IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLLICATION NO. 544/02 OF 2021

WILSON SIRIKWA.....APPLLICANT

VERSUS

MIKAEL MOLLEL.....RESPONDENT

(Application for Extension of Time within which to file an application for leave to Appeal to the Court of Appeal in order to challenge a decision of the High Court of Tanzania at Arusha)

(Gwae, J.)

dated the 16th day of July, 2019
in
Land Appeal No. 24 of 2018

.....

RULING

21st August and 1st September 2023

GALEBA, J.A.:

This is an application for extension of time within which to file an application for leave to appeal to this Court, on a second bite. It has been preferred under rule 10 of the Tanzania Court of Appeal Rules 2009 (the Rules), among other rules indicated in the notice of motion. The applicant was aggrieved by the decision of the High Court of Tanzania at Arusha (the High Court), in Land Appeal No. 24 of 2018, which was handed down on 16th July, 2019. Aggrieved, the applicant through Vigilance Attorneys,

on 24th July, 2019, requested to be supplied with necessary documents for purposes of challenging the decision of the High Court.

However, as the dispute underlying the intended appeal was a land matter, and the order to be appealed against being issued by the High Court exercising appellate jurisdiction, by the provisions of section 47 (2) of the Land Disputes Courts Act, leave of the High Court or of this Court ought to be procured ahead of filing the appeal.

On making a follow up on the matter with the High Court, on 7th September, 2019, it came to the applicant's attention that the documents that were requested by Vigilance Attorneys had been ready for collection since 18th July, 2019. By this time, the thirty days stipulated under rule 45 (a) of the Rules within which to file an application for leave to appeal had lapsed. Thus, on 9th September, 2019, the applicant filed Miscellaneous Civil Application No. 87 of 2019 (the first application), praying for enlargement of time within which to file an application for leave to appeal to this Court. However, that application was struck out on 25th November, 2019 for not having been filed as a Miscellaneous Land Application. Together with the order striking out that application, a further order was made to file a proper application within seven days. Nonetheless, Miscellaneous Land Application No. 4 of 2020 (the second application),

was lodged on 9th January 2020, forty-five days later. This application was fully heard but was dismissed on 17th September, 2021. That dismissal had a net effect of the High Court refusing leave to appeal to this Court. It is based on that refusal, that the applicant has approached this Court on a second bite, seeking similar orders as those which were refused.

The notice of motion is supported by the affidavit which in the main, is detailing the facts summarized above. The affidavit in reply was sworn by the respondent, resisting grant of the orders sought. Parties too, filed written submissions for and against the application.

When this application was called on for hearing on 21st August, 2023, the applicant was represented by Mr. John Materu, learned advocate. The respondent was neither present in person, nor represented by counsel, notwithstanding that Law Guide Attorneys, representing him had been served with a notice of hearing on 10th August, 2023. However, as he had filed written submissions, under rule 106 (10) (b) of the Rules, I decided to proceed with Mr. Materu elaborating on his submissions, and as for the respondent, I would consider his submissions as his arguments against the application. Learned advocates' submissions will be considered at the time of resolving the issues below.

The issues for me to resolve, in this application are twofold; **first,** whether the applicant has accounted for the whole period of delay; and if not; **second**, whether there were illegalities on the judgment of the High Court.

In the interest of simplicity and convenience, I will split the entire period of delay from 17th August, 2019 to 9th January, 2020, into three periods. The **first** is between 17th August, 2019 when the applicant was supposed to file the application for leave to appeal up to 9th September, 2019 when the first application was filed. The **second** period, is between 9th September, 2019 to 25th November, 2019, when the first application was pending, and the **third**, is from that date of striking out the first application up to 9th January 2020, when the second application was filed. I will refer to these, as the first, the second and the third periods of delay, respectively.

To begin with, I will consider the first period. As indicated above, under rule 45 (a) of the Rules, the applicant had thirty days from 17th July, 2019 to 16th August, 2019 to file an application for leave. This period is statutorily provided and needed no explanation. In respect of the first period Mr. Materu submitted that, under rule 90 (5) of the Rules, after delivery of a judgment or ruling, if a party requests in writing for necessary

documents, he must be informed in writing that the requested documents were ready for collection. In this case the applicant attached with his affidavit, a letter from Vigilance Attorneys which was received by the office of the Deputy Registrar of the High Court on 24th July, 2019, but as submitted by learned counsel, there is no letter informing the applicant or his advocates as to the readiness of the documents that were requested. This means that neither the applicant nor Vigilance Attorneys, was accessed with the documents up to 7th September, 2019, according to learned counsel.

In reply, Mr. Lobulu Osujaki, learned advocate, who drew the written submissions for the respondent, argued that the documents necessary for applying for leave to appeal were collected by Mr. Kinabo on 18th July, 2019. Before me in rejoinder, Mr. Materu contended that the said allegation is not supported because, had that information been authentic, then a letter issued by Mr. Kinabo under rule 90 (1) of the Rules and the letter from the Registrar under rule 90 (5) of the Rules informing Mr. Kinabo that documents were ready for collection, would have been attached with the affidavit in reply.

On this point, I am not convinced by Mr. Osujaki's argument because procurement of documents from the court, after conclusion of a

case, is a legal process with rules of procedure, particularly where one wants to challenge a decision of the High Court to the Court of Appeal. The process is regulated by rule 90 of the Rules. In this case the affidavit in reply was not attached with any of the letters referred to at rule 90 (1) or (5) of the Rules. There was not even an affidavit of Mr. Kinabo deponing that he took possession of the documents.

Legally, and as submitted by Mr. Materu, proof of lawful access of documents from the High Court after requesting for them, must be evidenced by a letter from the Registrar of the High Court, see also this Court's decisions in the **Board of Trustees of the National Social Security Fund v. New Kilimanjaro Bazaar Limited**, Civil Appeal No. 10 of 2014; and **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania and Two Others**, Civil Appeal No. 114 of 2020 (both unreported).

Thus, as there was no evidence to show that the applicant or his advocates received the documents requested or were notified of the documents' readiness for collection any time before 9th September, 2019, the applicant demonstrated good cause meriting extension of time, for the first period.

The delay during the second period is legally referred to as technical delay, and in law it is excusable if the applicant demonstrates that there was a matter pending in court. In this case, it is not disputed that during the second period, the first application was pending. See this Court's decision in **William Shija v. Fortunatus Masha** [1997] T.L.R. 213. So, the second period, like the first, has acceptable and lawful explanation.

The last period is that running from 25th November, 2019 to 8th January, 2020 when the second application, was filed. In this regard, Mr. Materu admitted that when the first application was struck out, the applicant was granted seven days to lodge a proper application, but the application was not filed until forty-five days lapsed. However, he advanced two arguments to explain the delay; **first,** for all that period of forty-five days that is the seven days granted and the other thirty-eight days, the applicant was waiting to be supplied with the order that struck out the first application. **Second**, he contended that, there is no time limit within which a litigant is required to file an application for extension of time to lodge any court proceeding. What one needs to do, he added, is to advance reasons to justify the delay. He actually submitted that the order of the High Court limiting the applicant to lodge the application within seven days was superfluous and unnecessary.

In my view, Mr. Materu's two points above converge at one common requirement; a requirement to explain the third period, which is thirty-eight days. In the affidavit in reply, there is a complaint that this time is not justified. At the hearing, I asked Mr. Materu as to what supports his contention that the applicant was waiting to be supplied with the court order, and that the order was delayed by the court. He admitted that there was nothing attached to the affidavit showing that the applicant requested for the order striking out the first application. In my view, the dictates of fairness and justice demands that, the same principle that Mr. Materu implored me to apply in disagreeing with the respondent that the requisite documents in the first period were taken by Mr. Kinabo, without any letter requesting for them, should also apply in this scenario.

In law, for extension of time to be granted under rule 10 of the Rules, the entire period delayed must be accounted for. On this point there is a litany of decisions of this Court including **Mumelo v. Bank of Tanzania** [2006] T.L.R. 227; and **Tropical Air (TZ) Limited v. Godson Eliona Moshi** [2018] T.L.R. 363.

In this case, as there was no credible accounting of the thirty-eight days in excess of the seven days that were granted, from 25th November, 2019, the third period of delay has not been explained. For the above

reasons, the first issue is answered in the negative, that the applicant has not managed to account for the whole period of delay.

I will now cross over to the second issue pertaining to illegality. Mr. Materu had urged me, and properly so in my view, that in case this Court does not agree with him on explaining the entire period of delay, just as it has happened, then, I hold that because the judgment of the High Court, is blemished and tainted with illegalities, I extend time on that basis. True, if counsel is right, I agree with him that the presence of an illegality is a ground for extension of time whether good cause has been shown to explain the delay or not, see **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported).

In supporting his contention, learned counsel for the applicant pointed out four illegalities; the **first** being that, as the respondent was alleged to get the land from his father through inheritance, it was imperative for the first appellate court to ensure that the respondent tendered letters of administration before the District Land and Housing Tribunal (the DLHT) in order to establish that the respondent had *locus standi* in the proceedings. To support his contention, he referred the Court to this Court's decision in **William Sulus v. Joseph Samson Wajanga,**

Civil Appeal No. 193 of 2019 (unreported). His point was that, there was no evidence before the DLHT that the respondent was the administrator of estate of his father, because he did not tender the letters of administration. The reaction to this argument is in the written submissions of the respondent, where he contended that he was given the land *inter vivos* by his father in 1960 and that, there was nothing on the pleadings or evidence that the respondent got the land after passing on, of his father.

Luckily, at the hearing Mr. Materu was present, so I asked him to take me through the judgment and point out the paragraph or paragraphs with the above illegality. He started with page one of the judgment, but on a reflection, he noted that the point was missing on that page. He then went all over the judgment, but sincerely he was unable to point out to me at a definite page where the point he raises is located. The reason he would not trace it is simple, and it is twofold; **one**, the point was not one of the grounds of appeal or cross appeal, therefore there is no way the High Court could have erred on the aspect it did not deal with, in the first place. **Two**, the failure to trace the point on the judgment was inbuilt in the complaint itself. The complaint was that there was no evidence of the

letter, which means there cannot be anything to show, particularly on the judgment of the High Court.

Under our law, for the point of illegality to be valid for purposes of extension of time, it must be easily traceable on the face of the judgment sought to be challenged and should not require a long-drawn argument or a search process to unearth or discover it, see **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In this case, the first point did not only require a tiring long drawn argument and process of searching for its discovery, but also, upon engaging the process, the point could not be discovered throughout the judgment.

Mr. Materu's **second** point was that there was non-joinder of parties because there was evidence that Christina Wilson Sirikwa and the applicant were joint owners of the land in dispute. Nonetheless, the said Christina Wilson Sirikwa was not made a party in the proceedings at all levels. **Third**, was that there was non-compliance with the law on taking and consideration of assessors' opinion by the DLHT; and **fourth**, that the decree does not tally with the judgment, because there is nowhere in

the judgment of the High Court where the respondent was declared a lawful owner of the land, while the decree declares him the lawful owner of the land in dispute.

These three points will be discussed together because, they share one common attribute; they were all not disclosed in the affidavit of the applicant. Throughout that affidavit, the point of illegality is contained in only clause 9 of the said affidavit. That paragraph reads: -

> *"9. That, there are serious illegalities in the High Court decision which need to be addressed by this Court one among those illegalities is an act of the learned Judge to declare the respondent a lawful owner of the suit land without satisfying himself as to how title to the disputed land passed to the respondent as his claim of ownership is alleged to come from inheritance."*

In reply to that clause, by the respondent at clause 10 of the affidavit in reply, he says:-

> *"10. That, the contents of paragraph 9 of the applicant's affidavit are disputed and the respondent avers that the judgment of the High Court was justified and suffers from none of the illegalities put forward by the applicant. The respondent herein was granted the land inter*

vivos and he has in no occasion claimed it as a legacy from his deceased father or anyone else, the rest of the facts of the applicant is put under strict proof of the same."

As it may be noted in clause 9 of the applicant's affidavit, the three points were not part of it. The points for the first time became part of the applicant's complaints in the written submissions of the applicant which was lodged on 19th November, 2021 after the respondent had filed an affidavit in reply on 11th October, 2021. Because of that, the respondent argued in his written submissions that the Court should not consider the points because they were neither in evidence, nor on pleadings.

Clearly, the above three points are not part of the affidavit of the applicant, which means that the respondent was denied an opportunity to respond to them in his affidavit in reply. In the circumstances, I agree with the respondent's counsel, that as the three points were raised for the first time at the written submissions stage, they cannot be taken to be part of the application. The points came as an afterthought at the stage of supporting the application, not at the stage of initiating the application. Had the applicant wanted to include the points in the application after lodging it, he could have moved the Court under rule 49 (2) of the Rules to lodge a supplementary affidavit to include the missing points, but that

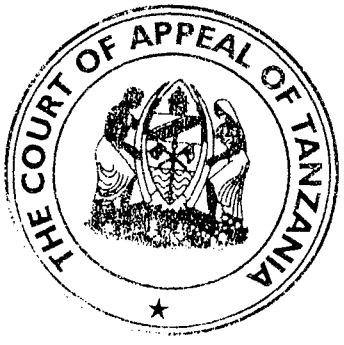
did not happen. In view of the above, the second issue is answered in the negative, that there were no clear illegalities on the judgment of the High Court.

In the final analysis, I am settled in my mind that, the applicant has failed to demonstrate good cause by explaining the whole period of delay. He has also not managed to point out any illegalities on the judgment sought to be challenged. There is therefore no basis upon which this Court can exercise its discretion to grant extension of time to file an application for leave to appeal. Accordingly, this application is devoid of merit and the same is hereby dismissed with costs.

DATED at **ARUSHA**, this 31st day of August 2023.

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 1st day of September, 2023 in the presence of Mr. Mitego Metusela holding brief of Mr. John Materu, learned counsel for the Applicant and in the absence of the learned counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL