

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 27/01 OF 2022

BARRETTO HAULIERS (T) LTD APPLICANT

VERSUS

JOSEPHINE E. MWANYIKA 1ST RESPONDENT

PHILIP E. MWANYIKA.....2ND RESPONDENT

**(Application for extension of time to lodge application for revision from
the decision of the High Court of Tanzania at Dar es Salaam)**

(Kulita, J.)

dated the 22nd day of December, 2021

in

Civil Review No. 09 of 2020

.....

RULING

8th February & 13th March, 2024

KIHWILO, J.A.:

In its quest for justice, the applicant had to tread a long and, perhaps also, a bumpy path which, quite unfortunately, was unpleasant. In this application, which is yet another daunting task, Barretto Hauliers (T) Ltd, the applicant, is seeking orders for the enlargement of time within which to lodge an application for revision against the decision of the High Court of Tanzania at Dar es Salaam dated 22nd December, 2021 in Civil Review No. 09 of 2020. The notice of motion is predicated on rule 10 of the Tanzania Court of Appeal

Rules, 2009 (the Rules). It is supported by an affidavit sworn by Richard Barretto, the Principal Officer of the applicant.

The applicant has raised mainly one ground as a basis for the extension of time in that the procedure leading to the alleged out of court settlement is tainted with illegalities. Before me, Mr. Richard Barretto, appeared for the applicant.

On the other hand, the respondents, are resisting the application through a joint affidavit in reply. Mr. Roman Selasin Lamwai, who raised a preliminary point of objection notice of which was lodged in Court on 17th July, 2023, prayed to abandon the preliminary objection upon which I granted the prayer and marked the preliminary objection abandoned.

By way of background as gleaned from the accompanying affidavit, the applicant on 25th April, 2016 filed Land Case No. 81 of 2016 at the High Court of Tanzania, Land Division against the respondents for the declaratory order of specific performance of the lease agreement in respect of the premises described as Plot No. 60 Tom Estate at Kurasini Area, Temeke Municipal, Dar es Salaam. That matter was settled through a successful mediation and a Consent Settlement Order was executed on 17th October, 2016. Resenting the

process and the resultant outcome of the settlement which was signed by the applicant's counsel without the latter's authorization, the applicant lodged Miscellaneous Civil Application No. 806 of 2018 seeking for enlargement of time to lodge an application for revision of the decision in Land Case No. 81 of 2016. Quite unfortunate, on 13th March, 2020 that application was dismissed by the High Court (Kulita, J.).

Not amused by the dismissal order, the applicant on 13th August, 2020 duly lodged Civil Review No. 09 of 2020 seeking to review the decision in Miscellaneous Civil Application No. 806 of 2018. Nonetheless, the High Court was disinclined and, on 22nd December, 2021 (Kulita, J.) rejected the applicant's account and the application was found to be time barred. Curiously, the judge of the High Court dismissed it but this is not relevant for now. It is on account of that background the applicant has lodged the instant application.

In justifying the prayer for enlargement of time, the applicant sought to convince me that, there were illegalities in signing the deed of settlement which has occasioned eviction of the applicant such that if extension of time is granted the applicant will be able to put records right. Mr. Barretto entreated me to grant the extension sought.

In their joint affidavit in reply, the respondents deny most of the averments in the supporting affidavit. Briefly, they depose that, admittedly the respondents through their counsel Mafuru & Co. Advocates did serve the applicant with a letter demanding payment of TZS 27,971,000.00 as rent arrears and vacant possession. They further admitted that the respondents lodged an application for execution in Miscellaneous Civil Application No. 162 of 2020. However, the respondents argue that, the decision complained about to be illegal is a misconception and there is nothing warranting the grant of the extension sought. Moreover, they aver that the applicant collected the impugned decision before the expiry of the sixty (60) days required to lodge the application for revision in terms of rule 65 (4) of the Rules and the instant application was lodged on 21st January, 2022 which is thirty (30) days from 22nd December, 2022 when the impugned decision was delivered. According to the respondents' averments the applicant had thirty (30) more days within which to lodge the application for revision but surprisingly and for an obscure cause the applicant elected to lodge an application for enlargement of time instead of the application for revision.

In highlighting the respondents' averments, Mr. Lamwai argued that, although the applicant's main ground for seeking enlargement of time is illegality, however, it has been unable to cite any illegality in the impugned decision which is Civil Review No. 09 of 2020 which is the subject of the application for enlargement of time. In his view, the alleged illegality was to come from the impugned decision and not the deed of settlement in Land Case No. 81 of 2016 which is not the subject of the instant application. Mr. Lamwai invited me to the celebrated case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) in which citing the case of **The Permanent Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) T.L.R. 387 we stressed that, every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies one. However, in that case we emphasized that, such point of law, must be that "of sufficient importance" and 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. He wound up his submission by arguing that, the applicant has demonstrated sufficient cause for extension of time.

In a brief rejoinder, Mr. Barretto being a layperson did not have much to offer in reply. However, he reiterated his earlier submission and insistently argued that, the applicant has come to Court in quest for justice. He rounded off by imploring me to grant the prayer and that costs in this application be costs in the course.

Addressing the contested application, I feel it is instructive, as a matter of general principle, to reiterate that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. It bears reaffirming that, in exercising that discretion the court has to abide by the rules of reason and justice and that the discretion is judicial as such it has to be exercised judiciously. In the case of **Mbogo v. Shah** [1968] E.A. 93, the defunct Court of Appeal for Eastern Africa stressed that, all relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, the degree of the prejudice to the defendant if time is extended and the like.

Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a

person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice.

I have painstakingly examined the notice of motion, the accompanying affidavit as well as the joint affidavit in reply in line with the oral arguments highlighting the averments in the affidavits. Undoubtedly, the instant application is seeking enlargement of time in order to lodge application for revision against the impugned decision which is the decision of Kulita, J. in Civil Review No. 09 of 2020 delivered on 22nd December, 2021. Furthermore, according to the notice of motion and the accompanying affidavit, the application is rooted on one sole ground, and that is, illegality of the deed of settlement in Land Case No. 81 of 2016. Quite surprising, and for an obscure cause, the applicant is alleging illegality in one matter, which is Land Case No. 81 of 2016 as a basis for seeking enlargement of time to lodge revision in respect of another matter, that is Civil Review No. 09 of 2020 which is the impugned decision. This is quite a novel thing.

I am very aware that, where 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 is established, to take appropriate measures to put the matter and the record straight. However, in my view, that illegality must be in relation to the impugned decision and not otherwise. I therefore, find considerable merit in Mr. Masumbuko's argument that, although the applicant's main ground for seeking enlargement of time is illegality, it has been unable to cite any illegality in the impugned decision which is the subject of the application for enlargement of time. In the contrary, the applicant has cited illegality in another matter which is not the subject of the instant application, which I find to be misleading and erroneous.

Even if I assume for the sake of arguments that the applicant had other grounds for seeking enlargement of time other than illegality, but still it defies logic and common sense for the applicant to have lodged the application seeking enlargement of time to lodge revision on 21st January, 2022 for the decision which was pronounced on 22nd December, 2021 merely thirty (30) days from the date of pronouncement of the decision while in terms of rule 65 (4) of the Rules time for lodging the application for revision is sixty (60) days in terms of rule 65 (4) of the Rules. Thus, the applicant had thirty (30) days more within which to lodge the revision without seeking

enlargement of time, and worse, no explanation leave alone plausible explanation was offered as to why the applicant was unable to lodge the application on 21st January, 2022 or thereafter within those other thirty (30) days. With great respect, therefore, I am unable to accept the applicant's argument that time was lost pursuing Civil Review No. 09 of 2020 and Miscellaneous Civil Application No. 806 of 2018.

In the final analysis, I decline to exercise my discretion in favour of the applicant, as I hold that the matter at hand discloses no justifiable reasons for the grant of the sought order. Accordingly, I dismiss the application with costs.

DATED at ARUSHA this 13th day of March, 2024.

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 13th day of March, 2024 in the presence of Mr. Richard Barretto, Director for the applicant and in the absence for the respondent, is hereby certified as a true copy of the original.



A. S. Chugulu
A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL