IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 2/16 OF 2021

HB WORLDWIDE LIMITED.....APPLICANT

VERSUS

GODREJ CONSUMER PRODUCTS LIMITED..... RESPONDENT

(Application for extension of time to lodge an appeal from the Judgment of the High Court of Tanzania, Commercial Division at Dar es Salaam)
(Magoiga, J.)

dated the 22nd day of May, 2020
in
Commercial Appeal No. 2 of 2019

.....

RULING

14th February & 13th March, 2023

KWARIKO, J.A.:

By a notice of motion taken under rules 10, 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules), the applicant has moved this Court for extension of time within which to lodge an appeal to the Court against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (the High Court) dated 22nd May, 2020 in Commercial Appeal No. 2 of 2019. The notice of motion is supported by an affidavit sworn by Mr. Gulamhussain Yusuf Hassam, learned advocate for the applicant.

It is deponed in the affidavit that the impugned decision was scheduled to be delivered on 12th June, 2020 but in fact it was delivered on 22nd April 2020 without a notice to the applicant. Being dissatisfied by that decision, the applicant lodged a notice of appeal and applied for leave to appeal to the Court vide Misc. Commercial Application No. 98 of 2020 whose ruling was delivered on 18th September, 2020. The deponent went on to aver that, on 22nd September, 2020 the applicant requested for a copy of the proceedings and ruling in respect of the said application which was supplied to her on 21st October, 2020.

It was averred further that upon receipt of the documents, the applicant applied to be issued with a certificate of delay. However, the certificate did not exclude the period spent by the applicant to obtain leave to appeal. That, the certificate of delay excluded the period between 15th June, 2020 when the applicant applied for a copy of proceedings and the impugned decision and 6th July, 2020 when she was supplied the said copy. Thus, because the leave to appeal had not been granted at that time, she could not lodge her intended appeal. The deponent also averred that the impugned decision is tainted with an illegality hence good cause to be considered for extension of time.

The application has been contested by the respondent through an affidavit in reply sworn by one Krishan Kishore, Senior Project Manager of the respondent. As to the averments in respect of the certificate of delay, the deponent responded that the same does not concern the documents in relation to the application for leave to appeal but it was for the appeal purposes. And in any case the applicant ought to have proved when she was notified by the Registrar that the documents were ready for collection and if she really received those documents on 21st October, 2020. In relation to the alleged illegality, the deponent averred that the same is invisible.

A brief background of this matter suffices. It goes as follows: Formerly, the respondent was aggrieved by the ruling of the Deputy Registrar of the Trade and Service Marks dated 2nd April, 2019 which dismissed the notice of opposition which was filed by the respondent in opposition to the applicant's application for registration of Trade Mark under application No. TZ/T/2010/1091. Following that decision, the respondent filed Commercial Appeal No. 2 of 2019 before the High Court in which the decision of the Deputy Registrar was declared invalid. The Deputy Registrar was thus ordered to continue with giving directives to enable the parties serve each other and be able to determine the real

controversy inter parties. The High Court also declared the registration done after the ruling of the Registrar to be invalid with no effect. The applicant was aggrieved by the decision of the High Court dated 22nd May, 2020 and lodged a notice of appeal on 16th June, 2020. However, the appellant was late to lodge her intended appeal, hence has preferred this application for extension of time to do so.

When the application was called on for hearing, Mr. Mpaya Kamara, learned advocate teamed up with Mr. Gulamhussain Hassam, also learned advocate to represent the applicant, while Mr. Francis Kamuzora, learned advocate, appeared for the respondent.

In his submission in support of the application, Mr. Kamara started by adopting the notice of motion and its supporting affidavit. He prayed for grant of extension of time to file the intended appeal since the impugned decision is tainted with an illegality on the following two points. First, that, the High Court had earlier fixed the date of judgment to be 12th June, 2020 but instead it was delivered on 22nd May, 2020 in the absence of the applicant but in the presence of the respondent. He contended that this omission was contrary to Order 39 rule 30 of the Civil Procedure [CAP 33 R.E. 2019] (henceforth the CPC) which requires the

court to notify the parties of the date of judgment. The learned counsel also fortified his contention with the Book of **D.F. Mulla: The Code of Civil Procedure,** 9th Edition at page 612 interpreting Order 20 rule 1 of the **Indian Code of Civil Procedure** which is in *pari materia* with Order 39 rule 30 of the CPC.

The second point is that the nullification of the trade mark was done by the High Court without affording the parties an opportunity of being heard. Likewise, the nullification was done without according the Registrar of Trade and Service Marks of his right to appear and be heard as required under section 52 (1) of the Trade and Service Marks Act [CAP 326 R.E. 2002] (the Act).

It was Mr. Kamara's contention that where an illegality is alleged, the Court is enjoined to grant extension of time so that the matter could be considered by the Court. He supported his argument with the decision of this Court in the case of **Brazafric Enterprises Limited v. Kaderes Peasants Development (PLC),** Civil Application No. 421/08 of 2021 (unreported).

Finally, the learned counsel argued that each day of delay may not be sufficiently accounted for but urged the Court to grant this application on account of the alleged illegalities.

In his reply, Mr. Kamuzora adopted the affidavit in reply and argued that the delivery of the judgment in the absence of the applicant did not occasion any injustice since she took all necessary steps as required in law including lodging the notice of appeal against the impugned decision. The learned counsel argued further that the issue of nullification of the trade mark cannot amount to an illegality since it was a natural consequence of the decision of the High Court. He added that the whole proceedings from which the appeal before the High Court arose, were based on the issue of registration of the trade mark. He contended that since the High Court overruled the decision of the Registrar, the consequence was to declare the registration of the trade mark invalid, otherwise the said appeal would have been a mere academic exercise. Mr. Kamuzora argued that the alleged illegality is actually not an illegality hence the right to be heard does not exist.

Further, Mr. Kamuzora argued that the applicant has not accounted for the period between 21st October, 2020 when she was supplied with

documents in relation to the application for leave to appeal and 21st December, 2020 when she applied to be issued with the certificate of delay. He supported his argument with the decision of the Court in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported). For these reasons, the learned counsel implored the Court to find that the application has no merit and dismiss it.

In his rejoinder, Mr. Kamara argued that there is no other prejudice suffered by the applicant than that of notifying one party only for the delivery of the judgment. He contended that the judgment which was delivered that way is not a judgment in law. He argued further that the fact that the applicant lodged the notice of appeal within the prescribed time does not take away the said illegality.

The learned counsel maintained his stance in respect of the nullification of the trade mark and argued that after all there was no such a prayer before the High Court. He added that, the nullification could not be a natural consequence of that decision because that court went ahead of what was done by the Registrar on the preliminary objection, hence

even if the High Court ordered the parties to go back to the Registrar, on account of the nullification, there is nothing to be heard by the Registrar.

Mr. Kamara stressed that, even if the applicant has not accounted for each day of delay, the issue of illegality is good cause for the grant of this application.

Having heard the parties and perused the record, the germane question for my determination is whether the applicant has shown good cause for the grant of this application as required under rule 10 of the Rules upon which this application has been pegged. Rule 10 of the Rules provides:

> *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 t reference to that time as so extended.*

Times without number, this Court has stressed that the applicant should show good cause before time can be extended for him to do a

certain act. See for instance the cases of **Amani Girls Home v. Isack Charles Kanela,** Civil Application No. 325/08 of 2019 and **Idrisa R. Hayeshi v. Emmanuel Elinami Makundi,** Civil Application No. 316/08 of 2019 (both unreported).

Even though, what amounts to good cause has not been defined, but in a number of its decisions, this Court has stated some factors to be considered. They include; whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; the lack of diligence on the part of the applicant; the applicant's ability to account for the entire period of delay; and existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged. (See for instance, the cases of **Lyamuya Construction Company Ltd** (supra) and **Osward Masatu Mwizarubi v. Tanzania Processors Ltd,** Civil Application No. 13 of 2010 (both unreported).

As shown above, among the factors to be considered in the application of this nature is for the applicant to account for each day of delay (see **Lyamuya Construction Company Limited** (supra). The applicant has stated categorically that she has not sufficiently accounted for the delay. As rightly argued by Mr. Kamuzora, the applicant has not

accounted for the delay to file this application from 21st October, 2020 when she was supplied with the documents pertaining to an application for leave to appeal and 21st December, 2020 when she applied to be issued with a certificate of delay.

However, the applicant's main reason for the grant of this application is that the impugned decision is tainted with illegalities. **Firstly,** that the impugned judgment was delivered in the absence of the applicant and without notice contrary to Order 39 rule 30 of the CPC. The respondent's counsel has opposed this allegation on account that it did not prejudice the applicant. I have gone through the record and found that on 23rd April, 2020, the High Court ordered for the date of delivery of the judgment to be 12th June, 2020 but that was not the case since it was delivered on 22nd May, 2020 in the absence of the applicant.

Secondly, the applicant has complained that the nullification of the trade mark done by the High Court was illegal since the parties were not afforded opportunity of being heard. In the same vein, she alleged that the Registrar of the Trade and Service Marks was not heard as required under section 52 (1) of the Act. The respondent argued that the High Court did not err since nullification was a natural consequence of its

decision. Whether or not the alleged illegalities are fatal or prejudiced the applicant or both parties, is not the domain of the Court to decide at this stage.

It is a settled principle of law in our jurisdiction that where illegality is an issue in relation to the decision being challenged, the Court is enjoined to grant application for extension of time so as the matter can be considered. One of the celebrated decisions of the Court on this aspect is the case of **Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] T.L.R 185, where it was held that:

> *"(i) Where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of rule 8 (now rule 10) of the Rules for extending time;*
>
> *(ii) When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take*

appropriate measures to put the matter and the record right."

Likewise, in the case of **VIP Engineering and Marketing Limited & Three Others v. Citibank Tanzania Limited,** Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported), the Court stated thus:

> *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 (now rule 10) regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."*

[See also: **Brazafric Enterprises Limited** (supra); **The Attorney General v. Emmanuel Marangakisi (As Attorney of Anastansious Anagnostou) & Three Others**, Civil Application No. 138 of 2019; and **Tanzania Breweries Limited v. Herman Bildad Minja,** Civil Application No. 11/18 of 2019 (both unreported)].

Guided by the above stated principle, I find that the allegation by the applicant of illegalities in respect of the impugned decision is good cause for extension of time even though she has failed to account for the delay to file her appeal.

It follows therefore that; the applicant has shown good cause in terms of rule 10 of the Rules. This application has merit and I hereby grant it. The applicant should lodge her intended appeal within sixty days from the date of the delivery of this ruling. Costs in this application shall abide the outcome of the intended appeal.

It is so ordered.

DATED at **DAR ES SALAAM** this 9th day of March, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of March, 2023 in the presence of Mr. Gulamhussain Hassam, learned counsel for the Applicant and in the absence of the Respondent, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL