IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPL NO. 752 OF 2016

TAMICO KMCL .....APPLICANT

VERSUS

BULYANKULU GOLD MINES LIMITED ..... RESPONDENT

29/3/2018 & 25/4/2018

RULING

I.P.KITUSI,J

This application, made under section 11 of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 seeks for this Court's indulgence to extend the time within which TAMICO (KMCL) on behalf of ENOCH JOSEPH and 113 others, hereafter the applicants, may file a Notice Appeal to the Court of Appeal after the expiry of the statutory time. It is the applicants intention to appeal against the decision of this Court, (Rugazia, Mwarija and Juma, JJJ, as they then were) dated 24th April, 2014.

The application is supported by an affidavit of January Raphael Kambamwene, learned advocate who also prosecuted it. It is strongly resisted by Bulyanhulu Gold Mines Limited, the respondent, first by a counter affidavit taken by Reginald Bernad Shirima, an advocate also, and by oral submissions he made in court. Both in the affidavit and the submissions the applicants have raised grounds which aim at accounting for the delay, a requirement under the law. In addition they

have raised issues which they consider to be pertinent for decision by the Court of Appeal.

It is paragraph 5 of the affidavit which rationalizes the delay in filing of the Notice of Appeal and I shall let it speak;

> *"5 That after the High Court delivered its distressing decision the applicants, in desperations, retired to their homes to ponder the next step. Communication among the group that had spread out geographically in order to obtain consensus on the decision to appeal, the time it took to obtain copy of judgment and decree for purposes of appeal and the decision to look for and hire another advocate to prosecute the appeal prevented us from filing the Notice of Appeal within the time prescribed by law. Also the 14 days reserved for application for leave to appeal had passed "*

Briefly submitting on this ground, Mr. Kambamwene referred to the fact that the decision intended to be impugned was handed down on 24th April 2014 and its decree extracted on 4th September 2014. Then the trade union for mining workers started to consult with its members so as to decide on the way forward, but given the fact that

the members are scattered all over the country, this exercise took long and by the time a decision to appeal was reached the time for filing the Notice had elapsed. The learned counsel invited the Court to treat the circumstances of this case as peculiar and on that basis grant the application. The peculiarity of this case, he submitted is the fact that TAMICO the said Trade Union which was acting for the applicants could not decide without the consensus of the many members whose number and geographical location complicated the consultation exercise.

The learned counsel cited the case of **Manota & others V. Geita Gold Mine**, Civil Reference No. 100 of 2016, CAT at Mwanza (unreported) in which the Court of Appeal considered circumstances similar to the instant and granted extension of time on that ground.

Mr. Kambambwene further raised points which appear under paragraphs 6,7,8 and 9 of the affidavit and urged the Court to bear them in mind, in considering this application. In these paragraphs of the affidavit the application raises issues with the legality of the retrenchment allegedly done by the respondent in violation of laws.

Mr. Shirima learned advocate for the respondents did not turn the other cheek, but fought back strongly. The learned advocate criticized the applicants for not being specific as to when did they retire to their respective homes to ponder over the decision of the Court so as to know what appropriate steps to take. Nor are the applicants specific, he submitted, as to when did they make the decision to pursue the matter

by an appeal. Further the learned advocate submitted in relation to the same point that there is no affidavit that has been taken by at least one officer of the trade Union to support the averements made by Mr. Kambamwene.

Referring to submissions in relation to the period during which copies of judgment and decree were yet to be supplied to the applicants, Mr. Shirima submitted that even if the period between 4th April 2014 when judgment was delivered to 4th September 2014 when the copy of decree was obtained is to be excluded there is yet a period of 26 months that has not been accounted for. As regards the period during which the applicants were discussing which advocate to represent them, Mr. Shirima submitted that in law that is not a sufficient ground and that in this case the application does not specify the number of days wasted.

The learned counsel for the respondent cited the case of **Sebastian Ndaul a V. Grace Rwamafa**, Civil Application No. 4 of 2014, CAT at Bukoba (unreported) for the principle that the applicants have to account for every single day of the delay, arguing that in this case that duty has not been discharged. He submitted in conclusion that what caused the delay in this case is negligence and inaction which does not form sufficient reason. For this, the learned counsel cited the case of **Maulid Hussen V. Abdallah Juma**, Civil Application No. 20 of 1988, CAT at Zanzibar (unreported)

Sameah Salah, learned advocate submitted in further support of the respondents case to the effect that the period of 26 months is an inordinate delay. She distinguished this case from that of Mamota (supra) submitting that in that case the representative had passed away so another had to be appointed. In this case the trade union was there and in her view the immediate reasonable reaction that would have been taken by the applicants was to file a Notice of Appeal which did not require copies of judgment and decree.

In the rejoinder Mr Kamebamene submitted that there were a total of 113 people who went to unknown destinations in the county. As for specificity, Mr Kambamwene submitted that the applicants must be deemed to have reached a consensus when they contacted him. While agreeing that the law requires him to account for every single day of the delay he submitted that in this case that was not possible. The learned counsel submitted that 26 months is not an inordinate delay nor, according to him were the applicants negligent.

I shall now proceed to consider the submissions vis a vis the settled position of the law governing extension of time. The parties are on common territory that it is the duty of the applicant to account for the delay and that such explanation should be for every single day of the delay by giving sufficient reasons. It is also the law that there is no definition of what amounts to sufficient cause. See **Tanga Cement Company Limited V. Jumanne D. Masangwa and Another**,Civil Application No. 6 of 2001, CAT(unreported)

The main reason advanced by the applicants in this application is that it was not easy given their number to get them to decide on what was the next step to be taken, so it took long. I do not intend to take what was decided in the case of Manota (supra) as a rule cast on stone, but I also note that Mr. Kambamwene said nothing about Ms. Salah's distinction of the two cases.

I only wish to pose one question; who had difficulties tracing the applicants? Definitely it was not Mr. Kambamwene because then he had not been engaged. The law is clear that one may only state on oath or affirmation only those facts which one has knowledge of. In **Lalago Cotton Ginnery and Oil Mills Company Limited Vs. The Loans and Advances Realisation Trust (LART)** CAT Civil Application No. 80 of 2002 CAT(unreported), Cited by this court(the late Kyando, J as he then was) in **Issa H. Samma V. The Attorney General and he Commissioner for Lands** Misc. Civil Cause No. 74 of 2001 High Court Main Registry(unreported) it was stated;

> " *An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are on the advocates personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings"*

In this case the learned advocate for the applicant not only violated that principle but did not care to state as to when was he approached by the applicants, a fact that he ought to have personal knowledge of. But as rightly submitted by Mr. Shirima no Officer from the representative trade Union took an affidavit to state the difficult it faced in consulting with the applicants.

In this case it is not even shown as to who was trying to reach the applicants and how he was doing so. In this era with its technological advancement it cannot be said that communication with 113 people would justifiably take 26 months. I consider the delay as too inordinate to be wished away by what the applicant have submitted.

Accordingly and for want of merits this application is dismissed with costs.

I.P.KITUSI

JUDGE

2/5/2018