

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUSSA, J. A., MWARIJA, J. A., And MWANGESI, J. A.)

CIVIL APPLICATION NO. 35 OF 2015

M/S TANZANIA COFFEE BOARD ----- APPLICANT

VERSUS

M/S ROMBO MILLERS LIMITED ----- RESPONDENT

**(Application for Reference from the decision of the Court of Appeal of
Tanzania at Arusha)**

(JUMA, J.A.)

dated the 3rd October, 2015

in

Civil Application No. 13 of 2015

RULING OF THE COURT

28th Feb. & 6th Mar. 2018

MWANGESI, J. A.:

This is a reference arising from the decision a single Justice of the Court of Appeal (Juma, J. A., as he then was), in Civil Application No. 13 of 2015, who declined to extend time within which the applicant herein, could serve the respondent with a Notice of Appeal arising from the judgment and decree of the High Court of Tanzania (Commercial Division) at Arusha, in Commercial Case No. 11 of 2011 that was handed down on the 31st October, 2014.

The application before the single Justice of Appeal was made under the provisions of Rule 10 of the Court of Appeal Rules, 2009 (hereinafter referred to as **the Rules**). It was supported by two affidavits, the first one was sworn by Mr. Meinrad Menino D'Souza an advocate for the applicant, and the second one was sworn by Engerasia A. Mongi also an advocate and Senior Legal Officer of the applicant.

On hearing the submissions from learned counsel for either side that is, Mr. Meinrad Menino D'Souza for the applicant and Mr. Elvaison Erasmo Maro for the respondent, the learned Justice of Appeal declined to grant the sought extension of time upon the ground that, the applicant had failed to account for each of the delayed days.

In this reference, which has been taken under Rule 62 (1) (b) of **The Rules**, the applicant is moving us to reverse the finding of the learned single Justice on the following grounds namely:

- 1. That, the Honourable Justice of Appeal erred in law and fact and did not confine to the issues and matters raised in the pleadings, the applicant's affidavit and respondent's affidavit in reply.*

2. *That, the learned Honourable Justice of Appeal did not consider that, the respondent will not be prejudiced in any way or occasion any failure of justice in allowing re-service of the Notice of Appeal.*
3. *That, the Honourable Justice of Appeal did not evaluate that, the applicant raised serious triable issues in the intended appeal that has great chances of success.*
4. *That, the Honourable Justice of Appeal did not exercise his discretion judiciously.*
5. *That, the Honourable Justice of Appeal did not consider that, the respondent did not raise any preliminary objection or make any prior application to strike out the Notice of Appeal for any reason whatsoever.*
6. *That, the Honourable Justice of Appeal failed to appreciate the dictum of the Full Bench of the Court in **Tanzania Ports Authority Vs M/s Pembe Flour Mills**, Civil Application No. 49 of 2009.*

On the 28th February, 2018, when the application was called on for hearing, the applicant had the services of Mr. Meinrad D'Souza Learned counsel, whereas, the respondent was being advocated for by Mr. Elvaison Maro learned counsel. In his submission before us in support of the

application for extension of time, Mr. D'Souza argued that, the delay which the applicant had to account for, was of the fifteen days computed from the 13th November, 2014 when the notice of appeal was lodged by the applicant, to the 11th December, 2014, when the notice of appeal signed by the Deputy Registrar was returned to it. The account for such delay according to Mr. D'Souza is contained in the affidavits in support of the Notice of Motion, and in particular, paragraph six of the affidavit of Engerasia Mongi, where it is indicated that, the delay was not occasioned by the fault of the applicant but of the Court.

Since what was contained in the affidavits was never challenged by an affidavit in reply by the respondent, it was the averment of Mr. D'Souza that, such information ought to have been believed by the learned single Justice of Appeal and thereby, grant the sought extension of time. In support to his stance, the learned counsel did place reliance on the unreported cases of **Tanzania Sewing Machines Company Vs Njake Enterprises**, Civil Application No. 56 of 2007, and **Henry Leonard Maeda and Another Vs John Anael Mongi and Another**, Civil Application No. 31 of 2013.

Mr. D'Souza learned counsel, submitted further to the effect that, the Honourable single Justice of Appeal did not exercise his discretion as conferred under Rule 10 of **the Rules** judiciously, when he failed to consider the triable issues which were raised by the applicant in its motion and the chances of success of the appeal.

The Court was further impressed by the learned counsel for the applicant on the diligence exhibited by the applicant that, immediately after the notice of appeal signed by the Deputy Registrar was returned to him on the 11th December, 2014, expediently did serve it to the respondent on the following day on the 12th December, 2014. He implored us to look on the reasons for the delay, which have sufficiently been accounted for by the applicant and the time for delay that is, only fifteen days, which was not inordinate. After all, the learned counsel concluded, the respondent will not be prejudiced in any way if the extension of time will be granted to the applicant.

There was an attempt by the learned counsel for the applicant to add another ground allegedly founded on the illegality of the decision of the High Court sought to be impugned in the intended appeal. He was however, prevented by the Court from doing so for the reason that, such

ground was never raised in the application before a single Justice of Appeal and hence was a new thing to the decision, which has been referred to us in this application.

Relying on a number of decisions including, **Mabi Auctioneers (T) Limited Vs NBC Holding Corporation**, Civil Application No. 158 of 2005, **Ahamed Abdi Farrah Guled Vs Co-operative and Rural Development Bank**, Civil Application No. 1 of 1998, and **Victoria Real Estate Development Limited Vs Tanzania Investment Bank and Three Others**, Civil Application No. 225 of 2014 (all unreported), Mr. D'Souza urged us to grant the extension of time to effect service of the notice of appeal to the respondent for the sake of doing justice to both parties.

In response to what was submitted by his learned friend, Mr. Maro on behalf of the respondent was of the view that, the Honourable single Judge was justified in declining to grant the application for extension of time that was sought by the applicant, because he miserably failed to account for the delay. With regard to the information contained in paragraph 6 of the affidavit sworn by Engerasia, he submitted that, the same could not be believed because it was mere hearsay. It was

categorically resisted in paragraph 4 of his affidavit, which he did swear in reply to the affidavit of Engerasia Mongi.

Under the circumstances, Mr. Maro went on to submit, it would have been expected to find an affidavit of a third party from an official of the Court, who furnished the information to the deponent. To bolster his averment, the learned counsel referred us to the decisions which were also cited before the single Justice of the Court of Appeal of **Said Salim Bakhresa Vs Ally Ngume** [1997] TLR 312, and two unreported cases of **Kigoma Alli Malima Vs Abbas Yusuf Mwingamno**, Civil Application No. 5 of 1997, and **Bushiri Hassan Vs Latifa Mashayo**, Civil Application No. 3 of 2007.

Responding to the contention by his learned friend that, the applicant was diligent enough in lodging the application for extension of time, Mr. Maro learned counsel was of the opinion that, such contention lacks basis on the fact that, apart from failing to account for the fifteen days' delay, before the notice of appeal was returned to it after being signed by the Deputy Registrar, the applicant did also fail to account for the other one hundred and eleven days, from when it obtained the notice of appeal from the Court, to when it lodged the application for extension of time.

Mr. Maro concluded his submission by arguing that, while it is correct as argued by his learned friend that, the discretion of the Court under Rule 10 of **the Rules** to extend time or not to an applicant, has to be applied judiciously, he wondered as to how such right, could be demanded by a person, who sleeps over his right for more than hundred days with no explanation at all. He thus asked us to dismiss the application with costs.

In light of what was submitted by the learned counsel from either side, the basic issue that stands for our deliberation and determination, which is whether or not, the applicant managed to give **good cause**, to move the Court to extend the period sought to effect service of her notice of appeal to the respondent. We have bolded the clause **good cause** because, it is the catchword under Rule 10 of the Rules, which 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 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]

This Court has from a number of its decided cases, formulated principles that have to be established by the applicant in showing good cause for the delay. See for instance, the case of **Lyamuya Construction Company Limited Vs Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), where the principles were stated to be:

- 1. That, 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 illegality of the decision sought to be challenged.*

In deciding as to whether or not the applicant herein managed to establish **good cause**, we shall put into test the above named principles, starting with the first one that is, as to whether or not, the applicant did account for each of the delayed days. The account which was given by Mr.

D'Souza learned counsel on behalf of the applicant in the instant application is on fifteen days only wherein, the blame has been directed at the Court as per paragraph 6 of the affidavit of Engerasia Mongi. We shall revert to the merits of the affidavit later, for the moment, we wish to look at the period from when the applicant obtained the signed notice of appeal, to when she lodged the application for extension of time.

There has been no explanation whatsoever from the applicant as to what she was doing between the 11th day of December, 2014, when she obtained the notice of appeal signed by the Deputy Registrar from the Court, to the 2nd day of April, 2015, when the notice of motion for extension of time was lodged, a period of about 111 days. The silence on the part of the applicant is an indication that, she was not that much diligent as her learned counsel tried to impress before us. It is pertinent at this juncture to reiterate what was held earlier by the Court in **Bushiri Hassan Vs Latifa Mashayo** (supra) thus:

"Delay even of 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."

With regard to the account given on the first fifteen days, reliance was placed on paragraph 6 of the affidavit of Engerasia Mongi, which reads:

*"That, the delay in being supplied with the notice of appeal was occasioned by no fault of the applicants. And that, on or about the 17th November, 2014, I **was informed** that the said notice of appeal was accidentally misplaced during the annual file stock taking and preparation of the file returns/reports."*

[Emphasis supplied]

We have bolded the words "I was informed" above, to illustrate that, the information being relayed therein, was not from the personal knowledge of Engerasia Mongi, but from someone else. In the circumstance, we are inclined to buy the averment of Mr. Maro learned counsel that, such information was hearsay, which could not be believed. The failure by the learned counsel for the applicant to look for an affidavit of the court official, who informed Engerasia Mongi about the misplacement of the notice of appeal at the court registry and thereby, occasioning the delay as he contended, was fatal. The situation is quite similar to what happened in **Kigoma Alli Malima Vs Alli Yusuf Mwingamno** (supra), where the Court held that:

"The failure by the learned counsel for the applicant to annex the affidavit of the messenger of the court to supplement his contention that, service had not been effected to his client was fatal."

It is evident therefore in light of what has been traversed above that, in the application at hand, the applicant failed to sufficiently account for neither the delay in the first 15 days before he was supplied with the signed notice of appeal, nor for the subsequent delay of about 111 days before he lodged the application for extension of time, and thereby, making a total delay of about 126 days. There can be no gainsaying in holding that, such delay was inordinate. In the same breath, with such situation, it cannot be said that, the applicant was diligent in prosecuting his application. The same therefore, disentitles the applicant from availing herself to any of the first to the third principles listed in **Lyamuya Construction Company Limited** (supra).

The remaining fourth principle, could only be availed by the applicant, if there could be an issue of illegality in the decision sought to be appealed against. Nonetheless, as earlier hinted above, Mr. D'Souza learned counsel, was prevented by the Court from addressing us on the

issue of illegality in the decision of the High Court for the reason that, the same did not feature in the decision, which is the subject of this reference.

That said, it is our considered view that, the applicant in the application at hand, failed to account for the delay in lodging her application for extension of time and that, the Honourable single Justice of Appeal was justified in holding so. To that end, we dismiss the reference with costs.

DATED at **ARUSHA** this 5th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



E.Y. Mkwizu
E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL