THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. CIVIL APPLICATION NO. 16 OF 2022.

(From Civil Appeal No. 3 of 2021, In the District Court of Iringa District, at Iringa, Original Civil Case No. 72 of 2020, In the Primary Court of Iringa District, at Bomani).

BETWEEN

MBARAKA WAZIRI.....APPLICANT

AND

REFCO COMPANY LTD..... RESPONDENT

RULING

8th September & 5th December, 2022.

UTAMWA, J:

The applicant, MBARAKA WAZIRI moved this court by way of Chamber Summons under section 25 (1) (b) of the Magistrate Courts Act, Cap. 11 RE. 2019 (The MCA), Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts), Rules, GN No. 312 of 1964 (Henceforth the GN), section 14(1) of the Law of Limitation Act, Cap. 89

RE. 2019 (The LLA) and any other enabling provision of law. The application was supported by an affidavit of the applicant himself. It seeks the following orders:

i. That this Honourable court be pleased to grant an order of extension of time to the applicant to file an appeal out of time against the decision (impugned judgment) of the District Court of Iringa District, at Iringa in Civil Appeal No. 3 of 2021,

ii. Costs of the application to follow the event,

iii. Any other relief(s) this honourable court deems fit to grant.

In his affidavit, the applicant basically deponed that, he was aggrieved by the impugned judgment of the District Court delivered on the 22nd October, 2021. The District Court delayed to supply him with the copy of the impugned judgment until on the 9th June, 2022. Granting the application will not thus, prejudice the respondent. There are also some illegalities in the impugned judgment since there are discrepancies of the parties' names and reference numbers of the original case.

The respondent, REFCO COMPANY LTD resisted the application by filing a counter affidavit affirmed by one Farooq Haruna, the principal officer of the respondent. The counter affidavit in essence refuted the fact that the District Court delayed to supply copies of the impugned judgment to parties. It also refuted the existence of illegalities.

At the hearing of the application, Mr. Moses Ambindwile, learned advocate appeared for the applicant. On the other hand, Mr. Farooq Haruna appeared on behalf of the respondent. The application was argued by way of written submissions.

The applicant's advocate submitted in support of the application that, an extension of time can be granted if the applicant advances sufficient reasons. To cement his submission he cited the cases of **Republic v. Yoha Kaponda and 9 others (1985) TLR 84** and **Benedict Mumelo v. Bank of Tanzania (2006) 1 EA 227.** He added that, it is trite law that an extension of time is absolutely premised in the discretion of the court. What constitutes sufficient reasons was well stated in the case of **Attorney General v. Tanzania Ports Authority & Another, Civil Application No. 87 of 2016** (unreported) referred in the case of **Zuberi Nassor Moh'd v. Mkurugenzi Mkuu Shirika la Bandari Zanzibar, Civil Application No. 93 of 2018, Court of Appeal of Tanzania (CAT) at Zanzibar** (unreported). In such precedents, the CAT held that, what amounts to good cause includes whether the application has been brought promptly, existence of any valid explanation for the delay and lack of negligence on the part of the applicant.

It was also the contention by the applicant's counsel that, the law further guides that, where there is illegality in the decision which is the subject of an application for extension of time, the court grants the application for extension of time. To support this position, he cited the **Zuberi Nassor case** (supra), **Tanga Cement Company Ltd v.**

Jumanne Masangura and Amos A. Mwawanda, Civil Application No. 6 of 2001, CAT (unreported), **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT** (unreported), **Mrs. Mary Kahama (Attorney of Georgia Kahama) & Another v. H.A.M Import & Export Ltd & 2 Others, Civil Application No. 52/17 of 201, CAT at Dar es Salaam** (unreported) and **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia (1992) TLR 182.**

Another argument by the applicant's counsel was that, the applicant's first reason for the delay was the failure by the District Court to timely supply the copies of the impugned judgment and decree to the applicant. The said copies were prepared, certified and ready for collection on 9th June 2022 though the judgment had been delivered on 22nd October 2021. This was irrespective of the fact that the applicant had made a follow up of the copies. Soon after receiving the said copies, the applicant lodged this application. The applicant's delay to lodge the intended appeal was not thus, deliberate. Waiting for copies of judgment and decree amounts to sufficient reasons for a delay as it was held in the case of **Walhadi Ngoli & Others v. Aida Adamson Kalinga, Misc. Land Application No. 85 of 2018, High Court of Tanzania (HCT) at Dar es Salaam** (unreported).

The applicant's counsel submitted further that, in computing time limitation for a delay, the time spent waiting for copies of judgment and

decree should be excluded as per the dictate of section 19(2) of the LLA, though that course is not automatic. To support this position, he cited the case of **Simon Asajile Mbogela v. Juma Njate, Misc. Land Appeal No. 27 of 2019, HCT at Mbeya** (unreported).

Another reason highlighted by the applicant's advocate was that, the impugned judgment and decree of the District Court was tainted with illegalities. This was because, the names of the parties at the District Court did not tally with the names of the parties at the trial primary court. The names in the trial court were REFCO Company Ltd v. Mbaraka Waziri Issa, but before the District Court, the names appeared as Mbaraka Waziri v. REFCO Company Ltd. This is a fundamental error which goes to the root of the appeal because, the names of the parties are central to their identification in litigations. The discrepancy of the names made the appeal before the District Court incompetent. The impugned judgment and orders so delivered from the said appeal were thus, a nullity. To support his contention, he cited the cases of **Jaluma General Suppliers Ltd v. Stanbic Bank (T) Ltd, Civil Appeal No. 34 of 2010, CAT at Dar es Salaam** (unreported) and **CRDB Bank PLC (formerly CRDB 1996 Ltd) v. George Mather Kilindu, Civil Appeal No. 110 of 2017, CAT at Dar es Salaam** (unreported).

The applicant's advocate thus, urged this court to exercise its discretion and grant this application as the factors pointed out above constitute sufficient reasons.

By way of replying submissions, the respondent at the outset questioned the competency of the application. She contended that, Rule 3 of the GN provides for the requirement of attaching a copy of the intended petition of appeal or in alternative to state the grounds of the intended appeal in the application. The expression used in the above cited provision is "shall" which connotes mandatory as provided under section 53(2) of the Interpretation of Law Act, Cap. 1 RE. 2020.

Alternatively, in opposing the application, the respondent prayed to adopt her counter affidavit. She submitted that, it is a position in our legal system that, extension of time which is a discretionary remedy, is grantable upon laying down a ground for the delay as held in **Mbogo v. Shah (1968) EA 93.** The **Lyamuya Construction case** (supra) set the following guidelines for consideration to warrant extension of time: the applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take and if the court feels that there are other sufficient reasons.

The respondent also opposed the applicant's first reason in that, attachment of a copy of judgment in matters originating from primary courts is not one of the legal requirements in the process of appeal. Waiting for the copy of judgment cannot therefore, be considered as sufficient reason for the applicant's delay. The applicant ought to have filed his appeal within thirty days from 22nd October 2021. Section 25(1)(b) of the MCA provides for a checklist of requirements necessary for preference

of an appeal to this court for civil matters originating from Primary Courts. To support his argument, he cited the cases of **Sam Ndege & Others v. Agness Erasto Malunga, PC Civil Appeal No. 64 of 2020, HCT at Mwanza** and **Zainabu Nzota v. mary Mahimbi, Misc. Civil Application No. 429 of 2021, HCT at Dar es Salaam** (unreported). The respondent thus, distinguished the precedents cited by the applicant's counsel regarding the first reason.

On the reason of illegality, the respondent submitted that, it is a principle of equity in determining litigants' rights that *"who comes into equity must come with clean hands".* He cited the case of **Everet v. Williams, EX. 1725, 9 L.Q Rev. 197** where the court held that, the purpose of the doctrine is to prevent a party from obtaining relief when that party's own wrongful conduct has made it such that granting the relief would be against good conscience. The applicant was the appellant in Civil Appeal No. 3 of 2021 before the District Court, hence he was the one who prepared the petition of appeal which contained his name as Mbaraka Waziri and not Mbaraka Waziri Issa as it was in the trial primary court. He could not thus, benefit from his own wrongful conduct. Again, this reason does not qualify as an illegality as the same is curable. The District Court can rectify the clerical errors *suo moto* or upon application by either party. The defect does not affect the substantial justice of the parties as observed under section 37(2) of the MCA. The overriding objective principle can cure the error if at all the court will take it into account.

The respondent therefore, prayed for the application to be dismissed in its entirety with costs since the applicant failed to demonstrate sufficient grounds for the court to grant the same. The applicant did not file any rejoinder submissions.

I have considered the affidavit, the counter affidavit, the record, arguments by both sides and the law. In my view, since the respondent raised a legal point challenging the competency of the present application, I must determine it. I will then proceed to consider the merits of the application in case the legal point will be overruled. This is because, the legal point has all the properties of a preliminary objection (PO) which in law, has to be decided before a court decides the main matter before it. I will determine such legal point though raised a bit belatedly in the replying submissions of the respondent. In fact, raising it belatedly is not an issue since a legal point of law can be raised at any stage of the proceedings as long as parties are given opportunity to address it. In the present matter, the applicant had an opportunity to make replies against the raised legal point, but he opted to stay mute by not filing any rejoinder submissions. I will thus, proceed to consider the legal point by considering only the arguments by the respondent.

Indeed, it must be noted here that, though the applicant did not bother to make replies against the legal point, that passive reaction is not the reason why this court should uphold it. I must still test it according to the law since courts of law in this land are enjoined to decide matters

before them according to the law and the Constitution irrespective of the reaction by the parties.

In arguing the PO, the respondent briefly contended that, the application at hand offended Rule 3 of the GN which mandatorily requires an application of this nature to be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order. The issue here is *whether the application at hand is competent*. In my view, what was highlighted by the respondent is the actual and clear position of the law as per the above cited provisions of the GN. The application at hand however, is neither accompanied by a petition of appeal nor does it set out the grounds which the applicant intended to rely upon in the intended appeal in case this application will be granted. I thus, agree with the respondent that the application offended the mandatory provisions of the law.

The sub-issue which arises at this stage is this; *which is the legal effect of the violation of the provisions of rule 3 of the GN?* In my settled opinion, the violation was fatal to the application. This is because, it is clear that the purposes of rule 3 of the GN was to assist the court by providing it with sufficient tools for determining whether to grant or reject the application for extension of time to appeal out of time. The grounds of appeal to be relied upon by the applicant informs the court on whether or not there are serious issues to be determined in the intended appeal. The omission to indicate the grounds of appeal therefore, makes it difficult for

the court to make a just and fair decision on whether to grant the application for extension of time.

The omission committed by the applicant cannot thus, be cured by the principle of overriding objective. This principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the Court of appeal of Tanzania (The CAT) in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

Nevertheless, it cannot be considered that the principle of overriding objective suppresses other important principles that were also intended to promote justice. The holding by the same CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported) supports this particular view. Indeed, this precedent is an authority that, the principle of overriding objective does not operate mechanically to save each and every blunder committed by parties to court proceedings or by courts of law themselves.

Owing to the above reasons, I answer the issue posed above negatively that, the application at hand is incompetent. Courts of law are not entitled to entertain incompetent matters. This finding therefore, relieves me from testing the merits of the application at hand since the sole legal remedy for an incompetent matter is to strike it out. I accordingly

strike out the application at hand with costs since costs follow event. It is so ordered.

JHK UTAMWA

JUDGE

05/12/2022

COURT: Ruling delivered in the presence of Mr. Farooq Nabil on behalf of the respondent . Ms. Gloria Makundi (clerk) also present.

MALEWO M. A.

DEPUTY REGISTRAR

05/12/2022

Right of appeal explained.

MALEWO M. A.

DEPUTY REGISTRAR

05/12/2022