IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

MISC. APPLICATION NO. 6 OF 2022

(C/F COMMERCIAL CASE NO. 5 OF 2017)

MARK-KIM

CHEMICALS COMPANY LIMITED.....APPLICANT.

VERSUS

GADGETRONIX NET LIMITED.....RESPONDENT.

RULING.

Date of last Order: 12th October, 2022.

Date of Ruling: 21st October 2022.

MARUMA, J.

This is an application brought under Section 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, whereby the applicant is seeking an extension of time to allow him to file a notice of appeal against the decision of this Court in Commercial Case No. 5 of 2017.

On 13th October 2022 when this matter was set for hearing, Mr. Sabato Ngogo, Advocate appeared for the Applicant and Mr.

Rogers Mlacha, Advocate assisted by Hamidu Juma Mushi, Advocate appeared for the Respondent.

Before proceeding with the hearing, Mr. Rogers raised a legal concern that this application could not be heard because there is a pending application at the Court of Appeal. He pointed out that in the affidavit in support of the application, the applicant admitted that he had already filed a notice of appeal to the Court of Appeal against the Judgment and Decree of this Court in Commercial Case No. 5 of 2017. He further pointed out that in the applicant's affidavit, in particular paragraph 7 it was established that the said notice of appeal was struck out with costs by the Court of Appeal on 15th March 2022 pursuant to the application made by the respondent. He added that due to the said notice of appeal being struck out the applicant had also filed a Civil Application No. 501 of 2018 for a stay of execution of this Court decree in Commercial Case No. 5 of 2017 which is still pending at the Court of Appeal. He argued that despite the fact the notice of appeal was struck out, the applicant had not made any initiative to withdraw the

application but opted to file the application at hand. He submitted that by failing to withdraw the application pending at the Court of Appeal and filling out this application, the applicant is riding two horses at the same time, which is an abuse of the court process. To support his argument, he supplied a copy of the letter wrote by the counsel for the respondent concerning the application. He argued that since there is a pending application at the Court of Appeal, the respondent has been prevented from executing the decree of this Court in Commercial Case No.5 of 2017 and that if this application is determined on merit, regardless of what the outcome will be, it will enable the applicant to If this application is denied, the applicant will file an appeal and, eventually, another stay of execution application in the Court of Appeal. He argued that this is the ingenuity which prevents the principle of ridding two horses at the same time and invited the Court to adopt the wisdom of the Court of Appeal in the case of the **Registered Trustees of Kanisa la Pendekoste Mbeya vs Lamson Sikwaze & 4**

Others, Civil Appeal No. 210 of 2020 at page 9 & 10. He therefore prayed for the striking out of this application with costs.

Contesting the concern raised, Mr. Sabato submitted that it is not in dispute that the former notice of appeal which was filed on 23rd November 2018 was subsequently struck out on 15th March, 2022 by the Court of Appeal in Civil Application No. 414/16 of 2019 filed by the Respondent. He submitted that the remedy the applicant has is to re-institute a notice in compliance with section 11 (1) of the Appellate Jurisdiction Act, R.E of 2019 as the applicant followed the law and filed this application. He added that the argument that the applicant did not initiate any effort to withdraw the application for stay of execution pending at the Court of Appeal has been made out of carom as it is neither supported by any law nor judicial precedent which binds this Court.

He further submitted that since he has raised this concern as an objection, the rule is very simple an objection must be on a point of law. He argued that there was no law to back up what was submitted. The objection was based on a letter sent to the Registrar

Court of Appeal requesting the hearing of Civil Application No.501 of 2019, which Her Ladyship Justice Kirefu, JA stayed pending the hearing of Civil Application No.414/16 of 2018.The letter supplied has no response from the Registrar. He further submitted that that was because of the known principle that once a notice which initiates proceedings in the Court of Appeal is struck out, everything falls. To back up his position, he made reference to the case of **Inter Best Company Ltd vs Standard Chare Bank Tanzania Ltd** TLR 2018 at page 197. Furthermore, after an appeal has been struck out upon the ground that it is incompetent, there is nothing to be saved in the regard of notice of appeal. He further argued that the procedure for instituting an application for stay of execution or execution of decree is governed by different procedures quite different from the procedure of filling an appeal to the Court of Appeal, so these are two different matters and it cannot be said that they are ridding two horses at the same time or abuse of court processes. He argued the cases cited by the

counsel are quite distinguishable from the circumstances of this application.

As principally known, wherever there is a point of law, it should be determined first before I proceed to determine the merits of this application. Having the submissions made with respect to the concern raised and the response thereto. It is also a well-known principle that an objection raised should be purely on the point of law. Unfortunately, the concern raised by the counsel for the Respondent has no any back up of the law. Moreover, considering his argument that there is a pending application at the Court of Appeal, the fact he refuted by himself as he admitted that the notice of appeal filed by the applicant was struck out by the Court of Appeal on 15th March 2022 for being in competent pursuant to the application made by the respondent.

At this juncture, I have to direct myself on the position of the law, which is very clear that since there was no notice of appeal, nothing could stand, as it was argued by the counsel for the Applicant who made reference to the case of **Inter Best**

Company Ltd (Supra). On that basis, since the notice of appeal has been struck out, anything, including the Civil Application No 501 of 2019 which was stayed pending the hearing of Civil Application No.414/16 of 2018 technically and automatically ceased following the striking out of the notice of appeal.

Therefore, since the position of the law is very clear as stated in the case of **Inter Best Company Ltd v(supra) that,**

> **"***…Once the appeal is struck out as it were in the case at hand that implies the striking out of the record of an appeal as whole. Under such circumstances, the Appellant will be duty bound to refile the appeal afresh having in mind the requirements of the Rules of the Court. Furthermore, after an appeal has been struck out upon the ground that it is incompetent, there is nothing as it were, saved with regard to the appeal including the notice of appeal. It is open for the Appellant to reinstitute the appeal if so desired…"*

Based on the fact that the said notice was struck out for being incompetent. Technically, there was nothing before the Court of Appeal and the remedy for the same was the filling of this application as required by law. After reaching the above conclusion, I will not spend more time on the concern raised and is accordingly overruled. This gives the way to proceed with the determination of the application on merit.

The applicant is requesting an extension of time to file a notice of appeal against this Court's decision in Commercial Case No. 5 of 2017. Addressing this, Mr. Sabato started by adopting the affidavit of the principal officer of the applicant in support of the application. He went on to submit that the applicant filed a former notice of appeal on time against the decision of this Court in Commercial Case no. 5 of 2017 but due to a legal technicality, it was struck out on 15th March 2022. In abide of the law to refile another notice of appeal the Applicant filed Misc. Commercial Application No.2 of 2022 .On the date when the application was first called for hearing, the counsel for the applicant prayed to

withdraw with leave to refile due to topographical error on the Chambers summons and affidavit which could not be cured. After the same was withdrawn, the applicant immediately filed this application after the cured errors. He therefore submitted that the delay in filing the notice of appeal was just a technical delay and not a result of negligence or inactions by the applicant, bearing in mind that the former notice of appeal was filed on time and it was just a legal technicality which led to it being struck out as the applicant did not serve the respondent with a letter which requested for copies of proceedings and exhibits. In his argument he prayed to the Court to be guided by the **Case of Fortunaus Masha vs William Shija & Another** (1997) TLR at page 154 where it was observed that a distinction has to be drawn between cases involving real or actual delay and those like the present one, which only involves what can be called technical delay in the sense that the original appeal was lodged on time, but the present situation arose only because the original appeal, for one reason or another, has been found to be incompetent and afresh

appeal has to be instituted. He submitted that in the circumstances, the negligence, if any, refers to the filing of an incompetent appeal, not the delay in filling it out. The filing of an incompetent appeal having been duly penalised by striking out the same, cannot be used yet again. He submitted further that to determine the timeliness of applying for the filling of a fresh appeal. " The same principle has been recently adopted in the case of **National Housing Corporation & Three Others vs Jing Lang Li,** Civil Application No.432/17 of 2017 (Unreported) whereby the Justice of Appeal Mwambegele from page 10 - the last page, was determining similar circumstances to our case but specifically at page 13 guided by the case of Fortunatus (Supra). Therefore, it was his submission that the application has merit since the delay was a technical one and that the same should be allowed with costs.

Opposing the application, Mr. Rogers for the Respondent submitted that the application has no merit as the application be for the application for extension of time to file notice of appeal to the Court of appeal. The applicant ought to show and the court has

to be satisfied that there is a good or sufficient cause warranting the extension of time to file the notice of appeal. He went on to say that the Court of Appeal determined what constituted a good or sufficient reason in the case of **Stephen Ngalambe vs Onesmo Ezekia Chaula & Others**, Civil Appeal No 27 of 2020 (Unreported) at page 12. He argued that by applying the case in the matter at hand, the application was devoid of merit and deserved to be dismissed with costs for want of merit as none of the principles in this case were complied with by the applicant. He went further to argue that the judgement and decree in Comm case no.5 of 2017 were delivered on 28th November 2018 and since then to June 6th June 2022 when the application at hand was filed is a water shade as there are 1286 days which were delayed.

He also submitted that, unfortunately, in the affidavit in support of the application, the applicant has neither given reason for these delays or accounted for them. Hence, the applicant has failed to expound the principle of technical delays, making reference to the case of **Mathew T. Kitambala vs Rabson**

Grayson & Republic, Criminal Appeal No.330 of 2018 at page 16 & 17. Based on the said decision, he argued that what has been brought to the Court is a mere allegation that the applicant has been busy in court corridors. He also pointed out that when counting the days from when the notice of appeal was struck out by the Court of Appeal to the date when the previous withdrawn application was filed on 5th April 2022 as the filling date. The date of payment should be counted, not the date of filing, as it was held in the case of **UNTA Export Limited vs Customs,** EAC 1970 at page 648, that no document was properly filed until the fees were paid. He submitted that all the cases cited are distinguishable as the applicant has failed to expound the principles of technical delay. He therefore prayed for the application to be dismissed with costs.

Making a rejoinder, Mr. Sabato submitted that they have to account from November 28th November 2018 when the former notice of appeal was struck out, to the date of filling out this application. The dates have been properly accounted for in the affidavit particularly para 4 -10 of the affidavit. It also shows when

and why the original notice of appeal was struck out and the order of the Court of Appeal is attached to the application. He also pointed out that the contention that the date of payment was the date of filling. The position of the law under the Judicature of laws of Electronic Filling specifically rule 21 (1) clearly states that a document. So, the date of filling online is the date of filling a document under the current law. He further submitted that in their counter affidavit, particularly para 8 & 9 our para 8 and 9 of the affidavit were not controverted and they did not give the correct version of their story. Therefore, putting them to strict proof without their side of the story amounts to admission, as it was observed by this Court in the case of E**ast Africa Cables (T) Limited vs Spencon Service Limited**, Misc. Commercial Application No. 61 of 2016 at pages 7 & 8 of the decision.

Considering the submissions in support and against the application made by the counsel. The focus in determining this application is based on the principles for granting an extension of time, as it was argued by the counsel for the respondent that the

applicant ought to show a good or sufficient cause warranting the extension of time to file the notice of appeal made reference to the case of **Steven Ngalambe** (Supra).

Also, it is trite law that the Court in exercising its discretional power to grant an extension of time, must be upon showing good cause, depending on the facts in each particular case. This is stated in the case of **Vodacom foundation Versus Commissioner General (TRA)**, Civil Application No.107/20 of 2017(Unreported) at page 7 that,

> " …… *each case will be decided on its own merits taking into consideration the questions, whether the application for extension of time has been brought promptly, whether ever day of delay has been explained and whether there was diligence on the part of the applicant…"*

The gist of this application for an extension of time was based on technical delays, as clearly pointed out by the counsel for the applicant. That the delay in filing notice of appeal was due to a legal technicality which led to it being struck out as the applicant

did not serve the respondent with a letter which requested copies of proceedings and exhibits. However, this was contested by the counsel for the respondent, making reference to the case of **Mathew** (Supra) that the applicant has failed to expound the principle of technical delay.

I agree that a technical delay can be a reason sufficient to warrant an application of time, as it was held in the landmark case of **Fortunate Masha & William Shija & Another,** (1997) TLR, 154. Among other things, a distinction must be made between those... that clearly involved technical delay and those... that allowed for technical delay on the ground. Also, the case of B**harya Engineering & Contracting Co. LTD Versus Hamoud Ahmed Nassoro**, Civil Application No. 342/01 of 2017 where the Court of Appeal sit at Tabora considered that a technical delay constitutes a sufficient ground for extension of time.

Going with the argument of the respondent counsel that the reason of delay was not expounded by the Applicant and the reason given was not sufficient to warrant the extension of time as no

ground stated in the affidavit. I find these arguments with no weight based on the facts in paragraph 7 of the affidavit in support of the application, the reason as to why for the former notice on appeal was struck out were clearly established. Therefore, the argument that this fact comes from the bar is a mere afterthought. Also, the reason for technical delay is also stated in same paragraph and it was not necessarily to be stated as technical delay if the facts demonstrate the same as in the present application. Besides the case of **Mathew** (Supra) cited by the counsel for the Respondent in support of the Applicant as the Court of Appeal agreed that a technical delay can be a ground for an extension of time as established in this present application. This is also based on the guidance provided in the case of **Langael Sangito Marx Vs The Board of Trustees of Medical Stores Department**, Civil Application No.41 of 2019. Where the Court held that,

"…Where the delays are not caused by the applicant and that where the respondent is likely not to be affected by the extension of time, then the Court is to extend such extension of time…"

In this application, the Applicant did establish a technical delay caused by the incompetence of the former notice of appeal which was filed on time. The said technical delay led to the strike out of the application as discussed above. Moreover, with due respect to the arguments raised by counsel for the Respondent that the applicant has failed to account for delays. Having gone through the affidavit of Akifa Kara affidavit in paragraphs 2 to 10, the Applicant has accounted for each day of the delays as demonstrated by the sequence of steps and events properly accounted for from October 29th October 2018 to 1st June 2022 to warrant the grant of the extension of time as stated in the case of case of **ALLIANCE INSURANCE CORPORATION VERSUS ARUSHA ART LIMITED,** Civil Application No. 512/2 of 2016. At page 5 the Court stated that;

"…*It is apparent that an application for enlargement of time within which to take any step in legal proceedings is entirely in the discretion of the court to grant or not to grant it. It is also settled law that extension of time may only be granted where it has been*

sufficiently established by an applicant that the delay was with sufficient cause..."

Besides, the argument by the counsel for the Respondent that the counting of days should be the date of payment of fees, i.e. when the previous withdrawn application was filed, on the 5th April, 2022 based on the case of **Unta Export Limited vs Customs**, EAC 1970 at page 648 where it was held that"... no document properly filed until the fees have been made...". I think the counsel has misdirected himself or is not aware of the current law of the Judicature and Application of Laws (Electronic Filing) Rules of 2018 whereby Rule 10 (5) of the Rules provides that;

> *"Any document which is filed with, served on, delivered or otherwise conveyed to the Registrar or magistrate in-charge through the electronic filing system by a registered user using a user ID shall be deemed to have been intentionally so filed, served, delivered or otherwise conveyed by the registered user."*

Therefore, reading the rule above, it clearly defines when the document is deemed to be filed in court. This is when the document is electronically either filed, served on, delivered or otherwise conveyed to the respective authority, it is deemed to have been filed and the provision is under mandatory terms "shall". Therefore, the counting of days should be from the day when the applicant submitted his application online and not the day of payment.

In the event, I am satisfied that sufficient reasons have been established to justify the grant of this application. As a result, this application is hereby allowed with costs. The applicant is given thirty days to file a notice of appeal.

Dated at **Arusha** this 21st day of October, 2022.

Z.A.Maruma.

JUDGE