IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 90 OF 2018

MANTRAC TANZANIA LIMITED ..... APPELLANT

VERSUS

RAYMOND COSTA ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania, at Mwanza)

(Gwae, J.)

dated the 16th day of March 2017
in
Misc. Civil Application No. 101 of 2016

.....

JUDGMENT OF THE COURT

7th & 25th February, 2022

KOROSSO, J.A.:

The appellant was the defendant in Civil Case No. 14 of 2006 filed by the respondent (then the plaintiff) in the District Court of Nyamagana, at Mwanza with claims based on malicious imprisonment, malicious prosecution and lowering of his reputation. The judgment of the trial court was in favour of the respondent. Dissatisfied with the trial court's judgment and decree, the appellant preferred an appeal in the High Court of Tanzania at Mwanza, Civil Appeal No. 39 of 2008. The appeal was dismissed by Nyangarika, J. on 17/8/2008.

Still aggrieved, the appellant lodged an appeal to the Court, Civil Appeal No. 74 of 2014 which was struck out on 22/7/2015 because the decree supporting the appeals in the High Court and the Court were defective. The Court also nullified the proceedings and Judgment of the High Court. Undeterred, the appellant on the 30/7/2015 wrote a letter received on the 31/7/2015 requesting the trial court to issue the proper decree to enable him process appeal in the High Court. The appellant was issued with the appropriate decree on 24/6/2016. By the time of receipt of the said decree, the number of days prescribed by the law for lodging the appeal to the High Court had already expired. As a result, the appellant on 8/7/2016 filed an application in the High Court, Civil Application No. 101 of 2016 that sought for extension of time within which to appeal to the High Court. The application was dismissed on 16/3/2017.

The dismissal of the application is what precipitated the instant appeal, which is premised on the following four grounds:

1. *The High Court Judge erred in holding that the appellant ought to have filed the application for extension of time before the trial court issued a proper decree.*

2. *The High Court Judge erred in holding that the appellant was obliged to follow up rectification of the decree when the District Court file was still at the High Court.*

3. *The High Court Judge erred in law in bringing his own evidence against the appellant in respect of the date the files were sent back to the High Court from the Court of Appeal.*

4. *The High Court Judge erred in law in relying on the evidence that the trial court and the High Court files were sent back to the High Court on 28/9/2015 without giving the appellant an opportunity to be heard regarding the said evidence.*

On the day the appeal was called for hearing, Mr. Libert Rwazo learned counsel entered appearance for the appellant whereas, Mr. Audax Kahendaguza Vedasto, learned counsel represented the respondent.

Mr. Rwazo commenced his submissions by adopting the written submissions and the list of authorities filed earlier on praying that they form part of the appellant's overall submissions. Amplifying on the 1st ground of appeal, he argued that the High Court Judge's holding that the appellant ought to have filed the application for extension of time

before the trial court issued the proper decree was flawed. It was his contention that considering that the Court on 22/7/2015 nullified the proceedings and decision of the High Court it was incumbent on the appellant to seek for the proper decree before processing his appeal to the High Court against the decision of the trial court.

The learned counsel for the appellant maintained that as revealed from the record of appeal, the appellant had taken all required initiatives to process the appeal. According to him, soon after the Court struck out his appeal Civil Appeal No. 74 of 2014 on 22/7/2015, on the 30/7/2015, the appellant wrote a letter to the trial court requesting to be supplied with a proper decree and the decree was issued on 24/6/2016. Subsequently, he promptly filed Misc. Civil Application No. 101 of 2016, an application seeking extension of time to file an appeal to High Court. He thus implored the Court to disregard the reasons given by the High Court for dismissing the application, arguing that they were not based on proper application of the law and procedure.

The learned counsel further argued that since the intended appeal was against the trial court decree found to be defective by the Court, and considering that by then, the limitation of time to appeal had

already expired, and the unpredictability of when the proper decree will be available even at the time he requested for it, prudence guided that initiating appeal process, such as seeking extension of time to appeal out of time was not an option. This is because, he argued, firstly, the time it would have taken to acquire the proper decree was unknown. Secondly, that it would have been premature to file an application for extension of time to appeal out of time before receiving the proper decree because the High Court would have been unable to order for when the appeal should be filed in the absence of the impugned decree. He cited the case of **Patel Trading Co. (1961) Ltd. and Another vs Bakari Omary Wema t/a Sisi kwa Sisi Panel Beating Enterprises**, Civil Application No. 21 of 2014 (unreported), to reinforce his argument.

Regarding the 2nd ground of appeal, Mr. Rwazo challenged the High Court decision that the appellant was obliged to follow rectification of the decree when the trial court file was still at the High Court. He argued that the holding of the first appellate court is unjustified since the appellant duly wrote a letter to the trial court requesting to be supplied with proper decree on 30/7/2015. He alluded that the first appellate judge failed to take into account the fact that the requisite file with relevant record was in the Dar es Salaam Registry of the Court and

thus more time was spent for its transfer and transmission between Mwanza and Dar es Salaam registries which led to further delay in issuance of a proper decree. He referred us to decisions of this Court in **Transcontinental Forwarders Ltd Vs Tanganyika Motors Ltd** (1997) T.L.R. 328; **Samwel Mgonja Vs Total (T) Limited**, Civil Application No. 400/16 of 2017 and **Mwananchi Communications Ltd Vs New Habari (2006) Limited**, Civil Application No. 61/16 of 2017 (both unreported) to augment his stance on the need for courts to consider delays partially attributed to court registries.

According to the learned counsel, had the first appellate judge considered the fact that the concerned file had to move through three registries, the appellant would not have been found to have neglected to properly follow-up the proper decree with the Deputy Registrar. He urged the Court to take into consideration all the surrounding circumstances in this case and lead it to find that the appellant was far from inordinate delay in following up the proper decree. He argued that it was not the appellant's duty to supervise the movement of the files and evidence shows that he exercised diligence since upon receipt of the proper decree, he instantly filed the application for extension of time.

Submitting on the 3rd and 4th grounds of appeal jointly, the learned Advocate for the appellant challenged the fact that the High Court judge considered evidence that addresses his personal follow-up on the transmission of the requisite file within the registry which was essentially neither part of the proceedings nor were the parties invited to address the court on the matters as seen at pages 614 and 615 of the record of appeal. Submitting further, Mr. Rwazo advanced that the High Court judge considered facts which neither arose from the pleadings nor from the evidence, that is, affidavits. He contended that in essence the parties were denied the right to be heard on the matter. To bolster his argument, he cited decisions of this Court in **Kumbwandumu Ndemfoo Ndossi Vs Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018, **Pili Ernest Vs Moshi Musani**, Civil Appeal No. 39 of 2019 and **Christian Makondoro Vs The Inspector General of Police and Another**, Civil Appeal No. 40 of 2019 (all unreported).

The appellant counsel concluded by praying that the appeal should be granted with costs since the appellant deserved extension of time to enable him appeal to remove illegalities apparent in the case under scrutiny.

In response, Mr. Vedasto contended that the appeal is devoid of merit and the Court should find so. With respect to the 1st ground of appeal, his position was that the High Court judge properly determined the case and there was no error in the challenged decision. He argued that the appellant failed to provide sufficient reasons to the satisfaction of the High Court for each day of delay to enable it condone the delay to file their appeal on time in terms of section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2002, now R.E. 2019 (LLA).

The learned advocate for the respondent implored the Court to find the 2nd ground of appeal to lack merit and argued that the case of **Daudi Robert Mapuga and 417 Others Vs Tanzania Hotels Investments Ltd and 4 Others**, Civil Application No. 462/18 of 2018 (unreported) outlines the applicable law where a decree is defective. According to Mr. Vedasto, it was negligence on the part of the appellant not to follow-up on the Deputy Registrar after writing the letter seeking a proper decree to be used to process an intended appeal.

On 3rd and 4th grounds of appeal, he sought the Court not to consider the appellant's arguments since there is no evidence of new evidence having been considered by the High Court judge. He argued

that, whilst it is true that the High Court judge found that the file was available for ten months and that it is the appellant inability to follow-up which delayed getting the rectified decree, that this assertion has no legs to stand on since it is the affidavit of the appellant replying to the affidavit in reply from the respondent which prompted this discussion. He contended that it is in that affidavit that the appellant controverted averments that the decree stayed for ten months at the High Court without being taken.

Submitting further, Mr. Vedasto contended that the High Court's judge deliberations in the Ruling was after reviewing the record to determine whether there was a stay of ten months without the appellant retrieving the rectified decree as alleged. Therefore, the finding of the High Court judge was not without base. In the alternative, he argued that in any case there was no miscarriage of justice occasioned by the findings of the High Court judge on the matter and it in essence benefitted the appellant and therefore no base to ground the assertion of it being prejudicial. He invited us to be guided by Rule 115 of the Rules and find that where there is no injustice in any error, complaints should not be entertained especially where the complainant does not reveal how such error prejudiced him. He finalized his submissions

imploring the Court to find that the appellant failed to advance sufficient reasons that would have warranted the High Court to exercise its discretion and grant extension of time to appeal as prayed.

In rejoinder, the appellant's counsel reiterated his contentions and prayers submitted earlier on, stressing that there are errors in the decision of the High Court. Particularly, when he stated that the appellant should have processed the appeal further before receiving a rectified decree. He argued that the case cited by the respondent counsel, **CRDB Vs George Kilindu**, Civil Application No. 149 of 2006 (unreported) is distinguishable, since in that case there was no evidence that the appellant was following up while this is not the case in the present appeal. Regarding his contention that the High Court judge considered additional facts which were not part of the proceedings nor based on any evidence before him, the learned counsel for the appellant stated that in essence, in his written submissions, the respondent counsel conceded to this fact but argued that the added facts were not prejudicial to the appellant. An assertion, Mr. Rwazo contended, was misconceived since the parties had the right to be heard, and the High Court judge erred in relying on his finding on this matter, whilst the parties were not called upon to expound their positions, controverting

the fundamental right of being heard. He concluded, praying that the appeal be allowed.

We have carefully examined the grounds of appeal, oral and written submissions, and cited authorities of both parties and the record of appeal. Our starting point will be determining the 1st and 2nd grounds of appeal conjointly. To caption the matter for determination, we find it pertinent to reproduce the segment of the Ruling of the High Court addressing the finding that the appellant should not have waited for the rectified decree to file the application for extension of time. The High Court judge stated: -

> *"The applicant or his advocate ought to have filed the application for extension of time promptly and meanwhile make follow-ups to have the court decree rectified..."*

In the circumstances, the issue for our determination at this juncture is whether the High Court judge was correct to find that the appellant should have promptly filed the application and not wait for the rectified decree. The appellant's counsel argues that before the proper decree was issued, since it was not known when it will be issued, it was not legally possible to seek extension of time because: Firstly, at the time it

was impossible to expound on the length of the delay to file the appeal; and secondly, if the application had been lodged immediately after the Court of Appeal decision striking out the appeal and before a rectified decree was received, during the hearing, in the absence of a proper decree, the High Court would have been constrained to order when the appeal should be filed.

We have also considered the respondent's counsel argument that the appellant's stance is misconceived, for reason that there is no legal direction to that effect. We find this argument wanting when the import of section 14(1) of the LLA which governs application for extension of time is taken into consideration. Mr. Vedasto further argued that it is only in cases under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), where an application for extension of time can be filed after the doing of the act for which extension is sought, and in all other cases extension of time is made when a party is still uncertain as to when the appeal will be lodged. The learned advocate for the respondent also contended that extension of time is required to be certain only in respect of how long the applicant has been late to lodge the application and the law requires an applicant to account for every day of delay from the

moment he was positioned to lodge an application for extension of time to the time he lodges it.

Suffice to say, the position of the law on extension of time to file for a civil appeal from the District Court to the High Court or appeal where specified limitation period has expired is expounded in section 14(1) of LLA which states:

> *"14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.*

Section 14 (1) of the LLA clearly outlines the fact that the right to apply for extension of time can be before or after expiration of specified limitation period and not only before as argued by the learned counsel for the respondent. The requirement is for the applicant to show sufficient cause for the delay to the court for it to exercise its discretion and condone the delay. We recognize that there is no clear definition on what amounts to "sufficient cause". However, this Court has held in

various decisions that a number of factors have to be considered; including whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, and lack of diligence on the part of the applicant to name a few. For this stance, see **Dar es Salaam City Council Vs Jayantilal P. Rajani,** Civil Application No. 27 of 8 1987 and **Tanga Cement Company Limited Vs Jumanne D. Masangwa and Amos A. Mwalwanda,** Civil Application No. 6 of 2001 (both unreported). Particularly, in **Yusufu Same and Another Vs Hadija Yusufu**, Civil Appeal No.1 of 2002 (unreported), the Court held:

> *"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step."*

In the instant appeal there is no doubt that the time started to run immediately after the decision of this Court on 22/7/2015 when Civil Appeal No. 74 of 2014 was struck out and the Court nullified the proceedings and judgment of the High Court in Civil Appeal No. 38 of 2008 as already outlined hereinabove. The respondent recognizes the fact that the appellant wrote a letter to the trial court seeking for a

rectified decree on 30/7/2015 and received on 31/7/2015. That is, about 9 days after the order of the Court striking out the appeal. Conversely, the rectified decree was received on 24/6/2016 and the application for extension of time, that is, Civil Application No. 101 of 2016 was filed on 8/7/2016, that is 14 days after the proper decree was received.

The reasons for delay in filing the application for extension of time are found in the affidavit supporting the notice of motion (at pages 290-291 of the record of appeal) in paragraphs 13-21. The appellant's advocate then, Faustin Anton Malongo avers that at the time the rectified decree was received on 2/6/2016, the 90 days prescribed for lodging an appeal against the judgment and decree had already expired and that the original record of DC Civil Case No. 14 of 2006 was unavailable in the registry. Additionally, the respective affidavit avers on the day-to-day activities of the appellant's advocate from the time of receiving the decree to the day of filing the application for extension of time on 8/7/2016.

Having perused through the record of appeal, we are satisfied that after the striking out of Civil Appeal No. 74 of 2014 by the Court, the appellant had without delay written the letter requesting for rectification

of the trial court's decree in line with section 96 of the Civil Procedure Code, Cap 33 R.E 2002, now R.E. 2019 (the CPC). At the same time the fact that there was no record of the case in the District Court as alluded to by the appellant's advocate above and found in the affidavit which supported the notice of motion were essentially not disputed by the learned counsel for the respondent in his affidavit in reply reflected at pages 401-403 of the record of appeal. In paragraph 5 he avers:

> "...*After conclusion of the hearing and pending time for returning to Dar es Salaam at 21.45 hours on 24/5/2016, I made inquiry about the present matter. I found that the was no record of this case whatsoever in the District Court....*"

Thus, notwithstanding the whereabouts of the relevant file at the time, and the applicant's letter requesting for the proper decree, it suffices that there is evidence that it was not in the hands of the District Court at the time to enable the appellant to process the appeal. It is obvious that under the circumstances, in light of the fact that the respective files had to move not only from registries but even regions, that is, Dar es Salaam and Mwanza, the respective court registries cannot be totally absolved from having somewhat contributed to the delay in providing the applicant with the proper decree. Regarding delay that may be

contributed by the court itself, the Court had occasion to discuss this in the case of **Benedict Mumello Vs Bank of Tanzania,** Civil Appeal No. 12 of 2002 (unreported) and found that delay to be supplied with copies of proceedings and judgment and improper decree contributed to the delay for the applicant to appeal within the prescribed period and thus found that reason to be sufficient cause for the delay.

Moreover, we find the case relied upon by the respondent, that is **Daudi Robert Mapuga and 417 Others** (supra) to be distinguishable. In that case, the applicants just waited for notification from the Registrar that the documents required were ready while in this case the appellant narrated the follow-up he made as reflected in the affidavit supporting notice of motion.

We have already stated above that the argument by the respondent counsel faulting the appellant in filing for extension of time after the time to appeal has expired to be misconceived, since section 14(1) of the LLA covers applications even after expiry of the time specified for an action. We also agree with the learned counsel for the appellant that in the peculiar circumstances like in the present case, which we have already highlighted herein, the proper decree was

essential prior to filing the application and initiating the process of appeal. In effect, we find the 1st and 2nd grounds of appeal have merit.

We now turn to the 3rd and 4th grounds of appeal which we shall address conjointly. Essentially, the complaint is that the High Court judge considered and relied on facts which were not gathered from the evidence or record before him to determine whether the appellant reasons for delay to file appeal were sufficient or borne out of negligence or lack of diligence. The appellant counsel submitted that the High Court judge introduced evidence with respect to the date the trial court file and the High Court file were returned from the Court of Appeal to the High Court, which was not part of the proceedings. He argued that this new evidence is clearly discussed in the High Court's decision dismissing the application for extension of time.

The learned counsel further contended that the High Court judge stated that he had obtained the evidence when he was writing the ruling by checking a registry dispatch that shows that the relevant files came back to the High Court on 28/9/2016. He argued that the said dispatch relied upon by the High Court judge was neither introduced by affidavit, counter affidavit, reply to counter affidavit nor written submissions and

that the parties were not heard on the said evidence. He cited our decision in the case of **Peter Ng'ohomango vs The Attorney General**, Civil Appeal No. 114 of 2011 (unreported), to bolster his contention.

On his part, responding to the 3rd and 4th grounds of appeal, Mr. Vedasto argued that allegation by the appellant that the High Court judge introduced new evidence not founded on the evidence before the Court is misconceived since the discussions on the number of days the file was at the registry of the High Court was alluded to in the reply in the affidavit. He therefore argued that the issue for determination is whether the appellant exercised diligence in pursuant of his appeal. The learned counsel argued that the appellant (then the applicant) failed to partake the initial stages of filing this application prior to obtaining of the proper decree as a copy of decree is not a pre-requisite to filing of an application for extension of time. He contended that the appellant, upon receiving the order of the Court striking out the appeal, he failed to promptly seek extension of time and instead waited for more than one year without filing an application for extension of time to file an appeal was negligence on the part of the appellant.

The learned counsel urged us to consider the averments in paragraph 5 of the affidavit in reply at page 401 of the record of appeal prompted by his findings upon conducting a follow-up of the relevant files. That it was this action which availed him with information that the registry of the District Court had no such file but that it was stored at the High Court Registry in Mwanza sitting still as of July 2015 immediately after the decision of the Court in Civil Appeal No. 74 of 2014. He thus reiterated his contention that the appellant failed to exhibit sufficient cause to lead the High Court to exercise its discretion and grant the prayers sought.

The rejoinder by the appellant's advocate was to reiterate the submissions in chief and to stress the fact that the appellant was condemned unheard upon the new evidence introduced by the High Court judge and that throughout the appellant has exercised diligence in pursuant of the intended appeal.

In determining the 3rd and 4th grounds of appeal, for ease of reference, we find it prudent to reproduce a segment of the findings of the impugned High Court Ruling dated 16/5/2017 in Misc. Civil Application No. 101 of 2017. The High Court judge stated:

> *"... I found myself compelled to carefully check our registries, **dispatch** in particular and come up with observation that the records (Trial court file No. 14 of 2006, High Court File No. 39 of 2008 together with Court of Appeal file No. 74 of 2014) from the Dar es Salaam after delivery its judgment on 22nd July 2017 were evidently brought back to this court on 28/09/2015 and on the same date one **Lllian Mlindoka**, a High Court Civil Section in-charge received both High Court File and District Court File together with the Court of Appeal judgment. Thus, if truly the applicant was desirous to pursue his appeal he could have made follow ups to have the defective decree rectified earlier as all the files were here in Mwanza since **28th September 2015** and not as incorrectly submitted by the applicant's counsel that the files from Dar es Salaam were brought to Mwanza in **May, 2016.**"*

A scrutiny of the above excerpt shows that the High Court judge took initiative to follow up on the relevant files to assist the appellant to process his appeal. Certainly, his research, led him to consider matters such as the contents of the dispatch, which was not part of the pleadings or the record. Conversely, our perusal of the record has discerned that in his deliberation of the case before him, the High Court

judge did introduce new facts found in a dispatch or other files found in his research which were neither part of the proceedings nor evidence.

It suffices, that the court record is presumed to represent the truth of what transpired and thus must be sacrosanct. The issue for consideration we find is whether the parties were given a hearing on issues that appear to be new as also complained by the appellant. We are of firm view that the new facts were not availed to the parties to be addressed prior to being considered in the Ruling.

It is well settled that each party has the right to be heard as previously held in various decisions of this Court such as; **Charles Christopher Humphrey Kombe Vs Kinondoni Municipal Council**, Civil Appeal No. 81 of 2017 and **Yazidi Kassim Mbakileki Vs CRDB (1986) Ltd and Another,** Civil Reference No. 14/04 of 2018 (both unreported). In **Yazidi Kassim Mbakileki** (supra) a paragraph from **Abbas Sherally & Another Vs Abdul S.H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) it was held:

> *"The right to be heard before adverse action or decision is taken such a party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will*

be nullified ever if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

We do not wish to spend much time on the issue, but based on the above settled position of the law and having found that the High Court judge raised and determined facts relevant to determination of what was before him, on his own without providing an opportunity to the parties to opine on the said alleged facts, we are of the view was tantamount to determination of relevant facts without hearing the parties, and was, with due respect, flawed. Upon finding the said evidence, it was upon the High Court judge to share the results of his research with the parties and let them submit on it, which was not what transpired as shown above. As a result, with the above findings, we are of the view that the 3rd and 4th grounds have merit.

In the final analysis, we are of the settled opinion that though the High Court judge introduced some facts which were not borne from the pleadings without hearing the parties, this is an error which in the circumstances of this case, cannot outweigh our finding in respect of the 1st and 2nd grounds of appeal. We have considered the material placed before the High Court and find that the appellant sufficiently provided

reasons for the delay and was entitled to extension of time within which to lodge the appeal against the decision of the trial court.

Consequently, we allow the appeal and grant the appellant extension of time to lodge its appeal to the High Court within the prescribed time by the law. Equally important, considering the circumstances of this appeal, each party to bear own costs.

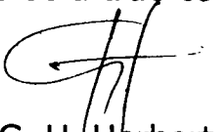
DATED at **MWANZA** this 25th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in the presence of Mr. Idrissa Juma, learned counsel for the Appellant and also holding brief for Mr. Audax Kahendaguza Vedasto, learned counsel for the respondent is hereby certified as a true copy of original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL