IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO 186 OF 2015

1. **SHELINA MIDAS JAHANGER**
2. **JAHANGIR TEJANI**
3. **KIRITKANT K. PATTNI**
4. **FIROZ TEJANIA**
5. **ZULFIKAR TEJANIA**

.....APPLICANTS

NYAKUTONYA NPF CO LTD.....RESPONDENT

(Application for extension of time to file a notice of appeal and leave to appeal from the decision of the High Court of Tanzania at Mwanza)

(Rweyemamu, J.)

Dated the 29th day of September, 2005
In
Civil Appeal No. 47 of 1997

RULING

26th & 30th May, 2016

JUMA, J.A.:

This is an application by Shelina Midas Jahangir, Jahangir Tejani, Kiritkant K. Pattni, Firoz Tejani, Zulfikar Tejania (all collectively t/a MIDAS ENTERPRISES) seeking two distinct orders of the Court. **First**, the applicants are praying for extension of time within which to lodge their Notice of Appeal to this Court. The **second** distinct order sought by the applicant is for leave to

appeal to this Court against the decision of Rweyemamu, J. dated 29/9/2005 in HC Civil Appeal No. 47 of 1997. This application is founded on Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). In support of their Notice of Motion, the applicants rely on the following grounds:

1. *The Ruling of Hon. Rweyemamu, J. dismissing Civil Appeal No. 47 of 1997 for want of prosecution failed to take cognizance or to consider the illegality of the proceedings in the court below;*

2. *The proceedings in the court below, namely Civil Case No. 106 of 1994 in the District Court of Mwanza between the parties herein are tainted with illegality for want of pecuniary jurisdiction; and*

3. *The proceedings in the court below in Civil Case No. 106 of 1994 aforesaid were determined ex parte in blatant disregard of the mandatory provisions of the rules of service of process upon the Applicants herein who are all non-residents of Tanzania.*

The brief background to the motion was highlighted in the affidavit of Shahnawaz Abdul Meghji and the subsequent supplementary affidavit affirmed by Dilip Kesaria, the Advocate for the applicants' Midas Enterprises. It all began when the respondent (NYAKUTONYA N.P.F. Co. Ltd) went to the High Court of Tanzania at Mwanza and instituted a suit (Civil Case No. 71 of 1992) to claim Tshs. 12,000,000/= against the applicants. Masanche, J. transferred this suit to the Mwanza Resident Magistrate's Court on the ground that the claim of Tshs. 12,000,000/= fell under the pecuniary jurisdiction of the subordinate courts. In the Resident Magistrate's Court the suit was registered as the Civil Case No. 106 of 1994 and was determined *ex parte* on the ground that though served, the applicants failed to enter appearance in the Resident Magistrate's Court. An attempt by the applicants to set aside the *ex parte* judgment was refused by the trial Resident Magistrate's Court on 18/8/1995.

An appeal against that refusal to the High Court was unsuccessful when on 29/09/2005 Rweyemamu, J. dismissed the

Civil Appeal No. 47 of 1997 for want of prosecution. Undaunted, the applicants filed an application to set aside the dismissal order, but was similarly dismissed by Mchome, J. on the reason that the remedy available to the applicants was to appeal but not to set aside the dismissal of the HC Civil Appeal No. 47 of 1997. The applicants returned back to the High Court with an application for extension of time in order to pursue the remedy of appeal which Mchome, J. had directed. This application was dismissed by Mwangesi, J. on 15/10/2013. Mr. Kesaria concluded his affirmation by stating that: *"The Applicants are entitled to have therefore made a like application for extension of time to this Hon. Court."*

In a supplementary affidavit in reply sworn by P.R.K. Rugaimukamu learned advocate for the respondent, he opposed the application for extension of time. Apart from averring that the applicants seeking the extension of time have not explained the delay by assigning good cause, Mr. Rugaimukamu blames the applicants for failing to explain delays in not only the instant application, but also in other previous applications like Misc.

Application No. 104 of 2005 which was dismissed by Nyangarika, J. the fact of which the applicants failed to disclose.

At the hearing of the application before me the parties were represented by two learned counsel. Mr. Dilip Kesaria represented the applicants. Mr. Chama Matata represented the respondent. Both learned counsel filed written submissions which they expounded on orally.

Mr. Kesaria submitted that the applicants' complaints over illegalities began with the Order of Masanche, J. dated 4th October, 1993 which ordered that the respondent's suit in the High Court to be transferred to the Court of Resident Magistrate at Mwanza on the reason that: *"...The subject matter of the case is shs. 12,000,000/= which is within the jurisdiction of the Court of Resident Magistrate."*

Mr. Kesaria submitted that upon the transfer, the suit was registered as RM Civil Case No. 106 of 1994 in the Resident Magistrate's Court of Mwanza. On 22nd November, 1994

respondent prayed for an *ex parte* judgment under Order IX Rule 6 (ii) on the ground that the applicants, though duly served, still failed to make appearances in court. Mzuna-RM granted the *ex parte* judgment. Concerned with the outcome of the suit, the applicants began earnest attempts to reverse the matter in the same Resident's Magistrate Court. But the application to set aside the *ex parte* judgment was dismissed on 18th August, 1995.

The Resident Magistrate's Court went ahead to extract a Decree for the respondent's claim of tshs. 12,000,000/=. Mr. Kesaria submitted on the HC Civil Appeal No. 47 of 1997 which the applicants filed in the High Court to reverse the ex parte judgement. According to the learned counsel, one of the complaints raised in the memorandum of appeal contested the decision of the learned trial magistrate to adjudicate on a suit, over which the subordinate court did not have jurisdiction. But on 29th September, 2005 Rweyemamu, J. dismissed this appeal with costs for want of prosecution.

Mr. Kesaria next submitted on the efforts which took much of the applicants' time. The efforts include the attempt they made to move the High Court to set aside the dismissal order of Rweyemamu, J. This avenue did not bear fruits because Mchome, J. dismissed the application advised them to appeal against the decision of Rweyemamu, J. The applicants took heed of the advice by lodging in the High Court at Mwanza of the Misc. Civil Application No. 66 of 2011 before Mwangesi, J. to seek two reliefs. The first relief was prayer for leave to file their notice of appeal out of time. The second relief according to Mr. Kesaria was leave to appeal to the Court of Appeal out of time. Mwangesi, J. dismissed the application.

With the High Court dismissing their prayer for extension of time, Mr. Kesaria submitted that the applicants are next entitled under the law, to have a second attempt by seeking an order of extension from the Court of Appeal, hence the instant application.

The learned Counsel has submitted that in the determination of the instant application the Court should be guided by the

question whether under the terms of Rule 10 of the Rules, there is good cause to justify an extension prayed for. He hastened to add that the illegality of the proceedings in the trial Resident Magistrate's Court which tainted all subsequent proceedings in the High Court constitute good cause for purposes of extension of time under Rule 10 of the Rules. He argued that illegality can only be removed if the extension of time is granted for the applicants to appeal against the illegal Decree of the Resident Magistrate's Court.

He contended that the illegalities he is alluding to are apparent on the face of the record. He elaborated by referring to the claim of Tshs. 12,000,000/= which the trial court awarded under the *ex parte* decree and submitted that it was above the pecuniary jurisdiction of the Resident Magistrate's Court prevailing on 11th September, 1997 when the trial court issued the *ex parte* decree. According to the learned counsel, it was a jurisdictional error for the subordinate court to seized with a matter that was above its pecuniary jurisdiction. Mr Kesaria submitted that the law

governing pecuniary jurisdiction at that time was section 40 (2) (b) of the Magistrates Courts Act, Cap 11 which stated:

> *"40 (2) A district court when held by a civil magistrate shall, in addition to the jurisdiction set out in subsection (1), have and exercise original jurisdiction in proceedings of a civil nature, other than any such proceedings in respect of which jurisdiction is conferred by written law exclusively on some other court or courts, but (subject to any express exception in any other law) such jurisdiction shall be limited–*
>
> > *(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed twelve million shillings; and*
> >
> > *(b) in other proceedings where the subject* ***matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed ten million shillings****.*
> >
> > [emphasis added]

Mr. Kesaria argued that in light of the provisions of section 40 (2) (b) cited above, the Order of Masanche, J. directing a claim of Tshs. 12,000,000/= be transferred to the Resident Magistrate's Court was erroneous because the pecuniary jurisdiction of that subordinate court was Tshs. 10,000,000/= for monetary claims. Similarly, he argued that Court of Resident Magistrate at Mwanza erroneously assumed pecuniary jurisdiction over the respondent's monetary claim of Tshs. 12,000,000/= which was above that subordinate court's maximum pecuniary jurisdiction of Tshs. 10,000,000/=.

The wrongful assumption of jurisdiction by the Court of Resident Magistrate at Mwanza, Mr. Kesaria argued, was the fundamental illegality that has permeated and tainted through all subsequent proceedings which the applicants would like now to rectify. All proceedings tainted with illegalities should not be left to remain in court records, he submitted further. The learned Counsel placed reliance on a string of decisions all insisting that ground of illegality in the record constitutes good cause for extension of time.

He referred to **Principal Secretary, Ministry of Defence; National Service vs. Devram Valambhia** [1992] TLR 185 (CA) where the Court restated that where the point of law involves a claim of illegality, that in itself constitutes good cause justifying the Court to extend the time which otherwise may be limited by the Rules:

> *"...We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law."*

Mr. Kesaria urged the Court to seek the guidance of the above statement because to decide otherwise would result in leaving on record the illegality of the erroneous assumption of jurisdiction that did not then belong to the Court of Resident Magistrate to remain standing.

In cementing his argument that erroneous assumption of jurisdiction is a fundamental illegality warranting an extension of time, Mr. Kesaria cited the decision of the Court in **The Principal Secretary, Ministry of Defence and National Service v Duram P. Valambhia** [1992] TLR 387 (CA) — where the Court stated that:

> *"While avoiding the risk of going into the merits of the case, we think that the points raised are sufficiently weighty. They are such that if proved they go to the root of the matter. For instance, they allege illegality of the order or orders of the Court. That is obviously a point of law. In Civil Reference No. 9 of 1991 involving the same parties as in this case, we took the view that where the point of law at issue is the illegality or otherwise of the decision being*

challenged, that is a point of law of sufficient importance to constitute sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance. The same applies here. So that although we would have upheld the preliminary objection on the grounds of failure by the Government to pay court fees and security for costs in this appeal, there ought to be afforded opportunity for the Court to ascertain on the issues raised and, if the allegations are established, take appropriate measures."

Taking issue to the respondent's contention that the applicants should only have themselves to blame for pursuing wrong avenues for redress, Mr. Kesaria submitted that the applicants' dilatory in taking steps to remedy the situation or their pursuing inapplicable routes cannot prevent the grant of an extension of time that is grounded on complaint of illegalities. To support this line of his submission, the learned counsel cited the decision of the Court in **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the Liquidator of**

TRI-Telecommunications (T) Limited vs. CITIBANK Tanzania Limited, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) where the Court also dealt with the illegalities accompanied with a claim that an applicant had wasted much time pursuing wrong remedies. The Court stated:

> *"We have already accepted it as established law in this country that where the point of law at issue is illegality or otherwise of the decision being challenged, that by itself constitute 'sufficient reason' within the meaning of rule 8 of the Rules for extending time. ..... As the point of law at issue in these proceedings is the illegality or otherwise of the decision of the High Court annulling the respondent's debenture with Tri-telecommunications (Tanzania) Ltd, then this point constitutes 'sufficient reason' .... for extending the time to file a notice of appeal and applying for leave to appeal. This is notwithstanding the fact that the respondent brought the applications very belatedly..."*

Mr. Kesaria ended his submission by arguing that just as the Court of Resident Magistrate committed illegality by erroneously assuming pecuniary jurisdiction over the respondent's claim for Tshs. 12,000,000/=, the Order of Masanche, J. transferring the suit to the Resident Magistrate's Court was similarly an illegal order because the issue of jurisdiction is sole realm of the legislature, not even a Judge can confer jurisdiction on a subordinate court.

On behalf of the respondent, Mr Chama Matata, learned Counsel, adopted his written submissions and began by blaming the applicants' different learned counsel who, after the decision of Rweyemamu, J. pursued wrong avenues which contributed to so much delays. The learned Counsel also suggested that by supporting their notice of motion by an affidavit of one Shahnaz Abdul Meghji who is not one of the applicants, the motion lacks the essential leg to stand one and to that extent the instant application for extension of time is defective. Mr. Matata also suggested that the applicants should not seek an extension of time in order to appeal against the Judgment of Rweyemamu, J. He suggested that

because the applicants had an avenue of seeking re-admitting of their appeal under Order XXXIX Rule 19 of the Civil Procedure Code, this application for extension of time to file notice of appeal is untenable.

Reacting to the authorities which Mr. Kesaria cited to support the position that claim of illegalities constitute good cause, Mr. Matata insisted that ground of illegalities cannot help the applicants because of their act of choosing wrong avenues and seeking wrong remedies which contributed to the delays. He supported his line of submission by citing *Nyanza Co-operative Union (1984) vs. M/S BP (T) Ltd, Jibrea Auction Mart and Court Brokers and Antonia Zakaria*, Civil Application No. 22 of 2008 (unreported) where the application for extension of time was dismissed because of inordinate delay and the Court distinguished **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the Liquidator of TRI-Telecommunications (T) Limited vs. CITIBANK Tanzania Limited** (supra).

Mr. Matata concluded his oral submissions with a prayer that should the Court feel inclined to grant the application to extend time, the respondent should not be ordered to pay costs. He argued that the respondent should not be made to pay for the mistake which was set off by Masanche, J. when he ordered the transfer of the suit to the Resident Magistrate's Court.

In rejoinder, Mr. Kesaria expressed his surprise why Mr. Matata raised the issue of affidavit. He referred me to the preliminary objection which the respondent's Counsel had also raised in the early stages of this application and which Kimaro, J.A. dismissed. I should pause here to agree with Mr. Kesaria. Kimaro, J.A. had settled the complaints over the supporting affidavit in the following way:

> *"...Regarding the second point of preliminary objection, I will not hesitate to say that it lacks merit. All that Rule 48 (1) of the Court of Appeal Rules says is that the application to the Court must be made by way of notice of motion which shall be supported by an affidavit. It does not specify the category of persons who should swear or affirm the*

affidavit and the relationship of the deponent of the affidavit to the parties in the application. This means that the claim by the learned advocates for the respondents that the application was supposed to be supported by affidavits of the applicants is unfounded."

Mr. Kesaria also rejected the suggestion that after Rweyemamu, J. had dismissed the applicants' appeal they should have sought re-admission. Mr. Kesaria submitted that re-admission of the appeal was not feasible because it was not struck out but was dismissed by Rweyemamu, J.

On the issue of costs, Mr. Kesaria gave his reasons why the applicants should be awarded costs should the extension of time be granted. He argued that the respondent has always contested applications put forward by the applicants. The respondent has manifested this contest even in the instant application by filing affidavit in reply, supplementary affidavit in reply and even raising preliminary points of objection.

After hearing the submissions of the two learned counsel, it is appropriate to state the power of the Court to either extend time or to decline such an extension is provided for under Rule 10 of the Rules. This Rule states:

> ***10.*** *- The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.*

It is apparent from the instant motion that, as their good cause; the applicants are not seeking to account for each day of delay, but predicated their motion on the illegality of the proceedings in the courts below as good cause under Rule 10 of the Rules.

I cannot but fully agree with the learned counsel for the appellant that on 4th October, 1993 when Masanche, J. ordered the

suit that was based on monetary claim of Tshs. 12,000,000/= to be transferred to the subordinate court, the maximum pecuniary jurisdiction of the Court of Resident Magistrate over monetary claims was Tshs. 10,000,000/=. To the extent of the respondent's monetary claim of Tshs. 12,000,000/=, the Resident Magistrate's Court of Mwanza had no pecuniary jurisdiction on 22nd November, 1994 to issue an *ex parte* judgment. Although the pecuniary jurisdiction of the Resident Magistrate's Court over monetary claims was raised to one hundred million shillings when the Magistrates Courts Act was amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 25 of 2002, the legal position remains that the Resident Magistrate's Court of Mwanza did not have the requisite pecuniary jurisdiction in 1994 over monetary claims of above Tshs. 10,000,000/=.

From the sheer number and weight of decisions of the Court, it is now settled that grounds alleging illegalities constitute good cause which can favourably move the Court to grant an extension of time. Apart from the decisions discussing claim of illegalities to be good cause for extension of time which Mr. Kesaria has cited; in

Hamida Hamisi vs. The Principal Magistrate Mbagala Primary Court and 2 Others, Civil Application No 118 of 2015 (unreported) the Single Justice of the Court was faced with a belated application for extension which was wholly predicated on the illegality committed by judicial officers. The Court referred to its earlier decision in **Patrobert D. Ishengoma vs. Kahama Mining Corporation Ltd (Barrick Tanzania Bulyankulu) and 2 Others,** Civil Application No. 2 of 2013 (unreported) which had the occasion to traverse the grounds of denial of right to be heard and illegalities. The Court stated:

> *"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. Firstly* ***the applicant is alleging to have been denied the right to be heard*** *by not being made a party to Miscellaneous Civil Cause No. 97 (supra) though he was affected by the outcome. There is* ***an allegation of illegality, irregularities and impropriety.*** *There is also the reason of illness advanced by the applicant which cannot be brushed aside."* [Emphasis added]

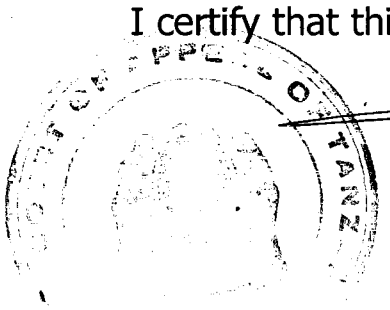
From the foregoing, I will not hesitate to find that the applicants have shown good cause warranting an extension. From an innocuous but illegal order of transfer made by Masanche, J. unless this Court intervenes now to arrest the situation, illegalities will continue to spin out of control in courts.

In the result, the applicants are granted both an extension of time to lodge their Notice of Appeal to this Court and to lodge the requisite Leave to appeal to this Court and both shall be filed within thirty (30) days of this Order. The applicants are awarded costs. It is so ordered.

DATED at **MWANZA** this 28th day of May, 2016.

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL