IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC. CRIMINAL APPLICATION NO. 2 OF 2020

(From High Court Criminal Appeal No.100 of 2017, Original Criminal Case No. 165 of 2017, District Court of Bariadi)

DIRECTOR OF PUBLIC PROSECUTIONS..... APPLLICANT

VERSUS

1. MASUNGA MUHAMALI
2. SUDI MADUHU } **.....RESPONDENTS**

RULING

15/7 & 21/8/2020

G. J. Mdemu, J.;

This is an application for extension of time to file notice of appeal to the Court of Appeal. The Applicant Director of Public Prosecutions intends to challenge the judgment of this court (Makani J.) delivered on 23rd of March 2018 in Criminal Appeal No.100 of 2017. According to the record, the District Court of Bariadi convicted the Respondents for unlawful entry, unlawful grazing and unlawful destructions of vegetation in the game reserve.

The offences were committed contrary to the provisions of the Wildlife Conservation Act, Cap.283. They were successful in their appeal to the High Court. The latter, along with quashing conviction and sentences, also ordered the forfeited livestock be returned to the Respondent or proceeds of sale in case the Applicant auctioned the said livestock. As said, the DPP was not happy, hence the instant application on the following orders:

1. *That this honourable court be pleased to extend time for lodging notice of intention to appeal from judgment of the High Court of Tanzania Shinyanga District Registry in criminal appeal No.100 of 2017*

2. *Any other relief the Court may think just and equitable to grant.*

The said application which is supported by the affidavit of one Mafuru Moses, sworn on 14th of February, 2020, came for hearing on 15th of July, 2020. On that date, the Applicant had the service of Mr. Mafuru Moses, learned State Attorney and the two Respondents were represented by Ms. Maria Mwaselela and Mr. Mvungi, both learned Advocates.

Before the commencement of hearing the application, the learned State Attorney prayed for adjournment and leave to file supplementary affidavit. The Respondent's counsel did not object the prayer save that the same be filed and hearing to proceed on the same day. In the interest of justice, leave was granted. The session thus resumed in the afternoon in which the Applicant complied by filing his supplementary affidavit. On being supplied, the Respondents thought to proceed without an affidavit in reply to the supplementary affidavit.

Submitting in support of the application, the learned State Attorney opted to submit on the contents of his recently filed supplementary affidavit. He reminded first this court that, whoever desires to appeal out of time has to show reasonable and sufficient cause for this court to exercise its discretionary power to enlarge time. His main ground submitted for extending

time hinges on what he termed as tainted illegalities and irregularities in the impugned decision subject to appeal. The matter rested on jurisdiction of the court in wildlife offences.

What he observed in the judgment was a finding that, the District Court of Bariadi had no jurisdiction to try wildlife offences originating in Meatu District. He stated this to be wrong on account that, the provisions of section 113(2) of the Wildlife Conservation Act, 2009 confers jurisdiction to all District Courts in the Mainland Tanzania to try wildlife offences. On this, Mr. Mafuru was of the view that, the court did not properly interpret letters of the law.

Having that to be the correct understanding of section 113 (2) of the Act, the Learned State Attorney paged it to be an illegality thus constituting reasonable and sufficient cause for extending time to file notice of appeal to appeal to the Court of Appeal. In this, he cited the case of **Principal Secretary, Ministry of Defence and National Service v. DP Valambiah (1992) TLR 185** and that of **Tanzania Breweries Ltd vs Herman Minja Civil Appeal No.11/18 of 2019** (unreported). It is on that account the learned State Attorney thought the application has merits and urged me to allow the same. He also abandoned the affidavit filed earlier on in support of the application.

In reply, Ms. Maria Mwaselela submitted that, as the Applicant relied only on illegality in the judgment leading to jurisdiction as the ground for extending time, he would have directed this court which part of that judgment the said illegality is constituted. As to section 113 (2) of the Wildlife Conservation Act complained by the learned State Attorney for noncompliance, Ms. Mwaselela was of the view that, the same was one of the

grounds of appeal they prosecuted in this Court on appeal and the case of **Sendama v R. Criminal Appeal No.279B of 2013** (unreported) was cited thereto.

Making reference to the case of **Sendama** (supra) Ms. Mwaselela submitted that, the cause of action was at Meatu and as by then there was not established a Resident Magistrate Court of Simiyu, the Appellant was thus tried by the Resident Magistrate's Court of Shinyanga. In that case, the Leaned Advocate added, the Court of Appeal observed that, the District Court of Shinyanga had no jurisdiction.

In the instant application, the question is one of territorial jurisdiction such that, if the interpretation of the section is coached in the manner the learned State Attorney interpreted, then there will be misuse of courts' jurisdiction. The learned Advocate observed. She also stated that, to be a delaying tactic on the side of the Government because, in reality, there is nothing like illegality in the impugned decision of this court.

She concluded her submission by prayer to have her counter affidavit adopted forming part of her submissions. She further observed that, this application is incompetent on account of the act of the learned State Attorney abandoning the previously filed affidavit in support of the application. She thought what the learned State Attorney would have done was to have both.

When took the floor, Mr. Shaban Mvungi submitted in addition that, not all illegalities constitute sufficient cause to extend time. On this, he cited the case of **Omary Ally Nyamalenge & 2 Others v Mwanza Engineering Works,**

Civil Application No.94/08 of 2017 (unreported). The two counsels thus thought the application has no merit thus urged me to dismiss it.

In rejoinder, briefly, the learned State Attorney could not see any problem to rely on the supplementary affidavit because of the pleaded illegalities being the sole ground for extending time and not the issue of counting of days for the delay. Expounding on jurisdiction, he thought if the same is left as is in the judgment, will perpetuate abuse in trials of wildlife cases. Much as it he conceded that not every illegality may constitute sufficient cause; the issue of jurisdiction to him is central thus there is cogent reason to have the application allowed. Parties ended this way.

I have considered the record along with submissions of learned counsels in this application. As observed by parties, it was on 23th of March, 2018 when this court allowed the appeal of the Respondents. The Applicant Director of Public Prosecutions did not lodge the notice of appeal in time. On 14th of January 2019, after 10 good months, the Applicant lodged to this court an application for extension of time to lodge notice of appeal. On what came to the knowledge of the Applicant that the court was improperly moved, they decided to withdraw their application on 10th of January, 2020. From this, the instant application got lodged on 14th of February, 2020, that is, after one month. Having this history in mind, my duty now is to determine whether the Applicant has shown sufficient cause for this court to extend time.

In the Supplementary affidavit, one Mafuru Mosses deposed that:

"That the judgment and decision thereon is tainted with fatal illegality and irregularities on matter of jurisdiction of wildlife cases."

This ground in the supplementary affidavit has been preferred to be the sole ground after the learned State Attorney in his submission opted to abandon all the grounds in the previously filed affidavit in support of the application. The abandonment of the previous affidavit has some consequences not only to the supplementary affidavit, but to the whole application. I am saying so because, **one**, it was in the previous affidavit where the judgment is particularized as to number, particulars of the deponent, reasons for the delay, and chances on the intended appeal's success has been deposed. In absence of this, the ground in the supplementary affidavit remain hanging.

Two, as all the deposed grounds in the previous affidavit have been abandoned, it all means that, the whole affidavit has been abandoned and therefore, there is nothing to supplement. The word supplementary comes from the word supplement which in its ordinary meaning as at page **711**of **Oxford Student's Dictionary, 3rd Edition,2012** is defined as *something that is added to something else*. In that stance, as the main affidavit was abandoned, taking the plain meaning of the word supplement just defined above, there is nothing to supplement.

This being the case, the said supplementary affidavit cannot stand alone, as in law, we would not have an application supported by a supplementary affidavit. The least is to say, there is no affidavit hence no evidence. In **Mustapher Rahael v. West African Gold Mine, Civil Appeal**

No.40 of 1998 (unreported) at page 8-9, the Court of Appeal observed the following regarding affidavit as evidence:

> *"With respect we have to agree with Dr. Mapunda that, affidavit evidence like any other type of evidence, has to be evaluated when its probative value is being considered. An affidavit is not kind of superior evidence. It is simply a written statement on oath. It has to be factual and free from extraneous matters such as hearsay, legal arguments, objections, prayers or conclusions."*

What it takes from the above legal position in the instant application is that, there is no evidence at all to consider in determining of the application for want of affidavit following abandonment of the affidavit of the Applicant and also, as stated, we may not have a supplementary affidavit standing alone to support the application.

Three, going by the supplementary affidavit, it is hardly not possible for one underscore which decision the Applicant got aggrieved with, thus, the need to have this court enlarge time to file notice of appeal, for appeal purposes. In my considered view, it may not be possible, perhaps this was the reason why the learned counsel for the Respondent observed that the Applicant would not have withdrawn his previously filed main affidavit.

The above three points would have sufficiently disposed of the instant application. However, in the interest of justice, I think it is of essence also to look on the illegalities pointed by the learned State Attorney. As submitted by Ms. Maria Mwaselela, the Applicant did not in the first place point where in

the judgment the said illegality is located. However, as his complaint is on the jurisdiction of the District Court of Bariadi, at page 9 of the judgment of this court, it was observed that:

> *"The charge sheet and the facts are very clear that the offence was committed in Maswa Game Reserve which is in Meatu District, Simiyu Region. The Appellants were also taken to Meatu Game Reserve to identify their cattle. Section 4(1) of the MCA establishes district courts, which shall exercise jurisdiction within the district in which the said District Court is established. As stated by Ms. Mwaselela, and correctly in my view, the offence was committed in Meatu District and the charge sheet clearly stated as such. It follows therefore that, only the District Court of Meatu had the territorial jurisdiction to hear and determine the matter."*

In my considered opinion, as the offence was committed in Meatu District, the charge also depicts so, in terms of the law as prescribed in the Magistrates' Court Act, Cap.11, the District Court of Meatu and not Bariadi, had territorial jurisdiction. I thus do not find any illegality in the above observation of the learned Judge.

The main concern however of the Learned State Attorney was with respect to the provisions of section 113 (2) of the Wildlife Conservation Act, Cap. 83 which, in his considered view, confers jurisdiction to all District Courts in the Mainland Tanzania to try wildlife cases. For clarity, the section is reproduced as hereunder:

"Notwithstanding the provisions of other written law, a court established for a District or area of Mainland Tanzania may try, convict and punish or acquit a person charged with an offence committed in any other District or area of Mainland Tanzania."

Does the quoted provisions above mean the prosecution may be at liberty to file charges in any part of the Mainland? The learned judge on appeal considered this position in the following version as at page 10 of her judgment after having reproduced the section:

"The purposive reading of the provision above, leaves no doubt that it considered suspects who commit wildlife offences in a certain District and have moved and are arrested in another district. If such is the case, then they need not return to the District the offence was committed but can be tried in that district which he/she has been arrested or has been located. This in my view took into account that WCA deals with management, conservation and protection of wildlife and thus the involvement of pastoralists, hunters, and poachers is inevitable as they move from one place to another gracing livestock or in search of wild animals.....I am afraid if the argument of Mr. Tawabu were to be put into action , then there would have been a lot of confusion in the adjudication of matters related to WCA. And in my opinion, the Parliament never intended for any chaos to arise in terms

of this provision, as such, the argument by the learned State Attorney cannot be taken into account."

In the instant application, Mr. Mafuru had the same sentiment. I think, that wouldn't have been the intention of the Legislature that every District Court in the Mainland Tanzania be clothed with jurisdiction of wildlife offences regardless of their territorial jurisdiction. The word used in the section in my considered view, gave the prosecution discretion to prosecute a criminals of wildlife cases in any district court where, as observed in the impugn judgment, the suspect has been arrested in a different district and the bringing him to the jurisdiction of the court where the offence was committed, may not be done without occasioning failure of justice. One instance might be in case of a pastoralist shifted his residence to another place. Had the Parliament intended any District Court, as observed by the learned State Attorney, then it could have imposed mandatory terms in section 113(2) of the WCA by perhaps using the word "shall"

The case of **James Sendema v R** (supra) which has similar facts to the instant application also determine that, the District Court of Shinyanga did not have territorial jurisdiction of wildlife offences committed in the District Court of Bariadi where there is another District Court. This was a Court of Appeal decision. My understanding is that, the position regarding territorial jurisdiction of wildlife offences in District Courts is clear. That means there is nothing like illegality in the instant application, which, if time is extended, the Court of Appeal would put matters right. It be also noted that, it is not automatic that whoever pleads illegality as a ground for extending time, then be granted the same.

In **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010**, the Court of Appeal made the following observation on this point:

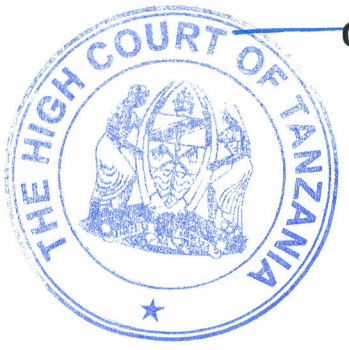
> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA's case,* ***the court meant to draw a general rule that every applicant who demonstrated that his intended appeal raises points of law should, as of 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 processes." (emphasis mine)*

With that foregoing position, and as also alluded above, I have not seen any merit in the instant application and is accordingly dismissed.

Ordered accordingly.

Gerson J. Mdemu
JUDGE
21/8/2020

DATED at **SHINYANGA** this 21st day of August, 2020.



Gerson J. Mdemu
JUDGE
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