IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 282 OF 2019

(From Civil Case No. 85 of 2009)

KAGERA TEA COMPANY.....1ST APPLICANT

MUTWIRI IKIAO.....2ND APPLICANT

JOSEPH KIRUGI MUKINDIA.....3RD APPLICANT

DR PETER MGIMBA.....4TH APPLICANT

VERSUS

ARTHUR KIRIMI RIMBERIA.....1ST RESPONDENT

JULIUS KIANGI MATHIU.....2ND RESPONDENT

RULING

Date of Last Order: 11/5/2021
Date of Ruling: 8/6/2021

MASABO, J.-

Kagera Tea Company and 3 Others filed this application under Section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2019. They have fronted two prayers namely, an extension of time within which to file a notice of appeal to the Court of Appeal and a subsequent extension of time within which to apply for leave to appeal to the Court of Appeal against an order of this court in Civil Case No. 85 of 2009.

As gleaned from the affidavit, the background of this application can be traced from 9th June, 2009 when the respondents instituted Civil Suit No 85 of 2009 in this court claiming against the applicants, reimbursement of a contribution alleged to have been paid by them for establishment of the

1st applicant's company. In their written statement of defence, the applicants raised a preliminary objection on point of law claiming that the court was not clothed with territorial jurisdiction to determine the suit as the cause of action arose in Bukoba and the defendants are domiciled and operate their business there. Hence, it offended the provision of Order 8 rule 1 of the Civil Procedure Code, Cap 33 RE 2019. Subsequently, the respondents filed a counter preliminary objection that the applicants filed their written statement of defence out of time. It is alleged that, instead of determining the applicant's preliminary objection which was the first to be raised, the court ignored it and proceeded to determine the preliminary objection raised by the respondents and having sustained it, it expunged the applicants' written statement of defence from the record and proceeded to hear the case *ex parte*.

Disgruntled, the applicants filed a Notice of Appeal to the Court of Appeal and a subsequent application for Leave which was admitted in this court as **Misc. Application No. 444 of 2016**. It is discerned from the affidavit and the court records that the application was dismissed for want of prosecution. Later on, the applicants successfully moved the court for restoration of the application but, while they were still waiting for the resurrected application to be heard the Notice of Appeal was struck out by the Court Appeal. Consequently, the resurrected application was struck out as it had been overtaken by events.

The applicant has assigned only one reason for delay, to wit, irregularity of the decision sought to be challenged. They have deponed that the

court's decision in **Civil Case No. 85 of 2009** is illegal and should not be left to stand.

The respondents, through their joint counter affidavit, sternly disputed the alleged illegality. They have deponed that the decision in Civil Case No. 85 of 2009 was well founded as the applicants filed their written statement of defence out of time contrary to the applicant's disposition. They also deponed that the suit was properly filed in this Registry as the cause of action arose in Dar es salaam.

Further, it was deponed that, the applicants have terribly failed to demonstrate a good cause and to account for each day of the inordinate delay, thus the extension of time cannot issue as negligence does not amount to a good cause. It was deponed further that, the instant application is a delaying tactic and an abuse of judicial processes as the Notice of Appeal previously filed by the applicants was struck out by the Court of Appeal after the applicants failed to take necessary steps to prosecute the intended appeal.

Moreover, it was deponed that, after the Notice of Appeal and Misc. Civil Application No. 144 of 2016 was struck out, the applicants filed two applications with prayers similar to the prayers sought in the present application. The two applications were registered in this Court as **Misc. Civil Application No. 766 of 2018** and **Misc. Civil Application No.680 of 2019** both of which were disposed of by Mlyambina, J. A copy of the plaint in Civil Case No. 85 of 2009 and drawn order thereto and the respondents' requests to be furnished with copies of the drawn orders in

respect of **Misc. Civil Application No. 766 of 2018** and **Misc. Civil Application No.680/2019** (which have so far not been furnished to the respondents) were appended to the counter affidavit. In conclusion, the respondents complained that the applicants are employing a delaying tactics to the disadvantage the respondents by filing frivolous and vexatious applications.

At the hearing of the application which proceeded in writing, both parties had representation. The applicants were represented by Mrs. Crescencia Rwechungura, learned counsel while the respondents were represented by Mr. Kiondo Mtumwa, learned counsel.

In her submission in chief, Mrs. Rwechungura having narrated the background of the application submitted that the application is brought under section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2019, which mandates this court to extend the duration within which to file the notice and apply for leave has expired. She submitted further that illegality of a decision is a sufficient ground for the court to grant extension of time. In support of this point, she cited the case of **Principal Secretary Ministry of Defence and National Service vs Devram P. Valambia** [1992] TLR 387; **CRDB Bank Limited vs George M. Kilindu and another**, Civil Application no 87 of 2009, CAT (unreported) and **Kalunga and Company Advocates vs National Bank of Commerce Limited** [2006] TLR at page 235.

Mr. Kiondo sternly resisted. Having adopted the counter affidavit he submitted that the order sought to be appealed against is more than

seven years old as it was delivered on 5th March 2013. As a trite law, the applicants ought to account for each day of delay reckoned from 5th March 2013 to 11th June 2020 when this application was filed but they have terribly failed. Regarding the averments on illegality, he submitted that the assertion is a gross misdirection as the decision was well founded. He contended further that the applicant's case demonstrates lack of seriousness and gross negligence which does not constitute a good cause for extension of time (**William Shija vs Fortunatus Masha** [1997] TLR 213). He argued further that the applicants acted negligently by failure to file the written statement of defence on time and they failed to take the necessary steps in the Court of Appeal. Therefore, they have no one to blame. Mr. Kiondo further narrated the events preceding the application and concluded that the applicants are employing a delaying tactic and their conduct is tantamount to an abuse of court processes.

Rejoining, Mrs. Rwechungura reiterated her submission and sternly disputed the submission that the applicants acted negligently and in abuse of court processes.

I have carefully considered the application, its supporting affidavit, the counter affidavit and the submission for and against the application. Rule 83(2) of the Court of Appeal Rules, 2009 requires that, a person who intends to appeal to the Court of Appeal against the decision of this court shall file a notice of Appeal with 30 days and where the right to appeal is not automatic, subsequently apply for a leave to appeal within 14 days as per Rule 45(b) of the Court of Appeal Rules.

Section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2019, vests this court with discretion to enlarge this time upon a good cause being demonstrated by the Applicant. The term ***good cause*** is not defined under the law. Therefore, as stated in **Mugo & Others vs Wanjiru & Another** [1970] EA 481;

> "Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the delay & should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."

And, as per the authorities in **Leonard Maeda and Another v Ms. John Anaeli Mongi and Another,** Civil Application No. 31 of 2013, Court of Appeal (unreported); The **Registered Trustees of the Marian Faith Healing Centre vs The Registered Trustees of the Catholic Church Sumbawanga Diocese,** Civil Appeal No. 64 of 2007, CAT (unreported), and **Zahara Kavindi and Another v Juma Swalehe & Others**, Civil application No. 4/5 of 2017, CAT (unreported), **a *good cause*** is determined by considering such factors as the lengthy of delay (whether or not the delay is inordinate), the reasons for delay, whether the applicant has accounted for each day of delay, whether he acted diligently in pursuit of the legal action. Also, as submitted by Mrs. Rwechungura, the existence of a point of law of sufficient importance such as an illegality of the decision sought to be challenged is in itself a sufficient ground for extension of time. In the light of the aforementioned principles, the issue for determination before me is *whether or not the applicants have demonstrated a good cause*.

The following facts are undisputable. **First**, the order sought to be challenged was delivered on 5th March 2013 whereas the instant application was filed on 11th June 2020. The delay is for approximately 7 years hence inordinate. Unless a good reason has been demonstrated, it is inexcusable. **Second,** the application is sought to reinstitute a fresh notice of appeal after the first notice was struck out owing to the applicant's failure to take the necessary steps. It is also intended to reinstitute an application for leave after the initial application, **Misc. Application No. 444 of 2016**, was overtaken by events and subsequently struck out. **Third,** although mischievously omitted by the applicants, it is an undisputed fact that, in the past, the applicants filed similar applications including **Misc. Civil Appl. No 766 of 2018** and **Misc. Application No. 680 of 2019** whose proceedings have been taken judicial notice by this court. In the later application, the applicants made the following two prayers; that is:

1. The court may be pleased to set aside the order granted by Ndyasobera J in Application No. 444/2016 on the applicant's failure to appeal in court after the application was filed in court;
2. The court may be pleased to grant the applicant leave to appeal to the Court of Appeal against the order entered by Mwarija J in Civil Case No. 85/2009;

As both prayers were uncontested, my learned brother, Mlyambina, J found it fit to set aside the dismissal order but refrained from issuing the order for extension of time and directed that the same be issued by the court upon restoration of the case file for Misc. Civil Application No. 444 of 2016. What transpired thereafter was undisclosed. But what could be

discerned from the record for **Misc. Application No. 680/2019** is that, the applicant filed a fresh application, praying among other things, leave to appeal to the Court of Appeal against the ruling and order in Civil Case No. 85 of 2009. The application was ordered to be disposed by way of written submission but could not proceed further as it was withdrawn by the applicants on 8/7/2020. Although, the reasons for withdraw are undisclosed, the fact that the instant application was filed on 11th June 2020 suggests that, the applicants abandoned **Misc. Application No. 680/2019** so as to pursue the fresh application which was subsequently pending. From this series of events, I have been invited by the respondents to consider the applicants' deeds an abuse of court processes. I will revert to this later.

Looking at the facts rendered by the applicants, it can fairly be concluded that, as argued by the respondents, they have miserably failed to account for the inordinate delay contrary to the legal requirement that the applicant must account for each day of delay as articulated in **Bushfire Hassan vs Latina Lucia Masaya**, Civil Application No. 3 of 2007, Court of Appeal of Tanzania (unreported) and **Mustafa Mohamed Raze vs Mehboob Hassanali Versi,** Civil Application No, 168 of 2014, CAT (unreported). Similarly, they have terribly failed to escape the label of negligence, sloppiness and apathy in pursuit of right which is a disqualifying factor for extension of time.

It is not surprising to me that the Applicants have zeroed down on the point of illegality, which provides an avenue for extension of time even in cases where the extension would otherwise not issue. As held in

Secretary, Ministry of Defence and National Service v. Devram Valambia (supra):

> " ....when the point at issue is one alleging illegality of the decision being challenged , the court has a duty even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established to take appropriate measures to put the matter and the record right"

In **Omary Ally Nyamaiege and 2 others v. Mwanza Engineering Works Civil Application No. 94/08 of 2017** (unreported) the Court of Appeal sitting at Mwanza emphasized that, for the extension of time to be granted on the point of illegality;

> "... such point of law must be of sufficient importance and I would add that it must be apparent on the face of the record, such as the question of jurisdiction not one that would be discovered by long drawn argument or process"

In the present case, having considered the affidavit and the submission made by the applicants' counsel, I am convinced that the point raised meets the test above. While avoiding repetition, the illegality sought to be challenged is premised on the territorial jurisdiction of this court to entertain Civil Suit No. 85 of 2009. In my humble view, it is pertinent that the application be allowed to provide room to the Court of Appeal to interrogate the proceedings of Civil Case No. 85 of 2009 so as to ascertain whether the court was clothed with the requisite geographical jurisdiction and correct the illegality if any. On this one ground, the application sails.

Reverting to the point of "abuse of court processes" which I had earlier shelved, the concept of "abuse of court processes" was extensively discussed and defined in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others** Civil Appeal No. 25 of 2002 [2009] KLR 229 and in **R-Benkay Nigeria Ltd Vs Cadbury Nigerian PLC** SC 29 of 2006. In these two cases which are highly persuasive, the concept of abuse of court process was defined to encompass the following scenarios:

i. Institution of multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
ii. institution of different actions between the same parties simultaneously in different courts even though on different grounds.
iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.
v. Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by a lower court

From the series of events pertaining to the instant case, as narrated above, as I have observed with deep concern, the multiple applications instituted by the applicant and especially the fact that the present

application was instituted while **Misc. Application No. 680/2019** which had similar prayers, was still pending in this court. Borrowing from the definition ascribed to the term "abuse of court processes" in the two cases above, I am of the firm view that, the applicants' deeds are tantamount to an abuse of court processes hence intolerable and highly detested.

That said, in the view of my finding with regard to the point of illegality, I allow the application. The Applicants are to file their notice and apply for leave within 14 days. As for the prayers for costs, based the above findings regarding the conduct of the applicants, I have found it just to award costs to the respondents.

DATED at DAR ES SALAAM this 8th June 2021

J.L. MASABO

JUDGE