IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 428/01 OF 2021

ULTIMATE SECURITY (T) LTD.....APPLICANT

VERSUS

CHANDE ALLY LUBUGILE ..... 1ST RESPONDENT

RAYMOND PATRICE SIMON ..... 2ND RESPONDENT

CREVA RAJABU MKUMBUGWA ..... 3RD RESPONDENT

NOBLE MOTORS COMPANY ..... 4TH RESPONDENT

(Application for extension of time to file notice of appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Mgonya, J.)

dated the 1st day of November, 2019

in

Civil Appeal No. 20 OF 2018

.....

RULING

29th May, & 13th June, 2023

KIHWELO, J.A.:

In this application the applicant, by way of notice of motion filed on 16. 09. 2021 under rule 45A (1) (a), (2) and (3) as well as rule 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) is seeking enlargement of time within which to lodge a notice of appeal to this Court

against the decision of the High Court dated the 01. 11. 2019 in Civil Appeal No. 20 of 2018. The application is by way of Notice of Motion and is supported by an affidavit, duly sworn by Richard Liampawe, the principal officer of the applicant. In addition, the applicant has filed written submission to support his quest. The application has been resisted by the respondents who filed written submissions in opposition, however, they did not file affidavit in reply.

For better appreciation of the gist of the application before me, it is, in my view, essential to provide abbreviated facts of the matter. The first, second and third respondents were employed by the appellant in the capacity of security guards. Sometimes in 2010, while still under the appellant's employment, the first, second and third respondents were arrested and taken to Buguruni Police Station where they were charged and detained for conspiracy, breaking and stealing properties of the fourth respondent. They were detained at Buguruni Police for six days and later were apprehended before Ilala District Court where charges were read over to them but they denied any involvement, and subsequently they were taken to remand prison where they were detained for a couple of months until when they were granted bail.

On 16.01.2014, upon hearing the parties, the Ilala District Court came to the conclusions that the prosecution did not prove its case to the hilt and therefore, the first, second and third respondents were discharged. Subsequently, the appellant terminated all the three and accordingly paid them all their dues.

It is on that account, the first, second and third respondents approached the Ilala District Court in Civil Case No. 4 of 2016 suing the appellant for damage they suffered as a result of humiliation, metal torture, harassment and physical injuries sustained while they were maliciously prosecuted by the appellant and the fourth respondent. At the height of the trial on 06.11.2017 the Ilala District Court found the case for the first, second and third respondents and ordered the appellant and the fourth respondent to pay the first, second and third respondents a total of Tshs.13,000,000.00.

Dissatisfied with the decretal amount the first, second and third respondents preferred an appeal before the High Court in Civil Appeal No. 20 of 2018 which upon hearing the parties on merit the High Court decided the matter in favour of the first, second and third respondents and awarded each of them the sum of Tshs. 22,000,000.00. Unamused by the decision of

the High Court, the appellant filed a notice of appeal before the Court. In addition, the appellant wrote a letter requesting to be supplied with certified copies of the ruling, drawn order and proceedings. Having noted some anomalies in the notice of appeal the appellant lodged an application to withdraw the notice of appeal on 29.09.2020 and the withdrawal order was served upon them on 06.10.2020. Subsequently, on 12.10.2020 the applicant filed an application for extension of time to file notice of appeal through Miscellaneous Application No.517 of 2020 before the High Court (Mlyambina, J) which was dismissed with costs, hence this instant application as a second bite.

At the hearing of the application before me, the applicant was represented by Ms. Neema Ndossi, learned counsel whereas the first, second and third respondents were represented by Ms. Tully Kaundime, learned counsel and the fourth respondent was represented by Mr. Ndanu Emmanuel assisted by Ms. Sharifa Mohamed both learned counsel.

Upon the applicant being asked to take the floor and expound the application, Ms. Ndossi prayed to adopt the notice of motion, supporting affidavit by the applicant along with the written submissions which were prior lodged in Court on 11.11.2021 in support of the application. In her

explanation, Ms. Ndossi reiterated that in order for the Court to grant extension of time, the applicant has to demonstrate that there is sufficient cause for granting the sought order. In her view, in the instant case there are several grounds which the applicant is relying in persuading the Court and went ahead to describe four grounds.

According to Ms. Ndossi, the delay to lodge the notice of appeal was technical as opposed to actual delay. Elaborating, she argued that the High Court decision subject of the intended appeal was delivered on 01.11.2019 and the applicant filed the notice of appeal on 08.11.2019 which however, was withdrawn on 14.09.2020 on account that it was incompetent and, in her view, the delay was technical because the initial notice of appeal was filed in time but only that it was found to be incompetent. Reliance was placed in the case of **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154 to fortify her argument.

Ms. Ndossi further contended that the delay to lodge the notice of appeal was not inordinate and that the applicant soon after the judgment was pronounced lodged the appeal and even then, the applicant kept making follow up of the proceedings and upon realizing that the notice had some

defects the applicant chose to withdraw it instantly. Illustrating, she gave oral account of the chronology of events from 01.11.2019 when the judgment was delivered to 12.09.2020 when the instant application was lodged in this Court and submitted that the six days lapse which was spent preparing necessary documents before lodging in court was not an excessive delay in the eyes of the law and bearing in mind that all along the applicant has been in and out of the court seeking for justice. To fortify her argument, Ms. Ndossi cited our previous decision in **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 111 of 2009 (unreported) for the proposition that the applicant who has been diligently and persistently in and out of the court's corridor in search of justice in particular after discovering the defect himself and attempting to cure it before anybody else deserves an extension of time.

Ms. Ndossi further faulted the High Court for denying extension of time unjustifiably and without considering the fact that the reason for withdrawal of the earlier notice of appeal was clearly stated in the affidavit and the written submissions in support of the application. In her view, the learned judge maliciously decided to reject the applicant's application for extension of time without considering evidence which were conspicuously stated in the

affidavit in support. In my considered opinion, and with due respect, the appellant's complaint as regards the alleged denial for extension of time is decidedly thin. The reason is not far-fetched, in an application for extension of time as second bite this court does not seek to challenge the decision of the first instance judge who determined the application for extension of time but rather, the court seeks to establish whether circumstances obtaining in that application may warrant the Court exercise its discretion to extend time.

Ms. Ndossi finally argued that the decision subject of the intended appeal is marred with illegality and irregularity which if left to stand will create bad precedent in the administration of justice. In her view, the fact that there is a point of illegality on the decision subject of the intended appeal, that is sufficient to warrant the grant of extension. Reliance was placed 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) in which the Court discussed at considerable length that where a point at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason for extension of time. She therefore, humbly prayed that the application be granted.

When it was her turn, Ms. Tully, prayed to adopt the written submission which were earlier on lodged in Court on 30.11.2021 in opposition to the application. She contended that the delay to lodge the application was actual and not technical as argued by the counsel for the applicant since the decision to withdraw the notice of appeal came as a second thought in order to shift burden to the fourth respondent and therefore delay the first, second and third respondents from enjoying the fruits of their decree. In her view, that delay cannot be termed as technical delay in the spirit of the principle stated in **Fortunatus Masha** (supra).

Ms. Tully further submitted that the applicant did not take essential steps to lodge the appeal in terms of rule 90 (1) of the Rules which requires an appeal to be lodged within sixty days and reiterated that the decision to withdraw the notice of appeal came as a second thought.

In further responding to the issue of illegality Ms. Tully submitted that the alleged illegality and irregularity must be of sufficient importance, and not one that would be discovered by a long-drawn argument as in this case and cited the case of **Lyamuya Construction Company Limited** (supra) to support her proposition.

In response to the argument that the application for extension of time was unjustifiably denied by the High Court, Ms. Tully contended that the High Court was undeniably right in not granting the prayer having considered all the facts and reasons assigned by the applicant. She went on to argue that the issue of overwhelming chance of success is not sufficient to grant an application for extension of time.

Mr. Emmanuel, learned counsel for the fourth respondent, apart from praying to adopt the written submission which were earlier on lodged in Court on 10.12.2021 he zealously opposed the application and in essence he argued in more or less the same line argument advanced by Ms. Tully and cited the case of **Lyamuya Construction Company Limited** (supra). In addition, Mr. Emmanuel submitted that the lodging of an incompetent notice of appeal was occasioned by ignorance of the counsel for the applicant which is not an excuse. He paid homage to the case of **Omary Ibrahim v. Ndege Commercial Services Limited**, Civil Application No. 83/01 of 2020 (unreported) for the proposition that neither ignorance of law nor counsel mistake constitutes good cause for the extension of time. He therefore, prayed that the application be dismissed.

In rejoinder submission Ms. Ndossi did not have much to say other than stressing what she earlier on submitted.

I have painstakingly examined the record and considered the rival arguments by the learned trained minds and in order to appreciate the essence of the application, I find it appropriate to reproduce the provision of rule 10 of the Rules which reads inter alia 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 expiration of that time and whether before or after doing of that act: and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

I have reproduced the above provision deliberately in order to facilitate an easy determination on whether the application by the applicant is founded on sound basis.

At the outset, I wish to point out that, the law is very settled and clear in this jurisdiction that, in order for the applicant to succeed to prompt the court to exercise its discretion under rule 10 of the Rules to order an

enlargement of time in an application of this nature, the applicant must bring to the fore good cause for the delay. There is, in this regard, a considerable body of case law in this area but to mention a few **Benedict Mumeilo v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported) and **Kalunga and Company, Advocates v. National Bank of Commerce Limited** [2006] T.L.R. 235.

Although rule 10 does not go further to define as to what amounts to good cause. However, case law has it that extension of time being a matter within the court's discretion, cannot be laid by any hard and fast rules but will be determined by reference to all the circumstances of each particular case. There is, in this regard a long line of authority to that effect, if I may just cite the case of **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 in which this Court stated that:

> *"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is 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."*

However, it is significant to emphasize that the court's discretion in deciding whether or not to extend time must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice – **See Shah v. Mbogo and Another** [1967] E.A. 116.

I am mindful of the fact that there are certain decisions of this Court suggesting that a single Justice should not deal with the substance of the matter for which an extension of time is sought because that is the province of the full Court. I am therefore not prepared to stretch myself beyond what is expected of a single Justice in the instant application.

The question is therefore, whether or not the applicant in the instant matter has complied with the conditions for the grant of this application or not. It is not insignificant to say that the applicant was prompt in filing the notice of appeal on 08.11.2020 after the judgment was pronounced on

01.11.2020 which was however, withdrawn later on 29.09.2020, following the application by the applicant lodged on 14.09.2020 having realized some anomalies in the notice of appeal. I agree with Ms. Ndossi that the six days delay from 06.10.2020 when the notice for withdraw was served upon the applicant to 12.10.2020 when the applicant's application for extension of time in Misc. Application No. 517 of 2020 was admitted have been accounted for, as the applicant spent time preparing the necessary documents which were lodged electronically at the High Court few days before formal admission on 12.10.2020.

However, there is a period from 03.09.2021 when the ruling in Misc. Application No. 517 of 2020 was delivered to 16.09.2021 when the instant application was lodged which is a period of about thirteen days which has not been accounted for by the applicant. Ms. Ndossi, did not account this delay. There is a considerable body of case law in this area to the effect that in an application for extension of time, the applicant is duty bound to account for each day of delay. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), faced with analogous situation we held that:

"Delay of even a single day has to be accounted for otherwise there would no point of having rules prescribing periods within which certain steps have to be taken."

Corresponding observations were also made in the case of **Bariki Israel v. Republic**, Criminal Appeal No. 4 of 2011 (unreported).

Therefore, the applicant has failed to show good cause for the delay which is the precondition for the extension of time to file notice of appeal. I am aware that Ms. Ndosi sought to take refuge on what she called illegality and irregularity of the impugned decision. However, she was unable to clearly demonstrate the alleged illegality and irregularity.

I think it is momentous that I should remark in passing before I take leave of the matter that, the respondents, despite being dully served with the notice of motion and the supporting affidavit, did not file a reply affidavit to controvert the factual averments in the affidavit in support of the application and the learned counsel did not assign any reason, leave alone credible reason for such omission. Surprisingly and for an obscure cause in the course of their oral and written submissions they challenged the applicant's factual averments from the bar in the absence of the affidavit in reply something which is contrary to the law. The legal consequences

following such inaction has been stated in a number of array of authorities. An affidavit being a sworn declaration on matters of evidence can only be challenged through a sworn declaration and not through written or oral submissions which is not evidence but rather elaboration of evidence which ordinarily is expected to be found in an affidavit. In this regard, I find inspiration in the decision of the Court of Appeal of Uganda in **Transafrica Assurance Co. Ltd v. Cimbria** (EA) Ltd (2002) E.A 627 in which the court stated that:

> *"As is well known, a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on it."*

This position has also been amplified in a number of our previous decisions in which we have decidedly made it clear that, failure to lodge an affidavit in reply, save for legal matters, the factual matters deposed in the affidavit are taken not to have been disputed. See, for instance, **Irene Temu v. Ngasa M. Dindi and Two Others**, Civil Application No. 278/17 of 2017, **Fweda Mwanajoma and Another v. Republic**, Criminal Appeal No. 174 of 2004 and **Jonas Betwel Temba v. Paul Kisamo & Another**, Civil Application No. 10 of 2013 (all unreported).

To that end, I must conclude that the applicant has not demonstrated any good cause that would entitle him extension of time. In the result, this application fails and is, accordingly, dismissed with costs.

DATED at **DAR ES SALAAM** this 8th day of June, 2023.

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of June, 2023 in the presence of Ms. Neema Ndossi, learned counsel for the Applicant who also took brief for Ms. Tully Kaundime, learned counsel for the 1st, 2nd and 3rd Respondents and Ms. Sharifa Mohamed, learned counsel for the 4th Respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL