at hand with the referred decision of **Dominic Nkya** for the reason that the two cases were founded upon different facts. In the situation at hand, he said, the delay in lodging the application was for only one day, whereas in **Dominic Nkya** the delay was for ten months.

Addressing the bone of contention, granted that in **Dominic Nkya** the Court dismissed the application on account that it was time barred but, in arriving at the decision, the Court drew inspiration from two previous decisions, namely, **Halais Pro-Chemie vs Wella** [1996] TLR 269 and Civil Application No. 42 of 2000 – **NBC Holding Corporation and Another vs Agricultural & Industrial Lubricant Supplies Ltd and Two Others** (unreported). It is, however, noteworthy that in both cases, the ultimate orders of the Court were to strike out and not to dismiss the respective applications before it. More particularly, in **Halais Pro-Chemie** the Court was privy to the following remark:-

> *"By any standard, a 10 months' delay is too late.*
>
> *Obviously, this application is not properly before us*

and ***we are bound to strike out with costs and we so order.***" [Emphasis supplied].

In NBC Holding Corporation the Court, in similar vein, concluded thus:-

> *"In the result and for the reasons we have given, we sustain the preliminary objection and* ***strike out the application with costs.***" [Emphasis supplied].

If such were the ultimate orders of the Court from which the Court in **Dominic Nkya** drew inspiration, we are compelled into the remark that the dismissal order therein could have well been an inadvertent slip. We say so because, upon numerous decisions, the law is well settled as to when it comes to the Court taking a decision whether to dismiss or strike out a matter before it. In the old case of **Ngoni Matengo Cooperative Marketing Union Ltd vs Alimahomed Osman** [1959] EA 577, the defunct Court of Appeal for Eastern Africa made the following statement of principle:-

> *"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in*

each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."

The foregoing statement of principle has consistently been followed in a number of decisions, just to mention a few: Civil Application No. 3 of 2010 – **Cyprian Mamboleo Hizza vs Eva Kioso and Another**; Civil Application No. 20 of 2007 – **NIC and Another vs Shengena Ltd**; Civil Appeal No. 27 of 2003 - **Hashim Madongo and Two Others vs The Minister for Industry and Trade and Two Others**; Civil Appeal No. 18 of 2008 – **Abdallah Hassan vs Vodacom (T);** and Civil Application No. 1 of 2005 – **Thomas Kirumbuyo vs TTCL Ltd** (All unreported).

We should pause here to observe, albeit enpassant, that it will turn differently if the relevant legislation or Rules of the Court imposes, on the Court a duty or discretion to give a dismissal order with respect to a matter which has not been heard on the merits. A case in point is, for instance,

Rule 63 (1) of the Rules which gives the Court a discretion to dismiss an application in the wake of the non-appearance of the applicant.

All said and done, we sustain the unopposed preliminary objection to the effect that the application is time barred. For the reasons we have belabored to canvass, we, accordingly, strike out the application but, since the sustained preliminary objection was raised by the second respondent alone, it is finally ordered that the application is struck out with costs to the second respondent.

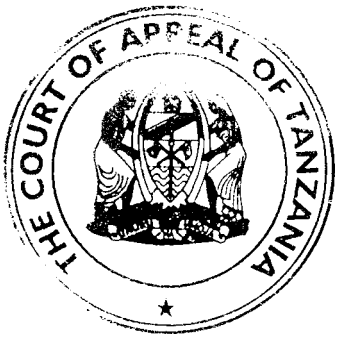
DATED at **DAR ES SALAAM** this 23rd day of October, 2018

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL