

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 149 OF
2022**

(Arising from Commercial Case No. 153 of 2013)

BETWEEN

CONTINENTAL SERVICES LIMITED..... APPLICANT

Versus

CHINA RAILWAY JIANCHANG ENGINEERING

COMPANY LIMITED..... RESPONDENT

Date of last order: 5th October, 2022

Date of Ruling: 27th October, 2022

RULING

MKEHA, J.

In the present application, the applicant is moving the court for an order of extension of time to lodge a notice of appeal to the Court of Appeal of Tanzania against the whole judgment and decree of the High Court,

Commercial Division at Dar es salaam delivered on 16th April 2018 in Commercial Case No. 153 of 2013.

The applicant's first attempt to appeal was unsuccessful, when her appeal was struck out for having been instituted beyond the time prescribed under rule 90 of the Court of Appeal Rules.

The application before the court is made under section 11 (1) of the Appellate Jurisdiction Act. The same is supported by the affidavits of Mr. Paul Mremi Lyimo, the Managing Director's applicant and Mr. Elvaison Maro learned advocate for the applicant. On the other hand, the application is contested through the counter affidavit of Mr. Dickson Paulo Sanga, learned advocate for the respondent. The application was orally heard. Mr. Elvaison Maro learned advocate represented the applicant while Mr. Sanga Learned advocate represented the respondent.

According to Mr. Maro learned advocate for the applicant, reasons in support of the application are contained in paragraphs 4 and 9 of the affidavit. The affidavit indicates that, the applicant was at the Court of Appeal up to 1st September 2022. This application was filed before the court on 7th September 2022. In his view, the time spent is 7 days which is reasonable for the preparation and filing of this application. Mr. Maro

learned advocate further submitted that, the judgment in Commercial Case No. 153 of 2013 emanated from material procedural irregularities and illegalities. He made reference to paragraph 14 of his affidavit and paragraphs 3 & 4 of Mr. Mremi's affidavit, which specifically indicate that, there was no evidence tendered before the trial court. According to the learned advocate, the awarded interest of 12/% on the decretal sum was illegal.

Mr. Sanga learned advocate submitted in reply that, the reasons advanced by the applicant are not sufficient to warrant grant of the application. He made reference to paragraphs 5 and 7 of his own counter affidavit whereas the contents of paragraphs 4 & 9 of the applicant's affidavit were vehemently denied. According to the respondent, there was ignorance of procedural law and not technical delay as suggested by the applicant. The learned advocate for the respondent further submitted that, the submission regarding delay of six (6) days does not feature in the applicant's affidavit. The six days have not been accounted for.

According to the learned advocate, witness statements were clearly admitted and the opposite party got time to cross-examine the witness. In his view, Rule 56 (3) of the High Court (Commercial Division)

Procedure Rules of 2012, enables lesser weight to be accorded to a witness statement of a witness who did not appear in court for cross-examination. He further submitted that illegality should be apparent on the face of record. Supporting his position, he cited the case of **SELEMANI SEIF VS HAFIDHI SAID, MISCELLANEOUS CIVIL APPLICATION OF 2018**. Responding in respect of award of interest, it was the learned advocate's position that, the complaint did not fall within the purview of illegality.

The issue is **whether there are sufficient reasons for the delay**. Amongst others, the applicant put forward some procedural irregularities and illegalities as reasons for the delay. It was specifically stated in paragraphs 3, 4, and 14 of the applicant's affidavits that, illegalities are apparent on the face of record due to the fact that, there was no evidence tendered before the trial court.

Carefully reading the court record particularly the proceedings dated 13th October 2017, it is clear that, the witness statement of DW1, one Paulo Lyimo was neither admitted nor adopted in the court record as evidence in chief of the witness. I do agree with the learned advocate for the respondent that, the witness (DWI) was present and cross-examined before the court and the judgment was entered based on the evidence

of both parties including the evidence of DW1. However, as correctly submitted for the applicant, the witness statement was not formally admitted before the court leave alone being adopted as evidence in chief. It is common knowledge that, illegality on the face of record suffices to be a ground for extension of time regardless the length of delay. The decision in **PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE VS DERVAM VALAMBIA (1992) TLR 185**, is an authority to that legal position.

It is for the foregoing reason I hold the application to be meritorious. The application is granted. Thirty (30) days' time is given for the applicant to achieve the purpose for which the present application was filed. No order is given as to costs. It is so ordered.

Dated at DAR ES SALAAM this 26th day of October, 2022.




C. P MKEHA

JUDGE

26/10/2022

Court: Ruling is delivered in the presence of the parties' advocates.



C.P. MKEHA
C.P MKEHA

JUDGE

26/11/2021