IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

TBR CIVIL APPLICATION NO. 3 OF 2007

ZUBERI MUSSA ..... APPLICANT
VERSUS
SHINYANGA TOWN COUNCIL ..... RESPONDENT

(Application for extension of time to apply for review from the decision of the Court of Appeal of Tanzania at Mwanza)

(Kisanga, J.A., Lubuva, J.A., And Lugakingira, J.A.)

dated the 16th day of November, 2001
in
Civil Appeal No. 16 of 1999

R U L I N G

23 & 28 October 2009

MASSATI, J.A.:

On the 28th day of March 2007, Mr. Mtaki, learned advocate filed a Notice of Motion under S. 4 (2) of the Appellate Jurisdiction Act and Rule 8 of the Court of Appeal Rules, 1979 (the Rules) for the following orders:

(1) The Applicant be granted extension of time to apply for review of the decision of the Court dated 16th November, 2001 in Civil Appeal No. 16 of 1999 at

Mwanza (Kisanga, Lubuva And Lugakingira, JJA).

(2) The Order of the Court dated 16th November, 2001 be reviewed.

At the hearing of the application before me however, Mr. Mtaki abandoned the second prayer because he held the view, and I think rightly so, that, a single Justice could not review the decision of the Court. So, in the present ruling I will only consider and decide on the application for extension of time.

In support of the application for extension of time, the learned counsel filed his own affidavit. On the basis of paragraphs 3, 4, 5, 6 and 7 of the affidavit, and his submission in Court, Mr. Mtaki urged me to find that since the applicant was bona fide litigating in Court at all the material time and since the said application for review had high chances of success, the application disclosed sufficient reasons for extension of time, and so the application should be granted.

But Mr. Jerome Muna, learned counsel for the Respondent, filed a 4 point counter affidavit to oppose the application. According to paragraphs 2 and 3 of the counter affidavit, and his submission in Court, Mr. Muna argued that the reasons set out in the affidavit to account for delay did not constitute sufficient reason for extension of time; and that, in any case the application for review stood little chance of success, as Rule 89 of the rules was inapplicable in the present case. In sum total, Mr. Muna submitted, that by making the mistakes in the application subsequent to the decision of the Court in question, the learned counsel displayed total lack of diligence in handling the matter and that, in his view, did not constitute sufficient reason for extension of time. He thus prayed for dismissal of the motion with costs.

Mr. Mtaki quickly responded by saying that lack of diligence could only mean failure to attend Court as and when required to do so which was not the case in this case. He went on to submit that the affidavits filed in subsequent applications were defective, but that was a mere result of oversight rather than lack of diligence. He

further submitted that the ruling in Civil Application No. 100 of 2004 on the issue of defective jurats demonstrated that the law on jurats in affidavits was a recent development, and this factor should be considered in deciding whether or not there was diligence in not complying with the law. On Rule 89 Mr. Mtaki pointed out that the appeal before the Court that was struck out being a second appeal, the applicable rule was Rule 89 (2) rather than Rule 89 and so, clearly the Court overlooked it. His application for review, thus had reasonable chances of success. He thus reiterated his prayers for extension of time.

The issue before me is whether the applicant has disclosed sufficient reasons for extension of time as required under Rule 8 of the Rules. This rule calls for exercise of the Court's discretionary powers. This is judicial discretion and has to be applied judiciously. In so doing one has to look at the circumstances in each case guided only by principles of justice, equity and common sense. As such, it is not possible nor desirable to lay down and follow any hard and fast rules.

In the present case, I have been asked to consider, first, whether the Applicant acted diligently in pursuing the cases, and second, whether the application for review had any chances of success.

I agree with Mr. Mtaki, that for the purposes of compiling a record of appeal in a second appeal, the applicable law is Rule 89 (2) and not rule 89 (1) as urged by Mr. Muna, but Mr. Muna cannot be faulted for this, because, in his Notice of Motion, Mr. Mtaki did not specifically cite Rule 89 (2) but only Rule 89 which was not entirely a correct citation. But that said, by looking at Annexure R alone, I cannot determine how the Court overlooked that provision and thus find that the application for review has any chances of success. There is simply no sufficient material before me to determine so. I will thus reject this leg of Mr. Mtaki.s argument in determining extension of time.

The next question is whether the applicant has been diligent enough in pursuing his case. First, I take it as indisputable that diligence is now regarded as one of the factors to be taken into account in considering whether or not sufficient reason exists for extension of time under Rule 8 of the Rules.

In determining this factor Mr. Muna, has submitted that Mr. Mtaki should be faulted for drawing defective documents in preparing the applications. Mr. Mtaki, on the other hand, has urged me to find that "diligence" must be confined to court attendances. On my part, I do not accept Mr. Mtaki's narrow definition of the word "diligence". I think, the word must be given its literary meaning to mean, care and hard work in executing one's duties. In my considered view, this means, in the case of advocates, not only attending court as and when required, but also extends to preparation of documents on behalf of their clients in their chambers. So Mr. Muna is right in the sense that preparing defective documents could amount to lack of diligence in some cases.

But as demonstrated above each case must be taken on its own peculiar facts. In a case such as the present one, one must inevitably look at the history of the case and the reasons for the various decisions handed down by the Court. Here, there is no dispute that after Civil Appeal No. 16 of 1999 had been struck out on 16/11/2001, the Applicant filed application for Review No. 4 of 2001. It was fixed for hearing on 2.7.2003, but could not proceed because Mr. Mtaki did not appear. No reasons were recorded for his non appearance. When he appeared before the Court a year later (i.e. 2/7/2004) the learned counsel applied for amendment but his application was refused. The application was struck out with leave to file a fresh application. From Annexure R1, it is not clear what type of amendments Mr. Mtaki had sought. Be that as it may, Mr. Mtaki filed yet another application for review No. 100 of 2004. The application was struck out on the ground of a defective jurat in the affidavit on 16/3/2003. Twelve days later, he filed the present application. Mr. Muna has capitalized on Mr. Mtaki's filing of a defective affidavit as evidence of lack of diligence.

I have already held above that lack of diligence could, in a fit case extend to preparation of documents in an advocate's chambers. But the law would fail in protecting the rights of the parties if it was to frown upon every mistake that an advocate makes. To err is human. Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. If, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But if he makes only a minor lapse or oversight only once and makes a different one the next time that would not in my view, amount to lack of diligence.

In the present case, and from the submissions of Mr. Muna, it is not shown how many similar mistakes, Mr. Mtaki has made in preparing his documents in the two applications. According to the record, the two different applications were struck out for different reasons. I do not think that such a mistake amounted to gross negligence on the part of the Applicant's counsel. I am thus unable

to agree with Mr. Muna that, that alone, is evidence that the Applicant was not diligent. I agree also with Mr. Mtaki that the Applicant, who has been in and out of the Court corridors pursuing his case has been diligent in his quest for justice. In the absence of any mala fides on his part, the Court cannot shut out its doors to him.

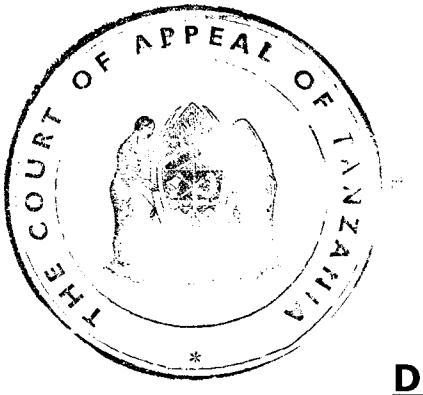
In the result, I find and I am satisfied that the Applicant has disclosed sufficient reasons for the delay in filing his application for review. He is therefore entitled to the grant of extension. The application is therefore allowed. The applicant is to file his application for review within 14 days from the date of this order. Costs shall abide the results in the intended application.

Order accordingly.

DATED at TABORA this 26th day of October, 2009.

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(J.S. MGETTA)
DEPUTY REGISTRAR