IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 142 OF 2022

ABSA BANK (T) LTD [*Formerly Barclays Bank (T) Ltd*] ..... APPLICANT

VERSUS

TANZANIA PHARMACEUTICAL INDUSTRIES LTD ..... 1ST RESPONDENT
RAMADHANI MADABIDA..... 2ND RESPONDENT
SALUM SHAMTE..... 3RD RESPONDENT
ZARINA MADABIDA..... 4TH RESPONDENT

RULING

March 13th, 2024 and May 3rd, 2024

Morris, J

This application marks the fifth time of the resolute applicant's back-and-forth recourses between this Court and the Court of Appeal pursuing the noble justice. This time round, he is moving this Court to extend time for him to, once again, file the notice of appeal and subsequently challenge the ruling and order of this Court in Commercial Case No. 147 of 2012 at the latter Court. The to-be-contested decision was delivered on June 2nd, 2014.

The applicant and respondents filed respective affidavit and opposing affidavits through their counsel. Whereas advocate Mpaya Kamara's affidavit was filed for the application, the same was countered by two affidavits in obstruction of the application sworn by Mr. Dennis Michael Msafiri, learned advocate for the respondents. By the by, the disposal of this application has taken a fairly long time following the demise of the 3rd respondent. Thus, the proceedings were to be kept in pendency until the deceased's legal representative was appointed to take over.

The genesis of this matter is easy to comprehend. The applicant sued the respondents vide commercial case no. 147 of 2012. However, it was dismissed on June 2nd, 2014 for want of prosecution. Incidentally, the dismissal was attributed to the applicant-plaintiff's failure to lodge his witness statement(s) according to law. Thence, he appealed to the Court of Appeal under Civil Appeal No. 87 of 2015. His appeal did not sail through. It was confronted with the respondents' preliminary legal points of objection. On October 19th, 2017, the Court of Appeal dismissed it for want of the complete record of appeal.

The applicant did not let matters to rest there. He instead, applied for revision at the same Court after being granted extension of time for the same proceedings. Still unlucky, his application was struck out on the ground that he had initiated improper proceedings. The present application is his yet another attempt to start the appeal processes to the Court of Appeal all over again.

Hearing of this application proceeded by way of written submissions. Each side was represented by own advocate. Messrs. Mpaya Kamara and Dennis Msafiri lodged submissions for the applicant and respondents respectively. All the corresponding affidavits were adopted by the lawyers as part of their submissions. Nevertheless, I will summarise the parties' additional submissions. Mr. Kamara commenced his submissions by appreciating the position of the law that the order to extend time falls within the discretionary powers of the Court which are exercisable upon the applicant exhibiting good or sufficient cause.

To support the position, he cited ***Lyamuya Construction Co. Ltd. v Board of Trustees of Young Women's Christian Association of Tanzania***, Civ. Appl. No.2 of 2010; and ***Tanga Cement Co. Ltd. v***

Jumanne Masanga and Another, Civ. Appl. No. 6 of 2001 (both unreported). Further, it was his submission that the applicant herein has advanced two major grounds to support his prayers in this application. **One**, that he was prevented by both erstwhile proceedings before the Court of Appeal. That is, the appeal and revision that were struck out owing to the disclosed manifest errors. To Mr. Kamara, the time spent by the applicant in pursuit of such matters should not be levied against him because he was actively engaged in quest for justice. Referring to the case of ***DN Bahram Logistics v National Bank of Commerce***, Civ. Ref. No. 10 of 2017 (unreported), he argued that such duration is considered and excepted by the law as technical delay.

Two, advocate Kamara submitted that it took the applicant five days: from August 26th, 2022 when his revision was struck out by the Court of Appeal to September 1st, 2022; to file the present application. According to him, the subject duration was utilized by the applicant's advocates to prepare the documents for this matter and the Court should, therefore, consider it as ordinate delay. To buttress his conviction hereof, he was armed with the holding of the Court of Appeal in ***Murtaza Mohamed Raza Viran v***

Mehboob Hassanali, Civ. Appl. No. 448/01 of 2020 (unreported) to the effect that a 7-day delay was condoned on the basis that the applicant needed time to prepare and file the application.

Finally, it was Mr. Kamara's prayer that, since the applicant has demonstrated the good cause which prevented him from filing the Notice of Appeal up to the present; his application should be allowed.

In opposition, it was the submissions of advocate Msafiri for the respondents that, this application should not be merited because the applicant has been negligent in seeking the longed justice and the subsequent proceedings he anticipates to initiate before the Court of Appeal are unwarranted. He contended further that facts and circumstances surrounding this matter do not add up to qualify as good cause for the delay. To him, the applicant's delay herein is inexcusable because he did not read the law; he acted ignorantly; he laboured on excessive negligence; he did not dutifully control the courses on time; and that his advocate was no better.

The cases of ***Allison Xerox Sila v Tanzania Harbours Authority***, Civ. Ref. No. 14 of 1998; and ***William Shija v Fortunatus Masha*** [1997]

TLR 213 were cited by the respondents to justify the argument that rules of limitation were promulgated to serve an objective motive; and negligence on the part of the applicant's counsel is not a sufficient cause for extension of time. Regarding the futility of the applicant's envisaged appeal, advocate Msafiri argued that the law to be tested in the Court of Appeal is now long settled such that no new rule to the contrary is likely to be set. He premised his submissions on ***Africarriers Ltd. v Shirika la Usafiri Dar es Salaam and Another***, Civ. App. No.350 of 2020; and ***Robert Kadaso Mageni v R***, Crim. App. No. 476 of 2023 (both unreported). On that axis, rested the respondents' conclusion and prayer that this application should not pass.

In a brief rejoinder, it was submitted by the applicant that his application is well grounded legally and meets the required threshold of being sustained. He also argued that the cases of ***Africarriers Ltd.***(*supra*) and ***Robert Kadaso Mageni***(*supra*) were cited by the respondent out of context. To him, rhyming this ruling with the decisions in those cases is tantamount to prejudicing the intended appeal. He reiterated his prayer for the application.

Out of the above contentious arguments, I steer the Court towards determining the application by answering a *solo* question: whether or not the grounds advanced by the applicant (technical delay and time for applicant's preparation to file this application) suffice to support grant of this application. I will examine each ground at a time.

As I pick the first ground, I do not feel misplaced to start by recording my agreement with the applicant's counsel that technical delay generally presents a sufficient cause in an application for extension of time. However, in determining the merit of this ground (technical delay) in the present application, the Court is guided by various undeniable aspects. **First**, the ruling in Commercial Case No. 147 of 2012 was delivered on June 2nd, 2014 and the present application was filed on September 1st, 2022. That is, over eight (8) years after delivery of the ruling. **Second**, this application has been filed after failure of two different types of proceedings (appeal and revision) by the applicant before the Court of Appeal. Both appeal and revision emanated from the same ruling of this Court in Commercial Case No. 147 of 2012. **Third**, this is the second time the same applicant is pursuing extension of time to enable him to challenge the ruling from the stated case. **Fourth**,

after his first appeal was struck out by the Court of Appeal for want of complete record, the decision to abandon the course for appellate proceedings and adopt revision instead, was voluntary after obtaining professional advice from his legal experts.

The above applicant's invigorated enthusiasm to seek justice notwithstanding, I subscribe to the respondents' reliance on ***Allison Xerox Sila case*** *(supra)*, that rules of limitation should not be circumvented by a mere sympathy for the applicant's cause. I, probably, should also state it here that, the essence of setting the time limits in law is, among other objectives, to promote the expeditious dispatch of justice [***Costellow v Somerset County Council*** (1993) IWLR 256]; and to provide certainty of timeframe for the conduct of litigation [***Ratman v Cumara Samy*** (1965) IWLR 8]; and laying down the foundations of inevitability of litigation outcomes. Consequently, time limiting and finality of litigation work in the advantage of proper management of resources; most important of which are time and finance.

In the matter at hand, the applicant deposed and submitted that he was late due to prosecuting numerous causes between parties herein, the

latest proceedings of which came to an end on August 26th, 2022. I am mindful of the cardinal law that, if the applicant for extension of time was prosecuting other proceedings which were later on found to be incompetent; time spent in pursuit of such other matters, should be considered in his favour. I fully subscribe to such principle. This position is well settled in ***Fortunatus Masha's case*** *(supra)*; and ***Mathew T. Kitambala v Rabson Grayson and Another***, Criminal Appeal No. 330 of 2018 (unreported). Definitely, the applicant herein would benefit from the subject technical delay principle subject to the analysis below.

The foregoing position of the law on technical delay notwithstanding, I am considerably averse to hold and make it a principle that the subject technical delay should, all the time, be abused and used as a hideout of professional negligence, incompetence, or a vehicle for delaying justice. I will briefly demonstrate the kernel of my loathness hereof. In the matter at hand, the two applicant's proceedings at the Court of Appeal were dismissed for lacking the complete record and being inappropriate respectively. The applicant, in such proceedings, enjoyed the stewardship of legal professionals - officers of the court, to be precise. The law enjoins litigants

to act diligently. More so, when they are being represented, parties are less expected to commit awful or hopeless mistakes by litigating in wrong *fora* or initiating imaginary proceedings for the sake of it.

It should be noted further that, neither ignorance of the law nor counsel's mistakes, constitute a good cause for extension of time. See, for instance, ***Bariki Israel v R***, Criminal Application No. 4 of 2011; ***Charles Salungi v R***, Criminal Application No. 3 of 2011 (both unreported); and ***Umoja Garage v National Bank of Commerce*** [1997] TLR 109. It is also a settled rule that advocate's sloppiness, apathy, or negligence befall the respective client. I fully associate myself with such line of holdings in ***Athumani Rashid v Boko Omar*** [1997] TLR 146; ***Salum Sururu Nabhani v Zahor Abdullah Zahor*** [1988] TLR 41.

Further, settled is the obvious philosophy for such stern restriction. **Firstly**, the advocate being the officer of the court, is expected to act professionally and diligently enough to assist both his client and the Court to respectively seek and dispense justice. **Secondly**, to condone qualified legal professionals to habitually make awful mistakes and/or act without certainty of the position of law; is to prejudice the public which banks its ubiquitous

trust with the lawyers. If it is not them, the lawyers, who will be left out there to lead the unlearned citizenry to the legit end?

Thirdly, to tolerate advocates who pursue incompetent causes in courts of law, sometimes twice or thrice, and let them go away with that (by gaining extension of time for yet another attempt of the right course later); makes litigation not only akin to gambling but also overly costful and time consuming at the expense of their clients. Courts being overburdened with parties' desperate proceedings will be mentioned last on this list of professional iniquities.

Fourthly, lawyers to wrongfully litigate in courts (in some instances, repeatedly) are susceptible to put the otherwise noble legal profession in an unjustifiable disrepute. Allowing them to do so habitually, is to reduce or equate the courts of law to scientific laboratories in which specimens are tested to prove certain findings or hypotheses of studies. In my thoughtful view, therefore, the technical delay ground should be sparingly applied on case-to-case basis. The present application forms no exception. I accordingly disallow the first ground.

In addition to the above analysis and reasoning, even with invocation of the technical delay in the equation, the applicant must account for each day of the delay. Reading from the affidavit supporting the application, it is clear to the Court that the applicant is truthful that there are five (5) days between termination of revision at the Court of Appeal and filing of the current application. In principle, the court finds value in the applicant's argument that such time was utilized to prepare documents and filing this application. Nonetheless, I register my disinclination to consider such argument favourably because is not backed up by evidence on record. The applicant's affidavit and reply to counter affidavit do not contain any or such ground howsoever. That is, no corresponding deposition in the record of the Court. Instead, the accounting is evident in the submissions of the applicant's counsel.

Settled, is the law that arguments and submissions from the bar are not evidence. See, for instance, ***The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman, Bunju Village Government & 11 Others***, Court of Appeal Civil Appeal No. 147 of 2006; and ***Bish International B.V. & Rudolf Teurnis Van Winkelhof v***

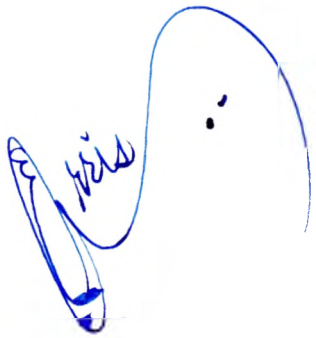
Charles Yaw Sarkodie & Bish Tanzania Ltd, Land Case No. 9 of 2006 (both unreported).

Therefore, in the absence of evidence to substantiate how the 5-day delay is to be excepted, it is unsafe for the Court to find and hold that such days were not wasted out of the applicant's negligence, neglect, inaction or sloppiness. To the contrary, justice will not cry if this Court concludes that the time from August 26th, 2022 to September 1st, 2022 is not sufficiently accounted for. In law, if I may repeat, one applying for extension of time must account for each and every day of the delay. Precisely, ***Hassan Bushiri v Latifa Mashayo***, Civil Application No. 3 of 2007 (unreported), has it a rule that delay "of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

Other comparable holdings are in the cases of ***Yazid Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & another***, Civil Application No. 412/04 of 2018; ***Sebastian Ndaula v Grace Rwamafa (legal personal representative of Joshua Rwamafa)***, Civil Application No. 4 of 2014; ***Dar es Salaam City Council v Group Security Co. Ltd***,

Civil Application No. 234 of 2015; ***Muse Zongori Kisere v Richard Kisika Mugendi***, Civil Application No. 244/01 of 2019; and ***Ally Mohamed Makupa v Republic***, Criminal Application No. 93/07 of 2019 (all unreported). Consequently, the second ground is marred with days of delay account for which is not deposed or substantiated by evidence. It is equally overruled.

For the stated reasons, I find this Court not sufficiently moved to extend time as prayed by the applicant. The application is, thus, baren of merit. It is accordingly dismissed. Given the fact that the parties have consistently been in Courts for a considerable time now, none of them is awarded costs. It is so ordered.



C.K.K. Morris

Judge

May 3rd, 2024

Ruling delivered this 3rd day of May 2024 in the presence of Advocate Gilbert Masalya holding the brief of Mr. Mpaya Kamara, learned advocate for the applicant.

C.K.K. Morris

Judge

May 3rd, 2024