

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 228 OF 2018

(Arising from the judgment and decree in the Commercial Case No. 138 of 2017)

BANK OF AFRICA TANZANIA LIMITED.....APPLICANT

VERSUS

ROSE MIYAGO ASSEA.....RESPONDENT

RULING

B.K. PHILLIP, J

The applicant herein being aggrieved by the judgment of this court in Commercial Case No. 138 of 2017, has lodged this application under the provisions of section 11(1) of the Appellate Jurisdiction Act, cap 141, R.E 2002 (henceforth "Cap 141") and section 95 of the Civil Procedure Code cap 33, R.E 2002 praying for extension of time within which the applicant can file its notice of appeal to the Court of Appeal of Tanzania against the aforementioned judgment of this court. The decision intended to be appealed against was delivered on 31st July 2018 and it was ready for collection by the parties on 16th August 2018. At hearing of this application the learned Advocate Godwin Nyaisa appeared for the applicant and this application has been heard ex-parte as the respondent failed to appear in court despite being served with a notice for appearance.

The application is supported by two affidavits, the first one is sworn by the learned Advocate Stephen Axwesso and the second one is sworn by Joyceline Kaika, the principal officer of the applicant. In both affidavits the deponents have stated that the reason for delay in filing the notice of appeal within thirty days from the date of the judgement is that the applicant had to wait to be supplied with the copy of the said judgment so as to read it and understand the reasoning of the trial judge and make an informed decision as whether to appeal or not. Another reason advanced is that the applicant ("the Bank") had no leadership that could make a decision like appealing to the Court Appeal since the managing director of the applicant had resigned from working with the bank since May 2018 and the new management team had not obtained any approval from the Bank of Tanzania. A copy of correspondences between the applicant and Bank of Tanzania, and a board resolution for appointment of the new management team were attached to the affidavit sworn by Joyceline Kaika. Furthermore, it is stated in the affidavits that, the new management was allowed to start working by the officers from the regulatory authority by word of mouth since 25th September 2018. In addition to the above, in the affidavit sworn by Mr. Axwesso it is stated that the decision intended to be appealed against raises important issues which need to be determined by the Court of Appeal, such as, the said decision is not in line with the decisions of the Court of Appeal on the Banker's right to recover unrealized amount from the borrower and whether the court's decision to raise suo motto a point of law and proceed to determine it without according the applicant a right to be heard, to the

effect that that once the bank decides to exercise its statutory power of sale under mortgage agreement, if the proceeds of the sale do not realize the amount secured then the bank cannot come to court with a view of recovering the unrealized amount from the borrower is proper.

In addition to the above Mr. Nyaisa submitted that the judgment intended to be appealed against is tainted with illegality for the reasons I have summarized herein above and was of the view that existence of element of illegality in the decision intended to be appealed against is a good reason for granting the extension of time sought. He referred this court to the case of **Transport Equipment Ltd Versus D.P. Valambia (1993) T.L.R 91** in which the court of appeal held that;

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

Mr. Nyaisa insisted that the applicant was not accorded opportunity to be heard on the point raised by the court suo motto which finally formed the basis of the decision of the court. He submitted further that, had the court given him an opportunity to be heard, he would have convinced it to decide otherwise. He referred this court to the case of **Ms. Mary Kahama (Attorney of Georgia Kahama) & another Vrs H.A.M Import & export(T) LTD and another, application No 52/2017** (unreported) and **the Attorney General Vrs Tanzania Ports Authority and Mr.**

Alex Msama Mwita, Civil application No 87 of 2016, (unreported) furthermore, Mr. Nyaisa submitted that the order for extension of time is within the court's discretion and the court has to determine whether good cause has been shown by the applicant for the delay. Mr. Nyaisa pointed out that there are no hard and fast rules on what amounts to good cause, it all depends on the circumstances of the case. He referred this court to the case of **Tanga Cement Limited Vrs Jumanne Masangwa and another, Civil application No. 6 of 2001** (unreported) in which the court mentioned three factor which have to be taken into consideration by the court, to wit; whether or not the application has been brought promptly, the absence of any or valid explanation for the delay and lack of diligence on part of the applicant. He proceeded to submit that this application has been brought in court promptly, since it was lodged on 2nd October 2018, just seven days after the new Management team for the respondent started working. Mr. Nyaisa contended that the applicant has been diligent in pursuing this matter and he has offered valid reasons for the delay in lodging the notice of appeal. He referred this court to the case of **Mrs. Kamiz Abullah M.D Kermal Vrs The Registrar of Buildings and Miss. Hawa Bayona (1998) TLR199 (CA)** in which the Court of Appeal said that ;

".....where delay is caused by good reason, a prudent party may safeguard his interests by applying for extension of time.

There is no any query on the position of the law on the court's discretionary powers on granting extension of time. In an application of this nature the court's task is to determine whether good causes for the

delay have been established and the applicant has accounted for each day of delay. There are dozens of authorities to the effect that the discretionary powers have to be exercised judicially and that there is no hard and fast rule on what constitutes good cause. (See the case of **Eliakim Swai, Frank Swai vrs Thobias Karawa Shoo, Civil application No. 2 of 2016**). As correctly submitted by Mr. Nyaisa, the courts have been taking into considerations factors such as a party's diligence in pursuing the matter, magnitude of the delay and prejudice to the other party, just to mention a few. (See the case of **Tanga Cement (supra)** and **Benedict Shayo vrs Consolidated holding Corporation as official Receivers of Tanzania Film Company Ltd, Civil Application No. 366/01/2017**).

In the instant application there is delay of more than two months, that is from 30th July 2018 when the judgment of this court was delivered to 2nd October 2018. The correspondences between the applicant and Bank of Tanzania ('BOT') that have been attached in the affidavit show that communication for approval of new management team from BOT was sent the applicant on 2nd August 2018, that is before the copy of the judgment was supplied to the parties, that means by 16th August, 2018, when the copy of the judgment was ready for collection, the applicant had already its new management team in place and approved by the BOT . This contradicts what is stated in the affidavit that the go ahead for the new management team to start working was given orally on 25th of September, 2018. Interestingly, the deponent did not mention the regulatory authority

that issued the said oral approval. All in all, what I am trying to show here is that the applicant has failed to account for each day of delay as required by the law from day the judgment was ready for collection to the day this application was filed. However, taking into consideration the alleged points of illegality and the impact of the judgment intended to be appealed against in the Banking industry, I am of a considered view that it is prudent to grant this application. Under the strength of the decision of the Court of Appeal in the case of **Transport Equipment Ltd** (supra), I hereby grant the applicant extension of time to lodge the notice of appeal, the same should be lodged within twenty one days (21) from the date of this order.

Dated at Dar es Salaam this 11th day of April, 2019




B. K. PHILLIP
JUDGE