IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 164/01 OF 2022

APRONIUS MUTALEMWA MUZO T/A
LIRY INVESTMENT & GENERAL SUPPLIERS .... APPLICANT

VERSUS

OSCAR BATALINGAYA KOMBO
OPR VENTURE LIMITED .... RESPONDENT

(Application for Extension of time within which the Applicant may apply for leave to appeal against the decision of the High Court of Tanzania at Dar es salaam)

(Kitusi, J.)

Dated the 23rd day of May, 2018
in
Civil Appeal No. 215 of 2017

RULING

21st March & 12th June, 2023

KENTE, J.A.:

Before me, is a notice of motion filed by Mr. Ashiru Lugwisa learned counsel for the applicant seeking an extension of time within which to file an application for leave to appeal to this Court to challenge the decision of the High Court of Tanzania (Kitusi J as he then was) in an appeal marked "Civil Appeal No. 215 of 2017" dated 23rd May, 2018. The application is made under Rules 10,45 (b) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules) and is resisted by Mr. Richard Rweyongeza learned advocate on behalf of the respondent who urged that the applicant has not furnished good reason to account for the delay.

It is worthwhile to note, right from the outset that, in terms of rule 45A (1) of the Rules, a party whose application for leave to appeal is rejected by the High Court, has a right to come to this Court by way of what has been babtized as "a second bite". Equally noteworthy is a requirement that, such an application has to be made within fourteen days of the decision of the High Court dismissing the application for leave to appeal. It follows therefore that, in the present case, as it is in any application of the present nature, the focus is on the 7th August, 2020 which is the date of delivery of the ruling of the High Court dismissing the applicant's application for leave to appeal and what happened subsequently thereafter as to lead to the applicant's failure to comply with Rule 45A (1) of the Rules.

According to Mr. Lugwisa in his founding affidavit, and this is necessary for the parties to confine themselves to their respective pleadings, the sole reason why the applicant could not beat the fourteen days deadline is that, both himself and his client were absent on 7th August, 2020 when the High Court delivered its ruling dismissing the application for leave to appeal. It must be added that, the learned counsel also claims to have been notified of the said ruling on 14th September, 2020 by an anonymous court clerk who allegedly went to his office and issued him with a copy of the said ruling requiring him to counter-sign at

the foot of the said document to acknowledge receipt. Mr. Lugwisa goes on to assert that, about three months thereafter, i.e on 7th December, 2020 after receiving instructions from his applicant, he filed another application for leave to appeal which was however struck out by this Court on 22nd March 2022 for being barred by limitation.

For his part, Mr. Rweyongeza sought to persuade me to find that the application had no merit at all. His general thesis was that, the applicant has not accounted for each day of the delay and that the claim that the impugned decision of the High Court was erroneously reached at in total disregard of the law of evidence would have been a fit ground of appeal if the applicant had conventionally made his way to this Court.

Regarding the averment made by Mr. Lugwisa that he was served with a copy of the ruling of the High Court refusing the application for leave to appeal by an unnamed court clerk a claim which, as well, deserves my attention, albeit very briefly, Mr. Rweyongeza submitted unequivocally and without reservation that, the said averment was nothing but a lie. Mr. Rweyongeza's argument was based on the fact that, in the certificate of delay (annexture OPR1 collectively to the affidavit in reply), the Deputy Registrar of the High Court clearly states that the copies of proceedings, ruling and drawn order were supplied to the applicant through post services. The learned counsel thus accused the

applicant of lying through his advocate with the intention of misleading the Court on how he was served. Mr. Rweyongeza relied on the case of **Ignazio Messina v. Willow Investment SPRL,** Civil Application No. 21 of 2001 and urged me to turn down Mr. Lugwisa's affidavit as the one telling lies and not act on it. Once I reach that conclusion, Mr. Rweyongeza submitted, the notice of motion will be left without any supporting affidavit and subsequently liable to dismissal.

Submitting in the alternative, Mr. Rweyongeza contended that, should Mr. Lugwissa's affidavit survive the above mounted onslaught, the applicant had not accounted for the delay as required by law. Elaborating, the learned counsel begun with the applicant's unexplained absence on the 7th August, 2020 the day when the High Court delivered its ruling dismissing the application for leave to appeal.

The learned senior counsel contended that, since the applicant and his advocate had not explained why they were absent on that day, time begun to ran against him from the date of delivery of the ruling because he did not apply to be issued with a copy of the ruling as to be entitled to a certificate of delay. It was Mr. Rweyongeza's conclusion on that aspect that, by the 14th September, 2020 when the applicant received the necessary documents, he was already out of time for which he ought to account.

Another period which is unaccounted for according to Mr. Rweyongeza, is the period between 14th September, 2020 when the applicant received the said document to the 1st October, 2020 when he applied for the certificate of delay.

Yet another disquieting procrastination on the part of the applicant as pointed out by Mr. Rweyongeza, relates to the period from 14th September, to 7th December, 2020 when the applicant lodged the first application for leave to appeal to this Court. Regarding this delay of eighty three days for which it is averred that Mr. Lugwisa had not received instructions from his client who had travelled to his home village in Bukoba, Mr. Rweyongeza was very brief. He submitted, and I think correctly so that, delay caused by communication between an advocate and his client cannot be a ground for extension of time.

Faced with Mr. Rweyongeza's arguments which are almost unassailable, but still undaunted, Mr. Lugwisa had a second string to his bow. Relying on the case of **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 he argued unflinchingly that, in essence, there was no delay properly so called as the first application was lodged in time but only to be mistakenly struck out for being time barred and that, all in all, the applicant had acted diligently and promptly in the pursuit of his rights.

With regard to the decision of the High Court which the intended appeal to this Court is sought to challenge, Mr. Lugwisa was at pains trying to show, almost as an afterthought and without elaborating that, indeed the said decision had been reached at erroneously in total disregard of the law of evidence.

Having considered the applicable the law and the submissions made by counsel for both parties, I do not think this application is in any way sustainable as to detain me. Indeed as correctly submitted by Mr. Rweyongeza, the applicant was obviously dilatory in the pursuit of his rights. After absenting himself from receiving the ruling of the High Court on 7th August, 2020 for which no explanation has been offered, the applicant went on doing whatever was required from him at a snail's pace when everyone else thinks it would be better if he did it much more quickly, taking into account the law of limitation and its wrath which knows no bounds. As opposed to Mr. Lugwisa's, material averments which as it turned out, are not free from question, there is nothing in his supporting affidavit to show that the applicant had acted with promptness after it was decided by the High Court not to grant him leave to appeal to this Court. This being the case, I am inclined to agree with Mr. Rweyongeza as I hereby do that indeed, the applicant has not accounted for the inordinate delay.

With regard to the contention by Mr. Lugwisa that the decision of the High Court was reached at without regard to some of the principles underlying the law of evidence and without solid evidence on the respondent's part, I would be unduly judgmental if not nay-saying to uphold Mr. Lugwisa's allegations even in the least. For, how can I criticize or cast doubt on a judgment which I have never seen? It follows in my judgment that, Mr. Rweyongeza was correct therefore that, the above grounds are grounds of appeal which the applicant is likely to rely on but which cannot persuade me at this stage to grant extension of time for filing an application for leave to appeal to this Court.

With the above remarks, I find no merit in this application which I hereby dismiss with costs.

DATED at **DAR ES SALAAM** this 7th day of June, 2023.

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 12th day of June, 2023 in the presence of Mr. Ashiru Lugwisa, learned counsel for the Applicant, and Mr. Theodory Primus, counsel for the Respondents, is hereby certified as a true copy of the original.

G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL