IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO.86 OF 2003

ARBOGAST C. WARIOBA ..... PLAINTIFF

VERSUS

NATIONAL INSURANCE CORPORATION (T) LTD ..... 1ST DEFENDANT

CONSOLIDATED HOLDING CORPORATION ..... 2ND DEFENDANT

Date of last order: 03/11/2010
Date of final submissions: 07/12/2010
Date of ruling: 08/02/2011

RULING

MAKARAMBA, J.:

This is a ruling on application for extension of time and leave to appeal to the Court of Appeal, the Applicant filed in this Court on the 2nd day of July, 2010. The Application has been preferred under sections 5(1)(c) and 11(1) of the Appellate Jurisdiction Act 1979, Rules 45(a), 46(1) and 47 of the Tanzania Court of Appeal Rules, 2009. It seeks extension of time and leave to appeal to the Court of Appeal against the decision of Hon. Justice Kimaro, J. (as she then was) which was delivered on the 4th day of June 2004 in Commercial Case No.86 of 2003 dismissing the applicant's application for restoration of the suit allegedly for want of prosecution.

The application is supported by the affidavit of ARBOGAST WARIOBA, the applicant. The application by consent of the Counsel for the

parties was disposed of by way of written submissions, Mr. Byarushengo learned Counsel from Byarushengo & Co. Advocates appeared for the Applicant and Mbamba & Company and Crax Law Partners (Advocates) appeared for the 1st and 2nd Defendant/Respondents respectively.

The background to the application briefly is that the Applicant had preferred an appeal to the Court of Appeal against the decision of Kimaro, J. (as she then was) delivered on the 4th day of June 2004 dismissing the application for setting aside the dismissal order dated 25th February 2004. However, on the 19th day of January 2010, the appeal was struck out on the ground that the dates on the ruling and drawn order were different from the date when the ruling was pronounced. Consequently, the Applicant applied for and obtained a properly dated ruling and drawn order on the 2nd day of March 2010. Since the Applicant could not apply for leave to appeal to the Court of Appeal before filing a Notice of Appeal, on the 22nd day of April 2010, the Applicant filed an application for leave to file Notice of Appeal out of time, which leave was duly granted on the 7th day of June 2010. Hence on the 18th day of June 2010, the Applicant lodged the Notice of Appeal to this Court. On the 2nd day of July, 2010 in compliance with Rule 46(1) of the Tanzania Court of Appeal Rules, 2009, the Applicant filed the present application for extension of time and leave to appeal to the Court of Appeal. In what the Respondents' Counsel have referred to as a rare occasion where application for leave is being resisted, this Court made a schedule order for written submissions and hence this ruling.

Before I embark on examination of the Counsel submissions on the substantive application, however, let me first address the contention by the 2nd Respondent's Counsel that the Applicant's written submission was filed out of time. The 2nd Respondent's Counsel prayed that the application be

dismissed since filing submissions is tantamount to hearing hence failure to file them in time is "as if the party did not appear in court on the date fixed for hearing", citing the decision of the Court of Appeal of Tanzania in the case of **NIC OF (T) & CONSOLIDATED HOLDING CORPORATION VS SHENGENA LIMITED, Civil Application No.20 of 2007** (CAT-Dsm)(unreported); and the decision of the High Court (Land Division) in the case of **JUMA CHIBAYA & 17 OTHERS VS WILLIAMSON DIAMONDS LTD & ANOTHER, Land Case No.162 of 2004**.

In his rejoinder submisisons on the contention by the 2nd Respondent's Counsel that the application at hand should be dismissed due to late filing by the Applicant of his submissions in support and without leave to file them out of time, the Applicant's Counsel took a strong resistance arguing that as the scheduled date for filing their written submissions, which was on the 17th day of November, 2010 fell on the EID AL HAJJ holiday, the Applicant had to file them on the next working day, which was the 18th day of November. The Applicant's Counsel submitted further that the issue of failure on the part of the Applicant to honour the Court's order dated 3rd November, 2010 for filing of written submissions does not therefore arise.

I am at one with the submission of the Applicant's Counsel, and with due respect to the 2nd Respondent's Counsel, given the facts as estabished by the Applicant's Counsel, the issue of filing written submissions out of time and without leave of court does not arise. As the record clearly indicates, the scheduled date of 11th day of November 2010 for filing of written submission by the Applicant as per the Court order dated 3rd day of November 2010, fell on the EID AL HAJJ, which was a holiday. It is a rule of both procedure and practice that in such event the next working day

would be the date for taking action as ordered namely lodging the submissions in Court, which was to be the 18th day of November 2010. The submission by the 2nd Respondent's Counsel that the filing by the Applicant of his written submissions out of time and without leave of court is hereby overruled for lack of merits.

Let me now turn to consider the submissions of Counsel on the application for extension of time and for leave to appeal to the Court of Appeal. The main argument by the Applicant's Counsel is that there is no basis whatsoever upon which the trial judge dismissed the suit on 25th day of February, 2004 allegedly for want of prosecution, and proceeding to dismiss the applicant's application for restoration of the suit on the 4th day of June 2004. The gist of the Applicant's Counsel submission is that it was wrong for the trial court to dismiss the suit for want of prosecution while the defendant's counsel held brief for the plaintiff's counsel, and further it was wrong for the court not to take into consideration substantial and uncontroverted reasons for non-appearance of the Plaintiff's Counsel as submitted before it by the defendant's counsel. The Applicant's Counsel arrived at this conclusion having mounted a detailed explanation of what in his opinion amounts to "sufficient cause" in terms of Order XVII Rule 1(1) of the Civil Procedure Code [Cap.33 R.E. 2002] for a court to adjourn the hearing of a suit.

The reasons advanced by the Applicant's Counsel in his submission explaining why he thinks the trial court judge was wrong to dismiss the suit are that the Applicant's Counsel, the failure to appear was associated by failure of the late Ndyenabo who had travelled to Bukoba on the 20th day of February, 2004 to fly back in time to attend the hearing since he had got stranded at Bukoba airport due to heavy rains which made air traveling

difficult. The Applicant's Counsel submitted further that since Mr. Ndayanabo's partner Mr. Rutashoborwa could not have taken up the matter on 25th February 2004, Mr. Ndyanabo asked Mr. Mbamba to hold their brief and pray for adjournment to a future date, which the Applicant's Counsel contends that Mr. Mbamba did as indicated in the court's record. Further to this, the Applicant's Counsel submitted also that on the scheduled date of the hearing of the suit, Mr. Rutashoborwa was scheduled to appear before another Judge which fact he also communicated to Mr. Mbamba while requesting of him (Mr. Mnamba) to hold his brief and pray for adjournment, as indeed he did as the Applicant's Counsel maintains.

In his reply submissions, the 2nd Respondent's Counsel submitted that the Applicant's Counsel has totally failed to convince this Court by showing sufficient cause to warrant the grant of extension of time and leave to appeal as prayed. The 2nd Respondent's Counsel submitted further that the argument by the Applicant's Counsel that the dates in the ruling and in the drawn order were different is not a good cause because the applicant and his advocate ought to have made sure that they filed in court documents which were properly dated as required by the law.

The 2nd Respondent's Counsel submitted further that the argument by the Applicant's Counsel that the late Ndyenabo had flew to Bukoba to handle a civil matter there is an afterthought since the Applicant's affidavit does not contain anything about the said civil matter, and further that when the matter was called before Hon. Kimaro, J. (as she then was), the Court was not informed about the fact of Mr. Ndyenabo flying to Bukoba to handle any case. Further to this, there is no supporting record or proceedings to prove the allegation that Mr. Rutashoborwa was appearing before another judge.

The 2nd Respondent's Counsel submitted further that the requirement under Order XVII Rule 1(1) of the Civil Procedure Code [Cap.33 R.E. 2002] to show sufficient cause cannot automatically be used in the applicant's favour, and cannot be used as a "*shield to a negligent party who omits to appear in court for no reasons.*" The 2nd Respondent's Counsel further submitted that under the said Order, the court has discretion to adjourn or not to adjourn any matter taking into consideration the reasons for adjournment which is advanced, which in the present case, the court proceeded to dismiss the suit for lack of sufficient reasons. The 2nd Respondent's Counsel submitted further that the fact that Mr. Mbamba, advocate, held the brief of his fellow counsel is also not a good ground because the Court is not bound to adjourn hearings by briefs held by advocates for their fellows, and in any event it is a mere allegation unsurported by affidavit of Mbamba Advocate. The 2nd Respondent's Counsel submitted further that all what has been stated about the absence of the late Ndeyanabo when the matter was called for hearing are immaterial and unnecessary in this application because the said Ndeyanabo was not in court records as counsel for the Applicant and there was no prior information notifying the court that it is Ndeyanabo who would take over instead of Rutashoborwa who was on record, as the Applicant's Counsel.

The 2nd Respondent's Counsel surmised that looking at the reasoning of the court while dismissing the suit and the facts supporting this application, it is obvious that there is no arguable issue involved to be considered by the Court of appeal. The Applicant having failed to appear in court and prosecute his case, the intended appeal is of no help as the

Court will have nothing to determine but to dismiss the appeal, the 2nd Respondent's Counsel surmised.

In his reply submissions, the 1st Respondent's Counsel took over from where the 2nd Respondent's Counsel ended, by propounding some guiding general principles as regards exercise of discretion to restore or refusal to restore dismissal of a suit and the requirements for application for leave. Amplifying further, the 1st Respondent's Counsel submitted that essentially the intended appeal whose application for leave is being sought in the present application is against refusal of the trial judge to exercise discretion in favour of the applicant, that is, to restore the dismissed suit. The 1st Respondent's Counsel submitted further that in appeals to challenge the exercise of discretion of a judge, unlike appeals on other grounds, leave to appeal is not simply and easily obtained, citing the supporting authority in the case of **SANGO BAY ESTATE LTD. AND OTHERS VS DRESDNER BANK [1971] EA 17** per Spry, VP at pages 20-21 which was quoted with approval by Masati, J. (as he then was) to dimiss an application for leave to appeal in **SHENGENA LTD. VS NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED AND PSRC, Comm Case No.75/2005** (at page 5 of the typed decision), which the 1st Respondent's Counsel reproduced ad verbatim in his submissions and availed a copy of the decision to this Court.

On the issue of Mr. Mbamba, Advocate holding the brief of Mr. Ndeyanabo as contended by the Applicant's Counsel, the 1st Respondent's Counsel submitted that this did not derogate or defeat the discretion of the judge to refuse an adjournment and as such agreement of parties to adjourn a case does not bind a judge to agree. In any event, the 1st Respondent's Counsel further submitted, the trial judge did not refuse

adjournment on the grounds of Mr. Ndeyanabo being committed in Bukoba, but the questionability of absence of Mr. Rutashoborwa and their (Mr. Ndeyanabo's and Rutashoborwa's) client.

I have carefully gone through the affidavit and considered the submissions of Counsel for the parties as I have summarized above. Briefly, the applicant wishes to appeal against the decision of Hon. Kimaro, J. (as she then was) dated 4th June 2004 refusing to restore the dimissed suit for want of prosecution. The gist of the intended appeal in the event leave is granted by this Court is that the Applicant is seeking to contest the failure by the learned trial judge to exercise discretion to restore the dimissed suit. The main contention by the Applicant's Counsel is that since Mr. Mbamba, Advocate held the brief of Mr. Ndeyanabo and applied for adjournment for the reasons that Mr. Ndeyanabo was committed at Bukoba in another case and had failed to make it back to Dar in good time for the hearing of the suit due to reasons beyond his (Mr. Ndeyanabo's) control, then the trial judge ought to have agreed to adjourn the case.

The present application for extension of time and for leave to appeal to the court of appeal which has been strongly resisted by the Respondents brings to the fore a number of issues. In the fisrst place, as correctly submitted by both Cousel for the Respondents, the order for which leave is sought to appeal against to the Court of Appeal was a result of exercise of judicial discretion. As a matter of general principle, as succintly stated by Spry VP., in **SANGO BAY ESTATE LTD. AND OTHERS VS DRESDNER BANK [1971] EA 17** at pp.20-21 and quoted with approval by Masati, J. (as he then was) in **SHENGENA LTD. VS NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED AND PSRC, Comm. Case No.75/2005** at page 5 thereof, for leave to appeal to be grated where the

order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made. The issue therefore is whether in the present application the Applicant has succeeded in making such a stronger case for this Court to exercise its discretion to grant of leave to appeal. Picking a leaf from my brother judge Masati, J. (as he then was) in **SHENGENA LTD. VS NATIONAL INSURANCE CORPORATION OF TANZANIA LIMITED AND PSRC, Comm. Case No.75/2005,** the Applicant should establish by affidavit facts showing that the discretion was improperly exercised by the trial judge and that in the light of the avialable facts, the trial judge contravened any rule of law.

It is trite to point out here from the outset that the power to exercise discretion to adjourn a hearing is vested on the court vide Rule 1(1) of Order XVII of the Civil Procedure Code which stipulates as follows:

> "(1) *At any stage of the suit the court **may,** if sufficient cause is shown, grant time to the parties or to any of them, and **may** from time to time adjourn the hearing of the suit." (the emphasis is of this Court).*

Clearly and as correctly submitted by the 2nd Respondent's Counsel, the exercise of powers to adjourn the hearing of a suit under Rule 1(1) of Order XVII of the Civil Procedure Code which is quoted above, is discretionary. The said provision by the use of the term may, makes it permissive and not mandatory. The exercise of such discretionary powers is predicated upon sufficinet cause shown. The question this Court has to ask itself is whether in light of the reasons advanced by the Applicants explaining the failure to appear on the date set for the hearing of the suit point to fact that the trial judge improperly exercised her discretion.

In the present application, the facts as deponed by the Applicant at the time of dismissal and refusal to restore the dismissal have not changed. The Applicant has not been able to establish that the trial judge improperly exercised the discretion. As correctly submitted by the 1st Respondent's Coiunsel and as could be gathered from the ruling of Hon. Kimaro, J. dated 4th day of June 2004, at the time the Court dimissed the suit on 25/02/2004, it was not the absence of Mr. Ndeyanabo but that of Mr. Rutashoborwa that was questionable. In any case, the date for the trial was fixed in the presence of Mr. Rutashoborwa and not Mr. Rutashoborwa who indeed did not inform the trial judge that Mr. Ndeyanabo would appear for the trial. As observed by the trial judge, the fact that Mr. Ndeyanabo is not on record to have made any appearance in the case since its institution creates doubts whether the Applicant's Advocate is not taking advanatge of Mr. Ndeyanabo's missing connection flight as a cover up. Furthermore, the absence of the plaintiff, whose presence as the trial judge observed, could have enabled the Court to make an assessment whether there were any preparations made for the trial, is still not accounted for. I join hand with the observation by the trial judge that it is the court which has power and control of the proceeding and that consesus for an adjournment between Advocates may not necessarily be accepted by the court.

In the upshot the intended appeal has no reasonable prospects of success. In the event and for the foregoing reasons, the application for extension of time and for leave to appeal is hereby refused. It is accordingly dismissed with costs. It is so ordered.

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R.V. MAKARAMBA
JUDGE
08/02/2011

Ruling delivered this 8th day of February 2011 in the presence of M/S Aziza Msangi, Advocate for Mr. Byarushengo for the Applicant, M/S Aziza Msangi, Advocate for the 1st Respondent and in the absence of the 2nd Respondent.

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R.V. MAKARAMBA

JUDGE

08/02/2011

Words count: 3,066