IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 41/08 OF 2018

TANZANIA FISH PROCESSORS LIMITED.....APPLICANT

VERSUS

EUSTO K. NTAGALINDA.....RESPONDENT

(Application for extension of time to apply for Review of the decision of the Court of Appeal of Tanzania at Mwanza)

(Mbarouk, Bwana, And Mussa, JJ.A.)

Dated the 22nd day of March, 2013
in
Civil Appeal No. 23 of 2012
.....

RULING

03rd & 10th April, 2019

KWARIKO, J.A.:

The applicant lost an appeal to the respondent before this Court on 21/3/2013. Having been aggrieved, by a notice of motion, he has filed this application for extension of time to apply for review of that decision. The application has been preferred in terms of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion has been predicated upon the following grounds: -

i) That the Applicant has been diligently and timely

pursuing another Application for Review in this Honourable Court, Civil Application No. 6 of 2013 but due to a newly developed case law on affidavit, the jurat in Civil Application No. 6 of 2013 was found to be defective and the Application was struck out on 6th December, 2017; and

ii) That there are serious issues of law in the judgment sought to be reviewed.

The notice of motion is supported by an affidavit sworn by Mr. Constantine Mutalemwa, advocate of the applicant.

In opposing this application, the respondent filed an affidavit in reply sworn by his advocate, Mr. Mathias Rweyemamu. Both parties filed written submissions in support of their respective positions on the matter.

When the application was called on for hearing on 3/4/2019, Mr. Constantine Mutalemwa and Mr. Mathias Rweyemamu, learned advocates appeared for the applicant and respondent respectively.

Arguing for the application, Mr. Mutalemwa first prayed to adopt the notice of motion, the supporting affidavit and the written submission to be part of his oral submission. He explained that, earlier, the applicant had filed an application for review before the Court vide MZA. Civil

Application No. 6 of 2013 which was struck out on 6/12/2017 for being incompetent. That, the incompetence of that application was attributable to the defective affidavit which was a result of conflicting decisions of the Court in relation to the jurat of attestation, having omitted to indicate the name of the attesting officer.

For the foregoing, it was Mr. Mutalemwa's contention that the applicant has been diligent and timely in pursuing the matter, but her application for review got struck out only on account of newly developed case law on affidavit. He argued that, the foregoing exempts the applicant from accounting for the time between the filing of the application for review and the date it was struck out as it is termed a "technical delay". In support of the foregoing the learned counsel cited the decision of this Court in **Yara Tanzania Limited v. D B Shapriya & Co Limited,** Civil Application No. 498/16 of 2016 (unreported).

Further, Mr. Mutalemwa submitted that the "real or actual delay" is from 6/12/2017 when the application for review was struck out and 21/12/2017 when this application was filed.

Additionally, for the grounds of the intended review, the learned counsel argued that there are serious matters of law in the impugned decision hence good cause for extension of time so that the issues could be looked at. That, the Court did not view the original record before it decided the issues of exhibits. To be precise the learned counsel argued that the Court ruled out that, exhibit P8 was a photocopy without due regard to the original exhibit as tendered in the High Court. That, failure to inspect the original record amounted to denial of the right to be heard amounting to the illegality. He fortified his argument with the decisions of this Court in **Abubakar Ali Himid v. Edward Nyelusye,** Civil Appeal No. 70 of 2010 and **Grand Regency Hotel Limited v. Pazi Ally & 5 Others,** Civil Application No. 100/01 of 2017 (both unreported).

It was Mr. Mutalemwa's further argument that, the respondent's reply did not rebut the issues raised in respect of the exhibits. He contended that the decision of this Court filed by the respondent of **Hamisi Angola v. R,** Criminal Application (unreported) supports the applicant's case.

In his reply, Mr. Rweyemamu contended that the applicant's former application for review was struck out on the negligence of the advocate hence cannot be good cause for the delay. Also, the applicant has not presented good cause for the delay. Neither has she shown that the impugned decision features illegality. That the notice of motion does not contain grounds of illegality or denial of the right to be heard. After all, neither the impugned decision nor the struck-out application for review have been attached to the notice of motion or affidavit. Also, exhibit P8 complained of either does not form part of the facts in this application. Further, to prove that the applicant was not fully heard by the Court, there ought to be affidavit of the Registrar who appeared in Court during the hearing of the appeal. He argued that, the complaints are an afterthought because the Justices inspected the original record during the hearing. Thus, the grounds in relation to the exhibits are not fit under Rule 66 of the Rules.

Additionally, Mr. Rweyemamu argued that in his submission the respondent opposed the complaint in relation to the admissibility of exhibit P1. Also, the decision in **Hamisi Angola** (supra) does not support the applicant on the issue of the denial of the right to heard. He

submitted that the decisions cited by the applicant relate to an application for extension of time to file revision. He urged the Court to find that the application has no merit fit to be dismissed with costs.

In his rejoinder, Mr. Mutalemwa argued that in the notice of motion and the affidavit it is complained that the applicant was not fully heard in respect of the exhibits. He admitted that the impugned decision was not attached to the notice of motion but argued that the pleadings have not been rebutted by the respondent. Thus, the applicant has complied with Rule 66 of the Rules.

I have dispassionately considered this application in the light of the contending submissions of the learned advocates for and against the application. The law is settled that in an application for extension of time to apply for review, the applicant is enjoined not only to show good cause for the delay as per Rule 10 of the Rules, but also to show one or more grounds for review as shown under Rule 66 (1) of the Rules. Some of the decisions of this Court in that respect are, **Jehangir Aziz Abdulrasul & 2 Others v. Balozi Ibrahim Abubakar & Another,** Civil Application No. 265/01 of 2016; **Elia Anderson v. R,** Criminal Application No. 2 of

2013; **Anyelwisye Mwakapake v. R,** Criminal Application No. 1 of 2014; **Hamisi Angola v. R,** Criminal Application No. 6 of 2015; **Azizi Mohamed & Another v. R,** Criminal Application No. 4 of 2015; **Jirani Maarufu v. R,** Criminal Application No. 8 of 2013 and **Nyakua Orondo v. R,** Criminal Application No. 2 of 2014 (all unreported). For instance, in **Elia Anderson v. R** (supra), the Court said thus: -

> *"An application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but also established by affidavit evidence, at the stage of extension of time, either impliedly or explicitly, that if extension is granted, the review application would be predicated on one or more of the grounds mentioned in paragraphs (a) or (b) or (c) or (d) or (e) of Rule 66 (1)."*

Now, the question which follows herein is whether the applicant has complied with the conditions for the grant of this application. As regards the first condition, there are two aspects of the delay. First it is the period between the pronouncement of the impugned decision on 22/3/2013 and the date the former application for review was struck out for being incompetent on 6/12/2017. Mr. Mutalemwa argued that this period ought

to be termed as 'technical delay' because the applicant had been diligently and promptly pursuing the matter. On the other hand, Mr. Rweyemamu contended that, the former application for review was struck out on account of the advocate's negligence for not properly observing the law. It is not disputed that the application for review was filed within time. Hence, I agree with Mr. Mutalemwa that until the time that application was struck out, the applicant had been promptly and diligently pursuing his case. Hence, that period termed as a 'technical delay' has been accounted for.

Facing with the similar situation, this Court in **Yara Tanzania Limited** (supra) adopted the stance in the case of **Fortunatus Masha v. William Shija & Another** [1997] T.L.R 154. In the case of **Fortunatus Masha** it was said thus: -

> *"A distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In*

the circumstances, the negligence if any really refers to the filing an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."

[See also **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor,** Civil Application No. 342/01 of 2017 (unreported)].

Despite the foregoing, there is a period from 6/12/2017 when the application for review was struck out and the time when this application was filed on 21/12/2017, which is termed as 'real or actual delay'. This is a period of about fourteen days which has not been accounted for by the applicant. In his submission, Mr. Mutalemwa did not explain away this delay. The law is clear that in an application for extension of time, the applicant should account for each day of the delay. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported), the Court said thus:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

[See also, **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 and **Bariki Israel v. R,** Criminal Application No. 4 of 2011 (all unreported)].

Therefore, the applicant has failed to show good cause for the delay which is the first limb of the preconditions for the extension of time to apply for review.

In the second limb, the applicant ought to fulfill requirements of Rule 66 (1) of the Rules, which provides thus: -

"The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds: -

(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or

(b) *a party was wrongly deprived of an opportunity to be heard;*

(c) *the court's decision is a nullity; or*

(d) *the court had no jurisdiction to entertain the case; or*

(e) *the judgment was procured illegally, or by fraud or perjury."*

In the instant case the applicant's ground for review raised in the notice of motion is couched thus;

> *"There are serious issues of law in the judgment sought to be reviewed."*

The applicant did not say which among the grounds in Rule 66 (1) of the Rules the ground raised in the notice of motion has been predicated upon. Also, in amplification of this ground it is essentially deposed under paragraphs 13 and 14 of the affidavit thus: -

> *"13. That I swear and state in the interest of justice that there are also serious issues of law that need reconsideration by way of review namely that this Honourable Court ruled that "P-8" was a photocopy without a due regards on the original exhibit as tendered in the High Court of Tanzania (Commercial Division).*

14. Further, I swear and state that the record of appeal in regards the exhibits tendered in the High Court of Tanzania (Commercial Division) were apparently prepared based on the pleadings in the possession of the Respondent as a result of which all appear as photocopies and bear no endorsement of the trial Court as being admitted as exhibits."

In his submission in relation to the facts deposed under the two paragraphs, the applicant's counsel argued that, had the Court inspected the original record during the hearing of the appeal, it would not have ruled out that exhibit P8 was a photocopy. That, the omission amounted to an illegality and a denial of the right to be heard.

The applicant did not annex the impugned judgment in his affidavit as would have been the case. Instead, he filed it as one of the authorities to be relied upon in this application. Despite the omission, I have taken judicial notice of the impugned judgment and taken liberty to peruse it. As regards the issue of the exhibits P2 to P8, the Court said the same were not pleaded hence the trial court erred to admit them under Order XII Rule 1 (1) of the Civil Procedure Code instead of Order VII Rule 14

(1), Order XIII Rule 1 (1) or Order VII Rule 18 (1) of the CPC. Then the Court held thus: -

> *"We believe there was an oversight on the part of the trial judge in not invoking the foregoing provisions of the CPC when admitting exhibits P2 to P8."*

The Court went on to say thus: -

> *"What are the consequences of all the above noted shortcomings? We are of the settled mind that since those exhibits were not pleaded, the only plausible conclusion is to expunge them from the record as we hereby do."*

Therefore, looking at the foregoing, I believe that the applicant has failed to show that he has an arguable case in terms of Rule 66 (1) of the Rules. See also **Azizi Mohamed & Another v. R** (supra).

Further, the issue of admissibility of exhibit P1 mentioned by the learned advocates in their respective submissions, is out of context. This is so because the matter was not raised in the notice of motion. The same applies to the alleged denial of the right to be heard and illegality in the impugned judgment raised by Mr. Mutalemwa from the bar during the hearing of the application.

In the result, I find that, the applicant has failed to meet the preconditions for the grant of extension of time to apply for review. The application is thus without merit and I hereby dismiss it with costs.

DATED at **MWANZA** this 10th day of April, 2019.

M. A. KWARIKO
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL