

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

CIVIL APPLICATION NO. 583/20 OF 2018

MABIBO BEER WINES AND SPIRITS LTD.....APPLICANT

VERSUS

1. FAIR COMPETITION COMMISSION 2. LUCAS PIUS MALYA T/A BARAKA STORE 3. S.H. AMON ENTERPRISES CO. LTD 4. TANZANIA REVENUE AUTHORITY (TRA)	}RESPONDENTS
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(Application for extension of time from the decision of the Fair Competition Tribunal at Dar es Salaam)

(Muruke, J.)

dated the 24th day of April, 2015

in

Reference No. 8 of 2014

RULING

15th & 27th May, 2019

KEREFU, J.A.:

The applicant, Mabibo Beer Wines and Spirits Ltd, has lodged this application seeking for orders of extension of time to lodge an application for revision against the order of the Fair Competition Tribunal, (*the FCT*) dated 24th April 2015 in *Tribunal Application No. 08 of 2013* as well as the pending proceedings in *Tribunal Taxation Reference No. 08 of 2014*. The

application is brought by way of Notice of Motion lodged on 21st December, 2018 under Rule 10 of the Tanzania Court of Appeal Rules, 2009, GN 368 of 2009, (*'the Rules'*). The application is supported by the affidavit of one Respicius Didace, the learned counsel for the applicant. The application is contested by the 1st and the 2nd respondents, but supported by the 3rd respondent.

A brief background of this application is that, initially, the applicant lodged the *Civil Application No. 132 of 2015* before the Court (*Mussa, Mkuye, and Wambali, JJ.A*) with the intention of revising the Order of the FCT dated 24th April, 2015 in *Tribunal Application No. 8 of 2013* as well as the pending proceedings in *Tribunal Taxation Reference No. 8 of 2014*. On 23rd October, 2018 the said application was struck out for being time barred, hence, the current application for extension of time to lodge another application for revision of the said Order and pending proceedings out of time.

At the hearing of the application, the applicant was represented by Mr. Pascal Kamala, the learned counsel, who was holding brief for Mr. Michael Ngalo, the learned counsel for the applicant. The 2nd respondent was represented by Dr. Deo John Nangela, the learned counsel, who also

held brief for Mr. James Andrew Bwana, the learned counsel for the 2nd respondent. Ms. Grace Makoa, the learned counsel appeared for the 4th respondent. The 3rd respondent, though duly served did not enter appearance and the matter proceeded *ex parte* against her in terms of Rule 63(2) of the Rules.

Submitting in support of the application, Mr. Kamala commenced his submission by fully adopting the contents of the Notice of Motion and the supporting affidavit. He then referred to paragraphs 3 and 21 of the supporting affidavit and argued that, the said paragraphs have clearly indicated the good cause for the delay. He as such, cited the decision in **Backlays Bank Tanzania Limited v. Phylisian Hussein Mcheni**, Civil Application No. 176 of 2015, (unreported) at page 3 and argued that, *first*, the delay in this application was only a single day, which he said, by all means cannot be termed as inordinate delay, *second*, the said delay was not attributed by misconduct on the part of the applicant or even his counsel, and *third*, there are illegalities in the said Order and pending proceedings, as reflected in paragraphs 11, 21 and 22 of the supporting affidavit, where the applicant was condemned un-heard by the 1st respondent, who issued orders against the applicant's interests and

published the same in the news papers. He then argued that, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending time for the purpose of taking appropriate measures to rectify the same. To bolster his argument, he cited **Amour Habib Salim v. Hussein Bafagi**, Civil Application No. 52 of 2009, (unreported) at page 5 and 6, where the court with approval cited the case of **Principal Secretary, Ministry of Defence and National Services v. Duramp Valambhia** [1992] T.L.R 387. He then argued that, since the applicant in this application has demonstrated that, there are illegalities that alone, constitute a good cause for the grant of this application. He finally prayed for the application to be granted.

In response, Dr. Nangela also commenced his submission by adopting the contents of the affidavits in reply for the 1st and 2nd respondents to form part of his oral submission. He then contended that, Rule 10 is a discretionary Rule, where the court's discretion can be exercised only when good cause has been shown. To buttress his position he cited **Kalunga & Company Advocates Ltd Vs National Bank of Commerce Ltd** (2006) TLR 235 and **Moto Matiko Mabanga v. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017.

He then strenuously argued that, the applicant herein has not submitted any good cause to move the court to grant the prayer sought. He said, he has perused the Notice of Motion and the supporting affidavit and there is nowhere is indicated as to why there was a delay to lodge the application for revision. He contended that, even paragraphs 11, 21 and 22 of the supporting affidavit relied upon by Mr. Kamala do not tell why there was a delay. He said, the entire supporting affidavit is only giving a historical chronology of the litigation, but it has not shown good cause for the delay.

Dr. Nangela strongly disputed the claim by Mr. Kamala that, the delay is only for a single day. He said, as per the record, the first application was struck out on 23rd October 2018 and the current application was filed on 21st December 2018, after lapse of about two months or sixty (60) days and the applicant has not accounted for all these days. He referred to **Moto Matiko Mabanga**, (supra) and emphasized that, for the applicant to succeed in this application, must account for each day of the delay.

• On the issue of illegality, though Dr. Nangela agreed that, a ground of illegality alone may constitute a good cause, but he argued that, the alleged illegality must be apparent on the face of record. He then started analyzing the five grounds indicated in the Notice of Motion and the 23

paragraphs contained in the supporting affidavit and argued that, there is no single ground or paragraph that has demonstrated the alleged illegalities. He said, worse enough, even the order of the Tribunal alleged to contain illegalities is not attached, now, how can the court verify the said illegalities? Wondered Dr. Nangela.

Amplifying further on that point, Dr. Nangela referred to paragraphs 10 and 11 of his reply affidavit on the chronological order of events on what transpired at the FCT up to the time when the applicant lodged the *Civil Application No. 132 of 2015*. He said, since that time to-date, there has been no Ruling issued by the FTC to be subjected to revision by the Court. He said, what was issued by FCT so far, is a Consent Order attached to paragraph 20 of the supporting affidavit as TAB-8, which was issued through mutual consent between the parties. He added that, parties to the said Order are different from the parties in this application and the said Order cannot in anyway bind the parties herein. He said, even the subject matter for the said Order was on the distribution of the *Windhoek Beers*, while the dispute between the parties herein is on the importation and trading on *Heineken Beers*. The said matters are not related.

On the complained advertisement, Dr. Nangela argued that, the same was in relation with the distribution of Windhoek Beer and had nothing to do with this application or even the pending proceedings or dispute before the FCT. Dr. Nangela concluded by noting that, in totality of all those discrepancies it is clear that, the applicant has failed to show good cause to warrant grant of this application. He finally prayed for the application to be dismissed with costs.

In rejoinder submission, Mr. Kamala reiterated what he submitted in chief and added that, the Order that was issued by the Kinondoni District Court on 15th October 2010 in *Civil Case No. 06 of 2009* binds all parties thereto and other people who were not before the court, but are importing Heineken Premium Larger Beer, Windhoek Premium Larger Beer and Windhoek Premium Light Beer in Tanzania. It was the strong view of Mr. Kamala that, the act of the 1st respondent to issue the said advertisement in the Mwananchi newspaper without consulting the applicant is a serious illegality, which needs to be considered by the Court. He as such, prayed for the application to be granted.

Having heard the counsel for the parties on the issues above, the remaining task before me to resolve is *whether the applicant has shown*

good cause for the delay to warrant grant of this application. Pursuant to Rule 10 of the Rules, an application of this nature can be granted upon good cause being shown by the applicant. For avoidance of doubt, I think it is instructive to extract the said Rule in full. Rule 10 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 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].

Under the above cited provision of the law, the requirement which the applicant has to satisfy is to show good cause for the delay in filling the application. However, the term '*good cause*' has no single definition but it can be interpreted depending on the circumstances of each case. In **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd, Civil Application No. 13 of 2010**, the Court stated 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.”

Therefore, the requirement which the applicants herein have to satisfy is to show good cause for the delay. Now, in considering the period of delay in the application at hand, I am aware that, Mr. Kamala had since submitted that, the delay is not inordinate, because it was only a single day delay. He also said that the reason for that delay was attributed to the belief that the *Civil Application No. 132 of 2015* was filed in order. This claim was vehemently disputed by Dr. Nangela, who argued that, the applicant's delay is not for single day, but more than two months or sixty (60) days. He also said, even if we consider it a delay of a single day, still the applicant has not accounted for the said delay in his supporting affidavit or even the oral submission by Mr. Kamala.

It is on record that, the Order of the FCT, sought to be revised was delivered on 24th April 2015 and the *Misc. Civil Application No. 132 of 2015* was struck out on 23rd October 2015 for being time barred and the current application was lodged on 21st December 2018, after lapse of about sixty (60) days, as submitted by Dr. Nangela. However, the Notice of Motion and the supporting affidavit are both silent on this delay. In his submission

Kamala mislead himself by stating that the delay was for only a single day. This is a clear indication that, Mr. Kamala had failed to distinguish circumstances of the delay in the previous application for revision and the current application. These are two different applications and the applicant was required to account for the delay of each day from the date, when the impugned Order was delivered. Unfortunately, that was not done.

It is settled that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and one of them is **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported), where the Court emphasized that:- *"...**delay of even a single day, has to be accounted for**, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."*[Emphasis added].

Following the above authority and reasoning, it is my respectful view that, there is considerable merit in Dr. Nangela's submission that the applicant herein has completely failed to account for the delay of each day. Therefore, the first reason for the delay argued by Mr. Kamala cannot stand.

I now turn to the issue of illegality, I do agree with Mr. Kamala that, a ground alleging illegality may as well constitutes a good cause for extension of time, but I wish to remind him that, the alleged illegality must be apparent on the face of record and clearly demonstrated in the applicant's affidavit. See for instance **Principal Secretary Ministry of Defence and National Service Vs Divram P. Valambhia** (1992) TLR 387 and **Arunaben Chaggan Mistry Vs Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016, (Arusha) (Unreported).

As for the application at hand, it is on record that issues of illegalities raised by Mr. Kamala are in respect of the Order of the FTC dated 24th April 2015 in *Tribunal Application No. 08 of 2013* and the pending proceedings before the Tribunal in *Tribunal Taxation Reference No.08 of 2014*. Unfortunately, the said Order and the pending proceedings were not attached to the application for my perusal and determination as to whether the said illegalities are indeed apparent on the face of record. The said record and the '*face*' are not before me. In **Lyamuya Construction Company Limited v. Board of Trustees of Young Women's**

Christian Association of Tanzania, Civil Application No. 02 of 2010, (unreported), the Court observed that:-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises point of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that **such point of law must be that of sufficient importance and, I would add that, it must also be apparent on the face of the record**, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process". [Emphasis supplied].*

Again, in **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015, (unreported) the Court emphasized that, *the illegality in the impugned decision should be clearly visible on the face of record.*

Applying the foregoing principle to the application at hand, it is my respectful view that, without such information it becomes impossible for

me to ascertain the points of illegalities raised by Mr. Kamala and hold that the same constitute good cause. As such, it is therefore clear that, the applicant herein has failed to demonstrate that the said illegalities are apparent on the face of record. Therefore, the pointed illegalities, by all means cannot constitute good cause to warrant grant of this application.

In the event, I find and hold that the applicant has failed to show good cause warranting extension of time to lodge an application for revision out of time. Consequently, the application is without merit and is hereby dismissed with costs. It is so ordered.

DATED at DAR ES SALAAM this 21st day of May, 2019.

R. J. KEREFU
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL