IN THE HIGH COURT OF TANZANIA
(COMMERIAL DIVISION)
AT DAR ES SALAAM

COMMERIAL CASE NO. 62 OF 2003

DHOW MERCANTILE (EA) LIMITED.....1ST APPLICANT
YOHANA HILARIUS NYAKIBARI.....2ND APPLICANT
GULAMALI SHAH BOKHARI.....3RD APPLICANT
VERSUS
REGISTRAR OF COMPAIENIES.....1ST RESPONDENT
LUSHOTO TEA COMPANY LIMITED...2ND RESPONDENT
ABDIRAZZAKH S. TUKE.....3RD RESPONDENT
NAWAB ABDULRAHIM MULLA.....4TH RESPONDENT
YUSUF NAWAB MULLA.....5TH RESPONDENT

R U L I N G

Hon. Mruma,J

This is an application for enlargement of time to file and serve notice of appeal to the Respondents. The Applicants herein were plaintiffs in commercial case No.62 of 2003 in which the present Respondents were Defendants.

In that case (commercial case no. 62 of 2003), the Applicants unsuccessfully sought to strike out the names of the 2nd and 3rd Respondents from the register of the share holders in Dhow Mercantile (E.A) Limited. They were aggrieved by the decision of this court (Kalegeya J as he then was) and appealed to the Court of Appeal in Civil Appeal No.86 of 2004. The said appeal was struck out on the

ground that copy of the decree accompanying the appeal was signed by a Registrar instead of a judge who determined the case. The applicants went back to the trial court (i.e this court) and obtained a decree properly signed by a judge as required. Believing that the notice of Appeal previously lodged survived the striking out of Civil Appeal No.86 of 2004, the Applicants lodged the second appeal (Appeal No.56 of 2005). Te second appeal suffered similar consequence. It was struck out on the ground that it was not supported by a valid notice of Appeal, hence this application.

This application is brought under the provisions of section 11(1) of the Appellate Jurisdiction Act (Cap 141 RE 2001) and as is the practice of this court it is supported by Affidavits of the Applicants Yohana Hilarius Nyakibari and Gulamali Shah Bokhari.

The Respondents through their advocate George M. Kilindu have strongly resisted the Application on the grounds among others of in ordinate delay in applying for extension of time to file a fresh notice of Appeal. Further more the Respondents have submitted that the fact that the Applicants counsel did not file written submissions implies that they have failed to support the application therefore it must be dismissed. To support this argument Mr. Kilindu cited the decision of the High court (Main Registry) Mihayo J

in the case of ***Grewal Sawmills Ltd Vs Presidential Parastatal Sector Reform Commission Civil Case No.147 of 2007 Dar-es-Salaam Registry (unreported),*** where it was held that Defendants submissions filed out of time and without leave of the court were improperly before the court. I do agree with Mr. Kilindu.

Failure by a counsel to file written submissions in support of an application as ordered by the court has the same consequence as non-attendance, without sufficient cause shown of a party when ordered to appear in person for hearing. The consequence here is that the application is not supported by any argument and therefore it qualifies for a dismissal order. This would have ended the matter but counsel for the Applicant has raised a very interesting point which, I think is worth discussing herein. The learned counsel has filed a rejoinder and submitted that the fact that the Applicant did not file submissions as requested does not bar him from filing rejoinder. In my opinion and with due respect to the learned advocate I do not think if that should be the position. If failure to file written submissions to support an application is equated to non-appearance of a party when the matter is called for hearing, it goes without saying that rejoinder submissions is the equivalent of cross examination procedure which is geared to shake the

credibility of a witness in ordinary hearing. The question that follows is whether a party who did not appear during the hearing (which is equivalent to failure to file written submissions), can consequently be allowed to cross examine a witness testified in his absence (which is equivalent to a filing of rejoinder). The answer to this question in my view is in the negative. Rejoinder in the law of pleadings signifies the plaintiffs answer to the Defendants submissions in replay. There on be no rejoinder where there is no submission to be replied to.

Secondly in my view to that allowing a party who didn't file written submissions in chief to file a rejoinder will have the effect of reversing the order of the right to begin to address the court. Normally in the application like this, the applicant has the right to begin to argue in support of his application and the respondent has the right to reply. To do it the other way round is to play a hide and seek game; and this should not be allowed. How can a party who did not file his initial submission rejoin the other party who filed his.

In the instant application there is no submission in chief by the applicants therefore they cannot be heard saying that they have the right of filing the rejoinder. In the final analysis on this issue I find that the rejoinder filed on

11.1.2008 was improperly filed and is hereby expunged from the records.

That would enough to dispose of this matter, but I find it not harmful to address myself to the law under which the application is brought.

As stated earlier, this application for enlargement of time for the applicants to file and serve notice of appeal on the Respondents is made under section 11 (1) of the Appellate Jurisdiction Act Cap 141 RE 2002.

The provision provides:

> *"11-1 (1) subject to sub section (2), the High Court or where an appeal lies from a subordinate court exercising extended powers the subordinate court concerned, may 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 appeal, notwithstanding that the time for giving the notice or making the application has already expired."*

Let me be quick to point out that the above cited provision of the law (ie s. 11 (1) of the Appellate Jurisdiction Act) confers discretional powers to the court to grant or not to

grant the extension of time sought. But courts' discretional powers should only be exercised **judicially** and **judiciously.** It is **judicially** exercised when there is an enabling provision of the law which confers upon the court powers to exercise such discretion and it is **judiciously** exercised when there is material facts enabling the court to take such course. In the instance application the enabling provision of the law is section 11 (1) of the Appellate Jurisdiction Act. However, there is no relevant material facts submitted to this court by the applicants for it to consider before it can reach its decision to grant the extension sought. In other words this court cannot exercise its discretion **judiciously** in absence of material facts submitted to support the application.

In the final result, I find no merits in this application and it is hereby dismissed with costs.

A.R.MRUMA

JUDGE

1,388 - words

I Certify that this is a true and correct of the Original order Judgement Ruling
Sign ..... Registrar Commercial Court Dsm.
Date 21/5/09