

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

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 146 OF 2022

(Arising from Commercial Cause No. 2 of 2020)

JITESH JAYANTILAL LADWA1ST APPLICANT

INDIAN OCEAN HOTELS LIMITED.....2ND APPLICANT

VERSUS

DHIRAJLAL WALJI LADWA1ST RESPONDENT

CHANDULAL WALJI LADWA.....2ND RESPONDENT

NILESH JAYANTILAL LADWA3RD RESPONDENT

RULING

Date of last order: 22/11/2022

Date of ruling: 12/12/2022

A.A. MBAGWA, J.

This is an application for extension of time within which to file a notice of appeal and application for leave to appeal to the Court of Appeal. The application was brought by way of chamber summons made under section 11(1) of the Appellate Jurisdiction Act and it is supported by the affidavit affirmed by Jitesh Jayantilal Ladwa, the 1st applicant. In contrast, the



application was opposed by the respondents through joint counter affidavit affirmed by the respondents namely, Dhirajlal Walji Ladwa, Chandulal Walji Ladwa and Nilesh Jayantilal Ladwa.

As I commence this ruling, I find it apposite to give a background of the matter albeit in brief.

The present application emanates from Commercial Cause No. 2 of 2020 in which the respondents and the applicants are petitioners and respondents respectively. In the said Commercial Cause No. 2 of 2020, the respondents, in terms of section 233(1) and (3) of the Companies Act [Cap 212 R.E. 2002] petitioned in this Court seeking for, among other reliefs, a declaratory order that the conduct and operations of the 1st respondent, Jitesh Jayantilal Ladwa (in this application the 1st applicant) were unlawful and prejudicial to the interests of the company, shareholders, directors and members of the company. As the matter was pending, the applicants prayed the trial judge (Hon. Nangela J) to recuse himself from the conduct of the petition. In his ruling delivered on 28th August, 2020, the trial judge refrained from recusal thereby dismissing the applicants' prayer.



The applicants, Jitesh Jayantilal Ladwa and Indian Ocean Hotel were not amused by the decision of Hon. Nangela J hence they appealed to the Court of Appeal via Civil Appeal No. 435 of 2020. However, as bad luck would have it, their appeal hit the rock as it was struck out for being incompetent. While upholding the preliminary objections raised, the Court of Appeal at page 14 of its judgment made the following remarks;

'Conversely, there is nothing before us to show that the impugned order, locked the doors for the appellants in pursuit of justice through the suit. We are thus of the firm view that there was nothing presented to augment that justice was compromised and thus it has no legs to stand on. Indeed, even upon determination of the instant matter, there is still an opportunity for the appellants' concerns to be addressed if properly channeled within the confines of the law. Therefore, without a doubt, the instant appeal is premature since the impugned ruling did not finally and conclusively determine the suit filed by the appellant and still pending at the High Court. The first preliminary point of objection is thus found to have substance and sustained'



To my dismay, despite the clear holding of the Court of Appeal, the applicants have now filed the present application purportedly seeking extension of time to lodge a notice of appeal and to file an application for leave to appeal against the decision of this court (Hon. Nangela J) delivered on 28th August, 2020. The applicants, in their affidavit, contend that the application is meritorious as they fell out of time because they were pursuing Civil Appeal No. 435 of 2020. In rebuttal, the respondents strongly resisted the application stating that the applicants are playing delaying tactics. It is noteworthy that Commercial Case No. 2 of 2020 is still pending in this court.

When the matter was scheduled for hearing, the applicants were represented by Jeremiah Mtobesya assisted by Sisty Bernard, learned advocates whilst the respondents enjoyed the services of Robert Rutaihwa, learned advocate.

Submitting in support of the application, Mr. Sisty Bernard adopted, at the outset, the affidavit to form part of his submission. He continued that the decision sought to be challenged was pronounced on 28th August, 2020. The counsel expounded that following the decision of the Court of Appeal that the applicant was required to seek leave of the Court before going to the Court of Appeal, the Court proceeded to strike out the said appeal. Mr.

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Bernard submitted that this means that the applicants were supposed to seek and obtain leave before going to Court of Appeal.

Mr. Bernard added that from 28th August, 2020 when the decision sought to be challenged was delivered up to 31st August, 2022 when the appeal was determined by the Court of Appeal, the applicants were diligently prosecuting their appeal which was filed within time. As such, Mr. Bernard submitted that the period within which the applicants delayed falls under technical delay. To buttress his point on technical delay, the counsel referred this court to the case of **Fortunatus Masha vs William Shija and another TLR [1997] 154**. In view of his submission, it was his humble prayer that extension be granted.

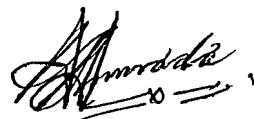
Bernard's submission was supplemented by Mtobesya who told the court that the applicants managed to account for each day of delay at paragraphs 11 through 15 of the affidavit. He insisted that the time spent by applicants while diligently prosecuting the matter was liable to be excluded. Mr. Mtobesya finally prayed the court to consider the provisions of section 21 (2) of the Law of Limitation Act and consequently grant the orders as contained in the chamber summons.

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Upon being probed by the court at page 13 through 15 of the judgment in Civil Appeal No. 435 of 2020, Mr. Mtobesya conceded that the ruling sought to be impugned is not final but maintained that this issue was to be considered in the application for leave and not in this application.

In reply, Mr. Robert Rutaihwa, learned counsel for the respondents strongly opposed the application. Like his counter parts, he prayed to adopt the joint counter affidavit to form part of his submission.

It was the Rutaihwa's submission that the application is out of misconception and a pure abuse of the court process. He proceeded that the applicant's affidavit which Mr. Bernard adopted includes judgment of the Court of Appeal in which the applicants had attempted to impugn the decision of this Court. Mr. Rutaihwa clarified that from page 14 throughout 15, the Court of Appeal was very articulate that decision sought to be challenged is not appealable but the applicants are still insisting on challenging the decision. The respondents' counsel further lamented that the applicants did not explain how they can appeal against the decision which the Court of Appeal already held that it is not appealable. It was Rutaihwa's conclusion that the applicants are trying to use the back door which already is closed by the Court of Appeal.

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With regard to the ground of technical delay, Mr. Rutaihwa was opined that the delay was not technical one rather it was due to ignorance which is not an excuse in law. He therefore distinguished the case of **Fortunatus Masha (supra)**.

The respondents' counsel continually submitted that application for extension of time is granted at the discretion of court after considering different factors. He argued that the merits of this application rest on the reasoning of the Court of Appeal in Civil Appeal No. 435 of 2020 which is attached to the applicants' affidavit.

Further Mr. Rutaihwa submitted that section 21 of the Law of Limitation Act cited by the applicants' counsel was out of context because it provides for automatic exclusion of time. He opined that if the applicants believed on the *bonafide* prosecution of appeal, they would have immediately instituted application for leave and lodged notice of appeal without bringing the present application.

Mr. Rutaihwa concluded that the application is without merits hence it is liable to be dismissed with costs.

In a brief rejoinder, Mr. Mtobesya said that it is not the right time to look at the decision of the Court of Appeal in Civil Appeal No. 435 of 2020. He stressed that whether the application is an abuse of court process, it is subjective. Responding to the critique of citing section 21 (2) of the Law of Limitation Act, Mtobesya maintained that the provision is relevant to the present application.

I have given due consideration to the rival submissions as well as the depositions of the parties. The pivotal issue for determination of this application is whether the applicants have demonstrated sufficient cause to warrant extension of time. Admittedly, there is no fast and hard rule as to what constitutes good cause. Rather, sufficient causes are determined by reference to all the circumstances obtaining in particular case. See **Regional Manager, Tanroads Kagera vs. Ruaha Concrete Co. Ltd**, Civil Application No. 96 of 2007, CAT at Dar Es Salaam.

Aware of the absence of decisive factor in determining the good cause, courts invariably take into account various considerations including but not limited to length of delay involved, reasons for delay, the degree of prejudice, if any, that each party is likely to suffer, the conduct of the parties and the need to balance the interests of a party who has a decision in his

favour against the interests of a party who has a constitutionally underpinned right of appeal. See **Jaliya Felix Rutaihwa vs Kalokora Bwesha & Another**, Civil Application No. 392/01 of 2020, CAT at Dar es Salaam, **Paradise Holiday Resort Limited vs. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018, CAT at Dar Es Salaam and **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372 of 2018, CAT at Dar Es Salaam (Unreported).

I have strenuously appraised the depositions and their annexures particularly the judgment of the Court of Appeal in Civil Appeal No. 435 of 2020. It is quite clear that the Court of Appeal, in unambiguous terms, pronounced that the ruling that the applicants intend to impugn is not appealable. Further, while submitting, this court drew the attention of Mr. Mtobesya to the holding of the Court at page 15. Despite his concession that the ruling of this court (Hon. Nangela J) was not final and conclusive as held by the Court of Appeal, Mr. Mtobesya persistently maintained that the application is meritorious.

As hinted above, while determining application of this nature, the court, more often than not, looks at different factors including the conducts of the parties. I have had an occasion to navigate through the annexures to the applicants' affidavits and noted that the applicants have been raising several

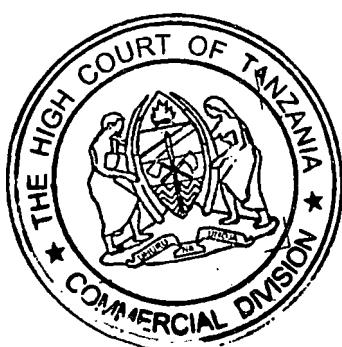


trivial issues in Commercial Cause No. 2 of 2020 which the Court of Appeal has overruled. After holistic evaluation of the record, I am opined that the applicants' conduct is malicious in the sense that it is intended to delay the hearing and determination of Commercial Cause No. 2 of 2020 which is still pending in this court. Indeed, such a move should not be condoned. It is against this backdrop I find that the applicants have failed to demonstrate good cause for extension of time. Instead, I am of the considered view that the application is an abuse of the court process whose intention is to delay the determination of the central dispute between the parties in Commercial Cause No. 2 of 2020.

In view of the above, I find the application without merits and consequently I dismiss it. The applicants should pay costs of this application.

It is so ordered

Right of appeal is explained.



A.A. Mbagwa

JUDGE

12/12/2022