IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CIVIL APPLICATION NO. 342/01 OF 2017

BHARYA ENGINEERING & CONTRACTING CO. LTD ..... APPLICANT

VERSUS

HAMOUD AHMED NASSOR ..... RESPONDENT

(Application for Extension of Time to Lodge a Notice of Appeal from the Judgment of the High Court at Tabora)

(Mgonya, J.)

Dated the 15th day of September, 2015
in
Civil Case No. 4 of 2013

RULING

24th August & 10th September, 2018

MWAMBEGELE, J.A.:

The applicant Bharya Engineering and Contracting Co. Ltd, by a notice of motion, applies for extension of time within which to lodge a notice of appeal against the decision of the High Court handed down on 15.09.2015 in Civil Case No. 4 of 2013. The notice of motion has been taken out under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules). It is supported by an affidavit duly sworn by Sarbjit Singh Bharya, Managing

Director of the applicant. The same has been resisted by the respondent in a duly affirmed affidavit in reply of Hamoud Ahmed Nassor, the respondent.

At this stage, I find it apt to narrate a brief factual background to the present application. It is this: The applicant lost in a suit instituted by the respondent against her in the High Court vide Civil Case No. 4 of 2013. Dissatisfied, she timely lodged a notice of appeal and later Civil Appeal No. 148 of 2015 was instituted in this Court. That appeal; that is, Civil Appeal No. 148 of 2015 was struck out on 17.10.2016 for the reason that the notice of appeal thereof contained different names compared to those appearing in the judgment. Undeterred, the applicant filed in the High Court Miscellaneous Civil Case Application No. 20 of 2016 seeking enlargement of time within which to file a fresh notice of appeal against Civil Case No. 4 of 2013. The High Court (Mallaba, J.) dismissed the application on account that no sufficient reasons were shown to warrant the court exercise its discretion to grant the extension sought.

Still determined, the applicant lodged in the Court Civil Application No. 70/11 of 2017 to exercise his right of a second bite of the cherry.

However, that application was struck out by a ruling of the Court pronounced on 19.07.2017 on a successful preliminary objection raised by the respondent. Still undaunted, the applicant lodged the present application on 03.08.2018 to, once again, try another bite at the cherry.

When the application was called on for hearing on 24.08.2018 the applicant appeared through Mr. Michael Mwambeta, learned counsel. Mr. Mugaya Kaitila Mtaki and Ms. Monica Mlaho, both learned counsel, joined forces to represent the respondent. Both parties had earlier filed written submissions and reply written submissions, as the case may be, for and against the application which they sought to adopt at the hearing.

Mr. Mwambeta for the applicant, having adopted the notice of motion, the affidavit supporting it as well as the written submissions earlier filed in its support as part of the oral submissions for the applicant, submitted that when Civil Case No. 4 of 2013 was decided against the applicant, she timely lodged a notice of appeal and later Civil Appeal No. 148 of 2015 was lodged in the Court of Appeal but was struck out on 17.10.2016 as a result of a successful preliminary objection raised by the respondent to the effect that the relevant notice of appeal contained

different names compared to those appearing in the judgment and its flanking decree. After the striking out efforts were made, through an application in the High Court and a second bite in this Court, to file a fresh notice of appeal but those efforts went unrewarded. The learned counsel went on to submit that from the date of striking out the application on a second bite by the Court on 19.07.2017, the applicant has not shown any inaction or inordinate delay. He was therefore entitled to an enlargement of time as was the case in **Benedict Mumello v. Bank of Tanzania** [2006] 1 EA 227, he submitted. The learned counsel thus submitted that the applicant has shown good cause for the Court to be pleased to grant the extension sought.

In addition to the foregoing, the learned counsel submitted that there were poinst of law of public importance for consideration by the Court. He stated that the points of law involved were; one, whether the plaintiff and defendant were parties to any contract within the meaning of the Law of Contract Act, and two, whether there was any document to that effect. For this point as well, Mr. Mwambeta prayed that the extension sought should be granted.

Responding, the respondent, also having adopted the affidavit in reply and the reply written submissions earlier filed, argued with some force that the applicant has not brought to the fore good cause to warrant the Court exercise its discretion to grant the extension sought. All the applicant has exhibited, he submitted, is negligence which does not amount to good cause under rule 10 of the Rules. He cited **William Shija and another v. Fortunatus Masha** [1997] TLR 213, **Maneno Mengi Limited and 3 others v. Said Nyamachumbe & the Registrar of Companies** [2004] TLR 319 and **Mwananchi Engineering and Contracting Corporation v. Manna Investment (Pty) Limited & another**, Civil Application No. 5 of 2006 to buttress the proposition that mistake or negligence of a counsel cannot amount to good cause under rule 10 of the Rules.

The learned counsel for the respondent also cited **Maulid Hussein v. Abdallah Juma**, Civil Application No. 20 of 1998 (unreported) to buttress the point that inordinate delay caused by negligence is inexcusable. He also cited **Tanzania Bureau of Standards v. Anitha Kaveva Maro**, Civil Application No. 60/18 of 2017 (unreported) in which **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007

(unreported) was cited for the proposition that delay of even a single day must be accounted for. The learned counsel thus submitted that the application be dismissed with costs.

Rejoining, Mr. Mwambeta stated that the applicant has never been negligent. If anything, he argued, the applicant has been diligently prosecuting the case after the first notice of appeal was filed timeously and after Civil Appeal No. 148 of 2015 was struck out by the Court. He thus reiterated the prayer to have the present application allowed.

I have dispassionately read and considered the applicant's written submissions as well as the authorities cited therein. The Court is asked to exercise its discretionary power to extend time within which to file a notice of appeal against Civil Case No. 4 of 2013. The power to enlarge time within to perform a certain act is bestowed upon the Court by the provisions of rule 10 of the Rules under which the present application has been taken. This rule reads:

> *"The Court may,* ***upon good cause shown,*** *extend the time limited by these Rules or by any 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 a reference to that time as so extended."* [Emphasis added].

As shown in the bold expression in the section above, the Court will only exercise its discretion in favour of an applicant only upon showing good cause for the delay. What amounts to good cause cannot be laid by any hard and fast rules but is dependent upon the facts obtaining in each particular case. As we stated in **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (unreported); the case relied upon by the respondent, each case will be decided on its own merits taking into consideration the questions, *inter alia*, whether the application for extension of time has been brought promptly, whether every day of delay has been explained away as well as whether there was diligence on the part of the applicant – see also: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Tanga Cement**

Company Limited v. Jumanne D. Massanga and another, Civil Application No. 6 of 2001, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Yusufu Same and another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (all unreported decisions of this Court).

In the case at hand, the applicant has stated that she has been diligently prosecuting her case ever since Civil Appeal No. 148 of 2015 was struck out on 17.10.2016. On the other hand, the respondent is of the view that nothing but negligence comes out clearly in the applicant's reasons for the delay to act timely. Respectfully, having subjected to serious scrutiny the affidavit supporting the notice of motion as well as the submissions of the applicant, I have not been able to see anywhere showing negligence on the part of the applicant. What is apparent is the applicant's diligence to prosecute her case. When Civil Appeal No. 148 of 2015 was struck out on 17.10.2016, the applicant started the process afresh by lodging in the High Court Miscellaneous Civil Case Application No. 20 of 2016 seeking enlargement of time within which to file a fresh notice of appeal. That application was not successful; it was dismissed on 06.12.2016 for failure to show good cause for the delay. Consequent upon

that, the applicant lodged in the Court Civil Application No. 70/11 of 2017 as a second bite but as bad luck would have it, that application was also struck out by the Court on 19.07.2017 following a successful preliminary objection raised by the respondent. Undeterred, the applicant lodged the present application on 03.08.2018 in another bid for the second bite at the cherry. The fact that Civil Appeal No. 148 of 2015 in this Court was struck out after a successful preliminary objection, and the fact that Miscellaneous Civil Case Application No. 20 of 2016 for extension of time to file the notice of appeal was refused for failure to bring good cause for the delay and the further fact that Civil Application No. 70/11 of 2017 was struck out by the Court on a successful preliminary objection do not, in my view, provide sufficient proof that the applicant was negligent. To agree with the respondent on this accusation over the applicant will be tantamount to lay down a very broad principle to the detriment of the applicant and justice.

It cannot be gainsaid that the first notice of appeal was timely filed. As the striking out of Civil Appeal No. 148 of 2015 on 17.10.2016 annihilated the notice of appeal - see: **National Microfinance Bank PLC v. Oddo Odilo Mbunda**, Civil Appeal No 91 of 2016 and **Dhow Mercantile (EA) Ltd & 2 Others v. Registrar of Companies 4**

Others, Civil Appeal No. 56 of 2005 (both unreported), the applicant had to start the process of appeal afresh by applying for extension of time to file a fresh notice of appeal. Thus the period of delay between 17.10.2016 when Civil Appeal No. 148 of 2015 was struck out and 19.07.2017 when the Court struck out Civil Application No. 70/11 of 2017 prior to the lodgment of the present application is explicable and excusable. This is what is termed as a technical delay within the meaning of a plethora of authorities of the Court – see: **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 and **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.,** Civil Reference No. 18 of 2006, **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017, **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016, **Vodacom Foundation** (supra) and **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17 of 2017 (all unreported), to mention but a few. In **Rwegasira** (supra), for instance, the full Court quoted the holding and subscribed to the position taken by a single Justice of the Court in **Fortunatus Masha** (supra), the holding, I think, merits recitation here:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

As an extension to the following, I find it irresistible to quote what the Court stated at p. 155 in the case - **Fortunatus Masha** (supra) - in allowing an extension, the Court observed:

"... 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 penalized 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].

I subscribe to the view taken by the Court in the above cases. The applicant in the present application, having been duly penalized by striking

out Civil Appeal No. 148 of 2015 and dismissing Miscellaneous Civil Case Application No. 20 of 2016 as well as striking out Civil Application No. 148 of 2015, the same cannot be used yet again to determine the timeousness of applying for filing the fresh notice of appeal in a bid to file a fresh appeal. That was a technical delay on the part of the applicant which constitutes good cause under rule 10 of the Rules. That is to say, I take it that the applicant has explained to my satisfaction the period of delay between 17.10.2016 when Civil Appeal No. 148 of 2015 was struck out and 19.07.2017 when the Court struck out Civil Application No. 70/11 of 2017 prior to the lodgment of the present application.

Having said the above, I would have granted the application and rested in peace if it were not for the applicant's failure to explain away the delay that followed thereafter. No scintilla of explanation has been brought to the fore in respect of the delay regarding the period between 19.07.2017 when the Court struck out Civil Application No. 70/11 of 2017 and the lodgment of the present application on 03.08.2017. This period of about fifteen days has not been accounted for. There is not an iota of explanation in the notice of motion, in the affidavit supporting it, in the written submissions filed in support of the application; not even in the oral

arguments before me. As rightly submitted by the learned counsel for the respondent, in applications of this nature, each and every day of delay must be accounted for. In **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), the Court had an occasion to underline the dire need for litigants who seek to extend time in taking actions within which certain steps could be taken, to account for each and every day of delay in the following terms:

> *"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".*

In the case at hand, as already alluded to above, the applicant has failed to explain away the delay of about fifteen days from 19.07.2017 when the Court struck out Civil Application No. 70/11 of 2017 to the lodgment of the present application.

For the avoidance of doubt, the argument by the learned counsel for the applicant to the effect that there are points of law of public importance calling for determination of the Court, will not change the verdict. The

points of law referred to by the learned counsel for the applicant are not ones of public importance. Upon a plethora of authorities of the Court, it is only a point of law which is of sufficient significance as to warrant the attention of this Court that will sail through as good cause under rule 10 of the rules. I am reinforced in this stance by the case of **Lyamuya Construction Co. Ltd. v. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported). In that case it was articulated:

> *"In VALAMBHIA's case (supra) this Court held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time. But in that case, the errors of the law, were clear on the face of the record."*

And the Court went on:

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in*

VALAMBIA's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The court there emphasized that ***such point of law, must be that 'of sufficient importance'*** *and I would add that* ***it must also be apparent on the face of the record,*** *such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."* [Emphasis supplied].

[See also: **MZA RTC Trading Company Limited v. Export Trading Company Limited,** Civil Application No. 12 of 2015 (unreported)].

The above said, the points whether the plaintiff and defendant were parties to any contract within the meaning of the Law of Contract Act and whether there was any document to that effect are not points of law of public interest. Thus, it is apparent that there is no point of law of public

importance that would need the attention of the Court worth granting an extension of time.

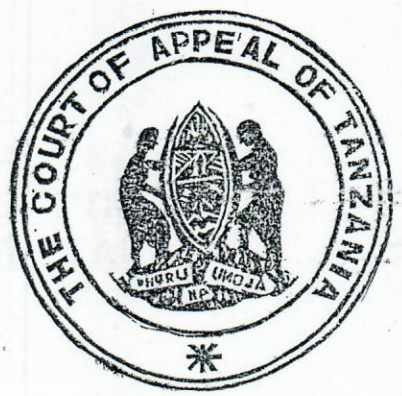
In the upshot, it is my well-considered view that the applicant has not shown good cause for the delay to warrant the Court exercise its discretion to grant the extension sought. Consequently, I find this application wanting in merit and dismiss it with costs.

Order accordingly.

DATED at **TABORA** this 7th day of September, 2018.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



H. S. Mushi
DEPUTY REGISTRAR
COURT OF APPEAL (T