IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 12 OF 2020

LETSHEGO BANK (T) LTD ..... APPLICANT

VERSUS

JAMES SIMON KITAJO ..... 1ST RESPONDENT

MASHOKA AUCTION MART (T) LTD ..... 2ND RESPONDENT

RULING

29th April, & 24th June, 2020

ISMAIL, J.

This is an application for enlargement of time within which to institute an appeal to this Court, against the judgement and decree of the Resident Magistrates' Court of Mwanza at Mwanza, in respect of RM. Civil Case No. 26 of 2018. The decision sought to be impugned was delivered on 27th September, 2018. The appellant emerged a loser in a contest that tilted in the 1st respondent's favour.

The application has been preferred under the provisions of sections 93, 95 and Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002; and sections 14 (1), 21 (2) and 3 (a) of the Law of Limitation Act Cap. 89 R.E. 2002. Supporting the application is the affidavit of Denis H. Dendela, the applicant's counsel and it sets out grounds on which the prayer for extension of time is based. The applicant's main ground for the prayer is that the judgment it seeks to impugn was appealed against, vide Civil Appeal No. 16 of 2019, which was instituted in this Court on 13th March, 2019, but the said appeal was withdrawn on 25th June, 2019, on concession that the decree was at variance with the judgment from which the said decree was extracted. Withdrawal of the appeal was intended to allow the applicant to cure the error. The applicant is also imputing illegality on the face of the decision as a ground for the intended appeal to this Court.

The 1st respondent has opposed the application. Through a counter-affidavit filed in the Court, he has levelled grounds on which he holds the view that the application is misconceived. He prayed that the same dismissed with costs.

At the hearing which was held through tele-conference, the parties moved the Court to allow disposal of the application by way of written submissions. This prayer was acceded to by the Court, consequent to which a schedule for filing the submissions was drawn and conformed to by the parties.

Getting us underway was Ms. Salima Musa, learned counsel who represented the applicant in the matter. She began her address by revising steps that she employed from the date on which Civil Appeal No. 16 of 2019 was filed in this Court to 25th June, 2019, when the said appeal was finally withdrawn after noting that the same carried some defects in the judgment and decree. The learned counsel further argued that the withdrawal was intended to have the errors rectified through Misc. Application No. 32 of 2019 whose decision was delivered on 6th December, 2019.

The learned counsel held the view that, since the applicant was prosecuting Civil Appeal No. 16 of 2019 with due diligence, section 21 (2) of Cap. 89 ought to be invoked with a view to reckoning time spent in prosecuting the said appeal. In the second limb of the submission, the applicant's counsel imputes illegality. The contention is that the trial court

awarded damages without conforming to the principles governing award of damages. Citing section 14 (1) of Cap. 89 which is one of the enabling provisions, the applicant contended that sufficient cause had been shown to trigger the Court's discretion as held ***in Benedict Mulelio v. Bank of Tanzania*** [2006] TLR 227. To fortify his contention, he referred the Court to the decision of ***Zuberi Nassor Mohamed v. Mkurugenzi Mkuu Shirika ia Bandari Zanzibar***, CAT-Civil Application No. 93/18 of 2018 (ZNZ-unreported). In both of these decisions, what amounts to sufficient cause was underscored. With regards to technical delays, the learned counsel cited a couple of decisions. These are ***Willlam Shija & Another v. Fortunatus Masha*** [1997] TLR 213; and ***Tanzania Sewing Machines Company Limited v. Njake Enterprises Limited***, CAT-Civil Application No. 56 of 2007 (unreported). In both of these decisions the reasoning is that delays arising out of incompetent actions are excusable. The applicant urged this Court to grant the application.

Mr. Mwita Emmanuel who represented the respondent would not take any of the applicant's contention. With respect to the appeal which has since been withdrawn, the learned counsel was of the view that the same was filed belatedly. He contended that the delay left 76 days

unaccounted for. The learned counsel took exception to the applicant's resort to technical delay as the basis for its attempt to put its appeal on course, contending that technical delay can only thrive where a party has demonstrated pro-activeness. He held the view that, in this case, the applicant had shown none. Responding to the claim of illegality, Mr. Mwita argued that illegality as a ground is not without restrictions. He asserted that such ground can only be applied if the applicant has met the threshold set in the case of ***Benedict Shayo v. Consolidated Holdings Corporation as Official Receivers of Tanzania Film Company Ltd***, CAT-Civil Application No. 366/01 of 2017 (unreported). Discussing circumstances under which the appeal was withdrawn, Mr. Mwita contended that this was not a case of withdrawal. Rather, it was a striking out of the appeal at the instance of the 1st respondent, and grounds therefor were dilatoriness and errors apparent on the decree. In view thereof, he held the view that the decisions cited in support of the application are distinguishable as none of them condone sloppiness, inactiveness, negligence or inordinate delay. To aid his cause, the learned counsel cited the case of ***Abdul Mbune Kibibi v. Debora Sabato & 2 Others***, HC-Land Appeal No. 11/2018 (Mwanza-unreported) in which the

need for parties' diligence and pro-activeness in pursuing their matters was underscored. He decried the route taken by the applicant in having the errors in the decree rectified, arguing that a shorter route would do.

The learned counsel contended that this is not a fit case for grant of extension of time since the applicant has demonstrated sloppiness and negligence which is not consistent with what the law provides. To bolster his contention he referred this Court to the case of ***Yara Tanzania Limited v. DB Shapriya and Co. Limited***, CAT-Civil Application No. 498 of 2019 and ***Elly Peter Sanya v. Ester Nelson***, CAT-Civil Application No. 3 of 2015 (unreported), both of which discussed and deliberated on technical delays.

Submitting in rejoinder, the applicant's counsel insisted that the appeal was filed timeously and that the only defect on the appeal was the variance of the two documents that formed part of the appeal. She reiterated that this is a fit case in which technical delay may be invoked as a reason. The learned counsel contended, still, that the decision sought to be impugned is tainted with an illegality. On the factors for consideration as propounded in ***Benedict Shayo***, the counsel was of the view that all of those are prevalent. On preference of the route that the applicant took in

the rectification of the errors, the learned counsel argued that that is the only known procedure under section 96 of the CPC, and that the delay in having the errors rectified is not in the remit of the applicant. The counsel reiterated her rallying call that the application be granted.

Before I get to the heart of the parties' contentions, it behooves me to say a word or two about the provisions which have been cited as the enablers of this application. As it can be discerned from the application, the provisions used include section 93 of the CPC and section 21 (2) and (3) of Cap. 89. Section 93 provides as follows:

> *"**Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code**, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."* [Emphasis supplied]

Looking at the provision as cited above, there can hardly be any dispute that the enlargement of time provided in this provision relates to doing an act where time for doing so is fixed or granted by the Court. It implies that the Court's powers of extension under this provision are confined to time prescriptions fixed or granted by the Court and not statutory prescriptions such as the one that the applicant is craving for

under the instant application. It is my considered view that inclusion of this provision as one of the enabling provisions was utterly fallacious. Equally horrendous, is the citation of section 21 of Cap. 89 which talks about exclusion of time of proceeding *bonafide* in court without jurisdiction. This provision has nothing to do with extension of time. Akin to what is provided for under section 19 of Cap.89, the provision relates to netting off of time under which the plaintiff was pursuing a related claim diligently and in good faith. It would not apply where, as is this case here, the delay has been acknowledged and the applicant is intending to trigger the court's discretion to grant enlargement of time after showing sufficient cause.

It is my conviction that the lavish behavior exhibited by the applicant in needlessly citing inapplicable provisions was uncalled for and anomalous. It warranted a word of abhorrence, lest if germinates into a practice which will bear an undesirable norm in the procedure. I hasten to add, however, that doing so has not taken away the fact that there are other perfectly cited provisions which enable the application. Those provisions alone were enough to found an action, and their effectiveness or relevancy was not affected by the surplus provision. I find the anomaly to be of a trifling magnitude and one that would not cause an irreparable dent on the

competence of the application. My humble conviction is that the worst that would befall such application is to sustain harmless 'bruises' by having one of its pillars *i.e.* section 93 of the CPC and section 21 of Cap. 89 amputated for being superfluous, consistent with the holding of the Court of Appeal in ***Bitan International Enterprises Ltd v. Mished Kotak***, CAT-Civil Appeal No. 60 of 2012 (unreported).

From these rival submissions, the sole issue for determination is whether sufficient cause has been adduced to warrant grant of extension of time.

Let me I preface my analysis by stating the incontrovertible. This is to the effect that the appeal which was preferred by the applicant, vide Civil Appeal No. 16 of 2019 was nipped in the bud on account of technical errors that rendered it untenable. This was done on 2nd June, 2019. True, as well, is the fact that subsequent thereto and, all along until 6th December, 2019, the applicant was working on a rectification of the errors. The said appeal was filed on 13th March, 2019, 41 days after certification of the judgment and decree of the court. The contention lies on whether what befell the appeal and all other tribulations suffered by the applicant are justified. The respondent holds in the negative. It should be noted that,

following the order of the Court on 2nd June, 2019, all subsequent efforts which were employed by the applicant, to have the appeal brought back to life had to have this Court's discretion triggered. This is so because such action would have to be taken after expiry of the time prescription set for appeals to the Court. This would be done through an application for enlargement of time and it is why the present application was instituted.

It is a trite position that grant of an application for extension of time is at the discretion of the Court. This is done where the Court is satisfied that the application presents a credible case and the applicant has acted in an equitable manner. The rationale for imposition of this stringent requirement was amply accentuated by the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014, wherein the following persuasive position was laid down as follows:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of*

courts which litigants ***have to lay a basis [for], where they seek [grant of it].***"

The position in the just cited decision strikes a concurrence with the insightful position expounded by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), wherein key conditions that should guide a court in considering to grant or not to grant an application for extension of time were laid down. These are:

> "*(a) The applicant must account for all the period of delay.*
>
> *(b) The delay should not be inordinate.*
>
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
>
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.*"

See also: ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human***

Resource Development, Attorney General, Application No. 50 of 2014 (Supreme Court of Kenya).

The cited decisions point to one key fact that, while extension of time has to meet key conditions as propounded in those decisions, the applicant of extension of time should not have his the right of appeal impeded or scuppered, unless it is evident that circumstances of his delay are inexcusable and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3. In the instant application, both of the counsel are in concurrence that the condition precedent for a party's success in the pursuit of extension of time is demonstration of reasonable or sufficient cause from which the applicant's action can be gauged. This ensures that applicants who are chary of their actions and are, therefore, at fault do not benefit from their own inaction. This wisdom is consistent with the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in which it was held that ***"... no court will aid a man to drive from his own wrong."***

While the term **sufficient cause** derives no definite terms, courts have come up with circumstances which, if they prevail, are considered to

constitute sufficient cause. These include the ***Lyamuya Construction Case*** (supra). In ***The Registered Trustees of the Archdiocese of Dar es Salaam*** (supra), the Court of Appeal held thus:

> *"It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words should receive liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides, is imputable to the appellant."*

The quoted passage traces its roots from the decision in ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546 in which it was held thus:

> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."*

See also: Gibson Petro v. Veneranda Bachuya, HC- Civil Revision No. 10 of 2018 (Mwanza-unreported); and ***Idrisa Suleman v. Kresensia Athanas***, HC- Misc. Land Application No. 39 of 2017 (Mwanza-unreported).

Distilling from the depositions and the contending submissions, two grounds advanced in support of the application are illegality; and delays arising from pursuit of the appeal which fell through. Noting the decisive importance of the ground of technical delay, I will confine my discussion on that, aware of the fact that an illegality will only bear significance if the same is of a disturbing nature which, if not dealt with, has the potential of occasioning a miscarriage of justice to one or both of the parties to the proceedings. Since the applicant has not demonstrated any peculiar circumstances under which such extension should be granted (see: ***John Tillto Kisoka v. Aloyce Abdul Minja***, Civil Application No. 3 of 2008), nothing gives me the impression that any of the previous proceedings were shrouded in any illegality, of whatever magnitude, as to constitute the basis for allowing an appeal which would cure such malady. It is my unflustered view that circumstances of this case do not call for application of illegality as a ground for extension of time.

Disposal of this issue takes me the second point of contention which is the epic battleground in this matter. It relates to the period between 2nd June, 2019 and 18th February, 2020, when the instant application was filed in this Court. The respondent's contention is that the applicant exhibited loathness in the whole conduct up until the filing of the application. The sloppiness, inactiveness and negligence with which conduct of the matter is allegedly characterized is, in the respondent's view, the basis for distinguishing this application from the principle set out in the cited decisions.

The law is settled in this country, that delays which arise as a result of pursuing matters which are subsequently adjudged defective or through a procedure that is wrong are excusable. These are delays which fall in the realm of delays which are known, in legal parlance, as technical delays, and are acceptable. They constitute a sufficient cause for extension of time. It is a principle which was propounded in ***Fortunatus Masha*** (supra). It received an acclaim in the later decision of the superior Bench in ***Amani Girls Home v. Isack Charles Kanela***, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported).

In the latter, the Court of Appeal fortified the view it had in the ***Fortunatus Masha*** (supra) and held that a diligent pursuit of the appeal through unsuccessful applications is a cause sufficient enough for grant of extension of time. The most recent subscription of all is in the decision of ***Victor Rweyemamu Binamungu v. Geofrey Kabaka & Another***, CAT-Civil Application No. 602/08 of 2017 (Mwanza-unreported), in which the superior Court had the following observation:

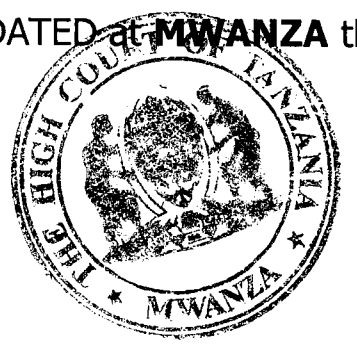
> *"Be it as it, he first applied for revision which was however struck out on 4th December 2017 on account of time limit. This period from the date of the decision intended to be revised to the date of striking out Civil Application for revision No. 26 of 2017, is what has acquired the name of technical delay which cannot be blamed on the applicant. There are many decisions on that position such as* ***Ally Ramadhani Kihiyo v. The Commissioner for Customs and the Commissioner General Tanzania Revenue Authority,*** *Civil Application No. 29/01 of 2018 (unreported),* ***Kabdeco v. Watco Limited,*** *Civil Application No. 526/11 of 2017 (unreported),* ***Salim Lakhani and 2 Others v. Ishfaque Shabir Yusufali (As an Administrator of the Estate of the Late Shabir Yusufali),*** *Civil Application No. 455 of 2019 (unreported)."*

Circumstances revealed by the applicant in the instant application are in all fours with the decisions cited by both counsel and the just cited decisions. They talk about the setback that the applicant encountered in the appeal which was shot down, necessitating taking a tactical retreat which made amends that enabled it to bounce back and resurrect its quest for justice through the impending appeal. In my considered view, these circumstances overly convinces me to hold that sufficient cause has been demonstrated to allow the Court exercise its discretion and extend time within which to file an appeal to this Court.

Consequently, I hold that the applicant has passed the legal threshold requisite for extension of time. Accordingly, I grant the application. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 24th day of June, 2020.



M.K. ISMAIL

JUDGE

Date: 24/06/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Kilenzi, Advocate

Respondent: Absent

B/C: B. France

Court:

Ruling delivered in chamber in presence of the Kilenzi, Advocate and in the absence of the respondents and in the presence of Ms. Beatrice B/C, this 24th June, 2020

M. K. Ismail
JUDGE

At Mwanza
24th June, 2020