IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 46 OF 2015

(Arising From Miscellaneous Commercial Cause No. 14 of 2009)

MUNICIPAL DIRECTOR,
KINONDONI MUNICIPA COUNCIL ..... APPLICANT

VERSUS

N. W. BUILDERS LIMITED ..... RESPONDENT

26th August & 29th September, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application filed by the applicant; Municipal Director, Kinondoni Municipal Council against N. W. Builders; the respondent. The application seeks the indulgence of this court to enlarge time to file notice of appeal in the Court of Appeal. The application has been made under the provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 and any other enabling provision of the law. It is supported by an affidavit sworn by one Burton Yesaya Mahenge; legal officer of the applicant. The application was argued before me on 26.08.2015 during which Mr. Rwebangira and Mr. Mahenge, learned advocates appeared

for the applicant and Mr. Lugaila, learned advocate appeared for the respondent.

The facts giving rise to the application are simple and short. They, as far as relevant to the present application, go thus: on 24.10.2011 this court delivered a ruling which irritated the applicant. She lodged a Notice of Appeal, and appealed, to the Court of Appeal. On 25.02.2015, the appeal was struck out by the Court of Appeal on account that it was incompetent for, *inter alia*, being accompanied with a Certificate of Delay which was defective. The applicant thus knocked at the doors of this court seeking for the prayers made in the Chamber Summons whose gist in elucidated above.

In support of the application, the two learned counsel, speaking through Mr. Eustace Rwebangira, learned counsel submitted that the applicant has been persistently pursuing the matter in this court and the Court of Appeal and that the reason why the exhibits were wrongly endorsed was this court's mistake. In the circumstances, relying on ***Ramani Consultants Ltd Vs the Board of Trustees of the National Social Security Fund & anor***, Civil Application No. 7 of 2014 (unreported), this court should grant this application for extension of time. On the point of granting this application for persistently pursuing the matter, the learned counsel relied on ***Royal Insurance Tanzania Ltd Vs Kiwengwa Strand Hotel Ltd***, Civil Application No. 111 of 2009 (unreported).

Mr. Rwebangira also stated that it is the law in this jurisdiction that an application for extension of time to file notice of appeal will be granted where there is an illegality in the decision intended to be appealed against. He

clarified that in the present suit, the court granted the respondent an amount which was not awarded by the arbitrator. He stressed that the Court of Appeal has been granting extension where the issue of legality is at stake. He cited and supplied to court the cases of ***VIP Engineering and Marketing & ors Vs Citibank Tanzania Ltd***, Consolidated Civil References No. 6, 7 and 8 of 2006, ***Losindiio Zuberi Vs Ally Hamis***, Civil Application No. 5 of 1999 and ***Murtaza Mohamed Raza Virani Vs Mehboob Hassanali Versi***, Civil Application No. 168 of 2014; all unreported.

The learned counsel added that this court has been extending time even where there was an inordinate delay, inadvertence, blunder, negligence, and laxity on the part of the applicant. On this proposition, the learned counsel cited ***Mehboob Hassanali Versi Vs Murtaza Mohamed Raza Virani***, Commercial Case No. 281 of 2002 (unreported). He thus asked this court to grant the application and costs should be in the cause.

In response, Mr. Lugaila for the respondent attacked the application with the force it deserved. He submitted that the application is without merit in that the time spent in allegedly pursuing the matter in this court ant the Court of Appeal exhibited but negligence having delayed for about thirty-nine calendar months from 24.10.2011; the date on which the decision intended to be appealed against was delivered to 06.03.2015; the date on which the present application was filed. He stressed that the persistence alluded to in paras 9, 10, 11, 12, 16 and 24 of the supporting affidavit exhibits gross negligence on the part of the applicant and counsel and that they failed to act diligently. In the premises, the learned counsel submitted that that cannot be sufficient

reason to grant an extension. He cited ***Dr. Ally Shabbay Vs Tanga Bohora Jamaat*** [1997] TLR 305; the decision of the Court of Appeal.

The learned counsel also cited ***Umoja Garage Vs the National Bank of Commerce*** [1997] TLR 106 in which, citing the case of ***Edwards Vs Edwards*** [1968] 1 WLR 149 at 306, the Court of Appeal refused to grant extension to file notice of appeal because the applicant had used an incorrect certificate of delay in order to serve a purported appeal which was long time barred.

On the question of illegality, the learned counsel submitted that it was not possible for this court to venture into the illegality or otherwise of the decision of this court as it is not legally empowered to do so. What this court is supposed to do, he submitted, is to see to it that there are sufficient reasons that have been advanced by the applicant to account for the delay, which the applicant has miserably failed to account.

Mr. Lugaila, learned counsel insisted that the applicant is going to equity without clean hands; the Court of Appeal, in its ruling which struck out the appeal, ordered the applicant to pay the amount which was not in dispute but the applicant has not complied with that order. The course opted by the applicant, as was stated in the ***University of Dar es Salaam Vs Mwenge and Lub Oil Ltd***, Civil Application No. 76 of 1999 (unreported), is meant to protect the contempt, he submitted. He thus prayed that the application be dismissed with costs.

In rejoinder, Mr. Rwebangira, learned counsel submitted that the ***University of Dar es Salaam*** case was distinguishable because in that case the applicant was applying for stay of execution, not for extension of time to file notice of appeal as is the case in the present instance. The ***Shabbay*** case, the learned counsel submitted was equally distinguishable in that the issue of legality, unlike in the present case, was not at stake in that case. Relying on ***Khadija Rehire Said & 5 ors Vs Mohamed Abdallah Said*** Civil Application No. 39 of 2014 (unreported) and the ***Murtaza Virani*** case (supra), the court is bound to extend time where there is an illegality in the decision intended to be challenged irrespective of whether there was negligence, inordinate delay, laxity or inaction on the part of the applicant. Equally, the ***Umoja Garage*** case is distinguishable because in that case it was an incorrect certificate which was attached to the appeal which is not the case in the present case and the applicant was not seeking for extension of time to file notice of appeal.

As for the maxim of equity which says he who goes to equity must do so with clean hands, the learned counsel stated that the applicant has clean hands as they intend to make good of the amount not in dispute as ordered by the Court of Appeal but that they did not immediately comply with the order because local government monies are reimbursed quarterly. They intend to make good of the same in the quarter beginning from September, 2015. The learned counsel added that the extension of time to file notice of appeal, unlike stay of execution and injunction, is not an equitable right. On this premise, the maxim cannot be applicable to the present case.

The learned counsel insisted that the applicant and counsel ere acting diligently because they realized the first defect and wrote the District Registrar of the Court to have the error rectified so that the Certificate of Delay showed 24.10.2011; but the Registrar made yet another error by indicating 24.10.2013 which error escaped their attention. On the premise, he submitted, the court is to blame for being contributory to the predicament we are in.

As for the 39 calendar months delay, the learned counsel submitted that time should be reckoned from 25.02.2015 when the appeal was struck out; not from 24.10.2011 when this court pronounced the decision complained of.

The learned counsel summarized that in view of the fact that the applicant there is an illegality in the decision intended to be challenged, and in view of the fact that the applicant has been acting diligently all along while pursuing the matter in this court and court of appeal, in further view of the fact that the applicant was illegally incapable of challenging the decision complained of while pursing this matter and in further view of the fact that is largely not to blame on the error but the court, this application should be allowed and costs should be in the cause.

I have considered the rival arguments by the learned counsel for the parties as appearing in the affidavit, counter-affidavit and skeleton written arguments as well as the arguments before me during the hearing of the application. both arguments are healthy and convincing. The ball is now in my court to decide.

The reasons why this extension is sought have been amply stated by the applicant in the affidavit and the submissions before me at the oral hearing of the application. In the main, as already stated at the beginning of this ruling, having been dissatisfied with the decision of this court made on 24.10.2011 the applicant promptly went to the Court of Appeal to challenge it. On 25.02.2015, the appeal was struck out by the Court of Appeal for the reason that it was incompetent for, *inter alia*, being accompanied with a defective Certificate of Delay. Undeterred, the applicant wants to go again to the Court of Appeal to challenge the decision of this court whose appeal was struck out, hence the present application. The reasons given by the applicant for the Certificate of Delay being defective is ascribed to an error of this court. That the applicant is not to blame for the Certificate of Delay showing incorrect dates.

I think the reasons stated by the applicant are sufficient enough to grant the orders sought for. The applicant is not to blame for the Certificate of Delay showing incorrect dates. The applicant said, and was not controverted by the respondent, that they first realised that the Certificate was Defective by bearing wrong date on which the ruling complained of was delivered. They wrote the Registrar of this Court to have the ailment rectified so that the dare of the ruling was shown 24.10.2011. The anomaly complained of was purportedly rectified but, once again, the Registrar issued yet another defective Certificate of Delay the error which did not indicate the date of ruling intended to be impugned as 24.10.2011 but 24.10.2013 which error went unnoticed by the applicant and consequently the appeal was struck out by the Court of Appeal because of it.

I have not seen any negligence or inaction on the part of the applicant or its advocate as claimed by the respondent. If anything, the applicant has all along been diligent and prompt in prosecuting its case. The delay is not for 39 calendar months as Mr. Lugaila, learned counsel for the respondent urges this court to believe. As rightly pointed out by applicant's counsel, time should be reckoned from 25.02.2015 when the appeal was struck out.

I agree with Mr. Lugaila, learned counsel for the respondent that this court is not endowed with jurisdiction to enquire into whether there is an issue of illegality in the decision of this court worth being corrected by the Court of Appeal. As correctly submitted by the learned counsel what this court is supposed to do is to see to it that there are sufficient reasons that have been advanced by the applicant to account for the delay – see: ***Aluminium Africa Limited Vs Adil Abdallah Dhiyebi***,Civil Appeal No. 6 of 1990 (unreported), cited in the ***Ramani Consultants*** case (supra).

I have already found and held that the applicant has advanced sufficient reasons to grant this application.

But before I pen off, let me say something about the use of the phrase "any other enabling provision of the law" which the applicant has used to, *inter alia*, support its application. I have, time and again, in other previous ruling In which I have had opportunity to comment on, expressed my opinion that phrase "any other enabling provisions of law" does not have any value addition to the application. the phrase cannot provide enough legs on which an application can stand in court. This court (Mihayo, J.) has observed in occasions more than once that the phrase "any other enabling provisions of

law" is now meaningless, outdated, irrelevant and an unnecessary embellishment. In ***Janeth Mmari Vs International School of Tanganyika and Another***, Miscellaneous Civil Cause No. 50 of 2005 (unreported), His Lordship had an opportunity to make an observation on the phrase. His Lordship observed:

> "This song, **'any other enabling provisions of the law'** is meaningless, outdated and irrelevant. The court cannot be moved by unknown provisions of the law conferring that jurisdiction. That law must therefore be known. Blanket embellishments have no relevance to the law nor do they add any value to the prayers to the court."
> (Emphasis not mine).

His Lordship observed on the phrase in yet another case: ***Elizabeth Steven & Another Vs Attorney General***, Miscellaneous Civil Cause No. 82 of 2005 (also unreported) as follows:

> "The phrase any other provision of law is now useless embellishment, the law is now settled."

The applicant having cited the provisions of the law which supported his application, the phrase "any other enabling provisions of law" was unnecessary. The court cannot be moved by unknown provisions of the law.

In the upshot and for the reasons stated earlier, I find merit in the application and would allow it. This application is allowed as prayed. That is, the applicant is allowed to file a Notice of Appeal out of time and take necessary steps in filing the appeal out of time as prayed in the Chamber Summons. The Notice of Appeal should be filed within thirty days from the date of this ruling. Costs will be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 29th day of September, 2015.

J. C. M. MWAMBEGELE

JUDGE