IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 363 OF 2016

INTERSTATE OFFICES LTD .....1ST APPLICANT

FREDDY WILLIAM RWEGASIRA .....2ND APPLICANT

VERSUS

SILENT HOTELS LTS .....RESPONDENT

Date of last Order: 29/06/2018
Date of Ruling: 20/07/2018

RULING

I. ARUFANI, J.

The applicants filed in this court the application under section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 (Hereinafter referred as the Act) seeking for an order of extension of time to file notice of appeal to the Court of Appeal out of time. The second applicant, Freddy William Rwegasira, the Managing Director of the first applicant sworn an affidavit to support the application. On the other hand the respondent opposed the application by filing a counter affidavit sworn by her Managing Director, one Thaddeus Lelo Makoi.

During the hearing of the application the applicants were represented by Mr. Theodory Primus, learned advocate and the respondent was represented by Mr. Deogratius W. Ringia, learned advocate. The applicants' learned counsel prayed the court to adopt the affidavit filed in court to support the application as part of his submission. He told the court that, the second applicant was second defendant in Civil Case No. 364 of 1999 of this court. He said that, when the case was in progress on 19th day of December, 2008 the applicants were found guilty and convicted in the offence of contempt of court and sentenced to pay fine of Tshs. 1,000,000/=. The applicants were dissatisfied by the decision of the court and filed in this court a notice of intention to appeal to the Court of Appeal.

It is stated in the affidavit supporting the application that, while the applicants awaiting to be supplied with the documents for the appeal purpose the aforementioned suit was adjourned on several times to enable the applicants to file the appeal in the Court of Appeal. He said the applicants wrote a letter annexed to the affidavit as IOS3 to notify the court it had no jurisdiction to proceed with the matter as there was a notice of appeal which was pending in the Court of Appeal. He cited to the court the case of **Tanzania Electric Supply Company Limited V. Dowans Holdings SA**

(Costa Rica) and Another, Civil Application No. 142 of 2012 CAT at DSM (Unreported) where it was stated once a notice of appeal to the Court of Appeal is filed the High Court is ceased to have jurisdiction of entertaining the matter save only on application for leave or certificate of point of law.

He stated further that, despite writing the stated letter the court decided to proceed with the case and they decided to withdraw from representing the applicants in the case. He said that, on 20th day of November, 2015 the second applicant prayed to be given time to look for another advocate and the case was adjourned up to 12:00 hours of the same date. When the court resumed in the afternoon the second applicant told the court he had failed to get an advocate to represent them but the court insisted to proceed with the matter. He said the second applicant decided to move out of the court and left the court proceeding with the matter. He stated that, the case was heard on that day and the judgment was delivered on 4th day of December, 2015. He said the applicants were not informed about the date of delivery of the judgment as provided under Order XX Rule 1 of the Civil Procedure Code, Cap 33, R.E 2002. To strengthen his argument he referred the court to the case of **DSM Education & Office Stationery**

and Another V. NBC Holding Corporation and Two Others, Civil Application No. 39 of 1999 CAT at DSM (Unreported).

He said the applicants were not notified the date of the judgment of the court and they came to learn through Mwananchi newspaper of 21st day May, 2016 where they saw a summons requiring the applicants to appear in court in an application for execution of the decree. The applicants' learned counsel stated that, the second applicant made a follow up and discovered the judgment was delivered on 4th day of December, 2015 and on 9th day of June, 2016 they filed the application at hand in this court. He argued that, although the law requires them to account for each day of the delay to file notice of appeal within the time but as there is an issue of illegality alleged in their application the court is required to grant extension of time.

He supported his argument by the case of **TANESCO V. Mufungo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016 CAT at DSM (Unreported). He submitted that, as the applicants were not served with notice of date of delivery of the judgment and the court proceeded to hear the case while there was notice of appeal to the Court of Appeal which had already been filed in court there is sufficient reasons for the application to be granted so that the applicants can lodge the notice of intention to

appeal out of time. He also prayed the court to grant the applicants costs of the application.

In reply the learned counsel for the respondent told the court that, on 19th day of November, 2015 when the case came for hearing the court made a ruling refusing to adjourn the case but no step was taken by the applicants to challenge the said ruling. He said there is no letter which was written to show dissatisfaction of the applicants by the ruling and order made on 19th and 20th day of November, 2015 and if there is any letter written it was not annexed to the affidavit. He said under that circumstances an appeal cannot be made against those decisions. He said if there was any illegality in the decisions of the court, the applicants ought to have taken necessary steps to challenge them.

He prayed the court to adopt the counter affidavit of Thaddeus Lelo Makoi as part of his submission and stated that, the main suit was fixed on BRN and the decision the applicants want to challenge has bearing with the main suit. He said after the court said it will proceed with the hearing of the case on 19th day of November, 2015 Mr. Rweyongeza, learned advocate representing the applicants in the main suit decided to pull out from representing them. The court adjourned the case up to the next day to give chance to the applicants to engage another advocate. He said on

20th day of November, 2015 the second applicant appeared in court but with disrespect before the Hon trial judge the second applicant refused to proceed with the case and forcefully storm out of the court chamber and closed the door of the court chamber by bamming it. He said that, thereafter the court ordered the case to proceed and after hearing the sole witness of the plaintiff on the same date it fixed the judgment of the case to be 4th day of December, 2015.

He stated that, as the date of judgment was fixed on the date when the second applicant was present in court but he decided to storm out of the court chamber and from when the judgment was delivered up to when the instant application was filed in this court on 9th day of June, 2016 about six months had elapsed the said days has not been accounted for. He submitted that, the reason advanced to this court to support the application relates to the ruling and not the judgment delivered by the court. He stated further that, the alleged illegality if any relates to the ruling of the court and not judgment of the court. He submitted further that, the authorities referred by the counsel for the applicants are not relevant to the application at hand and prayed the court to dismiss the application with costs.

In rejoinder the learned counsel for the applicants stated that, their intention is to appeal against the decision delivered on 4th day of December, 2015 and the ruling of the court made on 19th day of November, 2015 and that of 20th day of November, 2015 are just part of the proceeding of the court. He stated that, the ruling of 20th day of November, 2015 states clearly that the judgment was not delivered on that date and said the argument that no letter was written the same goes with the notice of intention to appeal.

He said further that, as the applicants were not summoned to attend the court on the date when the judgment was delivered and they didn't get the judgment they would have not written a letter to request for the proceeding or to file the notice of appeal as they were not aware if judgment had been delivered. He said the applicants started taking action on 21st day of May, 2016 after knowing the judgment had been delivered. He said as there is illegality in the proceeding of the court he is praying the court to follow the position laid in the case of **TANESCO V. Mufungo Leonard Majura** (Supra) to grant the application.

After considering the parties' counsel rival submissions the court find as the application is made under section 11 (1) of the Appellate Jurisdiction Act, Cap 141, R.E 2002 is proper to have a look on the said provision of the law so as to know what the court

is required to take into consideration while determining the matter at hand. The said provision of the law states as quoted hereunder:-

> *(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned,* ***may*** *extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.*

According to the wordings of the above provision of the law it is obvious that, the power of this court to extend time for the doing of any of the things listed in the quoted provision of the law is discretional because the section is couched with the word "***may***" which implies discretion. As stated in the case of **BERRY VS BRITISH TRANSPORT COMMISSION** [1962] 1 QB 306 principles for the exercise of discretionary powers of the Court, must be used justly and as laid in the case of **ROAKES** [1598] 5.

Co. Rep.996 it must be exercised according to the rules of reason and justice, not according to private opinion, but according to the law and not humour. It must be exercised not arbitrarily, vaguely or fancifully but legally and regular. It must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself.

While being guided by the above principles the court has gone through the affidavit of the applicant and find the main reason for the applicant to delay to file in the court the notice of their intention to appeal to the Court of Appeal within the time prescribed by the law is because were not notified the date of delivery of the judgment they intend to challenge before the Court of Appeal if the instant application will be granted. The requirements for a party who is not present in court when the matter was heard in his absence to be notified the date of delivery of the judgment is provided under Order XX Rule 1 of the Civil Procedure Code, Cap 33, R.E 2002 referred by the learned counsel for the applicant which states as follows:-

> *"The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which* ***due notice shall be given to the***

parties or their advocates." (Emphasize supplied).

After seeing the above provision of the law requires the court to notify the parties the date upon which the judgment of the court should been pronounced the court find also there is no dispute that although the second applicant was present before the court on 20 day of November, 2015 when the case had been fixed for hearing but he moved out of the court chamber before hearing of the suit as he had no advocate to represent him in the case and he was not ready to proceed with the hearing of the suit in person. The court has also find there is no dispute that after the second applicant moved out of the court chamber, the hearing of the case proceeded in his absence and the date for delivery of the judgment was fixed but he was not informed about that date as provided under the above quoted provision of the law. He said to have become aware of the delivery of the judgment of the case after seeing the notice in the Mwananchi newspaper dated 21st day of May, 2016 which required them to appear before the court on 31st day of May, 2016.

The court has considered the argument by the counsel for the respondent that, as the applicants did not take any measure like writing a letter to challenge the ruling of the court of 19th day of November, 2015 and order of 20th day of November, 2015 they

cannot appeal against those decision of the court and find the argument has no any merit. The reason for arriving to that finding is because the counsel for the respondent has not cited any law supporting his argument that the applicants were supposed to write a letter to challenge the decision of the court they are intending to challenge to enable them to appeal against those decisions. The court has also find it has not been stated anywhere that the applicants intends to appeal against the ruling and order of 19th and 20th days of November, 2015 alone. The court has found the applicants' learned counsel stated the applicants are intending to appeal against the judgment delivered by the court on 4th day of December, 2015 which included not only the ruling and order made on the mentioned dates but also the whole decision of the court.

Another argument by the learned counsel for the respondent that the illegality alleged by the applicants' learned counsel if any relates to the decisions made on the two mention dates and not judgment of the court is not supported by anything because there is nowhere stated so, being in the affidavit or submission of the applicants. Since there is no proof that the applicants were made aware of the date of delivery of the judgment or were notified about the outcome of the case so that they could have been able

to take the appropriate measure within the prescribed period of time it cannot be said they have failed to account for the delay to lodge their notice of intention to appeal within the time prescribed by the law.

Since the court is not dealing with the appeal but an application for extension of time to file notice of intention to appeal to the Court of Appeal this court has found proper not to go into details of seeing whether there is an illegality in the decision intended to be challenged or not as that will be done by the Court of Appeal if the application for extension of time to file notice of appeal out of time will be granted. The court has found as there is an allegation of illegality of the decision of this court the position of the law set in number of cases requires the court to grant extension of time to pave way for the alleged illegality to be looked and if ascertained to be corrected.

The above finding is supported by what was stated in the case of **TANESCO V. Mufungo Leonard Majura** cited in by the counsel for the applicants and in the cases of **CRDB Bank Ltd and Serengeti Road Service**, Civil Application No. 12 of 2009, CAT at DSM (Unreported), **Principal Secretary, Ministry of Defence and National Service V. Devram Valambia**, [1992] TLR 182 and **Kashinde Machibya V. Hafidhi Said**, Civil

Application No. 48 of 2009 (Unreported) decided by the High Court. It was established in the above cases that, when the point at issue is one alleging illegality of the decision being challenged, that by itself constitute sufficient reason to grant extension of time so that if the alleged illegality is established, the court can take appropriate measures to put the matter and the record right.

The court has also taken into consideration that, a right to appeal is a constitutional right as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 and find, that right can only be taken away when there is a clear and justifiable legal reason to deny a party such right. When the Court of Appeal of Tanzania was dealing with an application for extension of time to file appeal out of time in the case of **Tanzania Revenue Authority V. Tango Transport Company Ltd,** Civil Application No. 5 of 2006, CAT at Arusha (Unreported) it stated that, if the applicant is denied leave to appeal out of time it will amount to penalizing him while under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time is entitled as of right to appeal against the decision of the court to the Court of Appeal.

As stated in the case of **China Henan International Cooperation Group Co Ltd V. Salvand K. A Rwegasira**, Civil

Application No. 43 of 2006 CAT at DSM the object of the courts is to decide the rights of parties and not to punish them for mistakes they make in conduct of their cases if it can be done without injustice to the other party. By being led by the above stated reasons and authority it is to the view of this court proper for the purposes of giving substantive justice priority to grant the applicant extension of time to file notice of intention to appeal to the Court of Appeal out of time.

Therefore the application is granted and the applicant is given thirty days from the date of this ruling to file the notice of intention to appeal to the court of Appeal against the decision made by this court in Civil Case No. 464 of 1999 dated 4th day of December, 2015. The court has also found justifiable to make no order as to costs in this matter. It is so ordered.

Dated at Dar es Salaam this 20th day of July, 2018

I. ARUFANI
JUDGE
20/07/2018