IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MZIRAY, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 469/01 OF 2017

CRDB BANK LTD ..... APPLICANT

VERSUS

ISSACK B. MWAMASIKA
REGISTERED TRUSTEES OF DAR ES SALAAM
INTERNATIONAL SCHOOL ..... RESPONDENTS
EDBP & GD CONSTRUCTION COMPANY LTD

(Application for leave to introduce an additional ground of appeal in Civil Appeal No. 139 of 2017 from the decision of the High Court at Dar es Salaam)

(Mkasimongwa, J.)

dated the 19th day of January, 2017
in
Civil Case No. 79 of 2012

RULING OF THE COURT

14th February & 6th April, 2018

MWAMBEGELE, J.A.:

By a Notice of Motion taken out under Rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules), the applicant applies for leave to introduce an additional ground of appeal to the Memorandum of Appeal filed in Civil Appeal No. 139 of 2017 which seeks to challenge the decision of the High Court (Mkasimongwa, J.) in Civil Case No. 79 of 2012. The application is supported by an affidavit deposed by Richard Karumuna Rweyongeza, one of the applicant's counsel

and resisted by an affidavit in reply deposed by Martin D. Matunda, one of the respondent's counsel. The application did not have a smooth sail, for, ahead of the hearing, it is hurdled by a two-point preliminary objection lodged by the respondents. The preliminary objection, notice of which was lodged on 15.11.2017, reads:

> *"1. That the application is time barred; and*
>
> *2. That the ground of appeal sought to be added by the applicant being against the admissibility of exhibits which were admitted with the consent of the appellant is not automatic as it requires leave of the Court."*

When the application was placed before us for hearing on 14.02.2018 the Court blessed the consent of the parties to argue the preliminary objection as well as the substantive application. It was agreed that should the preliminary objection succeed, that would be the end of the application. However, if the preliminary objection fails, the Court would proceed to decide the substantive application on its merits. That was the agreement between two teams of renowned advocates for the parties - Dr. Alex Nguluma and Messrs. Richard Karumuna Rweyongeza and Dilip Kesaria on the one hand; the learned counsel who appeared for the applicant and Prof. Gamaliel Mgongo Fimbo and Messrs. Mpaya Kamara and Martin Matunda on the other; the learned counsel who appeared for the respondents.

On the preliminary objection, the respondents' advocates, speaking through Mr. Kamara, sought to drop the second point at the very outset. The Court thus marked the second point of the preliminary objection as abandoned. On the remaining point, the learned counsel was very brief in its argument but to the point. He argued that the application was time barred because the Memorandum of Appeal to which leave is sought to be introduced a new ground was filed on 10.07.2017 and the present application was filed on 10.10.2017, some 92 days thereafter. Relying on **Bank of Tanzania v. Said A. Marinda**, Civil Reference No. 30 of 2014; an unreported decision of the Court which set the timescale of 60 days limitation in respect of applications for which there is no specific timescale provided, Mr. Kamara submitted that the present application ought to have been filed within sixty (60) days of the date of lodging the Memorandum of Appeal sought to be added a new ground. There being no order of extension of time by the Court, the learned counsel argued, the present application was time barred and should be struck out with costs. The respondent prayed the Court to certify costs for two advocates.

Responding, the applicant's advocates, speaking through Mr. Rweyongeza, were of the view that the remaining point of objection had no merit and, like the second point, should have been abandoned as well. Mr. Rweyongeza had no qualms with the sixty days limitation in applications like the present, where no specific timescale is provided for by the law. The only question which posed a tug of war between the parties, he argued, was the date from which the sixty days should be reckoned. It

was his firm view that the sixty days should not be reckoned from the date the Memorandum of Appeal was filed, but, rather, from the date the written submissions in support of the appeal were filed. This proposition was predicated upon the provisions of Rule 106 (2) (b) of the Rules which stipulate:

> *"(2) Every such written submission shall contain –*
>
> *(a) N/A*
>
> *(b) ... Equally, if the appellant or applicant,* ***intends to apply for leave to introduce an additional ground not taken in the memorandum of appeal or notice of motion, this shall be indicated in the submission;***
> *..."*
> [Emphasis added].

It is the applicant's firm view that the application which was lodged on 10.10.2017 was filed well within time, the sixty days limitation being reckoned from 07.09.2017; the date of lodgment of the written submissions supporting the appeal.

Giving Mr. Rweyongeza a helping hand, Mr. Kesaria rose to submit that the preliminary objection was intended to confuse the Court because what the applicant was asking in the impugned application was the discretion of the Court which, according to **Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd** [1969] 1 EA 696 at 701, does not attract a preliminary objection. It was his view that the respondents' preliminary objection was meant to confuse the Court and

escalated costs. He thus prayed that the Court should not dismiss the application so as to avail itself with the opportunity to revise the decision of the High Court under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA).

The learned counsel for the applicant thus beckoned the Court to overrule the preliminary objection with costs and certify for two advocates.

Rejoining Mr. Kamara reiterated his submissions in chief.

Having summarized the contending arguments of the learned counsel for the parties, we should now be in a position to confront the point of contention between the parties. But before we make a determination on this pertinent point, we find it appropriate to tackle one problem which cropped up in Mr. Kesaria's submissions. This is the argument to the effect that the application, which seeks the exercise of discretionary powers of the Court, is not amenable to a preliminary objection.

This point will not detain us at all. We are aware Mr. Kesaria pegged this proposition on the following observation in **Mukisa** (supra):

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection.*

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. ***It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.*** *The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."*

[Emphasis supplied].

Having given due consideration to Mr. Kesaria's submission, we are decidedly of the opinion that the preliminary objection before us is not pegged upon a matter or question of the Court's discretion. Since the respondents' preliminary objection is to the effect that the present quest for amendment is time barred, it is evident that, basing on settled jurisprudence of the Court, the Court would not have discretion other than striking out the application should it sustain the preliminary objection – see: **Almas Iddie Mwinyi v. National Bank of Commerce** [2001] TLR 83, **The Minister for Labour and Youth Development and Shirika la Usafiri DSM v. Gaspar Swai & 67 Others** [2003] TLR 239 and **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**, Civil Appeal No. 34 of 2010 (unreported), to mention but a few. Moreover, we cannot exercise our power of revision, let alone exercise it under

section 4 (3) of the AJA, when the additional ground sought to be added is made a ground of appeal. Mr. Kesaria's submission is therefore without merit and its flanking prayer is refused.

We now revert to the merits of the preliminary objection. We wish to state at this juncture that the lusty arguments of both sides are very attractive at first sight. In a nutshell, while the learned counsel for the respondents aver that an application for leave to amend the memorandum of appeal must be filed within sixty days of filing the memorandum of appeal sought to be amended, the learned counsel for the applicant agree with the sixty days limitation but that those days start to count from the date of filing written submissions. Both arguments are very attractive. However, for reasons that we will endeavour to show hereinbelow, we are disinclined to agree with both sides.

We wish to start our determination by reproducing the provisions of Rule 113 (1) of the Rules under which the impugned application has been made. The sub-rule reads:

> *"No party shall, without the leave of the Court, argue that the decision of the High Court or tribunal, should be reversed or varied* ***except on a ground specified in the memorandum of appeal*** *or in a notice of cross-appeal, or in support of the decision of the High Court or tribunal*

on any ground not relied on by that court or specified in a notice given under Rule 94 or Rule 100."

[Emphasis ours].

But we think the above provision under which the present notice of motion has been taken cannot be read in isolation. We think the provisions of rule 111 are equally important in applications of this nature. It reads:

"The Court may ***at any time allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal,*** *as the case may be, or any other part of the record of appeal, on such terms as it thinks fit."*

[Emphasis supplied].

We have deliberately supplied emphasis to phrase "at any time allow amendment of any notice of appeal or notice of cross-appeal or memorandum of appeal". As rightly put by Mr. Kamara for the respondents and readily conceded by Mr. Rweyongeza for the applicant, and to our minds rightly so, it is no gainsaying that the Rules are silent on the time limit within which some applications have to be lodged in Court. In such situations, that *lacuna* is filled by bringing into aid "the sixty days rule". That is the position we took in **Marinda** (supra). Relying on our previous decision of **Suleiman Ali Nyamalegi and 2 others v. Mwanza Engineering Works Ltd**, Civil Application No. 9 of 2002 (unreported), we stated in **Marinda**

(supra); the decision on which the respondents' counsel have placed heavy reliance, that:

> *"... when there is no specific time-scale imposed in any application, the sixty days should come into aid to fill the lacuna"*

But we are aware of our other decisions on the point which made our decision in **Marinda** clearer. In **Dimension Data Solutions v. WiA Group Limited & 2 others**, Civil Application No. 218 of 2016 (unreported) a single justice of the Court underlined that an application for extension of time does not have any time limit within which it should be lodged and that the sixty days rule was not meant to apply to applications for extension of time. The Court stated:

> *"... the limitation period of 60 days could not have been meant to apply to applications for extension of time ... Fixing a time limit would have the effect of fettering the discretion of the court. It is for this reason that although in the Rules, the period of limitation for filing applications for revision and review have now been prescribed, no period was set for filing an application for extension of time ..."*

The foregoing stance was followed and restated by another single justice of the Court in an unreported decision of **Tanzania Rent a Car Limited v. Peter Kimuhu**, Civil Application No. 226/01 of 2017 in the foregoing terms:

> *"Having been inspired by the above comment the Court [in **Dimension Data Solutions**] went on to state that the limitation period of 60 days could not have been meant to apply to applications for extension of time.*
>
> *In the circumstances, I am increasingly of the firm view that there is no specific time limit set within which an application for extension of time should be filed. This is not only in accordance with the long established practice built on Court's landmark decisions but also accords to logic that so as to expedite dispensation of justice there is need to avoid, whenever possible as is the case herein, multiplicity of applications. This is indeed the spirit of the law as it categorically states that **the Court may, upon good cause shown, extend the time ... whether before or after the expiration of that time and whether before or after the doing of the act.**"*
>
> [Underlining ours].

As already stated above, the learned counsel for the parties are at one that the present application should have been filed within sixty days, the time limit not having been provided for by the Rules. The only point on which the learned counsel for the parties have locked horns, is the time from which the sixty days should be reckoned.

We find difficulties in agreeing with them. We think, on the dictates of Rule 111 of the Rules as well as case law, injecting limitation to an application of this nature will defeat the purpose for which the Rule was meant to serve. We think what was at the back of the mind of the drafter of the Rules was that application of this nature, could be made **at any time** before the matter is decided. That is why, we think, the words used in Rule 111 of the Rules, under which the Court is bestowed with power to allow parties to amend, *inter alia*, any memorandum of appeal, are **"at any time".**

We take inspiration from the interpretation injected to the provisions of Order VI Rule 17 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter referred to as the CPC). For ease of reference, we take the liberty to reproduce the rule as under:

> *"17. Amendment of pleadings*
>
> *The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

The catch words used in the rule are "at any stage of proceedings" and such words have been interpreted to mean amendments should be freely allowed – see: **Waljee's (Uganda) Ltd v. Ramji Punjabhai Bugerere Tea Estates Ltd**, [1971]

1 EA 188 (and the authorities cited therein); the decision of the High Court of Uganda to which we fully subscribe as depicting the correct position of the law. Applications of this nature can be made at any time before delivery of judgment – see: **James Kabalo Mapalala v. British Broadcasting Corporation** [2004] TLR 143.

We are not aware of any authority which prescribes limitation in an application under Order VI Rule 17 of the CPC, just as we are not aware of any prescribing limitation to application for filing an application for leave to add an additional ground of appeal.

In the foregoing premises, we are of the considered view that the words "any application" used in **Marinda** (supra) were not meant to cover **each and every application.** We say so because there are applications which do not have limitation in their lodgment. We have in our minds applications for extension of time – see: **Dimension Data Solutions** and **Tanzania Rent a Car Limited** (supra). That is, on the authorities cited above, we do not think an application for extension of time is encapsulated in the words "any application" in **Marinda** (supra), just as we do for an application for seeking leave to introduce an additional ground of appeal, like the present application.

However, we feel obliged to haste the remark that although the right to file an application under Rule 111 is available at any time, that right will cease to exist when

an adversary files a notice of preliminary objection challenging the legal sufficiency of the document that would otherwise be sought to be amended. That is so because, entertaining an application after a preliminary objection will, as already alluded to above, have the effect of defeating the preliminary objection, a course we have discouraged as discussed above.

In **Jaluma** (supra), we had occasion to interpret the meaning and import of the words "at any time" as appearing in Rule 107 (1) of the Rules and observed as follows:

> *"... the expression 'at any time' in Rule 107 (1) means at any time before objection is taken. Upon objection being taken, time is up ..."*
> [As quoted in **Jared Nyakila & another v. Shanti Shah & 2 others**, Civil Appeal No. 87 of 2012 (unreported)].

We borrow a leaf from the interpretation in **Jaluma** and state that the expression "at any time" in Rule 111 means at any time before objection is taken against the amendment sought.

We find it irresistible to associate ourselves with a cry from the bar to the effect that the interpretational position taken by the Court renders the phrase "any time" in Rule 111 of the Rules, meaningless – accessed through https://www.scribd.com/doc/88551567/MALIMA-Beatus-Gugai-Litigation-and-the-Administration-of-Justice-in-Tanzania-A-Review-of-the-Court-of-Appeal-Rules-2009-TLS-CLE-April-2012. We think, however, the position is fairly settled that a preliminary

objection should not be preempted just as we think we should not thwart the expression "at any time" in the Rule by injection into it a limitation of sixty days; a position which we think ameliorates the cry by the bar.

The foregoing culminates into the finding that the respondents' and applicant's argument to the effect that the sixty days limitation should be brought into aid in this application for amendment of the memorandum of appeal is refused for the simple reason that such an application is brought at any time.

As good luck would have it, the Court has had an occasion to deal with the point in other cases. A single justice of the Court was confronted with an akin situation in an unreported decision of **Suna Mwinyimkuu v. Mohamed Seleman**, Civil Application No. 15 of 2016. In that case, the applicant applied for extension of time within which to lodge an application for amendment of the memorandum of appeal. The Court dismissed the application because an application for amendment of a memorandum of appeal has no time limit within which to be lodged. The Court stated at p. 4 of the Ruling:

> *"... there is no time limit within which one can seek to amend the Memorandum of Appeal. Since, the time to amend the Memorandum of Appeal is not limited, Rule 10 is not applicable ... since what is sought by the applicant can be remedied under Rule 111 of the Rules, to accede to the applicant's prayer to entertain this application for*

extension of time to amend the memorandum of appeal, is to condone to the abuse of court process."

The Court proceeded to strike out the misconceived application. We subscribe to the position the Court took in the **Mwinyimkuu** case (supra). An application for leave to file an additional ground has no time limit within which it should be made. It is subject only to any preliminary objection which can be raised against the shortcoming intended to be remedied by the amendment.

At the end of it all, we wish to recapitulate, on the preliminary objection, that an application for amendment of a memorandum of appeal has no time limit within which it should be lodged in the Court. The sixty days rule which applies to applications whose time limit has not been provided for by the Rules, like in applications for extension of time, does not apply to applications for amendment of memoranda of appeal to introduce an additional ground of appeal. This kind of an application can be filed at any time before the judgment. It can even be raised during the hearing of the appeal. It is only subject to any preliminary objection being raised against the ailment intended to be cured by the amendment.

For the reasons stated, the preliminary point of objection is overruled. As the applicant supported the sixty days limitation on which the preliminary objection has been determined, we think justice will triumph if we make no order as to costs. We order that each party shall bear its own costs in the preliminary objection.

Having found and held that the preliminary objection is wanting in merit and having overruled it, we now advert to merits of the substantive application. As stated at the very first para of this Ruling, the applicant seeks the indulgence of the Court to allow her amend the Memorandum of Appeal by adding a new ground of appeal. Both the applicant and respondents filed written submissions and reply submissions which they sought to adopt along with the affidavit in support and affidavit in reply, respectively. As can be gleaned in the affidavit and written submissions in support of the application, the applicant intends to add one ground to the memorandum of appeal filed in respect of Civil Appeal No. 137 of 2017 now pending in Court. The proposed additional ground reads:

> *"That, the trial judge crossly (sic) misdirected himself in law in failing to comply with the mandatory provisions of the law in admitting exhibits."*

The applicant states in the Notice of Motion to the effect that the foregoing is a very important ground which was not included in memorandum of appeal earlier filed. In the premises, the applicant argues, the provisions of Order XIII Rule 4 of the CPC were offended against. The applicant adds that no fees were paid for exhibits before they were admitted in evidence which also offended the law.

The respondents oppose in the affidavit in reply and reply submissions that the applicant should not be allowed to add the intended additional ground of appeal because; one, the exhibits complained of were tendered and admitted in evidence with

the consent of the appellant, two, the admitted exhibits were clearly endorsed and signed, three, they were paid for as annextures and as exhibits, four, they were admitted in evidence before GN No. 187 of 2015 became operational, five, the impugned decision did not decide on improper marking of exhibits or nonpayment of court fees upon exhibits and that the exhibits were exhaustively and unreservedly used in examination, cross-examination and re-examination of witnesses and therefore the error, if any, did not occasion any failure of justice and did not affect the merits of the decision.

Rejoining, the applicant's counsel speaking through Mr. Kesaria submitted that the respondents have not submitted any useful material to oppose the application. What is important for determination at this juncture, he submitted, is whether or not, in the affidavit, there have been raised good grounds to justify the addition sought and not whether or not the intended ground has merit.

We have subjected the learned arguments from both sides to a proper consideration they deserve. We feel pressed to state that we could not hold our surprises to the trained minds from both sides to burn a lot of fuel on the merits or demerits of the intended ground to be added. As rightly put by counsel for the applicant at the oral hearing, what is relevant at the present stage is whether the applicant has shown grounds to the satisfaction of the Court to allow her add the intended ground to the memorandum of appeal earlier filed and not whether or not

the intended ground to be added has or has no merits. Despite what was said at the oral hearing, learned counsel for the applicant have also fallen into the trap by addressing in the written submissions in support of the application, the merits of the intended ground. If anything, both parties have burnt a lot of fuel in addressing the merits or demerits of the ground to be added instead of the merits of the application. This, we think is patently wrong. As rightly put by Mr. Rweyongeza, the parties should, in the meanwhile, load their guns and wait to fire at an opportune moment.

Authorities on the point have it that applications of this nature should freely be allowed provided that an adverse party is not prejudiced – see: **the Senator of the University of Dar es Salaam v. Edmund Mwasaga & 4 others**, Civil Application No. 49 of 2008, **K. S. F. Kisombe v. Tanzania Harbours Authority**, Civil Application No. 12 of 2007, **Wilfred Onyango Nganyi &. Others v. Inspector General of Police &. Others**, Criminal Application No. 1 of 2009 and **National Development Corporation v. Equador Limited**, Civil Application No. 466/01 of 2017 (all unreported). In **Edmund Mwasaga** (supra), we allowed the applicant to file an amended copy of the drawn order. In **Kisombe** (supra), we allowed the applicant to amend the record by removing the name of the first respondent Tanzania Harbours Authority and substituting therefor with another name; Tanzania Ports Authority. In **Wilfred Onyango Nhanyi** (supra), we allowed the applicant to amend the memorandum of appeal by including the relief prayer to the following effect:

*"**REASONS WHEREOF:** The Appellants pray that their appeal be allowed and they be set at liberty"*

The foregoing prayer was allegedly inadvertently omitted in the original memorandum of appeal. As already stated, we allowed the applicant to include the prayer.

Of particular importance to the present discussion is the **Equador** case (supra) whose facts fall in all fours with the facts of the present application in that the applicant had a similar complaint; that the exhibits at the trial in the High Court were tendered and admitted in contravention of Order XIII Rule 4 of the CPC and that no fees were paid before the exhibit were admitted in evidence. Like in the present, it was Mr. Rweyongeza who represented the applicant in that application. We granted the prayer and ordered that the applicant introduced the additional ground of appeal as framed and as prayed. We fully subscribe to the position we took in the above cases.

The ground intended to be added is, in our view, very crucial to the determination of the appeal. We do not think the respondents will be prejudiced if the applicant is allowed to add the ground. We would grant the application. The applicant is allowed to introduce a new ground to the memorandum of appeal filed in Civil Appeal No. 139 of 2017 pending in the Court. That ground should read:

"That, the trial judge grossly misdirected himself in law in failing to comply with the mandatory provisions of the law in admitting exhibits."

In terms of Rule 20 (1) of the Rules, an amended version of the memorandum of appeal should be lodged within a fortnight of the pronouncement of this Ruling. Costs of the present application shall abide by the outcome of the appeal. In that event, we certify for three advocates for whichever party that emerges a winner.

Order accordingly.

DATED at **DAR ES SALAAM** this 28th day of March, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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