

TANZANIA / JUDGMENT

meshack kifanta kyando vs korosho africa ltd and 2 others 2023 tzhc 16241 22 march 2023

COURT
TZHCDECIDED
22 March 2023

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IN THE HIGH COURT OF TANZANIA (SONGEA DISTRICT REGISTRY) AT SONGEA MISC. CIVIL APPLICATION NO. 12 OF 2022 (Arising from DC. Civil Appeal No. 02 of 2022, Songea High Court)
MESHACK KIFANTA KYANDOAPPLICANT VERSUS KOROSHO AFRICA LTD 1st RESPONDENT ERICK KAMNDE..... 2nd RESPONDENT ALLY SALUM3 rd RESPONDENT

RULING

07/03/2023 & 22/03/2023 E.B. LU VAN DA, J. The Applicant above mentioned is seeking extension of time to file review against the judgment of this Court in DC. Civil Appeal No. 2/2022 dated 12/7/2022. The reasons grounded for the delay is on account of obtaining new evidence on 24/8/2022 for handing over the impugned motor vehicle and legal advise obtained on 12/9/2022. The first Respondent opposed the application for reasons that this court was seized with the matter on appeal and not as a trial court. The Applicant had ample time to request the vehicle and be seized with the evidence. i Mr. E.O. Mbogoro learned Counsel for Applicant submitted that what prompted the Applicant to file this application is the correspondence between the Applicant and first Respondent which took place between 22th (sic, 22nd) August 2022 and 24th August, 2022. That the first Respondent declined the proposal by the Applicant for the former to waive and abandoned a bill of costs. That after obtaining the advise on 12/9/2022, the Applicant instructed his lawyer who lodged this application electronically on the same date but due to hitches in the electronic filing process, delayed to obtain control number due to network problems the hard copy of the application was formerly lodged on 23/9/2022. In opposition, Mr. Stephen L. Lekey learned Advocate for the first Respondent submitted the judgment subject for review was delivered on 12/7/2022, where 30 days elapsed on 10/8/2022, while this application was filed on 23/9/2022, after 44 days. He submitted that the Applicant ought to account for all the period from 11/08/2022 to the date of filing. He cited the case of Aziz Mohamed vs R, Criminal Application No. 84/2019. He submitted that discovery of new evidence cannot be entertained by this court, rather the trial court, citing order XLII rule 1(1) (a) of the Civil 2 Procedure Code, Cap 33 R.E. 2019; Israel Malegesi & Company vs Tanganyika Bus Services, Civil Application No. 172/18

of 2020, for a proposition that granting an extension to a futile application does not amount to a good cause; KCB Bank Tanzania Ltd vs Phina Munish, Misc, Labour Application No. 34 of 2021, for accounting for all days of delay; Ms. P & O International LTD vs The Trustees of Tanzania National Park (TANAPA), Civil Appeal No. 265/2020; Naima Seleiman (suing as a next friend of Zakaria Omary Salum Shigela (minor) vs Idu Busanya Mugeta (administrator of the late Lazaro Busanya) & Others, Civil Application No. 538/8 of 2019. He submitted that the Applicant is contradicting for saying he filed electronically on 12/9/2022, on the other hand said the document was filed formerly on 23/9/202. He submitted that the date submitting document electronically is the date of filings, citing rule 21 of the judicature and Application of Laws (Electronic Filing) Rules, 2018 (G.N. No. 148 of 2018). The Applicant is alleging that what prompted him to file this application is a discovery of new evidence. However, reading in between the lines, this is a disguise because seemingly a purported bill of costs by the first Respondent is the reasons for this application. No wonder the Applicant 3 did not take action immediately after obtaining the alleged new evidence on 12/9/2022, till on 23/9/2022 when he alleged to have formerly filed this application, meaning in between there were on going dialogue for proposal for waiver of bill of costs. It appears after the first Respondent turned down a proposal, and filed a bill of costs it is when the Applicant obtained an advise to come to court. My undertaking here is that there was no good cause for delay, neither delay accounted for, from 12/7/2022 when the impugned judgment was delivered to 24/8/2022 when the new evidence alleged to have been obtained and from 24/8/2022 to 23/9/2022 when this application is alleged to have been formerly lodged. The alleged hitches in the election filing process and delay in obtaining control number from 12/9/2022 to 23/9/2022 ought to have been pleaded in the affidavit, which could invariably be taken into board in the reply to the counter affidavit, which was not filed, instead this ground features in the written submissions which is not an evidence. Above all as alluded by the learned Counsel for First Respondent that this court was dealing with the impugned matter on appeal and not as trial court. Actually, I wonder if new evidence can be entertained or allowed at appeal stage. 4 In the case of Aziz Mohamed (supra), the Apex Court had this to say at pages 9 and 10, 'the court held that an application for extension of time to apply for review should not be entertained unless the applicant has not only show good cause for the delay, but also established by affidavit at the time of filing the application for extension of time, that if extension is granted, the review application will be predicated on one or more of the grounds specified under rule 66 (1) of Rules' I think this obiter can be extended to this application to establish if at all extension of time is granted, the intended review will fall within the purview of Order XLII rule 1(l)(a) Cap 33 (supra). Herein, the grounds for extension is pegged on a fact that there is discovery of new evidence, of which cannot be entertained at an appeal stage. 5

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