IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 67 OF 2004

FEDERICCO GELLINI.....APPLICANT/PLAINTIFF

VERSUS

JACO ROELLENE DU PLESSIS SAFARI OF SOUTH AFRICA..... 1ST RESPONDENT/DEFENDANT
ROELLENE DU PLESSIS ALIAS CAROLINA DU PLESSIS.....2ND RESPONDENT/DEFENDANT
GERT JACOBUS DU PLESSIS (SENIOUR).....3RD RESPONDENT/DEFENDANT
RYAN WIENAND.....4TH RESPONDENT/DEFENDANT
ABDULKADIR LUTA MOHAMED ..... .5TH RESPONDENT/DEFENDANT
CHRISTOPHER JAMES HATTY.....6TH RESPONDENT/DEFENDANT
MASAILAND HUNTING C. LTD.....7TH RESPONDENT/DEFENDANT

Ruling

Date of final submission: 15 November, 2010

Date of Ruling: 24 February, 2011

BUKUKU, J.

This is an application for extension of time to lodge a fresh notice of intention to appeal to the Court of Appeal. The application is made under section 11(1) of the Appellate Jurisdiction Act, 1979 (Cap 141 RE: 2002)

read together with Rule 47 of Court of Appeal Rules, 2009 (GN 36 of 2010).

The application is supported by an affidavit of Federicco Gellini, the applicant. When the matter was called on for mention on 22 October, 2010, Mr. Mapunda, Counsel for the applicant prayed that the matter be argued by way of written submissions. The prayer was duly granted and a schedule for filing submissions by both Counsels was made. I am thankful to the Counsels for their compliance and enthusiasm.

The background to this ruling is that, on the 11th of September, 2007, Luanda, J. (as he then was) dismissed the applicant suit on grounds that the applicant had no locus to sue as he had extended a power of attorney in respect of his shares to the third respondent. More so, Luanda, J. went on and ruled that, the power of attorney so granted, amounted to a surrender of the applicants' ownership of his shares.

The applicant being dissatisfied with that decision, filed a notice of appeal. When the appeal was called for hearing on 16th September 2009, it was discovered that the record of appeal was defective. Mr. Mapunda, learned Counsel for the appellant readily conceded and invited the Court to strike out the appeal at that time and The respondent conceded that the appeal should be struck out and on that account, the appeal was struck out with costs by the Court of Appeal.

The applicant did not end there. Efforts were made to restart the appeal and on 27th November 2009, the applicant filed the first application for extension of time. This application was struck out on the grounds that it had no provision of the law to stand on. Again, the applicant filed yet another application on 9th January, 2010 which was also struck out for non citation of the enabling provision of the law, hence this application.

Submitting for the 4th – 7th respondents Counsel for the respondents oppose the application as adopted in the Counter Affidavit. To him, the application is in all respect bad in law and in fact. Elaborating on this, Counsel for the respondent averred that, the application is an abuse of the court process because it is designed to prolong the litigation ***ad infinitum***; that, the applicant wants to set a bad precedent that, repeated negligence is a ground for the court to extend the time within which to appeal; and that, the application is intended to cure what the applicant refused to cure when availed that opportunity by the Court of Appeal. He therefore prayed that this Court find the application incompetent and that it should be dismissed with costs.

In support of the application, Mr. Mapunda Counsel for the applicant submitted that, the submissions of the respondent in opposition of the application had no substance in that, the previous appeals/applications were only struck out and not dismissed and therefore, filing a fresh notice of appeal is the right of an affected party whenever an appeal is struck out for being incompetent.

On this point, Counsel for the applicant relied on the case of **Haruna Mpangos and 902 others V. Tanzania Portland Cement Co. Ltd. Civil Appeal No. 10 of 2007, Olam Uganda Limited (Suing through its Attorney United Youth Shipping Co. Ltd. Commercial case No. 50 of 2002 (Unreported)**.

Relying on the case of **Olam Uganda V. Tanzania Habours Authority Commercial Case No. 50 of 2002 (unreported),** Counsel for the applicant submitted that, it is the High Court which has jurisdiction to extend the time for filing a fresh notice of intention to appeal whether before or after expiry of the period of time; and finally, there is a good cause disclosed in the affidavit in support of the chamber summons which show application merits for the grant of the order for extension of time to file a fresh notice of appeal.

For purposes of convenience, let me commence with the application to extend time for leave to appeal to the Court of Appeal. First and foremost, I am satisfied that, this Court has powers to extend time under s. 11(1) of the Appellate Jurisdiction Act (Cap 141 RE: 2002), under which this application is pegged. The said section provides as follows:

> " *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 the 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."

Under the said section, the Court has a wide discretion to extend the time for giving notice of intention to appeal from a judgment of the High Court, notwithstanding that the time for giving such notice or making the application has already expired. I am aware that, this discretion however wide it may be, is a discretion to be exercised judicially having regard to the particular circumstances of each case. The issue in the present application, is whether in the circumstances, it is proper for this Court to exercise those powers.

Let me turn to the submission made by Counsel for the respondent on the propriety of the application. It is quite true from the records that, the applicant attempted twice to apply to this Court for extension of time to lodge a fresh notice of appeal without success. On both occasions, the applications were struck out by the Court for defective documentation and wrong citation of the legal provisions. The issue is that, both previous applications having been struck out for being incompetent, can this application be reinstituted?

I am aware of that position of the law. There are numerous decisions made by this Court and the Court of Appeal which directed parties to restart the process of appealing afresh upon striking out an appeal for being incompetent. It was succinctly put by the Court of Appeal in **PITA KEMPAP LTD V. MOHAMED I.A ABDULHUSSEIN (CAT-**

Civil Application No. 128 of 2004 C/F No. 69 of 2005 (Unreported) On page 5 of the Ruling of RAMADHANI, J.A (As he then was), stated:

" *When the Court strikes out a matter, that does not mean that the matter has been refused. All that the Court says is that for some reasons the matter is incompetent and so there is nothing before the Court for adjudication. So the proper cause of action is to rectify the error and go back to the same court...*"

I am also aware of several instances in which the Court of Appeal itself has granted indulgence to the parties whose appeals were struck out to rectify the errors and re institute the appeals if they so wished to do so by making the appropriate application before the High Court. (See **ALIMU KAFUNGA VS. ALLY SAMBILA (**CAT Civil Appeal No. 39 of 2004) (unreported). And there are instances where the Court of Appeal adopted the wisdom and took the opportunity to explain the laxity of the Courts in granting extension. (See **ROBERT JOHN MUGO (Administration of the Estate of the Late JOHN MUGO) and ADAM MOLLEL** Civil Appeal No. 2 of 1990) unreported) and **TANGANYIKA CHEAP STORE VS. NATIONAL INSURANCE CORPORATION (T) LIMITED (**CAT Civil Appeal No. 37 of 2001). The Court of Appeal described the MUGO case as a wake up call and warned:-

" *We are anxious that that the Court will not in future be put in a situation of having to reconsider its position regarding invitations to*

reinstitute appeals caught up by the above failure. (of not attaching a valid decree)". All in all the position is such that, where an appeal is struck out, one of the fall back positions for the applicant is to reinstitute the appeal.

Luckily, in his written submission, Counsel for respondents concedes this position that, when an appeal is struck out by the Court of Appeal, the Appellant has the right to come to the high Court to apply for extension of time. However, he submits that, since applicant has shown gross negligence in handling his applications, then it is high time for Courts not to allow this application and thus sound a warning that seriousness and diligence should be the cornerstone of justice and that parties should not be allowed to vex the Court as many times as they wish with impunity.

As a general rule, a right of appeal is a statutory right. The Civil Procedure Act, confers a right of appeal to any person who has a grievance because an order has been made which prejudicially affects his interests either pecuniary or otherwise. More so, the law under section 11 (1) of the Appellate Jurisdiction Act as it is, does not require the appellant (for extension of time) to give or assign any reason let alone sufficient reason before time can be extended. I note from the record that, the rulings which were earlier on struck out by the Court for being defective, were lodged within the prescribed time, same with this Notice of Appeal

which was lodged well within time, and reasons for the appeal being advanced.

Having carefully examined the issue at hand, I wish to observe that, much as there were technical errors in the filing of the appeals which were struck out, I consider this to be more of an issue of substantive justice compared to the legal technicalities that are being advanced by the respondent. it is my considered opinion that, such technicalities were not necessarily fatal and that explains why the Court of Appeal and the High Court on different occasions, decided to strike out the applications rather than dismiss the same, so as to avail the applicant an opportunity to reinstitute the appeal (if they so wished to do so).

I wish to underscore the fact that, the pristine maxim *vigilantibus, non dormientibus, jura subeniunt* (law assists those who are vigilant and not those who sleep over their rights) is true. But even a vigilant litigant is prone to commit mistakes. As the aphorism *"to err is human"* is more a practical notion of human behavior than an abstract philosophy, the unintentional lapse on the part of the litigant should not normally cause the doors of the judicature closed before him. I believe that the efforts of the court should not be on finding means to pull down shutters of adjudicatory jurisdiction before a party who seeks justice on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.

Having said so, the next issue for consideration is whether there is good cause contained in the affidavit which show the application merits such extension of time to file a fresh notice of appeal.

In this instant case, the learned Counsel for applicant is urging this court to allow the application on grounds that, the Court of Appeal will resolve the confusion and uncertainty arising from the judgment of this Court sought to be challenged, on the interpretation of Power of Attorney whether the granting of a power of attorney by a donor amounts to surrender of ownership of property by the donor to the donee.

Counsel for the applicant submitted that, the intended appeal raises serious points of illegality and irregularity which constitute good cause or sufficient reasons for taking the matter to the Court of Appeal so that the Court of Appeal may have an opportunity to correct the illegality complained of and put the record right. On this he cited the case of **Principal Secretary, Ministry of Defence and National Service Vs. Devram Vallambia (1992) TLR 185.**

In the above cited case, the Court of Appeal held that:

"When the point at issue is one alleging the illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established to take appropriate measures to put the matter and the record straight".

The point at issue in this application before me is one alleging illegality of the decision being challenged, that is, the validity of the High Court decision in interpreting the status of a power of attorney, so that to afford an opportunity to the Court of Appeal to decide and thus avert a possible crisis in the subordinate courts who are bound by the decision of the High Court which says a "power of attorney confers a right of ownership on the person it has been given".

In coming into a conclusion, I had in mind that, when determining an application for leave to appeal, the High Court should not look into the merits of the appeal itself but should limit its investigation into determining whether there are grounds of appeal which merit serious consideration by the Court of Appeal. Whereas, in **Sango Bay Estates Ltd. V. Dresdner Bank (1971) E.A 17 at Pg. 20** the Court of Appeal of East Africa, Spry, V.P said:

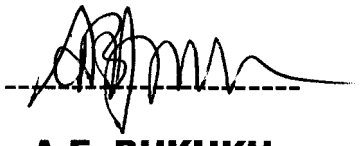
"As I understand it, leave to appeal from an Order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration."

In **Simon Kabaka Daniel V. Mwita Marwa Nyang'anyi & 11 others (1989) TLR 64** Mwalusanya, J. (as he then was) refused the application for leave to appeal on grounds that, no point of law has been made out fit for consideration by the Tanzania Court of Appeal.

Having regard to submissions made by the learned Counsels, various literatures on power of attorney, and case laws, and considering the legal points raised by Counsel for the applicant that needs consideration of the Court of Appeal and which had no opportunity of being fully heard and determined before, I am satisfied that sufficient reasons have been shown for the granting of an extension of time to file a fresh notice to appeal to the Court of Appeal. I have taken into account the submission by Counsel for respondent (on the issue of gross negligence on the part of the Applicant) but I have also noted that there are serious questions of law which are fit for consideration by the Court of Appeal.

In the result, I grant the application for extension of time to lodge a fresh notice of appeal as prayed. Application to be filed within 14 days from the date of this Ruling. Costs will be in the cause.

It is ordered accordingly.



A.E. BUKUKU

JUDGE

24 FEBRUARY, 2011

Ruling delivered in Chambers this 24th February, 2011 in the presence of Mr. Lukiko, Learned Counsel for the Applicant and Mr. Mponda, Learned Counsel for 4th-7th Respondents.

A.E BUKUKU

JUDGE

24/02/2011

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