

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 134/01/2019

VIJAY SHANTILAL CHOCHAN ----- APPLICANT

VERSUS

1. ABDUL SHAKULE HALDAY ----- 1st RESPONDENT

2. ILALA MUNICIPAL COUNCIL ----- 2nd RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania
Dar es Salaam District Registry
at Dar es Salaam)**

(Twaib, J.)

dated the 4th day of September, 2012

in

Civil Appeal No. 77 of 2002

RULING

09th July & 1st August, 2019

MWANGESI, J.A.:

This ruling is in respect of an application which has been preferred by way of a Notice of Motion under the provisions of Rules 10 and 45A (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 as amended by Government Notice No. 362 of 2017 hereinafter referred to as **the Rules**. The applicant is seeking for extension of time within which it can lodge a notice of appeal to challenge the decision of the High Court (Twaib, J.), in Civil Appeal No. 77 of 2002, which was handed down on the 4th day of September, 2012. It is a second bite following a refusal which was made

by the High Court (Mlyambina, J.), in Miscellaneous Civil Application No. 474 of 2017 vide a ruling which was delivered on the 12th day of December, 2018. An affidavit sworn by Mr. Joseph Sang'udi, has been annexed to accompany the Notice of Motion.

Before embarking on the merits or demerits of the application, it is apposite to set out the facts of the case albeit in brief, and the context in which the application has arisen as could be discerned from the record in the case file.

Way back in the year 1991, the applicant herein lodged civil case No. 32 of 1991 at the resident magistrates' court of Kisutu in Dar es Salaam Region against the respondents, praying for among other reliefs, a declaration that it was the rightful owner of a landed property which was being disputed between them, situated at Buguruni Industrial Area within Dar es Salaam City. Unfortunately, it lost in the said suit.

Aggrieved by the decision of the trial court, the applicant unsuccessfully challenged it in the High Court of Tanzania Dar es Salaam District Registry, vide Civil Appeal No. 77 of 2002. Still undaunted, the applicant lodged Civil Appeal No. 105 of 2013 in the Court, which was

however struck out for want of competence in a judgment that was delivered on the 23rd June, 2017.

With the intention of rebooting its quest, the applicant approached the High Court through Miscellaneous Civil Application No. 474 of 2017 wherein, it prayed for extension of time within which it could lodge a Notice of Appeal to challenge the decision of the High Court. In the decision that was delivered by the High Court (Mlyambina, J.), on the 12th December, 2018, the prayer by the applicant for extension of time was refused for the reason that, no sufficient cause was advanced to account for the delay. Such refusal by the High Court, has led to the current application before the Court for a second bite.

In compliance with the provisions of Rule 106 (1) of **the Rules**, on the 4th June, 2019 the applicant filed in Court written submission to amplify the Notice of Motion. On the other hand, each respondent lodged its affidavit in reply. Additionally, on the 3rd July, 2019 the first respondent lodged written submission in reply to the one lodged by the applicant in terms of Rule 106 (8) of **the Rules**. Besides, each respondent raised a preliminary objection challenging the competence of the application. There was no written submission lodged by the second respondent.

At the hearing of the application before me on the 8th July, 2019 Mr. Joseph Sang'udi, learned counsel, entered appearance for the applicant whereas, Messrs Kinguji Abdi Ally, Bernard Shirima and Abdul Fattah all learned counsel, teamed up to represent the first respondent. On its part, the second respondent had the services of Ms. Judith Nasson, who was assisted by Ms. Subira Tossi, both learned Municipal Solicitors.

As it is customarily the common practice of the Court, we had to deal with the preliminary objections first before we could switch to the main application, starting with the one raised by the first respondent which reads:

"The Notice of Motion filed by the applicant is fatally defective."

When Mr. Kinguji was called upon to expound the preliminary objection which they have raised, he argued that the preliminary objection is founded on the fact that the Notice of Motion by the applicant, has been presented as an appeal as illustrated by its heading. In his view, that was not proper because an appeal cannot be made by way of Notice of Motion. In that regard, it was the firm assertion of the learned counsel that, the Notice of Motion is improperly before the Court and urged the Court to

strike it out with costs. Such stance by Mr. Kinguji, was shared by his learned sister Ms. Nasson.

In response to the submissions by his learned friends, Mr. Sang'udi argued that, the preliminary objection was unfounded and devoid of merit. While he was in agreement with his learned friend Mr. Kinguji that, an appeal is never initiated by a Notice of Motion, he argued that what was before the Court was an application for extension of time as reflected by the provisions under which it was made and the presentation of the parties that is, being named as applicant and respondents. After all, Mr. Sang'udi went on to submit, his learned friends did not cite any provision of law which was infringed in the application which they were challenging. The learned counsel implored the Court to overrule the preliminary objection with costs.

With regard to the second set of the preliminary objection which has been raised by the second respondent, it bears the following wording that is to say:

*"(i) that the application is incompetent and
unmaintainable as the Court is wrongly moved;*

(ii) that the application is unmaintainable for being omnibus."

Upon a brief dialogue with the Court, Ms. Nasson resolved to withdraw the preliminary objection which had been raised by the second respondent and thereby, paving way for the hearing of the main application for extension of time. I reserved the ruling in regard to the first set of the preliminary objection, with a promise to give it at a later stage after hearing the main application. In case the preliminary objection would be sustained, then that would mark the end of business for the entire application.

In expounding the application for extension of time Mr. Sang'udi, adopted the affidavit accompanying the Notice of Motion and the written submission in amplification of the same. It was the submission on behalf of the applicant that the application before the High Court, that is, Miscellaneous Civil Application No. 474 of 2017, was asking for two reliefs namely **one**, extension of time to lodge a Notice of Appeal, and **two**, extension of time to apply for leave to appeal out of time. The application was however, dismissed on the grounds that first it was omnibus, and secondly, that no sufficient grounds were advanced to account for the

delay. According to Mr. Sang'udi, two issues stand for determination in the instant application that is, **first**, whether the application before the High Court was omnibus. **Second**, whether the parties were not entitled to be heard on the issue which was raised *suo motu* by the Court in regard to the competence of the application.

After having discussed at length in his written submission on the above two framed issues, as well as visiting a number of authorities, Mr. Sang'udi answered both issues in the negative and concluded his written submission by strongly urging the Court to grant the sought extension of time, for the reason that sufficient grounds had been given by the applicant to account as to why it failed to lodge the notice of intention to appeal within the time prescribed by the law. The learned counsel also prayed that the applicant be awarded the costs for the application.

On the other hand, it was the submission of Mr. Shirima on behalf of the first respondent that, from the affidavit that was sworn by Mr. Sang'udi on behalf of the applicant, as well as the submission in amplification of the Notice of Motion, the delay which has been accounted for, is from the 4th August, 2017 when Miscellaneous Civil Application No. 474 of 2017 was lodged in the High Court, onwards. There was no account at all for the

period from the 4th September, 2012 when the judgment of the High Court intended to be impugned was delivered, to the 4th August, 2017 which is a period of about five solid years.

Since it is the requirement of law that in an application for extension, every single day has to be accounted for, he prayed the application at hand to be dismissed because the applicant failed to account the delay of about five years. To buttress his stance, Mr. Shirima, referred the Court to unreported cases of **Sebastian Ndaula Vs Grace Rwamafa (legal representative of Joshua Rwamafa)**, Civil Application No. 4 of 2014 and **TAMICO (KMCL) on behalf of Enoch Joseph and 113 Others Vs Bulyankulu Gold Mines Limited**, Civil Application No361/01/2017.

It was the further submission on behalf of the first respondent that, the application which is before the Court even though it is a second bite, it is a fresh application and not an appeal against the refusal of extension of time which was made by the High Court. That being the case, the issues which were framed by the applicant in his written submission have nothing to do with the application which is before the Court. Conversely, the proper issue which ought to have been framed, is whether the applicant has advanced sufficient cause to move the Court to grant the sought extension

of time. And since there were no reasons advanced, Mr. Shirima implored the Court to dismiss the application for want of merit with costs.

As earlier pointed out, there was no written submission lodged by the second respondent. In her brief oral submission Ms. Nasson, prayed to adopt the affidavit in reply which was lodged by the second respondent. She then associated herself with the submission which was made by her learned friend on behalf of the first respondent, and requested the Court to dismiss the application with costs.

Having outlined the positions of either side above and before moving any further in regard to the main application, I revert to consider first, the preliminary objection which was raised by the first respondent as regards to the competence of the application. It was argued by Mr. Kinguji, that the Notice of Motion lodged by the applicant was defective from the way it had been headed that is, *"appeal from the judgment and decree of the High Court of Tanzania Dar es Salaam District Registry (Mr. Twaib, J.) dated 4th September, 2012 in Civil Appeal No. 77 of 2002."* The response from his learned friend was to the effect that the error in naming the Notice of Motion an appeal, had just been occasioned inadvertently and that in the actual sense, it was an application as reflected from the

provision under which it was made, and the names of the parties who are applicant and respondents.

What I had to ask myself from the submissions from either side above, is whether the anomaly occasioned in naming the Notice of Motion an appeal, was fatal. My answer is in the negative. As submitted by Mr. Sang'udi, the entire Notice of Motion from its wording and the provisions under which it has been made is an application. The anomaly in naming it as an appeal, was a mere clerical error which can easily be remedied by an order for rectification. In that regard, I find the preliminary objection raised basing on such an error is innocuous and without any further ado, it is accordingly overruled.

Back to the main application for extension of time to lodge the Notice of Appeal, the issue for determination is whether the applicant managed to advance sufficient cause for his failure to lodge it within the time prescribed by the law. While the respondents forcefully argued that it did not, the applicant on its part averred that the reasons were sufficiently explained in the affidavit accompanying the Notice of Motion. To appreciate the tag of war between the two sides, I hereby reproduce *in verbatim* paragraphs three, five, six, seven, eight and nine of the affidavit of Mr.

Sang'udi, in support of the Notice of Motion which in my view, are the relevant ones in the determination of the application. They read:

- (3) *That, the applicant on 4th day of August, 2017 did file Miscellaneous Civil Application No. 474 of 2017 by way of Chamber Summons before the High Court of Tanzania praying inter alia for an order of extension of time to file Notice of Appeal to challenge the judgment and decree of the High Court (Hon. Twaib, J.) dated the 4th September, 2012 in Civil Appeal No. 77 of 2002. Copies of the Chamber Summons and the accompanying affidavit, counter affidavits are annexed hereto--.*
- (5) *That, on the 12th day of December, 2018 the High Court (Hon. Mlyambina, J.) delivered its ruling by striking out the applicant's application allegedly for lack of sufficient cause to account for the delay and for being omnibus.*
- (6) *That, aggrieved with the decision and orders as averred in para 5 hereinabove the applicant on 21st of December, 2018 wrote a letter to the Deputy Registrar of the High Court of Tanzania Dar es Salaam Registry, requesting for a copy of ruling and drawn order for purposes of making an application for a second bite before this Honourable Court.*
- (7) *That, the Deputy Registrar High Court of Tanzania Dar es Salaam District Registry vide his letter Ref Misc.*

Application No. 474/2017 supplied the applicant with the requested documents plus a certificate of delay on 10th day of April, 2019.

- (8) That, upon reading the ruling, the applicant discovered that the trial Judge in the course of composing his ruling he raised an issue to the effect that the applicant's application was omnibus.*
- (9) That, the parties particularly the applicant (who has been adversely affected with the decision thereof), were entitled to a right to be heard on the matter raised suo motu by the Hon. Court. Further that failure by the trial Court as aforesaid denied the parties a right to be heard and thus vitiating the impugned ruling."*

From what could be gathered in the rival arguments from either side, I feel obligated to first give a brief explanation in regard to the essence of a second bite application. It all starts with the provision of section 11 (1) of the Appellate Jurisdiction Act Cap 141 R.E. of 2002 **(the AJA)**, which confers on the High Court, concurrent jurisdiction with the Court, in granting extension of time to lodge a Notice of intention to appeal. It is further stipulated under the provision of Rule 47 of **the Rules** that the

procedure that has to be followed, is to lodge the application in the High Court first and if refused, the same application is made to the Court.

It is worthy being noted from the stipulation under **the AJA** as well as **the Rules** that, the application which has to be made in the second bite is a fresh application which has nothing to do with the one which was initially before the High Court and refused. In **the Bishop Roman Catholic of Tanga Vs Casmir Richard Shemkai**, Civil Application No. 507/12/2017 (unreported), the Court elaborated the position by observing that:

*"Our careful reading of Rule 47 of the Rules, we think that a party who is refused the application in the High Court, in making the same application to the Court in the second bite, is not bound to front the same grounds advanced at the High Court. He can as well raise new ones **in the fresh application** and the Court is enjoined to consider them."*

[Emphasis supplied]

In view of what has been canvassed above, it is apparent that the affidavit of Mr. Sang'udi, of which its paragraphs have been quoted above purporting to support the application for extension of time are

misconceived. And so were the issues framed in the written submission. According to what was deponed in all paragraphs, reference was being made to the application which was before the High Court, which in essence has nothing to do with the fresh application for extension of time which is before the Court. Unfortunately, even in the written submission to amplify the grounds for extension of time, much energy and time have been burnt in attacking the decision of the High Court in refusing the application for extension of time, as if this Court in the application for a second bite, was sitting as an appellate Court.

The foregoing observation apart, I now proceed to consider the issue which was posed earlier that is, as to whether the applicant managed to advance sufficient cause as to why, he failed to lodge the notice of intention to appeal against the decision of the High Court (Twaib, J.), which was delivered on the 4th September, 2012 within the period prescribed by the law. The position of law is settled that in an application for extension of time under Rule 10 of **the Rules**, the applicant is duty bound to account for the delay of every single day. See: **Said Salim Bakhresa Vs Ally Ngume** [1997] TLR 312, **Bushiri Hassan Vs Latifa Mashayo**, Civil Application No. 3 of 2007 (unreported), **TAMICO (KMCL)**

on behalf of Enoch Joseph and 113 Others Vs Bulyankulu Gold Mines Ltd. (supra).

From all paragraphs of the affidavit which was sworn on behalf of the applicant to accompany the Notice of Motion, I have failed to trace even a single ground accounting as to why there was failure by the applicant to lodge the notice of intention to appeal within the period that has been stipulated by the law. It is common knowledge that previously, there was an appeal in respect of the same matter that is, Civil Appel No. 105 of 2013 which was struck out by the Court on the 23rd June, 2017 for want of merit. Even if the Court was to take judicial notice in regard to that period, thenceforth, no account was given by the applicant as to why he remained inactive until when he lodged the application for extension of time on a date which was not disclosed and refused by the High Court on the 12th December, 2018.

While in terms of Rule 10 of **the Rules**, the Court is bestowed with discretionary powers to extent time within which an applicant can lodge a notice of intention to appeal, such discretion has to be judiciously exercised upon consideration of the grounds advanced for the delay. See: **Abubakar Ally Hamid Vs Edward Nyelusye**, Civil Application No. 51 of 2007,

Lyamuya Construction Company Limited Vs Board of Trustees of Young Womens Christian Association of Tanzania, Civil Application No. 2 of 2010 and **Abdul Issa Bano Vs Mauro Daolo**, Civil Application No. 563/02/2017 (all unreported).

The fact that in the instant application, there have been no grounds advanced by the applicant to account for the failure to lodge the notice of intention to appeal within the time prescribed by the law, there is no way in which the Court can exercise its discretion stipulated under Rule 10 of **the Rules**, in favour of the applicant. To that end, the application for extension of time is hereby refused and the respondents will have their costs.


Order accordingly.

DATED at DAR ES SALAAM this 15th day of July, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL