

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

CONSOLIDATED MISC. APPLICATIONS NO. 198 OF 2016

AND 214 OF 2016

(Original Commercial Case No. 111 of 2012)

DR. REGINALD ABRAHAM MENGI 1ST APPLICANT

KM PROSPECTING LIMITED 2ND APPLICANT

VERSUS

MUGANYIZI J. LUTAGWABA 1ST RESPONDENT

ERICK MASHAURI 2ND RESPONDENT

CHARLES XAVIER MNGUTO 3RD RESPONDENT

RULING

Date of the Last Order: 06/12/2017

Date of the Ruling 07/02/2018

SEHEL, J.

This is a ruling on two consolidated applications. The first application is Miscellaneous Application No. 198 of 2016 whereby the applicant is Dr. Reginald Abraham Mengi and respondents are K.M Prospecting Limited; Muganyizi J. Lutagwaba; Erick Mashauri; and Charles Xavier Minguto (as 1st; 2nd; 3rd; and 4th respondents respectively). In this application, the applicant is seeking for an extension of time to lodge notice of appeal to

the Court of Appeal of Tanzania against the decision of this Court delivered on 28th day of January, 2016 by the Registrar of the Commercial Division. The application was filed on 2nd day of September, 2016.

The other application is Miscellaneous Commercial Application No. 214 of 2016 filed on 19th day of September, 2016 by KM prospecting Limited through the services of Mbamba Co. Advocates against Dr. Reginald Abraham Mengi; Muganyizi J. Lutagwaba; Erick Mashauri and Charles Xavier Mnguto (1st; 2nd; 3rd; and 4th respondents respectively). In this application the applicant is also seeking for an extension of time to file notice of appeal against the same decision of this Court delivered on 28th January, 2016 on grounds, amongst others, of illegality.

On 6th day of October, 2016 when Misc. Commercial Application No. 214 of 2016 was called for necessary orders, Counsel Mbamba notified the Court that the applicant had written a letter to the Registrar requesting for consolidation of its application with Application No. 198 of 2016 and 206/2016 that involve same parties and arising from the same decision. With such information, it was ordered that the file be remitted to the Registrar so that the request made by Advocate Mbamba can be

considered. It was further ordered that prayers for filing Counter Affidavit shall be dealt with in the consolidated cases.

From this order, there was no any other order made in the file. The records is Misc. Commercial Application No. 198 of 2016 show that the file was last called before Hon. Mruma, J on 20th day of September, 2016 and thereafter it was reassigned to Hon. Mwambegele, J (as he then was) but no order for consolidation was made. Thus, on 5th may, 2017 when the file was before me, counsel Mbamba reminded the Court on the request for consolidation. I noted that there was no order for consolidation thus I had to place the file before the Hon. Judge in-charge for necessary orders. However, the files were returned to me with administrative directions that I can make the order for consolidation.

In that respect, on 21st day of August, 2017 I consolidated the two applications which were before me. Parties in the two consolidated applications are Dr. Reginald Abraham Mengi and K. M prospecting Limited as 1st and 2nd applicants respectively while Muganyizi J. Lutagwaba; Erick Mashauri; and Charles Xavier Mnguto are 1st; 2nd; and 3rd respondents respectively.

The consolidated applications were heard orally on 6th day of December, 2017 where counsel Mbamba appeared for the 2nd applicant and also held brief for advocate Ringia for 1st applicant. Advocate Alfred who held brief for counsel Mafuru appeared to represent all the respondents.

Counsel Mbamba notified the court that the 1st applicant filed his skeleton arguments as such the counsel fully adopt the skeleton arguments and had nothing more to add. For the 2nd applicant he contended that the 1st applicant does not oppose the application in Misc. Application No. 214 of 2016 that is why the 1st applicant did not file any counter affidavit. He further prayed for the application to be granted because none of the respondents filed their counter affidavit to oppose the application. He submitted that Rule 52 of the High court (Commercial Division) Procedure Rules GN 250 of 2012 provides that in an application commenced by chamber summons, evidence must be given by way of affidavit. He argued in Misc. Application No. 214 of 2016 there is an affidavit which is evidence supporting the application. However, there is no counter affidavit in opposition. He thus prayed for the application to be granted. To support

his argument he referred to court the case of **Mandavin Company Limited Vs General Tyre (E.A) Limited**, Civil Application No. 47 of 1998 (Unreported) where it was stated: "We agree with Mr. Ngalo that affidavital deposition is evidence on oath which cannot be contradicted by statements from the bar. Such evidence like any other type of evidence given under oath can only be controverted by evidence on oath. In the instant case, apart from the statements from the bar by Mr. Lugua, learned advocate, denying service, there was no evidence to contradict the respondent's evidence." He also made reference to the case of **Sheikh Issa Seif Gulu and Another Vs Rajabu Mangara Mtoro and 10 Others**, Civil Application No. 120 of 2010 (Unreported) where it was noted by the Court of Appeal of Tanzania that the details on bereavement of Mr. Mwakajinga contained in the affidavit were not countered in the affidavit in reply.

In reply, counsel Alfred had nothing more to reply apart from adopting skeleton arguments and prayed for the applications to be dismissed with costs. There was no rejoinder.

As I said earlier, both applicants are seeking for an extension of time within which to lodge notice of appeal out of time to the Court of Appeal of Tanzania. Before I dwell on the merits and demerits of the application let me say something about the argument of counsel Mbamba that since there is no counter affidavit then it is taken that the application is not opposed so it should be granted. With due respect with his submission, the though the respondents did not file any counter affidavit to controvert the averments made in the affidavit in support of the application but still the applicant is required to satisfy the court as to why he failed to lodge the notice of appeal in time. The case of Mandarin (Supra) said nothing more than statements made in affidavit cannot be controverted by statements from the bar. Further in the case of Sheikh Gulu (Supra) the Court of Appeal of Tanzania noted that there was a counter affidavit in reply but the said affidavit in reply did not controvert the details about Mr. Mwakajinga's bereavement contained in the affidavit.

Having stated so let me come back to the merits of the two applications. Section 11 (1) of the Appellate Jurisdiction Act Cap. 141 empowers the High Court to extend time for giving either notice of appeal,

leave to appeal or certificate in point of law. Its reads Misc. Application No. 8 of 2016.

"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."

The above Section calls for the exercise of the discretionary powers of the Court. Such discretionary power must be judiciously exercised and applied. In so doing one has to look at the circumstances of each case guided by the principles of justice, equity and common sense. As such, it is not possible nor desirable to lay down and follow any hard and fast rules (See: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne O. Massanga and Amos A.**

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Mwalwanda, Civil Application No.6 of 2001 (both Unreported –CAT)). The said discretion has to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily as it was stated in **Yusufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, (both Unreported).

The question that follows and which this court has to determine is whether according to the circumstances and facts of the case the Court can invoke its discretionary powers to grant the prayers for the extension of time for lodging notice of appeal to the Court of Appeal. The reasons given by the 1st applicant for the delay are such that the applicant could not lodge a notice of appeal in time because he was supplied with an undated judgment and decree; up to the time making the application for extension of time the applicant was not supplied with a properly dated judgment and decree instead he was issued with the same undated judgment but

rectified by Registrar by adding an extract showing that the judgment was delivered on the 28th January, 2016.

The reasons advanced by the 2nd applicant are that the judgment delivered by the Registrar indicates that the witness statements and written statement of defence of the 2nd applicant were struck off and the applicant was not allowed to defend therefore the applicant intend to appeal to the Court of Appeal. It is further indicated in the chamber summons that there is a ground of illegality with no further explanation in the affidavit. All in all, the counsel for applicants believed that these reasons are sufficient enough for the Court to exercise its discretionary powers in granting the prayers for an extension of time.

Counsel for respondents considered the reasons not to be sufficient since the law does not require the applicants in lodging notice of appeal to attach it with a copy of judgment and decree. I am in all four corners with the submissions made by the counsel for respondents. The repealed Rule 83 of the Court of Appeal of Tanzania Rules, 2009 is applicable to the matter at hand. This rule does not require for a notice of appeal to be attached with a copy of judgment or decree. The only requirement is for

the notice of appeal to be lodged within fourteen days from the date of judgment. The date of judgment to this matter was the date when the said judgment was pronounced by Registrar, that is, on 28th day of January, 2016. Thus the fourteen days started to be counted from 28th day of January, 2016. I therefore see no reason let alone justifiable reason as to why applicants were insisting of being supplied with correctly dated judgment and decree for them to lodge notice of appeal. For this Court to invoke its discretionary powers it has to be satisfied that there are justifiable reasons for the delay. The Court cannot just act on private opinions or on whimsical inclinations. It has to act according to the rules of reason and justice. The rules of reason and justice for this matter is that there is no reason let alone justifiable reason for the court to exercise its discretionary powers. There being no reason advanced then the consolidated applications are hereby dismissed with costs.

It is so ordered.



B.M.A Sehel

JUDGE

7th day of February, 2018

