

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 445/01 OF 2022

NATIONAL BANK OF COMMERCE... .. APPLICANT

VERSUS

BALLAST CONSTRUCTION COMPANY LIMITED..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tanga)

(Msuya, J.)

Dated 9th day of September, 2015

in

Civil Case No. 10 of 2009

.....

RULING

31st October, & 8th November, 2023

NGWEMBE, J.A.:

When this application was called for hearing, both parties procured legal services of learned advocates. While the applicant enjoyed the legal services of Mr. Sabato Ngogo, learned counsel, the respondent was represented by Hassan Kilule, learned advocate.

Briefly, the genesis of this application traces from the judgement of the High Court in Civil Case No. 10 of 2009 before judge Msuya delivered on 9th September, 2015. The judgement was in favour of the respondent herein. The applicant together with one Steven R. K. Shiletiwa were

aggrieved with the court judgement and decree, hence preferred an appeal to this Court. However, time was not in their favour, hence they applied for extension of time in Misc. Civil Application No. 39 of 2021 as the first bite. The applicants failed to satisfy the court for such delay, thus, judge Agatho of the High Court on 1st June, 2022 dismissed the application.

Being dissatisfied with such dismissal, the applicant, this time one of the applicants preferred a second bite of extension of time in this house of justice, while Mr. Steven R.K. Shiletiwa refrained from joining the wagon to this Court. Therefore, the applicant instituted this application for extension of time under certificate of urgency and moved the court by citing Rule 45A (1) (2) and Rule 10 of the Tanzania Court of Appeal Rules 2009 as amended (herein after be referred to as "the Rules"). The Notice of Motion is supported by an affidavit sworn by Desmond Malyi, a principal officer of the applicant.

In the cause of pleadings, the respondent filed notice of preliminary objections comprising two grounds. On the hearing of those objections, the learned counsel for the respondent, asked leave of this Court to add another ground of preliminary objection in respect to time limitation. The

prayer was not opposed by the learned advocate for the applicant; hence the following are the grounds of preliminary objections: -

- 1. The application was lodged in this Court out of time;*
- 2. The application has a nonjoinder of a necessary party namely Steven R. K. Shiletiwa as featured in the judgement of the High Court, certificate of delay, applicant's own letter requesting for copies of proceeding, ruling, drawn order and ruling of the High Court in Misc. Application No. 39 of 2021.*
- 3. That, the application is bad in law for being supported by an affidavit which bears a defective verification clause.*

In support to the grounds of objections, the counsel for the respondent argued those grounds seriatim. Submitting on time limitation, the learned counsel, argued that, the application was made as a second bite after dismissal of same at the first bite by the High Court. The time to lodge an application for the second bite is 14 days from the date of refusal of the first bite. Insisted that, the first bite was delivered on 1st June, 2022 and the certificate of delay was issued on 15th July, 2022 excluding the 2nd day of June to 15th July, 2022. The application ought to be filed on or before, 29th July, 2022. Therefore, filing the application on 1st, August, 2022 was already time barred for two (2) days. As such the application is caught in the web of time limitation for 2 days.

In reply, Mr. Ngogo conceded to the citation of applicable Court Rules, that the second bite for extension of time should be filed within 14 days from the date of refusal of the first bite. However, he insisted that, this application was lodged timeously on 29 July, 2022, which was a Friday. The following working day was on 1st August, 2022, that is when the Registrar stamped on the documents. Buttressed his position by referring this Court to the case of **Insurance Group of Tanzania Limited Vs. Joeff Group (T) Limited, Civil Application No. 18/01 of 2020**. Therefore, the application was filed within time.

On the second ground of objection, Mr. Kilule submitted at length that, all attachments of the previous decisions and pleadings, the applicants were the National Bank of Commerce and Steven R. K. Shiletiwa. The documentations attached in the affidavit of the applicant including, notice of appeal, letter requesting for certified copies of judgement, proceedings, decree and certificate of delay, featured both names. Therefore, failure to include the name of Steven R. K. Shiletiwa, makes this application a fresh one contrary to Rule 45A of the Rules. Buttressed his argument by referring this court to the case of **Wema Moyo Vs. Monday Mwafongo, Civil application No. 299/17 of 2021**.

Further, he submitted that, the enabling provision of law for this type of application for extension of time (Rule 45A and 10) requires consistence of parties, otherwise, this application is a fresh one, which should be struck out with costs.

In reply, Mr. Ngogo acceded to the fact that, Steven R. K Shiletiwa was a party throughout of this dispute, but in the present application, he has lost interest and the applicant could not force uninterested party to be joined. Insisted that, this point was averred in paragraph 16 of the affidavit. Thus, the ground lacks merits. In alternative, he prayed this court, if so calling to allow him to amend the Notice of Motion to include the name of Mr. Steven R. K. Shiletiwa.

Submitting on ground three, Mr. Kileli briefly, pointed paragraphs 7 and 9 of the applicant's affidavit that, required source of information in the verification clause. Invited this Court to Order XIX Rule 3 of the Civil Procedure Code Cap 20 R.E. 2022. Insisted that, failure to properly verify the affidavit, makes the whole affidavit defective, therefore, the Notice of Motion is not supported by an affidavit which makes the whole application defective, same be dismissed.

Replying on this point, Mr. Ngogo, submitted strongly that, the cited law (Civil Procedure Code), is not applicable in this Court and the referred paragraphs (paragraphs 7 & 9) even if will be expunged, yet do not affect the validity of the application. Rested by inviting this Court to dismiss all three grounds of objections for being unmerited.

Having considered the rival arguments from each side, I think the main issue for determination is whether this application is incompetent due to nonjoinder of parties. If the answer is in negative, then the next issue is whether the application is time barred. Finally, I will consider on validity of the verification clause of the applicant's affidavit.

Appreciating the arguments of learned counsels on nonjoinder of Steven R. K. Shiletiwa in this application, the counsel for the respondent stood firm that, at trial before the High Court, two defendants featured throughout. Even the first bite of an application for extension of time, the two applicants featured in the pleadings. Thus, making this application a fresh one.

Evidently, all documents attached with affidavit of the applicant including the trial court's judgement, decree, notice of appeal filed on 17th September, 2015, the ruling of this Court in Civil Appeal No. 72 of 2017

delivered on 21st February, 2019, ruling of the High Court in Misc. Civil Application No. 39 of 2021 before Agatho, J; drawn order in respect to that ruling, a letter requesting for copies of proceedings, ruling and drawn order dated 3rd June, 2022, response from the registrar dated 15th July 2022 and certificate of delay dated 15th July, 2022 all referred to the National Bank of Commerce and Steven R. K. Shiletiwa as parties.

Interestingly, the counsel for the applicant strongly resisted this ground by insisting that, Mr. Shiletiwa is no longer interested on appealing against the trial court's judgement. However, he did not explain as to when Mr. Shiletiwa was disinterested on the matter, because throughout, he was unsuccessfully, struggling to challenge the trial court's judgement together with the present applicant National Bank of Commerce. It is my considered view that justice on this matter demands Mr. Shiletiwa be made a party to it.

I am inspired by the decision of the Court when was determining almost a similar issue, in the case of **TPB Bank PLC (Successor in title to Tanzania Postal Bank) Vs. Rehema Alatunyamadza and 2 others, Civil Appeal No. 155 of 2017 at page 11 & 12** and in another case of this Court of **Tang Gas Distributors Limited Vs. Mohamed**

Salim Said & 2 others, Civil Application No. 68 of 2011 at page 29,

the Court stated that, a party can be added even at the appellate stage. I am settled in my mind that, the current application is more fitting to join Mr. Shiletiwa as was a party in the whole process of this dispute from the time of trial to the unsuccessful appeals and application for extension of time before the High Court.

Therefore, instead of striking it out as prayed by the objector/respondent, I find rules of justice when read together with Rule 4 (2) (b) of the Rules and section 3A of the Appellate Jurisdiction Act Cap 141 R.E. 2022, demand the applicant be granted leave to amend the Notice of Motion to include the name of Mr. Steven R. K Shiletiwa as a party in this application.

Regarding the second ground of objection on time limitation, I think this ground cannot tie me up for good reason that, the question of when the Court document is deemed filed, is well settled. Rule 119 (1) of the Rules provide that a document is taken to have been lodged in Court upon payment of requisite fees. For easy of reference, I reproduce it hereunder:

Rule 119 (1) *"The fees payable on lodging any document shall be payable at the time when the document is lodged"*

Further, this Rule met with proper interpretation by this Court in **Civil Application No. 18/01 of 2020 between Insurance Group of Tanzania Limited (Supra) at pages 7 and 8**. In that case, the applicant filed in court documents on 14th January, 2020, the receiving officer signified receipt by stamping on the document, but such document remained in the hands of Registrar up to 20th January, 2020. The contentious issue was whether the filing date should be reckoned from 14th January, 2020 when the documents were presented and received at the registry, or on 20th January, 2020 when the Registrar endorsed such documents and the requisite fees paid? The Court answered this question as follows: -

"In such a situation, we have failed to figure out what the applicant could have done to ensure that the application is lodged within the prescribed time"

Given the circumstance of this case, I think, section 3A of the Appellate Jurisdiction Act [Cap 141 R.E, 2019] read together with Rules 2 and 4 (2) (b) of the Rules provide a conclusive answer that for the interest

of justice, the application was instituted in this Court on 29th July, 2022. In any event, if there was any delay, same was caused by the Registrar who failed to endorse the documents for two (2) days. At any rate the objector/respondent has not furnished any material to show that the delay prejudiced her for those two days when the documents were lying at the Court's registry. For the aforesaid reasons, this ground of objection is unmerited.

The last ground of objection, on improper verification of the applicant's affidavit in support to the Notice of Motion, I think this ground likewise, should not tie me up, for good reason that, the applicant verified all paragraphs of the affidavit to the best of his knowledge. Such verification presumed the contents of the affidavit is within his knowledge. For clarity, the verification clause is reproduced hereunder:

"Desmond Malyi being the Principal Officer of the Applicant do hereby verify that, what is stated hereabove in paragraph 1, 2, 3, 4, 5, 6 7, 8, 9, 10, 11, 12, 13, 14,15, 16, 17, 18 and 19 are true to the best of my own knowledge"

The learned advocate for the respondent attacked this verification in respect to paragraphs 7 and 9. That the deponent would not have such

knowledge, rather he must have been informed by someone else. Such information is missing in the verification clause. Supported his argument by referring this court to Order XIX Rule 3 of the Civil Procedure Code Cap 33 R. E. 2022, which rule provide guidance on affidavits for court use. I think, Mr. Ngogo was right, that the cited statute is not applicable in this Court. The Civil Procedure Code is applicable to all courts save the Court of Appeal and Primary Courts in our jurisdiction. In the contrary, this Court derives its jurisdiction from the Constitution of the United Republic of Tanzania of 1977 as amended and the Appellate Jurisdiction Act Cap 141 R.E. 2019 and its Rules of 2009 as amended.

As regard to the contents of the two paragraphs, I reproduce them hereto for clarity:

Paragraph 7: "That, all material time applicant was represented by a firm of advocates styled as IMMA Advocates, whom Appllcant believed that as a reputable law firm they ought to have taken or they had already taken necessary steps to re-institute appeal in accordance with the law after the former appeal was stricken out causing notice of appeal also to crumple automatically.

Paragraph 9: That, applicant came to know that the said firm of advocate did not take the said action as stated hereinabove after making a thorough follow up on the transfer of execution no 63 of 2022 (handled by another law firm) from High Court – Tanga Registry to Kivukoni Resident Magistrate’s Court at Kinondoni to proceed with execution process including attaching and selling of the Applicant’s landed property situated at Kawe within Kinondoni Municipality.”

In any event, the deponent was right to depose as he did because the contents of those two paragraphs were capable of being within his own knowledge. Even by assumption, that he deposed wrongly, yet the result will be to expunge those two paragraphs from the affidavit. Removing them will not affect in anyway the whole affidavit because the remaining paragraphs are capable of supporting the Notice of Motion. That said, this ground must fail.

In totality, it is my finding that the respondent has succeeded to satisfy the legal requirements on ground two of the objection which, in this ruling is the first ground of my consideration. That I proceed to granted leave to the applicant to amend the Notice of Motion by including the name of Mr. Steven R. K. Shiletiwa and supplementary affidavit to be filed within

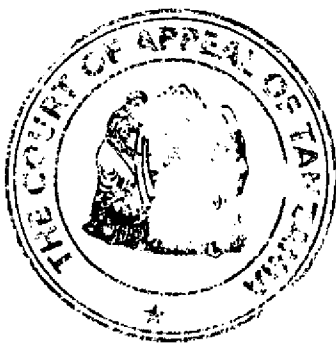
thirty (30) days from the date of delivery of this ruling, Otherwise, the rest of grounds of preliminary objections are Overruled, costs to follow the final verdict of the main application.


Order accordingly.

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

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 8th day of November, 2023 in the presence of Mr. Bakari Juma holding brief for Mr. Sabato Ngogo, learned counsel for the Applicant and Mr. Hassan Kilule, learned counsel for the Respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL