

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 21 OF 2020

RAIA MWEMA COMPANY LIMITED ----- APPLICANT

VERSUS

THE MINISTER FOR INFORMATION, CULTURE, ARTS

AND SPORTS ----- 1ST RESPONDENT

THE DIRECTOR OF INFORMATION AND SERVICE

DEPARTMENT ----- 2ND RESPONDENT

THE ATTORNEY GENERAL ----- 3RD RESPONDENT

Date of Last Order: 16/09/2020

Date of Ruling: 30/10/2020

RULING

L. M. MLACHA, J.

The applicant, RAIA MWEMA COMPANY LIMITED filed an application under section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 and Rule 47 of the Court of Appeal Rules GN 368 of 2009 as amended by GN 362 of 2017 and GN 344 of 2019 seeking leave to issue and file a Notice of Appeal out of time against the Ruling and Drawn Order of this court (De-Mello, J.) dated 24/12/2019. Consequent to the

above, he requested the court to grant leave to file an appeal against the ruling and drawn order out of time. The application is supported by the affidavit of Dr. Rugemeleza Albert Kamuhabwa Nshala who is also the counsel for the applicants. Service was effected to the respondents, THE MINISTER FOR INFORMATION, CULTURE, ARTS AND SPORTS, THE DIRECTOR OF INFORMATION AND SERVICE DEPARTMENT and THE ATTORNEY GENERAL who filed a counter affidavit sworn by Ms. Vivian Method, State Attorney in opposition. Mr. Nshalla had an opportunity to file a reply to the counter affidavit.

I had time to go through the affidavits and oral submissions made by Dr. Nshala and Ms. Vivian Method, State Attorney. The gist of the applicant's case is that they became aware of the ruling of this court dated 24/12/2019 on 08/04/2020. They applied for it and they were supplied with it on 27/04/2020. They then prepared the document and filed the present application on 29/04/2020. Explaining the reasons behind the delay, counsel submitted that he travelled to Muleba 19/12/2019 where he had gone to introduce his newly wedded wife. And that, while there, his relative was involved in a road accident and passed away. He was held

up there for some days attending the two aspects. Back in Dar es Salaam his clerk Amina Hamza came to court on 19/12/2019 but the ruling could not be delivered. It was delivered on 24/12/2019 but no communication was made to him.

Counsel proceeded to submit that the ruling of De-Mello, J has illegalities in that it overruled an earlier ruling of the court made by Muruke, J on 13/12/2018. He stressed that the ruling of De-Mello, J is loaded with illegalities. He stressed that, De-Mello, J had no power to overrule the ruling of her fellow judge. That is an illegality, he said. He submitted that the existence of an illegality is a ground for granting an application of this nature as per the case of **Mohamed Salum Nahid V. Elizabeth Jeremiah, Civil Reference No. 14 of 2017** and the case of **The Principle Secretary Ministry of Defence and National Service V. DP Valambia [1992] TLR 387**. He invited the court to grant the application.

Submitting in reply Vivian Method, State Attorney said that the granting of the application is at the discretion of court which must be exercised judiciously. She went on to say that the applicant must show good cause which will warrant the court to grant the extension of time. He must account for

each day of delay and show that there has been no negligence on his side, she said. She referred the court to **Lyamuya Construction Co. Ltd V. Board of Registered Trustees of Young women Christian Association of Tanzania, Civil application No. 2/2016** for further details.

The State Attorney submitted that, in this case there is a delay of more than 90 days in exclusion of 30 days granted under rule 83(2) of Court of Appeal Rules. She submitted that the counsel for the applicant has failed to establish good cause or count for each day of delay. She went on to say that what is exhibited by the applicant's conduct is nothing but negligence in pursuing the appeal. Giving details she said that counsel sent a clerk to court while knowing that she had no locus to address the court. Further to that, he could not make any follow up thereafter until when he was asked by his client about the status of the case. She referred the court to **Kambona Charles (Administrator of the Estate of the late Charles Pangani) V. Elizabeth Charles, CAT Civil Application No. 529/17 of 2019** for reference.

Counsel proceeded to submit that there was no illegality in the Ruling by De-Mello, J because her ruling had no relation to the Ruling of Muruke, J. She said that, illegality must be

seen on the face of the records something which is not the case here. She argued the court to decline to grant the application.

In rejoinder Dr. Nshala joined issued with counsel for the respondent in all the points.

I have to address my mind to two areas. **One**, whether there is good cause to extend the time and **two**, whether there is an illegality on the face of the ruling of De-Mello, J calling the attention of the Court of Appeal. I will start with the first issue. As explained by the learned counsel for the respondent, there must be good cause coupled with an account for each day of delay. The ruling of De-Mello, J was delivered on 24/12/2019 while the present application was presented on 04/05/2020. There is a span of 133 days. If we less the usual period of lodging a notice of appeal of **30 days** provided under the Court of Appeal Rules, one gets 103 days. Reasons explained for the delay are these; **one**, the counsel had gone to Muleba Bukoba to introduce his newly wedded wife. While there he lost a relative. **Two**, counsel sent a clerk to court who asked a counsel to hold the brief but no communication was made to the counsel for the applicant. **Three**, counsel had no report of the delivery of the ruling until

when he was asked by his client to make a follow up of the matter.

I had time to examine these reasons. Like the counsel for the respondents, with respect, I don't see any good cause. Going to introduce a newly wedded wife to parents and relative is a social responsibility. It is good to do so but that act does not relinquish a counsel of his to responsibility to the court and his client. He was supposed to write the court and seek a release or get a leave of absence. He never wrote to the court. He never got any leave of absence. He just left leaving the case to his clerk. That was not a good conduct. Sending clerks to court is a practice which is familiar to many firms. It serves the purpose of getting adjournments. But it remains a practice outside the rules. If someone sends a clerk to court to ask a counsel to represent him and something goes wrong, he should not complain against the court or the other side. He should blame himself. The death of a relative is a serious issue but has remained a mere fact with no proof. No death certificate or burial permit is attached. I don't think that it can assist the applicant. In total there has never been a clear and good account to explain the delay which has remained hanging. The point is rejected.

What about illegality? It is alleged that the ruling of De-Mello, J is illegal on the face of it because it has vacated the ruling of Muruke, J on the matter. This calls for an examination of the two rulings. I have attempted to do so.

Reading through the ruling of Muruke, J., I could learn that it was based on preliminary points of objection that the application for leave to file an application for orders of certiorari, mandamus and prohibition against the respondents has been overtaken by events. The Judge said at page 4 as follows: -

*"...it is my opinion that, **an illegal order cannot be overtaken by events if the application to set it aside (quash it) was filed within time.** The leave is sought for three orders of certiorari to quash the impugned order, mandamus to compel the respondents to abide by the law and prohibition to stop them to violate, in future, the rights of the applicant. It has been held that whenever illegality if any order is at issue, the court is duty bound to investigate it even if one is out of time....."*

Applicant seeks to challenge illegality in an order of Minister, it covers past, present and future.

Thus application cannot be said to be overtaken by events. Preliminary objection is overruled.

(Emphasis added)

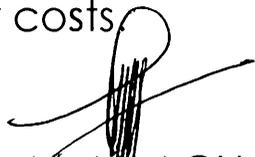
De-Mello, J. was determining three preliminary objections. One of them was that the application for grant of certiorari, mandamus and prohibition had been overtaken by events. She decided it on the first point. She had this to say at page 4.

*“Now that the substantive application is on record, **the matter and as evidenced, has at this juncture been overtaken by event, rendering the application ineffectual.** Since 29th of September, 2019 up to 30th December, 2019, the ban had expired and would fully agree that, to challenge its validity, that is the “ban” to be specific and, at this stage is of no effect at all.”* *(Emphasis added)*

Now, as it is apparent from the above, whereas the court had already ruled out through Muruke, J that the application which seek to challenge the order of the Minister cannot be said to be overtaken by event, the same court has said again through De-Mello, J that it has been overtaken by events rendering the application in effectual. That is a contradiction

calling for the attention of the Court of Appeal. It is an illegality so to say, in my view, because judges of the same level have no power to overrule each other in the same case. On the strength of the decision of the Court of Appeal in **TanESCO and 2 Others V. Salim Kabora, Civil Application No. 68 of 2015** that where there is an illegality on the face of the record, time must be extended, I will allow the application. I grant 15 days within which the applicant can file his Notice of Appeal and the appeal against the decision of this court Miscellaneous Cause No. 17 of 2019 (De-Mello, J.). It is ordered so. No order for costs.



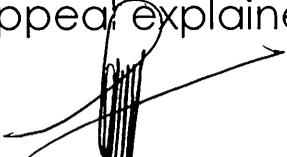

L. M. MLACHA

JUDGE

30/10/2020

Court: Ruling delivered in the presence of Dr. Nshala for the applicant and Ms. Vivian Method, State Attorney for the respondents. Right of appeal explained.




L. M. MLACHA

JUDGE

30/10/2020