

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 182 OF 2022

(Originating from Civil Case No. 216 of 2016)

BETWEEN

AIRTEL TANZANIA LIMITED APPLICANT

VERSUS

MIRAGE LITE LIMITED RESPONDENT

RULING

MRUMA J,

This is an application for extension file a notice of appeal to the Court of in order to challenge the decision of this Court (De Mello J) dated 7th May 2020 in Civil Case No. 216 of 2016.

The application is supported by an affidavit sworn by the counsel for the Applicant. Initially this matter was before my sister n bench honourable Dr Masabo J and following her transfer to another working station, it was re-assigned to me.

In these proceedings the Applicant enjoyed the service of Mr Jonathan Wangubo learned advocate while the Respondent was represented by Mr Rutabingwa, also learned advocate. The application was argued viva voce.

In paragraph 15 of his affidavit counsel for the Applicant avers that he is aware that the Applicant may be granted an extension of time to file a notice of appeal upon showing sufficient cause. He states that the delay in filing the notice of appeal was not attributed to his negligence but was a result of the Court of Appeal striking out the earlier appeal on the ground that the appeal was incompetent. He contends at paragraph 18 of the same affidavit that the delay in filing notice of appeal is not a real delay but a technical delay because the earlier notice of appeal which was filed within time was struck out with Civil Appeal No 32 of 2021. He is of the view that the time spent by the Applicant bona fide prosecuting Civil Appeal No. 32 of 2021 which was struck out for technical reasons amounts to sufficient cause to grant an extension of time. The learned counsel asserts that the decision of this court which awarded interest on the decretal amount at the rate of 12% which is above the 7% permitted by law is not awardable and it was an

erroneous decision fall under illegality which constitute sufficient cause for grant extension of time.

In his oral submissions before me counsel for the Applicant reiterated the averments in his affidavit to the effect that following of striking out of the Civil Appeal No. 32 of 2021 the consequence was that the previous notice which was filed within time also collapses whereby the period between the filing of the previous notice of appeal obtaining the proceedings, judgment, and other necessary documents for purpose of filing the appeal and prosecuting it up to the time it was struck out is what can be termed as technical delay within the meaning of the decision of the Court of Appeal in **Fartunatus Masha vs William Shija & Another [1997] TLR, 154.**

On the illegality the learned counsel avers that the awarded interest of 20% compounded from November 2010 to the date of the judgment on the claim involving USD are illegal because the interest awarded is not awardable in law. To fortify his argument he cited the case of the **Principal Secretary Minister of Defence & National Services Vs Dervam Valambia [1992] TLR** in which the Court stated that;

Where the question is an alleged illegality of the decision being challenged the Court has a

duty even if it means extending the time for the purposes to ascertain the point and if the alleged illegality is established to take appropriate measures to put the matter and record right.

In reply, counsel for the Respondent submitted that the judgment of this court (De-Mello J), was handed down on 7th May 2020 and the present application was filed on 5th May 2022, a period of over two years. He said that that period must be accounted for by the Applicant. He went further and alleged that the first notice was timely filed but it collapsed following the striking out of Civil Appeal No. 32 of 2021. The learned counsel contended that these two periods have not been properly accounted for by the Applicant. He said that the first period which is from when the Applicant was called by the Registry to collect necessary documents for Civil Appeal which period is between 17th December 2020 to 16th February 2022 when Civil appeal No 32 of 2021 was filed had not been accounted for at all.

As regards the second period which is from the time when the appeal was struck out i.e. 26th April 2022, and the time of filing this application i.e. on 5th May 2022 has not been explained. He contended that, the period between 17th December 2020 to 24th December 2020 has not

been properly accounted for and instead the Applicant trying to manipulate something else.

The learned counsel contended that the contention that the delay was partly attributed to delay in obtaining copy of judgment of the Court of Appeal lacks substance because the filing of an application for an extension of time to file a notice of appeal does not require a copy of a judgment of the Court of Appeal. He said that had the Applicant been serious he could have filed the same on 27th April 2022 because 26th April 2022 was a public holiday and if we assume that they were waiting for the judgment of the Court of Appeal, then they would have been expected to file it on 29th April 2022 which was Friday. He complained that there was no explanation of what happened on 2nd, 3rd and 4th May 2022.

Submitting with regards to the alleged illegalities the learned counsel submitted that the appeal was struck out because the notice was filed out of statutory time and that was not technical but rather it was negligence on part of the Applicant. He further contended that the issue of illegality must be on the face of the record. He said that the issue of interest was not an apparent error on the face of the record because the

first part was commercial interest and the second part was interest at the discretion of the Court.

Having gone through the rival submissions of the parties I find that the issue for determination is whether the Applicant has established sufficient cause to warrant this Court to grant the relief sought by the Applicant. Section 11(1) of the Appellate Jurisdiction Act, Cap 141 under which this application is pegged provides that:-

Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may The Appellate Jurisdiction Act [CAP. 141 R.E. 2019] 11 extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.

From the above provision of the law, granting an extension of time within which one can file a notice of appeal is discretionary powers of the court and like any other discretionary powers it must be exercised judiciously and upon accounting for every day of delay [See the case of **Lyamuya Construction Co. Ltd Vs Board of Registered Trustees of Young Women Christian Association of Tanzania**], in which the

Court of Appeal laid down guidelines to be taken into account when determining an application for extension of time. At page 6 of the said decision the court stated thus:-

- "- the Applicant must account for all the periods 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 which he ought to take and;*
- that if the Court feels that there are other sufficient reasons such as the existence of a point of the law of sufficient importance such as the legality of the decision sought to be challenged"*

The above-established guidelines indicates that apart from being purely discretionary powers of the court to grant or not to grant an extension, but those powers can only be judiciously exercised upon the applicant showing sufficient or good cause and or accounting for every day of delay.

I have reviewed oral submissions of the parties I agree with the argument of Respondent's counsel that the Applicant's assertions that, he was delayed to file the application because he was waiting for the copy of judgment of the Court of Appeal lacks substance because the

filing of an application for extension of time to file a notice of appeal does not require a copy of a judgment of the Court of Appeal.

That notwithstanding, and assuming that that was the requirement of the law (which is not), as correctly submitted by the counsel for the Respondent, the Applicant was availed with a copy of judgment on 28th April 2022, but he didn't file it on 29th April 2022, nor did he file it on 2nd, 3rd or 4th May 2022 and no explanations were given for these delays. Thus, the Applicant didn't give sufficient account for delays occurred between 26th April 2022 and 4th May, 2022. In the circumstance it is my finding that the Applicant failed to account for every day of the delay. As the application for leave to appeal is not an automatic right this court must do its duty to filter which matter should go the court of Appeal and which matter should not go so as to avoid unnecessary backlog in the highest court of the land. In the case of **British Broadcasting Corporation v. Eric Sikujua Ngamaryo, Civil Application No. 138 of 2004**; The Court in discussing the grounds to be considered it stated that:

"Needless to say, leave to appeal is not automatic. It is within the discretion of the court to grant or refuse. The discretion must however be judiciously exercised and on the materials before the court. As a matter of

*general principle, leave to appeal will be granted where the grounds of appeal raise issues of general importance or novel point of law or where the grounds show a prima facie or arguable appeal. (See: **Buckle v Holmes (1926) ALL ER. 90 at page 91**),*

However, where the grounds of appeal are frivolous, vexatious or useless or hypothetical no leave will be granted." Arguably, much as the grant of leave is the discretion of the Court, the same is not automatic in the sense that, the Court has to be satisfied that the grounds of the intended appeal raise arguable issue(s) for consideration by the Court. The Court has to be satisfied that the grounds raised should merit serious judicial consideration by the Court in order not to waste the precious time of the Court"

That said I find this application to have no substance and consequently,
I dismiss it with costs. It's so ordered.




A.R MRUMA

JUDGE

14/11/2022