

IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAM  
COMMERCIAL DIVISION

MISC COMMERCIAL CAUSE NO 300 OF 2015  
**(Arising from Commercial Case No 38 of 2007)**

**BETWEEN**

ZAIDI BARAKA -----1<sup>ST</sup> APPLICANT  
COMFORT ENTERPRISES LIMITED -----2<sup>ND</sup> APPLICANT  
FREDRIC ALLY RASHIDI-----3<sup>RD</sup> APPLICANT

**VERSUS**

EXIM BANK (T) LIMITED -----RESPONDENT

RULING

Date; 16/3/2016 & 21/9/2016

SONGORO, J

On the 20<sup>th</sup> November, 2015, Zaidi Baraka, Comfort Enterprises Limited and Fredrick Ally Rashid, Applicant filed the instant application applying for an extension of time within which they may give a notice of intention to Appeal against the Judgment and Decree to Challenge the decision of Hon Nyangarika J dated 31<sup>st</sup> May 2012 in Commercial Case No 38 of 2007.

The Applicants Application was made under Section 11 (1) of the Appellate Jurisdiction Act, Chapter 141 [R.E.2002] and is supported by an affidavit of their Advocate, Mr. Audax Kahendaguza Vedasto.

The Respondent is Exim Bank Tanzania Limited who also opposed the Application by filing a counter affidavit Sworn by Edmund Aaron Mwasaga, the Principal Officer of the Respondent Bank,

Thus on the 16/3/2016 , when the Application was called for hearing, Mr. Audax, Learned Advocate appeared for the Applicant and pursue the Application; where as **Mr. Gabriel Mnyele**, Learned Advocate appeared for the Respondent`s Bank.

In pursuing the application, the Learned Advocate of the Applicant, informed the Court that, previously, the Applicants filed a Misc Commercial Cause No 28 of 2015 applying for an extension within which to give a Notice of Appeal out of time, but was struck out and that, is why they have filed the instant application.

He then indicated that, since their previous application was determined by not merit, the Court under Section 11 (1) of the Appellate Jurisdiction Act, Chapter 141 [R.E.2002] still have jurisdiction to hear and determine the Application. To support his assertion that, the court has jurisdiction to hear the second Application, the Applicant Counsel referred the Court to the decision in the Case of Ludovick versus NBC, [1997] TLR p 26 in which the court said unless the Application is decided on merit that, is where the jurisdiction of the High Court ceases.

So on the basis of the decision in the case of Ludovick Versus NBC referred above, the Applicant`s Counsel pointed out that, the court has Jurisdiction to hear the second application.

Turning to the reasons in support of the Application, the Counsel relying on the decision in the case of Mwabulama **Gold Corporation versus Minister of Energy and Minerals [1998] TLR at P 425** briefly informed the court that, ordinarily an application for extension of time within which to give a notice of appeal may be granted, so, longer as it will not prejudice the opposite party.

Then the Counsel informed the court that, the Applicants delay to issue a notice of appeal within requisite period because they were pre-occupied by other court proceedings in the Court of Appeal including Civil Appeal No 58 of 2012 which was struck out on the 28/1/2015, and their Miscellaneous Application No 28 of 2015 which was struck out on the 18/11/2015 for being omnibus application. Further, Applicant's counsel narrated to the court that, the present application was filed just two days after their Miscellaneous Application No 28 of 2015 was struck out.

So, it was the Applicant's Counsel Views that, Applicants acted promptly and diligently in filing the present application and that, constituted sufficient reasons for granting the application. More, the

Applicant`s Counsel submitted that, the Applicant has a point which need to addressed to the Court of Appeal. In view of the above, he prayed that, the court grants the applicant an extension of time to issue a notice of appeal.

In response to the Application, M. Mnyele, Learned Advocate of the Respondent bank opposed the application and pointed out that, he is adopting respondent`s argument contained in the affidavit of Edmund Aaron Mwasaga, the Respondent's officials.

Then, the Respondents indicated that, the applicants were negligent in issuing a notice of appeal and their notice of appeal was struck out for none disclosure of the parties.

The Counsel the pointed out Applicants were also negligent in pursuing the application for extension of time to issue notice of appeal, by filing an omnibus application, and that, is the reasons, their application for an extension of time to issue a notice of appeal was struck out.

Mr, Mnyele then relying on the decision on decisions in cases of Inspector Sadick versus Gerald Nkya [1997] T.L.R p 220, William Shija Versus Fortunatas Masha [1987] T.L.R at page 213, Umoja Garage Versus National Bank of Commerce [1997] TLR No 109

submitted that, negligence of the Counsel is not good cause for an extension of time.

Finally, Respondent Counsel rested his submission by pointing out that, since, there is a proof that, Applicants Applications were dismissed due to negligence, he argued that, applicants have not advanced sufficient cause to warrant an extension of time. So he prayed, that, the application be dismissed.

The Court has carefully considered the Applicant application in line with Section 11 (1) of the Appellate Jurisdiction Act, Chapter 141 [R.E.2002] and find that, the Court may extend an extension of time within which to issue a notice of Appeal. In deed Section 11(1) states 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 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.*

Thus going by the wording of Section 11 (1) of the Appellate Jurisdiction Act, it is crystal clear that, the section confers discretion to the court to grant an extension of time. However such discretion must be judiciously exercised.

Now turning to the court record, the Court find the decision which Applicants want to appeal against was delivered way back 31/5/2012.

Further, the Court find on the 4/6/ 2012 Applicants filed their Notice to the Court of Appeal as per Rule 83(2) of the Court of Appeal Rule, 2009 which was within 30 days from the date of the decision. Also, the Applicant filed a Memorandum of Appeal on the 21/6/2012. Furthermore, their Appeal was strike out by the Court of Appeal on the 23<sup>rd</sup> December, 2014.

It is certain when their appeal was struck on 23/12/2014 by the Court of Appeal, the requisite time of filing another proper notice of Appeal which is 30 days as per Rule 83(2) of the Court of Appeal Rules, 2009 had expired while pursuing other proceedings in the Court of Appeal.

The fact that, the requisite time of filing proper notice of appeal while pursuing another proceedings that, is understandable. But since the Applicants Appeal was struck out on the 23/12/2014.

Then Applicants on the 18/2/2015 lodged another Miscellaneous No 28 of 2015 for Application for an extension time to issue a notice of Appeal which was also struck out on the 18/11/2015 because it was irregularly filed.

Further, on the 20/11/2015, Applicant filed the instant application just two days after their previous application was filed.

The Court is mindful that, under Section 11(1) of Cap 141 cited above, the granting of an extension of time to file a notice of appeal to the Court of Appeal, to a larger extent depends on discretionary of

the court after taking into account the circumstances surrounding the case as explained in the application.

Also, the court is mindful that, court discretion has to be exercised judicially by considering all the circumstances of the case, and if the applicant had acted prudently and without delay in lodging the application.

The above legal position was even emphasized in case of Lyamuya Construction Company Ltd Versus Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No, 2 of 2010 Arusha Registry Unreported where Masati J A stated that;

*As matter of general principle, it is the discretion of the Court to grant extension of time. But that, discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily.*

In the same case the Court of Appeal that, (a) the applicant must account for a period of delay, (b) delay should not be inordinate (c) the applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action he intends to take (d) if the court feels that, there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.

Thus applying the above –mentioned legal guideline, I noted that, applicants have consistently explained to the court that, immediately after decision of Commercial Case No 38 of 2007 on 31/5/2012 the filed a Civil Appeal No 58 of 2012, and were pre-occupied by an appeal until 23/12/2014 when their appeal was struck out.

In view of the fact that, from 31/5/2012 to 23/12/2014 when their appeal was struck out, it is obvious that, the requisite time of 30 days period of issuing a proper notice of appeal had expired, while pursuing their appeal. This explain they were active pursuing other court proceedings. The circumstances of this case shows the Applicant were pre-occupied with court proceedings.

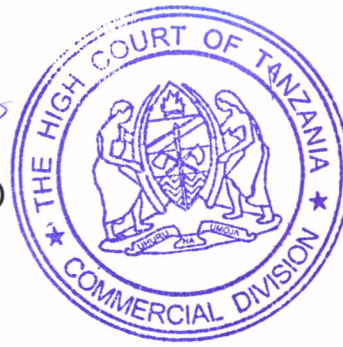
The fact that, the requisite time of issuing a notice of appeal expired while pursuing their appeal, that, alone in my view is reasonable and sufficient cause for extending their time of giving notice of Appeal.

For reasons, explained above, I hereby in terms of Section 11 (1) of the Appellate Jurisdiction Act, Chapter 141 [R.E.2002] exercise the Court discretion and extend the Applicant time of issuing a notice of Appeal to the Court of Appeal. Notice to be filed within 14 days from the date of this Ruling. Each part to bear his own costs.

Dated at Dar es Salaam this 21<sup>st</sup> September, 2016



  
H.T.SONGORO  
JUDGE



Delivered at Dar es Salaam this 21<sup>st</sup> day of September, 2016

  
H.T.SONGORO  
JUDGE



The Ruling was delivered in the presence of Mr. George Vedasto, Learned Advocate also holding a brief of Mr. Musengezi, Learned Advocate for the Respondent.