

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

MISC. CIVIL APPLICATION No. 511 OF 2019.

BETAM COMMUNICATIONS LIMITED APPLICANT

Versus

CHINA INTERNATIONAL TELECOMMUNICATIONS

CONSTRUCTION CORPORATION.....1st RESPONDENT

CITCC TANZANIA LIMITED.....2nd RESPONDENT

RULING

30th April -2nd June, 2020

J. A. DE-MELLO J;

Before me is an Application made under **section 11(1) of the Appellate Jurisdiction Act, Cap 14**, seeking for orders to for Extend Time, to file a fresh Notice of Intention to Appeal from the decision of this Court in **Civil Case No. 220 of 2012** delivered on **27th March , 2017** by **Hon. Muruke J**; Accompanying the same is the Affidavit of **Terrefe Ras-Work**, the Director of the Applicant, fended by Counsel... **Yohanes Konda**, Counsel for the **1st and 2nd Respondents** filed a joint Counter Affidavit strongly opposing this Application.

The Trial Court had dismissed the original **Civil Case No. 220 of 2012** for **Want of Merit**, favoring the Respondent. There was also, missing record in form of a document in **Civil Appeal No. 181 of 2017** as well as clerical error on the Court of Appeal Records in the **Civil Appeal No. 181 of 2017**. Written submissions preferred by both Counsels complied with, as **Rugambwa Cyril Pasha R.B Rwechungura**, appeared for the **Applicant** whereas; the 1st and 2nd respondents enjoyed the services of **Yohanes Konda** learned Advocate.

Adopting the Affidavit of **Terrefe Ras-Work**, Counsels for the Applicant, in paragraphs 3, 4, 5, 7, 8, 9, 10, and 11, expounded reasons for delay was a result of securing rather retrieving certified copies of the Proceedings, Judgment and Decree of the impugned judgment, whose consequence was Striking Out the Civil Appeal No. 181 of 2012 on the first instance for want of complete record of Appeal. Secondly and moreover of overwhelming chances of success of the intended Appeal in the event this Application is granted. References to the case of **Yusuph Same & Another vs. Hadija Yusuph, Civil Appeal No. 1 of 2002** (Unreported), **Mufindi Papermills Limited vs. Ibatu Village Council & 3 Others (Unreported) & Fortunatus Masha vs. William Shija and another [1997] T.L.R 154 by Mfalila J.A** to fortify the contention on **"the power to determine this application is discretionary power and the same has to be exercised judiciously after the applicant has shown sufficient cause for the enlargement of time"**. He is of a firm view that not on their part that the delay was occasioned but technical one and excusable, on the Court's side. He referred this court to the case of in line with accounting of each day of delay, Counsel is of a view that all the five hundred and sixty eight days

(568) have been accounted as depicted from correspondence with the court. This is from the **19th February, 2019** when the ruling Striking Out the 1st Appeal was delivered up to **17th September 2019** when this Application was filed on line and attracting the payment bill from the Court on **23rd September 2019** with fees paid on the same date. On **19th February, 2019** the Applicant Counsel took action by requesting all missing documents in Appeal for necessary rectification. Soon there on **27th August 2019** Counsel for the Applicant drafted the present Application, which on the **5th September, 2019**, the Affidavit in support of this Application was sent to Ethiopia for the Applicant to sign and attestation which was executed on **10th September, 2019**, received by Counsel on **16th September, 2019** He referred to **Rule 21 (I) of The Judicature and Application of Laws (Electronic Filing) Rules of 2018** to back up his argument on the filling date and procedure. It is his prayers that the Application be granted with costs.

Opposing the Application and at the outset, Counsel for the Respondent raised a Preliminary Objection that, the Affidavit filed in support of the application is defective having been attested by the person not qualified under the **Notaries Public and Commission for Oath Act, Cap. 12 R.E 2002**. Therefore, the Application is incompetent having contravened **Order XLIII, Rule 2 of the Civil Procedure Code Cap. 33 R.E 2002**. That the attesting of the Affidavit in Addis Ababa, Ethiopia allegedly by unqualified purported person not a Notary Public and Commissioner for Oaths in Tanzania Mainland as per section **3 of the Cap. 12 R.E 2002**. He is even contesting the alleged accounting of the five hundred and sixty eight (**568**) days delay which does not conform with the date when the 1st Appeal was Struck Out up to the filling of this Application as no

document was required to accompany the Application of this nature. As for all the case cited in support Counsel finds then distinguishable and unfit.

Rejoining the Counsel registered concern over the melancholy act of raising the preliminary objection at the hearing stage as it will prejudice the applicant as the same ought to have been raised at the very early stage save for jurisdiction as was observed in the case of **Betam Communication Tanzania Limited vs. China International Telecommunication Construction Corporation, Civil Case No. 220 of 2012**. However, and in the event the Court finds it appropriate then the overriding objective principle be invoked to cure the remedy so long as the Court has

It is the principle of the law that preliminary objections should be raised at the earliest stage of the proceedings to afford Court not to waste time on the merit or otherwise of the cases that are before them. As observed and which I to do share not only is the Applicant taken by surprise but even the Court, highly in contravention with **Order VI Rule 1 and 2** and **Order VIII of the Civil Procedure Code Cap. 33** as amended . This has been rule of the game and supported by several cases namely; **James Buchari Rugemalila vs. Republic and Harbinda Singh Seti, Criminal Application No. 5919 of 2017 (CAT)**, and **Olga William Mwamyalila vs. MGS International (T) LTD & Another, HC Miscellaneous Application No. 636 of 2017**. I will not myself indulge in such attack, as I dismiss the objection forthwith. Whether the Applicant has established **sufficient/good cause** for this Court to Extend Time and notwithstanding unclear definition of what constitutes good cause, I

will refer to what case **Tanroad Kagera vs. Ruaha Concrete Company Ltd Civil Application No. 9 of 2007**(unreported) it was held that;

'Sufficient reasons cannot be laid down by any hard and fast rule. This must be determinedly reference to all the circumstances of each particular case. This means the applicant must place before the court material which will move the court to exercise its judicial discretion in order to extend the time.'

Looking at the matter at hand it is undisputed that the delayed days from when the original Civil Appeal in 181 of 2017 was filed to the date when the same Appeal was Struck Out, was not within the Applicants mandate, considering also that Notice of Appeal and the Appeal itself were timely filed. The follow ups are even evident of **568** days delays, in evidencing the Applicants due diligence towards procurement of necessary document required to file an appeal via exhibited letters used to remind for the records requesting to the Court as attached to the Affidavit in support of the Application. To mention the few the letters dated **21/3/2018, 28/5/2019, 16/7/2019** and **25/4/2017**. in the case of **NBC vs. Sadnurdin Magingi [1998] TLR at 533** and of **Ramadhani J.K v Azara, Civil Application No. 401 of 2018, Zaida Baraka & Others vs. Exim Bank(T) Ltd Miscellaneous Commercial Case No. 300 of 2015**, the court of appeal of Tanzania cited with approval the case of **Lyamuya Construction Co. Ltd Vs. Board of Registered Trustees of Young Women Christian Association of Tanzania, (supra)** such **discretionary power** has to be exercised judiciously in which the Court held that;

"...the Court's discretion has to be exercised judiciously by considering all the circumstances of the case, and if the applicant had acted prudently and without delay in lodging the application"

In **Lyamuya case** cited above, the Court stated that;

"as a matter of general principle, it is a discretion of the Court to grant extension of time. But that discretion is judicial, and so must be exercised according to the rules of reason and justice and not private opinion or arbitrary"

And in the same case the Court of appeal insisted that **the applicant must show diligence and not apathy, negligence, or, sloppiness in the prosecution of the action he intends to take.**

With the above findings, this Court is warranted to unfold its hands and extend time of seven (7) days within which to file Notice of Appeal. Costs in due course.

It is so ordered.


J.A. DE-MELLO

JUDGE

2/6/2020