IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.55 OF 2005

USANGU GENERAL TRADERS ..... PLAINTIFF

VERSUS

KAGERA TEA COMPANY ..... DEFENDANT

RULING

BUKUKU, J.

This is an application for an extension of time to file a fresh application for restitution of excess money paid to the respondent while satisfying the decree granted in commercial case No.55 /2005 which was initially struck off by Mruma J. on 22/06/2009. The application has been preferred under Section 14(1) of the law of limitation Act, No.89 R.E.2002.

The application is supported by the affidavit of Mr. Peter Aloyce Mgimba, the principal officer of the applicant company. Before I proceed further, I think I have to state from the outset that, this case has a chequered history. It goes like this. The applicant herein, Kagera Tea Company were judgment debtors in Commercial Case No. 55 of 2005 and

the respondent Usangu General Traders was the decree holder. In that case, the applicants were decreed to pay the respondent T.shs 119,824.263.00/=, interest at bank rate and 7% interest at Court's rate. As it transpired, the applicant paid the respondent a total of T.shs.135, 131,791/= in satisfying the decree which amount comprised of the principle sum and interest thereon. After satisfying the decree, it is claimed that, the applicant realized that they overpaid the respondent by T.shs. 12,533,333.20/=, and that is when the recovery procedure ensued.

On 10th August, 2007 the applicant filed a chamber summons made under rule 68 (e) and 95 of the Civil Procedure Code, praying this Court to order the respondent to refund the applicant the amount overpaid and interest at bank rate. The application was heard by Mjasiri, J (as she then was) and on 4th December, 2007 it was dismissed with costs on the ground that this Court had become functus officio after making its decision. As if that was not enough, the applicant decided to lodge an appeal to the Court of Appeal, where upon, he filed an application seeking leave of this Court for extension of time within which to file an application for leave to file an appeal to the Court of Appeal. This application was resisted by the respondent on the ground that, the jurat of attestation was incurably defective. My learned brother Mruma, J. heard the preliminary objection and on 22nd June, 2009, he sustained the preliminary objection raised and struck out the application.

Instead of filing a fresh application, the applicant decided to appeal to the Court of Appeal. In that application, the applicant made two prayers namely, an application for extension of time to file an application for leave to appeal to the Court of Appeal and also an application for leave to appeal against an order of the High Court made on 4th December, 2007. The application was again met with a preliminary objection which, having been argued, the Court of Appeal allowed it and struck out the application. That was on 7th day of January 2012. It is this Ruling of the Court of Appeal that has given rise to the application before me.

I thought it was apposite to narrate the twists and turns of this case since way back in 2005, approximately 8 years now.

Now back to the application.

In her chamber summons, Counsel for the applicant prays that:

1. This Court may be pleased to grant the applicant an extension of time to file a fresh application for restitution of excess money paid to the respondent while satisfying the decree granted in Commercial Case No.55 / 2005 which was initially struck off by Mruma J, on 22/06/2009.

2. Costs of the application

3. Any other relief deemed fit by the Court.

Submitting in support of the application, learned Counsel for the applicant first narrated the whole saga as to what happened before this application and she further went:

"The applicant is resident in Bukoba and works in Bukoba. It could not proceed the case without consent of Directors to file a fresh application"

She then admits:

"the Ruling of the Court of Appeal was delivered on 12th January 2012. There was some delay to instruct me, We refilled the application on 26th June, 2012. Based on Court of Appeal Rules, section 45A, requires an application to be filed within 14 days of the decision. Since the 14 days expired, we pray for leave to file the appeal."

She then goes on to aver that this is a Court of Justice and has a duty to ensure that justice is done to all parties and thus prays that her application be granted.

The application received a serious opposition from Mr. Masaka, learned Counsel for the respondent. First of all, he says that the application has no merit. Secondly he says that, this Court cannot overturn its own decision and therefore it is functus officio, and then he adds that, the application before Honorable Mruma having been struck out, the applicant ought to have filed the application immediately. However, they did not do

so and to that end, it is Mr. Masaka's submission that, the applicant was negligent in pursuing the application.

Mr. Masaka attacked further by submitting that, the applicant filed this application on 26th June, 2012 while the ruling of the Court of Appeal was made on 12th January, 2012, which is almost six months after the determination of the Court of Appeal, and there is no explanation from the applicant accounting the delay. He submitted that, even if the application was made under Section 14(1) of the law of Limitation Act, there must be an explanation of the delay, making reference to the case of **Ally Imran Investment (T) Ltd. V. Print Pak (T) Limited and another, miscellaneous Civil cause No. 126 of 1997**. Mr. Masaka submitted further that, the applicant's affidavit does not contain reasons for the delay. In support of his submission, Mr. Masaka made reference to the case of **Daudi Haga V. Jenita Abdon Machafu, Civil Reference No. 1 of 2001 (CAT) (unreported)**.

Finally, it is Mr. Masaka's submission that, there was laxity on the part of the applicant and more so, Counsel for the applicant has not disclosed when she was instructed, and the mere fact that she was given leave to reply and failed to do so, implies that, she had nothing to say. In the circumstances, Mr. Masaka prays that the application be dismissed with costs.

In her brief rejoinder, Ms. Rwechungura conceded that, it is true that Section 14(1) of the law of limitation requires one to give sufficient

reasons. She averred that, the applicant resides in Bukoba and as an advocate, she could not proceed without instructions. Citing the case of **Mbarama Gold Corporation V. Minister for Energy and Attorney General [1998] TLR 425**, Ms. Rwechungura submitted that, she does not think that the appeal will prejudice the respondent and therefore, she prays that, this Court grants the application, and that legal technicalities should not be used to deny a party justice, as stated in the case of **Nimrod Mkono V. State Travel Services [1992] TLR 24**.

That is all for the submissions. Now let us go to the analysis.

It is not disputed that, by the time the appellant brought her application to this Court it is more than five months after the Court of Appeal struck out the application. Since under Rule 45A of the Court of Appeal rules her application should have been made within fourteen days after the Court of appeal ruling, and since that period, as Ms. Rwechungura conceded had already passed, it was obvious she needed extension of time. But in order for extension to be granted, reasons accounting for the delay have to be advanced. Section 14(1) of the Law of Limitation is very clear on this. It states:

> *"14(1) – Notwithstanding the provisions of this Act, the Court may <u>for any reasonable or sufficient cause</u> extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or*

after the expiry of the period of limitation prescribed for such appeal or application." (emphasis mine).

Undoubtedly, this application is out of time unless the Court exercises its judicial discretion to extend the period of limitation under the above quoted section. This can only be done if the applicant shows sufficient or reasonable cause to that effect. There has been a delay of more than five (5) months and unfortunately, the supporting affidavit as it appears, does not give any explanation at all for this inordinate delay. To me, this is indeed surprising. Time and again, it has been held that, in order for the applicant to have the benefit of Section 14(1), the applicant ought to explain the delay of every day that passes beyond the prescribed period of limitation. The basic question in this application is therefore, whether such reason has been shown.

In its affidavit supporting the application sworn by Mr. Peter Aloyce Mgimba, there is no paragraph which explains for the delay. Much as Counsel for the applicant has tried to impress this Court that the applicant is resident and works in Bukoba and that it could not proceed the case without the consent of its directors, I find such arguments to be flimsy and have no merit. If at all the applicant was that serious claiming for the monies, how much time do the directors require in order to pass a resolution? To me, the issue of applicant residing in Bukoba is a non starter. With this world of globalization, communication is everywhere. One need not travel all the way to Bukoba to get instructions to handle a case.

Unfortunately, Ms. Rwechungura has failed to say whether it was necessary to use more than five months for the directors to pass a resolution in order to file a fresh application.

I have carefully considered the compelling arguments and in the end, I have reached the conclusion that, no basis or sufficient reasons have been shown in this application why extension of time sought should be granted. As rightly submitted by Mr. Masaka, in the affidavit in support of the application sworn by Mr. Mgimba, no explanation whatsoever is given why it took the applicant so long to instruct Ms. Rwechungura to lodge the application for extension of time.

Counsel for the applicant has requested this Court not to indulge itself into legal technicalities so as to deny a party justice, making reference to the case of **Nimrod Mkono V. State Travel Services (supra)**. While I am alive to the need of Courts in this Country satisfying consumers of justice that they (the Courts) always remember that, procedural rules are meant to facilitate and not defeat justice, I do not entertain any doubt that, what Sir Jocelyn Simon P, said in the following passage in his judgment in **Edwards V. Edwards (1968) I WLR 149 at 151**, is applicable to the administration of justice in this country:

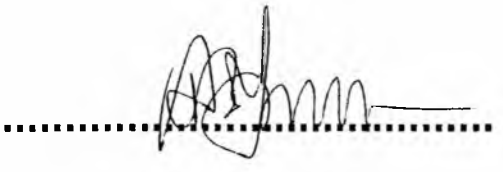
> *"So far as procedural delays are concerned, parliament has left a discretion in the Courts to dispense with the time requirements in certain respects. That does not mean, however, that the rules are to be regarded as, so to speak, antique time pieces of an ornamental*

value but no chronometric significance, so that lip service only need be paid to them. On the contrary, in my view, the stipulations which parliament has laid down or sanctioned as to time are to be observed unless justice clearly indicates that they should be relaxed."

I agree with Mr. Masaka that, there is in this application, no warrant for relaxation in the applicant's favour. Those who come to the Courts of law must not show unnecessary delay in doing so; they must show great diligence (see: **Dr. Ally Shabhay V.Tanga Bohora [1997] TLR 305)**. I am quite clear in my mind that, the state of affairs in this case has been occasioned by the applicant's failure to act diligently. This lack of diligence is devoid of merit as a plea for the extension of time.

From the above foregoing, the application stands dismissed with costs.

It is ordered accordingly.

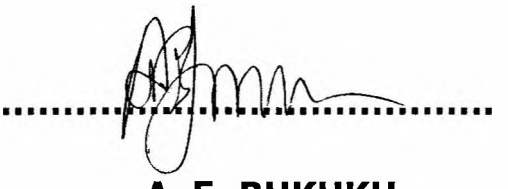


A. E. BUKUKU

JUDGE

18TH FEBRUARY, 2013

Ruling delivered this 18th day of February, 2012 in the presence of Mr. Mashaka holding brief of Mr. Masaka, Learned Advocate for the Appellant and in the absence of the Respondent.



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JUDGE

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