

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 6 OF 2016

ARUNABEN CHAGGAN MISTRY APPLICANT

VERSUS

1. NAUSHAD MOHAMED HUSSEIN
2. MOHAMED RAZA MOHAMED HUSSEIN
3. THE ATTORNEY GENERAL
4. ASSISTANT REGISTRAR OF TITLES MOSHI } RESPONDENTS

(Application from the Ruling and Order of the High Court of Tanzania
at Arusha)

(Moshi, J.)

dated the 30th day of October, 2014

in

Misc. Land Application No. 104 of 2014

.....

RULING

11th & 20th October, 2016

MJASIRI, J.A.:

Before me is an application by Notice of Motion brought under Rules 10 and 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Court Rules) The order being sought for is:-

- 1. That time within which to file an application for leave to appeal to this court be extended.*

The application is supported by the affidavit of Mr. John Faustin Materu, learned advocate.

At the hearing of the application the applicant was represented by Mr. John Materu, learned advocate. The 1st and 2nd respondents were represented by Mr. Loomu Ojare learned advocate while the 3rd and 4th respondents had the services of Mr. Innocent Njau, learned Senior State Attorney, assisted by Mr. Fortunatus Muhalila, learned State Attorney.

A notice of preliminary objection was filed by the learned Senior State Attorney on October 7, 2016, however, upon further consideration, the preliminary objection was withdrawn and the parties therefore proceeded on the main application. The applicant seeks to challenge the decision of the High Court in Land Case No. 8 of 2009 dated August 24, 2012. The applicant has already been granted extension of time by the High Court to file a notice of appeal out of time.

According to Mr. Materu, the background leading to the present application is as follows:- The application for leave filed in the High Court was dismissed for being time barred (Misc. Land Application No. 104 of 2014). The applicant then proceeded to file Land Review No. 7 of 2014 seeking for the dismissal order to be substituted by an order striking out the application. This application for review was also dismissed. The

applicant then sought for a revision of the order of the High Court in Land Review No. 7 of 2014 (Application No. 40 of 2015). The application for revision was dismissed by the Court of Appeal on February 16, 2016 as the applicant was supposed to file an application for leave to this Court following the refusal for leave by the High Court and not an application for revision.

Mr. Materu submitted that when the application for revision was dismissed by the Court the time within which to file an application for leave had lapsed. Rule 45 of the Court Rules provides that an application for leave to the Court of Appeal by way of a second bite has to be done within a period of 14 days.

Mr. Materu stated that following the guidance by the Court of Appeal that the application for leave for a second bite had to be filed to the Court, the application for extension of time was filed within two days. The decision of the Court striking out the application for revision was made on February 16, 2016 and the instant application was made on February 18, 2016.

Mr. Materu argued that he has been in and out of court in search of justice and there is good cause for the delay. He relied on the case of **Henry Leornad Maeda and Another v. Ms. John Anaeli Mongi and Another**, Civil Application No. 31 of 2013 (unreported), at page 19 where the criteria laid down in **Henry Mugaya v. Tanzania Telecommunication Company Ltd**, Civil Application No. 8 of 2011 was followed, that is the reason for delay, the degree of prejudice to the respondents and the chances of success of the intended appeal.

On the reason for delay, Mr. Materu submitted that the reason for the delay was that he was pursuing other applications in Court.

On the degree of prejudice to the respondents, he stated that the respondents will not be prejudiced in any way as the applicant was and is still in occupation of the property in dispute. The notice of appeal is still valid and once the appellant is granted leave the matter would be finally disposed.

On the chances of success on the intended appeal, Mr. Materu submitted that one of the intended grounds of appeal (Annex A11 to the applicant's affidavit) is whether or not there was fraud and/or

misrepresentation and whether the transfer was valid. He contended that the judgment of the High Court is problematic and tainted with illegality. He submitted that *illegality* has been considered as one of the grounds for extension of time. He made reference to **Maryam Idd (as Administratrix of the estate of the late Mbaraka Omari) v. Abdulrazack Omary Laizer and Another**, Civil Application No. 29 of 2014, (unreported). He also made reference to **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014 (unreported).

Mr. Ojare on his part strongly opposed the application. He submitted that an application for leave was supposed to be filed to the Court of Appeal within 14 days from the decision of the High Court refusing leave. However this was done after a period of two (2) years without seeking extension of time.

In 2014 the applicant filed an application for leave (second) bite before the Court of Appeal but the same was withdrawn on January 21, 2016 under Rule 58 (3) of the Court Rules. The basis of the withdrawal was that the applicant no longer intended to pursue the application.

Mr. Ojare argued that the application for extension of time was an abuse of the court process. There is no good cause shown by the applicant to justify the extension of time. The different advocates who had the conduct of this matter had been taking the wrong steps in pursuing this matter. Even if there was negligence of counsel, it does not establish good cause.

Mr. Ojare submitted further that contrary to the submissions made by Mr. Materu, the intended grounds of appeal makes no reference to fraud and no issue of illegality has been raised. The issue of illegality is not raised in the affidavit in support of the application. According to Mr. Ojare, Mr. Materu is simply going on a fishing expedition. The issues of illegality and misrepresentation are a mere after thought.

Mr. Ojare argued that the delay of the applicant is for a period of four years and it is so inordinate and cannot be allowed. He stated that it does not suffice that the applicant has been in and out of court. The applicant should not be allowed to drag the respondent in and out of court due to his negligence. Mr. Ojare relied on the case **Bazil Gerad Masha and Three Others v. Ally Salimu**, Civil Application No. 3 of 2012

(unreported). He indicated that litigation has to come to an end and cannot be open ended, otherwise the respondent would be prejudiced. He made reference to **Stephen Masato Wasira v. Joseph Sinde Warioba and the Attorney General** (1999) TLR 334.

Mr. Ojare reiterated that the period of delay was so inordinate and the applicant has completely failed to account for each day of the delay. He submitted that the points of law relied upon by the applicant in the intended appeal are ordinary points of law. He made reference to the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** (2000) TLR 288.

Mr. Muhalila on his part joined hands with Mr. Ojare and entirely agreed with his submissions. He stated that Rule 10 of the Court Rules is very clear. The applicant is required to show good cause. The suit in the High Court was finalized in 2012. It is now almost four (4) years. This Court has already stated that the negligence of counsel is no excuse. He cited the case of **William Shija v. Fortunatus Masha** (1997) TLR 213 and **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015 (unreported). The law requires the applicant to account

for every single day of the delay. He stated that the counsel for the applicant failed to account for the delay.

I would like to thank counsel for their industry and for the various authorities filed in support of their arguments. While I will not make reference to all of them, I have seriously taken them into consideration.

The main issue for consideration and determination is whether or not good cause has been established.

Rule 10 of the Court Rules provides as follows:-

"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 the expiration of that time and whether before or after doing of the act; any reference in these Rules to any such time shall be construed as reference to that time as so extended."

Rule 10 of the Court Rules confers the Court with very wide discretionary powers to grant extension of time. However it is upon a party to provide the relevant material in order for the Court to exercise its

discretion. See **Ratnam v. Kumarasamy** (1964) 3 AII ER 933 where it was stated thus:-

"The rules of 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 laws were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide for a time table for the conduct of litigation."

A close and careful scrutiny of the sequence of events as narrated in the applicant's notice of motion has demonstrated that it took the applicant nearly two (2) years before taking action. Serious action was taken from 2014, however as it is evident from the record, the applicant was busy making wrong applications contrary to the requirements under the law.

Following the refusal of leave by the High Court, the next course of action would have been to go for a second bite before the Court of Appeal. However various other applications were made contrary to the

requirements under the Rules. It is true that the applicant was busy in Court, but was not on course.

Given the circumstances I would entirely agree with the submissions made by Mr. Ojare and Mr. Muhalila that the delay was inordinate and no justification was made for the withdrawal of the application for extension of time (second bite) to this Court.

However the applicant has raised the issue of fraud, misrepresentation and illegality. Reference to this is made in the intended memorandum of Appeal, annexed to the applicant's affidavit, where it is stated thus:-

- 1. That the learned trial Judge erred in law and in fact in holding that there was no forgery in respect of the signatures of the appellant and her late son one Alkesh Chaggan Mistry.*
- 2. That, the learned High Court Judge erred in law and in fact in holding that the consent of the Land Officer was properly procured.*

The legal position is settled. When there is a an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered. In the case of **The Principal**

Secretary, Ministry of Defence and National Service v. Devram

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 to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

This position was reiterated in **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) it was stated as follows:-

"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" within the meaning of Rule 8 of the Rules for extending time."

In **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014, it was stated thus:-

"With regard to the last point, contentions as to illegality or otherwise of the challenged decision have now been accepted as a good cause for extension of time."

See – **CRDB Bank Limited v. George Kilindu and Another**, Civil Application No. 87 of 2009 (unreported).

In view of the fact that there is an alleged illegality, I find it appropriate under the circumstances to allow the application on the basis of this point so that the issue may be considered.

In the result the application is hereby granted. The application for leave to appeal to be filed within fourteen (14) days from the date of this Ruling. I make no order as to costs.

Order accordingly.

DATED at **ARUSHA** this 18th day of October, 2016.

S. MJASIRI
JUSTICE OF APPEAL

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




B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL