

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 536/16 OF 2018

MR. ROBERT SCHELTENS APPLICANT

VERSUS

**1. MR. BALDEV NORATARAM VARMA }
2. MR. VIKAS VARMA }RESPONDENTS
3. NATIONAL FURNISHERS LIMITED }**

(Application for extension of time to lodge Notice of Appeal against the
Judgment and Decree of the High Court of Tanzania
(Commercial Division) at Dar es Salaam)

(Massati, J.)

dated the 26th day of November, 2007

in

Commercial Case No. 26 of 2004

RULING

13th May & 18th June, 2019

LEVIRA, J.A.:

By Notice of Motion made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) the applicant, Mr. Robert Scheltens applies for extension of time within which to lodge Notice of Appeal to the Court out of time. The application is supported by an affidavit duly deposed by Gaudiosus Ishengoma, counsel for the applicant. The Notice of Motion contains three grounds as follows:

1. That the necessity of filling this application for extension of time to lodge Notice of Appeal has arisen out of striking out of the applicant's Appeal (Civil Appeal No. 82 of 2010) filed on time on technical grounds.
2. That the decision subject matter of the intended appeal is problematic, and in fact null and void.
3. That the first application in the High Court for extension of time to lodge Notice of Appeal (Commercial Application No. 189 of 2018) has been rejected on the reasons stated herein.

A brief background of this matter according to the supporting affidavit is that, the applicant and another person who is not a party to this application were sued by the respondents in the High Court, Commercial Division through Commercial Case No. 26 of 2004. The respondents won the case. Aggrieved, the applicant and his co-defendant (currently deceased) timely lodged a Notice of Appeal on 29th November, 2007 to the Court. On 27th February, 2008 they timely lodged Record of Appeal and the appeal was registered as Civil Appeal No. 24 of 2008. However, on 25th August, 2010 the said appeal was struck out for being incompetent.

The applicant managed to lodge another appeal on 4th November, 2010 which was registered as Civil Appeal No. 82 of 2010. Hearing of the said appeal did not take place immediately as one of the applicants passed away as indicated above until 29th June, 2018 when the Court struck out the deceased's appeal with an order to proceed with applicants appeal. Just like the first appeal, the second appeal also was struck out for being incompetent on 24th July, 2018.

Tirelessly, on 7th August, 2018 the applicant lodged to the High Court (Commercial Division) Application No. 189 of 2018 seeking extension of time to appeal out of time. Unfortunately, the said application was dismissed on 22nd November, 2018 on ground that the applicant's advocate was negligent and hence, the current application for extension of time to lodge Notice of Appeal out of time.

At the hearing of the application the applicant was represented by Mr. Gaudiosus Ishengoma, learned advocate. Ms. Claudia Nestory, learned advocate with instructions to proceed held brief for Mr. James Bwana, learned advocate for the respondent.

Mr. Ishengoma submitted in support of the application to the effect that, this application comes before me as a second bite as the applicant had unsuccessfully lodged the same application to the High Court

(Commercial Division). He adopted the contents of the supporting affidavit and the written submission as part of his submission.

He went on submitting that under Rule 83(2) of the Rules, the time within which to lodge a Notice of Appeal is thirty days from the date of the impugned decision, otherwise the applicant has to account for the delay. He added that, the applicant is also required to show good cause for the Court to extend time to lodge an appeal if the said appeal is time barred.

Elaborating on the reasons for delay, Mr. Ishengoma asserted that initially the applicant unsuccessfully managed to lodge two appeals which were struck out by the Court due to some discoveries made by the Court suo motto. In addition, he argued that from 26th November, 2008 when the impugned decision was delivered to date, the applicant has been diligently pursuing his rights in courts. He amplified that, the kind of delay experienced by the applicant is a technical one quite different from a normal delay. To buttress his assertion, he cited the case of **Fortunatus Masha v. William Shija & Another** [1997] T.L.R. 154, where it was held that:

"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 matter 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."

Mr. Ishengoma was of the view that, if this application will be refused it will be like punishing the applicant twice after striking out his two appeals which were initially lodged. He was of the further view that, the previous appeals of the applicant were struck out not because the applicant was negligent but due to reasons out of the applicant's control as the legal issue that was considered was that all exhibits were not endorsed properly. He insisted that, the applicant's delay in this matter is a technical delay and not actual one. Finally, he prayed for the application to be granted with costs.

In reply, Ms. Nestory commenced by adopting the contents of affidavit in reply and the respondent's written submission. She submitted that, the applicant's counsel did not do due diligence in ascertaining documents as a result the appeals he lodged were struck out. According to her, the counsel for the applicant was supposed to make sure that all the documents are proper otherwise they could not be in Court seeking extension of time. To bolster her point she cited the case of **Aliance**

Media (Tanzania) Limited v. A1 Outdoor Tanzania Ltd, Commercial Case No. 64 of 2005 (unreported) where it was stated that advocates are required to read properly to ensure integrity of the documents they intend to rely on. Ms Nestory submitted further that, the applicant's counsel was negligent and the applicant is just delaying the respondents an opportunity to enjoy the fruits of their award.

Regarding the issue of illegality, Ms. Nestory submitted that there was no illegality and those points raised by the applicant are points he intends to raise during appeal. As such, they are not good reasons to grant extension of time sought. According to her, the counsel for the applicant has failed to demonstrate good cause to warrant extension of time and thus, she prayed for this application to be dismissed with costs for lack of merits.

Mr. Ishengoma had no much to submit in rejoinder. Basically, he highlighted that the counsel for the respondent had failed to distinguish between actual and technical delay. As for him the delay in the current matter is technical as the applicant had lodged the first appeal timely. It was his view that even the case cited by Ms. Nestory is distinguishable from the matter at hand. In the end, he reiterated his prayer that the application be granted with costs.

Having considered submissions by both parties and the record of this application, the only issue calling for determination is whether the applicant has shown good cause to warrant extension of time sought. It has to be clear at the onset that whether or not extension of time is to be granted, depends on the reasons advanced by the applicant. The said reasons must be within the parameters of good cause intended to be covered under Rule 10 of the Rules. For easy of reference, the said Rule provides that:

*"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].

Mr. Ishengoma has addressed me at length on the reasons as to why this application should be granted. I do not intend to replicate what he said, but suffices here to indicate that he advanced two main reasons. First, that the applicant has been all along trying to pursue his appeal in vain due to technical factors. Second that, the impugned decision is tainted with illegalities.

In amplifying the first point, Mr. Ishengoma demonstrated how the applicant has been in courts' corridors since the date on which the impugned decision was delivered on 26th November, 2007. He promptly acted within time and managed to lodge his first Notice of Appeal on 29th November, 2007 two days later after the pronouncement of the High Court decision and on 27th February, 2008 the first appeal (Civil Appeal No. 24 of 2008) was lodged. Contrary to what Ms. Nestory submitted when insisting that the applicant did not act diligently, this prompt action in my view shows how diligent the applicant was in his action and that he was not satisfied with the High Court decision as indicated in paragraph three of the supporting affidavit. It is so unfortunate as submitted by Mr. Ishengoma, that the appeal did not proceed to hearing on merits as some of the documents forming the record of appeal were not properly endorsed when admitted during the trial at the High Court and therefore, the appeal was found incompetent and hence, it was struck out.

The applicant lodged the second appeal (Civil Appeal No. 82 of 2010) on 4th November, 2010 after being granted extension of time by the High Court. However, just as the first appeal, the second appeal was also struck out for being incompetent. This time the incompetence was caused by an error on the decree of the High Court. Whereas the impugned judgment showed that the respondents were awarded the sum of USD 275,000, the

decree indicated that they were awarded USD 27,000. Thus the appeal was found incompetent.

Ms. Nestory argued regarding the appeals which were struck out that the applicant's counsel was negligent as he failed to check on the documents before lodging both appeals. On his part, Mr. Ishengoma was of the view that the applicant should not be blamed for the errors which were done by the court unintentionally. As for him, those are human errors that can be committed by anyone. He also added that, the said errors were spotted out by the Court suo motto even the respondent was not aware that is why, the Court did not punish the applicant by ordering costs to be paid.

In **Fortunatus Masha's** case (supra) the Court differentiated between actual delay and technical delay where the applicant is not the one to blame per-se. In the current matter, the applicant acted within time to lodge the first appeal. However, the same was struck out following shortcomings caused by the High Court. The endorsement of exhibits once admitted is not done by the parties. Likewise, the second appeal was struck out due to an error which was caused by the trial court in preparation of a decree. I agree with Ms. Nestory that the applicant and/or his advocate was supposed to check on the documents before lodging

an appeal. I may add here that, even the counsel for the respondent as an officer of the court was supposed to counter check on the documents supplied to him and raise preliminary objection if they are not proper. I do however agree with Mr. Ishengoma that the errors were not made deliberately. In my considered opinion, the errors skipped the sights of both counsels and the trial court and thus, it cannot safely be concluded that the applicant or his counsel was negligent under the circumstances.

The second ground in this application is stated in paragraph 10 of the supporting affidavit. I wish to quote the said paragraph hereunder:

"That the judgment and the decree of the trial court, the subject matter of the intended appeal are problematic and in fact null and void. The decree is solely based on the improperly admitted documentary evidence including Exhibit P-5. The decree does also confer rights (reliefs) to parties (2nd and 3rd Respondents) who did not plead, appear and testify in court, and some of which were not pleaded and evidence were led in court during the trial, in respect thereof."

The point of illegality raised by the applicant was challenged by Ms. Nestory who argued that, the said illegality is nothing but the points which the applicant intends to rely on in the intended appeal. She urged me not to consider it as illegality. I wish to point out that, I am not convinced by the line of argument taken by Ms. Nestory. The applicant herein has

stated in the above paragraph that there were some procedural irregularities in admission of some exhibits which eventually led to the impugned decision. Not only that, but also the impugned decision confers rights to parties who did not plead, appear and testify in court. It is my considered opinion that, under normal circumstances, reliefs are awarded upon being pleaded and not otherwise. However, at this stage, as a Single Justice, I am not in a position of determining as to whether or not the complaints are true, as my task is only to consider whether the alleged illegality and the reasons for the delay constitute good cause for extension of time. Therefore, suffices here to state that, if truly that is how the decision of the High Court was reached then the Court will decide on it during the hearing of the intended appeal. In **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd, Civil Application No. 13 of 2010**, the Court held that:

*"What constitutes **good cause cannot be laid down by any hard and fast rules**. The term "**good causes**" is a relative one and is dependent upon the party seeking extension of time to **provide the relevant material in order to move the court to exercise its discretion**." [Emphasis added].*

Under the guidance of the above established principle and after considering circumstances of this application, I am satisfied that the

applicant has shown good cause for me to exercise my discretion to grant extension of time sought.

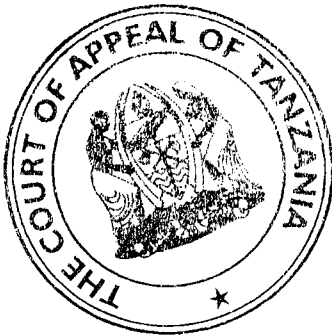
In the event, the application is granted for the applicant to lodge Notice of Appeal within thirty (30) days from the date of this Ruling. Costs in the cause.

Order Accordingly.

DATED at **DAR ES SALAAM** this 27th day of May, 2019.

M.C. LEVIRA
JUSTICE OF APPEAL

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




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL