

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 274 OF 2015

CHARLES ZEPHANIA MWENESANO APPLICANT

VERSUS

DANIEL SAMWEL CHUMA RESPONDENT

(Application for extension of time to apply for the revision of the proceedings, judgment, decree, ruling and orders of the

High Court of Tanzania, at Dar es Salaam)

(Ihema, J. and Mruke, J.)

In

Civil Appeal No. 301 of 2001 and Misc. Application No. 270 of 2013

RULING

16th & 25th May, 2016

MUSSA, J.A.

In the District Court of Kisarawe, the applicant successfully sued the respondent for trespass, vacant possession and loss of income over premises which are situate on Plot No. 3 Block D, Mwanaromango. It is, perhaps, pertinent to observe that the decision of the trial court was handed down on the 17th August, 2007 but the decree came about later and is dated the 27th September, 2001.

The respondent was dissatisfied and, on appeal to the High Court, the decision of the trial Court was reversed in favour of the respondent. The

High Court verdict (Ihema, J) was pronounced on the 4th April, 2005 but the decree in appeal just as well came about later and its dated the 11th April, 2006.

Aggrieved, the applicant embarked upon an appeal process by filing a Notice of Appeal and, subsequently, by seeking the leave of the High Court to lodge an appeal before this Court. Nonetheless, his initial application before the High Court was struck out (Mihayo, J) on the 31st January, 2006 for wrong citation of the enabling provision of the law.

There is a dearth of details with respect to what transpired in the immediate aftermath of the High Court Order but, the way it appears, the applicant did not promptly refresh the application for leave and thus, a good deal later he again approached the High Court seeking extension of time within which to file the application for leave. The application was granted on the 26th November, 2009 (Sheikh, J.) with an order that the application for leave should be filed within four weeks form the date of the order.

Thereafter, the applicant dawdled for almost four years before he eventually came with an application for leave on the 18th September, 2013. As it were, the application was adjudged time barred and accordingly

dismissed on the 12th June, 2015 (Mruke, J). The dismissal order seemingly prompted the applicant to abandon the appeal process and, instead, he presently seeks enlargement of time within which to lodge an application to revise the judgment, decree and the proceedings of the High Court.

The application is by Notice of Motion which has been 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. The application has been resisted by the respondent through an affidavit in reply sworn by a certain Asnath Samwel Chuma. Counsel for the respondent has additionally enjoined a preliminary point of objection going thus:-

"The affidavit in support of the notice of motion is incurably defective as it doesn't show where and when it was verified".

At the hearing before me, the learned counsel for the applicant defaulted appearance despite being duly served. Fortunately, the applicant was present and took over the conduct of the application in person. On the adversary side, the respondent had the services of Mr. Francis Mgale, learned

Advocate. Having heard either side on the preliminary point of objection, I overruled it, reserved my reasons for doing so and proceeded with the hearing of the substantive application. It is now opportune to assign reasons for my decision.

In faulting the applicants affidavit, counsel for the respondent almost entirely relied upon the provisions of Order VI Rule 15 of the Civil Procedure Rules. With respect, that Rule only makes provision for pleadings which are defined under Rule 1 of Order VI thus:-

"Pleading means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII".

Nevertheless, upon numerous decisions, this court has held that affidavits intended to be used in judicial proceeding should, among other requirements, be verified by the deponent (see for instance, the unreported Civil Application No. 11 of 2010 **Mantrac Tanzania Limited vs Raymond Costa**. The issue is whether or not the requirement was met in the matter

Advocate. Having heard either side on the preliminary point of objection, I overruled it, reserved my reasons for doing so and proceeded with the hearing of the substantive application. It is now opportune to assign reasons for my decision.

In faulting the applicants affidavit, counsel for the respondent almost entirely relied upon the provisions of Order VI Rule 15 of the Civil Procedure Rules. With respect, that Rule only makes provision for pleadings which are defined under Rule 1 of Order VI thus:-

"Pleading means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII".

Nevertheless, upon numerous decisions, this court has held that affidavits intended to be used in judicial proceeding should, among other requirements, be verified by the deponent (see for instance, the unreported Civil Application No. 11 of 2010 **Mantrac Tanzania Limited vs Raymond Costa**. The issue is whether or not the requirement was met in the matter

at hand. In the affidavit sought to be impugned the verification clause is couched as follows:-

"VERIFICATION

That all I have stated herein above in paragraphs 1 to 12 is true to the best of my knowledge.

DATED at Dar es Salaam this 28th day of December, 2015.

Sgnd

CHARLES ZEPHANIA MWENESANO".

Mr. Mgale would have wished the last sentence to read "*Verified at Dar es salaam....*" If I may express at once, to me, that is quite an unnecessary nicety and that being so, I found the preliminary point of objection to be without a semblance of merit.

Coming to the merits of the application, it is noteworthy that in his first ground as comprised in the Notice of Motion, the applicant stated as follows:-

"1. A discovery has been made to the effect that Civil Appeal No. 301 of 2001 date thereof deferred (sic) from that of the judgment of the District Court hence the appeal having been

incompetent as the same was supported by a defective decree”.

No doubt that is an allegation of illegality with respect to the proceedings giving rise to this application. In cases pertaining to extension of time under Rule 10 of the Rules, this court has consistently held that illegality in the impugned judgment constitutes good cause for extending time. In the case of **The Principal Secretary, Ministry of Defence and National Service Vs Dervam Valambia** [1992] TLR 182, it was stated 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 of ascertaining the point and if the alleged illegality be established, to make appropriate measures to put the matter and the record right.”

Thus, to that extent the applicant has shown good cause to entitle himself with an extension. The desired application should be filed within a period of

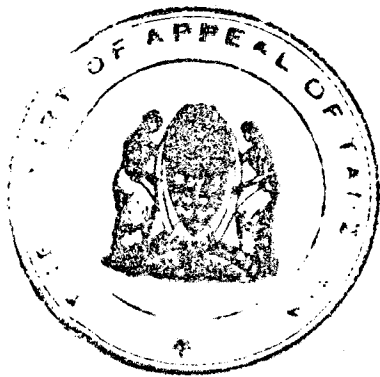
thirty (30) days from the date of the delivery of this Ruling. Costs will be in the case.


Order accordingly.

DATED at DAR ES SALAAM this 20th day of May, 2016.

K.M. MUSSA
JUSTICE OF APPEAL

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




Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL