

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

CIVIL APPLICATION NO. 107/15 OF 2019

MOH'D BAKARI RAMADHAN.....1st APPLICANT

**HAJI KHERI KONDO (*Legal representative of*
KONDO JUMA HAJI)2nd APPLICANT**

VERSUS

MWANASHERIA MKUU WA SERIKALI ZANZIBAR.....RESPONDENT

(Application for extension of time within which to apply for revision against the Decision of
the High Court of Zanzibar at Vuga)

(Sepetu, J.)

Dated the 08th Day of September, 2017
in
Civil Application No. 47 of 2016

RULING

29th November & 4th December, 2019

KEREFU, J.A.:

The above named applicants have lodged this application seeking an order granting them extension of time to lodge an application for revision against the decision of the High Court of Zanzibar sitting at Vuga (Sepetu, J) dated 08th September, 2017 in Civil Application No. 47 of 2016. The application is brought by way of a Notice of Motion lodged on 07th December, 2018 under Rule 10 of the Tanzania Court of Appeal Rules, 2009

(the Rules). It is supported by an affidavit of one Omar Said Shaaban, learned counsel for the applicants. The respondent, who was duly served with a copy of the application, opted not to file an affidavit in reply.

For a better appreciation of the issues raised herein, it is important to explore the background and chronological account of events, as discerned from the applicants' supporting affidavit. The applicants instituted Civil Case No. 01 of 2015 in the High Court against the respondent over a landed property (suit premises) seeking orders of vacant possession, payment of Tshs. 20,000,000/= as general damages and a declaration that they were lawful owners of the suit premises. However, on 29th March, 2016 the said suit was dismissed for non-appearance of the applicants.

After being aware with the dismissal order, the applicants lodged Civil Application No. 47 of 2016 for extension of time to lodge an application for setting aside the dismissal order. The respondent lodged a preliminary objection against the application. After hearing the parties on the objection raised, the learned High Court judge, on 08th September, 2017 sustained the objection. However, instead of striking out the application he dismissed it with costs, for being incompetent.

Aggrieved, the applicants lodged Civil Application No. 386/15 of 2018 in this Court praying for revision of the said decision. Again, the respondent raised a preliminary objection that the application was incompetent for being time barred. The Court (Mbarouk, Mkuye, Wambali, JJA.) sustained the said objection and struck out the application, hence the current application. In the Notice of Motion the applicants have disclosed three (3) grounds, namely: -

- (a) The Civil Application No. 47 of 2016 is tainted with illegalities as the learned High Court judge seriously misdirected himself by dismissing the application instead of striking out the same to the effect that he did not determine the application on merit;*
- (b) The applicants filed an application for Revision before this Court which on 3rd December, 2018 it was struck out for being time barred; and*
- (c) The applicants have been diligent in prosecuting this case and the reason for delay are not caused by negligence, but for reasons advanced in the accompanying affidavit.*

On the day when the application was called on for hearing, the applicants were represented by Mr. Omary Said Shaaban, learned counsel,

while Mr. Ali Ali Hassan, the learned Principal State Attorney appeared for the respondent. It is noteworthy that no written submissions were filed by the parties and they addressed the Court under Rule 106 (10) (b) of the Rules as amended by GN. No. 344 of 2019.

Submitting in support of the application, Mr. Shaaban commenced his submission by fully adopting the contents of the Notice of Motion and the supporting affidavit. He then, briefly clarified that, in the supporting affidavit, the applicants have advanced good cause to warrant grant of this application. He specifically referred to paragraph 10 of the said affidavit and argued that, the impugned decision is tainted with illegality and irregularity, as the learned judge dismissed the application at the stage of determining a preliminary objection. He said that, such an act has curtailed the applicants' rights to be heard on the main application. He contended further that the said omission is an illegality on the face of record which cannot be left to stand. It was his strong argument that, if such a decision is left to remain on the record of the High Court it will not only mislead the litigants, but also create bad precedent in our jurisprudence. He thus urged that time be extended as prayed.

In response, Mr. Hassan, though he conceded that, the learned judge dismissed the matter at the point of determining a preliminary objection, he strenuously opposed the application and the oral submission made by Mr. Shaaban. He argued that, Rule 10 is a discretionary Rule, where the court's discretion can be exercised only when good cause has been shown. He argued that, in the current application the applicants have failed to show good cause to move the court to exercise its discretion and grant the prayer sought in the Notice of Motion. To buttress his position, he cited the case of **Dapine Parry v. Murray Alexander Carson** [1963] E.A 546 at page 549 and emphasized that, even if there is such an illegality and/or irregularity in the impugned decision the same is not fatal and cannot warrant extension of time to the applicants. He finally prayed that the application be dismissed for lack of good cause.

In a brief rejoinder, Mr. Shaaban mainly reiterated what he submitted earlier and emphasized that the application be granted. He distinguished the authority cited by Mr. Hassan in **Dapine Parry** (supra) by stating that the same being an old case is no longer a good law and is inapplicable in the case at hand. He insisted that, in the current developed jurisprudence, it is a settled position that illegality of this nature constitutes a good cause. He

said that, this is to avoid illegal decisions, like the one at hand, to remain in the record of the court.

From the foregoing, it is evident that the application before me is premised under the provisions of Rule 10 of the Rules. The said Rule empowers the Court to exercise its discretion in granting an application for extension of time, if the applicant adduces good cause to justify the delay. For the sake of clarity, I have endeavoured to reproduce the said Rule herein below: -

*“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.”*
[Emphasis added].

Therefore, the requirement which the applicant has to satisfy under the above cited provision of the law is to show good cause for the delay in

filling the application. There are numerous authorities to this effect and some of them include, **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235; **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 (both unreported) to mention, but a few.

It has been also held in times without number that, a ground alleging illegality constitutes good cause for extension of time. Among the decisions include, **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** (1992) TLR 387; **Kalunga & Company Advocates Ltd** (supra) and **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016, (Arusha) (unreported). Applying that principle in the case of **Arunaben Chaggan Mistry**, (supra) the Court, relied on passage in the case of **Principal Secretary Ministry of Defence**, (supra) which states that: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for

the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right". [Emphasis added].

Therefore, in the application at hand, the main issue to be considered is whether or not the applicants have advanced good cause to warrant grant of this application. As regards the period of delay, I have noted that in the Notice of Motion and paragraphs 11 and 12 of the supporting affidavit, the applicants have clearly indicated that, they have acted promptly and diligently in prosecuting their case. It is on record that, Civil Application No. 386/15 of 2018 was struck out on 03rd December, 2018 and this application was lodged on 07th December, 2018, after lapse of three (3) days. As intimated above, the applicants have well accounted for the said days under paragraphs 11 and 12 of the supporting affidavit. I am therefore satisfied that, the applicants have acted diligently and promptly.

On the issue of illegality and irregularity contained in the impugned decision, I am mindful of the fact that, as a single Justice, I am not supposed to dig much on the same, but only to consider as to whether the same constitute good cause to warrant grant of this application. In this

regard, I have carefully perused the record of the application and found that, the applicants have lodged the Civil Application No. 47 of 2016 for extension of time to lodge an application for setting aside the dismissal order. Objecting the application, the respondent raised a preliminary objection consisting of four (4) points couched in the following manner that, the: -

- (a) Chamber Summons is improperly before the court that it contravenes the procedure set down under the Civil Procedure Decree Cap. 8 of the laws of Zanzibar;*
- (b) Application is supported by defective affidavit contrary to the requirement of Oath Decree Cap. 7 of the laws of Zanzibar;*
- (c) Verification is bad in law contrary to the laws of Zanzibar; and*
- (d) Affidavit is defective for uncertain deponents.*

After hearing the parties on the above points of objection, the learned judge sustained the preliminary objection and instead of striking out the application he decided to dismiss it with costs, for being incompetent. I am therefore in agreement with the counsel for the parties that, Civil Application No. 47 of 2016 was not heard on merit, as it was dismissed at the point of determining the preliminary objection. The counsel for the applicant contended that such a move taken by the learned High Court judge constituted an illegality. On the other hand, Mr. Hassan, though,

conceded on the existence of the alleged illegality, but he strongly argued that the same cannot warrant grant of this application. With respect, I found this line of argument wanting. This is because, this Court has always emphasized that, the right to be heard is a fundamental principle which the courts of law must jealously guard against. See for instance cases of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina Mwakyoma** [2003] TLR 251 and **V.I.P. Engineering and Marketing Limited and Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported).

Having scrutinized the authority cited by Mr. Hassan in **Dapine Parry** (supra), I am in agreement with the submission by Mr. Shaaban that the circumstances and facts of that case are distinguishable and inapplicable in the case at hand. In that case parties were heard on the main suit to the completion of the trial, but the applicant therein delayed, for a period of ninety (90) days, to challenge the judgment which was said to contain no specific order on the payment of interest, while in the case at hand, parties were completely not heard on the main application.

Therefore, in deciding as to whether the pointed irregularity in this application amount to an illegality envisaged under Rule 10 of the Rules, I wish to refer to the decision of this Court in the case of **Principal Secretary Ministry of Defence**, (supra) where the Court stated that: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right". [Emphasis added].

In the case of **Hamida Hamisi v. the Principal Magistrate Mbagala Primary Court and 2 Others**, Civil Application No. 118 of 2015 (Unreported), the single Justice of Appeal, when dealing with an application for extension of time based on allegation of illegality, as in this case, cited the case of **Patrobert D. Ishengoma v. Kahama Mining Corporation Ltd, (Barrick Tanzania Bulankulu) and 2 Others**, Civil Application No. 2 of 2013 which discussed a similar illegality based on allegation that the applicant was denied the right to be heard and stated that:-

*"...I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. Firstly, ..., **there is an allegation of illegality, irregularities and impropriety...**, which cannot be brushed aside" [Emphasis added].*

On the basis of the preceding authorities, I am in agreement with the submission of Mr. Shaaban that, the allegation of an illegality of the decision sought to be challenged amount to good cause, hence warrant grant of extension of time. It is my respectful opinion that granting such an extension will avail an opportunity to the applicants to subject the impugned decision to a revision for the Court to consider the alleged illegality, thus furthering just determination of the matter. I am therefore satisfied that, the alleged illegality falls squarely within the meaning of good cause in terms of Rule 10 of the Rules. It is therefore my respectful view that, this is among the cases where shutting the door for revision may occasion injustices.

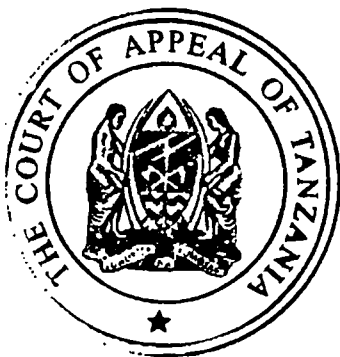
In the premises, I find merit in the application and it is hereby granted. Subsequently, the applicants are given sixty (60) days, from the

date of delivery of this ruling, to lodge an application for revision. Since parties have not pressed for costs, I make no order in that regard.

DATED at **ZANZIBAR** this 3rd day of December, 2019.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling of the Court delivered this 4th December, 2019 in the presence of Ms. Salma Juma Abdalla, counsel for the Applicants and Mr. Abubakar Omar counsel for the respondent is hereby certified as a true copy of the original.




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL