

# IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM  
CIVIL CASE NUMBER 102 of 1996

JUMA SELEMANI NYATI.....

Applicant/Plaintiff

VS

TANESCO.....

Respondent/Defendant

## Ruling

Date of last Order: 08-07-2010

Date of Ruling: 30-08-2010

### **JUMA, J.:**

The main issue for determination in this application is whether the applicant JUMA SELEMANI NYATI has shown sufficient reasons to explain his delayed appeal to the Court of Appeal to justify an extension of time to enable him to give fresh Notice of Appeal against the Judgment of this court which was delivered by Kimaro, J. on 17<sup>th</sup> May 2002.

The background to this application is a Ruling of the Court of Appeal delivered on 29-10-2009 where Court of Appeal struck out Civil Appeal Number 68 of 2004 which the applicant had preferred against the respondent TANESCO. The Court of Appeal struck out that appeal because the judgment and decree of this court against which the applicant was appealing were not properly aligned rendering the whole appeal defective. The applicant now through a chamber application he filed on 5<sup>th</sup> November 2009

would like to restore his appeal back to the Court of Appeal. The applicant is moving this Court to issue orders, to-

- (i) extend the time for giving Notice of Intention to appeal from a Judgment of this Court notwithstanding that the time for giving the notice has expired;
- (ii) allow the notice of intention to appeal to be filed and served on the respondent soon thereafter;
- (iii) any other relief this Court may deem fit to grant.

In moving this Court the Applicant relies on section 11 (1) of the **Appellate Jurisdiction Act, Cap 141** and Order XLII Rule 2 of the **Civil Procedure Code, Cap 33**. Order XXI Rule 24 (1) of CPC provides for when court may upon sufficient cause being shown, stay the execution of such decree for a reasonable time. Section 11-(1) of the **Appellate Jurisdiction Act** provides among other things for the power of this Court to extend the time for giving notice of intention to appeal from a judgment of the High Court.

Through an Affidavit taken out by the late Leopold Thomas Kalunga who was then representing the applicant, the applicant explained that the non-alignment of the date of judgment with that of the decree of the High Court (Kimaro-J.) was not occasioned by the negligence of the applicant. Non-alignment was an oversight on the part of this court. The applicant further contends that its appeal to the Court of Appeal has huge chances of success and for the interests of justice this court should grant prayers disclosed in the chamber application.

The chamber application is strenuously opposed by the respondent. Mr. Godson E. Makia a Principal Officer of the respondent company took out a counter affidavit wherein he contended that it was the duty of the applicant to ensure that the decree he included in his appeal documents to the Court of Appeal was properly aligned to the judgment from which that decree was extracted. Further, that it was due to the negligence of the applicant its appeal to the Court of Appeal was struck out. According to the respondent, the applicant has not shown sufficient reasons to move this court to grant its prayers.

Submitting on behalf of the applicant, Mhango and Company Advocates reiterated that the fault that led to the appeal being struck out was occasioned by issuance of a defective decree and the applicant was not responsible for that defect. It was further contended on behalf of the applicant that this Court should be guided by section 21-(2) of the **Law of Limitation Act, Cap. 89** to exclude from computation of the period for limitation of time the applicant had wasted while prosecuting his appeal at the Court of Appeal relying on a decree which later turned out to be defective. The relevant section 21-(2) provides,

..(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

Respondent's reply to the applicant's written submissions was prefaced by suggesting that sections 11-(1) of the **Appellate Jurisdiction Act, Cap. 141** and section 21-(2) of the **Law of Limitation Act, Cap 89** which the applicant employed cannot move this Court to grant the prayers he craves in the chamber application. In a gesture of magnanimity expected of officers of this Court, the Advocate for the respondent drew my attention to the Court of Appeal decision in **Tanzania Sewing Machines Company Limited Vs Njake Enterprises Ltd, Civil Application No. 56 of 2007 (unreported)** where Munuo, JA stated that issuance of a defective decree signed by the Registrar instead of the trial Judge can be a good cause for extension of time since the error is one of the court officer and not a party. In light of the Court of Appeal guidance, respondent left the matter at the discretion of this Court.

I have perused the records of this matter in light of ably presented written submissions made on behalf of the applicant and respondent herein. The records of this matter show the decree which the applicant obtained and filed to prosecute his Civil Appeal No. 68 of 2004 (at Court of Appeal) was not signed by the trial Judge as required by the law. It was inadvertently signed by S.A. Lila who was then the District Registrar of this court. In addition the decree was dated 5<sup>th</sup> April 2004 which was a different date from 17<sup>th</sup> May 2002 the date of the judgment. As pointed out by the Court of Appeal, the decree was defective and could not

form the basis of any appeal to the Court of Appeal. The applicant as an individual had no role in the preparation of the decree which was supposed to have been verified his Advocate. As was pointed out by the Principal Officer of the respondent company the late Mr. Kalunga who was senior learned Advocate ought to have pointed out to the Registrar that the Decree the Registrar prepared was defective for purposes of further appeal.

The late Advocate Kalunga is no longer with us to furnish further explanations and we should not punish the applicant for having relied on the services of his Advocate. My perusal of the record of this matter has disclosed inadvertence of this Court in the preparation of the Decree. Having delegated his legal representation to an Advocate the applicant as an individual had no further duty to ensure that the decree forming part of appeal documents is not defective. In my opinion, the guidance of the Court of Appeal in **Tanzania Sewing Machines Company Limited Vs Njake Enterprises Ltd, (supra)** is applicable in this application before me. The inadvertence on the decree which was occasioned by this court constitutes sufficient reason for this court to grant the applicant's prayers contained in the chamber application. To that end, the applicant is granted:-

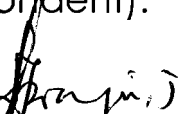
- (i) an extension of time to lodge Notice of Appeal against the decision of the High Court (Kimaro, J.) dated 17 May 2002 within a period of 30 days from the date of this Ruling;

- (ii) an extension of time to apply for the record of proceedings, Judgment, proper decree and all other documents for preparing the record of appeal;
- (iii) further extension of time for serving such application for record upon the Respondent.

No order is made with respect to the costs of this application.

  
**I.H. Juma**  
**JUDGE**  
**30-08-2010**

Delivered in the presence of: Mr. Mhango, Adv. (For the applicant, and Kusalika, Adv. (For the respondent).

  
**I.H. Juma**  
**JUDGE**  
**30-08-2010**

