

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM  
MISC. COMMERCIAL APP. NO. 161 OF 2022  
(Arising from Commercial Case No.132 of 2015)**

BARRETTO HAULIERS (T) LTD ..... APPLICANT

VERSUS

TATA AFRICA HOLDINGS (T) LIMITED.....RESPONDENT

**RULING**

Last order: 06<sup>th</sup> December, 2022  
Date of Ruling: 24<sup>th</sup> March, 2023

**NANGELA, J.**

On the 19<sup>th</sup> day of September, 2022, the Applicant herein filed an application in this Court by way of a Chamber Summons supported by an affidavit of one Richard Barretto. The application was brought under section 11 (1) of the Appellate Jurisdiction Act (Cap 141 R.E 2019) and Rule 47 of the Tanzania Court of Appeal Rules, 2019. The Applicant is seeking for the following orders of the Court:

1. This Honourable court be pleased to extend time for the Applicant to file a Notice of Appeal against the decision of this Honourable Court in Commercial case No. 132 of 2015 dated 13<sup>th</sup> May, 2016 by Honourable Mansoor, J.
2. Costs of this application.
3. Any other relief as the court may deem fit and just to grant.

On the 27<sup>th</sup> day of October, 2022, the parties appeared before me for orders and the matter was set to be disposed of by way of written submission. A scheduling order for the filing of submissions was given, and the parties have duly complied with it, hence this ruling. Mr. Raymond Wawa, Learned Advocate argued the application on behalf of the Applicant while the Respondent enjoyed the legal service of Mr. Erick Lusiu Peter, Learned Advocate.

Submitting in support of the prayers sought, the Applicant's legal counsel briefly narrated the background of this matter noting that, the Applicant was unable to file a notice of

appeal within prescribe time because of there being several other applications in Court in respect of the same case.

He contended that, on 12<sup>th</sup> November, 2015 the Respondent instituted a summary suit against the Applicant vide Commercial case No. 132 of 2015, which was subsequently followed by an application No. 329 of 2015 seeking a leave to appear and defend the suit. On 31<sup>st</sup> March 2016, leave was granted with condition to deposit the sum of USD 96,859 within two months.

According to the Applicant's counsel, before the expiration of the time given (60 days), the Court entered judgment in favor of the Respondent, that being only 43 days instead of 60 days as earlier given. He went on further to submit that, the Respondent was decreed to a sum of USD 132,000 plus 12% interest per month from August 2014 to the date of judgment.

The Applicant further submitted that, being dissatisfied with the judgment, he filed a Notice of Appeal which was within time, but the same was struck out. He then filed a Notice of Motion for stay of execution but the same was also struck out

for being filed out of time and without first seeking leave of the court. He again filed an application for extension of time but still, that was as well struck out on technicalities.

Regarding the issue of extension of time, the Applicant submitted that, the Court is empowered to exercise its discretion to grant an extension under section 11 (1) of the Appellate Jurisdiction Act (Cap 141 R.E 2019). From that provision, he contended, the Court is empowered to grant extension even if the time given for notice or making an application has already expired. He also submitted, however, that, this Application has to be filed before this Court despite the fact that the Notice of Appeal in the Court of Appeal is intended to set a motion for an Appeal before the Court of Appeal as provided under Rule 47 of the Court of Appeal Rules.

The Applicant's counsel was of the view that, the contents on Counter Affidavit do not dispute the alleged facts in the affidavit. He asserted that, the initial Notice of Appeal was filed well in time but was struck out on technicalities. And, he added, there after there was a series of other applications in the High Court and in the Court of Appeal, where by the

Applicant was pursuing them, and urged the Court to consider that as a reasonable ground to grant this application.

To bolster his submission, he pointed out the case of **Mr. Fortunatus Masha vs. William Shija and another**, [1997] TLR. 154 as a relevant supporting case to rely on. He went on submitting as another ground for the extension that, there was irregularity and or illegality that needed to be looked at as the High Court proceeded to issue Judgment prematurely, and contrary to the Order of the same Court issued on 31<sup>st</sup> March/2016, and, not only so, but also that, the said judgment and decree granting interest per month including 12%, 7% and 2% which was contrary to the law under summary procedure.

He argued further that, the Court entered judgment without any proof from the Respondent and, that, whenever there is illegality in the decision to be challenged, that will be the ground for the granting of an application for extension of time.

To support his position, he cited for this Court' reference, the Case of **Principal Secretary, Ministry of Defense and National Service vs. Devram valambhia**. TLR (1992) 85

and the case of **Attorney General vs. Consolidated Holding Corporation and another**, Civil Application No. 26 of 2014 (unreported), and case of **Tanzania Breweries Ltd vs. Edson Dhobe & Others**, Miscellaneous Civil Appeal No. 96 of 2000 (unreported).

Based on those authorities, he urged this Court to grant the application since, in his view, the Applicant has furnished sufficient cause and managed to comply with the conditions for extension of time.

In reply, Mr. Lusiu Peter contested the Application. He first adopted the counter affidavit and submitted, regarding the issue that the Applicant was given 2 Months, i.e. 60 days to deposit US\$ 96,859 and Judgments being entered on 43<sup>rd</sup> day, that, according to the record, the Applicant was given only two weeks to pay the agreed amount as a condition for leave to defend and not two months as it was alleged by the Applicant.

The Respondent's counsel submitted that, after the two weeks' time lapsed and due to the Applicant's failure to pay the agreed amount, on 13<sup>th</sup> May/2016, the court denied him leave

and proceeded to enter summary Judgments in favor of the Respondent.

It was a further submission that, although the Applicant claimed that the reason for the delay includes him filing a notice of appeal which was struck out and other applications which were dismissed, all those were in respect of Misc. Comm. Application No. 329 of 2015 and, that, the Applicant never filed a Notice of Appeal against the summary judgment in Commercial Case No.132 of 2015.

The Respondent's counsel went on to submit that, the Applicant's submissions and, the application which it supports as a whole, must be dismissed as the law has prescribed that whatever filed out of the period of limitation set by statute or law should be dismissed. He urged this Court to disregard the Applicant's submission as the matter is filed out of time.

He further argued that, if the Court is to exercise its discretion and grant extension of time, the Applicant must disclose sufficient good cause as the case of **Royal Insurance Tanzania Ltd vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 111 of 2009 (unreported) so established. In

that case, he argued, the Court of Appeal quoted with approval the case, the **Attorney General vs. Twiga Paper Products Limited**, Civil Application No. 128, (unreported) which stated the factors to be taken into account, which include the length of the delay.

From the above authority, the Respondent's counsel argued that, the Applicant has failed to exhibit sufficient reasons for the delay to warrant this Court to grant the prayers to extend time. According to the Respondent's counsel, the summary judgment was delivered on 20<sup>th</sup> May 2016 and since then, the Applicant did not bother to file an Appeal.

Responding on the fact that the initial notice was filed right on time but was unfortunately struck out, the Respondent's counsel denied and state that, the notice was in respect of Misc. Comm. Application No.329/2015. He stated that, even if it was erroneously filed that way instead of Comm. Case No.132/2015, still the mistake by party or counsel do not constitute sufficient reason for extending time.

He referred this court to the case of **Wankira Benteel vs. Kaiku Foya**, Civil Reference No. 4 of 2000, Court of Appeal



of Tanzania at Dar es salaam and case of **A H Muhimbira and two others vs. John K. Mwanguku**, Civil Application No. MBY-13 of 2005, Court of Appeal of Tanzania at Mbeya (unreported).

From the above submission, the Respondent's counsel reiterated that, there was no Appeal lodged against Commercial Case No. 132/2015 since 13<sup>th</sup> May/2016 and, that, the Applicant has delayed for a good six years and four months, and has failed to account for each of the days delayed, therefore, he cannot be granted extension.

He as well distinguished the case of **Mr. Fortunatus** (supra), stating that, this application is not a bona fide claim since the application filed was not in respect of Commercial Case, but it was in respect of resisting execution and, hence, the case above cannot be applicable in the circumstances.

As regards the issue of irregularities and illegalities, it was the view by the Respondent's counsel that, the fact that the summary judgment was delivered on 43 day and before expiry of the 60 days ordered on 31<sup>st</sup> March 2016 within which the Applicant was to make deposit of US\$ 96,859, is not a fact

deposed on the Applicant's affidavit in support of his application and, for that matter, the Respondent had no benefit of encountering the same.

The Respondent's counsel submitted that, according to the record, the Applicant was given two weeks (14 days) instead of 60 days as alleged as it was shown in proceeding T-5 at page 4 as well as the summary procedure T-6 at page 1 and, that remains to be so even in the submission in support of the application of execution T-7 at page 2, also the applicant's affidavit. All the above, he argued, are factual matters evident that, the time given for payment was within two weeks unlike the 60 days as alleged by the Applicant.

On the question regarding whether it is proper for the Court to grant interests per annum on a summary procedure, it was the submission by the learned counsel for the Respondent, referring to Order Rule 2(2) (a) of the Civil Procedure Code, it is clear that, in case the Defendant failed to obtain leaves to defend it is deemed that the allegations in the Plaint are admitted and the Plaintiff is entitled to a decree of the sum claimed together with the interest. In view of that, and since

the Applicant failed to obtain leave, the Respondent's counsel contended that, clearly the Court was right to award the amount claimed with the interest.

Mr. Lusu did, as well, tackle, the argument that there is an illegality for the Court to have proceeded to enter judgment without any proof. He contended that, by looking at Order XXXV of the CPC, it is clear that, once the Applicant fails to obtain leave to defend the suit under "Summary Procedure", the allegations in the plaint shall be deemed to have been admitted and, no need of there being further proof.

He submitted, therefore, that from the totality of the above, no illegality or irregularity in the summary judgment as alleged and, that, the case relied on, i.e., **The Principal Secretary**, (supra) was distinguishable and do not apply to the circumstances of this application. In view of that, finally he argued that there has to be an end of this litigation because since 2015 the Applicant has been pursuing endless proceedings and has filed applications as a delaying tactics to frustrate the execution. For that matter, he urged the Court to dismiss this application with costs as it lacks merits.

On his rejoinder, the Applicant reiterated his submission in chief and rejoined that, his submission was filed within time because, even if the day of the order is to be included, the time was supposed to have lapsed on 09<sup>th</sup> November 2022 unlike what the Respondent said, i.e., that, it was supposed to be filed on 08<sup>th</sup> November/2022.

Besides, it was contended that, the Respondent had ill motives and wants to maliciously mislead the Court. He argued that, the Respondent's submission that the Order of the Court requiring the Applicant to deposit the USD 96,859 as the condition given to the Applicant for her to be allowed to file Written Statement of Defense was for two weeks and not two months is an erroneous malicious statement as the Ruling of the Court is clear on page 7-8.

He contended that, the Court proceeded to issue the judgment in summary suit before the 2 months given to the Applicant expired and before it could be ascertained if the Applicant had failed to meet the condition or not, hence, occasioning a serious illegality as the Applicant was denied her right to heard.

It was a further rejoinder that, the issue of illegality was made clear on paragraph 5 and 6 of the Applicant's affidavit and that the issue of interest was a sort of punitive decree as the decree was subjected to three different rates of interests thus a punishment to the judgment debtor while that is not the aim of the law. To consolidate his point, he called to his aid the case of **Ngollo Mgagaja vs. Republic** Criminal Appeal No. 331 of 2017.

He rejoined that, whenever the reason for extension includes an alleged illegality of the decision sought, the issue of accounting for each day of delay becomes irrelevant as it was stated in the case of **Hamis Babu Bally vs. The Judicial Officers Ethics Committee & others**, Civil Application No. 130/01 of 2020 and the case of **Robert s/o Hilima vs. The Republic** Criminal Appeal No42 of 2019.

In view of all that, he urged this Court to grant the prayer for extension of time to file Notice of Appeal out of time so that the Applicant may be given chance to be heard by the Court of Appeal and the issue of illegality be determined thereby.

I have dispassionately considered the rival submissions and examined the pleadings. It is with no doubt that, when an issue of alleged illegality is raised, and which is on the face of the record, the Court from which orders for extension of time are being sought should not decline from granting the application.

That legal position was authoritatively stated by the Court of Appeal of Tanzania in the the case of **The Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 192 where it was held that:

"[W]hen the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

As correctly stated by the learned counsel for the Applicant, several cases have alluded to that position including the case of **Attorney General vs. Consolidated Holding Corporation and Another**, Civil Appl.No.26 of 2014, CAT, DSM (unreported), **Hamis Babu Bally vs. The Judicial Officers Ethics Committee & others**, Civil Application No. 130/01 of 2020 and the case of **Robert s/o Hilima vs. The Republic** Criminal Appeal No42 of 2019, (unreported), to mention, but a few.

In this present application, the Applicant's cry is that, she was denied a right to be heard having been given a condition which was to be fulfilled within 60 days but before she could discharge the condition, the Court proceeded, on the 43 days, to issue a summary judgment. In my humble view, I find that, the alleged illegality of the decision is a valid point which needs to be fully investigated by the appellate Court.

For the reasons aforesaid, this Court finds that, there is merit in the submissions made by the Applicant's counsel and this Court settles for the following orders, that:

- (i) The Applicant prayer to be allowed to file a Notice of Appeal out of time against the decision of this Honourable Court in Commercial case No. 132 of 2015 dated 13<sup>th</sup> May, 2016 by Honourable Mansoor, J. is hereby granted;
- (ii) the Applicant is to file the Notice, without failure, within twenty one days (21) days from the date of this ruling;
- (iii) In the circumstance of this case each party shall bear its own Costs.

**It is so ordered.**

DATED AT DAR-ES-SALAAM ON THIS 24<sup>TH</sup> MARCH 2023



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DEO JOHN NANGELA  
**JUDGE**

**High Court of the United Republic of Tanzania  
(Commercial Division)**