

TANZANIA / JUDGMENT

ndovu adventures ltd vs elibariki lorry 2021 tzhc 7390 29 november 2021

COURT
TZHCDECIDED
29 November 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF ARUSHA) AT ARUSHA MISC. CIVIL APPLICATION NO. 95 OF 2020 (C/F Taxation Cause No. 61 of 2019, arising from Civil Case No. 23 of 2017) NDOVU ADVENTURES LTD..... APPLICANT VERSUS ELIBARIKI LORRY..... RESPONDENT

RULING

24/09/2021 29/11/2021 GWAE, J Seemingly, the applicant, Ndovu Adventures Ltd was desirous to file an application for reference to the court against the decision of the court's taxing officer delivered on the 7th September 2020 but she found herself being out of the prescribed time. Having noticed to have been barred by the Law of Limitation, the applicant filed this application for extension of time within which to file an application for reference under Order 8 (1) of the Advocates Remuneration Order, 2015. Through a sworn affidavit of Gideon Makara, Managing Director the applicant averred that she requested for a copy of the ruling of the taxing officer on the 18th September 2020 and was availed with the same on the 24th September 2020 when she was left with only four days. She further stated that, after obtaining of the copy of the ruling, her counsel, Miss Magdalena electronically filed a reference application through Judicial Statistical Database System (JSDBS) however the system misbehaved by repeating technical error till on the 2nd October 2020 when the applicant's counsel noticed that, the application was not submitted for admission as it was still in draft holder. On the other hand, the respondent seriously resisted the application through an affidavit sworn by his counsel, Mr. Oola by stating that, the applicant was neither diligent in making follow ups to ensure that the copy was availed to her since the same was collectable by 7th September 2020 nor did she keenly file his application for reference. With leave of the court, this application was argued by way of written submission. In support of the application, counsel for the applicant (Miss Magdalena argued that, the error caused the court's electronic system and failure by the court to timely supply the applicant with a requisite copy of the ruling hindered her from filing her application for reference within the prescribed period that is twenty-one (21) days (See Rule 7(2) of the Advocates' Remuneration Order, 2015) from the date the ruling was delivered. She went on arguing that an innocent party should not be punished or penalized for the mistake caused by a court official. She then cited the Case of

Domitian Magomba vs. Esso Tanzania Limited, Civil Appeal No. 60 of 2001 and Tanzania Revenue Authority v. Tango Transport Company Limited, Civil Application No. 5 of 2006 (unreported-CAT). She however added that, the decision of the taxing officer is tainted with illegality especially when the applicant was denied of instruction fee on the basis that EFD receipts were not tendered/attached. She urged this court to make a reference to the case of Tanzania Rent Car Ltd vs. Peter Kimuhu, Civil Reference NO. 9 of 2020 (Unreported- CAT) Opposing the application, Mr. Oola, the learned counsel for the respondent argued that the applicant has failed to account for the days of delay and also to prove on the alleged existence of system error or a delay to be supplied with the copy of the ruling. He further submitted that the court is not associated with the applicant's delay In her rejoinder, Ms. Magdalena stated that, there is proof as to the complained JSDS's repeated error via her affidavit strongly adding that if copies of the ruling were ready since 7th September 2020 the applicant 3 would be supplied of the same on her request date that is on the 18th September 2020. Examining the parties' affidavits, written submissions, case law cited by the counsel for the parties and annextures thereof, the issue for determination is whether the applicant has demonstrated sufficient cause for her delay to file an application for reference within 21 days from the date of the ruling was delivered. First and foremost, it must be known that the last date for filing of the intended application for reference by the applicant would be on the 28th day of September 2020 and that it is evident that the applicant had requested for being supplied with a copy of the ruling since 18th September

2020. That being the case, in my firm view, if the copies of the ruling were available for collection by the parties since 7th September 2020 as wrongly suggested by the learned counsel for the respondent, the applicant would be timely supplied with the same. In the circumstances, I am persuaded that, the applicant was supplied with the copy of the ruling on the 24th September 2020 though she was supposed to tender other pieces of proof to the effect that she was really availed with the requisite copy on that date for instance, if she 4 produced a certified copy of the register special for collection of judgments, orders, decrees and proceedings exhibiting that she was certainly given the copy of the said ruling a bit late as the same must bear signature, name of the one who supplied her, Number of the Case, date on which it was supplied etc. Moreover, I have considered that, the exclusion clause as provided under section 19 (2) of the Law of Limitation Act, Cap 89 Revised Edition, 2019 is applicable in this matter as the time requisite for obtaining a copy of the ruling to the date when she was availed with the same must be excluded. Section 19 of the Act (supra) reads and I quote; 19 (1) Not relevant

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded". Though in our instant matter, no mentioning of an application for reference but if section 19 of the Act (supra) is broadly interpreted, the 5 copy of the ruling complained of was necessary and it is included in the wording of the statute. I have further considered the issue of electronic filing system; this system of filing cases is newly established together with known problem of

unstable network and therefore possibility of misbehaving of the system or possibility of the alleged errors to have been caused by the system itself as well as considering an affidavit of the applicant's counsel who stated that, she was the one who promptly filed the application for reference immediately after being availed with the copy of the ruling. In the absence of the evidence to the contrary, I think it is just and fair if the applicant, in the circumstances of this case, is given the benefit of doubt. I have however decided to abstain from determining the issue of illegality canvassed by the applicant's counsel in the course of written submission. Since an affidavit is evidence in lieu of oral testimony or a substitute of oral evidence, it follows that, the applicant ought to have included it in her the application. My holding is guided by a decision of the Court of Appeal of in The Registered Trustees of the Archdiocese of Dar es salaam vs. The Chairman Bunju Village Government, Civil Appeal No 147 of 2006 (unreported) where it was held; 6 "Since, as correctly submitted by Mr. Mhango, an affidavit is evidence, we think it was expected that reasons for the delay would be reflected in the affidavit. In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him. In the event, I unhesitatingly find that, the applicant has given good cause justifying this court to exercise its discretionary power bestowed to it to condone the dispute. Accordingly, this application is granted as prayed. The applicant is given seven days (7) days within which to file an application for reference if still desirous. Costs of this application shall be in the course. It is so ordered. k^{TMTM} M. Rf^WAE JUDGE 29/11/2021 7

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