IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 136 OF 2015

SALUM ISSA SOBO (Legal Representative

of the Late Asha Mohamed)..... APPLICANT

VERSUS

MARIAM MSENGI .....RESPONDENT
(Application for extension of time to institute an application for revision of the decision of the High Court of Tanzania at Dar es Salaam)

(Ndika, J.)

dated the 5th day of December, 2015
in
Land Application No. 73 of 2013

RULING

8th & 20th February 2017
MWAMBEGELE, J.A.:

This is a ruling in respect of an application for extension of time within which to institute an application for revision of the decision of the High Court (Ndika, J. as he then was) in Land Application No. 73 of 2013 pronounced on 05.12.2015. The application has been made by Notice of Motion taken under rule 10 of the Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth "the Rules"). It is supported by an affidavit of Salum Issa Sobo; legal

representative of the late Asha Mohamed and resisted by an affidavit in reply affirmed by Mariam Msengi; the respondent.

The application was argued before me on 08.02.2017 during which the applicant appeared in person and argued the application in person while the respondent, who also appeared in person, had the services of Mr. Fulgence Thomas Massawe, learned counsel. Prior to the hearing of the application, the applicant, on 12.08.2015, filed its written submissions for the application as dictated by the provisions of rule 106 (1) of the Rules. Initially, the respondent did not. However, having sought and obtained leave of this Court to file them out of time, the respondent, who is represented under the Legal Aid Scheme, did file the same on 08.03.2016, well within the time ordered by the Court.

At the hearing, both the applicant and respondent sought to adopt the affidavit and affidavit in reply they earlier filed as well as their respective written submissions which they filed pursuant to the provisions of sub-rule (1) and (8) of 106 of the Rules, respectively.

As can be gleaned from the affidavit in support of the application, and as submitted by the applicant in both oral and written submissions, the main reason for delay has been ascribed by the applicant to the High Court as well as the Court. The applicant deposed that immediately after the ruling sought to be challenged by revision was delivered, he applied for copies of proceedings,

ruling and drawn order for revision purposes. The applicants deposes further that the copies of ruling and drawn order were promptly supplied, save for the copy of proceedings which was supplied to him some three days to the expiry of the limitation of sixty days. He deposes further that he managed to submit the application for revision on 03.02.2015 but due to some intricacies at the registry of this court, the same was admitted on 06.02.2015 and christened Civil Application No. 15 of 2015, when, allegedly, it was already out of time. Having realized that the application would not sail through for being time barred, the applicant decided to withdraw it hence the present application.

The applicant also submitted that the present application was not filed promptly because the withdrawal order in Civil Application No. 15 of 2015 was not supplied to him in time. That he decided to file the present application without the order only to realize that it had been issued well before he decided to file the application without it.

The applicant added that there is an issue of illegality in the ruling intended to be challenged as the provisions of Order XLII rule 1 (a) of the CPC were not complied with as he was allowed to file an application for review provided that he did not file any appeal.

Responding, Mr. Massawe, the learned counsel for the respondent, with some considerable force, resisted the application submitting that the applicant

has not brought to the fore sufficient reasons to grant the order sought. Having adopted the affidavit in reply and the written arguments earlier filed, he submitted that the record has it that Civil Application No. 15 of 2015 was withdrawn for allegedly being out of time while, in the actual fact, it was not. He stated that from 05.12.2014; the date of the ruling intended to be challenged to 06.02.2015; the date of filing of Civil Application No. 15 of 2015 is well within sixty days. In the circumstances, the application having been withdrawn while it was in time, the withdrawal was unreasonable and hence the applicant is precluded from bringing a fresh application, he argued.

The learned counsel also submitted that the record has only the Notice of Withdrawal but lacks the actual order of the Court showing that the application was withdrawn as applied. He therefore argued that, in the absence of the order of this court showing that the application was withdrawn as prayed, there is a danger of having in place multiplicity of applications on the same matter.

The learned counsel for the respondent also submitted that the applicant has not accounted for the delay between 11.02.2015; the date when the notice of withdrawal of Civil Application No. 15 of 2015 was filed and 03.07.2015 when the present application was filed. He underlined that the delay of almost five months has not been accounted for. He also argued that the applicant

exhibited negligence in following up the documents and this cannot amount to sufficient cause for the delay.

Mr. Massawe, learned counsel, fronted another interesting argument to the effect that in the absence of sufficient reasons, the court may grant an extension if there is likelihood of success of the intended application and if there was an illegality in the decision to be challenged. The learned counsel argued that even if the Court grants the application for enlargement of time, the intended application is bound to fail because revision cannot be used as an alternative of an appeal.

In a short rejoinder, the applicant rejoined that Civil Application No. 15 of 2015 was presented for filing on 03.02.2015 but the Registrar could not admit it on that date and instead admitted it on 06.02.2015 after futile attempts of follow-ups on 04.02.2015 and 05.02.2015 and that the application was admitted on 06.02.2015 when it was already out of time hence the decision to have it withdrawn. He concluded that the Court contributed to the delay as well, as it ought to have admitted the application on 03.02.2015 but admitted it on 06.02.2015.

Having summarized the rival arguments by both parties to the present application, I should now be in a position to confront the real question of controversy in the application. This question is: has the applicant supplied the

court with sufficient reason for the delay to grant the extension sought? I should state at the outset that under the provisions of rule 10 of the Rules, this Court has been bestowed with a wide discretion to extend time where the time to perform any act has already expired. Such extension, however, will only be granted if the court is provided by the applicant with sufficient material upon which it (the Court) may exercise such discretion - see: **Mumello v. Bank of Tanzania,** [2006] 1 EA 227 and **Kalunga and Company Advocates v. National Bank of Commerce** [2006] TLR 235. In **Kalunga and Company, Advocates**, a single judge of this Court, grappling with an akin situation, as in the instant case, had this to say:

> *"This court has discretion to extend time but such extension ... can only be done if 'sufficient reason' has been given".*

Admittedly, what amounts to "sufficient reason" has not been defined under the Rules and this, I think, is pregnant with meaning, for, as was held in **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited,** Civil Application No. 96 of 2007 (unreported), extension of time being a matter within the Court's discretion, cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case.

It may not be irrelevant to emphasize here that the "sufficient reasons" referred to in this context must relate to the delay. On this point, I wish to echo what was stated by Lord Guest in the case of **Thamboo Ratnam v. Thamboo Cumarasamy and Another** [1965] 1 W.L.R. 8 at p. 12; [1964] 3 All ER 933 at p. 935 as quoted in **Kalunga and Company, Advocates** (supra):

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

In applications of this nature, the Court considers four relevant in deciding how to exercise the discretion to extend time – one, the length of delay; two, the reasons for the delay; three, whether there is an arguable case and four, the degree of prejudice to the other party if extension is granted – see: **Ngao**

Godwin Losero v. Julius Mwarabu, Civil Application No. 10 of 2015 (unreported) and **Kalunga and Company Advocates** (supra).

Another principle, as rightly submitted by Mr. Massawe, learned counsel, has been added by the somewhat recent jurisprudence of this Court; this is that extension will be granted if there is an issue of illegality in the proceedings of the lower court – see: **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 185, **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007 (unreported), **Kalunga and Company, Advocates** (supra) and **Ngao Godwin Losero** (supra). In **Edward Nyelusye**, a single judge of this Court held that where a point of law at issue is the question of illegality, time will always be extended and leave to appeal to the court of appeal must be granted even where there is an inordinate delay.

So much for the principles of the law relating to applications of this nature. Applying the principles to the case at hand, it is the applicant's contention that the High Court did not supply to it the copy of proceedings in time. This contention has been countered by Mr. Massawe, learned counsel, that it does not depict the truth because the application which was dated 03.02.2015 (but admitted by the registry of the Court on 06.02.2015) comprised the copy complained by the applicant to have been supplied to it out of time. Having perused the record, I find myself in agreement with Mr. Massawe's

contention. The High Court cannot be blamed to have supplied the copy of proceedings out of time. I would have understood if the applicant's complaint was that it (the High Court) did not supply the document in good time. And actually, the applicant's argument at the hearing, impliedly, conceded to this fact when he said that Civil Application No. 15 of 2015 was submitted for filing on 03.02.2015; three days before the expiry of the sixty days' limitation. The applicant does not deny and actually submits that the document was supplied to it three days to expiration of the sixty days' limitation. To allege that the copy of proceedings was supplied to the applicant out of time is therefore a contradiction in terms. There is ample evidence that the copy of proceedings was supplied to the applicant in time and the applicant does not deny this fact. In the premises, I find the applicant's contention that the High Court did not supply the copy of proceedings in time to be devoid of truth.

However, clarifying what he deposed at para 12 of his affidavit, the applicant stated at the hearing that he presented Civil Application No. 15 of 2015 for filing on 03.02.2015; three days before the expiry of the sixty days. He clarified further that the application could not be admitted on that date for several reasons; but basically that the registry officers of the Court were busy with preparations of the Law Day which was held on 04.02.2015 and that efforts to see the Registrar to expedite the process on 03.02.2015, 04.02.2015 and 05.02.2015 proved futile. He managed to see him (the Registrar) and tried to

dialogue with him that he presented the application for filing on 03.02.2015 and asked him to consider that fact but the prayer was not successful. The application was thus admitted on 06.02.2015 when it was already out of time. Knowing that he was out of time, the applicant filed the Notice of Withdrawal on 11.02.2015 so that he could file the present application for extension of time. If what the applicant states is true, and which I think it is, I think the Registrar was quite correct not to admit the application on 03.02.2015 while in fact the same reached him on 06.02.2015. And this is exacerbated by the fact the applicant admits to have paid for the filing fees on 06.02.2015. In the circumstances, the Registrar could not have indicated the date of admission of the application as 03.02.2015 while in fact the documents reached him on 06.02.2015 and the requisite filing fees paid on that date. I only wish to state at this juncture that the applicant brought that application under a certificate of urgency. However, for some reason, mostly perhaps the Law Day preparations, the court could not accord the application the urgency it deserved. The applicant must therefore, in the interest of justice, enjoy a benefit of doubt.

The respondent has raised an alarm on the delay of the time between the date of withdrawal of Civil Application No. 15 of 2015 and the filing of the present application which is about five months, has not been accounted for. To this, the applicant responded that the withdrawal order of the Court was not supplied to him. As already alluded to above, he decided to file the present

application without it only to realize in the process that it was given on 05.03.2015. I have subjected this argument to proper scrutiny it deserves. Admittedly, the applicant has not been explicit in the deposed facts in the affidavit, particularly para 12, but made himself quite clear at the hearing. He stated that after he lodged the Notice of Withdrawal, the Withdrawal Order of this court was not availed to him even after making several follow-ups. No sooner had he decided to file the present application without it then he realized that it had already been issued on 05.03.2015. All considered, I find and hold that what the applicant stated at the hearing falls within the scope and purview of para 12 of the affidavit. I also find and hold that the applicant, on the balance of probabilities, has sufficiently explained away the delay contributed by the registry of the Court which finally led to the withdrawal of Civil Application No. 15 of 2015. I also find and hold that, on a balance of probabilities, the applicant has accounted for the delay between the date of withdrawal of Civil Application No. 15 of 2015 and the date of filing the present application.

It is also the contention of the applicant that there is an issue of illegality to be determined by way of revision. He contends that the High Court did not consider the provisions of Order XLII rule of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 which give a litigant the right to file an application for review provided that he had not preferred an appeal against the decision he seeks to be reviewed. To this, the respondent contends in response that even if

the applicant is granted the extension sought, the intended application is bound to collapse because, just like review, revision is not an alternative of appeal. Without risking going into the merits of the intended application, I think there is need to avail the applicant an opportunity to argue his point in the application he intends to file. After all, I do not see any prejudice that will be occasioned on the part of the respondent if the present application is granted

For the avoidance of doubt I have not dedicated any moment to canvass on Mr. Massawe's three points to the effect that Civil Application No. 15 of 2015 was withdrawn while it was filed in time, that the record does not contain the Withdrawal Order and that the applicant was negligent in following his matter up. The good thing with numbers is that they do not lie. My simple calculations have it that there are more than sixty days between 05.12.2014 when the decision intended to be challenged was pronounced and 06.02.2015 when Civil Application No. 15 of 2015 was filed. On the question of Withdrawal Order not being on record, the court record does not vindicate the learned counsel's contention. The record has an order of this Court (Othman, C.J.) dated 05.03.2015 which marked Civil Application No. 15 of 2015 as withdrawn under the provisions of rule 58 (3) of the Rules. Mr. Massawe's apprehension of fear of the danger of having in place multiplicity of applications on the same matter is therefore misplaced. I also do not find any sloth on the part of the applicant in following his matter up as Mr. Massawe would like me to believe. If anything,

there is ample evidence in the affidavit that the applicant was, and has all along been, vigilant in following his case up.

In the result, I find and hold that the length of delay with which the applicant made the present application is not inordinate and that the reasons for the delay, on the balance of probabilities, have been sufficiently explained away. I also find and hold, as explained above, that there is, somehow, an arguable case and that the respondent will not be prejudiced if the applicant is granted an extension sought. Consequently, I grant the applicant extension to file an application for revision out of time as prayed. The same should be lodged within the statutory limitation period of sixty (60) days from the date when this ruling is pronounced. As the respondent was represented in this matter on legal aid, I make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 13th day of February, 2017.

J. Mwambegele
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL