

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISCELLANEOUS COMMERCIAL APPLICATION NO. 35 OF 2023
(Arising from Commercial Case No. 5 of 2018)

OLEPASU TANZANIA LIMITED

t/a MAXAM EAST AFRICA.....APPLICANT

VERSUS

HEINKEKEN BROUWERIJEN B.V.....1st RESPONDENT

HEINEKEN INTERNATIONAL B.V.....2nd RESPONDENT

Date of Last Hearing: 08/05/2023

Date of Ruling: 24/05/2023

RULING

MKEHA, J:

The applicant is moving the court for an order of extension of time within which to file notice of intention to appeal against the judgment and decree of this court delivered on 29th August 2019 in Commercial Case No. 5 of 2018. The application is made under section 11 of the Appellate Jurisdiction Act. The chamber summons is supported with affidavits sworn by one Gachao Kiuna, the Director and shareholder of the applicant, Messrs Salim Mushi and Bryson Shayo, learned advocates for the applicant.

In terms of paragraphs 3 and 4 of the applicant`s affidavit, the applicant had earlier timely lodged a notice of appeal which was followed by filing of actual appeal registered as Civil Appeal No. 321 at the Court of Appeal of Tanzania. In terms of paragraph 8 of the said affidavit, Civil Appeal No. 321 of 2019 was on 23/09/2022 struck out by the Court for reasons of incompetence.

According to Messrs Salim Mushi and Bryson Shayo learned advocates for the applicant, one of the reasons for extension of time is illegality of the decision sought to be challenged. This has reflection in paragraph 24 of the applicant`s affidavit. The learned advocates submitted that, the trial judge had raised an issue which she decided without hearing the parties. The learned advocates insisted that, the respondents had also complained about the said illegality in their cross appeal.

The respondents contested the application through counter affidavits sworn by Ms. Josephine Safiel, one of the respondents` advocates who represented the respondents in Commercial Case No. 5 of 2018 before this court as well as Civil Appeal No. 321 of 2019 before the Court of Appeal of Tanzania. In the said counter affidavits and the submissions by Mr. Joseph Ndazi learned advocate for the respondents, presence of illegality in the

impugned decision was not challenged. All what the respondents maintained was that, the alleged illegality was an afterthought having not been raised in the previous appeal which was struck out for reasons of incompetence.

The only issue for determination is **whether the applicant has sufficiently accounted for the delay**. It is true that the period between 13th September 2019 and 23rd September 2022 was spent by the applicant in pursuing Civil Appeal No. 321 of 2019 before the Court of Appeal. Whereas the appeal was struck out by the Court on 23/09/2022, the present application was filed on 14/03/2023.

The learned advocate for the respondents was of the view that, the applicant had failed accounting for every single day of delay. While holding the said view, the learned advocate was unable to dispute the fact that, the decision sought to be challenged suffered from an infirmity of illegal nature. It is trite law that, illegality of the decision sought to be challenged constitutes sufficient reason for extension of time regardless the extent of delay. See: **PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE vs. DEVRAM VALAMBIA (1992) T.L.R. 185.**

It is for the foregoing reasoning I hold the applicant to have sufficiently accounted for the delay. I thus grant extension of time for the applicant to file notice of intention to appeal against the judgment and decree of the High Court (Commercial Division) dated 29th August 2019 in Commercial Case No. 5 of 2018. Thirty (30) days ` time is given for the applicant to achieve the said purpose.

DATED at DAR ES SALAAM this 24th day of May 2023.




C. P. MKEHA

JUDGE

24/05/2023

Court: Ruling is delivered this 24th day of May 2023 in Chambers in the presence of Mr. Salim Mushi and Ms. Lyabonga learned advocates for the applicant and Ms. Comfort Opuku learned advocate for the respondents.




C. P. MKEHA

JUDGE

24/05/2023