IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 7/05/2016

JOSEPH PAUL KYAUKA NJAU ---------- 1st APPLICANT
CATHERINE PAUL KYAUKA NJAU ---------- 2nd APPLICANT

VERSUS

EMANUEL PAUL KYAUKA NJAU ---------- 1st RESPONDENT
HIACINTHA PAUL KYAUKA NJAU ---------- 2nd RESPONDENT

(Application for Extension of time to file application for leave to appeal to the Court of Appeal of Tanzania out of time from the decision of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

Dated the 9th day of March, 2016
in
Probate and Administration Applications N0. 34 of 2010 and 14 of 2014 Consolidated.

RULING

16th & 23rd May 2017

MWANGESI, J.A.:

The applicants herein have lodged their application in this Court by way of notice of motion made under the provisions of Rules 10 and 48 (1) and (2) of the Court of Appeal Rules 2009, (the Rules), moving the Court to extend time within which, they can apply for leave to appeal to the Court of Appeal to challenge the decision of the High Court of Tanzania at

Moshi, that was handed on the 09th day of March 2016. The application has been supported by an affidavit that has been sworn by Joseph Paul Kyauka Njau for himself and on behalf of Catherine Paul Kyauka Njau. The applicants have then filed written submission to amplify their grounds of application. On the other hand, the application has strongly been resisted by the respondents in the affidavit in reply, that has been sworn by Mr. Daniel Haule Ngudungi, who happens to be their counsel. The learned counsel has as well lodged a written submission in reply to the written submission that has been filed by the applicants.

When the application was called on for hearing on the 16th day of May 2017, Mr. Severin Lawena learned counsel, did enter appearance for the applicants, whereas, the respondents had the services of Mr. Daniel Haule Ngudungi, learned counsel. Upon taking the floor to argue on the application, the learned counsel for the applicants has implored the Court to adopt the affidavit, which has been lodged in support of the application, as well as the lodged written submission. It has been his argument that, the applicants were aggrieved by the decision of the High Court of Tanzania at Moshi, in respect of consolidated Probate and Administration Applications No. 34 of 2010 and No. 14 of 2014 that was handed on the

09th March 2016. And because they want to challenge it before this Court, immediately after delivery of the judgment, they did lodge a notice of appeal that is, on the 14th March 2016, and on the same date, they did apply to the Deputy Registrar of the Court, to be supplied with certified copies of the proceedings, judgment and decree.

Nonetheless, despite their close follow ups to the requested documents from the Court, they were not supplied with them untill on the 22nd March 2016. To appreciate what did actually transpire after delivery of the judgment intended to be impugned by the applicants, the affidavit sworn in support of the application, speaks it out through paragraphs 3 to 10, which are hereby reproduced verbatim.

> 3. That judgment in the said High Court of Tanzania at Moshi Probate and Administration Application No. 34/2010 and 14/2014 consolidated, was delivered on the 09th March 2016 before Honorable B. B. Mwingwa Judge.
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> 4. That on 14th March 2016 we applied to the Deputy Registrar, High Court of Tanzania at Moshi for supply of the copy of proceedings, judgment and decree.

5. That on the same date, that is 14th Mach 2016 we issued a notice of appeal against the decision of the High Court of Tanzania at Moshi Probate and Administration Application No. 34/2010 and No. 14/2014.

6. That as from 22nd March 2016 we started following up for the copy of the judgment and decree in the High Court of Tanzania at Moshi Registry.

7. That we were supplied with a copy of the decree on the 22nd March 2016.

8. That having obtained the said copies we approached our Advocate with the said documents and he told us that the time within which to apply for leave to appeal had long expired and that the only way is to apply for extension of time.

9. That on the 19th March 2016, we filed before this Honorable High Court of Tanzania at Moshi Miscellaneous Civil Application No. 26 of 2016 applying for extension of time within which to file our application for leave to appeal to the Court of Appeal of Tanzania.

10. That the said application was heard and on the 18th October 2016, Honorable P. S. Fikirini, Judge, dismissed the application with costs.

In the view of the learned counsel for the applicants, the applicants had managed to advance sound grounds to account as to why they did delay to lodge their application for leave to appeal to the Court of Appeal and as such, there was no justification for the High Court of Tanzania at Moshi, to deny to the applicants the sought extension of time. Mr. Lawena learned counsel for the applicants, has further submitted to the effect that, he is aware of the fact that, there is no requirement of annexing the requested documents in the application for leave to appeal to this Court. Nevertheless, it was pertinent for the applicants to know the nature of the decision, which they intended to appeal against. Regard being to the size of the judgment, which is about twenty five (25) pages, there was no way in which the applicants could have grasped its contents, without possessing it in hand. Under the circumstance, the applicants were compelled to wait to be supplied with the said copies before they could do anything.

To bolster his argument, the leaned counsel for the applicants did refer the Court to its previous decision in the case of **Lyamuya**

Construction Company Ltd. Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported), where the Court did enumerate the basic conditions that have to be put into consideration by the Court before it can get moved to exercise its discretionary powers to extend time as stipulated under Rule 10 of the Court of Appeal Rules. It was the firm belief of the learned counsel for the applicants that, such conditions as listed in the above cited case have been met in the current application by the applicants. The learned counsel did conclude his submission by humbly beseeching this Court to grant the sought extension of time so that, the applicants can do the needful to lessen the serious loss which they are likely to suffer in case their application is refused.

In rebuttal to what has been submitted by his learned brother, Mr. Daniel Ngudungi learned counsel for the respondents, has as well, requested the Court to adopt the affidavit which he has sworn in reply to the affidavit by the applicants, and the written submissions in reply, both of which have been filed herein. While acknowledging the stipulation under the provisions of Rule 10 of the Court of Appeal, that empowers the Court to extend time for any act to be done by a party to proceedings, it has

been his humble submission that, such powers by the Court are exercisable by the Court, where the conditions as stated by the Court in the case of **Lyamuya Construction** (supra), which has been cited by his learned brother in his submission, have been met. In his opinion, his learned brother has miserably failed to establish the existence of the named conditions in the application at hand.

Mr. Ngudungi learned counsel, has submitted that, regard being to the fact that, the applicants were supplied with the copies of proceedings, judgment and decree which they had requested from the Court on the 22nd March 2016, which was just after the elapse of about thirteen days only, from when the judgment intended to be impugned was delivered, they still had about two days in hand before they could be time barred. If they could have been diligent enough, undoubtedly, they could have lodged their application timely if not within a reasonable delay. To the contrary, the applicants remained with the documents until on the 19th April 2016, that is, after the elapse of about twenty five (25) days, when they did lodge their application for extension of time at the High Court of Tanzania at Moshi Registry. Since his learned brother has failed to account for the delay in the said 25 days, Mr. Ngudungi learned counsel, has submitted

that the application has to crumble for failing to meet the conditions in the case of **Lyamuya Construction Company Ltd.** (supra) which was relied upon in his submission. He has thus prayed for dismissal of the application with cost.

What stands for my determination in the light of the pleading regarding the application filed herein as well as the submissions from the learned counsel for both sides, is whether the applicants have managed to disclose sound grounds to move the Court to grant the sought reliefs. It is noted that, they did make their first attempt to seek for the sought reliefs at the High Court, an application that was dismissed on the 18th October 2016. As such, the applicants have come before this Court for the second bite. The provisions of Rule 10 of the Court of Appeal Rules under which the application has been made, bears the following wording:

> *"The Court may,* ***upon good cause being 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 to that time as so extended."*

What is evident in the light of the wording in the above cited provision of law is that, in invoking its discretionary powers, the Court has to be moved by good cause. The subsequent question that does crop is what amounts to a good cause? Unfortunately, the same has never been defined in any provision of law. The only available guideline as to what it means is from case law. Discussing on the discretionary powers of the Court in the case of **Godwin Ndewesi and Karoli Ishengoma Vs Tanzanian Audit Corporation** [1995] TLR 200, this Court did state that:

> *"The rules of the Court must prima facie be obeyed. And in order to justify extending time during which some step in proceeding requires to be taken, there must be some material on which the Court can exercise its discretion."*

Another instance was discussed by this Court in the case of **Regional Manager, Tanroads Kagera Vs Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported), where it had the occasion of deliberating on the term **"sufficient cause"**, which was contained in Rule 8 of the repealed Court of Appeal Rules, 1979, which is similar to **"good cause",** contained in Rule 10 of the current Court of Appeal Rules, 2009. The holding of the Court was to the effect that:

> *"What constitutes "**sufficient cause**" cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."*

The Court did move further by seeking some inspiration from the decision of the House of Lords in the case of **Ratman Vs Cumarasamy and Another** [1964] 3 All ER 933, where it was held thus:

> *"The rules of the court must, prima facie be obeyed, and, in order to justify a court extending the time during which some step in procedure requires to be taken, there must be some material on which the court 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 provide a time – table for the conduct of litigation."*

Other decisions of the Court that endeavored to give guidelines as to what is meant by good cause/sufficient reasons include, **Tanga Cement Company Limited Vs Masanga and Amos A. Mwalwanda** Civil Application No. 6 of 2001 and **Yusufu Same and Another Vs Hadija Yusufu** Civil Appeal No 1 of 2002 (both unreported). In the case of **Lyamuya Construction Company Limited Vs Board of Trustees of**

Young Women's Christian Association of Tanzania (supra), the Court did move a step ahead by formulating some principles, which can be applied by the Court in assessing if indeed, there were good cause/sufficient cause that occasioned the delay to the applicant. The principles read:

(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 are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

While Mr. Lawena learned counsel for the applicants, craved the Court to find that the above named principles did exist in the situation of his clients in the instant application, his learned brother Mr. Ngudungi did bash away such contention by stating that, none of them did exist. On my part, to gauge the authenticity of either argument, there is before me, the affidavit and counter affidavit of the concerned parties for assist ance. To start with, there is no dispute to the fact that, the decision intended to be impugned by the applicants was handed on the 09th day of March 2016, as

acknowledged in paragraph 3 of the affidavit sworn by the applicant. It is as well not disputed that, the copies of proceedings, judgment and decree, were supplied to the applicants on the 22nd March 2016, as per paragraph 7 of the same affidavit. In that regard therefore, it is evident that, the requisite documents requested by the applicants from the Court, were supplied to them within a period of 13 days or so, and therefore, within the period of 14 days in which, the law required them to have timely lodged their application.

According to paragraph 8 of the affidavit of the applicants, it has been stated that, after having received the documents which they had asked from the Court, they did approach their Advocate for the necessary action of lodging the leave. However, the Advocate did tell them that, the time within which to apply for leave to appeal, had long expired and that, the only way available for them, was to apply for extension of time. Unfortunately, the applicants have not disclosed the date on when, they did approach their Advocate. In any case, if such date was indeed after the expiry of the period permitted by the law, then such period did expire, while they were already in possession of those documents. The question to be answered by them is what were they doing with those documents? The

question arises from the fact that, the counsel representing them in this application is the one who represented them during the trial at the High Court. At this juncture, the contention by the learned counsel for the respondents that there was negligence cannot be underemphasized.

From the 22nd March 2016, when the applicants were supplied with the copies of judgment, proceedings and decree, it took them about 28 days up to the 19th April 2016, when the application for extension of time was lodged at the High Court of Tanzania at Moshi. Such period of time ought to have been accounted for by the applicants as per the requirement of law. It is settled law that a party applying for extension of time has to account for each day of delay. See: **Phiri M. K. Mandari and Others Vs Tanzania Ports Authority,** Civil Application No. 84 of 2013 (unreported).

The failure by the applicants to account for more than twenty (20) days delay in lodging the application has disqualified them from availing themselves with any of the first three principles enunciated in the case of **Lyamunga Construction Company** (supra) in that, they have failed to account for the delay which has been inordinate, and as such, they have failed to show diligence, while to the contrary, they have exhibited negligence, apathy and sloppiness. The only remaining principle for their

rescue, is the fourth one that is, as to whether there were any matters of illegality in the decision intended to be impugned, that call for the involvement of this Court. The learned counsel for the applicants has invited this Court to have a glance to the grounds of the intended memorandum of appeal which has been annexed to the affidavit of the applicants, which reveal that, there were some illegalities in the decision of the trial Court that call for deliberation by this Court.

On his part, Mr. Ngudungi learned counsel, has countered the contention of his learned brother by arguing that, there is no any point of law involved as all grounds of appeal are founded on factual issues. In rejoinder, Mr. Lawena learned counsel, has been of the view that, even if his learned brother was to be correct that, the disputed facts in the memorandum of appeal are matters of fact, still this Court being the first appellate Court, is enjoined by the law to consider them. Indeed, where the sought extension of time is aimed at enabling the Court to consider a complained of illegality in the impugned decision, the law is settled that, the same constitutes good cause upon which, the extension of time can be granted. In the case of **The Principal Secretary, Ministry of Defence**

and National Service v. D P Valambhia [1992] TLR 185, this Court did hold that:

> *"When the point at issue is one alleging illegality of the decision being challenged, the Court has the 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 right."*

What I am enjoined to consider in the instant application, is whether there is any point of law involved in the intended memorandum of appeal by the applicants. To appreciate the situation, I feel obligated to reproduce the grounds as contained in the intended memorandum of appeal by the applicants *in extenso* as hereunder:

1. That the Honorable Judge having admitted that, the estates of the late Paul Kyauka Njau were unevenly distributed, erred in law and in fact in holding that, Crescentia, the first wife of the deceased, deserved a lion's share simply because of living with the deceased for a long time without considering the fact that, all wives of the deceased had equal rights to the said properties.
2. That the Honorable trial Judge erred in law and in fact in holding that, the Administrators performed their duty, while there is evidence that some beneficiaries tempered with the

said estates and they failed to take necessary action especially when they knew the said properties tempered with by the said beneficiaries.

3. That the trial Judge erred in law and in fact when he held that, the first respondent duly performed his duty while in fact he was out of the country and that duty was conducted solely by Febronia Paul Kyauka Njau in the absence of the first respondent as a joint Administrator.

My position after having closely observed the grounds of appeal above is that, I share the views of learned counsel Mr. Daniel Ngudungi that, all grounds of appeal are challenging the way in which the Honorable trial Judge, did evaluate the evidence that was placed before him. Such challenge concern factual issues and not legal matters.

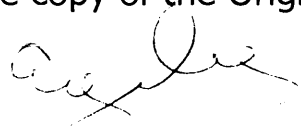
And, with regard to the proposition by Mr. Lawena learned counsel that, even if the grounds of appeal are all in relation to factual issues, still this Court is legally mandated to consider them, because it is a first appellate Court, with due respect, I cannot heed to such assertion. It is my feeling that the learned counsel is trying to mislead the Court either by design or inadvertently. This is from the fact that, what is before the Court for deliberation, is the question of the grounds that made the applicants to fail to lodge their application for leave to appeal within time, and not the

merits of the grounds of appeal. As such, the contention of the learned counsel is untenable. To that end, it is my finding that, the applicants have failed to sufficiently account for their delay in lodging their application. The consequent thereof, is to dismiss the application for want of merit and the respondents will have their costs. Order accordingly.

DATED at **ARUSHA** this 22nd day of May, 2017

S. S. MWANGESI
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL