

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 493 OF 2019

(Arising from High Court Civil Appeal No. 70 of 2016 of 10th October, of
2017 delivered by Hon. Ndyansobera, J.)

RAJABU JOHN MWIMI.....APPLICANT

Versus

MANTRACT TANZANIA LIMITED.....RESPONDENT

RULING

25th June – 30th July 2020

J. A. DE-MELLO J;

By way of **Chamber Summons** the Applicant has moved this Court under **Rule 45 (a)** of the **Tanzania Court of Appeal Rules of 2009**, praying for among others, **Leave to Appeal to the Court of Appeal**. Accompanying the same, is the Affidavit of **Rajabu John Mwimi**, the Applicant himself, affirming to facts with a view of persuading this Court to grant him leave to loge an appeal to the Court of Appeal. Countering the said Application, is the Respondent's Counter Affidavit accompanied by a preliminary objection that **'the application is time barred'**.

The genesis of this matter has its genesis from **Civil Case No. 15 of 2014** in the **District Court of Kinondoni** claiming among others, payment of **TShs. 95, 000, 000/=** as general damages, whereby the

judgment and decree was entered in favor of the Applicant by awarding him **TShs. 40,000,000/=** for both specific as well as, general damages. It is upon execution vide application, when the Respondent, on the **20th May, 2016**, filled **Civil Application No. 177 of 2016** praying for **Stay of Execution**. On 10th October, 2017, this Court granted the Respondent his prayers, similarly setting aside the decision of the District Court. This aggrieved the Applicant, who lodged this Application with a view of appealing to the Court of Appeal, faced with an objection. Hearing was conducted through written submissions, whereby the Respondent was represented by **Victoria Gregory** learned advocate, while the Applicant appeared in person and, unrepresented but, all in compliance with the scheduling order. It is Counsel's submissions in support of the objection that this Application is time barred, considering that on **3rd of September, 2019**, when the Applicant was granted extension of time for **Leave to Appeal** to the Court of Appeal, to file the same within fourteen **14 days** on the 18th day of **September, 2019**. To the contrary she did on the **16th day of 2019** long after the order ensued. Referring to the case of **Mathew Martin vs. Managing Director of Kahama Mining Corporation, HC Civil Case No. 79 of 2006**, that the present Application is as good as no application has been filed. He prayed for its dismissal.

On his part the Applicant and, while conceding to the scheduling dates ordered of **3rd September, 2019**, contended further that, he did lodge the same for filing, on the **16th day of September 2019**, but, the Registrar had endorsed the same on **18th day of September, 2019**, two (2) days later for reasons that, signature of the High Court Registrar and fees payable were not complied to.

Rejoining, Counsel for the Respondent attributed the excuse advanced to be lame and speculative. Counsel referred the case of **John Chuwa vs. Anthony Ciza [1992] TLR 233** in which it was held that; "An Affidavit of a person so material, as the cashier in this case, has to be filed" if at all the Applicant had proof on that.

Having gone through the submissions of both parties, from the **3rd September, 2019**, the fourteen days ordered would expire on the **16th** and not **18th** of **September 2019**, a two (2) days delay. The reasons for delay apportioned to the Registrar, is with no basis for being speculative in absence of a valid proof. Clear days to file this application, and I can say without any justifiable cause, despite of the fourteen (14) extended days. I agree, this duty is propounded from section **110** of the **Tanzania Evidence Act, Cap. 6 R.E 2019**, echoed by commentaries published by various authors of high renown epic among them being the legendary **Sarkar on Sarkar's Laws of Evidence. 18th Edn., M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, published by Lexis Nexis**. The relevant part of the commentaries is found at **page 1896** which states as follows and, I quote;

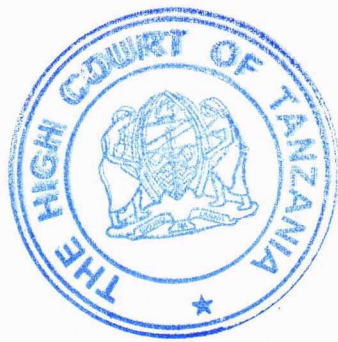
"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies"

In such vacuum, this translates to is negligence, carelessness and floppiness of the Applicant, and pure abuse of Court process as shown in the case of **Lyamuya Construction vs. YWCA, Civil Application No. 2 of 2010(unreported)** the **Court of Appeal of Tanzania** that;

"The applicant must show diligence and not apathy, negligence, or, sloppiness in the prosecution of the action he intends to take".

For the foregoing reasons, the Preliminary objection is sustained, the Application is hereby dismissed with costs, for being **Time Barred**.

I order.




J. A DE-MELLO

JUDGE

30/07/2020