IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.49 OF 2003

MARY JOHN MITCHELL

Legal Representative of the

Late Isabella JOHN..... APPLICANT

VERSUS

1. SILVESTER MAGEMBE CHEYO ..... 1ST RESPONDENT
2. PROVICOM INDUSTRIES LIMITED ..... 2ND RESPONDENT
3. NATIONAL BUREAU DE CHANGE LTD ..... 3RD RESPONDENT

Date of last orders: 29/09/2009

Date of final written submissions: 09/11/2009

Date of ruling: 11/05/2010

RULING

MAKARAMBA, J.:

On the 3rd day of August 2009, the Applicant, MARY JOHN MITCHELL, filed in this Court a Chamber application under section 11(1) of the Appellate Jurisdiction [Cap.14 R.E. 2002] seeking extension of time to file a Notice of Appeal out of time.

The application is supported by the affidavit of Mary John Mitchell, the applicant, who in this application is being represented by the firm of

advocates, R.K. Rweyongeza & Co. The 1st and 2nd Respondents are being represented by the firm of Kisarika, Malimi & Mlola (Advocates). The application by consent of the learned Counsel was disposed of by way of written submissions.

The background to the dispute briefly is that the applicant is the legal representative of the late Isabella John, who is her mother. Isabella John passed away on the 9th day of October 2007. At the time of her death, Isabela John had filed an appeal, Civil Appeal No.36 of 2006 which was pending at the Court of Appeal of Tanzania. She had lodged the appeal against the present three respondents, having lost her case in Commercial Case No.49 vide a judgment dated 16th August 2004. As the record on file shows the Applicant had been appointed Administratrix of the estate of her late mother Isabella John. Subsequently the applicant applied to be joined as a Legal Representative of her late mother Isabella John vides Civil Application No.111 of 2008.

The learned Counsel for the Applicant submitted that the Applicant is praying for extension of time to file a Notice of Appeal out of time so that she can bring back on track the appeal, Civil Appeal No.36 of 2006, which was struck out on 29th June 2009 by the Court of Appeal of Tanzania, following an objection which was raised by the 1st Respondent that the appeal was incompetent as the record of appeal was accompanied by a defective decree, to wit it contained a date different from the date on which the judgment was pronounced, as per the affidavit of Benjamini Mwakagamba, advocate for the 3rd Respondent. The fact of Civil Appeal

No.36 of 2006 being struck out on the 29th June 2009 for the reason that the decree was defective for bearing a date that was different from the date, on which judgment was pronounced, is also deponed to by the Applicant in her affidavit in support of the application. The Applicant did not however disclose the fact of there having been a first appeal, Civil Appeal No.12 of 2005 by the late Isabella John which was also struck out by the Court of Appeal on the 11th July 2005 on the same grounds as the second appeal, Civil Appeal No.36 of 2006, the subject of this application, which fact is disclosed in the affidavit of Mr. Benjamini Mwakagamba. In her affidavit, the applicant only states in paragraph 7:

> *"That, several attempts were made to cure the defect in the decree before the Court of Appeal, first by filing a supplementary record but as that was of no effect by filing an application for extension of time, which was turned down by the Court of Appeal of Tanzania."*

Both in the affidavit of Mr. Benjamini Mwakagamba, advocate for the 1st and 2nd Respondents, and in the submissions of the learned Counsel for the 1st and 2nd Respondents, the Respondents aver that the Applicant ought to have rectified the said anomaly and ensure that the fresh Appeal No.36 of 2006 which was lodged after the first one had been struck out on the 11th July 2005, meets all the requirements of the law. The further averement of the 1st and 2nd Respondents is that the Applicant has failed to show sufficient cause which prevented her from rectifying the said anomaly within time. In his reply submissions the learned Counsel for the 1st and 2nd Respondents essentially reiterated what Mr. Benjamini Mwakagamba had deponed in his affidavit that by certifying that the records of Civil Appeal

No.36 of 2006 were proper and therefore proceeding to file the same while it was not as such shows that the Applicant and her Counsel were not diligent enough even after they had been afforded a second opportunity to lodge the Appeal, which at the end of the day was also struck out.

In his submissions in chief the learned Counsel for the Applicant cited as the main reason for the delay in lodging the Notice of Appeal the fact of being the record of appeal being struck out by the Court of Appeal for being incompetent which rendered the earlier Notice of Appeal although filed within the prescribed time to be equally incompetent. It was the further submission of the learned Counsel for the Applicant that in order to bring back on rail the intended appeal, the applicant is now moving this Court for leave so that she can file a Notice of Appeal out of time, and once granted to file the intended appeal. The defect in the decree which lead to the record of appeal being struck out was not caused by the applicant herself but by the issuing Court, the learned Counsel for the Applicant further submitted. Buttressing this point, the learned Counsel for the Applicant submitted that it is now settled that an error by the Court constitutes sufficient reason, and cited to this Court the decision of this Court in **SYLVESTER LWEGIRA BANDIO AND ANOTHER VS THE NATIONAL BANK OF COMMERCE** where Makaramba, J. is quoted to have stated that in that case the two months the applicants took to spring into action following the striking out of their appeal did not constitute an inordinate delay, neither was it a sign of lack of seriousness on their part to pursue justice. The learned Counsel for the 1st and 2nd Respondent in his

reply submissions distinguished that case from the present case where the Applicant were given opportunity to rectify the defectiveness twice but failed to do so.

It is not denied that the Applicant's appeal was dismissed for being accompanied by a defective decree which contained a date different from the date on which the judgment was pronounced. In the words of Justice Rutakangwa in **THE HONOURABLE ATTORNEY GENERAL VS. REVEREND CHRISTOPHER MTIKILA Civil Appeal No.20 of 2007 (unreported)**, such decree is "*incurably defective which means it is irremedially lacking in legal sufficiency and it is as good as it never existed at all.*" The fate of a record of appeal which has been struck out was succintly stated by the Court of Appeal in **FOTUNATUS MASHA VS WILLIAM SHIJA AND ANOTHER [1997] T.L.R. 91**, that "*it amounts to efforts to bring an appeal into existence which failed*" which is quoted by His Lordship Rutakangwa in **Civil Appeal No.20 of 2007 THE HONOURABLE ATTORNEY GENERAL VS. REVEREND CHRISTOPHER MTIKILA (unreported)**. In the present application following the record of appeal being struck out the door however, was still open to the applicant to bring into existence the appeal so long as she was ready to comply with all the mandatory requirements of the law. This would mean the applicant coming back to the High Court to have the defective decree cured. However, since the time for serving a Notice of Appeal would have expired the applicant was required to seek for extension of time to lodge such Notice and if successful to file the intended appeal. This is where the

applicant faces the hurdle of satisfying this Court of the reasons for the delay.

The learned Counsel for the 1st and 2nd Respondents submitted that the Applicant however made several attempts to cure the defects before the Court of Appeal of Tanzania, which attempts were not according to law and the Court of Appeal dismissed all the attempts. The learned Counsel for the 1st and 2nd Respondents however, was quick to add that the said attempts and even this application is one of the delaying tactics the Applicant is employing to prevent the Respondents from executing the decree of the High Court of Tanzania, Commercial Division. The learned Counsel for the 1st and 2nd Respondents elaborating on what he meant by "endless applications" by the Applicant, cited the 1st Applicant's Appeal No.12 of 2005, which the Court of Appeal of Tanzania struck it out on 11th July, 2005, the record of which was accompanied with a defective decree in that it was not signed by the judge who passed the Decree. The learned Counsel for the 1st and 2nd Respondents narrated further that the Applicant filed another fresh appeal, Civil Appeal No.36 of 2006, which was as also struck out for being defective as well. The learned Counsel for the 1st and 2nd Respondents also cited the unsuccessfull attempt by the Applicant to file supplementary records and later on file Application for extension of time to file record of appeal from the judgment of the High Court of Tanzania, which was also struck out with costs. The learned Counsel for the 1st and 2nd Respondents did not hesitate to lay blame on the Applicant herself and her Counsel for not rectifying all errors during filing the appeal

for the second time, since they certified the record of appeal Civil Appeal No.36 of 2006 as being proper and filed them in Court, and therefore they did not do due diligence. That being the case, the learned Counsel for the 1st and 2nd Respondents surmised, the Counsel for the Applicant had contributed to the anomalies and they both have to blame themselves for what had happened. In any event, the Counsel for the 1st and 2nd Respondent countered, the Counsel for the Applicant has failed to show sufficient cause which prevented them from rectifying the defectiveness twice when given the opportunity to do so. That being the case, section 11(1) of the Appellate Jurisdiction Act, Cap.141 R.E.2002 is not in favour of the Applicant, the learned Counsel for the 1st and 2nd Respondents submitted and prayed this Court to dismiss the application with costs.

The learned Counsel for the Applicant in rejoinder abhored the action of the learned Counsel for the 1st and 2nd Respondents of "*shifting the goals posts*" by introducing new facts from the Bar, which are not supported by the counter affidavit, on the fact of the several attempts made by the Applicant to cure the defect which the learned Counsel for the 1st and 2nd Respondents branded as amounting to "*delaying tactics.*" These are serious allegations which if proved would amount to an abuse of the legal process, the learned Counsel for the Applicant hinted out, such that they should have been made in the counter affidavit, so that the applicant would have challenged them through a reply to counter affidavit, to show all surrounding attempts made by the Applicant to cure the defect in the decree. But since the counter affidavit had nothing worthy to reply to, the

applicant did not file a reply to the counter affidavit of the 1st and 2nd Respondents and that at this stage, the learned Counsel for the Applicant further submitted, he would not want to fall into the mistake as learned Counsel for the 1st and 2nd Respondents did of introducing new facts from the Bar. Pointing out on how submissions from the bar can be misleading, the learned Counsel for the Applicant cited the example of the submission of the learned Counsel for the 1st and 2nd Respondents, who despite being the same Counsel for the same partiers on appeal in Civil Appeal No.12 of 2005, which was struck out by the Court of Appeal on the 11th July, 2005, has stated that that the appeal was struck out for "***not being signed by a Judge who passed a decree.***" The learned Counsel for the Applicant submitted that it is true that Civil Appeal No.12 of 2005 was struck out, but it was not struck out because the decree had a different date from the date of the judgment. The learned Counsel for the Applicant prayed that the whole submission by the Counsel for the 1st and 2nd Respondents being purely based on submissions of facts from the bar not supported by any affidavit should be ignored. Earlier on in his rejoinder submissions, the learned Counsel for the Applicant had submitted that as they were not served with the submissions of the 3rd Respondent it is to be taken that the 3rd Respondent has conceded to the application.

The bone of contention in this application in my view is whether the Applicant has adduced reasonable or sufficient cause for this Court to exercise its discretion under section 11(1) of the Appellate Jurisdiction Act and grant the Applicant extension of time to file Notice of Appeal.

According to the learned Counsel for the 1st and 2nd Respondent the Applicant has not shown sufficient reason for the delay, which delay he claims was caused by negligence on the part of the learned Counsel for the Applicant and the Applicant herself for not rectifying or curing the errors which had lead the appeal to be struck out twice for the same reasons despite being given the opportunity to do so twice.

The provision of section 11(1) of the Appellate Jurisdiction Act under which the application has been preferred stipulates 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 above rule came for consideration by Masati J. (as he then was) in **Commercial Case No.49 of 2003 ISABELLA JOHN VS. SILVESTER MAGEMBE CHEYO AND 2 OTHERS (unreported),** where after citing a host of case authorities his Lordship insisted that the word "**may**" appearing in section 11(1) of the Appellate Jurisdiction Act implies discretion, which discretion however has to be exercised *"justly", "according to the rules of reason and justice," "not according to private opinion, according to law and not humour", according not arbitrarily, vaguely or fancifully but legal and regular."* Mr. Justice Masati noted in his decision that whereas the powers of the High Court to extend time which

are enshrined in section 11(1) of the Appellate Jurisdiction Act, 1979 which does not specifically limit the exercise of such powers to the existence of sufficient reasons, the powers of the Court of Appeal which are contained in Rule 8 of the Court of Appeal Rules requires sufficient reason to extend time. In his reasoning, which I do not find very good reason to differ with, Mr. Justice Masati observed that it would result in absurdity were an applicant be required to adduce sufficient reasons for extension of time under Rule 8 of the Court of Appeal Rules while not so required under section 11(1) of the Appellate Jurisdiction Act. Relying on the principle of statutory interpretation stated in **MOSS VS ELPHICK (1910) 1 K.B. 465**, that where there are two sections dealing with the same subject matter, one section being unqualified, and the other containing a qualification effect must be given to the section containing the qualification, Mr. Justice Masati gave effect to Rule 8 which contains a qualification, finding that the omission of the words "*sufficient reason*" in section 11(1) of the Appellate Jurisdiction Act was a mere slip of the pen and had to be judicially supplied to fill the legal lacunae.

The Court of Appeal of Tanzania amplifying on the requirement to show sufficient reason had occasion in the decision of **VIP ENGINEERING AND MARKETING LIMITED & TWO OTHERS VS. CITIBANK TANZANIA LIMITED, CONSOLIDATED CIVIL REFERENCES NO.6, 7 and 8 of 2006 (Unreported)** quoting from **ABDALLAH SALANGA & 63 OTHERS AND TANZANIA HARBOURS AUTHORITY Civil Application No.4 of 2001 (CAT) (unreported),**

which dealt with Rule 8 of the Court of Appeal Rules as to what amounts to "*sufficient reason*" to state thus:

> "*Rule 8 of the Court Rules requires that an applicant for extension of time give sufficient reason. This Court in a number of cases has accepted certain reason as amounting to sufficient reasons.* ***But no particular reason or reasons have been set out as standard sufficient reasons. It all depends on the particular circumstances of each application.***" (the emphasis was of the Court of Appeal of Tanzania).

Interpolating the above reasoning to encompass section 11(1) of the Appellate Jurisdiction Act, the question this Court has to ask itself is whether the fact of the appeal being struck out for having a defective decree in that it bore a date different from that of the date the judgment was pronounced is a point of sufficient importance to constitute a "*sufficient reason*" for purposes of section 11(1) of the Appellate Jurisdiction Act. The settled law is that error of the court constitutes sufficient reason for extension of time under section 11(1) of the Appellate Jurisdiction Act regardless of whether a reasonable explanation has been given by the Applicant under the rule to account for the delay. In the case under discussion the Applicant has been pursuing her rights by filing two previous appeals which were struck out on technicalities. This is her third such attempt. Unfortunately, the law does put a limitation as to the number of attempts an applicant has to make in trying to pursue her right to appeal to the highest court of the land. This Court has been satisfied that the fact of the appeal being struck out for having a defective decree in that it bore a date different from that of the date the judgment was

pronounced is a point of sufficient importance to constitute a "*sufficient reason*" for purposes of section 11(1) of the Appellate Jurisdiction Act. The fact that the decree bore a date different from the date of the judgment was no error of the applicant but of the court and this constitutes sufficient reason for extension of time under section 11(1) of the Appellate Jurisdiction Act regardless of whether a reasonable explanation has been given by the Applicant under the rule to account for the delay.

In the event and for the foregoing reasons the application succeeds. The Applicant is hereby granted extension of time within which to file notice of appeal out of time to bring back the appeal on track. Considering the circumstances and the nature of the case I shall make no order as to costs. Each party is to bear own costs in this application. It is accordingly ordered.

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R.V.MAKARAMBA

JUDGE

11/05/2010

Ruling delivered in Chambers this 11th day of May 2010 in the presence of Mr. Zake, Advocate for the Applicant and Mr. Tarzan, Advocate for the Respondents.

R.V. MAKARAMBA

JUDGE

11/05/2010

Words count: 3,237