IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 16/02 OF 2020

NJAKE ENTERPRISES LIMITED ..... APPLICANT

VERSUS

BLUE ROCK LIMITED ..... 1ST RESPONDENT

GEM AND ROCK AND VENTURES COMPANY LIMITED ..... 2ND RESPONDENT

(Application for extension of time to file a notice of appeal against the judgment and decree of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

dated the 9th day of March, 2007

in

Land Case No. 21 of 2007

RULING

16th & 23rd February, 2024

MGEYEKWA, J.A.:

By notice of motion made under rule 10 of the Tanzania Court of Appeal Rules, 2009, the applicant is seeking for extension of time to file a notice of appeal out of time. The notice of motion is supported by an affidavit deponed by Boniface Joseph, the applicant's learned counsel. In opposing the application, the respondents filed a joint affidavit in reply deponed by Eliamin Haji Mgallah and Sammy Mollel, Managing Director for the 1st and 2nd respondents.

To appreciate the nature and essence of the application, the relevant background facts, albeit in brief, as discerned from the affidavits filed for and against the application together with the documents attached thereto, are as follows: the applicant was the third defendant in Land Case No. 21 of 2007 before the High Court of Tanzania at Arusha and the respondents herein were the plaintiffs. The matter was decided in favour of the respondents, immediately after the delivery of the judgement and the decree the applicant lodged within time the Notice of Appeal to the Court, which was registered as Civil Appeal No. 69 of 2017 against the respondents herein.

Nonetheless, the said appeal was struck out on 4th December, 2018 for being incompetent which was dismissed on the 11th July, 2019. Subsequently, the applicant lodged a Misc. Land Application No. 142 of 2018 before the High Court of Tanzania at Arusha for extension of time to file a notice of appeal. The applicant's counsel was supplied with copy of proceedings on 6th December, 2018. Still desirous to pursue the intended appeal, the applicant has now filed the present application for an extension of time for a second bite, so to speak.

At the hearing of this application, the applicant enjoyed the legal service of Mr. John Materu, learned advocate while the respondent had the

legal service of Mr. Mpaya Kamara and Ms. Neema Mtayangulwa, both learned advocates.

Having adopted the notice of motion and the supporting affidavit, Mr. John Materu argued that the applicant is seeking an extension of time to file a notice of appeal out of time. Mr. Materu was perplexed to find that the High Court dismissed the applicant's application after noting that the 5 days delay was inordinate. To justify the delay of 5 days, Mr. Materu referred me to paragraph 7 of the applicant counsel's affidavit. He further argued that, on 10th December, 2018, the applicant instructed Royal Attorneys to lodge the application at the High Court and the court's administrative process of admission ended on 12th December, 2019.

Mr. Materu, stressed that there was no excessive delay in the lodgement of the application, and insisted that the 5 days of delay was not inordinate. To support his stance, he relied on cases of **Murtaza Mohamed Raza Viran & Another v. Mehboob Hassanal Versi,** Civil Application No. 448/01/2020 (unreported) in which the delay of 11 days was found not to be inordinate and **James Gideon Kusaga v. The Registered Trustees of the North Eastern Diocese of the Evangelical Lutheran Church in Tanzania**, Civil Application no. 145/12/2023, where the Court found that 10

days of delay was spent in consulting the lawyer and preparing the documents in relation to the application and therefore not inordinate.

Mr. Materu did not end there, to support his submission, he cited the cases of **Mpoki Lutengano Mwakabuta & Another v. John Jonathan (Legal Representative of the late Simoni Mperasoka**), Civil Application No. 566/01 of 2018 (unreported), **The Attorney General v. Oysterbay Villas Limited & Kinondoni Municipal Council,** Civil Application No. 299/16 of 2016 in the latter case, a delay of 45 days was held to be not inordinate. Elaborating on the diligence, he argued that the applicant was diligent in pursuing his case and lodged the said application within a short time.

On illegality, Mr. Materu was insistent that the applicant's intended appeal to this Court raises substantial points of law and facts to be determined. He illustrated that, the impugned decision of the High Court is tainted with illegalities in two aspects; **one**, the High Court granted special damages while the same was not legally proved. **Two**, the High Court misdirected itself in computing the interests from the date when the suit was lodged in court instead of computing the interest from the date when the judgment was delivered. To support his submission, Mr. Materu referred to

this Court's decision in **Anthon Ngoo & Another v. Kitinda Kimaro** [2015] 55 T.L.R. In conclusion, the learned counsel for the applicant urged me to grant the applicant's application.

In reaction to her counterpart's submission, Ms. Mtayangulwa and Mr. Kamara emphatically opposed the applicant's counsel's view that the application has merit. Having fully adopted the affidavit in reply and written submissions, Ms. Mtayangulwa attacked the averments that the 5 days of delay was reasonable and excusable. She spiritedly argued that, Mr. Materu's averment that the applicant spent time to hire an advocate and prepare documents is not pleaded in his affidavit but rather a statement from the bar. Elaborating the onslaughter, Ms. Mtayangulwa valiantly argued that the applicant has failed to explain how the 5 days were spent. She contended further that, the applicant failed to account for each day of delay from the date when the Court struck out the first application to the date of filing the instant application.

Ms Mtayangulwa argued eloquently without mincing words that a delay of 5 days is inordinate. She distinguished the case of **Murtaza Mohamed Raza Viran** (supra) cited by the applicant that, in the cited case, the applicant said he fell sick and attached a sick sheet to justify his delay while

in the instant application, the applicant did not justify the delay of 5 days. She also distinguished the case of **James Gideon Kusaga** (supra) and the case of **Mpoki Lutengano Mwakabuta & Another** (supra) cited by the applicant and stated that, in the present application, the days spent in preparation of the application are not stated in the affidavit, but a submission from the bar. She insisted that, the applicant was required to account for each day of delay. In support of her arguments, she cited the cases of **Elias Mwakalinga v. Domina Kagaruki, & Others,** Civil Application No. 120 of 2018 (unreported) and **Mtesigwa Lugola v. AG and Another** (supra),

Regarding the issue of illegality, the learned advocate for the respondents contended that the applicant has not pointed out how the judgment of the Court is illegal as alleged. She spiritedly argued that paragraph 10 of the applicant's affidavit does not indicate if there is any illegality in the impugned judgment. She also stressed that the alleged illegality on special damages is not an illegality because it is not on the face of the record. She added that the alleged illegality requires a long-drawn process. She valiantly argued that the case of **Anthon Ngoo and Another** (supra) cited by the applicant is irrelevant in the circumstances of the instant case. She submitted further that the alleged illegality is an irregularity worth

being a ground of appeal. To support her stance, she relied on the case of **Hawa Mashaka (As Administratrix of the estates of the late Mashaka Mufta Mwinyihami) v. Mtami Maftah and Another,** Civil Application No. 393/13 of 2023.

On the other hand, the counsel for the respondents challenged the affidavit supporting the application. Ms. Mtayangulwa claimed that the applicant's affidavit lacks evidential value because it is the applicant's advocate who swore the affidavit instead of the applicant. To reinforce her submission, she cited the case of **Sabena Techniques Dar Limited v. Michael J. Luwuzu,** Civil Application No. 451/18 of 2020**.**

Mr. Kamara learned counsel for the 2nd respondent, did not have much to say; he reiterated the submission made by Ms. Mutayangulwa and added that the termed illegality is a good ground for appeal because the applicant is challenging the judgment and decree of the High Court for refusing to grant the first bite application. Ending, he urged me to dismiss the application with costs.

Rejoining, Mr. Materu reiterated his earlier submission and impressed upon me to hold that a delay of 5 days is not inordinate. Responding on the issue raised by the learned counsel for the respondents of defective affidavit,

he clarified that, the applicant in his affidavit specifically in paragraphs 2 and 9, stated that, he instructed his advocate's to pursue his application as a second bite. The learned counsel for the applicant distinguished the case of **Mohamed** (supra) cited by the respondents' counsel and submitted that in the cited case, there were four applicants; the 1st and 2nd applicants did not file their affidavit, contrary to the present application where there is one applicant and one affidavit and the applicant instructed his advocate to represent him. To support his submission, he referred me to paragraphs 1 and 9 of the applicant's affidavit. In conclusion he urged me to grant the applicant's application with costs.

Before I proceed to determine the application on merit, I find it appropriate to address first the point of law raised by the respondents' counsel. In their submission, the respondents' counsel raised an issue on the appropriateness of the affidavit in support of the application. The respondents have alleged that affidavit supporting the application is improper because it was prepared and sworn by the applicant's counsel instead of the applicant's Principal officer. Mr. Materu, argued that the applicant's affidavit is proper before the court. Without wasting much time, I am in accord with the counsel for the applicant because the applicant's

counsel in paragraphs 2 and 9 of his affidavits clearly stated that he is the advocate and the applicant with instruction to pursue his application as a second bite. Therefore, I find the point of law raised by the respondents' counsel baseless also in view of rule 49 (1) of the Rules. I now, proceed to determine the application on merit.

It is vivid from the above arguments that the counsel have taken hard contrasting positions on whether the application is meritorious. The instant application is preferred under Rule 10 of the Rules which requires good cause to be shown for the Court to exercise its discretionary powers to extend time. The relevant Rule 10 states:

> *"10. The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Corut 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."*

The law is settled on applications for extension of time. Pursuant to above cited rule 10 of the Rules, an application of this nature, will only be allowed if an applicant has shown good cause to warrant the Court exercise

its discretion to extend time. This has been pronounced in a number of our previous decisions. See for instance **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) and **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported).

It is also settled law that in applications for extension of time, an applicant must account for each and everyday of the delay. See for instance the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) and **Finca (T) Limited and Another v. Boniface Mwalukisa**, Civil Application No. 587/12 of 2018 [2019] TZCA (15 May 2019).

Guided by the above position of the settled law, the main issue for my determination is whether the applicant has shown good cause for the delay to trigger the Court to exercise its discretion to grant the extension of time sought. In the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Appeal No. 3 of 2007, (unreported) the Court held that: -

> *"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 has to be taken."*

Being guided by the position of the law, I now move to determine the grounds raised by the applicant in the instant application. Mr. Materu has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of the High Court. He has raised two main limbs for the applicant's delay to file the notice of appeal; **one**, accounting the days of delay and **two**, illegality.

The applicant's advocate claimed that after receiving a copy of the ruling, his attempt to lodge a notice of appeal was unsuccessfully because the applicant's Managing Director was not in the office. As a result, the applicant lodged Misc. Land Application No. 142 of 2018 out of time. The same was filed in the High Court of Tanzania at Arusha on the 12th day of December 2018 after a lapse of 5 days, and in his view, such delay was not inordinate while the respondents' counsel claimed that the 5 days delay is inordinate because the applicant has not stated any reasons for his delay to lodge the notice of appeal within 5 days.

I am now faced with an immediate question which emerges whether or not the 5 days delay was inordinate. At this juncture, I think it is prudent to reproduce the relevant paragraphs of the applicant's counsel affidavit in support of the matter at hand:

"That the copy of the Ruling and Order (annexure 'NJ2') were supplied to the applicant's advocate on 6th December, 2018 and for reasons of absence of the applicant's Managing Director, Misc. Land Application No. 142 of 2018 was officially filed in the High Court at Arusha on 12th December, 2018."

Going by the above excerpt, it shows that the applicant has shown what had befallen the applicant from 6th December 2018 to 12th December 2018. However, a reading of the whole affidavit, reveals that the applicant did not state reasons on how the 5 days was spent. Mr. Materu in his submission in chief contended that the applicant spent 5 days to hire an advocate and prepare legal documents. However, as asserted by the counsel for the respondents, the applicant's advocate statement that the 5 days delay was used to hire the advocate and prepare documents is not reflected in the affidavit supporting the application rather it is a statement from the bar.

It is a well-known legal stance that submission is not evidence but opportunity whereby explanation or clarification is made. In addition, such account is in actual fact a statement from the bar the practice which is highly detested by the courts. There is a string of decisions in which the Court maintained that stance. Such decisions are **Karibu Textile Mills v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016

(unreported) and **Trans Africa Assurance Co. Ltd v. Cimbria** (EA) Ltd [2002] 2EA, the Court of Appeal of Uganda cited with approval the case of **Tina & Co. Limited and 2 Other v. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported), to which I subscribe to, is that, a matter of fact cannot be proved by an advocate in the course of making submission in Court. In that case, the Court stated as follows:

> *"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."*

Mr. Materu's submission does not tally with the scenario depicted by the applicant's counsel affidavit in paragraph 7. Therefore, I find that the applicant has failed to account for each day of delay.

I am aware that a court can grant an application if it satisfies itself that the delay was not inordinate. However, each case has to be determined according to its peculiar facts. In the cited case **Murtaza Mohamed Raza Viran** (supra) the applicant was seeking to file memorandum of appeal and he claimed that the delay of 10 days was spent in preparing and filing the application. While in the case at hand, the applicant's affidavit is silent on how he spent the 5 days. Taking a leaf from the case of **Bushiri Hassan**

(supra). I feel inclined to conclude that in the current application the applicant has accounted for the days of delay from 7th December, 2018 to 12th December, 2018.

Nonetheless, and in the circumstances of the application pertaining, I move to consider the last ground expounded by the applicant's counsel, contending that the impugned decision of the High Court is tainted with illegalities. Much as it can be appreciated that, illegality is one of factors to be considered as good cause, the same is not an automatic right. For illegality to be considered as a good cause for extension of time, it must be apparent on the face of record. In The **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R 387 the Court stated among others at page 189 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 straight."*

Mr. Materu in his in chief indicated that the High Court granted special damages while the same was not legally proved and the High Court misdirected itself in computing the interests from the date when the suit was

lodged in court instead of computing the interest from the date when the judgment was delivered. It has been held times without number that where illegality exists and is pleaded as a ground, the same as well constitute a good cause for an extension of time. However, the alleged illegality must be on the face of the record. In the case of **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when the Court of Appeal of Tanzania propounded as follows: -

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Vaiambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one.* ***The Court there emphasized that such point of law must be that of sufficient importance*** *and, I would add that* ***it must also be apparent on the face of the record, such as the question of jurisdiction****; not one that would be discovered by a long drawn argument or process." [Emphasis added].*

Applying the above authorities, in the present application, it is clear that the term illegality as correctly stated by the learned counsel for the respondents are not pleaded in the applicant's affidavit. Worse still, the

same cannot be reconciled, it would take a long drawn out process to get to the bottom of this, and decipher illegality in the decision that is sought to be challenged. I must therefore conclude that the applicant has also failed to convince me that there is a point of law of sufficient importance, involved in the intended appeal, to warrant an extension of time.

In the upshot, I hereby dismiss this application without costs.

It is ordered so.

DATED at **ARUSHA** this 23rd day of February, 2024.

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Mr. Mitegu Methusela holding brief for Mr. John Materu, learned counsel for the applicant and Mr. Henry Simon Katunzi, learned counsel for the Respondent, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL