

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 196/01 of 2021

ALLIANCE ONE TOBACCO TANZANIA LIMITED.....1ST APPLICANT

HAMISI SHONI..... 2ND APPLICANT

VERSUS

MWAJUMA HAMISI (Administratrix of the Estate of

PHILEMONI R. KILENYI)1ST RESPONDENT

HERITAGE INSURANCE COMPANY (T) LIMITED..... 2ND RESPONDENT

.....

RULING

15th Feb & 3rd March, 2023

RUMANYIKA, JA.:

This is a second bite application for extension of time made under rules 10 and 45A (1) (b, (2), (3), 48 (1) (2) and 49(1) and (3) of the Tanzania Court of Appeal Rules, 2009 as amended. Alliance One Tobacco Tanzania Limited and Another, the applicants are praying for an extension of time within which to apply for leave to appeal to the Court, after a similar application was refused by the High Court (Mlyambina, J.). The application is supported by an affidavit of Advocate Said Adam Nyawambura for the applicants. The respondent filed an affidavit in reply to oppose the application.

The background of the matter is that, the applicants were sued by the first respondent before the District Court of Morogoro, at Morogoro, for compensation following the demise of Philemon R. Kilienyi. The first respondent sued as administratrix of the latter's estate, the result of which the applicants, defendants then were ordered to pay her TZS. 60,000,000/=. Aggrieved by the decision, the applicants unsuccessfully appealed to the High Court (Feleshi, J.). Still aggrieved, they lodged a Notice of Appeal timely on 16/09/2016 except an application for leave to appeal to the Court for which he sought an extension of time without success. They lodged an application for leave to appeal but withdrew it on 05/06/2017 before Muruke, J. Only the copy of the withdrawal order was supplied to them on 19/06/2017. They filed another application for leave to appeal which the High Court (Mugeta, J.) struck out on 15/11/2018 for being incompetent. Still aggrieved, in further pursuit of the matter, they filed an application for extension of time on 20/12/2018 which Mlyambina, J. dismissed on 02/10/2020, hence the present application. The applicants have pegged the application on three grounds: **one**, that, there delay was technical, **two**, that, the judgment of the High Court is tainted with

illegalities and irregularities, **three**, that, the trial court erroneously entered a judgment instead of an order.

Messrs. Shukran Nzikila and Marwa Masanda learned counsel appeared for the applicants and the first respondent respectively whereas the 2nd respondent had the service of Mr. Kephaz Mayenje, learned counsel.

At the outset of the hearing, I had to determine a time-bar preliminary objection formally raised by Mr. Mayenje.

He averred that, filing of the application contravened the provisions of rule 45A (1) (b) of the Rules, which set fourteen day's limitation period running from 23/03/2021 when the applicants got the copy of the High Court's decision refusing them an extension of time, but they filed the present application on 04/05/2021, about one and a half years later without a certificate of delay filed in terms of rule 45A (2) of the rules. Mr. Mayenje therefore asked me to strike out the application with costs for being time-barred. To support his argument, he cited the Court's decision in the case of **Loondomoni Mallya v. Leparakwo Rasirasi and Another**, Civil Application No. 404/02 of 2019 and rested his submission.

Replying, Mr. Nzikila stated that, irrespective of various reminder letters to the Registrar asking for copies of the ruling and drawn order, they did not get the two documents until on 30/11/2020 and 23/03/2021 respectively, but the receiving date was wrongly endorsed and backdated 01/03/2021. The applicants complained about it, and the Registrar rectified the respective register to read 19/04/2021 and they filed this application on 04/05/2021, within fourteen days required.

Additionally, Mr. Nzikila averred that, the impugned judgment and decree in consolidated Civil Appeal Nos. 70 and 77 of 2013 are tainted with illegality as the applicants were not a party to Civil Appeal No. 77 of 2013. He prayed that, I overrule the p.o and determine the application on merit.

Having heard the learned counsel and considered their arguments, the issue for my determination is whether the present application is time barred. First bite applications like this one, are governed by rule 45A (1)(b) of the Rules. It reads thus:

"45A-(1) Where an application for extension of time to: -

(a)...

(b) apply for leave to appeal

(c) ...

*is refused by the High Court, **the applicant may within fourteen days of such decision** apply to the court for extension of time". (Emphasis added).*

The above rule has three effects in my considered view; **one**; the High Court and the Court have concurrent jurisdiction to extend time for doing a belated action, **two**; a first-bite application is made before the High Court and **three**; a second bite room is available only where a first attempt before the High Court was barren of fruits. In the latter scenario, the applicant can do so within fourteen days of the refusal or, where applicable, as certified by the Registrar of the High Court to exclude the time required for preparation of the copy of the respective decision and the order, in terms of rule 45A (2) of the Rules.

Both learned counsel are agreed that, this application was filed late. As stated above, the High Court refused the applicants an extension of time on 02/10/2020 and the latter filed the present application on 04/05/2021 which is more than six months far beyond the fourteen days required by law. The Registrar may have supplied them copies of the requisite documents late. However, the applicants cannot enjoy exclusion

even of a single day of the delay because they filed the present application without a certificate of delay issued by the Registrar.

With respect, I agree with Mr. Mayenje's submission that, the endorsement by the Registrar dated 19/04/2021 in the register to acknowledge the day the applicants received the documents is not worth the name nor substitute of a certificate of delay which is provided under rule 45A (2) of the Rules. The fact remains thus, that, the application is time barred. The preliminary objection is sustained.

In the circumstances, the preliminary objection is sustained. Consequently, the time-barred application is hereby struck out with costs. Order accordingly.

DATED at DAR ES SALAAM this 1st day of March, 2023.

**S. M. RUMANYIKA
JUSTICE OF APPEAL**

The Ruling delivered this 3rd day of March, 2023 in the presence of Mr. Shukran Mzikila, learned counsel for the Applicant, Ms. Victoria Gregory holding brief for Mr. Marwa Masanda, learned counsel for the first Respondent and Ms. Victoria Gregory, learned counsel for the second Respondent, is hereby certified as a true copy of the original.


**F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL**