

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

CRIMINAL APPLICATION NO. 3 OF 2012

GIBSON MADEGE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for Extension of Time to
file an Application for Review of the decision
of the Court of Appeal of Tanzania at Mbeya)**

(Lubuva, Nsekela, and Mbarouk. JJ.A.)

**dated the 10th day of September, 2007
in**

Criminal Appeal No. 194 of 2006

RULING

12th & 14th June, 2013

RUTAKANGWA, J.A.:

This application by notice of motion, is brought under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). At the top of the notice of motion as well as of the affidavit in support of it, the applicant shows that it is in respect of an:-

"Appeal from the decision of the High Court of Tanzania at Songea (Mr. Justice Mwipopo Dated on the 3rd day of February, 1999 in Criminal Appeal No. 61 of 1977."

However, in the body of the notice of motion, it is shown thus:

"Take notice that on...day of ...20...at...O'clock in the morning/afternoon or as soon thereafter as he can be heard, the above named applicant, will move a court/a Judge of the Court for the following orders:-

- 1. Extension of time within which to file an application for review out of time.*
- 2. Any other order the Court may deem fit and just to pass.*

The application will be supported by an affidavit of Gibson Madege sworn on Tuesday the 11th day of December, 2012."

For this reason, Ms. Rhoda Ngole, learned State Attorney, for the respondent Republic, has urged me to ignore the defect "in the interests of justice". I agree.

All the same, contrary to the mandatory requirements of Rule 48(1) and (2) of the Rules, which rule the Court held in Civil Application No. 60 of 1998 between **Masumbuko R.M. Lamwai and**

Venance F. Ngula & the A.G. (unreported), (in relation to the then identical Rule 45 of the 1979 Court Rules) to be “vital and go to the root of the matter”, the notice of motion does not state the ground or grounds for the relief or orders being sought. Nevertheless, the Court held in the above cited case that such an omission would be held to be fatal only if the supporting affidavit does not disclose that ground or those grounds. Does the supporting affidavit cure this apparently incurable irregularity? For the benefit of all, I find it necessary to reproduce the material contents of the affidavit before I hazard an answer to this pertinent question.

The relevant averments of the deponent are as follows:-

"I Gibson Madege, male, adult, Christian of Ruanda Prison Mbeya do states an oath (sic) as follows:-

- 1. **That** - I was convicted with Armed Robbery c/s 285 and 286 of the Penal Code Cap. 16 of the laws and sentenced to serve 30 years imprisonment.*

2. **That** - I am the applicant in this application for extension of time within which to file an application for review out of time.
3. **That** - after the appeal being dismissed by C.A.T. on 10th September, 2007 before Hon. Lubuva, J.A., Hon. Nsekela, J.A. and Hon. Mbarouk, J.A. I prepared an application for revision instead of an application for **review** within time from the date of judgment and forwarded to the Registry of C.A.T. at Dar es Salaam through the Prison officer in Charge of Ruanda Prison – Mbeya (My Lord see Exh. 1).
4. **That** - the Registrar C.A.T. at D'Salaam on 14th March, 2008 replied through official letter and returned an application to me through Ruanda Prison Authority and advised to be filed at Mbeya registry of C.A.T. as an application for **review** not an application for **revision**. (My Lords See Exh. 2)
5. **That** - as stated in paragraph 4 of this an affidavit the applicant started to prepare another application and filed at Mbeya registry of C.A.T. where the time has already barred. In general the delayment which caused the applicant to file

an application for review out of time was beyond the applicant control as he is a prisoner and layman to the Court procedures (Laws).

6. ***That*** - *on the hearing of an application for review on 26th November, 2012, the C.A.T before Hon. Bwana, J.A., Hon. Mandia, J.A. and Hon. Kaijage, J.A. struck out an application for reasons that were filed out of time and application does not show the enabling for provision under which the said motion was filed.*

7. ***That*** - *I prepared this an application for extension of time within which to file an application for review and rectify both defects which caused an application being struck out and I pray to this honourable court to allow my application for extension of time within which to file an application for review out of time.*

8. *...not relevant...*

9. *...not relevant..."*

[Emphasis supplied].

The applicant who appeared before in person fending for himself, relied on the contents of his affidavit. He said nothing in elucidation. Mrs. Rhoda on behalf of the respondent Republic, supported the application.

I have read the said "Exh. 1" mentioned in paragraph 3 above. It is evident that this letter forwarding the application, was written on 4th October, 2007, that is, 24 days after the delivery of the Court's judgment. All things being equal, had the misconceived application for revision, been an application for review, it would have been filed in time.

In order to do substantive justice in the case, I have also read the Registrar's letter mentioned in paragraph 4 of the affidavit as "exh. 2". This letter was received by the applicant on **25th March, 2008**. I have gleaned therefrom that the applicant was not only advised to make a formal application for review. He was also categorically advised that his application should cite the enabling provisions for the relief he would be seeking or the specific rule under which the notice of motion would be based. The letter went further to

inform the applicant of the consequences in law of omission to cite the relevant legal provision(s). This notwithstanding when he eventually decided to file the application for review on **3rd February, 2009**, that is nearly eleven (11) months after receiving "exh. 2," he did not cite the enabling provisions of the law under which it was based. As he was correctly informed by the Registrar, the application was held to be incompetent and struck out, hence this second attempt.

I have given these undisputed facts the benefit of an objective and mature consideration. Even if I make allowance for the 196 days (3 months) delay, prior to 25th March, 2008 necessitated by the applicant's ignorance of the law, he has totally failed to account for the delay of 11 months before he filed the abortive incompetent Mbeya Criminal Application No. 1 of 2009 which was struck out. The applicant has, therefore, abysmally, failed to meet the salutary test enunciated in **Shanti v. Hindocha & Others** [1973] E.A. 207 to the effect that an applicant for extension of time generally has to show:

"that the delay has not been caused or contributed by dilatory conduct on his part."

The unexplained 11 month delay after receiving the Registrar's letter, even if I accept his ignorance of the law to be a defence in instituting the incompetent application, leads me to an irresistible conclusion that this unreasonable delay was due to his own indecision and dilatory conduct. But that is not all.

As I pointed out in Criminal Application No. 2 of 2013 between **Eliya Anderson and The Republic** (unreported), a similar application heard on the same day, an application for review of the Court's judgment is a proceeding of its own kind in our jurisprudence. The Court's power to review its judgment unlike the exercise of its appellate or revisional jurisdiction, is greatly curtailed and is exercised in very exceptional circumstances.

The Court is strictly enjoined in Rule 66(1) of the Rules, not to entertain an application for review except on the basis of the five grounds or conditions prescribed therein. It would be futile, in my opinion, to grant extension of time to apply for review when the court is not certain of whether the intended application would be based on those grounds, and will not be a disguised attempt to re-open the

appeal to suit the needs and convenience of the late applicant or unsuccessful appellant. For this basic reason, I held that on top of the applicant accounting for the delay, he or she must demonstrate, at least on a balance of probabilities, that the intended application for review would be based on one or more of the five grounds mentioned in Rule 66(1).

Imposing a higher threshold in applications of this particular nature, would be neither a unique innovation nor an obstruction to access to justice, because litigation in this final Court should have an end. That is why, I am convinced, the Court was not conferred with either constitutional or statutory powers of review of its own judgments. I have deliberately said that it would not be a “unique innovation”. I am aware that in this country, election petitions are civil proceedings. Civil suits are proved on a preponderance of probabilities. However, it is trite law in our jurisprudence that election petitions are civil litigations *sui generis*. For this reason, it is settled law that the standard of proof in election petitions, on grounds of public policy, should be proved beyond reasonable doubt as is the case in criminal trials. In my considered opinion, therefore, before an

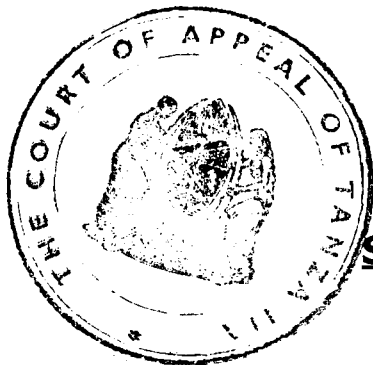
application for extension of time to apply for review, a proceeding *sui generis*, is granted, the applicant must show as one of his grounds for seeking enlargement of time, that the intended review is not sought to please one's ego but on the basis of the conditions set out in Rule 66(1). The applicant herein, has made no attempt to do so.


All said and done, in spite of the fact that the application was not opposed, I hold that for the reasons given above, the applicant has not made out a good case for the grant of an extension of time within which to apply for the review of the six years old Court judgment. I accordingly dismiss this application.

DATED at **MBEYA** this 13th day of June, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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




P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL