IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 9 OF 2017

TROPICAL AIR (TZ) LIMITED ---------- APPLICANT

VERSUS

GODSON ELIONA MOSHI ----------RESPONDENT

(Application from the ruling and order of the High Court of Tanzania at Arusha)

(Dr. Opiyo, J.)

Dated the 21st day of March, 2017

In

Miscellaneous Civil Application No. 106 of 2016

RULING

12th March & 2nd May, 2018

MWANGESI, J.A.:

The application at hand is by way of notice of motion taken under the provisions of Rules 10, 47, 48 (1) and (2) and 49 (1) and (3), all of the Court of Appeal Rules, 2009 **(the Rules),** and section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (**the AJA**) whereby, the applicant is seeking the indulgence of the court for enlargement of time within which, she can lodge a notice of appeal and application for leave to appeal against the decision of the High Court in Civil Appeal No. 48 of

2015. The notice of motion is supported by an affidavit that was sworn by Mr. John Faustine Materu, who happens to be the learned advocate engaged to represent the applicant in this application. Additionally, the learned counsel did file a written submission in compliance with the provisions of Rule 106 (1) of **the Rules**, to amplify the notice of motion.

On the other hand, the application has strongly been resisted by the respondent in the affidavit in reply, that was sworn by Mr. Asubuhi John Yoyo, who is the respondent's advocate. The learned counsel did as well file a written submission in reply to the written submission lodged by his learned friend on behalf of the applicant. This was done in terms of the provisions of Rule 106 (8) of **the Rules**.

When the application was called on for hearing before me on the 12th day of March, 2018, Mr. John Materu entered appearance for the applicant, whereas, his learned friend Mr. Asubuhi Yoyo appeared for the respondent. In his oral submission to amplify the notice of motion, the learned counsel for the applicant adopted the affidavit in support of the notice of motion, as well as the written submission which he had lodged earlier, to form part

and parcel of his submission. He argued that, the application is for extension of time and that, it was made subsequent to the dismissal of the previous one, which was made to the High that is, Miscellaneous Civil Application No. 106 of 2016, of which its dismissal was made on the 21st day of March, 2017. The basis of the application according to the learned counsel is mainly twofold namely, **first**, unawareness of the applicant to the existence of the decision intended to be impugned. And, **secondly**, illegality of the decision sought to be challenged on appeal.

Expounding the first ground, Mr. Materu submitted that, the applicant delayed to lodge his appeal to challenge the decision of the High Court in Civil Appeal No. 48 of 2015, which was delivered on the 9th February, 2016 because, he was not aware of the date on which the judgment was delivered. And, this was so from the fact that, he was not served with a notice of the date of delivery of the judgment. And, by the time the applicant became aware of the judgment which was in late May, 2016, the learned counsel went on to submit, he was already beaten by time, for the period prescribed by the law to appeal had expired. Thenceforth, the applicant diligently took the necessary steps to pursue his appeal, by

applying for extension of time in the High Court, only to be dismissed for want of merit.

Placing reliance on the decision of the Court in the case of **Royal Insurance Tanzania Limited Vs Strand Hotel Limited,** Civil Application No. 111 of 2009 (unreported), Mr. Materu invited me to find that, from the time when the applicant became aware of the existence of the decision in Civil Appeal No. 48 of 2015, he diligently made follow ups in Court to ensure that, his intended appeal is prosecuted. He therefore, urged the Court to grant the sought reliefs by enlarging time, so that the applicant lodges her appeal to get determined on merits.

In regard to the second ground, it has been submitted by the learned counsel for the applicant that, the decision sought to be impugned in the appeal is tainted with illegality. He challenged the decision of the Learned Judge of the first appellate Court in holding that, the ex parte judgment of the resident magistrate's court in Civil Case No. 100 of 2013, was legally sound while it was delivered without according the applicant the right to be heard and thereby, contravening the cherished stipulation under Article 13 of the Constitutional of the United Republic of Tanzania 1977, as amended

from time to time. This was as much as the judgment was given without neither notifying the applicant on the date of hearing the suit ex parte, nor the date on when the ex parte judgment was delivered.

Mr. Materu moved further and averred that, it has been the practice of the Court that, wherever there is illegality in the decision sought to be challenged, enlargement of time has to be given to pave way for the appellate Court, to address on the complained of illegality. In fortification to this contention, the learned counsel referred me to the decisions in the cases of **Principal Secretary, Ministry of Defence and National Service Vs Devram Valambhia** [1992] TLR 185, and **the Attorney General Vs Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014 (unreported).

As already hinted above, the application by the applicant was strenuously resisted by the respondent. In his oral submission in rebuttal to what was submitted by his learned friend, Mr. Yoyo did as well adopt the affidavit in reply, and the written submission in reply to the written submission that was lodged by his learned friend, to form part of his

submission. His response was made seriatim to what was submitted by his learned friend.

In regard to the first ground that, the applicant was not aware of the existence of the judgment of the High Court, which he desires to impugn till at the end of May, 2016, the learned counsel for the respondent termed it as blatant lies and misrepresentation. These lies he went on to submit, are evidenced by the fact that, the applicant was represented in taxation proceedings arising from the very judgment and decree quite early before the alleged end of May, 2016. To back up his contention, Mr. Yoyo referred me to a copy of summons addressed to the applicant dated the 12th April, 2016, which required the applicant to attend to the proceedings in the bill of costs, which was to be conducted on the 28th April, 2016. In compliance with the summons, the applicant was represented by one Omari. In that regard, the learned counsel for the respondent urged the Court to disregard the contention by the applicant that, he was unaware of the existence of the judgment because it is unfounded and misleading. Such lies did outright disentitle his learned friend from claiming that, his client was diligent in pursuing her appeal.

The learned counsel for the respondent remarked that, even though the power to grant extension of time solely lies on the discretion of the Court, he was quick to add that, the practice of the Court has been to ensure that, such discretion is exercised judiciously. In support of this contention, he did place reliance on the holding of the Court in the case of **Regional Manager Tanroads Kagera Vs Ruaha Concrete Company Limited,** Civil Application No.96 of 2007 (unreported).

And, on the claim by his learned friend that, there is an issue of illegality in the judgment of the High Court desired to be challenged on appeal, the view of Mr. Yoyo was that, the assertion is mere misconception on the part of his learned friend. In his considered view, such an issue did not arise at all because both lower courts did act according to the requirement of law. That being the case, even the authorities which were cited by his learned friend in reliance to his contention were of no assistance as they are distinguishable from the circumstances of the matter under discussion. Both the trial court and the first appellate Court were compelled by the circumstances pertaining to the matter that was before them, to do what they did. Mr. Yoyo concluded his submission by urging

the Court to dismiss the application with the contempt it deserves with costs.

The issue that stands for my deliberation and determination in light of what has been submitted by both counsel above, is whether or not the application by the applicant, which has been brought as a second bite is tenable. To begin with, as conceded by both learned counsel, the grant or refusal of an application for enlargement of time, is entirely the discretion of the Court. See: **Mumello Vs Bank of Tanzania** [2006] TLR 227 as well as **Kalunga and Company Advocates Vs National Bank of Commerce** [2006] TLR 235.

Nonetheless, in the exercise of its discretion, the Court has to consider as to whether or not, a good cause has been shown by the applicant as stipulated under the provisions of Rule 10 of **the Rules** thus:

> *"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 supplied]

The provisions of Rule 10 of **the Rules** above, has loudly been amplified by a plethora of case law amongst which, is the case of **Regional Manager Tanroads Kagera Vs Ruaha concrete Company Limited** (supra), which defined as to what was meant by **sufficient cause** in the repealed Act, which is the equivalent of **good cause** in the current Rules. A further move was made in **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), wherein, the factors to be looked at in considering good cause were listed to include:

"1. *The applicant must account for all the period of delay.*

2. *The delay should not be inordinate.*

3. *The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

4. *If the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

With the foregoing named factors in mind, I now turn to consider the grounds which have been raised by the applicant in the instant application, as to whether or not, they constitute good cause. It has been argued on behalf of the applicant in the first ground that, he delayed to lodge his appeal because he was not aware of the existence of the judgment desired to be impugned. According to the affidavit sworn by Mr. Materu, the applicant became aware of the judgment in late May, 2016. Such contention has on the other hand been strongly countered by the respondent placing reliance on the summons dated the 12th April, 2016 that was served to the applicant to attend taxation of the decree arising from the very suit. And secondly, the attendance of the applicant in the taxation proceedings which was conducted by the Deputy Registrar on the 28th April, 2016 through one Omari.

Upon intently considering the submissions from both sides and the annexes to the affidavit and the affidavit in reply, I noted that, there was no proof of service to the applicant in respect of the summons dated the 12th April, 2016. And, with regard to the attendance of one Omari on behalf of the applicant on the proceedings conducted by the Deputy Registrar on the 28th April, 2016, it is as well doubtful. Besides the name of Omari being indicated in the quorum of the Court to be in attendance on behalf of the applicant, his capacity was never disclosed, and also, nothing was heard from him during the proceeding. Under the circumstances, it cannot be vouched in no uncertain terms that, the applicant was aware of the taxation proceedings. Nonetheless, I am convinced on balance of probabilities that, by early April, 2016, the respondent was already aware of the existence of the judgment that was delivered on the 9th February, 2016 even though, he was as well not notified by the Court about the same.

In line with the foregoing position therefore, while it may be correct as averred by the learned counsel for the applicant that, his client became aware of the existence of the judgment of the Court in late May, 2016, I

am reluctant to buy his idea that, his client had been diligent in pursuing his matter. Being the one who had presented the appeal at the High Court, by any parity of reasoning, one would have expected to find him at the forefront in making a follow up of its judgment. One is left to wonder as to how, he could have remained idle for more than three months waiting for notification from the High Court regarding the outcome of his appeal. If indeed that was the situation, he cannot avail himself to the third factor expressed in the case of **Lyamuya Construction Company Limited** (supra), of showing diligence and not apathy, negligent or sloppiness. To that end, the first ground is found to be of no assistance to the applicant.

In regard to the second ground, the learned counsel for the applicant argued that, there is a question of illegality involved in the decision desired to be challenged. In expounding this ground Mr. Materu contested the decision of the High Court which held that, the ex parte judgment which was handed down by the resident magistrate's court was legally proper, while the applicant was not accorded a right to be heard. He thus urged the Court to grant the sought enlargement of time, so that such an issue can be deliberated in the appeal. When a situation of the like arose in the

case of **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the Liquidator of Tri - Telecommunication (T) Vs Citibank Tanzania Limited,** Consolidated References No. 6, 7 and 8 of 2006 (unreported), which had a similar scenario, the Court held that:

> *"It is settled law that, a claim of illegality of the challenged decision, constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) regardless of whether or not a reasonable explanation has been given by the applicant under the Rule to account for the delay."*

In yet another case of **Selina Chibago Vs Finhas Chibago,** Civil Application No. 182 of 2007, which had an almost similar scenario to the situation under discussion in that, the enlargement of time sought by the applicant was to enable her to lodge an application for leave to appeal, the Court still reiterated its stance held above by stating that:

> *"This Court therefore, has a duty to ascertain this point of law and if established, to take the appropriate measures to rectify the situation. This will be possible if the Court will grant extension of*

time to the applicant to lodge an application for leave to appeal out of time, so as to pursue her appeal. We take this to be a point of law of great public importance to be decided by this Court whatever its consequences."

What appears to be apparent from the second holding of the Court above is the fact that, the contention by the applicant that, there is a point of law involved in the decision sought to be impugned on appeal, need not be established in the application for extension of time. It only suffices for the applicant to indicate such a contention in the intended grounds of appeal. The duty to determine the alleged illegality lies with the Court in the course of considering the appeal. In that regard therefore, the submission by the learned counsel for the respondent in the application at hand that, there is no any point of law involved in the application under discussion, was prematurely made to the application for extension of time.

To that end, the allegation by the applicant that, there is an issue of illegality involved in the decision of the High Court, which they intend to challenge on appeal as inferred from the third ground of the proposed memorandum of appeal, where it has been averred that, the decision of

the first appellate Judge was legally incorrect, unfair and unjustifiable, suffices to constitute good cause. I would therefore, grant enlargement of time which has been sought by the applicant that, the notice of appeal and application for leave to appeal, have to be lodged within a period of twenty-one days from the date of this ruling. The costs to be in the cause.

Order accordingly.

DATED at **ARUSHA** this 03rd day of April, 2018.

S. S. MWANGESI
JUSTICE OF APPEAL

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

A.K. RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL