

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 126/02/ OF 2018

HANSPAUL AUTOMECHS LIMITED..... APPLICANT

VERSUS

RSA LIMITED..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Arusha)**

(Maghimbi, J.)

dated the 16th day of December, 2016

in

Civil Reference No. 06 of 2016

RULING

29th March & 1st April, 2019

KITUSI, J.A.:

This Court is called upon to extend the time under Rule 10 and Rule 48 (1) of and (2) of the Court of Appeal Rules GN 30 of 2009, (the Rules), to enable the applicant, Hanspaul Automech Limited to file an application for leave to appeal out of time. It is by a Notice of Motion supported by a 16 paragraph affidavit of Salim Juma Mushi, learned advocate representing the applicant. Initially, it was indicated that the leave is intended to appeal against the Ruling and drawn order of the High Court in Misc. Civil Application No. 2 of 2017 between the parties but later it turned out and it

was common ground that indeed the matter intended to be appealed against is Civil Reference No. 6 of 2016 High Court, Arusha Registry.

The application is contested by RSA Limited, the respondent, and it has done so by filing an affidavit in reply sworn by Joseph Kiyungi Songwa, learned advocate.

The brief background of the matter is that the applicant was dissatisfied with the decision of the Taxing Master (Hon. Rumisha, D.R) in Taxation Cause No. 28 of 2016 and challenged it by way of Reference to the High Court, vide Civil Reference No. 6 of 2016. Maghimbi, J. struck out the Reference for being incompetent and untenable having sustained the point of preliminary objection raised by the respondent. Still aggrieved, the applicant approached the High Court where he lodged an application for leave under section 5 (1) (c) of the Appellate Jurisdiction Act Cap 141 of the Revised Edition, 2002 (the AJA), and Rules 45 (a) and 47 of the Rules. It is alleged that the registration of that application took unexpected long time. At the time the registration was done however, the applicant was already out of time hence he wrote to the registrar asking for the withdrawal of the application. Consequently, the applicant lodged an application for extension of time within which to file leave of appeal to the

Court. His application however, was dismissed by the High Court hence this second bite application before the Court.

The relevant paragraphs of the affidavit narrate the background as follows:

7. *That on 29th December, 2016 we lodged an application for leave to appeal to the Court of Appeal on time. For admission and thereafter payment of necessary court fees as shall be assessed by the Court. Copy of the said application is hereby attached and marked as annexure HAL – 5*
8. *That since filing of said Application for admission process; we did not receive any communication as to the status of the admission despite several follow up.*
9. *That on 2nd January, 2017 we again made follow up on the whereabouts of the said Application only to be notified that it has been admitted and fit for payment of Court fees, but the filing date had to reflect a date on which payment of Court fees has to be made which would obviously be out of the prescribed time.*

10. That on the same date i.e. and January 2017, we wrote a letter that the said documents for application for leave be returned to us so as we can sick for leave to file the same out of time. A copy of the letter is attached herewith and marked to as annexure HAL - 6

The respondent's reaction to the above averments is contained in paragraphs 6 and 7 of the affidavit in reply. Generally, he is contesting the application for being baseless and also that the applicant has come up with the same grounds as those which were determined by the High Court in a decision that remains "uncontroverted."

When the application was called on for hearing, Mr. Salim Mushi and Philipo Edson, learned advocates, appeared for the applicant and respondent respectively and made rival submissions which I shall now refer to, beginning with the applicant's.

Mr. Mushi was brief, in the course of which he submitted that the decision of the High Court in Civil reference No. 6 of 2016 was tainted with illegality in that it was wrong for the High Court to hold the application incompetent for failure to serve it to the respondent within seven days.

Secondly, Mr. Mushi submitted on the reason for the delay and suggested that it was merely technical because it was caused by delay in the admission process at the Registry of the High Court. The learned counsel referred the Court to paragraph 13 of the affidavit which shows the efforts that were made to follow up the matter with the High Court Registry. He impressed on the Court that he was diligently pursuing the matter and asked for the court's indulgence to grant him extension of time so as to access the Court on appeal.

On his part, Mr. Edson submitted that had the applicant's documents been presented for filing, they would have been stamped, meaning that the absence of the stamp is an indication that the same were not presented as alleged. Then, the learned counsel addressed another point that was not addressed by the applicant, touching on the delay in obtaining copy of the ruling. This fact features under paragraph 15 of the affidavit. The learned advocate submitted that if there was indeed that delay in obtaining a copy of the ruling, the applicant should have obtained a certificate of delay by the Registrar as per Rule 8 (d) of the Rules.

On the issue of illegality, Mr. Edson submitted that there was none because the law is clear that service should be within seven days. He

invited the Court to also consider the fact that the High Court's ruling is not appealable. He finally asked the Court to dismiss the application with costs.

In a brief rejoinder, Mr. Mushi submitted that paragraph 13 of the affidavit which raised the issue of presentation of documents at the registry of the High Court has not been disputed. As for the certificate of delay, Mr. Mushi submitted that Rule 8 (d) of the Rules does not apply in applications. As for the holding of the High Court that its decision is not appealable, the learned counsel cited Section 5 (1) (c) of the AJA which he interpreted it to mean that with leave, any order of the High Court is appealable. He therefore, prayed for the Court to grant the application with costs.

I have given the learned submissions deserving consideration. In the first place, let me hasten to point out here that according to the provisions of Rule 10 of the Rules, an application for extension of time is entirely in the discretion of the Court to grant or refuse it. For it to be granted however, the applicant is duty bound to adduce sufficient reasons for the delay – See also the case of **Alliance Insurance Corporation Ltd vs. Arusha Art Ltd**, Civil Application No. 33 of 2015 CAT (unreported) whereby the Court stated that:-

"Extension of time is a matter for discretion of the Court and that the applicant must put material before the Court which will persuade it to exercise its discretion in favour of an extension of time."

In the present case, I think it is crucial at this stage to let it known to the parties that I am not sitting on appeal against the decision of the High Court which refused the applicant's first application for extension of time. This is a fresh application before me which has been preferred as a second bite application. In an almost similar scenario, recently, the Court had to make the following observation:-

"We were inclined to state the above legal position after we had read the contentions in the written submission by the respondent which, to frantic, attacks the grounds raised in the present application basing on what was argued before the High Court and the decision thereof when refusing to grant leave. The respondent ought to have known that this is a fresh application based on completely new grounds."

[See; **The Bishop Roman Catholic Diocese of Tanga vs. Casmir Richard Shemkai**, Civil Application No. 507/12 of 2017 (unreported)]

I will therefore proceed to consider the application on the grounds stated as if the same have never been determined. That, of course, is what 'second bite' application is all about.

The first ground according to Mr. Mushi, touching on the aspect of illegality, but with respect to the learned advocate, neither from the affidavit in support of the application nor from his oral submissions, is that contention easy to be seen. It has long and often been stated that for illegality to form sufficient cause for extension of time, it must be one that is obvious at a glance. There is a large family of decisions to that effect such as, **The Principal Secretary, Ministry of Defence and National Service vs. Derram Valambia** [1992] TLR 387 followed in **Lyamuya Construction Company Ltd vs. Board of Trustees of Young Women's Christian Association of Tanzania** Civil Application No. 2 of 2010 (unreported) and; **The Bishop of the Roman Catholic Diocese of Tanga (supra)**

Thus the first ground is without merits and I accordingly dismiss it.

The second ground alleges delay as having been caused by red tape in the admission process at the Court Registry. The respondent's submission in this regard is that the applicant has not proved that he, in

fact, presented the documents for the admission, and this is because there is no official stamp on the documents by the Registry. With respect, the contention of inaction on the part of the Registry is hard to challenge. There are several letters which were written by the learned advocate for the applicant trying to stir the registry into action on the basis of which I am satisfied that all was not well at the registry. The applicant's advocate had to write another letter, annexure "HAL – 6", mentioned under paragraph 10 of the affidavit to withdraw the application because he failed to make payments for filing fees within time. I think this explains the absence of the official stamp. In **Tanzania China Friendship Textile Co. Ltd vs. Charles Kabwe & Others**, Civil Revision No. 52 of 2008, CAT (unreported) the Court took the view that the applicant should not be condemned for the delay by the Court to supply him with a copy of ruling. Similarly, in this case I am satisfied that the applicant is not to blame since he has shown that the High Court Registry contributed to the delay.

Before I may pen off, I think it is important to say something in respect of the provisions of Rule 8 (d) of the Rules. As aforesaid, Mr. Edson has contended that Mr. Mushi ought to have obtained a certificate of delay from the Registrar of the High Court excluding those days he waited for the

ruling and the drawn order. He insisted that the provision of Rule 8 (d) of the Rules dictates the same. With all due respect to the learned counsel, the provision of Rule 8 (d) does not cover certificate of delay. On contrary, it speaks on how the period of time should be reckoned. For the sake of clarity, let me reproduce what is provided thereof:-

"Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions-

(d) where any particular number of days is prescribed by these rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded, and, if the last day expires on a day when the Court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded."

As it can be seen from the quotation above, the provision does not speak anything regarding certificate of delay. Nevertheless, it should be noted that the certificated of delay is normally issued under Rule 90 (1) of the Rules by the registrar of the High Court for appeal purposes only.

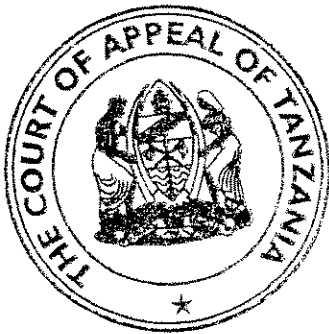
In the premises, for the reasons shown, I think, justice will be done if I grant this application as I accordingly do. The said application should be filed within 14 days of this ruling.

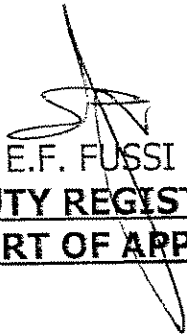
No order as to costs.

DATED at ARUSHA this 1st day of April, 2019.

I.P. KITUSI
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL