

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR
CIVIL APPLICATION NO. 154/15 OF 2020

KEMPINSKI HOTELS S. A APPLICANT

VERSUS

ZAMANI RESORTS LIMITED 1ST RESPONDENT

THE EXECUTIVE DIRECTOR BUSINESS &

PROPERTY REGISTRATION AGENCY ZANZIBAR 2ND RESPONDENT

**(Application from the Ruling and Order of the High Cour of Zanzibar
at Vuga)**

(Mohamed, J.)

dated the 6th day of September, 2017

in

Misc. Civil Cause No. 14 of 2017

RULING

15th June, 2022 & 9th August, 2023

MASHAKA, J.A.:

On 21st March, 2013, **Zamani Resorts Limited**, the first respondent, had initiated arbitration proceedings before the International Chamber of Commerce (the ICC), with London as the place of arbitration vide ICC Case No. 19352/EMT/GR against **Kempinski Hotels S.A**, the applicant, claiming for owner's return and damages for breach of contract amounting to approximately USD 20,000,000.00. The claim by the first respondent was dismissed on 16th September, 2015 and the applicant was awarded £3,500,000.00

and USD 244,000.00 as the costs for arbitration, both amounts attracting interest at the rate of 2% per annum from the date of award until final payment.

Dissatisfied by the decision, the first respondent moved the ICC on 13th October, 2015 requesting for the review, revision and correction of the Final Award. Nonetheless, the same was dismissed on 24th February, 2016 and additional costs were awarded to the applicant. After the dismissal, the applicant commenced to claim the amount awarded in the Final Award and its addendum in which, despite of several reminders, the first respondent failed to honour.

This led the applicant to initiate winding up proceedings of the first respondent's company vide Miscellaneous Civil Cause No. 14 of 2017 at the High Court of Zanzibar at Vuga. The application was resisted by the first respondent who had filed a notice of preliminary objection which was sustained and the application was struck out on 6th September, 2017. Still dissatisfied, on 2nd November, 2017 the applicant preferred an application for revision vide Civil Application No. 94/14 of 2018 to challenge the decision of Miscellaneous Civil Cause No. 14 of 2017. On 12th December, 2019 the application for

revision was struck out for being incompetent as the order was appealable and not tenable for revision.

On 18th December, 2019 the applicant lodged Civil Application No. 74 of 2019 at the High Court of Zanzibar seeking extension of time to lodge the notice of appeal. The application was dismissed on 6th October, 2020. She, thus requested for copies of the ruling and order which were supplied on 11th November, 2020. Thereafter the current application was lodged on 12th November, 2020 by way of Notice of motion under rules 10 and 45A (1) (a) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is praying for an extension of time to file a notice of intention to appeal against the ruling and order of the High Court of Zanzibar at Vuga dated 6th September, 2017 in Miscellaneous Civil Cause No. 14 of 2017. It is supported by an affidavit affirmed by Omar Said Shaaban, the applicant's counsel. The grounds advanced by the applicant are:

- 1. That the applicant has been honestly and diligently prosecuting the application for revision, Civil Application No. 94/14 of 2018 which was struck out on a technicality as well as, Misc. Civil Application No. 74 Of 2019 which was dismissed, the delay to file notice of intention to appeal is a technical delay;*

2. *That, the decision subject matter of the intended appeal is tainted by apparent illegalities as, the trial court failed to exercise jurisdiction that was vested to it under the non-repealed law by ruling that the trial court was not properly moved to assume jurisdiction in the circumstances of Miscellaneous Civil Cause No. 14 of 2017;*
3. *That, the decision subject matter of the intended appeal is tainted by apparent illegalities by failing to rightly interpret the provisions of section 1 of the Companies Act No. 15 of 2013 and thereby occasioning injustice to the applicant herein;*
4. *That the decision subject matter of the intended appeal is tainted by apparent illegalities by holding that Miscellaneous Cause No. 14 of 2017 at the High Court of Zanzibar was prematurely filed due to the pendency of Commercial Cause No. 320 of 2016 at the High Court of Tanzania Commercial Division at Dar es Salaam unknowing that the two co-existed in two different jurisdictions;*
5. *That the applicant has been prompt and diligent in lodging the Application for Revision, Civil Application No. 94/14 of 2018, Civil Application No. 74 of 2019 as well as the instant Application.*
6. *That the Respondent will not be prejudiced by this Application.*

When the application was called on for hearing, Mr. Robert Reuben, learned counsel represented the applicant and the first respondent was represented by Mr. Salim Hassan Bakari Mnkonge,

learned counsel. The second respondent was absent. After a short dialogue with Messrs Reuben and Mnkonje on the absence of the second respondent and in terms of rule 63 (2) of the Rules, the hearing of the application proceeded in the absence of the second respondent.

Mr. Reuben commenced to address the Court by adopting the contents of the affidavit in support of the application and written submissions to form an integral part of his oral submission. Based on the six (6) grounds advanced in the notice of motion, Mr. Reuben opted to argue grounds one, five and six separately and grounds two, three and four jointly.

In respect of grounds one, five and six, it was the applicant's submission that she had promptly and diligently prosecuted her initial application for extension of time which was not successful because of a technical delay. On this, it was contended that, the time spent in prosecuting the previous applications be condoned as the striking out of those applications which were found to be incompetent including the revision application was due to a minor lapse on the part of the learned counsel and not gross negligence. It was further contended that, besides the delay being technical, the applicant did not sit back

idle and instead has been prosecuting several applications previously and that the time spent in prosecuting the said applications should be discounted as the applicant was in pursuit of her right.

Moreover, it was argued that, the grant of extension will not prejudice the respondents whereas the denial of extension will occasion a failure of justice on the applicant who will be completely locked out to pursue an intended appeal against the impugned decision which is riddled with illegalities. To support his argument, cases cited included **Fortunatus Masha v. William Shija and Another** [1997] T.L.R 154, **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambia** [1992] TLR 185, **Kambona Charles (as administrator of the estate of the late Charles Pangani) v. Elizabeth Charles**, Civil Application No. 529/17 of 2019 (unreported).

Regarding grounds two, three and four, it was Mr. Reuben's submission that there are illegalities as averred at paragraph 24 of the supporting affidavit, which are apparent and that a denial of extension of time would occasion injustice on the part of the applicant who will be locked out to pursue the intended appeal. The illegalities stated are: **one**, High Court's failure to correctly interpret

the date of coming into force of section 1 of the Companies Act, Act No. 15 of 2013 having sustained a preliminary objection and concluding that it was improperly moved to invoke the jurisdiction to entertain the winding up petition which curtailed the applicant's right of fair hearing in the respective proceedings. **Two**, an apparent error occasioned by failure to grasp the disparity between the High Court of Tanzania (Commercial Division) and that of the High Court of Zanzibar which found the winding up petition to be premature on account of the pending enforcement proceedings in the High Court of Tanzania (Commercial Division) which resulted into holding that Miscellaneous Cause No. 14 of 2017 at the High Court of Zanzibar was prematurely filed due to the pendency of Commercial Cause No. 320 of 2016 at the High Court of Tanzania (Commercial Division) at Dar es Salaam. It was thus argued that, the omission occasioned a failure of justice and as such, it is in the interest of justice that the applicant be availed extension of time so that she can address the stated illegalities at the hearing of the intended appeal. To support the submission, cases cited to me were **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambia** (supra), **The Registered Trustees of Joy in the**

Harvest v Hamza Sungura, Civil Application No. 131 of 2009 (unreported).

On the strength of the findings of the Court, the applicant prayed for enlargement of time to file a notice of appeal.

On the other hand, the application was opposed by the first respondent through the affidavit in reply. They also adopted the written submissions filed earlier containing arguments against the application. This was not the case for the second respondent who filed neither the affidavit in reply nor the written submissions. On the part of the first respondent, she challenged the grant of the application arguing that: one, advocate's ignorance of the laws and lack of diligence to seek appropriate remedy in a proper forum such as Revision Application No. 94/14 of 2018 which was struck out by the Court arises from wrong interpretation of the law which is not excusable. In this regard it was argued that, the negligence and inaction of an advocate in adopting an incorrect procedure and seeking remedy in a wrong forum is not sufficient cause to warrant enlargement of time. To bolster the argument, cases cited to me included **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambia** (supra) and **William Shija and**

Another v Fortunatus Masha [1997] T.L.R 213. In the premises it was argued that, the applicant was not interested in pursuing the intended appeal or else she would have sought remedy in a proper forum and as such she cannot lean on ignorance and negligence to seek extension of time.

Two, on the issue of illegalities, it was argued that wrong interpretation of a provision of law is not an illegality but rather a mere error of law and as such, the striking out of the winding up petition for being filed under the repealed law and that amounted to exercise of jurisdiction by the High Court of Zanzibar. In this regard it was argued further that, the application was dismissed because the purported illegality was not apparent on the face of the record.

On the second point of illegality, Mr. Mnkonje was of the view that the finding of the High Court Judge that a person cannot ride two horses at the same time having lodged a suit at the High Court of Zanzibar and High Court of Tanzania, Commercial Division at Dar es Salaam does not amount to failure to exercise its jurisdiction. It was thus his contention that Mr. Reuben failed to show apparent illegalities which could be taken into consideration, that he could not state when the Zanzibar Law of Companies came into operation

through the legal notice in the Gazette and he could not show the difference between the winding up petition before the High Court of Tanzania, Commercial Division and that of the High Court of Zanzibar. Further he submitted that all the referred cases were distinguishable with the instant application and the applicant has failed to demonstrate material consideration to persuade the court to interfere with the discretionary powers of the High Court. On the ground that the respondent will not be prejudiced, Mr. Mnkonje argued that the costs occasioned and inconveniences suffered by the first respondent are a great prejudice to her rights and thus urged the Court to find the application merited and dismiss it.

Having considered the submissions of the applicant and the first respondent the issue for determination is whether the applicant has demonstrated sufficient cause warranting the grant of extension of time to lodge a notice of appeal.

The present application is regulated by rule 10 of the Rules which stipulates:

"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 the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

It is a settled principle that in an application for enlargement of time, the applicant has to account for each day of the delay involved and the failure to do so would be fatal to the application: see, **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshua Rwamafa)**, Civil Application No. 4 of 2014 (both unreported).

Though there is no defined interpretation of what constitutes good cause, the Court has in a number of its decisions explained the factors which were considered in **Tanga Cement Company Limited v. Jumanne D. Masangwa & Amos A. Mwalwanda**, Civil Application No. 06 of 2001; **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority**, Civil Application No. 146 of 2016 (both unreported). The Court clarified in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil

Application No. 2 of 2010 (unreported). In the said cases basically the Court underscored that the essential factors to be considered for the grant of extension of time are that the applicant must account for all the period of delay; the delay should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and if the court feels that there other sufficient reasons, such as the existence of the point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

In the instant application, the impugned ruling was delivered on 6th September, 2017 and on 2nd November, 2017 the applicant initiated the revision proceedings in Civil Application No. 94/14 of 2018 which was later struck out on 12th December, 2019. Immediately thereafter, she lodged the application for extension of time to lodge a notice of appeal to the High Court vide Civil Application No. 74 of 2019 which was also dismissed on 6th October, 2020. Having examined the chronological events, it appears that the applicant was diligent and prompt to pursue her rights. The argument that she pursued a wrong forum against the impugned decision and preferred revision proceedings which led to the striking

out of the application for being incompetent can safely be termed as technical delay which is excusable as was emphasized in **Yara Tanzania Limited v. DB Shapriya & Co. Limited**, Civil Application No. 498/16 of 2016 (unreported) that: -

*"The period of delay between date of the decision of the High Court on 19.05.2016 sought to be challenged by way of revision and 23.11.2016 when it was struck out for being incompetent, can conveniently be termed as a "technical delay" within the meaning of the decision of the Court in **Fortunatus Masha (supra).**"*

The Court had an opportunity to grapple with a similar situation and granted extension of time basing on the reasoning in **Fortunatus Masha v. William Shija** (supra), where the Court observed:

"... a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged on time...."

The delay arising from prosecution of the said application was, therefore not actual but a technical delay which is explicable and

excusable. See: **Emmanuel Rurihafi and Another v. Janas Mrema**, Civil Appeal No. 314 of 2019 and **Bank M (Tanzania) Limited v. Enock Mwakyusa**, Civil Application No. 520/18 of 2017 (both unreported).

The first respondent's assertion that the applicant was negligent in pursuing the revision proceedings instead of appeal has no basis as ignorance of law does not constitute prosecuting an action before the court with diligence. Two, from the chronology of events, there was no lapse nor inaction on the part of the applicant. Three, resorting to a wrong forum by filing revision proceedings is not negligence as argued because the learned counsel for the applicant believed that to be on the right track in pursuit for the rights of her client.

Regarding the points of illegality, the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambia** (supra) observed that: -

"In our view, 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 straight."

The Court further reaffirmed the stated stance in **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported), where it clearly stated, "*a claim of illegality of the decision being challenged, that by itself constitutes sufficient reason for extending time to file a notice of appeal*", regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay.

In view of the above, without prejudice, even if the application is unduly delayed, since the point of law at issue is illegality of the decision which is intended to be challenged, that is of sufficient importance to constitute sufficient cause for extending time to file the notice of appeal to enable the illegalities to be addressed in the intended appeal. In this regard, since the High Court did not consider the points of illegality raised, that was an omission warranting the interference of the Court.

Thus, the application is merited, the decision of the High Court which refused to grant extension is set aside and the applicant is

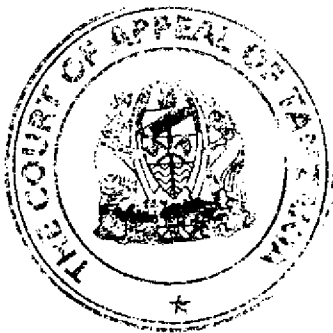
granted extension of time to lodge notice of intention to appeal within sixty (60) days of pronouncement of this ruling. Costs shall follow the event in the intended appeal.

Order accordingly.

DATED at **DAR ES SALAAM** this 4th day of August, 2023.

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of August, 2023 in the presence of Ms. Elizabeth John Mlemeta, counsel for the Applicant and also holding brief for Mr. Salim Mkonje, learned advocate for the respondents, is hereby certified as a true copy of the original.



A handwritten signature in black ink, consisting of a large, stylized loop and a horizontal line extending to the left.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL