IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 492/16 OF 2018

MARY MCHOME MBWAMBO and
AMOS MBWAMBO as joint administrators of the late GILLIAD MBWAMBO ..... **APPLICANTS**

VERSUS

MBEYA CEMENT COMPANY LTD ..... **RESPONDENT**

[Application for extension of time within which to appeal from the decision of the High Court (Commercial Division)]

(Kimaro, J.)

dated the 27th day of March, 2006
in
Commercial Case No. 126 of 2005

RULING

16th May & 3rd June, 2019

MWAMBEGELE, J.A.:

In this application, the applicants Mary Mchome Mbwambo and Amos Mbwambo who are administratrix and administrator, respectively, of the late Gilliad Mbwambo, who, prior to his death was employed by the respondent; Mbeya Cement Company, applies for extension of time within which to lodge an appeal against the decision of the Commercial Division of the High Court (Kimaro, J. – as she then was; she later became Justice of Appeal) rendered on 27.03.2006 in Commercial Case No. 126 of 2005. The application is by way of a notice of motion taken out under rules 10, 47

and 48 (1) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules). The application is supported by an affidavit deposed by Daniel Haule Ngudungi; the applicants' counsel. The same is resisted by Ndanu Emmanuel, the learned counsel from M/S Law Associates; a law firm representing the respondent.

The application was argued before me on 16.05.2019 during which both parties were represented; Mr. Daniel Haule Ngudungi, learned counsel, represented the applicants and Mr. Rahim Mbwambo, also learned counsel, represented the respondent. Both parties had earlier lodged written submissions and reply written submissions for or against the application, as the case may be.

Arguing for the application, Mr. Ngudungi adopted the grounds in the notice of motion, supporting affidavit as well as the written submissions as forming part of his oral arguments. He submitted that the applicants were granted leave by the Court to lodge a notice of appeal out of time which they did but they could not file the intended appeal in time because they were obstructed by relevant documents which were in the control of the Registrar of the High Court. He submitted that they were supplied with the

same on 19.10.2018 and on 25.10.2018 the applicants paid fees and the present application was lodged on 31.10.2018.

Mr. Ngudungi went to submit that there was also a point of illegality in the decision sought to be challenged because the case proceeded without the applicants being heard as they were not served and a default judgment was entered against them. There was a purported service alleging that the applicant was served through a family member and there was no proof of service by a court process server, he submitted. In support of the proposition that illegality is a ground that amounts to good cause to extend time, the learned counsel cited **VIP Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Consolidated**, Civil References No. 6, 7 and 8 of 2006 (unreported).

The learned advocate added that the delay to file the appeal on time was caused by the Registrar who did not issue a proper decree. The former decree issued was defective because it bore two dates; 17.05.2007 while the case was decided on 27.03.2008.

On the above grounds, Mr. Ngudungi submitted that good cause has been brought for the Court to exercise its discretion under rule 10 of the Rules to grant the extension of time sought.

Responding, Mr. Mbwambo resisted the application with some considerable force. Having adopted the affidavit in reply and reply written submissions, he argued that the application was misconceived because under rule 90 (1) of the Rules, when there is a delay by the Registrar in supply of documents for appeal purposes, he had to apply for a Certificate of Delay from the Registrar. The applicant ought to have applied for it which he did not do. The learned counsel went on to argue that the extension under rule 10 of the Rules is purely discretional; all the relevant factors for the delay must be taken into account which include the length of the delay, the reason for the delay and the prejudice to the other party if the time is extended. In the case at hand, the notice of appeal was lodged on 02.12.2016 and the application was lodged on 31.10.2018; about one year and ten months after. The learned counsel argued that the length of delay was inordinate which could be remedied by requesting a certificate of delay.

On the question of illegality, Mr. Mbwambo submitted that the purported illegality is not there. He went on to submit that according to the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) the Court addressed the issue of illegality and observed that the same should be clearly visible on the face of the record.

As the High Court judge said both applicants were served, the illegality is not clear on the record and therefore the same was not proved.

Mr. Mbwambo submitted that the applicants have failed to bring good cause to warrant the Court exercise its discretion under rule 10 of the Rules. He thus prayed that the application be dismissed with costs.

Rejoining, Mr. Ngudungi submitted that illegality is apparent on the face of the record in that the applicants were not served and the decree involved an amount of money which is colossal. Under Order VII rule 14 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 the case ought to have been proved; not to grant a default judgment. He added that a single Justice of the Court saw it in the ruling extending time to file the notice of appeal (at p. 13).

On the argument that the applicants should have applied for a certificate of delay, Mr. Ngugungi argued that in order to rely on rule 90 (1) of the Rules, an applicant must first have written the Registrar within thirty days of the delivery of the impugned judgment. This was not the case here. The decision is of 27.03.2006 and the application to file the notice of appeal was granted on 28.11.2016; after about ten years. The learned counsel thus argued that rule 90 (1) does not cover the applicants.

Mr. Ngudungi reiterated that good cause has been expounded to warrant the Court exercise the discretion under rule 10 of the Rules to order the enlargement sought.

I have subjected the rival argument by the learned advocates from either side. The main reason which the applicants have brought to the Court are found at paras 4 thorough to 11 of the affidavit. Therein it is deposed that after this Court enlarged time within which to lodge the notice of appeal on 28.11.2016, the same was timely lodged on 02.12.2016. On 01.12.2016, the applicants had applied from the Registrar for copies of proceedings, judgment, decree and exhibits which they were told they were ready for collection on 15.06.2017 and duly collected by the applicant. However, when preparing the appeal, the applicants realised that the proceedings were inadequate as they ran from 15.02.2011 to 2016; those from 2006 when the case commenced to 15.02.2011 were missing. This prompted the applicants to write another letter on 14.07.2017 requesting the missing part of the proceedings. The rectified proceedings including a properly dated decree were availed to the applicants on 16.10.2018. By that time, sixty days within which they could appeal had elapsed, hence the present application. The applicants were notified by their advocate about the availability of the documents for

appeal purposes but managed to pay fees by 25.10.2018 and the present application was filed on 31.10.2018.

Mr. Mbwambo on the other hand is of the view that the applicants ought to have applied for a certificate of delay to which the applicants' advocated stated that they are not entitled. I think Mr. Ngudungi is right on the argument that only an applicant who has applied for documents for appeal purposes thirty days after the pronouncement of the impugned judgement, will be entitled to a certificate of delay under rule 90 (1) of the Rules. This is the tenor and import of the proviso to rule 90 (1) of the Rules. It reads:

> *"save that* ***where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal,*** *there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."*
> [Emphasis added].

And under rule 90 (2) of the same Rules, an appellant will not be entitled to rely on the exception to sub-rule quoted above "unless his application for the copy was in writing and a copy of it was served on the Respondent". Likewise, the Court has pronounced itself on this position in a number of decisions – see: **Mkombozi Centre for Street Children & 2 Others v. The Hon. Attorney General**, Civil Appeal No. 30 of 2014 (unreported) in which **Mr. Kermal v. Registrar of Buildings** [1988] TLR 199, **Transcontinental Forwarders Ltd. v. Tanganyika Motors Ltd.** [1997] TLR 327 and **East Africa Mines Ltd v. Christopher Kadeo**, Civil Appeal No. 53 of 2005 (unreported) were cited and relied upon.

On the foregoing discussion, it follows that the applicants are not entitled to enjoy the right to a certificate of delay under the provisions of rule 90 (1) of the Rules.

Having considered all the circumstances of the case, as demonstrated hereinabove, I am of the view that the applicants have sufficiently explained why the appeal was not timely lodged. Every day of delay has been sufficiently accounted for. As this finding disposes of the matter, I will not go into considering the question of illegality in the impugned judgment as a ground to grant the orders sought.

In the end, I find this application meritorious and grant it. The applicants are given sixty days within which to lodge the intended appeal. Costs in the present application shall abide by the outcome of the intended appeal.

Order accordingly.

DATED at **DAR ES SALAAM** this 30th day of May, 2019.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL