IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

CRIMINAL APPLICATION NO. 2 OF 2013

ELIYA ANDERSON ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kileo, Bwana, and Mjasiri, JJ.A.)

dated the 16th day of September, 2009
in
Criminal Appeal No. 434 of 2007

RULING OF THE COURT

12th & 13th June, 2013

RUTAKANGWA, J.A.:

This is an application for extension of time within which to file an application for review of the Court's judgment in Criminal Appeal No. 434 of 2007 dated 16th September, 2009. The application is by notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). Rule 10 of the Rules provideds as follows:-

> *"The Court may upon **good cause shown**, extend the time limited by these Rules or by any*

decision of the High Court 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 the time as so extended." [emphasis is mine].

Rule 66(3) of the Rules mandatorily requires the notice of motion for review to be "filed within sixty days from the date of the judgment or order sought to be reviewed." The applicant failed to meet this requirement, hence this application.

Before canvassing the merits or otherwise of the application, I have found it appropriate to give its brief background, which goes as follows: The applicant was convicted as charged of the offence of rape by the District Court of Rungwe District at Tukuyu. He was sentenced to thirty (30) years imprisonment. He unsuccessfully appealed to the High Court sitting at Mbeya against the conviction and sentence. His further attempt to establish his innocence by way of a second appeal to this Court proved abortive. His appeal was

dismissed on 16th September, 2009, upon the Court being satisfied that the evidence against him "was overwhelming." This Court being the highest court of the land, the applicant had no right to a further appeal. In the rarest of cases, he could only move the Court for a review of the decision, which appears to be his ultimate intention in this application.

I must point out from the outset that I have deliberately used the words "in the rarest of cases." This is because a party to any proceedings in this Court who finds himself or herself aggrieved by the Court's decision or order has neither a constitutional nor a statutory right of review of the Court's decision: See, **Blueline Enterprises Ltd v. East African Development Bank**, Civil Application No. 21 of 2012 (unreported). It is settled law, in common law jurisdictions, that "a judgment of the final court is final and a review of such judgment is an exception", per the Supreme Court of India in **Devender Pal Singh v. State, N.C.T. of Delhi and Another**, Review Petitions No. 497, 626 and 629 of 2002 which was followed by the Court in **Blueline v. E.A.D.B** (supra). This has also been the firm stance of

this Court since it held in **Felix Bwogi v Registrar of Buildings,** Civil Application No. 26 of 1998 (unreported) that it has inherent jurisdiction to decide its own decisions. This is done only in "fitting situations when circumstances of a substantial compelling character demand us to do so in order to correct a manifest wrong and pass an order to do full and effective justice in the case": See **Blueline v E.A.D.B.** (supra).

The courts cherish the above stance not an account of their infallibility but for two principal reasons. These are: One, public policy demands finality of litigation and certainty of the law as declared by the highest court of the land (**Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd**, Civil Application No. 62 of 1996 (unreported). Two, the Court, and indeed any court of law, will never "sit as a court of appeal from its own decisions, nor will it entertain applications for review on the ground only that one of the parties in the case conceives himself aggrieved by the decision," and in the process let "disguised appeals pass off for applications for review." See, for instance, **Raja Patwi Chand Lall Chaudhary v. Suchraj**

Rai (AIR 1941 SCI) and **Chandrakant Joshubhai Patel v. R.** [2004] T.L.R. 218.

Against this backdrop, Rule 66 of the Rules, which embraces the concept of review of the Court's judgments, is very categorical. It restricts the Court's inherent jurisdiction of review to only five distinct grounds. It is provided as follows in sub-rule (1):

> *"The Court may review its judgment or orders,* ***but no application for review shall be entertained except on*** *the following grounds:-*
>
> *(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
>
> *(b) a party was wrongly deprived of an opportunity to be heard;*
>
> *(c) the court's decision is a nullity; or*
>
> *(d) the court had no jurisdiction to entertain the case; or*
>
> *(e) the judgment was procured illegally, or by fraud or perjury." [Emphasis is mine.]*

Furthermore, Rule 48(1) of the Rules mandatorily directs that save for informal applications, "every application to the court shall be by notice of motion supported by affidavit" and "shall state the ground for the relief sought."

This formal application has been initiated by a notice of motion, as already alluded to above. The applicant appeared in person to prosecute it but said nothing in elaboration. For ease of reference, I have found it apt to reproduce the material contents of the said notice of motion. It reads thus:-

> *"TAKE NOTICE THAT on the..... day of.....2013 or soon thereafter as he can be heard. He will move the court/Justices of the court for orders that:*
>
> *i. Extension of the time within which to file an application for review of appeal No. 434/2007 out of time.*
>
> *ii. To pass any order the court deems fit just to pass.*

The application is supported with (sic) an affidavit of Eliya Anderson the applicant attached herewith."

A cursory look at the above extract, will leave one with no flicker of doubt, that the notice of motion does not meet the requirements of Rule 48(1) of the Rues. This is because it is does not state "the grounds for the relief sought." All the same, this glaring omission can at times be cured by the affidavit in support of the notice of motion. (See, **Masumbuko R.M. Lamwai v. Venance Ngula & The A.G.,** Civil Application No. 60 of 1998 (unreported). Did the applicant's affidavit fill this lacuna? The answer should be obtained from it.

The full relevant averments of the affidavit are as follows:-

"I Eliya Anderson adult, male, Christian and the resident Ruanda at Mbeya, do hereby swear and declare as follows:-

1. ***That*** *- I was charged with the offence of rape c/s 130(i) and (2)(e) and S. 131 of the penal code (sic) as amended by SOSPA R.E. 2002 and*

sentenced to 30 years imprisonment by the D.C. of Rungwe.

2. ***That*** *- I am the applicant in this application for extension of time to lodge an application for review in cr. App. No. 434' 2007 out of time.*

3. ***That*** *- I appealed to the High Court of (T) at Mbeya but on the hearing it was dismissed the same - (sic) I appealed to the C.A.T. also it dismissed.*

4. ***That*** *- I prepared my application after the appeal was dismissed and sent it to the C.A.T. via prison authority.*

5. ***That*** *- On the hearing date of the application (it) was struck out for the reason that it was out of time and abuse of the court process.*

6. ***That*** *- the failure to lodge competent application for review in time was not my fault and out of my control as lay-prisoner who depends on prison authority in every step concerning appeals.*

7. ***That*** *- I shall be present during the hearing of this application.*

(R.T.P.)

ELIYA ANDERSON (APPLICANT):"

It will be clear to any objective reader that from the above averments the applicant apart from briefly showing the history of his plight, does not come out clearly as to why he is seeking an extension of time to apply to have the Court's decision, delivered almost four (4) years ago, reviewed. One might be tempted to sympathise with him, as did Mr. Rogers Francis, learned State Attorney, for the respondent, on the basis of the averment in paragraph 4 of the affidavit and hold, on the face of it, that he had within a reasonable period filed an application for review after the Court's decision, but not within the prescribed sixty (60) days. But this sympathy flies in the face of the undenied facts revealed in the order of the Court dated 22nd November, 2012 in Mbeya Criminal Application No. 3 of 2011. This is the application alluded to in paragraphs (4) and (5) above. The Court order as well as the Court judgment were part of the attachments to the notice of motion. Mr. Rogers urged me to allow the application because the applicant "has explained the cause of the delay."

I have had the opportunity of reading the said Court order, which, unfortunately, I have found to belie the applicant. It is vividly stated therein, contrary to the implicit assertion in paragraph 4 that the application was filed almost immediately, that the said application was filed on 12th July, 2011, "nearly two years later," as the Court found, following the delivery of the Court's decision. This very inordinate delay has not been accounted for by the applicant before me. Worse still, it was not even an application for review, but an application for "revision" of the Court's judgment. The Court found the application to have been filed "out of time" and since this Court has, unarguably, no jurisdiction to revise its own decisions, the Court correctly found the application to be "an abuse of the court process." Since the said application was totally misconceived in law, it was struck out on account of being incompetent. It was after the striking out of the incompetent application that the applicant lodged this application on 28th January, 2013, sixty six (66) days later.

The above facts notwithstanding, I am totally alive to the fact that the Rules do not define what is "good cause" in the context of

rule 10 or at all. All the same, I take it to be trite law that the position of an applicant for extension of time is totally different from the one seeking, say, leave to appeal. Under normal circumstances, that is in routine procedures where one is seeking an extension of time to pursue a statutory right of appeal or apply for revision out of time, the applicant is concerned only with showing sufficient reason why he should be given such an extension. As was lucidly put by the erstwhile Court of Appeal for East Africa in the case of **Shanti v. Hindocha & Others** [1973] E.A. 207:-

> *"the most persuasive reason that he can show...is that the delay has not been caused or contributed by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."*

The courts in determining such applications, are not concerned, at that stage, with the merits or otherwise of the intended appeal or revision proceedings: See, **VIP Engineering and Marketing Ltd. & Two Others v. Citibank Tanzania Ltd,** Consolidated Civil References No. 6,7, & 8 of 2006, **Abdalla Salunga & 63 Others v. T.H.A.,** Civil Application No. 4 of 2001 (both unreported), etc. Among

the "other reasons" contemplated in the **Shanti** case (supra) is the issue of "illegality of the decision being challenged." This, as held by the Court in the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] T.L.R. 185, can be another persuasive reason for granting an extension of time if well demonstrated by the applicant.

As I have already indicated above, the applicant herein is seeking an order enlarging the time, which has long expired, within which to apply for a review of the Court's judgment which was delivered four years ago. It is settled law that a review of a Court judgment is not a routine procedure but a procedure of its own kind (*sui generis*). That is why the review jurisdiction is exercised "very sparingly and with great circumspection" (**Blueline v. E.A.D.B.** (supra)). That is why also it has been consistently held that "while an appeal may be attempted on the pretext of any error, not every error will justify a review" (**Chandrakant Patel v.R.** (supra)). It is for this very fundamental reason, that Rule 66(1) unequivocally provides that "no application for review shall be entertained except on the "basis of

the five grounds mentioned therein. By the same parity of reasoning, I believe it would not be a monstrous justice to hold that an application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but has also established by affidavital evidence, at that stage, either implicitly or explicitly, that the review application would be predicated on one or more of the grounds mentioned in Rule 66(1), and not on mere personal dissatisfaction with the outcome of the appeal, which appears patently to be the case in this application. If we want to remain truly faithful to the much cherished public policy which calls for finality to litigation and certainty of the law as declared by the court of last resort, then we cannot divorce the application of the strict provisions of Rule 66(1) from proceedings of this type.

Imposing such a higher threshold at the outset of the entire process would, in my considered opinion, shut the floodgates to undeserving applications for extension of time which if allowed would open the Pandora's box for frivilous and vexatious applications for review, which in fact and law would be disguised applications for the

re-hearing of an appeal. That would be harmful, "intolerable and more prejudicial to the public interest" (**Raja v. Rai**, (supra)). It will not only render the law uncertain until "all legal ingenuity is exhausted," but would lead to an undesired drain on the judges' strengths and time as well as on the Court's and the opposing party's resources, be they meagre or abundant. These resources ought to be deployed for value in terms of delivering timely justice in deserving cases and not futile exercises, resulting in accumulation of case backlogs, which is the current bane of the Court and the public.

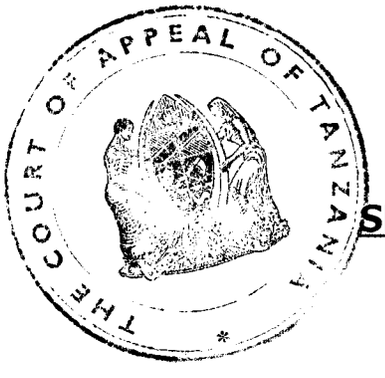
With the above considerations in mind, I have found myself constrained to hold, as I hereby do, contrary to the wishes of the parties herein, that this application is totally wanting in merit. This conclusion rests on my finding, based on the notice of motion and affidavital evidence before me, which irresistibly show that the applicant has totally failed to show any ground, constituting **good cause**, upon which I would justifiably predicate the grant of an order extending the time for lodging an application for review of the Court's

judgment dated 16th September, 2009 in Criminal Appeal No. 434 of 2007. I accordingly dismiss the application.

DATED at **MBEYA** this 12th day of June, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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



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SENIOR DEPUTY REGISTRAR
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