IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO 120 OF 2023

(Arising from Misc. Commercial Application No. 69 of 2023)

KEITH GEORGE MAGINGA *(as Administrator of the estate of the Late Daniel Maginga)*..... **APPLICANT**

VERSUS

STANBIC BANK TANZANIA LIMITED..... **RESPONDENT**

RULING

Date of Last Order: 30/10/2023

Date of Delivery: 03/11/2023

MATUMA, J.

The applicant is seeking leave to appeal to the Court of Appeal against the order of this court which extended time to the respondent to appeal to the Court of Appeal against the decision of this court in Commercial Case No. 105 of 2015. The applicant feels that the Respondent did not sufficiently account for each day of the delay and is now intending to challenge the order of this court which determined that the Respondent had established good cause warranting the extension she obtained.

This application is made under section 5 (1) (c) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009, and supported by an affidavit sworn by Roman S. L. Masumbuko.

The Respondent having been served with this application filed his counter affidavit and could not let it go without a preliminary issue. She thus raised a preliminary objection to the effect that the order sought to be appealed is non-appealable hence this court lacks jurisdiction to hear and grant leave on this matter.

At the hearing of this application, Mr. Roman Masumbuko learned advocate represented the applicant herein while the respondent was represented by Mr. Zacharia Daudi learned advocate.

Both learned advocates agreed that both the preliminary objection and the main application be argued together and this court gets time to digest and determine both in one ruling. Being aware that it has been a judicial practice at times for the preliminary objection to be argued together with the main matter and the court finally makes its finding on the preliminary issue if it suffices to dispose the matter and if not then the court proceeds to make the findings on the main matter, I allowed the parties to argue both

the preliminary objection and the main application. The parties submitted first on the preliminary objection and then they argued on the main application.

Mr. Zacharia learned advocate for the respondent argued for the preliminary objection stating that the order intended to be challenged on appeal is non-appealable. He was of the argument that an order extending time for one to appeal is not one of the orders listed under section 5 of the Appellate Jurisdiction Act be it with leave, without leave, and or under a certificate on point of law. He finally argued that the order extending time is an interlocutory and thus not appealable within the meaning of section 5(2) (d) of the Appellate Jurisdiction Act. He then referred this court to the decisions in the cases of ***Prime Catch (Exports) Limited and 5 Others vs Diamond Trust Bank Tanzania Limited, Civil Application No. 296/16 Of 2017*** (CAT) and ***Tanzania Motors Services Limited and Another vs Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2005*** (CAT) all of which speaking on interlocutory orders.

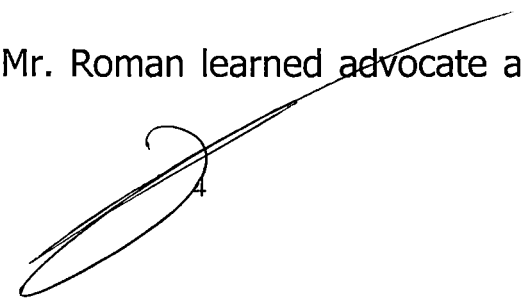
On his part, Mr. Roman the applicant strongly objected the same and averred that the application is made under section 5(1) (c) of the Appellate Jurisdiction Act (supra) which is structured for any other orders of the High

Court upon which leave is granted and that an order for extension of time is not an interlocutory one. Explaining further Mr. Roman learned advocate argued that extension of time was granted without there being any pending matter and the application was an independent one and that the court in granting extension of time finished the rights of the parties as far as the extension of time is concerned. He finally argued that the cited cases by the Respondent are distinguishable as they do not say that an order for extension of time is an interlocutory order.

As a matter of law and practice, whenever there is a preliminary objection the same must be disposed of before dwelling into the merits or otherwise of the main matter. I therefore determine the preliminary objection and if it will survive the application itself, then the same will as well be determined in accordance to the arguments of the parties already made.

Without chewing words, I find that the preliminary objection is without any merit and the same should be dismissed because; the preliminary objection raised was construed and argued to mean that the order sought to be appealed in the instant application was an interlocutory one.

In fact, there is no dispute that an interlocutory order is not appealable but as rightly argued by Mr. Roman learned advocate an order extending



time to the party to appeal is not an interlocutory one. An application for extension of time is always brought as an independent suit standing on its own and when it is determined, it is conclusively gone. It is instituted when there is no main suit pending and when its decision is given, it is delivered in the absence of a pending suit.

The suit subsequently filed after the extension of time cannot be relied upon to make the order extending time as an interlocutory because at the time of the order such filed suit or appeal was not in existence. The preliminary objection is thus overruled. That leaves the application for leave surviving on record. I am now moving forward to determine it.

In his submission for the application Mr. Roman learned advocate adopted what he termed as "*skeleton submissions*" earlier on filed which is however not a skeleton but an extensive arguments and citations on eleven pages typed under very small fonts. He submitted that according to the cases cited in the said skeleton submissions, their appeal is arguable before the Court of Appeal. He raised in his affidavit a total of eight grounds upon which leave is sought for the intended appeal.

He then argued that it is not for this court to determine whether the arguable issues have merits or not as by doing so it would be an overstep.

That it suffices that they have raised issues which the respondent disputes and thus arguable issues.

The learned advocate then mentioned the issues including that this court at the time it granted the extension of time had no jurisdiction as it was improperly moved, that the court failed to exercise its discretion judiciously because the respondent did not account for each day of the delay for her inordinate delay. He further asserted that the court did not as well determine the issues of defectiveness of the affidavit.

On his part Mr. Zacharia the respondent's advocate adopted the contents of their counter affidavit and asserted that paragraph 13(a) of the applicant's affidavit does not show any arguable issues to warrant this court to grant leave for the applicant to appeal.

He submitted that the Honourable Judge exercised his discretion judiciously and that the applicant's counsel in his submission was misleading this court when he argued that they raised a preliminary objection in relation to the jurisdiction of the court but the court disregarded it without making determination thereof while in fact the same was heard and its ruling delivered.

Having heard the parties for and against this application I am of the firm finding that the decision given by the court in the exercise of its discretion is not challengeable unless the discretion is injudiciously exercised. That was the stance in the case of ***DPP vs A.M. Rajpar (1982) TLR 213*** in which the court held that;

> *"Where a discretion had been injudiciously exercised, it is no discretion at all"*

See also the case of ***Maheri Marugu vs Republic (1984) TLR 209*** in which Hon. Justice Katiti as he then was held that the discretion must be done judicially and not arbitrarily. The essence of the two cited decisions supra is that the court should not be blasted when exercising its discretionary powers unless it is proved that the discretion was not exercised judiciously but arbitrarily.

Now, in determining whether the discretion was exercised judiciously or arbitrarily, a look will always be on whether in the exercise of the discretionary powers the court whose decision is sought to be challenged acted within the ambit of the law and the guiding rules. For extension of time, the guiding rule is for **the applicant to account for each day of the delay.** Once that is done to the satisfaction of the court, the matter is over.

The circumstances of each case shall dictate whether the grounds for extension in that particular case established the good cause for the delay or not. In the instant matter among the reasons upon which this court observed to have established good cause for delay is that the respondent after the dismissal of her suit took a wrong path to the Court of Appeal when she rushed through revision proceedings instead of an appeal. At page 4 of the ruling for instance, the Honourable Judge ruled out;

> *"In the application at hand, it is clear that the applicant timely filed Civil Application No. 55/16 of 2019 in the Court of Appeal but later on realized that the course taken was incorrect hence she applied to withdraw the said Civil Application. It is on record that Civil Application No. 55/16 of 2019 was withdrawn on 3rd day of May 2023 and the present application was filed on 12th day of May, 2023. This, in my view, exhibits that the applicant has been diligent to pursue her matter and she has no ill conduct whatsoever as she sought to challenge the decision from the very beginning."*

This court and the Court of Appeal have ruled out without numbers that when the applicant in an application for extension of time establishes that the time to appeal got lost when he or she was in the honest and diligent prosecution of other suits or applications, that in itself is a good cause for extension of time. See for instance the cases of ***Fortunatus Masha vs***

William Shija and Another (1997) TLR 154 and ***Bharya Engineering & Contracting Co. Ltd versus Hamoud Ahmed Nassor, Civil Application No. 342 of 2017***.

In that respect the Honourable Judge in granting extension of time on the basis that the respondent delayed to appeal because he had taken an incorrect course to challenge the impugned decision was within the ambit of guiding rules for extension of time and thus acted judiciously in the exercise of his discretion to extend the time.

Such discretion cannot therefore be challenged or else we would be trying to set out a limit fettering the discretion of the court which is in fact wrong as it was held in the case of ***Dimension Data Solutions vs Wia Group Limited & Others, Civil Application No. 128 of 2016*** where it was held that;

> *"The limitation period of 60 days could not mean to apply to applications for extension of time.* ***Fixing a time limit would have the effect of fettering the discretion of the court."***

See also; ***Tanzania Rent A Car Limited vs Peter Kimuhu, Civil Application No. 226/01 of 2017 (CAT)*** which held that there is no

specific time limit set within which an application for extension of time should be filed.

The two decisions supra are to the effect of protecting the discretion of the court in granting extension of time at its wide range provided that the discretion is exercised judiciously. This is due to the fact that no matter the length of the delay, the court should be free to determine the circumstances of the delay in each particular case and exercise its discretion of whether or not to grant the extension.

The discretion of the court cannot be measured by **satisfaction** or **otherwise** of either party to the proceedings. Ruling otherwise would be fracas at the Court of Appeal for every party who would be unsatisfied against the order extending time to his opponent would wish to appeal to the Court of Appeal not because the extension of time was granted arbitrarily but because in his opinion, the grounds upon which extension of time was granted were not sufficient to account for each day of the delay. Allowing the litigants to dictate what amounts and what does not amount to sufficient cause would simply mean the discretion whether or not to grant extension of time is transferred from the court to the litigants.

Therefore, opinions of advocates or their clients cannot be used to fetter the discretion of the court in granting or refusing to grant the extension of time. I take the stance I took in the case of ***Mnema Microfinance Limited versus Bertha Mombela, Labour Revision no. 3 of 2022,*** High Court at Tabora in which I ruled out;

> *"The Court or commission cannot be faulted for the exercise of its discretion unless such discretion was exercised injudiciously".*

The learned advocate for the Applicant having not established that this court exercised its discretion arbitrarily and not judiciously, deserves no leave to appeal. Leave is not granted lightly on the mere fact that the applicant has raised issues of facts and law. There must be some explanations warranting such issues to be placed before the Court of Appeal for its determination. Not a mere listing of the issues however strong they are. Refer to the decisions in ***British Broadcasting Corporation vs Erick Sikujua Ng'maryo, Civil Application No. 138 of 2004*** and ***Harban Haji Mosi vs Omar Hilal Seif and Seif Omar, Civil Reference No. 19 of 1997***. In the latter case herein the Court of Appeal for instance speaking on the purposes of the provision requiring leave for one to appeal, made it clear that;

"The purpose of the provision is therefore to spare the court the specter of unmeriting matters and to enable it to give adequate attention to cases of the public importance"

In the circumstances, I don't see any importance in granting leave to the Applicant for him to go to the Court of Appeal just to argue his opinion to the effect that had he been the High Court Judge presiding the matter, he would have determined the grounds of delay by the Respondent as having not established good cause for the delay and deny the extension sought.

In that respect I refuse to grant leave to the applicant to appeal to the Court of Appeal of Tanzania against the discretionary order of this court for he has failed to establish that such order was given arbitrarily and not judiciously. I also find that this application was made frivolously and it is hereby dismissed with costs.

It is so ordered.

MATUMA

JUDGE

03/11/2023

COURT;

Ruling delivered in the presence of Norbert Tarimo learned advocate for the applicant and Zacharia Daudi learned advocate for the respondent.

MATUMA

JUDGE

03/11/2023