

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 563/02/ 2017

ABDU ISSA BANO APPLICANT

VERSUS

MAURO DAOLIO RESPONDENT

**(Application for Extension of Time to file Revision out of time against
The decision of the High Court of Tanzania**

at Arusha)

(Massengi, J.)

dated the 24th day of April, 2014

in

Civil Case No. 16 of 2012

RULING

29th March & 8th April, 2019

KITUSI, J.A.:

Abdul Issa Bano, the applicant, lost in Civil Case No. 16 of 2012 High Court of Tanzania, Arusha Registry (Massengi, J.) on 24/4/2014. The applicant was aggrieved by that judgment and decree but did not immediately take steps to challenge it. He is now applying for extension of time under Rules 10 and 48 (1) of the Court of Appeal Rules 2009, the Rules, so that he may file a revision out of time.

Both statutory, Rule 10 of the Rules, and case law, confer this Court with the jurisdiction to extend time if good cause is shown for the delay. Has

the applicant shown good cause in this application to warrant the granting of the extension of time?

The applicant's Notice of Motion is supported by an affidavit of the applicant himself which accounts for the delay. Relevant to this application are paragraphs 11 and 12 of that affidavit as the rest, I am afraid, are nowhere close to reasons for the delay. The Paragraphs state:

11. "That the respondent herein through the services of his advocates lodged a Notice of Appeal in this Honourable Court on 11/06/2014. And it is until recently on 31/03/2017 where the respondent herein did file an application before this Honourable Court to withdraw the Notice of Appeal. (attached herein is a copy of the Notice of Appeal and Application to withdrawal (sic) collectively marked as "AIB – 6" leave of (sic) sought for it to form part of this affidavit.)

12. That, due to the Notice of Appeal filed by the Respondent the Applicant herein failed to lodge Application for Revision to challenge the judgment and decree delivered by Hon. Justice F.H. Massengi vide Civil Case No. 16 of 2012."

The respondent Mauro Daulio resists the application first through an affidavit in reply taken by Mr. Aloyce Peter Qamara, learned advocate, and

oral submissions as shall be alluded to later. In essence the respondent's counsel has stated under paragraph 10 of the affidavit in reply that; "it is further averred that:

"Notice of Appeal was not a bar for the applicant to file Revision application and/or cross appeal."

The applicant has also raised the issue of illegality in the decision of the High Court, and it is towards this aspect that the best part of the affidavit is devoted. Similarly five out of the six pages of the applicant's written submissions state reasons why the decision of the High Court is faulty.

When the application was called on for hearing Mr. William Ernest, learned advocate, appeared for the applicant while the respondent was represented by Mr. Peter Aloyce Qamara, learned advocate. When Mr. Ernest took the floor he made his position clear that he was only submitting on the point of illegalities in the impugned decision. Later when rejoining he briefly submitted on the reasons for the delay. The learned counsel referred to four aspects of illegality which are; the High Court's improper lifting of the veil of incorporation; the improper transferring of shares of the company which was not a party to the proceedings; a problematic order of costs which did not

specify the date of accrual and; orders that in effect contravene company law as to shares.

In response to this Mr. Qamara for the respondent submitted that the alleged illegalities that have been submitted on were not raised in the applicant's affidavit. It is counsel's submission that anything not raised in a party's affidavit may not be raised in oral arguments. He cited the case of **Interchick Company Ltd V Mwaitenda Ahobokile Michael**, Civil Application No. 218 of 2016, CAT (unreported)

In the course of the hearing it occurred to me that I should ask counsel to address me on what is the difference between illegality and ground of appeal or revision. To this, Mr. Ernest submitted that illegalities are matters that would give a party access to court even when the delay is not fully accounted for. He based this view on the decision of **Principal Secretary Ministry of Defence & National Service V. Devram P. Valambhia** [1992] TLR 185.

Mr. Qamara for the respondent submitted on this point that an illegality may be a point of law or of fact which is an error apparent on the face of the record.

I think Mr. Qamara is closer to the point in his submissions, and I am afraid Valambhia's case is being cited by Mr. Ernest out of context. In my view the difference between what would constitute illegality and mere grounds of appeal may be gathered from an observation by Massati, J.A., in **Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), when he stated, distinguishing Valambhia's case;

*"But in that case, the errors of law, were clear on the face of the record. The High Court there had issued a garnishee order against the Government, without hearing the applicant, which was contrary to both Government Proceedings Rules, and rules of natural justice. **Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot, in my view, be said in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one.** The Court emphasized that such point of law, must be that of "sufficient importance" and I would add it*

must also be apparent on the face of the record such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

(Emphasis mine)

Considering the above statement, with which I associate myself, my conclusion is that there is not apparent that the decision of the High Court in Civil Case No. 16 of 2012 is fraught with illegality to justify good cause for extension of time.

I now turn to examine whether the delay has been accounted for, the law being that every single day of the delay must be accounted for. See; **Dar es salaam City Council V. Group Security Co. Ltd**, Civil Application No. 234 of 2015, CAT [unreported] among many decisions. In the affidavit in support of the application the delay is being blamed on the respondent filing a Notice of Appeal on 11/6/2014 and that from that date to 31/3/2017 when it was withdrawn, the applicant could not lodge the application for revision.

The respondent has countered this assertion by stating that his Notice of Appeal was not a hindrance to the applicant pursuing the intended revision.

With respect, the ground is as feeble as it is strange, because if the applicant was indeed aggrieved by the decision of the High Court he could not sit back for three years waiting to reap where he did not sow. Even then, this reason, only accounts for the period from 11/6/2014 to 31/3/2017. It does not cover the period from 24/4/2014 when the judgment of the High Court was rendered to 10/6/2014, immediately before the Notice of Appeal by the respondent was filed. Nor does it explain why after the withdrawal of the said Notice on 31/3/2017, this application was filed months later, on 1/6/2017.

For the foregoing reasons, it is my conclusion that the applicant has failed to account for the delay.

I feel that I need not pronounce myself on whether or not the applicant's intended revision instead of appeal would be maintainable, an issue raised by the respondent both in the affidavit in reply and oral address. For one, this is not within the scope of my mandate under Rule 10 of the Rules, and for another, my pronouncement will be neither here nor there, since the applicant has failed to cross the first hurdle.

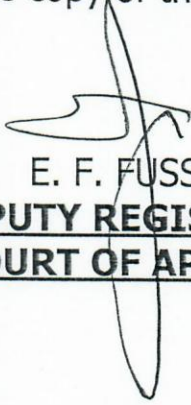
In fine, I find this application to be devoid of merits and accordingly I
dismiss it with costs.

DATED at **ARUSHA** this 4th day of April, 2019.

I.P. KITUSI
JUSTICE OF APPEAL

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




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL