

TANZANIA / JUDGMENT

national insurance corporation t ltd vs shengena ltd 2010 tzhccomd 14 14 june 2010

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14 June 2010

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO.75 OF 2005 NATIONAL INSURANCE CORPORATION (T) LTD
APPLICANT/JUDGMENT DEBTOR VERSUS SHENGENA LTD..... RESPONDENT/
DECREE HOLDER Date of last order: 10/02/2010 Date of final submissions: 18/01/2010 Date of
ruling: 14/06/2010

RULING

MAKARAMBA, J.: On the 9th day of October, 2009, two applications were set down for the directions of this Court, one for execution of a decree by the Respondent, and the other by the Applicant for extension of time to file a Notice of Appeal against the decision of Hon. Justice Kimaro, J. (as she then was), dated the 28th day of September, 2005. Apparently, on the 25th day September 2009, the Applicant filed application for extension of time following the striking out on the 24th day of September 2009 by this Court of a previous similar application for having been preferred under wrong provision of the law. On the 9th day of October, 2009 when the two applications were set for the directions of this Court, the learned Counsel for the i Applicant/Judgment Debtor made an oral application for stay of execution so as to pave way for this Court to deal with and determine the application for extension of time to file Notice of Appeal first. The learned Counsel for the Respondent/Decree Holder strongly objected, arguing that the application for execution was filed in this Court since 2006; that the intended application for stay of execution and other "frivolous" applications by the Applicant/Judgment Debtor were aimed at delaying his client from enjoying the fruits of his victory; and that in any case the application for extension of time to file Notice of Appeal does not operate as automatic stay of execution. This Court having been dissatisfied with the oral submissions of the learned Counsel for the parties on the oral application for stay of execution, ordered them to file written submissions and on the 17th day of November 2009, this Court ruled that it was prudent that the application for extension of time to file Notice of Appeal be proceeded with and determined first before dealing with the application for execution of the decree. On the 16th day of October 2009, the learned Counsel for the Respondent filed a Notice of Preliminary Objection against the application for extension of

time to file Notice of Appeal which the Applicant filed in this Court on the 25th day of September 2009, that at the hearing of the application, the learned Counsel for the Respondent will raise and pursue an objection on the following points of law:

1. The application is hopelessly time barred under the Law of Limitation Act, [cap.89 R.E. 2002], clause 21 of the Schedule to the Act. 2
2. That the affidavit in support of the chamber summons is incurably defective for it raises arguments, opinions and conclusions contrary to the law on affidavits.
3. That the affidavit in support of the chamber summons is incurably defective for having been verified by an advocate for the applicant in Heu of a deponent contrary to the law on affidavits.
4. Paragraph 4 of the reply to counter affidavit be struck out with costs as it raises new matters by way of rejoinder On the 23rd day of October 2009, the learned Counsel for the Applicant also filed a Notice of Preliminary objection that at the hearing of the application, a preliminary objection will be taken that the counter affidavit of REUBEN TENGA MTAITA is defective and incompetent at law because:
 - (i) Paragraphs 3, 5 and 6 of the affidavit contain arguments and opinion and not facts. (ii) That depositions of paragraph 6 of the Counter affidavit, so long as they are based on information and not facts the deponent is able to prove himself, offends Order XIX Rule 3 of the Civil Procedure Code [Cap.33 R.E. 2002]. (Hi) The affidavit raised is bad in law for swearing false depositions. (iv) That the contents of paragraph 6 point to conclusion and make counter affidavit incompetent at law. On the 17th day of November 2009, Mr. Mbamba learned Counsel for the Applicant prayed for leave to file supplementary affidavit in order to bring forth to the Court some additional facts upon wjhich to base his application for extension of time. Mr. Kitururu sought the direction of this 3 Court given that there were objections from both sides whether these should await for the filing of the supplementary affidavit or be delt with simultanously upon which this Court ordered for the disposition of the preliminary obections filed on the 16/10/2009 first before determining the application for supplementary affidavit and by consent of the learned Counsel for the parties this Court made a scheduled order for disposing the preliminary objection by way of written submissions. According to the scheduling order of this Court the Respondents was to file written submissions by or on 01/12/2009; the Applicant to reply by or on 15/12/2009 and rejoinder by the Respondent (if any) by or on 18/01/2010. The record shows that the learned Counsel for the Respondent/ Decree Holder filed his written submissions in support of the preliminary objection on the 18/12/2009 instead of 01/12/2009 as ordered by this Court. The Applicant filed his reply on 15/12/2009 as ordered and Respondent filed a rejoinder on 15/01/2010, within time as ordered by this Court. In this application, Mr. Mbamba, learned Counsel, is representing the Applicant/Judgment Debtor and Mr. Kitururu, learned Counsel, is representing the Respondent/Decree Holder. Mr. Kitururu however, has informed this Court through his letter dated 18th May 2010 that he is no longer advocate of record for SHENGENA LTD, the

Respondent, following withdrawal of instruction by his client for what he called that the Company feels that he is responsible for failing to execute the Decree. In this application, the learned Counsel for the Respondent has raised four interrelated points of preliminary objection against the affidavit in support of the application. The learned Counsel for the Applicant on his 4 part has also raised a four-point preliminary objection. In the course of his reply submissions, in answer to the submissions by the learned Counsel for the Respondent in support of his preliminary objection, the learned Counsel for the Applicant submitted that out of the four points of preliminary objection raised by the learned Counsel for the Respondent, only the first point is a preliminary objection properly so called within the meaning ascribed to the term in MUKISA BISCUITS MANUFACTURING CO. LTD VS WESTEND DSITRIBUTORS LTD (1969) EA 695. In that case the Court of Appeal for East Africa as per the famous statements given by Law, 1A and Sir Newbold, V.P., which I have ventured to paraphrase hereunder, stated what a preliminary objection is, thus: "...that a preliminary objection, which is in the nature of a demurer, raises a pure point of law, which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point on the assumption that all facts pleaded by the other side are correct, may dispose of the suit: and that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." The above words much common as they are among the legal fraternity they are easier stated than realized in action, and can prove to be quite confounding and challenging. The issue in so far as the present application is concerned becomes whether a defective affidavit is a fit candidate for a preliminary objection capable of disposing of the application. 5 In his reply submissions, the learned Counsel for the Applicant cited to this Court some decisions which depict what I find to be a trend where courts are not inclined to entertaining preliminary objections on defective affidavits. The decisions include NATIONAL INSURANCE CORPORATION OF (TJ LTD AND ANOTHER vs. SHENGENA LTD. Civil Application No.20 of 2007, where the Court rejected the so called preliminary objections which could not dispose of the matter before it; COTWU (T) OTTU UNION AND ANOTHER vs. HON. IDD SIMBA, MINISTER FOR INDUSTRIES AND TRADE & 7 OTHERS Civil Application No.40 of 2000 (CAT) (unreported); SUGAR BOARD OF TANZANIA vs. 21st CENTURY FOOD & PACKAGING & OTHERS Civil Application No.149 of 2005 (CAT); and GODBLESS MATHEW N AL BALA vs. ANNET JOHN LUKUMAY Civil Application No.119 and 142 of 2008 (unreported), where the Court of Appeal declined to entertain a preliminary objection on the defects of some paragraphs in the affidavits, holding that such paragraphs may be expunged leaving the rest to support the affidavit. The learned Counsel for the Applicant also cited the recent decision of the Court of Appeal of Tanzania in EAST AFRICAN DEVELOPMENT BANK vs, BLUE LINE ENTERPRISES Civil Application No.64 of 2009 (unreported), which involved an application for extension of time to apply for stay of execution, where His Lordship, Othman, J.A. agreed with the submissions of the applicant that preliminary objection other than those mentioned in MUKISA BISCUIT'S Case are not supposed to be raised in applications that call for the exercise of judicial discretion. 6 The learned Counsel for the Respondent in his rejoinder submitted that the learned Counsel for the Applicant has misunderstood the

import of the decision in MUKISA BISCUIT'S case, which defines a preliminary objection as a pure point of law able to dispose of the case summarily. The learned Counsel for the Respondent submitted further that since Order XIX Rule 3 of the Civil Procedure Code [Cap.33 R.E. 2002] provides for matters to which affidavits have to be confined, it follows therefore that any affidavit that contravenes the requirements of the rule breaches that rule thus raising a pure point of law, which indeed has been the practice of the Court. The learned Counsel for the Respondent cited the decision in PHANTOM MODERN TRANSPORT (1985) LTD V, D.T, DOBIE (TANZANIA) LIMITED Civil Reference Nos.15 of 2001 and 3 of 2002 (unreported) to buttress his point. The general principle governing affidavits was succinctly restated by the Court of Appeal in PHANTOM MODERN TRANSPORT (1985) LTD vs. D.T. DOBIE (TANZANIA) LIMITED (supra), which followed the decision of the East Africa Court of Appeal in UGANDA V. COMMISSIONER OF PRISONS EX PARTE MATOVU [1966] E.A 514 wherein it was stated at page 520 thus: "a/7 affidavit for use in court being a substitute for oral evidence should only contain statement of facts and circumstances to which the witness deposes either of his own knowledge...Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion." 7 The pronouncement of the principle in UGANDA V. COMMISSIONER OF PRISONS EX PARTE MATOVU [1966] E.A 514 on the nature of affidavits essentially echoes the provision of Rule 1 of Order XIX of the Civil Procedure Code [Cap. 33 R.E. 2002], which vests on the court with discretionary powers, at any time, for sufficient reason, to order that any particular fact or facts to be proved by affidavit, or that the affidavit of any witness to be read at the hearing, on such conditions as the court thinks reasonable. The provisions of Rule 3 of Order XIX of the Civil Procedure Code in my view, provides for the content of affidavits, namely: "...such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted: Provided that the grounds thereof are stated." The above rendering in my view does not bar statements of belief in affidavits provided their grounds are stated. The stipulation under Order XIX Rule 1 of the Civil Procedure Code in my view has the effect of bringing affidavits within the ambit of the law of evidence, such that an affidavit being a substitute for oral evidence falls within the category of facts to be proved. One cannot therefore validly challenge a set of facts deposed in an affidavit without venturing in the territory of evidence to establish the truth or otherwise of the facts deposed in the affidavit. The first guided attack by the learned Counsel for the Respondent on the affidavit of SAMSON EDWARD M BAM BA is that it raises arguments, opinions and conclusions contrary to the law of affidavits, and cited in particular paragraph 7 as being argumentative; paragraph 9 as being both 8 argumentative and setting out a conclusion; and paragraph 10 as containing prayers. The learned Counsel for the Applicant in his reply submitted that much as he was agreeable to the legal position on affidavits as stated in UGANDA V. COMMISSIONER OF PRISONS EX PARTE MATOVU [1966] E.A 514, which the learned Counsel for the Respondent has relied on in his submissions, but only to the extent that it prohibits arguments in affidavits, he strongly disputed that of the affidavit are argumentative as claimed by the learned Counsel for the Respondent. The learned Counsel for the Applicant submitted further that the learned Counsel for the

Respondent has failed to explain how argumentative the said paragraphs are. The learned Counsel for the Applicant submitted further that the facts deponed in e[^]S[^]SS[^]I of the affidavits regarding appreciation by Hon. Werema J. in his rulings are clear and straight forward, and that MBIMM of the affidavit is only a prayer in the interest of justice. The learned Counsel for the Applicant submitted further that in the alternative even if the said paragraphs are found to be defective the end result will be to expunge them from the affidavit, and remain with paragraphs which in his view are enough to support the application. The learned Counsel for the Applicant cited GODBLESS MATHEW NAIBALA vs, ANNET JOHN LUKUMAY Civil Application No.119 and 142 of 2008 (unreported) to support this view. I have carefully read the affidavit in support of the application. As submitted by the learned Counsel for the Applicant, and correctly so in my view, the depositions involve court proceedings within the knowledge of the advocate for the application. I have in mind here particularly, 9 paragraph 3 of the affidavit which states that on 28th September 2005, this Court issued a default judgment against the applicant after it failed to file written statement of defense. Further, paragraph 4 of the affidavit which states that the Applicant filed application in court to review the judgment which application was dismissed by Hon. Luanda, and which dismissal order was set aside by the Court of Appeal and substituted with the order for rejection. Not only that but paragraph 5 of the affidavit which states that the Applicant filed an application to set aside the rejection order which Hon Werema J. granted on grounds that the points that were raised in review were issues of law and very vital. The contents of paragraph 6 of the Affidavit are that Hon. Justice Werema heard the review application and ruled that he had no power to quash the decision of his fellow judge on grounds that befit an appeal, requires one to delve into the ruling itself to ascertain the truth of this statement. Finally, paragraph 7 of the affidavit which states that this application is being preferred so that the legal propriety of the judgment dated 28th September 2005 can be examined by the Court of Appeal. In my view this Court need not be detained by this particular paragraph since it contains matters for the determination of the Court of Appeal itself in the event the applicant is successful in obtaining extension of time to file notice of appeal. I am at one with the learned Counsel for the Applicant and as was observed by the High Court of Kenya in the case of REPUBLIC vs. NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY & OTHERS Ex Parte GREENHILLS LTD & OTHERS [2000] 2 E.A 269, which the learned Counsel for the Applicant has relied on, that there can never be a io better deponent than an advocate on issue relating to archives or court record as such matters are within an advocate own knowledge. The learned Counsel for the Applicant also cited the case of AUGUSTINE LYATONGA MREMA vs. AG [1996] TLR 273 at page 283 in reference to an advocate as an officer of the court empowered to appear and act for litigants and as such empowered to swear affidavits in relation to matters which arise from the conduct of cases. Mr. Mbamba, learned Counsel for the Applicant, appeared for the applicant in the matter before Hon. Werema J. and therefore competent to swear affidavit in relation to matters which arose from the conduct of the applications the subject of the rulings by Hon. Werema, J. In any event even if paragraph 7 of the affidavit would have been expunged from the affidavit, still the other paragraphs in the affidavit namely, paragraph

IM&EMMMMEi would still remain intact to support the application. However, in my view I do not see how the said paragraphs will assist the Applicant in his application for extension of time for they do not constitute good reasons to explain the delay in filing the application for extension of time to file notice of appeal. This now takes me to consider the other preliminary objection that the affidavit has been verified by an advocate for the applicant in lieu of a deponent. On this point, the learned Counsel for the Respondent cited the decision of the Court of Appeal in the case of SALIMA VUAI FOUM vs. REGISTRAR OF COOPERATIVE SOCIETIES and THREE OTHERS

[1995] TLR 75 (CA) that affidavits should be verified by the deponent. The learned Counsel for the Respondent submitted further that whereas ii the oath has been taken by SAMSON EDWARD MBAMBA who is the deponent, the verification has been made by an "Advocate for the Applicant", thus making the affidavit contain statements from the bar in clear breach of the law. The learned Counsel for the Respondent cited the decision of the Court of Appeal in REGISTERED TRUSTEES OF KOREA EVANGELICAL CHURCH AND 5 OTHERS VS, YUM YUN HWA AND ANOTHER Civil Application No.80 of 2003 (CA) (unreported) in support of this trite principle. The learned Counsel for the Applicant in reply to the submission by the learned Counsel for the Respondent that an affidavit verified by an advocate who himself has deposed to matters contained in it instead of using the term "deponent" is defective, submitted that this is not a pure point of law. The learned Counsel for the Applicant submitted further that aside from the learned Counsel for the Respondent citing the case of SALIMA VUAI FOUM v, REGISTRAR OF COOPERATIVE SOCIETIES and THREE OTHERS [1995] TLR 75 (CA), which in any case is not on this point, there is no law which stipulates that the omission to refer the verifier as a deponent is fatal. The learned Counsel for the Applicant submitted further that even if it would have been in breach of a specific provision to verify as an advocate for the applicant instead of deponent, that error is not fatal, citing the case of DDL INVESTMENT INTERNATIONAL LIMITED vs, THA & OTHERS Civil Application No.8 of 2001 (unreported), where it was held that errors to verification are not fatal and does not render the affidavit defective and that the court has discretion to order an amendment to cure the error. 12 The learned Counsel for the Respondent in rejoinder reiterated that it would have been proper for the same to be made by either Samson Edward Mbamba or "deponent" and not by an advocate. The contention is that when an advocate takes oaths and affirmations, he assumes the status of a deponent and cannot therefore depone in the capacity of an advocate, otherwise if he does so it amounts to adduction of evidence from the bar which is contrary to established principles including the case cited earlier that of REGISTERED TRUSTEES OF KOREA EVANGELICAL CHURCH AND 5 OTHERS vs. YUM YUN HWA AND ANOTHER Civil Application No.80 of 2003 (unreported). In my view, it seems that the learned Counsel for the Respondent in arguing that it was fatal for an advocate for the applicant to verify instead of deponent seeks to make a mountain out of mole hole. As submitted by the learned Counsel for the Respondent and correctly so in my view, when an advocate takes oaths and affirmations, he assumes the status of a deponent and cannot

therefore depone in the capacity of an advocate. This thinking flow directly from the logic inherent in Rule 3 of Order XIX of the Civil Procedure Code, that an affidavit being a substitute for oral evidence contains facts as the deponent is capable of his own knowledge to prove otherwise it will amount to statements from the bar. Much as an advocate as an officer of the court may depone in relation to matters which arise from the conduct of cases, this does not hold true as to facts the deponent is capable of his own knowledge to prove. In such circumstances the advocate cannot double in his capacity as counsel for the party and also as 13 deponent. This error however in my view, is not that fatal as it can be cured by simple amendment. The learned Counsel for the Respondent has also raised a preliminary objection that paragraph 4 of the reply to the counter affidavit raises new matters by way or rejoinder, which are prejudicial to the Respondent because he did not have room to reply to and should be struck out with costs. The learned Counsel for the Respondent amplifying on this point submitted that the reply to the counter-affidavit filed by the applicant on 23rd October 2009 raises new matters of escalation of the amount sought to be executed and that the respondent was called by the court to justify the calculation of interest at 38% but to this date the Respondent has not done so, which allegations were not stated in the affidavit in support of the application nor were they brought up in the counter-affidavit. The learned Counsel for the Applicant in reply submitted, and rightly so in my view, that the allegation that paragraph 4 of the reply to the counter affidavit raises new matters by way or rejoinder should not detain this Court any longer as is necessary, given that instead of the purported preliminary objection being filed in court after payment of court fees it was raised by way of a letter to Mbamba & Co. Advocates dated 27th October 2009 which was copied to the Registrar and was neither presented for filing nor endorsed by the registry officer. As such the preliminary objection that paragraph 4 of the reply to the counter affidavit raises new matters by way or rejoinder has not been properly raised and for that reason I shall dismiss it. 14 Let me now turn to the other preliminary objection that the application is hopelessly time barred. It is without much controversy that the application before this Court is for extension of time to file Notice of Appeal against the decision of Hon. Justice Kimaro J. (as she then was), which was handed down on 28th day of September 2005. It is also without much controversy that the time for lodging the application has long expired, which is why the applicant has come to this Court seeking for extension of time under section 11(1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], which provides as follows: "11.(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired." The argument of the learned Counsel for the Respondent in contesting the application is premised on the fact that the Appellate Jurisdiction Act does not provide for the period within which applications can be filed. In the considered view of the learned Counsel for the Respondent, to this extent therefore, clause 21 of the

Schedule to the Law of Limitation Act [Cap.89 R.E. 2002], which provides for all applications under the Civil Procedure Code, the Magistrate's Courts Act or other written law for which no period of limitation is provided in the Act or any other written law to be filed within 60 days comes into play. This would mean 15 that the application for extension of time ought to have been filed within 60 days, failure of which the applicant was obliged to apply for extension of time, the learned Counsel for the Respondent reasoned. The learned Counsel for the Respondent further argued that Rule 76 of the Tanzania Court of Appeal Rules under which a notice of appeal has to be filed within 14 days from the date of judgment, should be brought to bear in this application, and which is to be read together with clause 21 of the Schedule to the Law of Limitation Act. It means that an application for extension of time can be lodged without seeking extension of time after the lapse of the first fourteen days and not before the expiry of 60 days, and in the event the expiry of the 60 days there has to be an application for extension of time, the learned Counsel for the Respondent further reasoned. It is incumbent on the part of the applicant therefore to apply for extension of time to file the application to file notice of appeal out of time, the learned Counsel for the Respondent surmised. Submitting on the fate of proceedings filed out of time the learned Counsel for the Respondent submitted that this is clearly stipulated under section 3(1) of the Law of Limitation Act thus: "3.(1) Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefor opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence." (the emphasis is of this Court) (the emphasis is of this court). 16 The learned Counsel for the Respondent buttressed further his point on the fate of proceedings instituted after the period of limitation has expired that they are subject to dismissal, citing some decisions, including *ERIZEUS RUTAKUBWA vs. JOAN ANGERO* [1983] TLR 365 (HC); *CHRSTOPHERR BITEKEYE vs. TANZANIA PORTLAND CEMENT CO- LTD*. Civil Application No.66 of 2001 (CAT) (unreported); and also the decision of the Queen's Bench Division in *WHITTINGHAM vs. NATTRASS* [1958] 3 All E.R. 145 and that of the King's Bench Division in *RIPPINGTON vs. HICKS & SON (OXFORD) LTD, AND ANOTHER*

[1949] 1 All E.R. 239. The learned Counsel for the Respondent prayed that because the application has been filed out of time, the same be struck out with costs. The learned Counsel for the Applicant in reply submitted that unfortunately, the learned Counsel for the Respondent does not seem to understand that in terms of section 43(b) of the Law of Limitation Act [Cap.89 R.E. 2002], that Act does not apply to proceedings governing applications or appeals to the Court of Appeal, and therefore Item No.21 to the Schedule in that Act is irrelevant in the present application. The learned Counsel for the Applicant submitted further that Rule 76 of the Court of Appeal Rules is the law which provide for limitation to file a Notice of Appeal, under which any person desirous of appealing to the Court of Appeal is to lodge a written notice with the Registrar of the High Court within fourteen days of the date of the decision against which it is desired to appeal. The learned Counsel for the Applicant submitted further that for a person who fails to file the

application within time, the remedy is 17 available under section 11(1) of the Appellate Jurisdiction Act, which specifically gives the High Court powers to extend time for giving notice of intention to appeal from the judgment of the High Court notwithstanding that the time for giving the notice or making the application has already expired. It is because the Notice of Appeal was not filed within the prescribed period of 14 days from the 28th September, 2008, the learned Counsel for the Applicant further submitted, the applicant had to file an application for extension of time under section 11(1) of the Appellate Jurisdiction Act. It is therefore idle and naive on the part of the Counsel for the Respondent to say that an application for extension of time to file a Notice of Appeal under section 11(1) is time barred, the learned Counsel for the Applicant surmised. The main argument raised by the learned Counsel for the Respondent in his reply submissions is that the application is time barred in terms of Clause 21 of the Schedule to the Law of Limitation Act, which requires all applications to be filed within 60 days. The learned Counsel for the Applicant on his part argues that the Law of Limitation Act is not applicable to appeals and applications to the Court of Appeal. The learned Counsel for the Respondent in rejoinder seems to have interpreted this to mean that the Law of Limitation Act does not apply to the Court of Appeal. With due respect to the learned Counsel for the Respondent, this is a misreading of what the learned Counsel for the Applicant meant. The provision of section 43(b) of the Law of Limitation Act [Cap.89 R.E. 2002] excludes from the ambit of that Act among other things, "applications and appeals to the Court of Appeal." The High Court and the Court of Appeal 18 have concurrent jurisdiction in so far as the exercise of discretionary powers to grant extension of time to file notice of appeal is concerned, save that such applications by virtue of Rule 76 of the Court of Appeal Rules must be preferred first in the High Court under section 11(1) of the Appellate Jurisdiction Act. The Appellate Jurisdiction Act does not provide for a limitation period for applications for extension of time to file notice of appeal to the Court of Appeal. The issue therefore is whether the provision of Clause 21 of the Schedule to the Law of Limitation Act providing for a limitation period of 60 days can validly be brought to govern applications for extension of time to file notice of appeal to the Court of Appeal, which are not provided under the Law of Limitation Act or the Appellate Jurisdiction Act. In terms of Item 21 of the Schedule Part III of the Law of Limitation Act, the limitation period for all applications under the Civil Procedure Code, the Magistrate's Courts Act and "any other written law for which no period of limitation is provided under this Act or any other written law" is 60 days. The Law of Limitation Act under its section 43(b) excludes the application of the Act to "applications and appeals to the Court of Appeal." The issue is whether this provision excludes the application for extension of time to file notice of appeal to the Court of Appeal for which no limitation period is provided for under the Law of Limitation Act or the Appellate Jurisdiction Act or "any other written law for which no period of limitation is provided under this Act or any other written law." According to the learned Counsel for the Respondent, the provisions of clause 21 of the Schedule to the Law of Limitation Act does not apply to applications for extension of time to file Notice to Appeal to the Court of Appeal under section 11(1) of the Appellate jurisdiction Act. The learned Counsel for the

Respondent on his part argues that since the present application is pending in the High Court and not in the Court of Appeal, the Applicant cannot rely on section 43(b) of the Law of Limitation Act to avoid the fate of the failure to comply with clause 21 of the Schedule to the Law of Limitation Act. The learned Counsel for the Respondent reasoned further that what are excluded from the Law of Limitation Act are applications and appeals to the Court of Appeal but not applications under the Appellate Jurisdiction Act. I find the argument by the learned Counsel for the Respondent that what are excluded from the Law of Limitation Act are applications and appeals to the Court of Appeal but not applications under the Appellate Jurisdiction Act to be, with due respect, rather circumlocutous, in my view. Applications for extension of time to file notice of appeal to the Court of Appeal are governed by section 11(1) of the Appellate Jurisdiction Act, which in any case does not provide for a limitation period for such applications. In my view, section 11(1) of the Appellate Jurisdiction Act has to be read together with Rule 76 of the Court of Appeal Rules, which mandates that such applications must first be had in the High Court and must be filed within a period of fourteen days from the date of the judgment appealed against. I do not find any reason why would the learned Counsel for the Respondent wish to bring in the provisions of Clause 21 of the Schedule to the Law of Limitation Act to bear on applications for extension of time to file notice of appeal to the Court of Appeal under section 11(1) of the Appellate Jurisdiction Act, which as I have intimated, has to be read together with Rule 76 of the Court of Appeal Rules. If Parliament was minded of bringing the provision of Clause 21 of the Schedule to the Law of Limitation Act to apply to applications for extension of time to file notice of appeal to the Court of Appeal under section 11(1) of the Appellate Jurisdiction Act it would have stated so expressly. I do not see therefore how even with a stretch of imagination can the argument by the learned Counsel for the Respondent that an application for extension of time cannot be lodged without seeking extension of time after the lapse of the first fourteen days and not before the expiry of 60 days can be brought to bear in the present application. I do not therefore find that the limitation period of 60 days stipulated under Item 21 of the Schedule to the Law of Limitation is applicable in the application for extension of time to file notice of appeal to the Court of Appeal under section 11(1) of the Appellate Jurisdiction Act. Similarly, section 3(1) of the Law of Limitation Act, which deals with dismissal of proceedings instituted after expiry of the period of limitation, is inapplicable in the present circumstances. The initial period of fourteen days prescribed under Rule 76 of the Court of Appeal Rules for filing a Notice of Appeal against the decision which was handed down on 28th September 2008 has long expired. As I stated earlier, Rule 76 of the Court of Appeal Rules has to be read together with section 11(1) of the Appellate Jurisdiction Act, which allows an applicant to file an application for extension of time to file notice of appeal after the initial prescribed period of fourteen days has expired. However, with due respect to the learned Counsel for the Applicant, this does not mean that the Applicant will automatically be entitled to a grant of extension of time to file notice of appeal. The applicant must assign good reasons to explain the delay in filing the application for extension of time to file notice of appeal to the satisfaction of the court in order to be able

to exercise its discretion under section 11(1) of the Appellate Jurisdiction Act to grant the prayer for extension of time. The powers of the High Court under section 11(1) of the Appellate Jurisdiction Act being discretionary in nature in my view, call for their exercise judiciously based on reasonable or good reasons to the satisfaction of the court. The issue now becomes whether in the present application the Applicant has assigned such good reasons to justify this Court to exercise its discretionary powers to extend time to file notice of appeal. In the affidavit in support of the application the Advocate for the Applicant has stated only generally that it is due to the reasons appreciated by Hon. Werema J., in both of his rulings, the one setting aside the rejection order, and the other declining to review the decision of Hon. Kimaro, J (as she then was), as being the reason for preferring this application so that the legal propriety of the judgment dated 28th September 2005 can be examined by the Court of Appeal. I do not find this to be a reason good enough to the satisfaction of this Court as explaining the delay in filing the application for this Court to be able to exercise its discretion to grant extension of time to file notice of appeal. If anything in my view, the above reason given by the learned Counsel for the Applicant only goes to explain what the applicant is anticipating to raise at the Court of Appeal but not why the applicant failed to lodge the application for extension of time to file notice of appeal. In the event and for the foregoing reasons the preliminary objections raised by the Respondent succeeds to the extent indicated above. The application is hereby struck out with costs. It is accordingly ordered. R.V. MAKABA JUDGE 14/06/2010 23 Ruling delivered in Chambers this 14th day of June 2010 in the presence of Mr. Nyamugaruri for Mr. Mbamba, Advocate for the Applicant and Respondent in person. R.V. MAKARAMBA JUDGE 14/06/2010 Words count: 6,342 24

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