

TANZANIA / JUDGMENT

j mbuna vs national insurance corporation

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IN THE HIGH COURT OF TANZANIA AT PAR ES SALAAM CIVIL REVISION NO. 48 OF 2006
J.MBUNA..... APPLICANT VERSUS

1. NATIONAL INSURANCE CORPORATION 1st RESPONDENT
2. THE PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION..... 2nd RESPONDENT

RULING

MWARIJA. J. In this application which is two-fold, the applicant, J.Mbuna has applied for the following orders;

- (i) an extension of time within which he can apply for leave to appeal to the Court of Appeal against this court's decision (Mandia, J) in Civil Revision No. 48 of 2006 dated 16th March, 2007. (ii) Subject to grant of extension of time, an order granting leave to appeal to the Court of Appeal against the above cited decision of this court. The application which was made under S. 14(1) of the Law of Limitation Act, Cap. 89 RE 2002 and S 5(l)(c) of the Appellate Jurisdiction Act Cap. 141, S.95 of the Civil Procedure Code, Cap. 33 RE. 2002 and w Rule 4^5“of the Tanzania Court of Appeal Rules, 1979 was supported by affidavits sworn by Mafuru -M.Mafur-u, learned counsel on 25/5/2007. The applicant was represented by Donaldson & Wood, Advocates while the respondents, the National Insurance Corporation and the Presidential Parastatal Sector Reform Commission were represented by Mr.Sylvester Shayo and Mr. Fungamtama, learned counsel, respectively. Mr.Shayo has sworn a counter 2 affidavit opposing the application. There was no counter-affidavit filed on behalf of the 2nd respondent. The matter was argued by way of written submissions. In his submissions in support of the application the learned counsel for the applicant argued firstly that the delay in filing an application for leave to appeal was occasioned by a sufficient cause. He submitted that the notice of appeal to the Court of Appeal was filed in time on 16/3/2007. The applicant then awaited for copies of proceedings, ruling and order which he applied for from the Registrar. The learned counsel went on to submit that he received a letter from the

Registrar on 23/5/2007 informing him that the documents were ready. According to him it is for that reason that he could not file the application in time, hence the present application for extension of 3 time. He argued that he had to await for the copies of proceedings and the ruling intended to be appealed against because he was of the view that they were necessary documents to be accompanied with the application. His views were based the decision in the case of *Ital African Transporter v. Giarfar M. Beder & Anr*, Civil Case No. 160 of 1993. He added however that the decision is in conflict with another decision in the case of *George Methew Kilindu v. CRDB (1996) LTD.*, Civil Case No. 269 of 1996 which decided to the effect that, the copies need not be accompanied with the application. He went on to submit that although the position as per the authority of the court of appeal decision cited by the 1st respondent's counsel in his counter-affidavit is that the application need not be accompanied by copies of proceedings and ruling, yet, in the said case of *Faustin G. Kiwia & Anr. v Scolastica Paul*, Civil Appeal No. 24 of 2000, when there is a difficulty which may make it necessary to study a ruling before making an application for leave to appeal, a party can apply for extension of time to file that application. He relied on the following statement in that case; "But even assuming that there were such difficulties, once counsel got over them and time had thus run out, he should have sought an extension of time in which to file the application but he did not." He said that in the application at hand, after having encountered difficulties, soon after receipt of the copies on 23/5/2007, the application for extension of time was promptly filed on 25/5/2007. The learned counsel had another ground which he relied upon as being a sufficient cause for grant of 5 extension of time. He said that there is a serious point which merits consideration by the Court of Appeal and that when such a point exists in a decision which is intended to be appealed against, it constitutes a sufficient cause upon which extension of time can be granted. He cited the case of *Samson Kishosha Gobba v. Charles Kigongo Gobba (1990) TLR*, 133. According to the learned counsel, the point of law which merits consideration by the court of appeal in the intended appeal is that which concerns the issue whether an appeal is a continuation of a suit so that when an award is stated to be up to the date of judgment, that shall be taken to include the date of judgment in appeal. 6 Responding to the applicant's submissions on the application for extension of time to file an application for leave to appeal, Mr. Shayo, learned counsel for the 1st respondent submitted that the delay by the learned counsel for the applicant in filing the application on a fear that it might be struck out if it was not accompanied by a copy of the decision intended to be appealed against, is not a sufficient cause. He argued that the provisions of r.43(a) of the Tanzania Court of Appeal Rules, 1979 (now r.44(l)(a)) of the Tanzania Court of Appeal Rules, 2009) and O.XLIII r.2 have never required that an application for leave to appeal must be accompanied by a copy of the decision intended to be appealed against. He argued further that there are court decisions which decided to the effect that an application for leave need not be accompanied with a copy of the decision sought to be 7 appealed against. They are *Alex Maganga v. Director, Msimbazi Centre*. Civil Application No. 81 of 2001 (CA, DSM) (unreported), *Faustine Kiwia & Anr. V. Scolastica Paul*. Civil Application No. 24 of 2000 (CA) (AR) (unreported). Mr Shayo submitted in essence that both Mr Mafuru, learned counsel and the Applicant being prominent Advocates were sufficiently versed with that

position and therefore the delay was caused by their failure to check the law. He cited the case of *Metal Products & v. Director of Land Services*,^f 1989) TLR 5 which decided on that point to the effect that “categories of inadvertence causing delay to make an application for leave do not include ignorance of procedure or blunder of counsel” Another case cited by Mr. Shayo on that point is the case of *Calico Textile Industries Ltd v. Pvarali Esmail Premji* (1983) TLR 28 which held that “failure of a party’s Advocate to check the law is not sufficient ground for allowing an appeal out of time”. On the submission by the learned counsel for the applicant that he awaited for a copy of the decision intended to be challenged on appeal, Mr. Shayo submitted in his reply, firstly, that such a reason was not contained in the founding affidavit by the learned counsel for the applicant. Secondly, he submitted that in the revisional proceedings before Mandia, J (as he then was), the submissions were made in writing and on the date of ruling, the applicant was represented by two counsel, Mr. Mafuru and Mr. Mchome. Mr. Shayo added that the said Advocates were aware of the point of controversy, a simple point of law, and therefore awaiting a copy of the decision was unnecessary. 9 On the submission by the learned counsel for the applicant that there is a point of law which merits consideration by the Court of Appeal, Mr. Shayo’s reply was that since the revision proceedings arose out of execution of the trial court’s decree which was elaborate, there cannot arise any point of law which requires interpretation by the Court of Appeal. He added that the argument put forward in the revision that “an appeal is a continuation of a suit” was not relevant and the court rightly ignored to make a finding on it. In rejoinder submissions, the learned counsel for the applicant reiterated his arguments in the submissions in-chief. He emphasized that the period needed to obtain copies of proceedings and the decision constitutes a sufficient cause of delay. He 10 argued further that since the point of law that an appeal is a continuation of a suit and that the deriving issue whether computation period of damages should extend to the date of judgment of appeal was not decided, that point is worth determination by the Court of Appeal. From the submission by the learned counsel for the parties, the issue to be answered as regards the application for extension of time is whether there was a sufficient cause for delay by the applicant in filing an application for leave to appeal. The first ground raised was that the applicant was awaiting for copies of proceedings and the ruling intended to be appealed against. I do not find merit in that ground. An application to the High Court for leave to appeal to the Court of Appeal need not be accompanied by a copy of 11 the decision intended to be appealed against. The authorities cited by Mr. Shayo are supportive of that view. In the case of *Alex Maganga v. Director. Msimbazi Centre* (supra) cited by the respondent’s counsel, the Court of Appeal, Mroso, JA, (as he then was) decided as follows; “... in an application for leave to appeal which is made to the High Court under Rule 43 (a) of the Court Rules a copy of judgment of the High Court need not be attached to the application”. That ground raised by the learned counsel for the applicant is therefore without merit. Another ground argued by the learned counsel for the applicant is that the decision intended to be appealed against involved difficult issues of law. He pointed out the issue involved to be whether an appeal is a continuation of a suit or not. With due respect to the learned counsel, 12 that issue does not have any complexity so as to require a perusal of the

proceedings and ruling. This is more so because the counsel in this application is the same one who represented the applicant at other stages of hearing and revision. In the case of *Faustine G. Kiwia & Anr. v. Scolastica Paul* (supra) cited by the learned counsel for the applicant, similar point was raised that the learned counsel in that case needed to look at the ruling before he could prepare a sound application for leave to appeal. The court held as follows; “we find it difficult to accept Mr. Jonathan’s submission that he needed to look at the ruling before he could meaningfully prepare and file the application. He was the advocate handling the matter at all material time, which made him so familiar with the facts and circumstances of the case”.¹³ In that case, the High Court refused to set aside previous order dismissing an application for want of appearance by the applicant or his advocate. Apart from the holding as quoted above, the Court of Appeal found that the issue involved was narrow such that it did not require the advocate to obtain a copy of the ruling before he could file an application for leave to appeal. The position is similar in this application. The issue whether an appeal is a continuation of a suit or not for the purpose of computation of damages is a narrow issue which did not require perusal of a copy of the ruling by the learned counsel. On the basis of the reasons stated above therefore, the cause for delay as advanced by the applicant has hereby found to be insufficient to warrant grant of extension of time. The other ground which is directly interrelated with the foregoing ground of the intended application for leave to appeal concerns existence or otherwise of an arguable point of law meriting consideration by the Court of Appeal. In my view, after having found that¹⁴ the delay was without a sufficient cause, dealing with that issue would amount to a consideration of an in-existent application. In other words, determination of that issue would amount to going into the merits of the intended application for leave to appeal, the application which does not exist. On the basis of the reasons stated above, the application fails. It is accordingly dismissed with costs.¹⁵

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