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

**COMMERCIAL CASE NO.75 OF 2005**

**NATIONAL INSURANCE CORPORATION (T) LTD ..... APPLICANT**

**VERSUS**

**SHENGENA LTD ..... RESPONDENT**

Date of last order: 21/07/2009
Date of final submissions: 25/08/2009
Date of ruling: 24/09/2009

Counsel
For the Applicant: Mbamba & Company, Advocates
For the Respondent: Abduel G. Kitururu, Advocate

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**RULING**

**MAKARAMBA, J.:**

The applicant is minded in this application, to prosecute for extension of time to file a Notice of Appeal to appeal against the decision of Hon. Lady Justice Kimaro (as she then was) dated 28th September, 2005. The

application has been preferred under section 11 of the Appellate Jurisdiction Act [Cap 141 R.E. 2002]. The Applicant is now praying that subsection (1) be added to section 11 in the Chamber Summons in terms of section 95 and 97 of the Civil Procedure Code, so that the enabling provision of the law should now read as section 11(1) of the Appellate Jurisdiction Act. Section 11 of Cap.141 which the Applicant has cited in the application is headed "*Extension of time by High Court.*" On the other hand, subsection (1) of section 11 of Cap.141 R.E. 2002 which the applicant now seeks to be added to section 11 in the Chamber Summons provides as follows:

> *"11.(1) Subject to subsection (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 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.*"

The Applicant, it would appear, as could be garnered from the submissions of the learned Counsel for the Applicant, has come to this Court apparently as a result of two rulings by Mr. Justice Werema of this Court, the one dated 14th April, 2009 setting aside the dismissal order of an application for review and another dated 15th June, 2009, wherein his Lordship, refrained from setting aside the decision of Lady Justice Kimaro dated 28th September 2005 on review, and further that the grounds advanced were for appeal rather than review. The applicant has come up with this application upon realizing through the ruling of Mr. Werema J. that

the default judgment dated 28th September 2005 by Lady Justice Kimaro could only be set aside on appeal not review.

It is settled law that if the point of law at issue is illegality or otherwise of the decision sought to be challenged on appeal, it constitutes sufficient reason for courts to exercise discretion, the learned Counsel for the Applicant submitted buttressing his point by referring this Court to **PRINCIPAL SECRETARY MINISTRY OF DEFENSE AND NATIONAL SERVICE VS DEVRAM VALAMBHIA (1992) TLR 185**; **VIP ENGINEERING AND MARKETING LTD &B OTHERS VS CITIBVANK LTD Consolidated Civil Reference No.6, 7, and 8 of 2006** (unreported) and **PAUL JUMA VS DIESEL & AUTOI ELECTRIC SERVICE & OTHERS Civil Application No.54 of 2007** (unreported).

It is not disputed that the judgment of Lady Justice Kimaro (as she then was) which the applicant is now seeking extension of time to file Notice of Appeal to file an appeal against, was handed down on 28th September 2005. The learned Counsel for the Applicant submitted that this is the decision, which in rejecting application for its review, Werema J. of this Court said that it was improper in law for having been based on a time barred suit and for non compliance with Order VIII Rule 14(2)(b) of the Civil Procedure Code [Cap.33 R.E. 2002] requiring the Court to exercise its discretion to fix of a day for *ex parte* proof. The learned Counsel for the Applicant submitted further that in his ruling, Mr. Justice Werema had intimated that he could not set aside the said decision which was rendered by a fellow judge and that the proper way to deal with it was by way of appeal rather than review. It would appear that this is what apparently prompted the applicant to come up with this application for extension of

time to file notice of appeal to appeal against the decision of Lady Justice Kimaro.

The learned Counsel for the Applicant submitted further that before assuming jurisdiction and entering a default judgment on 28th September 2005, the Court was duty bound to ensure that the matter was validly before it as per Order VII Rule 11(c) of the Civil Procedure Code, which empowers the Court to reject a plaint if among other things it appears to the court that from the statements in the plaint the suit is barred by any law. However, the learned Counsel for the Applicant further submitted, it is only under Order VIII of the Civil Procedure Code, the Court can reject the plaint but after receiving the written statement of defense. Indeed, the learned Counsel for the Applicant further argued, in the absence of application for extension of time, a time barred application, as per **FAUSTIN G. KIWIA & ANOTHER VS SCOLASTICA PAUL Civil Appeal No.24 of 2000** (unreported), makes the court entertaining it to have wrongly assumed jurisdiction. The gist of a number of authorities cited by the learned Counsel for the Applicant in his submission is to the effect that even if counsel for the party does not raise the issue of limitation, the court can raise it *suo motu* for the purpose of ascertaining that it has jurisdiction in the matter before it. This line of reasoning is evident in **ABDAKAH JUMA VS THE PRICIPAL COMMISSIONER OF PRISONS & ANOTHER Civil Appeal No.102 of 2002** (unreported); **JOSEPH MHINA MSUMARI VS MKURUGENZI MTENDAJI ONE STOP CO. LTD. Civil Appeal No.72 of 2008** (unreported); **CHRISTOPHER BIKEKEYE VS TANZANIA PORTLAND CEMENT COMPANY LTD Civil Appeal No. 66 of 2001**; (unreported) and **HAMIS SALEHE VS FIROZ KARIMJEE & ANOTHER Civil Application No.66 of 2002** (unreported) quoting **MICHAEL LERSENI**

**KWEKA VS JOHN ELIAFE Civil Appeal. No.51 of 199**7 (unreported), the learned Counsel for the Applicant cited in his submissions. The attendant result is that if the suit the subject matter of the intended appeal was time barred, it follows therefore that the presiding court had no jurisdiction to issue the judgment as it did, and since it was the basic function of the Court to satisfy itself that it had jurisdiction, which it did not have, the proceedings were therefore a nullity for lack of court's jurisdiction, and consequently, it could not be allowed to stand, the learned Counsel for the Applicant surmised.

The above line of reasoning and the supporting authorities buttress the argument by the learned Counsel for the Applicant that the limitation of period, sancrosanct as it is could be raised by the parties in the pleadings or otherwise as per section 3 of the Law of Limitation Act [Cap 89 R.E., 2002] which stipulates very clearly that proceedings instituted after the expiry of the prescribed limitation period is to be dismissed whether or not limitation has been set as a defence. This legal position finds support in the case of **REGINALD ABRAHAM MANGI AND ANOTHER VS LART Civil Appeal No.45 of 2000** (CAT)(unreported), the learned Counsel for the Applicant cited in his submissions. It was the further submission of the learned Counsel for the Applicant that since the suit was time barred, the court had no jurisdiction to pass a default judgment dated 28th September 2005 and the same is not justified in law and prayed that since it was entered so illegally, an extension of time to file a Notice of Appeal against it be granted.

The Applicant has come before this Court, almost two years after the decision for which the intended appeal is being sought was rendered and that is why he is seeking extension of time to file Notice of Appeal. The

main reason advanced by the Applicant as constituting a sufficient reason for grant of extension of time and to explain the delay in lodging a Notice of Time to file an appeal in time, was his struggle to challenge the default judgment sought to be appealed against through other means than appeal until very recently when he realized that there is nothing this Court could do by way of review to set it aside the said judgment but appeal that is when he decided to lodge application for extension of time so that in the event it is granted it will pave the way for the Applicant to proceed by way of appeal.

The second reason advanced by the Applicant to justify grant of extension of time is that since the suit the subject matter of the default judgment which the Applicant seeks to challenge on appeal was for a liquidated sum exceeding 1000/-, and that the applicable provision was paragraph (b) of subrule 14 of Order VIII of the Civil Procedure Code, under which the plaintiff is required to prove his case exparte, the trial court was not therefore justified to convert a plaint into a judgment as it did. In support of this argument, the learned Counsel for the Applicant cited the case of **IQBAL ESSAJEE VS COSMAS ANTHONY Civil Revision No.14 of 1999** (HCT – Dsm) where Chipeta, J. (as he then was) quoted from **KULWA DAUD VS REBECCA STEPHEN (1985) TLR 116** that claims, even where are entertained exparte, must be proved before a judgment is entered.

In this application rather curiously, the learned Counsel for the Applicant in justifying his prayer for extension of time to file Notice of Appeal has raised and argued all the grounds he intends to raise in the appeal itself, relating to the omission of the trial court to do what it was required to do under the law, namely to observe that the matter was not

time barred under section 3(1) of the Law of Limitation Act read together with item 7 to the schedule of the Law of Contract Act, and Order VII Rule 11(c) of the Civil Procedure Code as well as observance of Order VIII Rule 14(2)(b) of the Civil Procedure Code.

The learned Counsel for the Respondent's replying submitted that the application is incompetent for having been preferred under the wrong enabling provisions of the law and further that it is a trite principle of the law that one has a duty to cite the relevant subsection that gives powers to the court, citing the case of **Civil Application No.64 of 2003 CITIBANK (T) LTD V. TANZXANIA TELECOMMUNICATIONS COMPANY LIMITED AND OTHERS** (CAT)(unreported) in support of his submission on this point. It was the further submission by the learned Counsel for the Respondent that the Applicant having noted the anomaly in his application wherein he had cited section 11 of Appellate Jurisdiction Act [Cap.141 R.E. 2002] without the subsection (1), filed a notice of amendment on 3rd July 2009, which he never pursued, and therefore the enabling provisions remain as originally it were, that is, section 11 of the Appellate Jurisdiction Act without the proper subsection.

The learned Counsel for the Respondent submitted further that the court is not properly moved to issue a specific order in respect of the application for amendment, and as such the issue before the court is the application for extension of time to file notice of appeal against a decision of this court dated 28th September 2005. The applicant has relied on authorities on illegality while this is not the case, the learned Counsel for the Respondent further submitted.

The learned Counsel for the Respondent in his submissions went back on the background to the application and submitted that the Applicant

filed the main case on 23rd August 2005, and was duly served but failed to file defense and on 28th September 2005 a judgment in default was entered by this Court whereupon on 17th May 2006 a final decree was entered. At the same time the Applicant applied for review of the order dated 28th September 2005 on the ground of error apparent on the face of the record as the judgment entered was in contravention of Order VIII Rule 14 of the Civil Procedure Code, and that the interest awarded lacked legal or factual basis and should not have been issued, which application was dismissed on 15th December 2005, upon failure of the Applicant to appear before the Court when the case was called for hearing. Leave to appeal to the Court of Appeal of Tanzania was refused by Hon. Massati J. (as he then was) on grounds that his Lordship saw nothing to fault the Court's decision to dismiss the application for want of prosecution. On 3rd November 2006, Hon Luanda J. (as he then was) granted leave to the applicant to file application for review against the decision of Hon. Kimaro J. (as she then was) dated 28th September 2005, this time around on among other grounds, that the suit was time barred. It would appear that the learned Counsel for the Applicant without leave of the Court filed submissions out of time which led to the application being dismissed by Luanda J. (as he then was) and appeal against this decision succeeded. The Court of Appeal ruled that the trial court ought to have struck out and not dismiss the application, and further ruled that the Applicant should use Order 42 Rule 7(2) of the Civil Procedure Code if they wanted to pursue the matter further. Upon filing application under Order 42 Rule 7(2) of the Civil Procedure Code for inter alia, setting aside the rejection order dated 16th February 2007, Hon Werema J. of this Court allowed the Applicant to revive their application for review within 14 days. The Court however,

rejected the application for review. Such is the background to this matter as graphically painted by the learned Counsel for the Respondent in his submission.

The learned Counsel Applicant in his submissions has conceded that he wasted time pursuing the matter by way of review instead of appealing against the judgment of Lady Justice Kimaro (as she then was) dated 28th September 20025, which he claims that it was wrong. The learned Counsel for the Respondent claims that it was lack of diligence on the part of the learned Counsel for the Applicant amounting to negligence since the provision for review are clearly stipulated in the law and this does not constitute sufficient cause for grant of extension of time to file Notice of Appeal.

Much as I am at one with the learned Counsel for the Respondent that the learned Counsel for the Applicant should have exercised more diligence in preferring an application for review instead of appeal, this in my view should not be used to determine whether this Court should or should not grant the prayers in the application. The learned Counsel for the Respondent submitted further that the reason for the delay was on account of the Applicant's failure to know the remedy available to him after an *ex parte* judgment had been entered against him. It was the case of the learned Counsel for the Respondent as per the case of **UMOJA GARAGE V. NATIONAL BANK OF COMMERCE [1997] TLR 109 (CA),** the issue whether oversight by an advocate amounted to sufficient cause in terms of Rule 8 of the Court of Appeal Rules for granting extension of time to file a fresh notice of appeal, the Court held that lack of diligence on the part of the Counsel or an oversight would even more be devoid of merit as plea for extension of time. In **CALICO TEXTILE LIMITED V PYARALIESMAIL**

**PREMJI [1983] TLR 28 (CA),** it was observed that not checking the requirements of the law properly is not a sufficient reason for allowing an appellant who is represented by a learned Advocate to file appeal out of time. Yet in **ROZENDO AYRES V. OLIVIA DARITTA (1934) Vol. 1 EACA 1** it was stated that special circumstances must be shown for extension of time to appeal. In that case the effort of the counsel citing misinterpretation of the judgment as cause of failure to appeal in time against the judgment was rejected and was held that a mistake by the applicant or counsel was not a ground good enough for granting application. In **MARTHA DANIEL V. PETER THOMAS [1992] TLR 359 (HC),** it was held that a mistake as to procedure set out by law, no negligence or want of diligence distinction to be drawn between a lawyer and a layperson. On lack of diligence, the learned Counsel for the Respondent also cited the case of **RE COLES AND RAVENSHEAR (1907) 1 K.B 8** on the effect of blunder on part of litigant's legal adviser.

The main submission of the learned Counsel for the Respondent is that the application should not be granted for want of sufficient reasons to explain the delay to lodge appeal and that the Applicant's Counsel had displayed negligence and lack of diligence in handling of this matter and should not therefore benefit from it.

As I stated earlier the learned Counsel for the Applicant has submitted on the possible grounds that will justify extension of time, which in my view, are the very grounds on appeal if leave for extension to file Notice of Appeal is granted.

On the ground that the suit was time barred and that the default judgment did contravene Order VIII Rule 14 of CPC, it was the argument of the learned Counsel for Respondent that the applicant's acknowledgment

of debt in his letter of 19th January 2000 prompted Respondent to file this case and as per section 25(1) of the Law of Limitation Act [Cap.345 R.E. 2002] such acknowledgement marks the time for purposes of limitation to start running afresh. The learned Counsel for the Respondent submitted further that Commercial Case No.75 of 2005 was filed on 25th August 2005 and being a contract whose limitation is 6 years, counting from the date of acknowledgement, time is yet to elapse and therefore the decision of this Court, which is the subject of this application cannot be said to be illegal. The learned Counsel for the Respondent submitted further that there is another case between the same parties pending at the High Court Registry Civil Case No.197 of 1998 but on a different cause of action.

On the argument that the default judgment did not contravene Order VIII Rule 14 of CPC, it was the submission of the learned Counsel for the Applicant that in view of the provision of Order VIII Rule 14(2) of the Civil Procedure Code, the trial court should not have entered default judgment instead it should have ordered *ex-parte* proof as the amount claimed exceeds one thousand shillings. It was the further submission of the learned Counsel for the Applicant that the pecuniary limitation of the High Court is now far beyond the archaic one which was set forty years ago in 1966, and that the practice of the court has been to ignore it. It was the submission of the learned Counsel for the Respondent that Order VIII Rule 14(2) of the Civil Procedure Code does not make it mandatory for the court to fix a date for exparte proof and prayed that application for leave to file a notice of appeal out of time should be rejected with costs for being devoid of merits.

The arguments of the learned Counsel essentially revolve around the following heads:

(a) That the Application for extension of time was made under wrong provisions of the law

(b) That the applicant and its Counsel were negligent for not preferring the right application and instead proceeded by way of review

(c) That the case upon which judgment in default was entered was not time barred

(d) That the pronouncement of judgment and omission to order ex parte proof was not an error in law.

I do not intend to deliberate on all of the above heads. Suffice however, that I shall tackle the main premise that the application is made under wrong provisions of the law. It was the submission of the learned Counsel for the Applicant in rejoinder that the Respondent never raised a preliminary objection when the Applicant made the prayer for addition of subsection 1 to section 11 of the Appellate Jurisdiction Act. It was the further submission of the learned Counsel for the Applicant that the prayer for addition of subsection 1 to section 11 of the Appellate Jurisdiction Act is therefore misplaced. It was the further submission of the learned Counsel for the Applicant that raising an objection after notice of amendment has been lodged amounts to circumventing the notice of amendment, and cited the case of **NIC (T) LTD VS ABDALLAH MAKUNGANYA Civil Application No.14 of 2003** (unreported) in support of his argument. It was the further submission of the learned Counsel for the Applicant in rejoinder that the amendment being sought is only for addition or insertion of subsection 1 to section 11 of Appellate Jurisdiction Act, which the Court can do even without halting the main application and without ordering

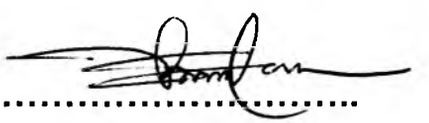
amended documents to be filed. The issue is whether the court has such powers if so moved.

It is true as the learned Counsel for the Respondent has submitted that the Applicant did not cite the specific subsection under section 11 of the Appellate Jurisdiction Act under which this Court could be moved to exercise its jurisdiction to grant the prayers sought in the Chamber Summons. Much as I am at one with the learned Counsel for the Applicant that the learned Counsel the Respondent never raised a preliminary objection when the Applicant made the prayer for addition of subsection 1 to section 11 of the Appellate Jurisdiction Act, this however, does not defeat the fact and on the authority of **Civil Application No.64 of 2003 CITIBANK (T) LTD V. TANZXANIA TELECOMMUNICATIONS COMPANY LIMITED AND OTHERS** (CAT)(unreported), that preferring an application under wrong enabling provisions of the law renders such application incompetent and misconceived and therefore incompetent with the resultant effect of being struck out. The omission to cite the specific provision of the law to move the court to exercise its powers in my view, it goes to the root of the matter itself as it touches on jurisdiction. In such circumstances it can be raised at any time even suo motu by the Court. This Court cannot therefore just ignore or casually acknowledge the omission and proceed as the learned Counsel for the Applicant would wish this Court to, and amend the application by inserting the omitted subsection even without there being any application to that effect.

I am at one with the learned Counsel for the Respondent that much as the notice to amend which the Applicant never pursued the Notice he had filed on 3rd July 2009, the enabling provisions remain as originally were, that is, section 11 of the Appellate Jurisdiction Act without citation of the

proper subsection. I am at one with submission of the learned Counsel for the Respondent that the order of this Court dated 21st July 2009 was with respect to hearing of the application for extension of time, and not for the application to amend the chamber summons. However, since I have determined that the application for extension of time to file Notice of Appeal is misconceived for having been preferred under wrong provision of the law, I need not go into the details of whether the application to amend can be held simultaneously with the main application for extension of time.

In the circumstances, and for the reasons I have explained above, I will as I hereby do, hold that the application for extension of time to file Notice of Appeal is misconceived for having been preferred under wrong provision of the law and is hereby struck out with costs for being incompetent. It is so ordered.



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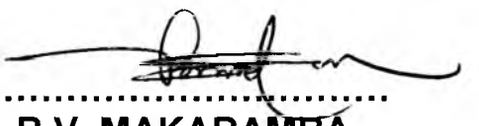
**R.V. MAKARAMBA**

**JUDGE**

**23/09/2009**

Ruling delivered in Chambers this 23rd day of September 2009 in the presence of Mr. Mbamba for the Applicant and Mr. Mbamba for Kitururu for the Respondent.



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**R.V. MAKARAMBA**

**JUDGE**

**23/09/2009**

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