

IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA

COMMERCIAL APPLICATION NO.07 OF 2020

*(Application arising from the decision of the High Court of the United Republic
of Tanzania (Commercial Division) at Mwanza in Commercial Appeal No.
01 of 2020 delivered on 03.07.2020 by Hon. Deo John Nangela, J.)*

BETWEEN
PREMIUM SECONDARY SCHOOL.....1ST APPLICANT
YUVENT FELICIAN2ND APPLICANT
VERSUS

BATOFREY COMPANY LIMITED.....RESPONDENT

RULING

Date of Last Order: 07/10/2020
Date of Judgement: 09/10/2020

NANGELA, J.:

This is a ruling concerning an application for leave to appeal to the Court of Appeal of Tanzania. The Applicants herein filed the application by way of Chamber Summons under section 5(1) (c) of the *Appellate Jurisdiction Act*, Cap.141 [RE.2019].The said provision states as follows:

“5.-(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal-

(a)...

(b)....

(c) with the leave of the High Court or of the Court of Appeal, against every other decree, order, judgment, decision or finding of the High Court.”

The Applicants’ Chamber Summons, which instituted this application, is supported by an Affidavit of Mr Mussa Joseph Nyamwelo and seeks for the following orders of this Court:

1. That, this Honourable Court be pleased to grant leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in Commercial Court Appeal No.01 of 2020 delivered on 03.07.2020 by Hon. Deo John Nangela, J.
2. Any other relief(s) that this Honourable Court may deem fit to grant to the Applicant.

The application was scheduled for hearing on the 07th day of October 2020. Perhaps it is vital to state the facts leading to this application, albeit briefly.

The Applicants herein were appellants in *Commercial Appeal No.1 of 2020, HC ComDv. Mwanza Registry*. In that Appeal, the Appellants were appealing against the ruling of the Resident Magistrate Court in Mwanza, in *Misc. Civil Application No.65 of 2019*. The impugned ruling of that subordinate court was delivered on 20th January 2020. In that ruling, the Applicants were seeking for extension of time to file a Notice of Appeal against the decision of the same court in *RM Commercial Case No.41 of 2018*. The application for extension of time came after

the Applicants' appeal, filed in this Court as *Commercial Appeal No.1 of 2019*, was struck out for want of Notice of Appeal under Rule 69 (2) of the *High Court (Commercial Division) Procedure Rules, 2012 (as mended, 2019)*.

Following the striking out of their appeal, they then filed the *Misc. Comm. Application No.65 of 2019*. Unfortunately, the same was ruled against their favour on the ground that they were out of time for about **117 days** which they had failed to account for as required by the law. Aggrieved by that decision, they appealed to this Court seeking to tear down the ruling of the subordinate Court. Their mission was unsuccessful because this Court confirmed the ruling of the subordinate Court and dismissed their appeal with costs. They now intend to appeal to the Court of Appeal, and, hence, this application for leave to appeal to do so.

It is worth noting that, all along, the Applicants have been represented by Mr Mussa Nyamwelo, learned Advocate, while the Respondent has continued to enjoy the legal services of Mr Emmanuel Mwita, also a learned Advocate. These learned Advocates appeared before me to argue the application orally. I will, therefore, summarize their submissions before examining the merits or otherwise of this application.

When Mr Nyamwelo commenced his submission, he adopted the contents of the affidavit filed in support of this

application. He submitted that, the applicants have raised two crucial points in their affidavit, (presumably under paragraph 8, 9 and 10) which are indicative of the fact that, this Court erred in law when it decided that, after the incompetent *Appeal No.1 of 2019* had been struck out on the 9th of October 2019, the Appellants were bound to account for all 117 days which constitute their delay to file the *Misc. Commercial Application No. 65 of 2019*.

Mr Nyamwelo submitted that, the entire period leading to the striking out of the *Commercial Appeal No.1 of 2019*, should have been termed as a '*technical delay period*' and, for that matter, the conclusion held by the Court that the Applicants ought to have accounted for all 117 days while they had already been punished by having their appeal struck out, was erroneous. He argued further that, once a person has been punished that way he cannot again be required to account for all the time leading up to the striking out of the suit, but should only account for the period from when the matter was struck out if he fails to file it timely.

To better crystallize his submission, he contended, therefore, that, the key and contentious point raised here is that, this Court erred in its interpretation and application of the case of **Fortunatus Masha v William Shija and Another [1997] TLR 154** and all other cases that followed its established legal principles.

In the alternative, to the above, Mr Nyamwelo submitted that, this Court failed to appreciate that, the conduct of the advocate who filed the *incompetent Civil Appeal No.1 of 2019* in this Court, which was filed without first filing a notice of appeal to this Court, was a human error which constitutes a good cause to grant an extension of time to an applicant.

On the basis of the above submission, therefore, Mr Nyamwelo submitted that, there is a *prima facie ground* in the intended appeal to the Court of Appeal. In support of his submission, Mr Nyamwelo relied on the Court of Appeal decision in the case of **Dorca Guyu v Guyu Mhindi and Another, Misc. Land Appl. No.56 of 2018**, were Her Ladyship Mkwizu, J.A, held (citing the decision of the Court of Appeal in the case of **Gaudensia Mzungu v IDM Mzumbe, Civil Appl. No.94 of 1999 (CAT) (unreported)**), that:

“...leave is not granted because there is an arguable appeal. There is always an arguable appeal. What is crucially important is whether there is a *prima facie* ground, meriting an appeal to this Court.”

He submitted, therefore, that, the two grounds stated herein constitute *prima facie grounds* meriting the granting of the leave sought by the Applicants.

For his part, Mr Mwita, the learned counsel for the Respondent, made a very brief submission in reply. In the first place, he objected to the granting of this application. He did so, on

the grounds, *firstly*, that, the issue of technical delay was properly decided by this court in the *Commercial Appeal No.1 of 2020*. He maintained that, this Court properly interpreted and applied the principle enunciate in the case of **Fortunatus Masha v William Shija and Another** [1997] TLR 154 and the subsequent cases that applied it.

Secondly, he contended that, the submission that the failure by the advocate to file a notice of appeal should have been taken up and condoned as a human error, comes as an afterthought. He held that view because it was not an issue discussed by this Court in the *Commercial Appeal No.1 of 2020*. Besides, he contended that, Court procedures must be adhered to and, the so-called human errors should not be allowed to override the court procedures.

Mr Mwita submitted, alternatively, that, even if the advocate's conduct was to be condoned as a human error, still the Applicants were supposed to account for the 117 days of their delay to bring the matter before the court. For such reasons, Mr Mwita concluded, therefore, that, there are no cogent grounds warranting the granting of the leave sought by the Applicants.

In a brief rejoinder submission, Mr Nyamwelo rejoined by reiterating his submission in chief. He further stated that, to argue that the proposed alternative ground was not an issue raised during the hearing of the appeal is immaterial because, as a point of law, it could be raised at any time.

To support his view, he relied on the case of **Adelinena Koku Anifa and Another v Byarugaba Alex, Civil Appeal No.46 of 2019 (CAT)** (unreported), where the Court, citing the case of **B.9532 Cpl. Edward Malima v Republic, Criminal Appeal No.15 of 1989 (unreported)** stated, that:

“ Firstly, we are satisfied that it is elementary law that an appellate court is duty bound to take judicial notice of matters of law relevant to the case even if such matters are not raised in the notice of appeal or in the memorandum of appeal. This is so because such court is a court of law and not of the parties”.

Therefore, Mr Nyamwelo concluded his rejoinder submission by requesting this Court to grant the prayers sought by the Applicants. Neither of the counsel for the parties herein prayed to be awarded costs of this application.

I have carefully considered the submissions from the learned counsel for both parties. The main issue before me now is **whether there are arguable points of law worth of being considered by the Court of Appeal.** My reading of the Applicants’ affidavit reveals that, the grounds upon which the intended appeal seems to be premised are in paragraphs 8, 9 and 10 of the Applicants’ affidavit, which state as follow:

“8. That, I swear and state, that the learned judge erred in law on the account that, after the striking out of an incompetent Commercial Appeal No.01 of 2019, the Applicants were not bound to account again for all

period of 117days in Misc. Civil Application No. 65 of 2019.

9. That, I swear and state, that, once the Commercial Appeal No.01 of 2019 was struck out for being incompetent, the same cannot be used again to determine the timeousness of filing the Misc. Civil Application No.65 of 2019 in the District Court of Nyamagana.
10. That, I swear and state, that, the learned judge erred in law for failure to appreciate that the act of advocate filing the appeal without the notice of appeal in existence is a human error which constitute a good cause for extension of time.”

As it may be noted, in his submission, Mr Nyamwelo expounded paragraphs 8 and 9 above by submitting that their import is, that, the learned appellate judge erred in his interpretation and application of the Court of Appeal Decision in the case **Fortunatus Masha v William Shija and Another [1997] TLR 154** and the subsequent cases that applied it.

Upon consideration of the above grounds 8 and 9 (which were summed up during the oral submission to mean what I have stated herein above) I am of the view that they present a contentious legal point warranting the attention of the Court of Appeal. In particular, the point is: whether this Court correctly interpreted and applied in the *Commercial Appeal No.01 of 2020*, the principle enunciated by the Court of Appeal of Tanzania in the case of **Fortunatus Masha v William Shija and Another [1997] TLR 154**.

As regards the alternative point raised by Mr Nyamwelo, and which seems to be reflected as paragraph 10 of the affidavit in support of the application, I have a different view. Having looked at the **Adelinena Koku's case (supra)** which was availed to me, I am of the view that, that case is wholly distinguishable to the matters at hand.

I hold so because the **Adelinena Koku's case** was dealing with a situation where the Appellate Court failed to point out and deal with a glaring procedural irregularity. First of all, it was not dealing with an issue of extension of time. Secondly, it was not as well providing an answer to the question whether an advocate's failure to file a notice of appeal amounts to a human error that could be condoned as a sufficient ground warranting a grant of an extension of time, when one fails to act within a legally prescribed period.

In view of the above, I do not find Mr Nyamwelo's submission made in the alternative to be of relevance. On the contrary, I find that the Respondent's submission presents the correct legal position that, procedural rules should be strictly adhered to. In my view, ignorance, inaction or negligence on the part of an advocate, even if christened as a '*human error*', cannot amount to an acceptable ground for an extension of time to a belated applicant. The second proposed ground of appeal, therefore, is misconceived as it does not amount to a *prima facie*

ground worthy of being brought to the attention of the Court of Appeal.

In the upshot, because I have stated that the first ground, regarding the correct interpretation and applicability of the Court of Appeal's decision in **Fortunatus Masha v William Shija and Another [1997] TLR 154**, and the subsequent cases that applied it, (which ground seems to be a reflection of what is stated in paragraphs 8 and 9 of the Applicants' affidavit) presents a *prima facie* contentious issue worthy of attracting the attention the Court of Appeal, I hereby grant the Applicants leave to appeal to the Court of Appeal of Tanzania. I make no orders as to costs.



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DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)

09 / 10 / 2020

Ruling delivered on this 09th day of October 2020, in the presence of Mr. Musa Nyamwelo, Advocate for the Applicants and who also holds the brief of Mr Emmanuel Mwita, Advocate for the Respondent.



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DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)

09 / 10 / 2020

