

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL APPL. NO. 200 OF 2021
(Arising from Commercial Case No. 76 of 2019)**

**FES ENTERPRISES COMPANY LTD.....APPLICANT
VERSUS**

SERENGETI BREWERIES LTD..... RESPONDENT

Last order: 01st August, 2022
Ruling: 08th September, 2022

RULING

NANGELA, J.

This application was brought under section 11 (1) of the Appellate Jurisdiction Act Cap 141, R.E 2019, section 68 (e) and 95 of the Civil Procedure Code Cap 33 R.E 2019, section 2(1) and (3) of the JALA Cap 358, R.E 2019 and any other enabling provision of the law.

According to the chamber summons filed in this Court, and which was supported by an affidavit sworn by Mr. Samson Edward Mbamba, learned advocate appearing for the Applicant, the Applicant is seeking for the following orders:

- (i) This Honourable court be pleased to extend time for the Applicant to file a notice of appeal against the decision of this Court dated 20th November, 2020.
- (ii) Pending the order for filling a notice of appeal may the court stay execution of decree in respect of the judgment dated 20th November, 2020.
- (iii) Costs of this application be provided for
- (iv) Any other order as the hon. Court may deem fit to issue.

Through the services of NEXT LAW ADVOCATES, the Respondent filed a counter affidavit contesting the application and raised as well a Notice of Preliminary objection to the effect that, the application is untenable in law for being omnibus, seeking two distinct reliefs; namely extension of time and stay of execution. However, the said notice of preliminary objection

was however withdrawn from the Court and the matter proceeded on merit.

On the 16th day of June, 2022, the parties appeared before me. On the material date, Mr. Samson Edward Mbamba Learned Advocate represented the applicant while the Respondent enjoyed the legal service of Mr. Nuhu Mkumbukwa, a learned advocate as well.

On the material date the parties prayed that the matter be disposed of by way of written submission. A scheduling order was given, and the parties have dutifully complied with the Court Order, although there was a delay on the party of the Applicant to file a rejoinder submission and an extension of time was sought and granted.

Submitting in support of the prayers sought, Mr. Mbamba abandoned the second prayer which was in respect of stay of execution and proceeded to argue the first prayer concerning extension of time. In his submission, Mr Mbamba contended that, according to Rule 83 (2) of the Tanzania Court of Appeal Rules 2009 (as amended), the notice of appeal was supposed

to be filed within 30 days from the day when the judgment was pronounced.

As regards this application, therefore, Mr Mbamba submitted that, the notice was supposed to have been iled on 20/11/2020 when the judgment was pronounced but it was not timeously filed and, hence, the present application. He argued, as the reasons for the delay, as outlined in the affidavit in support of the application, that, the first point was engagement in application to set aside the judgment.

He submitted that, as per existing case law, a default or ex-parte judgment cannot be appealed against without first attempting to set it aside. He contended that, in the present case, after judgment the Applicant unsuccessfully attempted to set it aside as indicated by a ruling attached to the affidavit as Annexure 3.

To support his argument, he cited for this Court, the case of **Regional Manager-Tanroads Lindi vs. DB Shapriya & Co. Ltd**, Civil Appeal No. 86 of 2010 where the Court of Appeal held that, if one is to approach the Court of Appeal, s/he must have exhausted all available remedies.

Submitting as the second reason for the application, Mr. Mbamba submitted that, illegalities, impropriety and irregularity of the decision are other factors explaining why the application was brought to the fore as stated in paragraph 9 of the Affidavit in support of the application.

To amplify on his submission, he submitted that, one of the items prayed for in the relief clause granted by the Court is an order for payment of interest at a commercial rate of 25% per annum from the date when the debt became due to the date of judgment. He submitted that, that particular item, apart from not being pleaded in the body of plaint and its basis of claim, was not prosecuted, established and proved; it was nevertheless granted without much ado, a fact which, according to him, was contrary to the law.

He submitted that, as a matter of law and principle, interest prior to the filing of the suit is a matter of substantive law and, hence, must not be granted simply because it was prayed for as a relief in the relief clause. Mr Mbamba contended that, the same must be pleaded in the body of the plaint, and, therefore, must be prosecuted and proved.

In support of his submission, Mr Mbamba drew the attention of this Court in the case of, **National Insurance Corporation (T) Limited vs. China Civil Engineering Construction Corporation**, Civil Appeal No. 119 of 2004 (unreported); **International Commercial Bank Ltd vs. Jadecam Real Estate Ltd**, Civil Appeal No.446 of 2020, and **Mariam Nyangasa vs. Shaban Ally Sembe**, Civil Application No. 139/12 of 2017.

In the above authorities, the Court insisted on granting an extension of time once there is raised in a particular application, issues of illegality, irregularity and impropriety. Mr Mbamba relied as well on the case of **TANAPA vs. Joseph K Magimbi**, Civil Application No.471/18 of 2016.

Mr. Mbamba, also pointed out other reason which relates to the issue of illegality and stated that, where there is point of law of significant importance to determine in the appeal, an application for extension of time will be granted.

To support his submission, he referred this Court to the decision of the Court of Appeal in the case of **Lyamuya Construction Company Ltd vs. the Board of Registered**

Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported).

Mr Mbamba submitted as an issue, the point whether the whole suit can be proved by affidavit and contended that, he is aware that Rule 22(1) of the High Court (Commercial Division) Rules, 2012, GN. No.250 of 2012 (as amended), allows proof by affidavit and, that, the Hon. Trial Judge did enter judgment in line with the above cited provision.

He submitted, however, that, case law does not allow proof of the whole suit by affidavit. To support his point he relied on the case of **Faizen Enterprises Limited F. Abdul Hussein vs. Richard Mchau**, Civil Reference No. 21 of 2008 and the case of **Abdul Rahim Shadhiri (as guardian of Miss Fatuma A.R Shadhiri) vs. Mandheir Govond Raykar**, Civil Appeal No.296 of 2004.

In view of the above, he emphasized that, there is a need for the Court of Appeal to be called upon to harmonize the law. And that, that can only take place if the Applicant is granted extension of time to file a Notice of Appeal out of time. Relying on the decision in the case of **Caritas Tanzania and Another**

[1996] TLR 239, Mr Mbamba submitted that, the Court of Appeal did observe in that case that, where a matter is proved by affidavit the Court is duty bound to scrutinize the depositions of the affidavit.

He contended that, in the decision intended to be appealed against, after the Respondent had filed an affidavit, the trial judge entered judgment. He contended that, there was no indication that the documents submitted in Court were authenticated with regard to the test on admissibility and the procedure thereof under the Evidence Act, Cap.6 R.E 2019, Stamp Duty Act, Cap.189, R.E 2019 and the Electronic Transaction Act, Cap.442 R.E 2019. He also contended that, that alone is a point of law of sufficient importance for the Court of Appeal to determine, but can only do so if the Applicant's application for extension of time is granted.

Mr Mbamba submitted that, both counsels for the parties do agree that, when the trial judge proceeded with the suit, there was in the Court of Appeal, a Civil Revision No.364/16 of 2020 challenging the propriety of the incidental ruling on the

same suit on refusal of extension of time for the Applicant to file a Written Statement of Defence.

Citing the case of **Yara Tanzania Ltd vs. DB Shapriya & Co. Ltd**, Civil Appeal No.244 of 2018, he contended that, the Court of Appeal did emphatically issued guidance that, in any proceeding before the Court of law, counsel as officers of the Court have the duty to volunteer any information to the Court whether on record or otherwise, which will assist the Court to reach at a just decision, especially with regard to the pendency of matters in courts.

In a further submission, Mr Mbama contended that, it was wrong, therefore, for the Court to have proceeded to entertain the matter before it while there was a matter pending in the Court of Appeal and the counsel for the Applicant herein had endeavored to raise the same to the attention of the Court. He submitted that, if there is an Appeal or a matter pending before the Court of Appeal, the rule is that all proceedings before the lower court must be stayed.

To that effect he pointed out the case of **Sauda Juma Urassa vs. Cocacola Kwanza Ltd**, Civil Appeal No. 227 of

2018, and, finally, urged this Court to grant the Applicant an extension of time to file a Notice of Appeal as there is arguable issue to be determined to the Court of Appeal.

Replying to the Applicant's submission, Mr. Nuhu Mkumbukwa, the Respondent's counsel, submitted at first, that, the power of the Court to grant extension of time is discretionary one and, upon there being sufficient reasons adduced by the Applicant. Indeed that is the established legal position.

According to Mr. Mkumbukwa, the Applicant has failed to adduce sufficient grounds in order to warrant this Court grant the prayer for extension of time which the Applicant has prayed for. He contended that, reading from the supporting affidavit and the written submission by the Applicant in support of the application, none of them adduce sufficient reasons required by the law.

He further submitted that, looking at the whole submission of the Applicant, the two points which can be said to be the basis of their submission are; (i) existence of a technical delay and (ii) the issue of Illegality.

Submitting on the issue of technical delay, Mr. Mkumbukwa submitted that, looking at paragraph 7 of the Applicant's affidavit, it has been alleged that, she was prevented from filing her Notice of Appeal in time because she was prosecuting proceedings to set aside default judgment, that is, Miscellaneous Commercial Case No. 186 of 2020.

He contended that, the Ruling of that application was delivered on 19th November 2021, whereas the application at hand was filed on 17th December 2021, which is after **about 29 days**. According to him, a person who pleaded a technical delay in extension of time must demonstrate that, after conclusion of an application which barred him to file the intended matter, s/he acted promptly and without laxity unlike the applicant who chose to sleep on his right.

To bolster his submission, he pointed out to the Court the case of **Fortunatus Masha vs. William Shija and Another** [1997] TLR 154. On the basis of that authority, Mr Mkumbukwa contended that, the Court did put conditions that, applications should be filed immediately after pronouncement of the ruling striking out the first appeal.

In view of the circumstances at hand, Mr. Mkumbukwa contended that, the case cannot favor the Applicant as she was supposed to file an application soon after her application to set aside a default judgment was pronounced. He argued that, the Applicant has not even accounted for that time of delay.

He cited to Court the case of **Hamis Babu Bally vs. The Judicial Officers Ethics Committee & 3 others**, Civil Application No. 130/01 of 2020, whereby the Court of Appeal emphasized that an Applicant had to account for each day of delay. He cited, as well, the case of **Tanzania Fish Processors Limited vs. Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018.

In his submission, he distinguished the case of **Regional Manager** (supra), contending that, the same was cited out of context as far as the ground of technical delay is concerned. Mr Msumbukwa did submit that, the case is of the effect that all remedies at the lower court must be exhausted first and it says nothing on the extension of time.

On the issue of illegality, impropriety and irregularity, Mr Mkumbukwa submitted that, the illegality which has been raised by the applicants was not apparent on the face of record on the impugned default judgment.

As regards the argument that the issue of the interest was not pleaded in the plaint filed in Commercial Case No. 76 of 2019, Mr Mkumbukwa submitted that, that was a misleading statement because there was no copy of the plaint annexed to the application. He contended that, in absence of the said plaint on record, that allegation become a mere submission by the counsel from the bar, and should be disregarded.

To strengthen his submission, Mr Mkumbukwa referred to this Court the cases of **Rosemary Stella Chambairo vs. David Kitundu Jairo**, Civil Reference No. 6 of 2018 and **The Registered Trustees of the archdiocese of Dar-es-Salaam vs. The Chairman of Bunju Village Government and others**, Civil appeal No. 147 of 2016. He submitted that, even this Court, (Hon. Magoiga, J), restated the said relief in his judgment.

Mr Mkumbukwa submitted further that, the cited case of **National Insurance Corporation (T) Ltd** (supra) was distinguishable to the facts in this case at hand since the pleadings were not annexed in this matter as compared to that case in the Court of Appeal. Further, that, in the judgment of Commercial case No. 76 of 2019, the said interest was pleaded unlike in the cited case.

In his further submission, he contended that, it is not usually necessary that an extension of time should be granted for all intended appeal which raises a point of law. To support his view, reliance was placed on the **Lyamuya Construction Company Limited's case** (supra), and that of **Moto Matiko Mabanga vs. Ophir Energy Plc & 2 Others**, Civil Application No. 463/01 of 2017.

He again submitted that, as regards the issue of proving the case by affidavit, that, according to the Rules of the Commercial Court Rule of 2019 as amended Rule 20 (2) the case can be proved by filing **Form No. 1** in case the other part failed to file its written statement of defence, and that is what happened in the case at hand. Reliance was placed on the case

of **Alaf Limited vs. Joyce Mbuyeku (as the Administratrix of the Estate of the late Ismael Mbuyeku)**, Commercial Case No. 146 of 2019.

Mr Mkumbukwa distinguished the case of **Faizen Enterprises vs. Africarries, Abdul Rahim Shadhili and Shabir F. Abdul Hussein** (supra) noting that, the same was decided way back before the Commercial Court Rules got enacted. He as well distinguished the case of **Yara Tanzania Ltd** (supra) that, the case had a peculiar circumstances and every case has to be decided on its own peculiar circumstances or merit.

To conclude his submission, Mr Mkumbukwa distinguished the case of **Sauda Juma Urassa vs. Cocacola Kwanza Ltd**, (supra) and contended that, in that case, there was a notice of appeal and that is why the Court stated that when there is a notice of appeal, subordinate Court lacks jurisdiction over the matter unlike the matter at hand whereby there was no pending notice of appeal. He, therefore, reiterated his submission and prayed that, this application should be dismissed with costs.

In a brief rejoinder, the Applicant's counsel conceded that, as a matter of law, granting/refusing an application for extension of time is a matter in the discretion of the Court. However, he was of the view that, that discretion depends on specific and particular facts in each case as it was observed in the case of **G. A B Swale vs. Tanzania Zambia Railways Authority**, Civil Reference No. 5 of 2011. He urged this Court to be guided by the Court of Appeal decision in that case.

The Applicant's counsel did as well oppose the submissions made in respect of the issue of failure to account for the days of delay from 19th November 2021, when the application to set aside default judgment was refused, to 17th December 2021 when the present application was filed. He rejoined, therefore, that, the 19th November 2021 was the date of decision and not the day of delivering of the ruling to the parties and, hence, the duration of delay cannot therefore be reckoned from the date of judgment.

On the issue of illegality as a ground for extension, he submitted that, once the issue of illegality is brought to the attention of the Court, the period of delay is ignored. He cited

several cases to back up his contention, one of them being the case of **Tanapa vs. Joseph K. M Magombi** (supra) and that of **Mariam Nyangasa vs. Shakur Ally**, Civil Application No.227 of 2015 (unreported). He urged this Court, to find, thereof, that, the application having raised and demonstrated that there was an issue of illegality, then the extension of time has to be granted for the Court of Appeal to determine the merits of such a point.

To conclude his rejoinder submission, it was Mr Mbamba's submission that, the case of **Lyamuya Construction** (supra) cited by the Respondent did not overrule the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 182 which set the law that illegality or irregularity of the impugned decision is a sufficient cause for the grant of extension of time.

I have carefully considered the above rival submissions, and the key issue which I am called upon to determine in this ruling, is whether this application filed by the Applicant is meritorious. From the submissions made by the counsels for the parties herein, several matters of principle have been

restated and I fully associate with them. One is that, the granting or refusal to grant prayers for extension of time is a matter left to the discretion of the Court. Secondly, where there is a Notice of Appeal filed in the Court of Appeal, the subordinate Court ceases to exercise its jurisdiction until when the Court of Appeal renders its decision. However, that will, as well, depend on the circumstance of each case before the Court.

It is also a trite legal principle that, in an application for extension of time, the Applicant has to demonstrate good cause, and, if that is set out, the Court is warranted to exercise judicial discretion and grant such application. I am as well aware of the principle that, a late Applicant has to account for each day of delay and, that, as stated in the Case of **Fortunatus Masha vs. William Shija and Another** (supra) regarding technical delay. The point is that, days that constitute a technical delay will be excluded.

But, of paramount consideration to me, and, as correctly stated by Mr Mbamba, is the principle enunciated by the Court of Appeal in the case of **Principal Secretary, Ministry of**

Defence and National Service vs. Devram Valambhia

(supra), which was also reiterated in the case of

Mgombayeka Investment Co. Ltd and 2 Others vs. DCB

Bank PLC, Civil Appl. No.500/16 of 2016 (unreported).

In those two cases, and indeed many others which I need not cite here, the Court of Appeal held that, when there is an allegation of illegality, that point alone is a sufficient one to warrant the granting of the application. That point, in my view, is a point which the Court of Appeal seems to have given a much weighty consideration when it comes to the decision whether to grant or not grant an application for extension of time.

In the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia**

(supra), the Court was of the view 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 purpose to

ascertain the point and if the
alleged illegality be established,
to take appropriate measures to
put the matter and the record
right".

See also the case of **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No.6, 7 and 8 of 2006 (unreported) and the case of **TanESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Application No 94 of 2016 (unreported).

All said and done, it suffices to note, as I hereby do, that, this being an application for extension of time; and taking into account that the Applicant has alleged matters of illegality, impropriety and irregularity, I am constrained, on the basis of the Court of Appeal's decision in the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** (supra), to allow this application.

In the upshot, therefore, this Court proceeds to grant the applicant the prayers sought in the Chamber summons and order as follows:

- (i) That, the Applicant is hereby granted 21 days from this date of the ruling of the Court, as an extended time within which to file a Notice of Appeal, against the decision of this Court dated 20th November, 2020.
- (ii) That, the granting of this application is with costs to the Applicant.

It is so ordered.

DATED at DAR-ES-SALAAM, THIS 08TH DAY OF
SEPTEMBER 2022



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HON. DEO JOHN NANGELA
JUDGE