IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: RAMADHANI, J.A, MUNUO, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 12 OF 2002

BENEDICT MUMELLO ..... APPELLANT

VERSUS

BANK OF TANZANIA ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Chipeta, J.)

dated the 13th day of July, 2000
in
Civil Appeal No. 179 of 1999

JUDGMENT OF THE COURT

23 August 2006

KAJI, J.A.:

The appellant, Benedict Mumello, is appealing against the decision of the High Court at Dar es Salaam (Chipeta J), dated 13.7..2000, in Civil Appeal No. 179 of 1999, in which the respondent, the Bank of Tanzania was granted extension of time to appeal against the decision of Kisutu Resident Magistrate's Court in Employment Cause No. 144 of 1994 delivered on 22.12.1998.

Briefly the facts giving rise to the appeal may conveniently be stated as follows:

The appellant was employed by the respondent from 1.10.1979. On 31.3.1994 he was served with a letter of retrenchment. He was paid Shs. 8,641,347/25 as terminal benefits. However he complained that he was underpaid as the respondent had computed his terminal benefits basing on the old salary. It would appear there was no compromise. On 30.12.1994 the appellant instituted the above Employment Cause claiming for Shs. 11,926,499/40 being the amount he claimed he was underpaid. The respondent conceded the error and paid him Shs. 11,893,523/45 on 23.6.1995. The appellant then sued the respondent claiming for payment of Shs. 20,000/= as subsistence allowance and Shs. 5,000/= as out of pocket allowance per day from 1.4.1994 till on 23.6.1995 when he was paid the difference. The respondent vehemently resisted the claim on the ground that those allowances were only payable to employees who are in service when traveling out of their stations on duty, and that the appellant was no longer its employee from 31.3.1994 when he was served with the letter of redundancy and got paid his terminal benefits. The trial court granted the appellant's claim with interest at the rate of 31% from 1.4.1994 to the date of judgment, and at the

court rate of 9% from the date of judgment to the date of full payment.

The respondent was not satisfied. On 6.1.1999 the respondent applied to be supplied with a certified copy of judgment and proceedings for appeal purpose. The same were supplied on 8.12.1999. On 16.12.1999 the respondent applied for extension of time within which to appeal. The ground for delay being failure to be supplied with the necessary documents in time, and being supplied with confusing two copies of decrees bearing different dates and different amounts. The High Court found the same to be sufficient grounds and granted the extension prayed for. The appellant was dissatisfied; hence this appeal after being granted leave by the Court.

Mr. Luguwa, learned counsel for the appellant, has preferred two grounds of appeal, namely:

1. That his Lordship the High Court Judge erred in law when he granted extension of time to the respondent to appeal in the absence of sufficient reasons for the delay to appeal.

2. That his Lordship the High Court Judge erred in law in basing his decision on the evidence of the affidavit of Bosco Ndimbo Kimela, a person who was not having the conduct of that case in the trial Resident Magistrate's Court.

Arguing the first ground of appeal, Mr. Luguwa contended that, in applying to be supplied with the necessary documents for appeal purpose the respondent had applied only for copies of proceedings and judgment, ignoring a copy of the decree intended to be appealed against. The learned counsel pointed out that, even if the respondent would have been supplied with the copies it had applied for, it would not have been able to file an appeal in the absence of a copy of decree which it had not applied for. In the circumstances, the learned counsel submitted that, the delay to be supplied with copies of proceedings and judgment alone is not sufficient ground for grant of extension of time. Submitting on the second ground of appeal the learned counsel pointed out that, the affidavit deponed to by Bosco Ndimbo Kimela containing the grounds for the delay should not have been relied upon by the learned judge of the High Court

because the deponent was not the one who conducted the case in the trial court, and that most of his deposition is hearsay.

Responding to these submissions Ms. Dosca Mutabuzi, learned counsel for the respondent, contended that, immediately after delivery of the judgment the respondent's advocate lodged notice of appeal and applied for the necessary documents for appeal purpose. The same were never supplied till on 8.12.99 after a reminder. The learned counsel observed that the situation was made even worse by the two copies of decree bearing different dates and different amounts. In her humble view, all these amount to sufficient cause as observed by the learned judge of the High Court.

Responding to the second ground of appeal the learned counsel submitted that, Mr. Bosco Ndimbo Kimela was the Principal Officer of the respondent bank, and that most of the facts he deponed to were known to him. In that respect it is her view that Kimela's affidavit is proper, and was properly relied on by the learned judge of the High Court.

It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension

of time may only be granted where it has been sufficiently established that the delay was with sufficient cause.

In the instant case time was extended by the High Court mainly on two grounds. First, that, although the respondent had lodged the notice of appeal in time and applied for copies of proceedings and judgment in time, yet it was not supplied with the same till on 13.12.1999, and that, immediately thereafter it lodged the application on 16.12.1999. Second, that the trial court contributed also materially to the delay and confusion by supplying the respondent with two copies of decree bearing different amounts and different dates.

The crucial issue, therefore, is whether these two grounds amount to "sufficient cause." Here we may pause and ask: What amounts to sufficient cause?

Addressing a similar issue of what amounts to sufficient cause, a Single Judge of the Court, Nsekela JA, in the case of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda** – Civil Application No. 6 of 2001 (unreported), had this to say:

> "What amounts to sufficient cause has not been defined. From decided cases a number of factors has to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."

The learned Single Judge cited the case of **Dar es Salaam City Council v. Jayantilal P. Rajani** (CAT) Civil Application **No. 27 of 1987** (unreported). In the instant case, it is common ground that the respondent applied for copies of the proceedings and judgment on 6.1.1999 which was just about 14 working days of the date of the decision intended to be appealed against. It is also common ground that the respondent was supplied with the same on 8.12.1999 after a reminder and filed the application on 16.12.1998. In our view, applying for copies of proceedings and judgment within such a short time from the date of judgment, and later making a follow up by way of a reminder, and finally lodging the application immediately after being supplied with the same, depicts diligence on the respondent. There is a complaint by the appellant's learned counsel that since the respondent had not applied also for a copy of decree, it would not have been able to lodge an appeal even if it would have been

supplied with the same. Indeed this would probably have been so. But there is nothing suggesting that it would not have applied for extension of time. If that would have been the case, we cannot speculate what the High Court would have said. In fact this challenge of not applying for a copy of the decree was raised by the learned counsel for the appellant from the bar. It is not reflected anywhere in the appellant's counter-affidavit dated 25.1.2000.

As far as the confusion caused by the two copies of decree is concerned, the respondent preferred this as one of the grounds for the delay in paragraph 6 of Kimela's affidavit. But in reply the appellant had deponed in paragraph 5 of the counter-affidavit as follows:

> 5. That the contents of paragraph 6 of the affidavit are false as there was no confusion at all regarding the copies of the decree because both copies contained the same particulars.

We doubt whether the appellant was serious when he deponed so. We say so because the two copies of the decree do not contain the same particulars. The first is dated and signed on 20.4.1999, and

shows interest to be based on the principal amount of Tshs. 11,893,523.45.

The second one is dated and signed on 30.4.1999, showing interest to be based on the principal amount of Tshs. 11,926,499.40.

With these glaring conflicting confusions the trial court cannot escape the blame of contributing to the delay as held by the High Court. There is a complaint by the appellant in paragraph 3 of his counter-affidavit before the High Court that, since the decrees were ready way back in April 1999, the respondent should have collected it (or them) thereabout instead of waiting for so long. We appreciate this. But even if the respondent would have collected them or either of them much earlier, it would not have been able to prepare and prefer an appeal because copies of proceedings and judgment were not yet ready (See ORDER XXXIX Rule 1 (1) of the Civil Procedure Code, 1966).

They became available on 8.12.1999.

Lastly, there is a complaint by the appellant's learned counsel that the affidavit by Kimela should not have been considered because he was not the one who conducted the case in the trial court, and that his deposition is hearsay. We have carefully gone through the

impugned affidavit. It is common ground that the deponent, Kimela, was the Principal Officer of the respondent bank. All his deposition is centred on what was known to him as a principal officer of the respondent, except perhaps paragraph 7 which says:-

> 7. That in following up the copy of the decree, the applicant was told to wait for the computer typed decree and was never given or shown the one typed with typewriter.

Even if this paragraph is expunged, the totality of the remaining 17 paragraphs satisfies the requirement of "sufficient cause".

We note from the record that in granting the extension of time applied for the learned judge of the High Court considered also the chances of success of the intended appeal where he said:

> "What is more the intended appeal cannot be said to be without merit."

On our part we are unable to say positively whether the intended appeal has overwhelming chances of success at this stage with the limited information availed to us.

In conclusion, we are of the firm view that, the delay to be supplied with copies of proceedings and judgment, and the two copies of decrees containing different material particulars, contributed to the delay by the respondent to appeal within the prescribed period. In that respect, it is our considered view that the delay was with sufficient cause.

For the reasons stated, we dismiss the appeal with costs.

DATED at DAR ES SALAAM this 12th day of October, 2006.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR