IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION No. 370/16 OF 2020

SALUM SAID MATUMLA.....APPLICANT

VERSUS

ECOBANK TANZANIA LIMITED.....1ST RESPONDENT

AHMED FREIGHT LIMITED .....2ND RESPONDENT

ANWAR AHMED ABDALLAH.....3RD RESPONDENT

MUNIR ABDALLAH AHMED.....4TH RESPONDENT

(Application for Extension of Time to file revision against the decision of the High Court of Tanzania [Commercial Division] at Dar es Salaam)

(Mruma, J)

Dated the 18th day of April, 2018

in

Commercial Case No. 33 of 2016

RULING

7th February & 9th March, 2023

RUMANYIKA, JA.:

By a Notice of Motion brought under rule 10 of the Tanzania Court of Appeal Rules, 2009, the Rules, Salum Said Matumla, the applicant is seeking the Court's indulgence to extend time for him to file an application for revision on the judgment of the High Court of Tanzania dated 18/04/2018. The application is supported by an affidavit sworn by the applicant. The 1st, 2nd and 4th respondents filed affidavits in reply to resist

it. The 3rd respondent did not file one. The applicant has raised seven grounds of application: **One**, Commercial Case No. 33 of 2016 was filed while the parties were already litigating on the same subject in Civil Case No. 148 of 2015. **Two**, the applicant was never served with the pleadings in the said Commercial Case No. 33 of 2016 or notified at all. **Three**, in Civil No. 148 of 2015 M/S AKSA, Attorneys opposed the applicant and represented him in Commercial Case No. 33 of 2016 without instructions and later withdrew from the conduct of the case without notifying the applicant. **Four**, after withdrawal of the service by the attorney purportedly representing the applicant, the Court did not direct the applicant to be served personally. **Five**, the applicant was denied chance to be heard. **Six**, the applicant was not aware of the default judgment entered against him. **Seven**, the applicant has shown good cause to be granted an extension of time.

For a better appreciation of the contentious issues in this application, it is necessary to explore the factual setting giving rise to it albeit briefly as follows: That, in June 2011, the applicant acquired from the 2nd respondent two motor vehicles with Registration Numbers T 901 ASJ and T 199 AVS respectively (the vehicles) and had not subjected them to any form of

disposition. However, one Biioster Debt Collectors Limited, the auctioneers seized the vehicles on 03/09/2015. Aggrieved by the seizure, the applicant complained to the 1st respondent but the latter turned a blind eye and muted. Then the applicant instituted Civil Case No. 148 of 2015 to recover the said vehicles. However, when the matter was called for defence hearing, the 1st respondent's advocate presented a copy of judgment of the High Court in Commercial Case No. 33 of 2016 to show that, the said claim was overtaken by events because that judgment involved the same subject matter. The 1st respondent alleged to have been aware of that judgment on 18/04/2018 whereas the applicant knew about it on 29/07/2020. And that, upon perusing the record of Commercial Case No. 33 of 2016, to his surprise he found that, Shirima of AKSA advocates who acted without his instructions had withdrawn the services. He said it to be reason for the applicant's failure to file written statement of defence which resulted into the impugned default judgment. He alleged that, if anything, Mr. Shirima had instructions of Ahmed Freight Limited, the 2nd respondent only.

Upon being served with this application, the 2nd and 4th respondents filed a notice of preliminary objection to show that, the application is incompetent and liable to be struck out as it seeks an extension of time to

file revision instead of filing an appeal much as those remedies are not alternatives of each other.

At the hearing of the application on 06/02/2023, Mr. Rutaihwa, learned counsel appeared for the applicant. Mr. Shirima learned counsel appeared for the 2nd and 4th respondents. The 3rd respondent was served by way of publication but defaulted appearance. Consequently, by an order of the Court the 3rd respondent's appearance was dispensed with. However, at the commencement of the hearing of this application Mr. Shirima withdrew the said preliminary objection.

On the merit of the application, Mr. Rutaihwa adopted the contents of the applicant's affidavit and written submission filed on 02/11/2020. He contend that, given the fact that the impugned default judgment emanated from the Commercial Case purportedly withdrawn by an advocate of M/S AKSA Attorneys and the applicant was not a party, the latter therefore, was denied of a right to be heard which constituted good cause as required under rule 10 of the Rules. Mr. Rutaihwa averred further that, where there is an illegality in the impugned decision, in this case such a constructive denial of a right to be heard, alone that one constituted a sufficient ground for the grant of extension of time under rule 10 of the Rules. To fortify his

point, he cited our unreported decision in **Amour Habib Salim v. Hussein Bafagi**, Civil Application 52 of 2009 and **VIP Engineering and Marketing Ltd and 3 Others** (supra).

Additionally, Mr. Rutaihwa argued that, the applicant could not have applied to set aside the default judgment because he became aware of it late in the day hence, in terms of rules 22 and 23 of the Commercial Court Rules already 21 days' time barred. Further he averred that, another illegality of the decision which entitles the applicant an extension of time is the concealment and or fraud committed by the respondents as the latter actively took part in the two cases without making the applicant to be aware of it. To support his point he cited our unreported decision in **Said Salum Bakhresa and Co. Ltd v. VIP Engineering and Marketing Ltd** (1996) TLR 309 and finally urged me to grant the application with an order that costs abide the outcomes of the intended application.

Replying, Mr. Nyika adopted his affidavit in reply and submitted that, the alleged denial of a right to be heard as illegality in the impugned judgment is unfounded and did not constitute good cause. He argued that, the alleged illegality is too remote to warrant an extension of time sought as it needs evidence and long drawn process to be established. To bolster

his argument, he cited a list of our unreported decisions including **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (both unreported). Additionally, Mr. Nyika averred that, the record spoke itself that, the applicant had the services of an advocate Shirima who, upon being served with the plaint, he successfully sought leave to file a written statement of defence. However, he defaulted appearance hence the default judgment. He argued that, court records tell what actually had transpired in court. Therefore, he argued, such records cannot be impeached lightly. Additionally, he submitted that, whether or not the said advocate acted without instructions of the applicant, that question needed to be proved by evidence which is missing from this application. To support his argument, he cited our unreported decision in **Alex Ndendya v. R.**, Criminal Appeal No.207 of 2018.

On his part, Mr. Shirima subscribed to Mr. Nyika's submission and averred that, the alleged illegality in the decision did not worth the name because it needed long drawn arguments to be established whereas the

alleged misconduct or negligence of the applicant's advocate could not constitute good cause. He further argued that, according to the criteria required for filling a revision, the impugned judgment did not qualify therefore the present application was useless and uncalled for. To demonstrate the long cherished legal principal that, courts do not grant extension of time for filing futile or useless cases, amongst other authorities, Mr. Shirima cited our unreported decision in **Fatma Hussein Sharrif v Alkan Abdallah** (Administrator of the Estate of Saida Abdallah) **and 3 Others,** Civil Application No. 536/17 of 2017.

Having heard the submissions by the learned parties' counsel, the issue for my determination is whether the applicant has shown good cause to warrant the grant of extension of time.

It is trite law that in an application for extension of time to do a certain act, the applicant must show good cause for failing to do what he ought to have done within the prescribed time. Rule 10 of the Rules, 2009 is relevant and reads thus:

> *"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 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."

It may be noted from the above quoted rule, that, the Court's power to extend time under rule 10 of the Rules are discretional much as, there is no hard and fast rule as to what constitutes good cause. However, in discharging its powers under the above rule, courts have to consider the length of the delay, the reasons for the delay, the degree of prejudice to the respondent should the time be extended, whether the applicant has shown diligence, whether there is illegality in the decision sought to be challenged and so forth. The Court, in its various decisions has consistently tested the provisions of Rule 10 of the Rules. Few of them are: **Dar es Salaam City Council v. Jayantilal P. Rajani,** Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application no. 4 of 2014 (all unreported).

The question to be asked now is whether there is illegality as good cause for this Court to exercise its discretion to grant extension of time. It is trite law that, illegality constitutes a sufficient ground for the grant of extension of time to appeal as it was stated in the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR 182. The Court held 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."*

The Court reiterated the above legal position in **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited,** Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported), where it was stated:

> *"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" within the meaning of Rule 8 of the Rules for extending time."*

See also **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014 and **CRDB Bank Limited v. George Kilindu and Another**, Civil Application No. 87 of 2009 (both unreported).

It is clear to me that, the above alleged seven points of illegality in the impugned default judgment revolve around one main point essentially that, *the applicant was denied a right to be heard in Commercial Case No. 36 of 2016*. It is noteworthy that a right to be heard is one of the attributes of the principles of natural justice. See- **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** (2003) TLR 215, the violation of which renders the resultant decision a nullity, even if the court would have reached the same decision if the aggrieved party was heard. We have reiterated the above principle in many cases including **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (both unreported).

The following question is whether the applicant was not heard in Commercial Case No.33 of 2016. It is not disputed, as Mr. Nyika pointed out that, in the said Commercial case, appearing for the applicant was advocate Shirima of Ms AKSA Attorneys who sought, and was granted

leave to file written statement of defence but he defaulted to file it and did not apply to set aside the default judgment. Whether advocate Shirima acted with or without instructions of the applicant, the answer will come to light shortly herein after. It is very unfortunate that, such evidence only came from the bar. It is trite law that, where, like here, a party alleges a fact whose existence could be proved by such other person's evidence. In this application advocate Shirima should have sworn an affidavit to support the applicant's averments but he did not. That omission was fatal. The record therefore, shall remains reading in the respondent's favour. For that reason, in the absence of the advocates' supplementary affidavit, as stated above, the applicant's complaint is an afterthought and unfounded. Consequently, I subscribe to a long established legal principle about sanctity of the court record referred to me by Mr. Nyika that, a court record is a serious document. Generally, it is always taken to be authentic because it tells what had actually transpired in court and therefore, cannot be impeached lightly. We have stated so in a number of cases including **Halfan Sudi and Another v. R** (1998) TLR 557, **Otto Kalist Shirima v. R,** Criminal Appeal No. 234 of 2008 and **Ex-D.8656 CPL Senga Idd**

Nyembo and 7 Others v. R, Criminal Appeal No. 16 of 2018 (both unreported).

In the present case, the lower court's record shows that, in Commercial Case No. 33 of 2016 before the High Court advocate Shirima represented the applicant until on 18/04/2018 when the court handed down the impugned default judgment. As such, the applicant has not shown good cause to impeach the said court record. It follows therefore, that, a party, who is on record having had been represented by an advocate he cannot disown that advocate or services rendered by him after losing the respective case. He can successfully do so upon showing that, all that time the advocate was not on the roll or that, on account of self-invitation and assumed instructions, that advocate was charged, prosecuted and convicted before a respective disciplinary committee. It is glaring on the record that, in the present case the applicant did not meet the above threshold. To think about it loudly, I wish to comment that, if every unsuccessful legally represented person was lightly allowed to disown his respective advocate and services rendered, not only majority of the judgment debtors could not miss that opportunity, but also, God forbid,

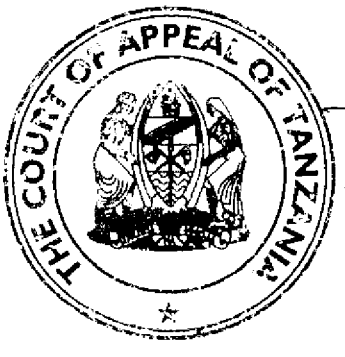
such uncontrolled freedom in the courts of law would have been a mockery of justice and result into endless litigation.

In the upshot, the application is dismissed with costs. Order accordingly.

DATED at **DAR ES SALAAM** this 7th day of March, 2023

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of March, 2023 in the presence of Ms. Rehema Samwel, learned counsel for the Applicant, and Mr. Libent Rwazo. Learned counsel for the 1st respondent also holding brief for Mr. Shirima, learned counsel for the 2nd & 3rd Respondents, and in the absence is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL