

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 192/20 OF 2016

KARIBU TEXTILE MILLS LIMITEDAPPLICANT
VERSUS
COMMISSIONER GENERAL (TRA) RESPONDENT

(Application for Extension of Time to Lodge Memorandum and Record of Appeal Arising
from the Judgment and Decree of the Tax Revenue Appeals Tribunal
at Dar es Salaam)

(H. M.Mataka, Vice Chairperson and Prof. J. Doriye and N. P. Shimwela,
Members)

Dated the 8th day of October, 2010
in
Appeal No. 12 of 2010

RULING

11th& 18th August, 2017

MWAMBEGELE, J.A.:

This is a ruling in respect of an application by a Notice of Motion taken under rule 10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth “the Rules”). The applicant seeks the indulgence of the Court to enlarge time within which to lodge a memorandum and record of appeal against the decision of the Tax Revenue Appeals Tribunal (henceforth “the Tribunal”) pronounced on 08.10.2010 in Appeal No. 12 of 2010. The

Notice of Motion is supported by an affidavit duly affirmed by Nadeem Al-Nasir Jetha, principal officer of the applicant company. It is resisted by an affidavit in reply affirmed by Yusuph Juma Mwenda, Manager in charge of Technical Services in the Large Taxpayers Department of the Respondent.

At the hearing of the application before me on 11.08.2017, both parties were represented. While Mr. Juma Nyamgaruri, learned counsel, appeared for the applicant, Mr. Felix Haule, also learned counsel, advocated for the respondent. The applicant had earlier filed written submissions in support of the application as required by the Rules. Despite filing an affidavit in reply, the respondent did not file any written submissions.

At the hearing, Mr. Nyamgaruri adopted the affidavit supporting the Notice of Motion as well as the written submissions earlier filed as the applicant's oral submissions. The learned counsel for the applicant had nothing useful to add. On the other hand, Mr. Haule for the respondent did not only concede to the application but also withdrew what was deposed at para 5 of the affidavit in reply; the only paragraph that contested the affidavit supporting the application.

In the twenty-one-paragraph affidavit and the twelve-page written submissions both supporting the application, the applicant has given the

background to the dispute between the parties and the reasons why the appeal could not be filed in time. At the centre of controversy between the parties was, and still is, a dispute arising out of a VAT assessment. That dispute was referred to the Tax Revenue Appeals Board (henceforth "the Board") which decided in favour of the applicant. Aggrieved, the respondent successfully appealed to the Tribunal. Undeterred, the applicant lodged an appeal in the Court but for reasons that will be apparent in this ruling, that appeal was withdrawn by the applicant.

While the appeal referred to in the foregoing paragraph was pending, the Court, through **Midcom Tanzania Limited v. Commissioner General (TRA)**, Civil Appeal No. 11 of 2011, ruled that pursuant to rule 21 of the Tax Revenue Appeals Rules, 2001, as amended, the proceedings, decisions and drawn orders of the Tribunal will only be valid if they are signed and certified by the chairman or vice chairman and all members who presided over it. As the applicant's appeal suffered these deficiencies, she did not see any prospect of the appeal sailing through and therefore applied to withdraw the same on 21.04.2015 and the appeal was accordingly marked withdrawn on 28.05.2015.

The appellant then embarked upon the process of complying with the decision in **Midcom**. She sought and obtained leave from the Tribunal to lodge a Notice of Appeal out of time and lodged it on 25.04.2016.

While waiting to be supplied with properly signed decrees by the Board and the Tribunal, the Court handed down yet another ruling which affected the applicant's endeavours. That was **G.S Contractors Limited v. Commissioner General (TRA)**, Civil Appeal No. 80 of 2015 (henceforth "Civil Appeal No. 80 of 2015"). That case ruled out that an appeal to the Court emanating from the Tribunal was a third appeal and thus required a certificate on a point or points of law by the Tribunal. To comply with this decision, the applicant sought and obtained a certificate from the Tribunal on 31.05.2016. However, Civil Appeal No. 80 of 2015 was varied in review by **G.S Contractors Limited v. Commissioner General (TRA)**, Civil Application No. 155 of 2016 (henceforth "Civil Application No. 155 of 2016") which held that appeals from the Tribunal are not third appeals but second appeals which did not need any certificate on a point or points of law as a condition precedent.

Likewise, by a ruling delivered by the Court on 16.09.2016 vide **African Barrick Gold Mine Plc v. Commissioner General (TRA)**, Civil

Appeal No. 77 of 2016 (unreported), the applicant also discovered that an omission to include in the record of appeal documents enumerated under rule 96 of the Rules makes the record incomplete and renders an appeal incompetent. The applicant, once again, embarked on yet another assignment to apply for opinion of individual members of the Board and Tribunal as well as certified copies of exhibits tendered at the Board. The applicant was supplied with a copy of the decree duly signed by members of the Board on 22.03.2017 and with certified exhibits on 27.03.2017. That seemed to complete the applicant's endeavour in making her intended appeal in order. But then she was already out of time hence the present application.

On the above submissions, the applicant argues that there exists good cause for the Court to exercise its discretion to grant the extension sought. She insists that the withdrawn appeal was lodged well within the prescribed time and all along the applicant was diligently pursuing the matter to make the intended appeal meaningful in compliance with the decisions of the Court. The applicant has relied on the cases of **Amani Centre for Street Children v. Viso Construction Company Ltd**, Civil Application No. 105 of 2013 (unreported) for the proposition that extension of time under rule

10 of the Rules involves the Court's exercise of its discretion and such a discretion must be exercised judiciously having regard to the particular circumstances of each case. He has also relied on **Insignia Limited v. Commissioner General (TRA)**, Civil Application No. 2 of 2007 (unreported) and **Fortunatus Masha v. William Shija & another** [1997] TLR 155 to buttress her arguments.

The applicant thus prays this application to be allowed with costs to abide by the result of the intended appeal.

As already intimated, the respondent's counsel supported the application and withdrew the only paragraph in the affidavit in reply which challenged the affidavit supporting the application, therefore, basically, leaving the application unchallenged. In view of Mr. Haule's concession, Mr. Nyamgaruri had nothing to rejoin. The respondent's concession notwithstanding, the Court is still enjoined to investigate if the applicant has advanced good cause to warrant it exercise the discretion to enlarge time as prayed by the applicant. That is to say, the respondent's concession in no way exonerates the applicant from showing existence of good cause for the delay so as to enable the Court exercise its discretion to grant the extension sought.

I have subjected the applicants affidavit and written submissions both of which the applicant sought to adopt as part of his oral submissions. As rightly submitted by the applicant's counsel, an application of this nature, within the dictates of rule 10 of the Rules, will only succeed upon showing good cause for the delay. In **Amani Centre for Street Children** (supra); a case cited and relied upon by the applicant's counsel, the Court observed:

"Extension of time under rule 10 of the Rules, involves the exercise of this Court's discretion. Such discretion must be exercised judicially having regard to the particular circumstances of each case."

Has the applicant succeeded in bringing to the fore good cause to warrant the Court exercise its discretion to grant the enlargement of time sought? This is the question to which I now turn.

As can be gleaned in the affidavit supporting the application as well as the written submissions also supporting the application, the applicant had filed the former appeal well in time. However, upon discovering that the appeal was not in conformity with the decision of this Court in the **Midcom** Case, the applicant, quite rightly in my view, sought to withdraw the appeal

and the same was marked withdrawn. After that, the applicant embarked upon making her intended appeal in conformity with the decisions of other decisions of the Court. First, she sought to conform to the decision of Civil Appeal No. 80 of 2015 and later discovering that those efforts were unnecessary in the light of a later decision in review of Civil Appeal No. 80 of 2015 in Civil Application No. 155 of 2016.

The applicant also, allegedly, had to comply with the ruling of the Court in African **Barrick Gold Mine** which held that an omission to include in the record of appeal documents enumerated under rule 96 of the Rules makes the record incomplete and renders an appeal incompetent.

I would have no problem in exercising my discretion to grant the extension sought if it were not for the applicant's failure to explain away every day of delay in lodging the memorandum and record of appeal. Much as I agree that it was incumbent upon the applicant to comply with the orders in Civil Appeal No. 80 of 2015, Civil Application No. 155 of 2016 and **Midcom**, as they were new developments in the law in respect of appeals to the Court emanating from the Tribunal, I highly doubt if the same was the case in respect of **Barrick Gold Mine**. I shall try to demonstrate.

The gist of **Barrick Gold Mine** was that failure to include the documentary evidence tendered at the trial offended against the mandatory provisions of rule 96 (1) (f) and (2) of the Rules. That was not the first time the Court held that position. There is a string of decisions in which the Court maintained that stance. Such decisions include **Joseph Onaukiro Ngiloi v. The Permanent Secretary, Central Establishment & 3 Others**, Civil Appeal No. 78 of 2011 and **Mangenyula Irumbila & Another v. Dar es Salaam City Council**, Civil Appeal No. 80 of 2014, to mention just two of them. In the premises, I seriously doubt if the decision in **Barrick Gold Mine** contributed to an excuse of the applicant not filing her memorandum and record of appeal in good time.

In addition to the foregoing, I seriously doubt if the applicant has managed to explain away every day of delay. Attempt to comply with the decisions of the Court so that the intended appeal would have no defects has been superbly explained by the applicant. There is sufficient explanation of delay from the moment the former appeal was withdrawn up to the moment when the certified exhibits supplied to her on 27.03.2017. However, the period between the time the certified exhibits tendered at the trial were availed to the applicant on 27.03.2017 and the time when the

present application was lodged on 27.04.2017, has, in my considered view, not only been insufficiently explained but not explained at all. At para 17 of the affidavit supporting the application the applicant deposes through her principal officer that she was supplied with certified copies of exhibit tendered at the trial on 27.03.2017 and that at that moment she was already out of time hence the present application. Nothing is mentioned why the present application was filed one month thereafter; on 27.04.2017, thirty clear days after the endeavours to comply with the decisions of the Court were accomplished.

Likewise, the same explanation is given in the written submissions. At page 7, the applicant restates that the process to comply with the Court's decisions was over by 27.03.2017 when the certified exhibits tendered at the trial were availed to the applicant when she was already out of time hence the present application. Yet, again, the applicant does not explain in the written submissions why the present application was filed one month after completing the process of complying with the decisions of the Court.

It is the law in this jurisdiction founded upon prudence that every day of delay must be accounted for. That this law was articulated by the Court

in an unreported decision of ***Bushiri Hassan v. Latifa Lukio Mashayo***, Civil Application No. 3 of 2007 in the following terms:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

The foregoing principle has consistently been followed in a plethora of cases. Such cases are **Mgombaeka Investment Company Limited & 2 Others v. DCB Commercial Bank PLC**, Civil Application No. 500/16 of 2016, **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 300/17 of 2016 and **Mwita Mataluma Ibaso v. R.**, Criminal Application No. 6 of 2013; all unreported recent decisions of the Court, to mention but a few.

At this juncture, I find it irresistible to restate what was stated by the Privy Council in **Ratnam v. Cumarasamy and Another** [1964] 3 All ER 933 in applications of this nature. The Privy Council, at 935, observed:

"The rules of court must prima facie be obeyed and, in order to justify a court in extending time

during which some step in procedure requires to be taken there must be some material on which the Court can exercise its discretion. If the law were otherwise any party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation."

The above stance was also restated in **Godwin Ndewesi and Karoli Ishengoma v. Tanzania Audit Corporation** [1995] TLR 200.

In the case at hand, the applicant has not even attempted to explain away why she took thirty clear days after she accomplished the process of complying with the decisions of the Court in several decisions mentioned above. In underlining the overarching need to show necessary delays and great diligence in taking steps in applications of this nature, the Court observed in **Dr. Ally Shabhay v. Tanga Bohora Jamaat** [1997] TLR 305 at 306 which observation merits quotation:

"Those who come to courts of law must not show unnecessary delay in doing so; they must show great diligence."

In the case at hand, the applicant might have shown great diligence in making his intended appeal in order, but has miserably failed to explain away the one month delay in filing the present application after that process was over.

In view of the above, I find and hold that the applicant has failed to bring to the fore good cause to warrant the Court exercise its discretion to grant the enlargement sought. Consequently, the present application stands dismissed. As the respondent supported the application, no order is made as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 15th day of August, 2017

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



E.Y. Mkwizu

DEPUTY REGISTRAR
COURT OF APPEAL

