

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR-ES-SALAAM

CIVIL APPLICATION NO. 227 OF 2015

EZROM MAGESA MARYOGO ..... APPLICANT

VERSUS

1. KASSIM MOHAMED SAID |

2. IBRAHIM MWANKUSYE |

..... RESPONDENTS

(Application for extension of time within which to apply for leave to appeal to the Court of Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Mgetta, J.)

dated the 7<sup>th</sup> day of February, 2014

in

Land Case No. 228 of 2005

.....

RULING

28<sup>th</sup> June, & 12<sup>th</sup> July, 2016

MUGASHA, J.A.:

This application by notice of motion is brought under among others, rule 10 of the Court of Appeal Rules, 2009. The applicant is seeking extension of time to file an application for leave to appeal following the refusal to grant such leave by the High Court. The grounds stated by the applicant in the notice of motion are as follows:-

1. That, the learned judge overruled the decision of his fellow judge without having any legal basis and the applicant wanted to appeal against this decision.

2. That, as a result of reviewing the decision of his fellow judge and without appeal, the applicant will lose his property which is the property in dispute.

3. That, after the ruling of Mgetta, J. on review, the applicant fell seriously ill and could not file application for leave to file the appeal in time.

The notice of motion is supported by affidavit of **EZROM MAGESA MARYOGO**, the applicant. The application has been challenged by **KASSIM MOHAMED SAID**, the first respondent through the affidavit in reply. The applicant and 1<sup>st</sup> respondent have filed written submissions in support of their arguments for and against the grant of the application respectively.

When the application was called on for hearing, Mrs. Nakazael Lukio Tenga, learned counsel represented the applicant, whereas Mr. Henry Kishaluli, learned counsel, represented the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent had the services of Mr. Richard Msirikale, learned counsel.

The essential background to this application is briefly as follows:-

The 2<sup>nd</sup> respondent unsuccessfully commenced against the applicant Land Case No. 167 of 2004 in the High Court which was

concluded in favour of the applicant who was declared a rightful owner of the 2 ¼ acre farm situate at Mji Mwema Kisiwani in Temeke, Dar-es-salaam region. Subsequently, on 22/11/2005, the 1<sup>st</sup> respondent filed Land Case No. 228 of 2005 against the applicant and 2<sup>nd</sup> respondent in a claim based on the same farm which was a subject in dispute in Land Case No. 167/2004. Still Land Case No. 228 of 2005 was concluded by Demello, J. in favour of the applicant who was declared a rightful owner.

Aggrieved, the 1<sup>st</sup> respondent lodged a notice of appeal expressing desire to appeal against the decision of the High Court in Land Case No. 228 of 2005. However, on 3/6/2013 the 1<sup>st</sup> respondent withdrew the notice of appeal and two days later he filed an application for review. On 7/2/2014, Mgetta, J. reversed the decision of Demello, J. having determined the review in favour of the 1<sup>st</sup> respondent and against the applicant.

The applicant was not happy with the ruling on the review and through his advocate Geoffrey Taisamo, the applicant promptly lodged a notice of appeal. He also requested to be supplied with requisite documents for the intended appeal. However, shortly thereafter the applicant suffered a severe stroke according to annexure 5 to the applicant's affidavit (the medical report). Thus, the applicant was

incapacitated and he could not avail instructions for the further steps in the appeal and the time to seek leave to appeal expired. On 25/8/2014, the applicant lodged the initial application for extension of time which was struck out for not meeting the requirements of the law. The applicant did not end there, on 16/7/2015 he filed another application seeking enlargement of time to apply for leave to appeal but on 19/10/2015 the application was refused by Mgetta, J. It is against the said background, the applicant has come to this Court by way of a second bite seeking extension of time to apply for leave to appeal against the decision on a review by Mgetta, J.

It is the submission of the applicant's counsel that, shortly after lodging the notice of appeal, the applicant suffered a severe stroke and speech was impaired making him not capable to transact any business including availing instructions, negotiate and effect payment for fees. As such, the applicant could not give instructions to the advocate to have the application for leave to appeal timely pursued. The applicant furnished the medical report which indicates that due to said illness, the applicant had difficulty with walking, speaking, writing, reading and his memory was impaired.

At the hearing of the application, the applicant's counsel reiterated what she expounded in the filed written submissions and

urged the Court to consider illness as sufficient ground which made the applicant delay to apply for leave to appeal against the impugned decision on review by Mgetta, J. The applicant referred this Court to the case of **REGIONAL MANAGER, TANROADS KAGERA vs RUAHA CONCRETE LIMITED**, Civil Appeal No. 96 of 2007 (unreported) in which Nsekela, JA (as he then was) cited with approval the case of **RATMA V CUMARASAMY AND ANOTHER[1964] 3 All ER 933**.

Mrs. Tenga added that, another ground sufficing good cause for extension is the need to have the Court consider the impugned ruling whereby the High Court reviewed its own decision in favour of the 1<sup>st</sup> respondent and against the applicant.

On the other hand, the 1<sup>st</sup> respondent in both the affidavit in reply and the written submissions argued that, since the applicant was represented by an advocate who filed the notice of appeal on 14/2/2014, the same advocate ought to have applied for leave to appeal not later than 21/2/2014. Mr. Kishaluli challenged the medical report of the applicant arguing that, since the applicant was examined on 27/2/2014, the illness stated in the medical report had no relationship with the proceedings for the intended appeal. He further argued that, as on 27/2/2014, the time to apply for leave had already expired then rule 10 does not favour the applicant who in paragraph 9

of the affidavit has deposed that the sickness was from 27/2/2014. The 1<sup>st</sup> respondent's counsel referred the Court to several decisions including the case of **SHEMBILU SHEFAYA VS OMARY ALLY [1992] T.L.R 245** where the Court stated that where there is no elaboration of illness on the delay to file the appeal in time that does not constitute sufficient cause to warrant extension of time. Relying on the principle that litigation must come to an end, Mr. Kishaluli cited the case of **RATMA CUMARASWAMY AND ANOTHER (1964) 3 ALL ER 933**. However, Mr. Kishaluli did not make any response on the alleged claimed illegality about the High Court reviewing its own decision reversing the earlier decision which was in favour of the applicant.

Mr. Msirikale for the 2<sup>nd</sup> respondent informed the Court that, since his client was neither a party nor served with the notice of hearing the application for review, the 2<sup>nd</sup> respondent is wrongly pleaded in this application. As such, Mr. Msirikale was of the view that, he had nothing useful to submit as far as this application is concerned. I will address Mr. Msirikale's concern at a later stage.

Responding to the date when the applicant started to be ill *vis a vis* the medical examination report, Mrs. Tenga reiterated that the problems relating to applicant's illness started 8 months prior to medical examination. As such, the illness did not start on 27/2/2014

as asserted by Mr. Kishaluli but rather all along the applicant was sick and communicated by gestures which inhibited the applicant from availing instructions to the advocate on the further handling of his case.

From the respective submissions of both counsel, it is not disputed that the pertinent issue for determination is whether the applicant has demonstrated good cause to warrant the Court to exercise its judicial discretion under rule 10 which states:-

*"The Court may, upon good cause shown, extend 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 expiration of that time and whether before or after the doing of the act, any reference in these Rules to any such time shall be construed as a reference to that time so extended".*

In **HENRY MUYAGA vs TTCL** Application No. 8 of 2011 (unreported), apart from the Court interpreting judicial discretion to extend time under rule 10 to be unfettered it also said:

*".....in considering an application under the rule, the courts may take into consideration, such factors including the length of delay, the reason for the delay and the degree of prejudice that the respondent may suffer if the application is not granted."*

In **TANGA CEMENT COMPANY LIMITED v JUMANNE D. MASSANGA AND AMOS A. MWALWANDA CIVIL APPLICATION NO. 6 OF 2001** where **NSEKELA JA said** what amounts to good cause includes whether or not the application has been brought promptly, the absence of any valid explanation for the delay and lack of diligence on the part of the applicant. In **VIP ENGINEERING MARKETING LIMITED AND 2 OTHERS vs CITBANK TANZANIA LIMITED**, Consolidated References No. 6, 7 and 8 of 2006 the Court stated that:

*"..... a claim of illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay."*

In view of the stated position of the law this application for extension of time to apply for leave to appeal hinges mainly on two limbs: **One**, the complaint on illegality and **Two**, an account of delay.

Mrs. Tenga submitted that in the intended appeal the applicant seeks to raise a crucial legal point relating to the manner in which the trial court reviewed its own decision which is a ground sufficing to be addressed by the Court. The applicant's complaint on the illegality of the Ruling on review is contained in paragraphs 5 and 7 of his affidavit. The applicant has deposed that, while in Land Case No 228



of 2005 by Demello, J. he was declared the rightful owner, that position was reversed in the review by Mgetta, J. who decided in favour of the 1<sup>st</sup> respondent.

The response of the 1<sup>st</sup> respondent in the affidavit in reply is as follows:-

*"That the contents of paragraph 5, 6 and 7 of the affidavit are admitted, the 1<sup>st</sup> respondent shall state that, the Review was filed as of right, and therefore, nothing procedural and the judgment on Review was very lawful and binding."*

The 1<sup>st</sup> respondent did not make any further clarification on the alleged complaint on illegality be it in the written submissions or at the hearing of the application.

As to the second limb regarding the reasons for the delay, counsel have taken different positions as to whether the applicant has demonstrated sufficient cause to be granted extension of time. Mrs Tenga is of the view that having timely lodged notice to appeal, it is the illness which prevented the applicant to promptly apply for leave to appeal which constitutes a good cause for the delay. According to Mr. Kishaluli, the applicant has not demonstrated good cause for not spelling out what befell him before 27/2/2014 the day when the applicant was subjected to medical examination. Mr. Kishaluli

narrowed down his argument on the unaccounted period between the date of filing the notice of appeal on 7/2/2014 and 21/2/2014 when leave ought to have been sought.

In the case under scrutiny, the trend of events indicates that the applicant was not lying idle or dormant in pursuing the intended appeal. After the impugned Ruling was delivered on 7/2/2014, five days later the applicant lodged a notice of appeal dated 11/2/2014. Also, the applicant sought to be supplied with requisite proceedings and the decision of the impugned decision. However, following the attack of a severe stroke he had no ability to communicate orally or in writing to instruct the advocate on further steps. On this account the applicant delayed to file the application to apply for leave to appeal.

A careful scrutiny of the medical report collectively shows that, on different occasions the applicant attended several hospitals including, **REGENCY MEDICAL CENTRE Ltd**, **TUMAINI COMPREHENSIVE INFIRMARY Ltd** and **SANITAS** Keeping health in Africa. One of the **SANITAS** hospital attendance sheet indicates that the applicant was medically attended on 18/2/2014. This was eleven (11) days after the delivery of the Ruling on review dated 7/2/2014 which tells that the applicant was already ill before the expiry fourteen (14) days period within which to apply for leave to appeal. It is also vivid that, on 19/6/2014 the

applicant was attended at **REGENCY MEDICAL CENTRE**. However, two months later that is on 25/8/2014 the applicant attempted to file an application for leave which was struck out. Furthermore, the **TUMAINI COMPREHENSIVE INFIRMARY Ltd** medical report shows that, on 5/6/2015 they remarked that the applicant's medical condition was not under control. However, after a month and ten days the relentless applicant further lodged another application but leave was refused. Apparently the further delay of beyond 27/2/2014 was not at all contested by the 1<sup>st</sup> respondent. In my view under normal circumstances, for a person who had health problems particularly a severe stroke, the delay was not inordinate. In this regard, the application under scrutiny is distinguishable from what was held in **RATMA V CUMARASAMY AND ANOTHER [1964] 3 All ER 933** whereby the court upheld the dismissal of the appeal and Lord Guest had this to say:

*"The rules of court must, prima facie be obeyed and in order to justify a court extending the time during which some steps in procedure required to be taken, there must be some material on which can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat*

*the purpose of the rules which is to provide time table for litigation."*

As earlier intimated, the applicant exhibited relentless efforts to pursue the intended appeal despite his ill health. The case of **SHEMBILU SHEFAYA VS OMARY ALLY** (supra) cited by the respondent where extension of time to appeal was denied due to failure to elaborate how the illness contributed to the delay to file the appeal, is distinguishable from the application. In the instant application the applicant has ably elaborated the nature of his illness which prevented him from applying for leave to appeal within the required time. As such, the applicant has exhibited valid explanation on the delay.

Even if, there was an attributed negligence on the initial advocate of the applicant to timely lodge an application for leave to appeal, the applicant deserves the grant of enlargement of time to seek leave on the complaint of illegality of the impugned decision which has not been vigorously contested by the 1<sup>st</sup> respondent. The complaint raising possible illegality constitutes good cause whether or not a reasonable explanation has been given to account for the delay. This position was taken by the Court in **VIP ENGINEERING MARKETING LIMITED AND 2 OTHERS vs CITBANK TANZANIA LIMITED** (supra)

I wish to address Mr. Msirikale's concern that his client was wrongly joined in this application as he was not served with the notice of hearing of the application for review. Apparently, as the original record of the High Court on the review proceedings is not before me it is impossible to gauge what actually transpired and who was in attendance at the hearing of the review titled Misc. Application No. 372 of 2015. Therefore, the concern raised by the 2<sup>nd</sup> respondent cannot be remedied in this application but rather in the intended appeal when the entire original record of the High Court will be before the Court.

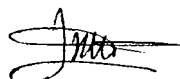
In view of the aforesaid, the applicant has demonstrated good cause warranting the grant of the application. The applicant must lodge an application for leave to appeal not later than fourteen (14) days from the date of delivery of this Ruling.

Parties are ordered to bear their own costs. It is so ordered.

**DATED** at **DAR ES SALAAM** this 30<sup>th</sup> day of June, 2016.

S.E.A. MUGASHA  
**JUSTICE OF APPEAL**

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



P.W Bampikya  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**