IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

CRIMINAL APPLICATION NO. 6 OF 2014

1. **ZAKAYO SHUNGWA MWASHILINDI**
2. **RAIS SHUNGWA MWASHILINDI** } **.....APPLICANTS**
3. **ABEL MWAMWEZI**

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for extension of time from the decision of the Court of Appeal of Tanzania at Mbeya)

(Lubuva, Nsekela, Mbarouk, JJJ,A.)
in
Criminal Appeal No. 78 of 2007

RULING

21st & 24th August, 2015

MASSATI, J.A.:

In this application, although there are three applicants, and each has filed a separate notice of motion, the contents of all the notices and affidavits are identical. They all seek to apply for extension of time to apply for review of the decision of this Court in Criminal Appeal No. 78 of 2007, dated 30th May, 2008. Since the notices of motion and the supporting affidavits are identical, I will take one set as a sample for the purposes of analysis in the present ruling.

The notice of motion of the first applicant, ZAKAYO SHUNGWA MWASHILINDI is brought under Rule 10 of the Court of Appeal Rules 2009 (the Rules) and supported by the applicant's affidavit. Despite the requirements of Rules 48(1) and 66(3) of the Rules, these Rules are not cited here, but as this point was not taken up during the hearing of the application, I will say nothing more except that in the notice, no grounds for the reliefs sought are mentioned. The major relief sought was "extension of time within which to lodge an application for review..." The reasons for the delay in bringing the application for review are disclosed in paragraphs 4, 5 and 6 of the affidavit. For the ease of clarity, those paragraphs are reproduced below: -

> *"4. That - Soon after my appeal being dismissed on 30th day of May 2008 I prepared my application for review under rule 66 (1) of Court of Appeal Rules, 2009 and handed over it to the authority of Ruanda Prison for on ward transmission to the C.A.T at Mbeya on 18th day of July, 2008 within sixty days. But since 2008 up to now I have never called by the C.A.T in order for hearing my application*

5. *That – I had filed my application for review within the prescribed time, but I come to discovery that the same is dented by the prison process because when I asked the authority of Ruanda Prison to remind the Sub-registry C.A.T at Mbeya through my copies of previous application which had kept in my Prisoner file records did not found therein as such I can't be punished for other peoples fault hence this second application applying an extension of time within which to lodge an application for review out of time.*
6. *That – The defects and or omission that affected my application to the Court of Appeal of Tanzania were caused by matters beyond my control as a prisoner."*

In resisting the application, the respondent filed an affidavit in reply by one LUGANO MWAKILASA, Senior State Attorney. The applicant's reasons for the application set out above are controverted through paragraphs 5, 6 and 7 of the affidavit in reply. They are also reproduced below for ease of reference:

"5. That the contents of paragraph 4 of the applicant's affidavit are disputed and the applicant shall be put into strict proof thereof.

6. That the contents of paragraph 5 of the applicant's affidavit are vehemently denied and the applicant shall be put into strict proof. thereof.

7. That the contents of paragraph 7 of the applicant's affidavit are not disputed."

At the hearing of the application, the applicants appeared in person, unrepresented. They adopted their affidavits and prayed that they be granted extension of time because the delay was caused by factors beyond their control. Ms Lugano Mwakilasa, learned Senior State Attorney, who appeared for the respondent, adapted her affidavit in reply, and submitted that the applicants' allegations that they had signified their instruction to apply for review were not supported by the records kept at the Ruanda prison, which she had occasion to visit and peruse. In addition, the learned counsel went on to point out that nowhere in their notices of motion or affidavits, did the applicants intimate any of the five points listed under Rule 66(1) of the Rules, on which they intend to benchmark their applications for

review. In support, she cited to us, the decision of **ELIYA ANDERSON v R** Criminal Application No 2 of 2013 (unreported). It was therefore her view that no case had made out by the applicants for extension of time, and asked me to dismiss it. In reply, each of the applicants, repeated that they had lodged their papers with the prison authorities but that if the learned state attorney did not see copies of the same, they were equally surprised. However, they all conceded that they did not indicate in their applications, the points of law, they intended to pursue at the intended review, but asked me, to allow the application, so that they could get a chance to air their grievances before the Court.

The issue in every application for extension of time under Rule 10 of the Rules, generally, and Rule 66(3) in particular, is whether an applicant has shown a good cause for the court to extend time within which to apply for review, especially in view of the fact that the remedy sought is neither constitutional nor statutory. (See **BLUELINE ENTERPRISES LTD v EAST AFRICAN DEVELOPMENT BANK**, Civil Application No. 21 of 2012 (unreported).

The position of the law, as aptly summarized in **ELIYA ANDERSON v R's** case (supra) is that under Rule 10, a good cause could be "factual" or "other reasons", which could include illegality of the decision sought to be impugned. In cases of intended review, the only permissible points of law that may be taken are those shown in Rule 66(1) which are; **a manifest error on the face of the record; a party wrongly deprived of an opportunity to be heard; the court's decision is a nullity, the court's lack of jurisdiction, and that the judgment was procured illegally, by fraud or perjury.** An applicant for extension of time to apply for review is therefore expected to show in the grounds in his notice of motion, or affidavit, at least one of those grounds, in addition to a factual account for the delay. (See also **DEOGRATIAS NICHOLAS @ JESHI AND JOSEPH MUKWANO v R** Criminal Application No. 1 of 2014 (unreported).

In the present case, the applicants allege that after their appeal was dismissed on 30th May, 2008, they lodged their applications for review with the prison authorities on 18th day of July, 2008 for onward transmission to the Court. But Ms Mwakilasa has disputed this averment. According to her oral submission, she visited the prison herself and perused the respective files and found that there were no such documents. However, such

assertions are not in the affidavit, which only contains a general denial. I think this is not fair to the applicants. First, the applicants were specific in their assertions in the affidavit. Those assertions could not simply be brushed off and put them to strict proof. They ought to have been specifically countered in the affidavit in reply, by disclosing the source of her information which, from her own submission, could not have been from her "own knowledge" as she had verified. Secondly, if she visited the prison, as she said, I think it would be easier and expected of her to get an affidavit from a prison officer to testify to the truth of her finding. There is no affidavit from such prison officer. In the circumstances, I would rather believe what the applicants have said in their affidavits. That said, I give the benefit of doubt to the applicants and find that they might have lodged their intended applications well in time with the prison authorities for onward transmission to the Court. The delay was therefore accounted for.

However, as observed above, in cases of applications for extension of time to apply for review, accounting for delay alone is not sufficient. The applicant must demonstrate that he has an arguable case to put to the Court for review. This means that he must show that the decision sought to be

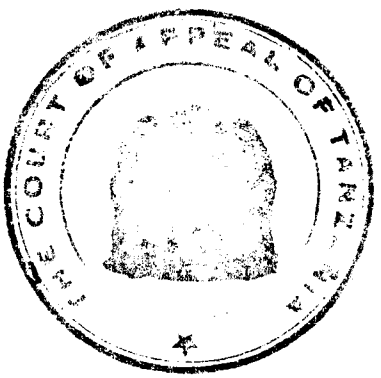
impugned has wronged at least one of the five principles set out in Rule 66(1) of the Rules.

In the present case, it was submitted, and the applicants have conceded that their present applications have not shown any of the statutory beacons for review. In the circumstances, I agree with Ms Mwakilasa, that the application lacks substance. It is accordingly dismissed.

DATED at **MBEYA** this 21st day of August, 2015.

S. A. MASSATI
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL