IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 10 OF 2015

NGAO GODWIN LOSERO.....APPLICANT

VERSUS

JULIUS MWARABU.....RESPONDENT

(An Application from the Judgment and decree of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 6th day of March, 2015 in
Misc. Civil Application No. 179 of 2014

RULING

11th & 18th October, 2016

MUSSA, J.A.:

The is an application for enlargement of time within which to lodge an application for leave to appeal to this Court against the decision of the High Court dated the 23rd May, 2014 (Moshi, J.) in Civil Appeal No. 25 of 2013. The application is by way of a Notice of Motion which was taken out under the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit, duly sworn by the applicant. In addition, the applicant has filed written submissions to expound his quest. The application has, however, been resisted by the respondent in an affidavit in reply as well as written submissions in opposition. For a better appreciation of the issues of contention, it is necessary to explore the factual setting giving rise to the application which may briefly be recapitulated as follows:-

In the Resident Magistrate's Court of Arusha, the applicant successfully sued the respondent for damages which arose from destruction of properties which were allegedly accassioned by the latter. Dissatisfied, the respondent preferred an appeal and, as it were, in the referred May 23rd decision which is desired to be impugned, the High Court reversed the verdict of the trial Court in favour of the respondent. Discontented, on the 6th June, 2014 the applicant, contemporaneously, lodged a Notice of Appeal and applied to be supplied with a certified copy of the record which he desired to appeal against.

Having accomplished the foregoing, the applicant then dawdled along and, in the result, he failed to apply for leave to appeal in good time. To remedy the situation, he preferred Application No. 179 of 2014 before the High Court through which he sought extension of time within which to apply for leave. At the hearing, the applicant informed the High Court that he delayed the quest for leave on account of taking a mistaken position that an application for leave comes after the supply of the certified copy of the record desired to be impugned. Nonetheless, the High Court was disinclined and, on the 6th March, 2015 (Opiyo, J) rejected the account and dismissed the application, hence the matter at hand which was lodged on the 25th March 2015, apparently, as a second bite.

At the hearing before me, the applicant was represented by Mr. Severin Lawena, learned Advocate, whereas the respondent was fending for himself,

unrepresented. The learned counsel for the applicant commenced his submission by fully adopting the contents of the Notice of Motion, the supporting affidavit, as well as the applicant's written submissions. In his explanation, Mr. Lawena reiterated the applicant's account that he mistakenly believed that he could only apply for leave after he was served with the record of the decision desired to be impugned. But, in addition, the learned counsel for the applicant contended that the impugned decision is fraught with misdirections and non-directions and, hence illegal. He referred to the intended memorandum of appeal which desires to challenge the impugned decision thus:-

> *"1. Whether the Appellate Court was right to base its decision on the quoted paragraph (page 5 of the typed judgment) without considering and re-evaluating the evidence as a whole tendered before the trial Resident Magistrate's Court.*
>
> *2. Whether the Appellate Court was not bound as a matter of law to re-evaluate the whole evidence tendered before the trial Resident Magistrate's Court it being the 1st Appellate Court."*

Mr. Lawena also referred to the unreported Civil Application No. 2 of **2010** - Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania. In that case, the Court reiterated the following guidelines for the grant of extension of time:-

> *"(a) The applicant must account for all the period of delay.*
>
> *(b) The delay should not be inordinate.*
>
> *(c) The applicant must show diligence and not apathy negligence*

or sloppiness in the prosecution of the action that he intends to take.

(d) If the court feels that there other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

Predicating his argument on the desired memorandum of appeal, the learned counsel for the applicant urged that to the extent that the first appellant court did not re-evaluate the evidence tendered before the trial court, its decision was fraught with illegality. In the premises, Mr. Lawena prayed that the requested extension be granted with costs.

For his part, the respondent was very brief. As regards the explanation given by the applicant to account for the delay, he urged that ignorance of the court procedure cannot amount to good cause for granting the extension. On the alleged illegality of the decision desired to be impugned, the respondent declined to make any comment on account of his being a lay person and left the matter for the determination by the Court in the interests of justice. Conversely, the respondent prayed for the dismissal of the application.

I have dispassionately considered and weighed the rival arguments from both parties. To begin with, I feel it is instructive to reiterate, as a matter of general principle

that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice. In the case of **Mbogo Vs. Shah** [1968] EA the defunct Court of Appeal for Eastern Africa held thus:-

> *"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, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."*

When all is said with respect to the guiding principles, I will right away reject the explanation of ignorance of the legal procedure given by the applicant to account for the delay. As has been held times out of number, ignorance of law has never featured as a good cause for extension of time (see, for instance, the unreported ARS. Criminal Application No. 4 of 2011 - **Bariki Israel Vs. The Republic;** and MZA. Criminal Application No. 3 of 2011 - **Charles Salugi Vs. The Republic.)** To say the least, a diligent and prudent party who is not properly seized of the applicable procedure will always ask to be apprised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness.

Coming now to the alleged illegality of the decision desired to be impugned, granted that in the case of **The Principal Secretary Ministry** of Defence and

Notional Service Vs. Devram Valambia [1991] TLR 387, it was held thus:-

> *"In our view, when 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 be established, to take appropriate measures to put the matter and the record straight."*

But, it is noteworthy that in **Valambia** (supra), the illegality of the impugned decision was clearly visible on the face of the record in that the High Court had issued a garnishee order against the Government without affording it a hearing which was contrary to the rules of natural justice. Incidentally, the Court in the case of **Lyamuya** (supra) made the following observations:-

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasised that such point of law must be that of sufficient importance and, I*

would add 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."

Applying the foregoing statement of principle to the case at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. Certainly, it will take a long drawn process to decipher from the impugned decision the alleged misdirections or non-directions on points of law. To that end, I must conclude that the applicant has not demonstrated any good cause that would entitle him extension of time. In the result, this application fails and is, accordingly, dismissed with costs.

DATED at **ARUSHA** this 13th day of October, 2016.

K. M. MUSSA
JUSTICE OF APPEAL

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL