IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE No. 281 OF 2002

MEHBOOB HASSANALI VERSI.....PLAINTIFF/RESPONDENT

VS

MURTAZA MOHAMED RAZA VIRANI...1st DEFENDANT/APPLICANT

MRS. RUBAB MOHAMED RAZA VIRANI..... 2ND DEFENDANT

RULING

BUKUKU, J.

This is an application by notice of motion brought under section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2002, Rule 47 of the Tanzania Court of Appeal Rules, 2009 and section 14(1) of the Law of Limitation Act, Cap 89 seeking for the following orders:

1. That, the Honorable Court may extend the time for giving notice of intention to appeal from the judgment of this Court (Mrs. Justice Kimaro) in the above proceedings dated 4th September, 2002;

2. That, the Honorable Court may extend the time to take all other steps essential for the prosecution of the appeal to the Court of Appeal of Tanzania including the filing of Memorandum of Appeal and record of appeal; and

3. That the costs of this application follow the events.

The Chamber Summons is taken at the instance of the applicant and is supported by the affidavit sworn by Mr. Murtaza Mohamed Raza, the applicant himself. In the affidavit, the applicant narrates the twists and turns of his case before this Court and his protracted, but fruitless attempts to air his grievances to the Court of Appeal of Tanzania.

In order to appreciate the sequence of events leading to this matter, it is convenient to set out briefly the background. The story goes like this: On 4th of September, 2003, this Court entered judgment on admission against the respondent Mehboob Hassanali Versi, in commercial case No. 281 of 2002. The respondent was dissatisfied with the decision and lodged notice of appeal on 9th September, 2003, and later instituted Civil Appeal No. 31 of 2004. This appeal was struck out on 12th December, 2004 on the grounds that it was incompetent for want of valid decree. The doors were left open for the respondent to reinstitute the appeal if he so wished.

On 28th December, 2004 the respondent filed Civil Appeal No. 145 of 2006 based on the very notice of appeal lodged on 9th September 2003 and which was struck out on 12th December 2006, for want of a valid decree. Unfortunately, this appeal too, was struck out by the Court of Appeal on grounds that, in the instant case the notice of appeal lodged on 9th September in respect of Civil Appeal No. 31 of 2004 died away when Civil Appeal No. 31 of 2004 was struck out on 12th December, 2006. Therefore, Civil Appeal No. 145 of 2006 was found to be incompetent for want of a valid notice of appeal. The only option left to the respondent was to apply for extension of time in which to file a fresh notice of appeal if he so wished to reinstitute his appeal. Yet again, determined to move the Court of Appeal to hear his points of appeal, on 16th December, 2008 respondent filed a notice of intention to appeal to the Court of Appeal. The

application was heard by this Court (Werema, J. as he then was) and having been satisfied that the intended appeal raises a serious question of law, on 3rd March, 2009, the application was granted.

Upon such enlargement of time, the respondent lodged his appeal, Civil Appeal No. 26 of 2009 on 4th February, 2011. The said appeal was heard by the Court of Appeal and on 22nd February, 2011 the appeal was struck out because the decree issued by this Court was dated 27th December, 2006 instead of 4th September, 2003. Aggrieved by the said ruling of the Court of Appeal, on 21st March, 2011, the respondent filed a chamber summons in this court. However it has dawned upon the applicant that the prescribed period for moving this court to enlarge time had long expired hence the current application.

The affidavit in support of the application has some seven paragraphs, but I will only refer to paragraph seven which is relevant. I will reproduce it thus:

> *"7.-That the point of law arising in the intended appeal is of great importance, not only to the litigants before this Court but also to the general public, who need to know the status of written and oral pleadings by advocates, who have been disqualified. We need the authoritative decision of the Court of Appeal because the High Court did not make its position clear".*

On 16th June, when the matter came before me, parties prayed that the application be argued by way of written submissions. Leave was granted, and the same were to be filed in accordance with an agreed schedule. Both parties submitted well researched submissions. I am grateful to them.

Mr. Sylvester Shayo, learned advocate for the applicant submitted that, the only issue which arises for the determination of the court in this

application is whether there has been shown sufficient reasons to warrant enlargement of time. With the aid of litany of case law, Mr. Shayo submitted that, the applicant has been facing a string of bottlenecks which are not of his making. Specifically he preferred to refer to the last appeal to the court of Appeal which was struck out on the ground that the decree being challenged was dated 27th December, 2006 instead of 4th September, 2003. According to the advocate, this court has a share of the blame in issuing the defective decree and the applicant cannot be said to have been negligent for what happened to his appeal. Advocate for the applicant maintained that, since neither of the parties is to be blame for the defective decree which resulted in the striking out of the appeal it will just if time is extended.

On the second point, Mr. Shayo submitted that, the other reason for extending the time is the serious question of law which the Court of Appeal is required to decide i.e whether it was proper for the court to act on the plaint drawn by an advocate who had been disqualified in terms of section 7 of the Notaries Public and Commissioners for Oaths Act CAP 12 R.E 2002. He therefore concludes by saying that, the two points are extremely important not only to the practitioners of law and the subordinate courts but also to the general public. It if from these points that he prays that time within which to file a notice of motion to appeal to the Court of Appeal be enlarged and the application be granted.

The application is opposed by the respondent. In answer to the affidavit of Mr. Virani, Mr. Mehboob Hassanali Versi filed a counter affidavit. In essence, through paragraphs 3,4,5,6 and 7 of the counter affidavit, the respondent shows that, the applicant has never intended to appeal against the ruling of Hon. Kimaro, J. but also, the issue of disqualifying Mr. D. Kesaria and acting on documents drafted by him is not subject to appeal for it being an interlocutory one; and that applicant has failed to show sufficient reasons for extension of time and that the present application is just another delaying tactic to circumvent the execution of the preliminary

decree as a result of judgment in admission; and that the applicant has been negligent, inordinate, inadvertence and inaction to take legal action within time, which has ended into endless litigation on the same issue.

In his written submission Advocate for the respondent equally submitted that reading through the affidavit of Mr. Murtaza Mohamed Raza Virani, one will discover that no reasonable ground has been raised for consideration by this court. He further submitted that reading from the previous record and the two notices of appeal attached to the counter affidavit of the respondent, the two notices of appeal were against the judgment on admission entered on 4th September, 2003. As such, the applicant has never intended to appeal against the ruling dated 24th July, 2003 delivered by Hon. Kimaro (as she then was), and therefore this point was an afterthought.

In his view, the central question that the court has to determine in this matter, was whether the applicant had shown sufficient reasons. He is guided by the principal that, extension of time shall be granted if and only if the sufficient reasons have been given, and these sufficient reasons must be stated or embodied in the affidavit supporting the application. He cited the case of Regional Manager **Tanroads Kagera V. Ruaha Concrete Co, Ltd. Civil application No. 96 of 2007**, where the Court of Appeal held that, sufficient reasons cannot be laid on by any hard and fast rule and that applicant must place before the court materials which will move the court to exercise its jurisdiction in order to extend time limited by rules. In the same vein he quoted the case of **Rotman V. Cumarosamy and Another (1964) 3 ALL ER 933.**

Finally, Advocate for the respondent prayed that the application be is missed with costs as no relevant material has been advanced to this court through the affidavit supporting the chamber summons for extension of time.

In determining applications of this nature, the court should primarily concern itself in probing into the reasons for the delay. Other factors such as the likelihood of success of the intended appeal, can also be considered. But most importantly, is the reason for the delay. Sufficient reasons have to be given. Not only that, in the case of **Simon Kabaka Daniel V. Marwa Nyang'anyi & 11 others, (1989) TLR 64** the Court held that, in an application for leave to appeal to the Court of Appeal, the applicant must demonstrate that there is a point of law involved for the attention of the Court of Appeal. Also, it is settled law that the Court of Appeal considers matters of law only. The issue before me is to determine whether, looking at the affidavit of the applicant, the applicant has provided good or sufficient reasons for extension of time. In answering to this issue, I am mindful of paragraph 5 of the counter affidavit where respondent submitted that, the present application is another delaying tactics used by the applicant to circumvent the execution of the preliminary decree as a result of judgment on admission.

With due regard to Advocate for the respondent, I wish to give him comfort that, I am aware that, the law of this country, like of other civilized nations, recognizes that, like life, litigation has to come to an end. Those who believe that litigation may be continued as long as legal ingenuity has not been exhausted are clearly wrong. Courts too are mindful of prolonged litigation, but they are also duty bound to ensure that, justice is done. In applications like this one, what is required by the court, is for the applicant to give sufficient reasons for the delay. The Court has in a number of cases accepted certain reasons as amounting to sufficient reasons. But no particular reason, or reasons have been set out as standard sufficient reason. It all depends on the particular circumstances of each application. The matters which the Court considers in an application of this nature include, the length of the delay, the reasons of the delay, possibly, the chances of appeal and the degree of prejudice to the respondent if the application is granted. Caution must be had that, in applications for

extension of time, it is dangerous to rely on precedents or hard and fast rules. Each case must be decided on the basis of its own facts, unless such precedent cases lay down the general principles or guidance. In the case of **Musa & others V. Wanjiru & another, (1970) EA 481,** it was held that:

> *" Normally, sufficient reasons for an extension of time must relate to the inability or failure to take particular steps."*

Having made those observations, I proceed to consider whether the law precludes the applicant from asserting in the instant application that there are sufficient grounds for his delay in applying for leave to appeal. The term "reasonable or sufficient cause" is a matter of discretion of the court. The court is clothed with ample power to do justice to a litigant if sufficient cause is made out for extension of time, though passed after the expiry of the time. I think all of this, depends on whether the delay by the applicant is excusable or not. There is also need to consider the decision being complained against.

As earlier on mentioned, in determining applications of this nature, we should primarily concern ourselves with probing into reasons for the delay. The true guide for a court in the exercise of its discretion is whether the applicant acted diligently. The court must bear in mind that it is a judicial discretion to be exercised. It is not a discretion to be exercised as a kind of caprice or to be based on personal sympathy. Having traversed through the affidavit of the applicant, I found out that, his reason for wanting to appeal is pertinent. However, the mishaps of the legal technicalities, were to some extent attributed to the conduct of the Advocate for not taking due care. That is why he is all out there to show reason why he should be allowed to appeal out of time.

The criteria used to grant extension of time to file an appeal out of time slightly differs from that of an application for leave to appeal. On this, The East African Court of Appeal in **Shanti V. Hindoche & Others (1973) E.A 207** had this to say:

> "The position of an applicant for extension of time is entirely different from that of an application for leave to appeal. He is concerned with showing sufficient reason why he should be given more time and the more persuasive reason that he can show as in **Bhatt's case (1962) EA 497** is that the delay has not been caused or contributed by dilatory conduct on his part. But there may be other reasons and these are all matters of degree. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case...." (emphasis mine).

Again, in the case of **CITI Bank (Tanzania) Ltd. V. TTCL, TRA & Others, Civil application No. 97 of 2003 (Unreported),** the court (Lubuva, J.A) said that each case should be looked at its own facts, merit and circumstances, by looking at all the circumstances of the case before arriving at the decision whether or not sufficient reasons have been shown for the extension of time. He referred to an English case, **Property & Revisionary Investment Corporation Ltd V. Temper & Another (1978) 2 ALL E.R 433,** where in an application for extension of time to appeal among the factors considered by the court were the special circumstances showing why the applicant should be allowed to argue the appeal out of time. I entirely agree with these reasoning's and I will adopt them in this application.

The determination of this application will entirely depend on whether or not the applicant has given convincing explanation for the delay in lodging his notice of appeal. In this application, the respondent has vigorously taken issue with the applicant for his delay in filing an appeal as being negligent, inordinate, inadvertence and inaction to take legal action within time, which has ended into endless litigation on the same issue. According to the respondent, negligence cannot be a sufficient reason for extension time. The applicant on his side has explained the chronological events as to why he is praying for leave to appeal out of time. Hastly, one can agree with the submission by respondent that the applicants have

demonstrated a high degree of negligence inordinate and inadvertence in pursuing their appeal, and that they have failed to account for their inordinate delay. But then, as earlier on intimated, in such an application, one has to examine the totality of the circumstances related to the decision which has attracted the appeal. In the case of **Republic V. Yona Kaponda & 9 Others (1985) TLR 84,** though criminal in nature, Justice Makame,J.A had this to say:

> *"Whether or not a delay is unreasonable, is only one of the factors to be taken into account but the delay has to be explained first".*

The court continued and stated what reflected in the submission by the applicant:

> *"In deciding whether or not to extend time, I have to consider whether or not there is sufficient reason" I understand it, sufficient reason here does not refer /and is not confined to the delay, rather it is "sufficient reason" for extending time and for this I have to take into account also the decision intended to be appealed against the surrounding circumstances and weight the implications of the issue or issues involved.*

The Court then concluded by saying:

> *" In view of all the foregoing, what is involved here is certainly a matter of public importance, and it is proper that the court of Appeal should decide the grave matter. The situation is a novel one and the novelty might have contributed to Mr. Teemba's delay. Notwithstanding the Republic's failure to advance reasons, I find sufficient reasons for extending time within which the Republic may file notice....."*

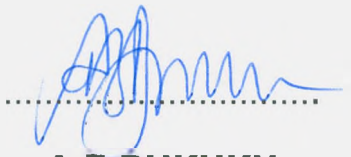
Having understood the above decision, I now need to bring it into play. Basically, I do not find the applicant's argument that the quagmire he is battling with, was caused by this Court, not to be sufficient reason

upon which the court should act. (See:**Lushoto Tea Company V. Tanzania Tea Blenders V Civil Appeal No. 71 of 2004 CA** (Unreported) where it was held that advocates are required to be more diligent and exercise care before filing documents in courts. However, in this particular case I have sought guidance in the decision of the Court of Appeal in the case of **Metal Products Limited V. Minister for Lands (1989) TLR 5.** It is already a good law that, the categories of explicable inadvertence causing delay does not include ignorance of procedure or blunder by Counsel. All these decisions apply here in this case.

One can say that, the applicants and their counsel could have exercised due care in checking their documents prior to lodging them in court. For whatever reason, they never did. However, be as it may, the right of a hearing is not only a process of the law, or a statutory one, but a constitutional right, which a person cannot be lightly denied, when his rights are being determined by a court of justice. We cannot ignore this right. It is upon this premise that I consider applicants' assertion with regard to the intended appeal as an exception. It is that, the intended appeal raises a serious question of law, which is pegged on to the complaint that, upon the court disqualifying Mr. D. Kesaria under section 7 of the **Notaries Public and Commissioners for Oaths (Cap 12 R.E 2002)** the court continued to act on the plaint drawn by him and upholding submissions made by him on the Respondent. In my opinion, this is a matter of great judicial importance. It requires the determination of the Court of Appeal. This point of law alone, is sufficient reason for granting leave notwithstanding the negligence, inordinate e.t.c. It will also be a gross injustice to and an unjustifiable infringement of their rights of appeal to dismiss this application on the pretext that the intended appeal has no chance of success or that the disqualification of Mr. Kesaria has no merit. These, will be determined by the Court of Appeal.

All said, I grant this application as prayed. The applicant should lodge the notice of appeal in accordance with the requirements of the law within fourteen (14) days of the date of this ruling.

It is accordingly ordered.

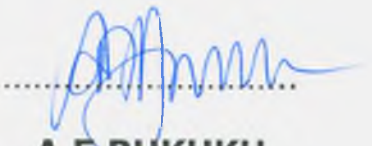


A.E BUKUKU

JUDGE

06TH SEPTEMBER, 2011

Ruling delivered this 06th September, 2011, before Mr. Eustace, Learned Advocate for the Respondent in the Absence of Applicant.



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JUDGE

06TH SEPTEMBER, 2011

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