

IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

MISC. COMMERCIAL APPLICATION NO. 60 OF 2022

(Originating from Commercial Case No. 43 of 2011)

KCB BANK TANZANIA LIMITED.....APPLICANT

VERSUS

VODACOM TANZANIA LIMITED.....RESPONDENT

RULING.

Date of last Order: 1st August 2022

Date of Ruling: 29th August 2022

MARUMA, J

This is an application for extension of time brought to this Court by way of a Chamber Summons made under Section 11(1) of the Appellate Jurisdiction Act, Cap 141 RE 2019 here in after to be referred to as AJA. The application is supported by a sworn affidavit by one Miss. Elisa Abel Msuya a learned advocate for the Applicant, KCB BANK TANZANI LIMITED.

The Applicant had the following prayers;

- i. Extension of time in order to file an appeal out of time as required by the law.
- ii. That costs and incidental abide the results hereof.
- iii. Any further reliefs the Hon. Court shall deem just and fit to grant.

The brief background of this application derives from the facts in the affidavit by the Applicant averred that on 23rd May, 2021 the Respondent filed Commercial Case No. 43 of 2031 against the Applicant jointly with Citibank Tanzania Limited. Subsequently and following an application to amend pleadings, Ms. Uluguru Resources Limited was assigned as co-defendant in the suit. That Respondent's claims were strictly resisted by the Applicant and Citibank Tanzania Limited. Uluguru Resources Limited never filed any pleadings and did not appear in the hearing there after. Thereafter, hearing of the case was conducted and the Court delivered its judgment and decree on March, 2017. Immediately thereafter the Applicant lodged notice of appeal and a letter to the Hon. D/Registrar requesting to be supplied with all document

necessary for the preparation of records of appeal.

Sometimes on 16th August, 2017 the Applicant was notified that the requested documents are ready for collection on payment of fees. The Applicant complied and collected the same as notified. She also paid the requisite fees. Having collected the documents as advised the Applicant noted an anomaly on the judgment and decree which mis-spelt the names of the Applicant leaving out the name "Bank". Under the circumstances the Applicant formerly requested to be supplied with another and correct judgment and decree bearing the correct names of the Applicant. The Applicant's letter was acted upon in the hearing ensued and where the Applicant's names was corrected accordingly. Unfortunately, the judgment delivered to the Applicant subsequently contained yet another discrepancy i.e. the date appearing on the judgment differed with the date the judgment was delivered. The Applicant therefore applied to be supplied with valid judgment in the letter dated 29th November, 2017 and same was corrected by the court ***Suo Motto*** and supplied as requested. The Applicant was late in filing the appeal as required she applied to be issued with the

Certificate of Delay which the same was issued. Unfortunately, the same was in contravention of the law. Sometimes on 13th July, 2021 when Civil Appeal No. 295 of 2017 filed by the Applicant to applied to the Court's decision was called for hearing. Consequently, leave was granted in order to incorporate valid certificate of delay in records of appeal. The original court case file was not immediately traceable. However, when same was retrieved and after Applicant read the court's records she found out that no letter was written by the Depute Registrar to inform the Applicant that the requested documents (valid judgment) as ready for collection. Under the circumstances it is not legally possible to prepare valid certificate of delay which is required to exempt time from the date the applicant requested the documents until the date she is informed that the same are ready for collection. On account of the legal irregularities stated in paragraph (11) above, on 25th April, 2022 when the Appeal was called for hearing Applicant made an application to withdraw the appeal so that she re-initiates the appeal processes afresh and the Court of Appeal accepted the prayer. Although the Order was made and granted on same day

i.e. 25th April, 2022 copy of the same was not readily available until on Friday, 29th April, 2022 afternoon therefore the Application is filed without undue delay. It is also stated in paragraph 5 of the sworn affidavit the Applicant filed appeal to the Court of Appeal immediately and without undue delay only that the Appeal was found to be incompetent and leave to withdraw was made and granted. All this time the Applicant was in the court corridors pursuing the appeal.

Further and after the Appeal in the Court of Appeal was withdrawn, the Applicant acted very promptly by filing this instant application. The Applicant has therefore acted without undue delay. The delay to file notice of appeal is a technical delay as opposed to actual delay as follows: -

- i. The appeal filed failed on a technical reason that the certificate of delay was invalidly issued.
- ii. That the Applicant is not alone to blame because the certificate of delay was issued by this Court on presumption that it is a valid certificate of delay only to be found to be invalid then after.

- iii. That technical delay constitutes sufficient ground to allow the Application for extension of time.

The Applicant established that the intended appeal exhibits prima facie grounds with higher chances of success. Thus, the only remedy and a constitutional one is to allow the application so that the irregularities in the impugned judgment/ decree of this Court is heard and decided by the higher court; the Court of Appeal.

The Respondent in his counter affidavit averred that since the Applicant was in possession of the certificate of delay issued on 24th October 2017, the Applicant had time to ask for it to be amended since he was aware of the mistake. The Applicant neglected to do the same and lodged an appeal with an invalid certificate of delay on 11th December 2017. In further reply to the contents of paragraph 11 Mr. Mrosso further noted that, when the appeal was scheduled for hearing, the Court of Appeal's generously granted the Applicant's prayer for adjournment to file a supplementary record of appeal containing a valid certificate of delay within sixty days of the order dated 13th July 2021. The Applicant failed to comply with the order of the Court of Appeal. He further state that

the Applicant had enough time to apply for the certificate of delay to be amended. There is no reasonable ground shown for the delay to warrant extension of time. Thus, it was his prayer that for the interests of justice, this Court should dismiss this application for want of merit.

During the hearing of this application the parties were represented by advocate Ms. Irene Mchau for the Applicant and advocate Mr. Junathan Lulinga for the Respondent.

Appreciating the submissions made by both counsel, there is only one issue which is enough to dispose of this application of which is whether the applicant has met the prerequisite as required by the law to adduce sufficient grounds to move this Court to grant an extension of time requested.

It is undisputed facts that, there were discrepancies in the record of the Court especially on the dates of the judgment and the certificate of delay as submitted by Ms. Mchau. Thus, why when the appeal was called on for hearing at the Court of Appeal the Applicant's prayer for adjournment to file supplementary records and a valid certificate of delay within sixty days was granted. But

surprisingly the Applicant did not do the same as it is evident in the records of the Court. This was also argued by Mr. Lulinga while contesting the application who submitted that notwithstanding the applicant was given sixty (60) days to file a supplementary record of appeal. On 25th April 2022, when the case was called again for hearing expected that the applicant to have filed the proper supplementary record of appeal. The Applicant prayed to withdraw the appeal to allow for the appeal process to be restarted without accounting as to why they failed to file supplementary record of appeal as granted.

As it was argued by the counsel for the respondent which I am also convinced that ,the applicant's attitudes in dealing with the appeal suggest that their intention is to make the use of delay tactics to delay execution of the judgment. It is also unbelievable for the Applicant who was in possession of the said certificate of delay since it was issued on 24th October 2017 until and when the case was called for hearing on 13th July 2021 at the CA, when the applicant prayed for adjournment because he wanted to rectify the invalid date in the certificate of delay which he never did so within

the prescribed time.

At this juncture I also agree with the submissions made by the counsel for the respondent that, the parties cannot conduct the litigations as they deemed fit. This is based on the settled principle that those who seek justice in court of law must file the proceedings within the prescribed time otherwise, they will face the law of limitation as a bar. I am of the settled view that, the time which was given by the Court of Appeal for the applicant to rectify the record and file the proper record of appeal was supposed to be counted for as to why the applicant did not comply with the court order. The reason given by Ms. Mchau that while they were on the process of filing, they found that there was no letter written by the Deputy Registrar to inform them that the certificate of delay was ready for collection. Thus, why they failed to file supplementary record as per order of 13th July 2021 hence withdraw of the appeal referring the facts to be stated in paragraph 5-15 in the affidavit in support of the application. I find her arguments are not strong enough to justify the good grounds to warrant the grant of this application due to the fact that, in the affidavit the applicant did

not count for the days from 13th July 2021 when the order was given up to the 25th April 2022 when the matter was called again for hearing at the Court of Appeal. I take note that the certificate of delay is the Court document and it is a duty of the court to rectify the discrepancy. However, the Applicant should show how each day in between 13th July 2021 when the order was given up to the 25th April 2022 was counted for. This is not seen in paragraphs 5-13 of the said affidavit. The delayed for three days from 29th April 2022 to 2nd May 2022 when this present application was filed in this Court is not sufficient to establish good grounds as pointed out by the counsel for the Respondent cited the position established in the case of **Dr. Ally Shaby vs Tanga Bohora Jamaat**, (1997) TLR 305 at page 7 to page 8. Also, the case of **A-One & Product brothers vs Abdallah Almas & Brothers**, Civil Appl No. 586/18 of 2017 where it is provided a principle that any person seeking for extension of time must establish sufficient reasons for his delay but also to account for each day of delay.

In this application the Applicant did not accounting for each day of the delay and showing good cause of the delays in order to

warrant the court to grant the extension of time as stated, in the case of **ALLIANCE INSURANCE CORPORATION VERSUS ARUSHA ART LIMITED**, Civil Application No. 512/2 of 2016. At page 5 the Court stated that;

"...It is apparent that an application for enlargement of time within which to take any step in legal proceedings is entirely in the discretion of the court to grant or not to grant it. It is also settled law that extension of time may only be granted where it has been sufficiently established by an applicant that the delay was with sufficient cause..."

Also, in the case of **Allan Mng'ong'o vs Christina Kimela**, Misc. Land Application TZHC No. 17 of 2021.

In the present application, it is evident that the Applicant has not established sufficient cause for the delays as discussed above. In the event I find this ground is sufficient to dispose this application with no further determination of other grounds in granting for extension of time. In the upshot, the application is hereby dismissed for lack of merit with cost. It is so ordered.

Dated at Dar es Salaam this 29th day of **August**, 2022.



A handwritten signature in black ink, consisting of several loops and a final vertical stroke, representing the name Z. A. Maruma.

Z. A. MARUMA

JUDGE

