IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 172/08 OF 2020

ISRAEL MALEGESI..... 1ST APPLICANT

FRANCIS MAINGU .....2ND APPLICANT

VERSUS

TANGANYIKA BUS SERVICES .....RESPONDENT

(Application for extension of time to file revision against the decision of the High Court of Tanzania at Mwanza)

(Sumari, J.)

Dated the 9th day of October, 2014

in

Miscellaneous Civil Application No. 47 of 2013

.....

RULING

30th NOV., & 8th December, 2022

SEHEL, J.A.:

On 26th July, 1994, a bus with registration number MZM 426 belonging to the respondent was involved in a road accident. It knocked down a cyclist, one Majani Daudi, the son of the late Munubi Maingu. Following such accident, the driver of the bus was charged before the District Court of Bunda at Bunda with the offence of causing death by reckless driving in Traffic Case No. 19 of 1994. He was found guilty as

charged, convicted and sentenced to two (2) years imprisonment. The District Court further ordered the driver to repair the deceased's bicycle to be handed over to the deceased near relatives. It also made an order that the deceased's relatives may file civil litigation against the driver, if they so wish for any compensation, they feel they have the right to get.

In that respect, the late Munubi Maingu, sued the respondent and the Manager of the National Insurance Corporation (N.I.C.) (not a party to the application at hand) before the High Court in Civil Case No. 44 of 1998 claiming for payment of TZS. 17,650,000.00 being compensation for the death of his son. It happened that the N.I.C. paid the late Maingu TZS. 2,000,000.00 hence was discharged from liability. As the counsel for the respondent failed to appear before the learned Judge when the case was called on for hearing, an *ex parte* judgment was entered in favour of the late Maingu and the respondent was ordered to pay the TZS. 15,650,000.00 plus interest at court's rate of 12% per annum from the date of judgment till payment in full. The respondent attempted to set aside that *ex parte* judgment through Miscellaneous Civil Application No. 109 of 2001. However, the learned Judge (Mchome, J.) did not find merit to the application hence dismissed it with costs. Thereafter, the

respondent lodged a notice of appeal but the same was struck out on 25th March, 2013 on failure to take essential steps. Consequently, the applicants who are the joint administrators of the estates of the late Munubi Maingu commenced the execution proceedings of the decree of the High Court in Civil Case No. 44 of 1998. After being served with the application for execution, the respondent instituted Miscellaneous Civil Application No. 47 of 2013 before the High Court seeking among other things for extension of time within which to file an application for setting aside the dismissal order in Miscellaneous Application No. 109 of 2001 and an order for setting aside *ex parte* judgment and decree in Civil Case No. 44 of 1998. On 9th October, 2014, the learned Judge (Sumari, J.) granted the application and set aside the *ex parte* judgment and decree. It is this decision of the High Court which the applicants intend to challenge by way of revision.

It is perhaps worthwhile to state here that the applicants tried to challenge the decision of Sumari, J., by filing an appeal which was struck out on 10th October, 2016 for being incompetent. Thereafter, the applicants filed before the High Court an application for extension of time to lodge a fresh notice appeal but the same was struck out on 9th October, 2018 for wrong citation of the enabling provision of the law. After realizing

that they required the assistance of a legal counsel for them to smoothly sail through their quest, on 12th June, 2019 they applied for legal aid from Tanganyika Law Society, following an advice given by Mr. Jonson Mabula. On 24th April, 2020, the applicants managed to secure the legal aid of Mr. Elias R. Hezron, learned advocate. On 4th May, 2020, the learned advocate filed the present application seeking for an extension of time within which to file an application for revision.

The application is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and supported by a joint affidavit sworn by applicants, an affidavit sworn by Elias R. Hezron, learned advocate for the applicants and an affidavit of Johnson Mabula. On the other hand, the respondent opposed the application by filing two affidavits in reply. One sworn by Faustin Anton Malongo, learned advocate for the respondent and the other one, affirmed by Manjit Singh Sandhu, the director of the respondent.

The reasons for extension of time which the applicants advanced in the notice of motion are such that:

"1) There is good cause for extending time.

2) The proceedings in the High Court contain glaring irregularities and illegalities including:

i) The Hon. A.N.M. Sumari, J., in Miscellaneous Civil Application No. 47 of 2013 had no jurisdiction to overturn the decision of her fellow Judge Hon. L.B. Mchome, J., who determined Miscellaneous Civil Application No. 109 of 2001 on merit.

ii) After the dismissal of Msicellaneous Civil Application No. 109 of 2001 on merit by the High Court, Hon. L.B. Mchome, J., the High Court, Hon. A.N.M. Sumari, J., was functus officio to determine Miscellaneous Civil Application No. 47 of 2013 as the same was res judicata Miscellaneous Civil Application No. 109 of 2001.

iii) As Miscellaneous Civil Application No. 47 of 20013 had three prayers, the Hon. Trial Judge of the High Court, Hon. A.N.M. Sumari, J., illegally determine the third prayer without first disposing prayers 1 and 2 in the application."

At the hearing of the application, Mr. Elias Hezron, learned advocate, appeared for the applicants, whereas, Mr. Faustin Malongo assisted by Ms. Caroline Kivuye, both learned advocates, appeared for the respondent.

Arguing the application, Mr. Hezron adopted the notice of motion, the three affidavits in support of the motion and the written submissions filed pursuant to Rule 106 (1) of the Rules, with nothing more to add.

In the written submissions, it was argued that from the date the intended impugned decision was delivered on 9th October, 2014 to 9th October, 2018, the applicants were in court corridors trying to challenge the said decision with no avail. It was therefore submitted that the applicants accounted for delay since the days spent in court are excusable delay as held in the case of **Omary Ally Nyamalege (as administrator of the estate of the late Seleman Ally Nyamalege) v. Khadija Karume and Another**, Civil Application No. 94/08 of 2017 (unreported).

Another reason that caused delay was explained by the applicants that, they were lay persons, with old age and no money to hire advocate. Therefore, they spent most of the time trying to secure the assistance of legal aid which they finally managed to secure the same on 28th April, 2020 and on 5th May, 2020 filed the present application. On this, the applicants cited the case of **Yusuf Same and Another v. Hadija Yusufu**, Civil Application No. 1 of 2002 (unreported) where it was held:

"It should be observed that the term sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or cases which are outside the applicant's power to control or influence resulting in delay in taking any necessary step...in the circumstance of this case at hand, where the respondent was a widow depending on legal aid, her plea for financial constrain cannot be held to be insignificant."

Further, the applicants contended that the intended impugned decision of the High Court is tainted with illegalities and irregularities since, the learned Judge Sumari, J. had no jurisdiction to overturn the decision of her fellow Judge of the High Court, Mchome, J., who determined the application on merit and found no reason to set aside the **ex parte** judgment. Another irregularity pointed out by the applicants was that, the learned Judge Sumari, J. was functus officio as the matter was heard and conclusively determined by the learned Judge Mchome, J. Therefore, the applicants submitted that since a claim of illegality in the application for extension of time is sufficient cause for the Court to grant the requested extension then I should find that the applicants have advanced good cause for the Court to grant the requested extension of time. They referred me to

the case of **VIP Engineering and Marketing Limited and 2 Others v. CITIBANK Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported).

Responding to the submission, Mr. Malongo first adopted the affidavits in reply and the written submissions filed in compliance with Rule 106 (8) of the Rules. He then highlighted that the application is misconceived because in terms of section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) no revision lies against an interlocutory decision which has no effect of finally determining the suit. He contended that the decision of the High Court in Miscellaneous Civil Application No. 47 of 2013 was interlocutory decision because after the *ex parte* judgment was set aside, the High Court ordered for the case to be heard *inter parties* between the parties. For this reason alone, he beseeched me to strike out the application with costs.

In the alternative, he contended that since the applicants started the process of appeal in challenging the decision of the High Court, they ought to have pursued that route till the end before resorting to revisional jurisdiction of the Court as it was held in the case of **Mussa S. Msangi**

and Another v. Anna Peter Mkomea, Civil Application No. 188/17 of 2019 (unreported).

On the days spent in pursuing an appeal, he contended that the time spent in pursuing a wrong remedy cannot constitute good cause as it was held in the case of **William Shija v. Fortunatus Masha** [1997] T.L.R. 213 that:

> *"...negligence on the part of the counsel for the first respondent in filing wrong applications which caused the delay cannot constitute sufficient reason..."*

As regards the claim of old age and financial constrain, citing the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016, he contended that they are not sufficient reasons for extending time.

On the alleged illegalities, he first acknowledged that illegality is one of the good grounds for the extension of time. However, he argued that the alleged illegalities are neither apparent nor of sufficient importance to warrant the Court to invoke its revisional jurisdiction. To support his argument that the illegalities must be apparent on the face of record, he

cited the case of **Mussa S. Msangi and Another** (supra). For those reasons, Mr. Malongo urged me to dismiss the application with costs.

Mr. Hezron reiterated his earlier submission and further re-joined that the apparent illegality is that the High Court Judge overruled the decision of her fellow Judge hence it is a point of law calling for the intervention of the Court to correct the mistake. He therefore beseeched me to find that the decision of the High Court is tainted with illegalities and such illegalities are sufficient cause to move the Court to grant the extension of time to file revision.

I have shown herein that the applicants preferred the present application under Rule 10 of the Rules. That Rule requires a party seeking for an extension of time to advance good cause for the Court to exercise its discretionary power to grant extension of time for doing any act authorized or required by the Rules. This position of the law was also reiterated by the Court in its numerous decisions, including the **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (both unreported); and **Victoria Real Estate Development Limited** (supra).

The term "good cause" is not defined in the Rules. Nonetheless, the Court has stressed that in assessing whether there is "*good cause*", each case has to be considered on its own peculiar facts and circumstances and the court must always be guided by the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily. This position was stated in the cases of **Yusufu Same and Another** (supra) and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In the present application, the applicants intend to file an application for revision against the decision of the High Court that was delivered on 9th October, 2014. In that decision, the High Court set aside *ex parte* judgment and made an order that the case to procced to be heard and determined *inter parties*. While I am alive with the position of the law that in application for extension of time, the Court is precluded in venturing into the merits of the application but with all respect, as rightly submitted by Mr. Malongo, section 5 (2) (d) of the AJA does not allow revision on the interlocutory applications. The said section provides:

"(d) No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."

From the above clear position of the law, I find that it logical, as per the rules of reason, that granting an extension of time to a futile application does not amount to good cause. For this reason alone, I am inclined to the submission made by Mr. Malongo that the present application for extension of time to file revision is misconceived.

Consequently, I do hereby strike out the application with costs.

DATED at **MWANZA** this 6th day of December, 2022.

B.M.A SEHEL,
JUSTICE OF APPEAL

The Ruling delivered this 8th day of December, 2022 in the presence of Mr. Bruno Mvungi holding brief for Mr. Elia Hezron and Mr. Malongo, both learned counsels for the Applicants and Respondent respectively, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL