

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

(CORAM: KWARIKO, J.A., KEREFU, J.A., and MAIGE, J.A.)

CIVIL APPEAL NO. 310 OF 2019

TCCIA INVESTMENT COMPANY LIMITED.....APPELLANT

VERSUS

DR. GIDEON H. KAUNDA.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania,
Commercial Division at Dar es Salaam)**

(Fikirini, J.)

dated the 15th day of August, 2019

in

Misc. Commercial Application No. 17 of 2019

JUDGMENT OF THE COURT

23rd September 2022 & 5th October, 2022

KEREFU, J.A.:

This appeal arises from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam in respect of Misc. Commercial Application No. 17 of 2019 (Fikirini, J. as she then was) dated 15th August, 2019. In that application, the appellant applied for extension of time within which to file a bill of costs emanated from the decision of the same court (Sehel, J. as she then was) dated 30th November, 2018 in Misc. Commercial Case No. 10 of 2018. In the said case, the appellant successfully sought to set aside an arbitral award dated 31st October, 2017 for being improperly procured. Thus, the appellant had sixty days,

from 1st December, 2018 to 29th January, 2019, to file its bill of costs. Since that was not done within the prescribed time, the appellant filed, in the High Court, Misc. Commercial Application No. 17 of 2019 seeking extension of time within which to file a bill of costs.

Before the High Court, the appellant submitted two reasons for the delay, **one**, that she was not aware of the new filing system, namely, JSDS 2, applicable at the commercial court, until 28th January, 2019 when she approached the High Court Registry to file the bill of costs and informed by the court clerk one Sania Rahman that the filling of the bill of costs has to be done online through that system; and **two**, that, the delay was due to the long time spent in the process of obtaining the Tax Clearance Certificate and renewing the appellant's counsel practicing certificate.

The respondent resisted the application as he contended that the appellant ought to act diligently and timely in pursuing the matter. That, the counsel for the appellant had admitted serious negligence for failure to comply with the new court's filing system until when he was informed by the court clerk one Sania Rahman. He urged the court not to consider the affidavit of the court clerk as it was not mentioned in the chamber summons and not attached to the affidavit in support of the application.

On the second reason, the respondent referred to section 35 (5) of the Advocates Act, [Cap. 341 R.E 2002] (the Act) and contended that, the failure by the appellant's counsel to renew his practicing certificate in time cannot constitute sufficient ground for extension of time. The respondent contended further that the appellant had failed to account for each day of delay from 22nd February, 2019 to 1st March, 2019. Thus, the respondent prayed the High Court to dismiss the application with costs.

In its decision, the learned Judge, having been satisfied that the two reasons advanced by the appellant did not constitute good cause warranting extension of time, she dismissed the application with costs. Aggrieved, the appellant lodged the current appeal. In the memorandum of appeal, the appellant has preferred five (5) grounds of complaint which can be paraphrased as follows:

- 1. The learned Judge erred in law and fact in giving a very liberal interpretation to the words 'reasonable' and 'sufficient cause' and failed to acknowledge that the bill of costs was presented in court within the sixty days, the act which clearly negate any appearance of sleeping on the appellant's rights;*
- 2. The learned Judge erred in law and fact in failing to apply the court's discretion judicially and thereby abandoned its duty to dispense substantial justice to the parties;*

3. *The learned Judge failed to appreciate the operation of the doctrine of precedent by dismissing the consideration of injustice already incorporated in the jurisprudence of the Court of Appeal through the case of **Mary Mbwambo and Another v. Mbeya Cement Company Ltd**, Civil Appeal No. 8 of 2015 by citing a passage in a Kenyan case **Daphne Parry v. Murray Alexander Carson** [1963] EA 546 whose facts and circumstances are different;*
4. *The learned Judge failed to reconcile her interpretation of section 35 (5) of the Advocates Act, that perennially renewal is extended to first quarter of the next year and therefore the novelty of JSDS 2 and the linkage of renewal of the High Court Roll of Advocates operated prejudicially to deny advocates legitimate privilege to practice up to 15th February, 2019; and*
5. *The learned Judge erred in the assessment of the evidence by ignoring an affidavit of a court clerk Sania Rahman for not being expressly mentioned in the chamber summons or failing to apply the maxim that 'procedure is the handmaid of justice.'*

At the hearing of this appeal, Messrs. Cyril Pesha and Benjamin Mwakagamba, both learned counsel, entered appearance for the appellant and the respondent, respectively. It is noteworthy that, pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, (the Rules), both learned counsel for the parties had earlier on lodged

their respective written submissions and reply written submissions in support of and in opposition to the appeal which they sought to adopt to form part of their oral submissions.

Submitting on the first ground of appeal, Mr. Pesha faulted the learned Judge for failure to consider the peculiar circumstances involved in this appeal. He contended that, the appellant presented the bill of costs, in court, timely on 28th January, 2019, the 59th day of filling the application, but the same could not find its way, in court, due to the introduction of the JSDS 2 filing system. He lamented that, if it was not for that system, the appellant's bill of costs could be filled on time. He thus challenged the learned Judge's narrow interpretation of the phrase, 'reasonable' and 'sufficient cause' and concluded that the appellant had not submitted good cause for extension of time. To bolster his proposition, he cited the cases of **Benedict Shayo v. Consolidated Holdings Corporation as Official Receiver of Tanzania Film Company Limited**, Civil Application No. 366/01 of 2017 (unreported) and **Republic v. Yona Kaponda and 9 Others** [1985] T.L.R. 84. He then added that the appellant acted diligently and had accounted for each day of delay. He, however added that, pursuant to Rule 21 (1) of the Judicature and Application of Laws (Electronic Filing) Rules, G.N. No. 148

of 2018 (the JALO Rules, 2018), the appellant was not under any obligation to account for the period of delay from the time it filed the application electronically on 23rd February, 2019 to 1st March, 2019. To support his proposition, he cited the cases of **Republic v. Yona Kaponda and 9 Others** and **Benedict Shayo** (supra) and faulted the learned Judge for erroneously finding that the appellant did not account for the five days of the delay.

On the second ground, Mr. Pasha faulted the learned Judge for failure to attach more weight to the appellant's bill of costs that it carries the remuneration for an advocate for his labour and the fees payable to the government. He added that, the appellant should not be forced to part ways with its lawful costs only by the reason of the applicability of rules of procedures, which are only handmaids of justice.

On the third ground, Mr. Pasha argued that, in determining the application, the learned Judge was expected to follow the precedent already set by the Court of Appeal in **Mary Mbwambo and Another** (supra), which was binding on her, but instead, she relied on an obiter decision from the High Court of Kenya in **Daphne Parry** (supra) without assigning any reason for that departure.

Expounding on the fourth ground, Mr. Pasha argued that normally, the practicing licenses for advocates remain valid within a year, and expire on 31st December each year and, in practice, there is a grace period given up to 31st January, in the following year. That, in 2019, the grace period was extended to 15th February, 2019 to accommodate the registration in the JSDS 2. He argued that, the JSDS 2 introduced a number of procedures including a Tax Clearance Certificate as a condition to obtain a practicing certificate. He argued that, the learned Judge was expected to consider all these challenges which, according to him, constituted good cause for extension of time.

Submitting on the fifth ground, Mr. Pasha faulted the learned Judge for failure to evaluate the evidence on record and ignoring an affidavit of the court clerk for not being expressly mentioned in the chamber summons. It was his contention that, since the said affidavit carried weight in supporting the application, the court should have taken judicial notice of the same. He finally cited Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 and urged us to allow the appeal with costs.

In response to the first ground, Mr. Mwakagamba challenged the claim by Mr. Pasha that the bill of costs was filed timely on the 59th day

that it is misconceived and self-defeating because, the appellant was out of time and that is why she rightly opted to file Misc. Commercial Application No. 17 of 2019 seeking extension of time to file the said bill of costs out of time. He contended that, before the High Court, the appellant advanced two reasons for the delay, (i) that, they were not aware of the new filing system in the commercial court, and (ii) that, the delay was due to the time spent during the process of obtaining of the Tax Clearance Certificate and renewing the advocate's practicing certificate. He strenuously argued that, the two reasons advanced by the appellant depicted ignorance and lack of diligence on their part and the same could not have amounted to good cause for extension of time. He added that, a learned counsel who is diligent ought to have known about the new filing system as the same was established by Rule 21 (1) of the JALO Rules, 2018.

As for the duty to account for the delay, Mr. Mwakagamba referred us to page 34 of the record of appeal and argued that before the High Court and even in this Court, Mr. Pasha had readily conceded that the appellant did not account for the five days of delay i.e from 23rd February, 2019 to 1st March, 2019 the last date when the application was admitted in the system. On that basis, Mr. Mwakagamba argued that the learned

Judge properly applied the authority in **Daphne Parry** (supra) and correctly interpreted the phrase, 'reasonable' and 'sufficient cause.

In response to the second and third grounds, Mr. Mwakagamba contended that the said grounds are unfounded and irrelevant because the issues indicated therein, do not constitute sufficient reasons for grant of extension of time.

On the fourth ground, although Mr. Mwakagamba acknowledged that section 35(5) of the Advocate Act provides for a requirement of a practicing certificate for an advocate to be renewed yearly, he insisted that the appellant's counsel was professional negligent for failure to renew his certificate timely. He also added that, the delay in obtaining the Tax Clearance Certificate cannot as well constitute a good cause for extension of time as it was only an administrative matter.

Finally, Mr. Mwakagamba argued that since Mr. Pesha had conceded that the affidavit of one Sania Rahman was not mentioned in the chamber summons, the learned Judge was justified to disregard it, as it did not form part of the application and she could not take judicial notice of a document which was not part of the pleadings. As for the applicability of Article 107A (2) (e) of the Constitution in this appeal, Mr. Mwakagamba referred us to **China Henan International Cooperation**

Group v. Salvand K.A. Rwegasira, Civil Reference No. 22 of 2005 (unreported) and argued that, not every procedural rule can be outlawed by that provision. He then implored us to dismiss the appeal with costs for lack of merit.

Rejoining, the appellant's counsel reiterated his submission in chief and urged us to allow the appeal.

On our part, having examined the record of the appeal and considered the written and oral submissions made by the counsel for the parties, we are settled that, the issue for our determination is whether the appellant had advanced good cause to enable the High Court to exercise its discretion to extend time as prayed in the chamber summons.

Before embarking on the determination of the said issue, we wish to state the general principle that an appellate court cannot interfere with the exercise of the discretion of the lower court unless it is satisfied that the decision concerned was made on a wrong principle or that certain factors were not taken into account. We find it apt at this point to refer to **Mbogo and Another v. Shah** [1968] 1 EA 93, a decision of the erstwhile Court of Appeal for East Africa, which has been cited and applied in numerous decisions of this Court. The relevant passage is as per Sir. Clement de Lestang VP at page 94 thus:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion." [Emphasis added]

-See also the statement of the above principle in the same case of **Mbogo** (supra) as per Sir Charles Newbold, President, at page 96. We fully subscribe to the above principle, which, we think, is equally applicable to the instant appeal which is also questioning a High Court's exercise of its discretion.

In the instant appeal, it is common ground that the decision of the High Court awarding costs to the appellant was delivered on 30th November, 2018. It is also on record that the applicant's application for extension of time i.e Misc. Commercial Application No. 17 of 2019, subject of this appeal, was filed on 1st March, 2019. In the chamber summons the appellant clearly indicated that the application is supported by an affidavit of one Tumwesige Evans. At this juncture, we deem it apposite to reproduce the relevant paragraphs of the said affidavit:

- 4. Misc. Commercial Case No. 10 of 2018 being finalized in favour of the applicant by a ruling delivered on 30th November, 2018, the applicant had 60 days to file the bill of costs. The said 60 days lapsed on 28th January, 2019.*
- 5. When I went to file the bill of costs on 28th January, 2019, I was informed by the Registry Officer, at the Registry one Sania Y. Rahman that the filing of bill of costs was to be done online through the new electronic system of JSDS 2. That unfortunately I was not aware of the new position hence I decided to take immediate action to follow up on the new system and register my firm so as to be able to file the bill of costs.*
- 6. That, when I went back to the office to register on the JSDS 2 system to file the bill of costs, the registration process could not complete because at that time, I had not renewed my practicing license. Luckily, the Registrar of the High Court extended the grace period for renewing the practicing licenses up to 15th February, 2019.*
- 7. The process of renewing the practicing license took longer than expected due to the delay and huddles we faces in obtaining the Tax Clearance Certificate. The Tax Clearance Certificate is needed in the process of renewing the practicing license.*
- 9. After renewing my practicing license, I started the process of registering on the JSDS 2 system on 15th February, 2019.*

The registration process was completed on 21st February, 2019. Between 15th and 21st February, 2019, I was waiting for the confirmation message from the JSDS 2 system which was sent on 21st February, 2019.

10. That, on 22nd February, 2019, I made follow up to get an affidavit of Sania Y. Rahman who informed me of the new development in the filing system."

It is settled law that the court can only grant extension of time, if the appellant shows sufficient cause. In **Shanti v. Hindoche and Another** [1973] E.A. 207, the Erstwhile Court of Appeal for East Africa considered similar phrase, "sufficient cause" and defined it to mean the cause which is convincingly beyond the applicant's control, that is to say:

" . . . the more persuasive reason . . . that he can show is that the delay has not been caused or contributed by dilatory conduct on his part. But that is not the only reason."

Some of the factors which may be taken into account in considering whether or not the applicant has shown good cause were stated by the Court in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where the Court defined what was meant by sufficient cause and

developed factors to be looked at when considering good cause for extension of time, that: (i) the applicant must account for all the period of delay; (ii) the delay should not be inordinate; (iii) the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and (iv) if the Court feels that there are other reasons, such as existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged. Therefore, to be entitled to extension of time, the applicant must put before the court sufficient material to show not only that he took actions before and after expiry of time to lodge the application but also that he acted promptly and diligently to take the action in order to convince the court to exercise its discretion to grant extension of time.

Now, in the instant appeal, before the High Court, the appellant advanced two reasons for the delay, (i) that, they were not aware of the new filing system in the commercial court, and (ii) that, the delay was due to the time spent during the process of obtaining of the Tax Clearance Certificate and renewing the advocate's practicing certificate. These were apparent in paragraphs 5, 6, 7 and 9 of the appellant's supporting affidavit indicated above.

We are mindful of the fact that, in the first, fourth and fifth grounds of appeal, Mr. Pasha faulted the learned Judge for giving narrow interpretation to the phrase 'reasonable' and sufficient cause.' He argued that, since the bill of costs was presented in court on the 59th day, within the time, but failed to be filed as he was not aware with the new filing system and he delayed in obtaining the Tax Clearance Certificate and renewal of his practicing licence, the same would have found to constitute good cause for extension of time. Mr. Mwakagamba associated the said reasons with ignorance and lack of diligence on the part of the appellant and her counsel. We agree with Mr. Mwakagamba on this point. We are increasingly of the view that, since the new filling system was established by Rule 21 (1) of the JALO Rules 2018, Mr. Pasha was expected to be aware of the same. Definitely, being unaware of the existence of that provisions of the law, depicted ignorance and lack of diligence on his part, which by any standard, could not have amounted to good cause. See for instance, the cases of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2011 and **Wambura N. J. Waryuba v. The Principal Secretary, Ministry of Finance and Another**, Civil Application No. 320/01 of 2020 (both unreported). In the former case, the Court categorically stated that: "*As has been held times without*

number, ignorance of law has never featured as a good cause for extension of time." Similarly in the latter case, the Court emphasized that: *"Ignorance of law is no excuse and cannot amount to sufficient cause for extending time to take a certain step."*

Furthermore, in **Dr. Ally Shabhay v. Tanga Bohora Jamaat** [1997] T.L.R. 305, the Court stated that: *"...those who come to court must not show unnecessary delay in doing so; they must show great diligence."*

It is again on record, and as readily conceded by Mr. Pasha that, the appellant did not account for the five days of delay i.e from 23rd February, 2019 to 1st March, 2019 the last date when the application was admitted in the system, as according to Mr. Pasha, at that period the appellant was already before the court. With respect, we are unable to agree with Mr. Pasha on this point, because it is a requirement of the law that a party seeking extension of time must account for the delay of each day. See for instance our decision in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported).

Worse still, and again, as conceded by Mr. Pasha, even the affidavit of the court clerk one Sania Rahman, who he alleged to have informed them on the existence of the new filing system, was not part of

the appellant's chamber summons and it was not attached to the affidavit in support of that application to prove that fact. It is trite law that, when the litigant is relying on the information availed by other people, the Court should not rely on such information, unless the same is accompanied by an affidavit of the person alleged to have provided such information. In **Christopher Mtikila v Jacob Nkomola and 3 Others**, Civil Case No. 278 of 1997 (unreported), when the Court considered a similar issue, it stated that:

"When the applicant is relying on the information provided by other people, the Court should not rely on such information without the same being accompanied by an Affidavit of the person alleged to provide the same".

On the basis of the above authorities and having considered the appellant's reasons advanced before the High Court, we agree with Mr. Mwakagamba that the learned Judge properly directed herself to the relevant facts of the case and correctly applied principles of the law in arriving at her decision that good cause was not shown to justify the enlargement of time that had been prayed for. As such, we find the first, fourth and fifth grounds of appeal to have no merit.

As for the second and third grounds of appeal, we agree with Mr. Mwakagamba that the same are misconceived as matters indicated therein, do not constitute sufficient reasons for grant of extension of time. We equally decline the invitation extended to us by Mr. Pesha to invoke the provisions of Article 107A (2) (e) of the Constitution. We thus find the second and third grounds of appeal devoid of merit.

In totality, we are settled that this appeal is devoid of merit, and we hereby dismiss it with costs.

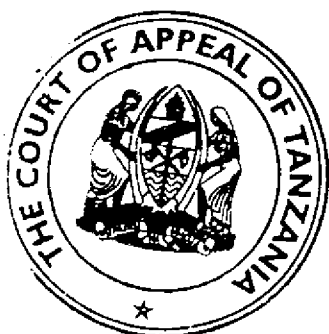
DATED at DAR ES SALAAM this 4th day of October, 2022.

M.A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 5th day of October, 2022 in the presence of Mr. Benjamin Mwakagamba, learned counsel for the Respondent also holding brief for Mr. Pesha, learned counsel for the Appellant is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. E. Fovo", is written over a horizontal line.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL