

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 38 OF 2022**

**(ARISING FROM COMMERCIAL CASE NO. 95 OF 2016)**

**ALOYCE KISSENGA MCHILI ..... APPLICANT**

**VERSUS**

**ZEBEDAYO MKODYA ..... 1<sup>ST</sup> RESPONDENT**

**BEST MICROFINANCE SOLUTION LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**GEOFREY WILLIAM MALAMILA ..... 3<sup>RD</sup> RESPONDENT**

**VERONICA ALOYCE KISSENGA ..... 4<sup>TH</sup> RESPONDENT**

**REDIMNA GINWAS HAMAY ..... 5<sup>TH</sup> RESPONDENT**

**Date of Last Order: 17.08.2022**

**Date of Ruling: 19.08.2022**

**RULING**

**MAGOIGA, J.**

The applicant, ALOYCE KISSENGA MCHILI by chamber summons made under the provisions of section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E.2019] has preferred the instant application against the above named respondents praying this court be pleased to give the following orders, namely:

- a. Grant extension of time within which to file notice of intention to appeal to the Court of Appeal of Tanzania against the decision of the

High Court of Tanzania (Commercial Division) at Dar es Salaam (Hon. Judge Songoro) dated 13<sup>th</sup> July 2018 in Commercial Case no.95 of 2016 between Zebedayo Mkodya versus Best Micro Finance Solution Limited;

- b. Costs of this application be in the cause;
- c. And any other relief(s) as the Honourable court may deem fit and just to grant.

The chamber summons was accompanied by affidavit deposed by the applicant stating the reasons why this application should be granted as prayed.

Upon being served with the chamber summons and accompanied affidavit, the first respondent filed a counter affidavit strongly opposing the grant of the prayers as contained in the chamber summons by stating the reasons why this application should not be granted and consequently invited this court to dismiss this application with costs.

The 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> respondents despite being served with the application on 05.05.2022 and instructed Ms. Mariam Mabina, learned advocate to represent them but no counter affidavit was filed.



The 4<sup>th</sup> respondent was served on 24<sup>th</sup> June 2022 and instructed Mr. Conrad Felix, learned advocate who told the court that the 4<sup>th</sup> respondent has no intention to file counter affidavit because she do not oppose the application.

So the learned advocate for the applicant, Mr. Erick Kamala prayed to proceed ex-parte against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> respondents and this court granted the prayed after being satisfied that were dully served but for no apparent reasons decided not to file counter affidavit to contest the grant of the application.

In the circumstances, the contention on the grant and not to grant was between the applicant's counsel and 1<sup>st</sup> respondent's counsel.

It is imperative to state albeit in brief facts pertaining to this application. The 1<sup>st</sup> respondent vide Commercial Case No.95 of 2016 as plaintiff claimed payment of Tshs.1,253,600,000/= and interest reliefs against the 2<sup>nd</sup> respondent, the applicant and the rest of the respondents as shareholders and directors of the 2<sup>nd</sup> respondent herein for payment of money borrowed and interest by the 2<sup>nd</sup> respondent. After contentious full trial, this court (Songoro, J as he then was) found in favour of the 1<sup>st</sup> respondent against the applicant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein. Aggrieved, the applicant



instituted an appeal against the whole decision of the High Court vide Civil Appeal No.170 of 2018 to the Court of Appeal of Tanzania.

Further facts were that when the said appeal was called on for hearing on 16<sup>th</sup> March 2022, before the Court of Appeal of Tanzania the same was found incompetent and consequently was withdrawn and as such the notice of appeal was not spared, hence, this application praying for extension of time within which to file notice of appeal to the Court of Appeal as necessary legal procedure for institution of the appeal.

When this application was called on for hearing, the applicant was enjoying the legal services of Messrs. Emmanuel Kessy, Erick Kamala and Ms. Bertha Bihondo, learned advocates, on the other hand, the 1<sup>st</sup> respondent was enjoying the legal services of Mr. Wilson Ogunde, learned advocate.

Mr. Kessy arguing the application adopted the contents of the affidavit in support of this application and went on to point out that there two reasons why this application should be granted; these are, **one**, the delay is technical one, and the second reason is that there is illegality within the decision. In support of the second reason, the learned advocate for the applicant cited the case of MARY RWABIZI t/s AMUGA ENTERPRISES vs.



NATIONAL MICROFINANCE BANK, CIVIL APPLICATION NO. 378/01 OF 2019, (DSM) CAT (UNREPORTED). Mr. Kessy went on to argue that the illegality in the decision suffices to grant extension and pointed out that under paragraph 14 of the affidavit particularized several illegalities. Of interest in this, the learned advocate pointed out that, the trial court suo motto raised the issue of veil of incorporation without hearing parties and as such condemned the applicant unheard on that issue. In support of this ground, Mr. Kessy cited the case of ACHE MWENDU LTD AND 2 OTHERS vs. TREASURY REGISTRAR(SUCCESSOR OF OCNSOLIDATEE HOLDING CORPORATION) CIVIL REFERENCE NO.3 OF 2015 (DSM) CAT (UNREPORTED) to underscore the point.


On the totality of the above reasons, Mr. Kessy strongly urged this court to grant the application as prayed.

In reply, Mr. Ogunde right away prayed to adopt the contents of the counter affidavit and proceeded to argue that no way an appeal withdrawn can be instituted again because it was withdrawn at the instance of the applicant's advocate who acted negligently for failure to serve the 2<sup>nd</sup> and 3<sup>rd</sup> respondent with notice of appeal. According to Mr. Ogunde, citing and relying in the case of TAUKA THEODORY FERDINAND vs EVA ZAKAYO

MWITA AND 3 OTEHRS, CIVIL APPLICATION NO 300/17 OF 2016 argued that, once an appeal is withdrawn at the instance of the party he cannot start the process afresh. The learned advocate for the respondent argued that paragraphs 8, 9 and 11 gave no sufficient reasons to warrant grant of the prayers in the chambers summons.

Further attacking prayer for grant of this application argued that the error committed by the advocate for applicant is not a good cause for grant of this application. In support of this he cited the case of INSPECTOR SADICK vs. GERALD NKYA [1997] TLR 290 which underscored the point that an error committed by the advocate do not constitute sufficient ground, and according to him, all stated in the said paragraphs are errors committed by advocate.

On illegality, Mr. Ogunde argued that in the case of TAUKA (supra) the issue of illegality was deeply discussed and the Court of Appeal was clear that not every illegality will amount to extension but is only where it is apparent on the face of the record. Mr. Ogunde thus concluded that no such illegality has been shown in the judgement in dispute.



On the foregoing reasons, Mr. Ogunde urged this court to dismiss this application with costs.

In rejoinder, Mr. Kessy pointed out that issue of corporate personality was suo motto raised by the trial judge at page 6 of the judgement and made a finding without hearing parties. According to Mr. Kessy, this illegality which is apparent on the face of the record and suffices for grant of extension as prayed.

On that note, the learned advocate for the applicant reiterated their earlier prayer for grant of the application.

This marked the end of hearing of this hotly contested application.

The noble duty of this now is to consider the merit or otherwise of this application. Having considered the rivaling submissions of the learned counsel for the parties and case law cited the bone of contention is the issue of delay if it is technical and the illegality. On technical delay as rightly submitted by Mr. Kessy learned advocate for the applicant, the time between when the judgement was delivered and when the appeal was withdrawn as per the case of FORTUNATUS MASHA vs. WILLIM SHIJA [1997] TLR 154 falls within the technical delay in the circumstances of this application.



According to the record, the appeal was withdrawn on 16<sup>th</sup> day of March 2022 and the instant application was filed on 24<sup>th</sup> March 2022 after elapse of 8 days. In my considered opinion and for the interest of justice, 8 days are not inordinate delay to deny extension to the applicant.

With regard to the issue of illegality, Mr. Ogunde based his arguments in the decision of TAUKA' case (supra) and concluded that no illegality has been pointed out to warrant the grant of extension. Mr. Kessy brief and straight to the point argued that, at paragraph 14 sub paragraph (d) and (g) of the affidavit in support of the applicant stated the illegality to the impugned decision which is enough to grant extension.

Having considered the rivaling submissions by counsel for the parties and read the case laws cited, with due respect to Mr. Ogunde, the act of the trial court raising suo motto the issue of corporate veil which was not an issue between parties and which is apparent at page 13 of the typed judgement and the fact that the applicant has stated to be condemned unheard on the point, in my own considered opinion suffices to be an illegality that calls for grant of extension so that the highest Court of the land can look at it. The import of right to be heard was stated in the case of KIJAKAZI MBEGU AND 5 OTHERS vs. RAMADHANI MBEGU [199] TLR 174 and the case of ROMAN



MAKINI vs. REPUBLIC [1980] TLR 148 I which it was held that right to be heard is natural and even God heard Adam before conviction.

Guided by the above stance when an issue of right to be heard is raised becomes a very serious legal issue that need the intervention of the Court of Appeal of Tanzania into such a decision.

Mr. Ogunde reply on illegality was too general both in the counter affidavit and in his oral submissions. The arguments that much as the said points enumerated in paragraph 14 were not argued in Appeal No. 170 of 2018 which was withdrawn, in my view, are far from convincing this court otherwise.

Having gone through the judgement of the court, reservedly, I find it imperative that I should allow extension to pave way for the Court of Appeal, among others, also to look into liability of the company as separate legal entity and its shareholders and directors where a collosum amount of money adjudged if was proved and jurisprudential development of company law in our country in the circumstances of this case.



Consequently, the applicant's application is to be granted and I hereby extend time to file notice of appeal as open gate to demonstrate the illegality alleged before the Court of Appeal.

In the fine, I find the application merited on the reasons demonstrated above. The applicant is, thus, to file notice of appeal in accordance to the law that guides notice of appeal to Court of Appeal of Tanzania.

The application is, thus, granted with costs in the cause as prayed.

It is so ordered.

Dated at Dar es Salaam this 19<sup>th</sup> day of August, 2022.



**S. M.MAGOIGA**

**JUDGE**

**19/08/2022**