

TANZANIA / JUDGMENT

exim bank tanzania limited vs abeed m manji 2024 tzca 87 22 february 2024

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CIVIL APPLICATION NO. 677/08 OF 2020
EXIM BANK (TANZANIA) LIMITED.....APPLICANT VERSUS ABEED M.
MANJIRESPONDENT (Arising from Civil Appeal No.372 of
2023 of the High Court of Tanzania at Mwanza) (Tiqanqa, J) dated the 25th day of February, 2021
in Civil Case No. 4 of 2017

RULING

12th & 22nd February 2024 MLACHA, 3.A.: This is a ruling in an application for extension of time within which the applicant may lodge a Memorandum and Record of appeal against the decision of the High Court of Tanzania at Mwanza (Tiganga, J.) dated 25th February, 2021 in Civil Case No.4 of 2017. Extension of time is sought from 24th May, 2021 up to 3rd July, 2023 when Civil Appeal No. 372 of 2023 was lodged before the Court. The notice of motion is made under rules 10, 48 (1) and (2) and 49 (1) of the Tanzania Court of Appeal Rules 2009 as amended (the Rules) and is supported by the affidavit of Mr. i Edmund Mwasanga, learned advocate and head of the legal services department of the applicant. The notice of motion has the following grounds:

- a) That the applicant could not file the memorandum o f appeal sixty (60) days from the date when the notice o f appeal was filed because the proceedings, judgment, decree and exhibits which are documents necessary to be included in the record o f appeal were yet to be provided to the applicant. The documents were ready to be provided to the applicant on 2& 1 April, 2023.
- b) That the appeal was filed on J d July 2023 believing to be within time under a honest and genuine m istake by the then counsel for the applicant that time within which to file the appeal is computed from 23rd May 2023 when the applicant received the letter calling her to collect the documents and not 2\$h A p ril 2023 when the letter was written by the registrar;
- c) That, the applicant cannot rely on the certificate o f delay issued by the Deputy Registrar in its current form because the same is defective for making reference to a notification made on 5thJune 2023 which is not the date when the applicant was called to collect the documents.

- d) That, in the absence of a valid certificate of delay, the applicant could not benefit from the automatic exclusion of time provided in the proviso to rule 90 (1) of the Court of Appeal Rules, 2009 as amended. 2
- e) The proceedings leading to the impugned decision and hence the decision are tainted with illegalities as there was no order made by the Court to proceed ex parte against the second defendant in civil case No. 4 of 2017 and no order was made on the liability of the 2nd defendant in civil case No. 4 of 2017 despite the fact that the Respondent prayed for Judgment and Decree against the Applicant and the second defendant jointly and severally.
- f) The Court decided the suit on the basis of the Applicant's vicarious liability which was unpleaded matter and proceeded to grant a relief which was never sought by the Respondent in the plaint and therefore condemning the applicant unheard.
- g) The Court proceeded to deal with a matter which was barred by the law following an order dismissing an earlier case which was filed by the Respondent.
- h) The Court awarded interest on the decretal amount at the current contractual rate applicable to fixed deposits accounts with the applicant from the date of judgment until payment in full or alternatively at the court rate.
- i) That there is no prejudice which will befall the Respondent because the appeal has already been lodged and served on the respondent.
- j) That the Applicant has been diligently pursuing the appeal save for the slip which was occasioned by the Applicant's counsel.
- k) The delay from 24th May 2023 is technical because the Applicant could not have filed the appeal without the requested documents,
- l) And for an order that costs of the application abide the outcome of the appeal The background of the application as can be picked from the affidavit of Mr. Edmund Mwasanga supporting the application is as follows: That, the respondent filed Civil Case No. 4 of 2017 at the High Court of Tanzania, Mwanza sub registry on 14th February 2017 seeking judgment and decree against the applicant and another person (second defendant) jointly and severally for payment of TZS. 1,145,000,000.00, interest on the amount at 14.5% per annum, interest on the decretal sum, general damages and costs. The High Court found that there was a misappropriation of funds done by the second defendant while in the employment of the applicant and therefore held the applicant vicariously liable for the act of the second defendant. It then ordered the applicant to pay TZS. 1,145,000,000.00 being the principle amount, compound interest at the rate of 14.5% per annum from November 2015 to the date of judgment, interest on the decretal sum at the current contractual rate from the date of judgment till the date of payment in full. 4 The applicant was aggrieved and had lodged a letter to the Deputy Registrar (DR) on 16th March 2021, seeking copies of proceedings, judgment, decree and exhibits for appeal purposes. He also filed a notice of appeal on 23rd March 2021. The DR prepared the documents and wrote a letter dated 28th April 2023

notifying the applicant that the documents were ready for collection. This letter reached the applicant on 23rd May 2023 who collected the documents on 5th June 2023. He also collected a certificate of delay on this date. Relying on the days excluded in the certificate of delay and believing the exclusion of time is computed from the date of receipt of the letter of the DR and not the date it was written, the applicant proceeded to this Court and lodged the memorandum and record of appeal on 3rd July 2023. The appeal was registered as Civil Appeal No. 372 of 2023. When Mr. Gaspar Nyika was engaged to take over the matter from the former counsel, he discovered that the certificate of delay is defective. It was excluding days from 17th March, 2021 up to 5th June 2023, instead of from 17th March, 2021 up to 28th April 2021. That, a valid certificate of delay ought to have excluded days from 17th March 2021 when the applicant applied to be supplied with the documents up to 28th April 2023 when the DR notified the applicant that the documents were ready for collection. Since the applicant cannot rely on the certificate of delay in its current form because it is defective as it cannot give her automatic exclusion of time provided under Rule 90 (1) of the Rules, she is now seeking extension of time as alluded above. Further, it is alleged that proceedings leading to the judgment are tainted with illegalities as there was no order against the 2nd defendant despite the fact that the respondent had prayed for judgment and decree against both the 2nd defendant and the applicant. That the court decided the case on the basis of vicarious liability which was not pleaded thereby denying the applicant a right to be heard. It also awarded interest illegally. The tale of the respondent as could be found in the affidavit in reply sworn by Salum Amani Magongo, advocate and counsel for the respondent is as follows: That the exclusion of time sought by the applicant is a question of law binding the parties. That, the certificate of delay dated 5th June 2023 is valid. That, the applicant ought to have applied for a proper/valid certificate of delay instead of filling the current application. That, the allegation of illegality of the decision of the High Court is baseless because they are not seen on the face of the record. That, the applicant has another application with the same reliefs; Application No. 634/01 of

2023. That, the respondent is being prejudiced by this application because is already in receipt of the memorandum and the record of appeal of the appeal now pending. Both Mr. Gaspar Nyika and Mr. Emanuel John adopted their written submissions filed in terms of rule 106(1) and (7) of the Rules and made oral submissions to amplify what is in the submissions. Their submissions were brief and repeated mainly what is contained in the affidavits. Mr. Nyika submitted that rule 10 gives the Court power to extend time on good cause being shown, before or after doing the act. In this case he is applying for extension of time after the act had happened because Civil Appeal No. 372 of 2023 is already before the Court. He thereafter pointed two reasons why extension of time should be granted; one, the certificate of delay issued by the DR is defective and incapable of excluding the days sought to be excluded, rendering the appeal to be illegally before the Court. Making details, counsel submitted that the DR made a wrong computation and excluded 881 days instead of 770 days causing the certificate to state something other than what is on the ground and thus defective. Counsel intimated what he had said that the defect was discovered at a later

stage, while the appeal was already in Court. To fortify his arguments, he made reference to decisions of the Court made in *Airtel (T) v. Miragelite Ltd*, Civil Appeal No. 32 of 2011; *ABSA Bank (T) Ltd and Another v. Hjordis Farmestead*, Civil Appeal No. 30 of 2020; and *Zanzibar Telecom Ltd v. The Commissioner General (TRA)*, Civil Application No.222/15 of 2021 (all unreported). Two, illegality of the decision of the High Court. He had three complaints under this heading, (i) Para 5 of the decree has contractual interest rate applicable to fixed deposits from the date of judgement till the date of payment in full. This in his view is contrary to Order XX rule 21 (1) of the Civil Procedure Code, Cap.33 R.E. 2019 (the CPC) which has an interest between 7% and 12% per annum as the parties may expressly agree in writing, (ii) The High Court ruled that the applicant was vicariously liable for acts of the second defendant but this was not in the reliefs. They plan to argue in the appeal that the applicant was condemned unheard on the point, (iii) That, although the respondent had sued two parties, but nothing was said on the liability and discharge of the other party; the judgment is silent. On this reference was made to *Lyamuya Construction Co. Ltd v. Board of Trustees of Young Women Christian Association of Tanzania*, Civil Application No.2 of 2010. He urged me to grant the application. Submitting in reply, Mr. John intimated that once the certificate of delay is defective, automatically the appeal becomes out of time. The remedy is not to seek extension of time but seek to amend the certificate on a date when the appeal will be called for hearing. He referred me to the decision of this Court in *Kantibhai Patel v. Dulyabhai F. Minstry*

[2003] TLR 437. He called what is being attempted is an abuse of the court process. He went on to submit that the case of *Asha Juma Mansoor and 9 Others v. John Asheri Mbogomi*, Civil Application No. 192 of 2020 (unreported) referred to me by the applicant in his submission is irrelevant because it dealt with a situation where there was no certificate of delay at all while in this case there is a certificate of delay but it is defective. He submitted that this is also what is contained at page 13 to 15 of the decision of this Court in the case of *Airtel (T) Ltd* (supra) and *ABSA* (supra). On illegality of the decision of the High Court, counsel for the respondent submitted that, since the applicant has admitted that the certificate of delay is defective, there cannot be any discussion on it because it is an illegal document. Citing the decision of this Court in *Lyamuya Construction* (supra), counsel submitted that the errors complained of are not apparent on the face of the record. They need a long prolonged argument to get them. He urged the Court to dismiss the application. In rejoinder, Mr. Nyika submitted that the defective certificate cannot be amended because at the time we get the amended certificate, we will be out of time. It will not serve the purpose. On distinguished decisions, counsel submitted that in this case the counsel has taken diligence before any objection is raised. I had time to revisit the authorities filed by the parties and to consider the rival submissions made before me closely. Apparently, it is not disputed that rule 10 of the Rules allows a party to seek extension of time on good cause, before and after the doing of the act. The words used are clear; "77?e Court may, up on good cause shown, extend the time lim ited by these Rules ... whether before or after the expiration o f that time and w h ether b efo re o r a fte r the do in g o f th e a c t ..." The

present application was filed after the doing of the act. It is therefore properly before me. The issue now is whether the applicant has managed to demonstrate a good cause to justify the exercise of discretionary powers of the Court to extend the time. In *Asha Juma Mansoor (supra)*, the Court, while following its decisions in *Dar es Salaam City Council v. Jayantilal P. Rajani*, Civil Application No. 27 of 1987; *Tanga Cement Company Limited v. Jumanne D. Masangwa and Another*, Civil Application No. 6 of 2001 *Eliya Anderson v. republic*, Criminal Appeal No. 2013 (all unreprted) and *Lyamuya Construction Company Limited (supra)* stated thus: "Certainty, there are no laid down variables or a dear definition of the phrase "good cause" when exercising the discretion under Rule 10 of the Rules, however there are factors which the Court considers when determining this... These factors though not exhaustive are such as; the length of delay; the reason for the delay; the degree of prejudice the respondent stands to suffer if time is extended; whether the applicant was diligent; and whether there is a point of law such as the illegality of the decision sought to be challenged." In addition to what has been stated above, it is important to note that, the term "good cause" is a relative one and is dependant up on the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion. See *Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd*, Civil Application No. 13 of 2010 (unreported). If the applicant wants to rely on the defective certificate of delay and illegality of the decision of the High Court. I will start with a deliberation on the defective certificate of delay. Both parties agree that, the certificate is based on wrong dates and calculations and thus defective. They equally agree that the mistake was done by the DR not the applicant. They differ on what is to be done. Whereas Mr. Nyika has the view that the safe way is to leave the certificate aside and apply for extension, Mr. John has the view that the remedy is to seek for an amendment. I think both of them are correct. The question is what route among the two can take us to a quick dispensation of justice which is the constitutional mandate of the Judiciary as provided under article 107A (1)(b) of the Constitution of the United Republic of Tanzania Cap. 2 R.E. 2002; "not to delay dispensation of justice without reasonable grounds." I think, with respect to Mr. John, if we opt to go for an amendment of the certificate of delay on the date of hearing as proposed, that will entail an adjournment and will put the court in a position of hearing unnecessary preliminary objections. But if we opt to seek for extension of time, so long as the appeal was lodged in time and served to the respondent, an order can conveniently be made to extend the time to cover the period, and I think the move can save both parties. The case will not stand a chance to be adjourned on the date set for hearing or fall into unnecessary interlocutory proceedings. Further, I see no way in which the respondent can be prejudiced by the order. Next is illegality. The applicant is complaining of the following areas: That, the suit was framed against two parties but the judgment held the applicant liable and spoke nothing about the other party, that the applicant was held liable under the principle of vicarious liability which was not pleaded and the interest imposed. Counsel for the respondent did not address these areas. His main area of focus was the defective certificate of delay. Looking through the judgment of the High Court and guided by the principles set in *Lyamuya Construction Company*

Limited (supra) and cases which followed it, some of which have been cited above, I have the view that the judgement of the High Court has an element of illegality calling for the attention of this Court. In view of what has been demonstrated above, taking into account that there will no prejudice on the part of the respondent and guided by section 10 of the Rules and the overriding objective principle which is now part of our laws, the applicant is granted extension of time from 24th May, 2021 up to 3rd July, 2023 when Civil Appeal No. 372 of 2023 was lodged before the Court, as prayed. 13 The application is found to be meritorious and granted. Costs to abide the result of the appeal. DATED at MWANZA this 22nd day of February, 2024. L. M. MLACHA JUSTICE OF APPEAL The Ruling delivered this 22nd day of February, 2024 in the presence of Mr. Erick Tumaini Korogo holding brief for Mr. Gasper Nyika, learned counsel for the applicant and also holding brief for Mr. Masoud Mwanaupanga, learned counsel for the respondent appeared, is hereby certified as a true copy of the original G DEPUTY REGISTRAR COURT OF APPEAL 14

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