

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION No. 31 OF 2021

(Arising from the decision of the District Court of Ilemela, Dated 29/12/2020 in Civil Case No. 01 of 2020.)

SINOHYDRO CORPORATION LIMITEDAPPLICANT

VERSUS

SHARK SPEAR SECURITY LIMITEDRESPONDENT

RULING

12th July, & 11th August, 2021

TIGANGA, J

Basically, this is an application for extension of time within which the applicant can appeal before this Court against the decision of the District Court of Ilemela in Civil Case No. 01 of 2020. The court in this application, is also asked to give any other order as it may deem fit and just to grant.

The application was made by the chamber summons under section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] and supported by an affidavit sworn by Cynthia Mwafongo who introduced herself as a Human

Resources Officer of the Applicant conversant with the fact and able to depose on the facts of the case.

In that affidavit and the record of the trial court, a brief background of this application can be deciphered, that the respondent sued the applicant before the District Court of Ilemela for a number of reliefs and after hearing of the case before it, the trial District Court judged and decreed in the favour of the respondent as follows;

- 1) Tshs 47,455,354 as special damages
- 2) Interest of the decretal amount at the rate of 12% from the date of the judgment to the date of satisfaction
- 3) Tshs. 10,000,000/= as special damages, and
- 4) Costs of the suit.

The judgment and decree aggrieved the applicant, but before appealing she found herself out of time, thus had to file this application to ask for extension of time first. The reasons for delay were that after hearing of the defence case, the Court scheduled the matter for judgment on 23/11/2020. As the applicant was represented by an Advocate one Zephania Bitwale, he was expected to attend on the judgment day to

receive judgment. The applicant did not hear of any information regarding the case until on 17/03/2021 when the deponent received an e-mail with a copy of judgment, which judgment appeared to have been delivered on 29/12/2020 in the absence of the representation from the part of the applicant.

Following that information, the applicant engaged another Advocate to undertake the matter by commencing the appeal process. He deposed that as the judgment was not with its extracted decree, the engaged counsel who wrote a letter to get a copy of the decree. It is her deposition that the delay to file an appeal was not due to negligence of the applicant but of the then engaged Advocate who did not act promptly and inform the applicant. She also added that if granted chance the appeal has a great chance of success because the trial court granted damage and interest excessively. And that if granted, the application shall not prejudice the respondent in whatever manner.

The application was opposed by the counter affidavit filed by Mr. Constantine Mutalemwa, learned counsel who disputed all the facts deposed by Cynthia Mwafongo, and stated that the instant application lacks merits for failure to disclose any reasonable or sufficient cause for not

filing the intended appeal within the prescribed time of 90 days to wit on 30/03/2021.

Parties were represented by counsel, whereby the applicant was represented by Miss Mirembe Lameck while the respondent was represented by Mr. Constatine Mutalemwa, learned Senior Counsel. With consent of the parties and leave of the Court, the application was argued by way of written submissions. Parties through their counsel filed their respective submission as scheduled whereby the applicant in introductory part reiterated the content of the affidavit which she had actually adopted. Further to that, he submitted that the applicant was not supplied with the copy of the decree in time and as Order XXXIX Rule 1 of the Civil Procedure Code [Cap. 33 R.E 2019] makes it mandatory for the appeal to be attached with the decree appealed against, it was necessary therefore for the applicant to await to be supplied with the copy of the decree before appealing. On that base, she submitted that the applicant is entitled to the amnesty that is provided by section 19(2) of the Law of Limitation Act, [Cap. 89 R.E 2019] by excluding the time which the applicant was awaiting for of the decree. He submitted that the decree was not ready that is why even the counsel for the respondent did not attach it.

The second limb upon which the applicant argued the application is illegality in the impugned decision. Mentioning the said illegality, he said the respondent was awarded damages excessively. He submitted that the applicant did not advance evidence to prove the extent of damage which would entitle him general damages, therefore he has been awarded general damages while the same was not been pleaded and proved the evidence of any suffering by the respondent caused by the applicant. He relied on the authority in the case of **Heritage Financing Ltd vs Harriet Khatibu Kamote**, Civil Application No. 17 of 2019 at Arusha, in which my brother Hon. Robert, J relied on the wisdom in the case of **Mbogo and Another vs Shah** [1964] E.A 94 that in awarding general damages the court has to consider some relevant factors something which was not done in this case.

The second point of illegality is double jeopardy. He submitted that despite assigning no reasons for the grant, he submitted that in his opinion there was no need for granting general damages after having already granted the whole of specific claim, interest and costs of the case. That amounts to double jeopardy in law.

The third point of illegality, he submitted that the trial court awarded interest contrary to the law, citing the law which has been abrogated by the award, he cited Order XX Rule 21(1) of the Civil Procedure Code [Cap. 33 R.E 2019] provides for the court interest rate to be imposed to be 7% and that anything more requires either agreement by the parties or strong justification by the magistrate awarding. He submitted that in the impugned decision the court awarded the maximum rate awarding 12% as prayed without there being an agreement by parties and without reasons justifying such award which is contrary to the above rule.

He reminded the court that, illegality of the decision sought to be challenged is considered to be good cause for extension of time. He asked the court to base on the three demonstrated illegality and the fact that the court's failure to supply the copy of the decree which was essential for appeal purpose to grant the application as the delay is technical; he prayed the court to consider and grant the extension of time. Further to that, he asked the court not to let the rights of the applicant who has trusted the Advocate be affected by the mistakes committed by the advocate like in the case of **Rafiq and Another vs Munshiral and Another** (1981) 2SCC 788.

He also submitted that such an error is minor, therefore should not be punished for that, he relied on the decision of the Court of Appeal has held in the case of **Charles Kambona vs Elizabeth Charles**, Civil Application No. 529/17 of 2019 at Dar Es Salaam, and **Yusuph Same and Another vs Hadija Yusuph** [1996] TZHC. 7 and **Zuberi Musa vs Shinyanga Town Council**, Civil Application No. 3/2007

He submitted that each applicant has accounted each day of delay, he also submitted that the applicant will suffer irreparable loss if the application will not be granted while to the contrary the respondent will not suffer much should the application be granted.

In the submission in reply, Mr. Mutalemwa started by pointing out that the application at hand is a misconception filed in the misconception of the law; he submitted that, item 1 of Part II of the Schedule to the Law of Limitation Act [Cap. 89 R.E 2019] provides that the period of limitation of appeal from the District Court to the High Court is 90 days, which when reckoned from the date when the judgment of the trial court was delivered were to expire on 28/03/2021. However, the applicant misconceived the law, instead of filing an appeal as he was within time, he on 24/03/2021

about four days before the expiry of 90 days he filed this application for extension of time.

Mr. Mutalemwa was of the view that although the applicant was not late, but he cannot be saved, as in his opinion misconception or ignorance of the law or failure to check the law cannot warrant extension of time. To support his contention he cited the case of **Badrudin Hassanali Essajee vs Amirali Abdulhusein Hassanali**, CAT, Civil Application No. 83 of 1998, DSM, Registry. It is his further submission that, the fact that the applicant was represented by the Advocate, and is the one who misconceived or failed to check the law cannot save the applicant **Calico Industries vs Pyaraliesmail Premji** [1983] T.L.R 28 in which it was held that; "failure of a party's Advocate to check the law is not sufficient ground for allowing an appeal out of time.."

He submitted that he is aware that under section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019] the extension of time may be filed either after or before expiration of the prescribed period. But in this case the applicant is not seeking extension before, he is seeking it after, having misconceived the law, therefore the court lacks jurisdiction and cannot really be granted what he did not apply for. To support his such contention

he cited the case of **James Funke Gwagilo vs Attorney General** [2004] TLR 161 and **Hotel Travertine Limited and 72 others vs NBC** [2006] T.L.R 133

He submitted that, in the alternative the applicant relied on the requisition of copy of decree and illegality. He however said that the same were not pleaded in the affidavit and chamber summons, they were introduced in the submission he reminded the court that submission share not evidence therefore the issues raised in the submission should be disregarded.

Regarding the issue of exclusion of the days of obtaining copies, he said that, the exclusion is not applied for, it is automatic while computing time of appealing. He cited the case of **Valeria Mcgiverv vs Salim Farkudin Balal**, CAT, Civil Appeal No. 385 of 2019, Tanga Registry.

He in the upshot submitted by way of conclusion that, as the period of 90 days was yet to lapse at the time of filing this application, the present application is misconceived. That the misconception and ignorance of law and failure to check the proper application of the law does not warrant an extension of time, an application does not apply for extension of time

before the expiry of the prescribed period, this court lacks jurisdiction to grant such a relief. That the new ground introduced in the submission be disregarded as they are not evidence in the eyes of the law. That the applicant has misconstrued section 19(2) of the Law of Limitation Act for applying for exclusion of time spent while waiting for a copy of the decree. Last that the application be dismissed with costs.

In rejoinder the applicant agreed with stand of the law that the time had not lapsed, but she differs in the consequences that follows; he disputed the proposition by the counsel for the respondent that the application be rejected. He submitted that as the court was properly moved and under section 14 of [Cap 89 R.E 2019] therefore it has jurisdiction to do so, secondly, that the premises under which he wants this application to be refused is a kind of technicalities that the principle of overriding objective came to cure.

Regarding the exclusion of days for obtaining the decree, he relied on the authority in the case of **Isamilo Plaza Co. Ltd Another v Mwajuma Mussa**, Land Appeal No. 30/2019 High Court at Mwanza.

In that spirit, she cited the case of **Michael Balenga vs Elina Daniel**, Matrimonial Appeal No. 03 of 2019 HC, Mwanza, **James Petro Ndaki vs Nyamalwa Wangaluke**, Civil Appeal No. 09 of 2019, High Court Mwanza.

That being a summary of what happened, from the submission filed by the counsel for the respondent, it has been established that the applicant misconceived the law, by thinking that he was already out of time when he filed this application asking for extension of time, while in fact he still had four days before the expiry of the period within which he was supposed to file an appeal, as the time was expiring on 28/03/2021 and he filed this application on 24/03/2021 about four days, before the expiry. For reason to be given in due course, I will concentrate my discussion of the aspect of when was this application filed and the consequences of filing of the application for extension of time instead of filing an appeal.

From the submission above, it goes without saying that, had the applicant properly construed the law, he would, instead of filing the application at hand, have filed the appeal, as by filing the application for extension of time while he was within time he was busy searching what

already had in his possession. Now that he discovered even if through his adversary, does that negate the fact that he was within time?

It is common ground that the decision by the court whether or not to grant an extension of time is purely discretionary; however, there is always one main factor to be considered in deciding whether or not to exercise that discretion. That main factor is what the law terms good or sufficient cause for such delay.

In **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.02 of 2010 (unreported), CAT, what amounts to good cause has been defined to include the extent of delay, seriousness of the applicant in prosecuting the action he intends to take, accounting for all days of the delay. In this case the applicant had not delayed, he was still within time but the advocate misconstrued the relevant laws, by filing the application of extension of time it shows that he was busy and serious in prosecuting his right of appeal, and he had not delayed not even a single day, therefore he has no delayed days to account for.

I am entirely in agreement with Mr. Mutalemwa regarding what action should be taken in cases where the Applicant or his Advocate misconceive or fail to properly check the law or exhibits to be ignorant of the law and as a result fail to file an appeal or application within time that cannot warrant extension of time. In that regard I find the cases of **Badrudin Hassanali Essajee vs Amirali Abdulhussein Hassanali**, CAT, Civil Application No. 83 of 1998, DSM, Registry, and **Calico Industries vs Pyaraliesmail Premji** [1983] T.L.R 28 to be the correct position of the law. However, these cases are distinguishable in this case, on the ground that while in the cited cases involved actual delay which was attributed by the misconception or failure to properly check the law, in this application there is no such delay. The misconception led to the applicant thinking that he was out of time while fact he was still within time. That may be negligence on the part of the counsel for the applicant, but that negligence cannot be left to take away the constitutional right of the applicant to appeal. That said, I find the fact that he was within time and now that time which he had to appeal has lapsed due to that misconception of filing an application already lapsed, I find it in the interest of justice to allow the applicant to file his appeal within 14 days.

My holding does not mean that I have ignored the argument by Mr. Mutalemwa that since an application does not apply for extension of time before the expiry of the prescribed period, this court lacks jurisdiction to grant such a relief. I should state here that, save for inherent jurisdiction; generally, jurisdiction is normally a creature of the statute. It is a fundamental matter to be considered by any adjudicator before assuming powers to admit, register and hear cases. It is not conferred by the relief sought in any particular case, it is conferred by the statute, now since under section 14 of the Law of Limitation Act (supra) this court is clothed with powers to register, hear and determine an application for extension of time, this court therefore has jurisdiction to grant the application.

That said, as there was no delay, in my opinion, discussing other grounds of the application which are, exclusion of the time of obtaining the copy of the decree, and illegality will be nothing but an academic exercise which I am not, for the interest of saving this courts precious time, discuss them. That said, for the reasons given herein above, the applicant is hereby given 14 days to file an appeal out of time. No order as to costs is made.

It is accordingly ordered

DATED at MWANZA this 11th day of August, 2021

J.C. Tiganga

Judge

11/08/2021

Ruling delivered in open chambers in the presence of the parties on
line through audio tele-conference




J.C. Tiganga

Judge

11/08/2021