IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA

CIVIL APPLICATION No. 35 OF 2018

(Arising from High Court in Bukoba (Bukoba District Registry) in Civil Case No. 2 of 2011)

1. ANDREW MSEUL
2. JANE TIBIHIKA
3. MUHAMUD MOHAMED
4. FILEMON FELIX MVUNGI ---------- **APPLICANTS**
5. CHONGERA ALPHONCE
6. KASHAMBA KAMUKOTO

Versus

1. THE NATIONAL RANCHING COMPANY LTD
2. THE ATTORNEY GENERAL --- **RESPONDENT**

RULING

20/05/2020 & 21/05/2020

Mtulya, J.:

This is an application for enlargement of time to institute an appeal before our superior court against the decision of this court in Civil Case No. 2 of 2011. The facts on the origin of the application are clear and straight forward.

On the 1st June 2011, eight (8) residents of Missenyi District in Kagera Region approached learned counsel Mr. Aaron Kabunga to

draft plaint for them to sue the National Ranching Company (the First Respondent) and Attorney General (the Second Respondent). Mr. Kabunga consented and drafted the plaint. On the 3rd of June 2011, Mr. Kabunga approached this court and registered Civil Case No. 2 of 2011 (the Case).

The plaint shows that the eight (8) plaintiff were claiming, apart from other reliefs, that the Respondents jointly to pay a total sum of Tanzanian Shillings Seventy Two Million Four Hundred Fifty Hundred Thousand Only (72, 450,000/=) being special damages suffered for unlawful seizures and confiscation of herds of cattle and unlawful fine and declaratory orders and permanent injunction for interference with occupation and use of Block No. 287/11 of Missenyi Ranch leased to the Plaintiffs.

This court, after hearing of the parties, ordered that the Applicants were not lawful tenants as they breached the terms of lease contract and that there were no evidences to establish the claim of illegal seizure of cattle hence no money was granted to them. The Applicants were not satisfied with the decision and preferred an appeal before the Court of Appeal in Civil Appeal No. 205 of 2016. However, the appeal was withdrawn at the request of the Applicants.

The reasons for the prayer to withdraw the appeal and application of the extension of time, are clearly stated by Mr. Kabunga in his sworn Affidavit. Mr. Kabunga briefly stated that:

The appeal came forth for hearing on 27th November 2017 and was struck out on 5d December 2017 with costs on the preliminary objection raised by the counsel of the First Respondent as it was incompetent as letter applying for judgment, decree and proceedings was not served to the Respondent...there was (also) generic naming of the Appellants in the Notice of Appeal which prejudiced the Respondents...as well as certificate of delay issued by the Deputy Registrar... the Applicants are still eager and vigilant to exercise his right to persue the Appeal to the Court of Appeal...the defects which made the appeal incompetent were anticipated errors which can be committed by any person and that one in certificate of delay was occasion by the court itself and not the Applicant...when the appeal was struck out, the appeal collapsed with the Notice of Appeal...and time to file the same has already run out...the Applicants were prosecuting the appeal with due diligence and by striking out

the Appeal the whole process of seeking enlargement of time are to be commenced afresh.

These reasons were tested when the Application was scheduled for hearing on 20th May 2020. The Applicants were represented by Mr. Kabunga whereas Mr. Gerald Njoka appeared for the Respondents. Mr. Kabunga submitted briefly that the Applicants are vigilant to persue their appeal up to the final court of appeal. To justify his submission, he stated that the initial notice of appeal was filed within four (4) days after delivery of judgment and the same to the application letter requesting copies of decree, judgment, proceedings and other necessary documents.

Mr. Kabunga submitted further that when the appeal before the Court of Appeal was called, the three defects were detected and withdrew the appeal at their own volition. In showing good cause in the present Application, Mr. Kabunga argued that the Applicant have good cause as they have demonstrated diligence in steps towards previous appeal and in this Application. To substantiate is submission, Mr. Kabunga argued that the Court of Appeal delivered the Ruling on the defects on 3rd September 2018 and the Applicant were issued

with the copy of the Ruling on 3rd October 2018 and filed the present Application on the same day.

Mr. Kabunga finally invited article 13 (6) (a) of the Constitution of the United Republic of Tanzania (the Constitution) on the right to be heard and precedent in the **Registered Trustees of the Evangelical Assemblies of God (T) (EAT) v. Reverend Dr. John Mahene, Civil Application No. 518 of 2017** inviting the application of the principle of overriding objective.

Mr. Njoka protested the interpretation of good cause and application of the principle of overriding objective advanced by Mr. Kabunga. With regard to the principle of overriding objective, Mr. Njoka submitted that the principle is applied in accordance with the law and it was not enacted to do away with the enacted procedures.

To Mr. Njoka, the present Application was withdrawn at the Court of Appeal because it had serious and cumulative defects, which could not be cured at the Court of Appeal. Mr. Njoka also cited the fault to serve the Respondents letter applying for necessary documents for purposes of appeal as a serious omission that shows that there were negligence, apathy and inaction on the part of the Respondent.

On the second level of protest, Mr. Njoka submitted that the Respondents have failed to advance good cause to persuade this court to grant extension of time because they did not inform this court what made them to fail to serve the Respondents the letter. Mr. Njoka argued that there are circumstances which may be considered, like illness or prompt filing of the application.

To bolster his argument, Mr. Njoka cited the authority in **Zawadi Msemakweli v. NmB PLC, Civil Application No. 221/18 of 2018** with regard to illness and decision in **Michael Lala v. Tajiri Njadu, Civil Appeal No, 68 of 2015, Sebastian Ndaula v. Grace Rwamafa, Civil Application No. 4 of 2014** and **Issack Sebegele v. Tanzania Portland Cement Co. Ltd, Civil Application No. 25 of 2002** with regard to prompt filing of the application and accountability of each day of delay.

According to Mr. Njoka the present Application was filed after one hundred and fifty two (152) days which is almost five months of delay. To substantiate his claim, Mr. Njoka submitted that the decision of the Court of Appeal was delivered on 3rd September 2018 and the Application was filed on 14th January 2019.

In a brief rejoinder, Mr. Kabunga argued that there is no inordinate delay in the present Application. He argued that Mr. Njoka relied on Chamber summons to advance his argument which is incorrect as that depicts the date of serving the other party. To Mr. Kabunga the proper citation of the filing date is depicted in the Applicants' Affidavit and exchequer receipt attached in the Application.

Mr. Kabunga distinguished the decision of **Zawadi Msemakweli** (supra) arguing that in the present application there is no delay of days and distinguished the decision in **Michael Lala** (supra) as the matter was called for an appeal hearing and not application. With seriousness of the defects and cure from the Court of Appeal, Mr. Kabunga argued that defects are inadvertence and cannot be escaped and the remedy are put in place to rectify the same. With regard to cure from the Court of Appeal, he contended that when the appeal was withdrawn, the Court remain with nothing and therefore cannot entertain any application.

On my part, I have gone through the submissions of learned minds and record of this Application. It is fortunate that both parties in this Application are not disputing the mandate of this court in

enlargement of time. It is correct from the provision of section 11 (1) (b) of the Appellate Jurisdiction Act [Cap. 141 2019] (the Act). The wording of section 11 (1) (b) of the Act are coached in following style:

> *the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned,* ***may extend the time*** *for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.*

This provision is silent on reasons for extension of time to file an appeal and uses the words *may extend the time*. Unlike section 14 (1) of the Law of Limitation which mentions, *any reasonable or sufficient cause*. The word *may* in the provision may be interpreted to mean that this court has discretionary mandate to grant extension of time depending on reasons adduced by the Applicant to persuade this court.

It is therefore important for Applicants of extension of time to file an appeal before the Court of Appeal court to attach materials which will persuade this court to exercise its discretion mandate in their favour. There is a large family of precedent on the subject interpreting *any reasonable or sufficient cause* (see: **Alliance Insurance Corporation Ltd v. Arusha Art Ltd, Civil Application No. 33 Of 2015; Eliah Bariki v. Republic, Criminal Appeal No. 321 Of 2016; Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited, Civil Application No. 116 Of 2008 (Unreported), Sebastian Ndaula v. Grace Rwamafa, Civil Application No. 4 Of 2014, Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010**).

For instance when interpreting the *word reasonable cause or good cause*, Court of Appeal in **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd, Civil Application No. 13 of 2010,** stated as follows:

> *What constitutes* ***good cause cannot be laid down by any hard and fast rules****. The term good cause is a relative one and is dependent upon party seeking*

extension of time to provide the ***relevant material*** *in order to move the court to exercise its discretion.*

To my opinion the word *may* in section 11 (1) of the Act gives the same discretionary mandate to the court to deciding matters of extension of time. However, as I stated that Applicants for extension of time to file their appeal must attach materials before the court to persuade it to exercise its discretion powers in their favour.

In the present Application, the Applicants have brought forward two materials to justify extension of time to file their appeal, namely: being vigilant in pursuing their appeal as part of the constitutional right and prompt application after withdrawal of the appeal in the Court of Appeal.

Practice of this court and our superior court on matters of extension of time has been that applicants must show good faith and acted promptly in filing the same after becoming aware of the delay. That is the advice and position of our superior court in judicial hierarchy in this country.

In the decision of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited, Civil Application No. 116 of 2008 (Unreported)**, the Court of Appeal stated that:

> *It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time,* ***act very expeditiously*** *and that the* ***application has been brought in good faith*** (emphasis supplied).

In the present Application, the Applicants were availed copy of the Court of Appeal Order on 3rd October 2018 and on the same day they filed this Application in this court. Record also reveals that they were prompt in their initial appeal which was struck out. However, the question which remain is whether the Applicants were negligent. Mr. Njoka says they were negligent, apathy and inaction and therefore must be accountable for that, especially failure to serve the Respondents the letter applying for necessary documents for appeal purposes. On the other hand, the Applicants are contending they were not negligent for that matter as lapses are part of human nature and that is why section 11 of the Act was enacted.

To my opinion the Applicants filed the present Application in good faith to persue their constitutional rights of appeal and right to be heard. This court may not deny them the by use of mere legal technicalities. Legal technicalities to deny parties access to substantive justice, is no longer part of this court practice.

This is important especially after enactment of section 3A of the Civil Procedure Code [Cap. 20 R.E. 2002] (the Code) via Written Laws (Miscellaneous Amendment) Act, No. 3 of 2018 which introduced a principle of Overriding Objective that requires courts to deal with cases justly and to consider substantive justice.

The principle has received judicial celebration and precedents are abundant (see: **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No. 35 of 2017, Mandorosi Village Council & Others v. Tuzama Breweries Limited & others, Civil Appeal No. 66 of 2017** and **Njoka Enterprises Limited v. Blue Rock Limited and Another, Civil Appeal No. 69 of 2017**).

The invitation of the principle in this Application, I think, is in accordance with the law in section 11(1) of the Act, section 3A of the

Code and enactment in article 13(6) (a) of the Constitution on the rights to be heard and article 107A (2) (e) which require this court to dispense justice without being tied up with technicalities which may obstruct dispensation of justice when determining right and duties of individuals.

This thinking of focusing on substantive justice and avoiding undue technicalities has long been considered by our superior court, even before enactment of section 3A in the Code in 2018. The full court of the Court of Appeal in 1992 in the judgment of **Nimrod Elireheman Mkono v. State Travel Service Ltd. & Masoo Saktay [1992] TLR 24,** at page 29 stated that:

> *We would like to mention, if only in passing, that justice should always be done without undue regard to technicalities.*

It is from substantive justice where the rights of individuals are fairly heard and determined. The wording of East African Court of Appeal in **Essaji v. Sollank [1998] EA 220** at page 224 are necessary to quote. Their Lordships think that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessary debar a litigant from the pursuit of his rights.

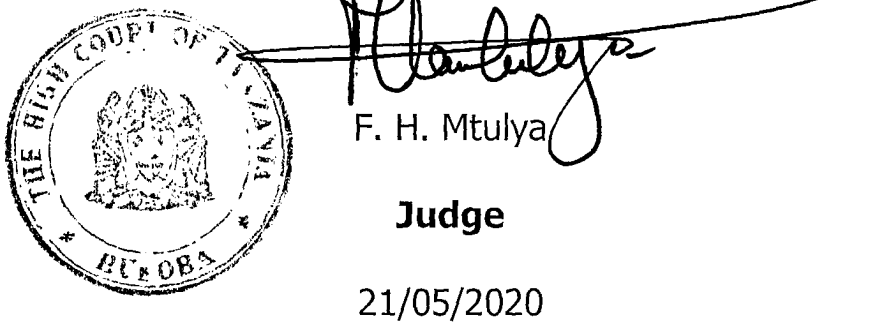
To my opinion the words of the East African Court of Appeal in the decision of **Essaji's case** (supra) in 1968 and our Court of Appeal in the judgment of **Nimrod Elireheman Mkono's** case (supra) in 1992 still important today.

I understand the Applicants were a bit apathy by failure to serve the affected party in their appeal, but other factors which led to withdrawal of their appeal were not occasioned by themselves and cannot be condemned for that. The Applicants and their learned counsel are human beings and have shown to take prompt necessary steps, but could not escape errors. It is impossible to expect a hundred per cent perfection in our daily doings. Even the law does not demand a hundred percent perfect record, but adequate record (see: **Gaspar Peter v. Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No. 35 of 2017**).

For the foregoing stated reasons, the Applicants in this Application have advanced and displayed reasonable or sufficient cause to justify extension of time to file their appeal out of statutory time limit. This Application is hereby granted for advancing sufficient cause which persuaded this court to do so. Therefore, the Applicants are granted ten (10) days leave from today, 21th May 2020, without any further delay, to file notice of appeal, letter applying for necessary documents and appeal in the Court of Appeal.

Having said so and considering the appeal is yet to be determined to the finality, I do not think it will be appropriate to order for costs. For this application, each side to bear its costs.

It is accordingly ordered.

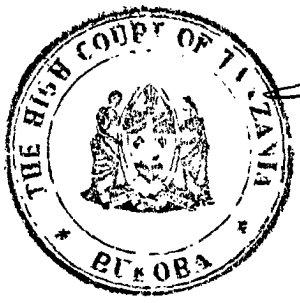


F. H. Mtulya

Judge

21/05/2020

This Ruling was delivered in Chambers under the seal of this court in the presence of learned State Attorney, Mr. Joseph Mwakasege and in absence of the Applicants.



F. H. Mtulya

Judge

21/05/2020