IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 94/08 OF 2017

1. **OMARY ALLY NYAMALEGE(As the Administrator of the estate of the late Seleman Ally Nyamalege)**
2. **KHADIJA KARUME**
3. **MTUMWA FARAHANI**

..... APPLICANTS

VERSUS

MWANZA ENGINEERING WORKS .....RESPONDENT

(Application for extension of time within which to apply for leave to appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Nchalla, J.)

dated the 16th day of November, 2001
in
Consolidated Civil Appeals No. 48, 50 and 51 of 1997

.....

RULING

28th September & 3rd October, 2018.

NDIKA, J.A.:

On 1st September, 2016 the applicants took out a Notice of Motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) praying for extension of time within which to apply for leave to appeal to this Court against the judgment of the High Court of Tanzania at Mwanza (Nchalla, J.) dated 16th November, 2001 in Consolidated Civil Appeals No. 48, 50 and 51 of 1997. In support of the application, each applicant deposed and lodged a separate affidavit. The application was strongly

opposed by the respondent on whose behalf an affidavit in reply made by its Managing Director, Mr. Gian Kalsi Singh, was filed.

The factual background to this application and the justification for it are contained in the Notice of Motion and the three supporting affidavits. Briefly, the applicants were the unsuccessful appellants in Consolidated Civil Appeals No. 48, 50 and 51 of 1997 before the High Court of Tanzania at Mwanza from the decision of the trial District Court at Mwanza in Civil Case No. 18 of 1996. The trial District Court had entered judgment for the respondent against the applicants who were adjudged trespassers upon a piece oflanded property described as Plot No. 238, Kenyatta Road Industrial Area, Mwanza Municipality. The trial court had further orderedthe applicants to demolish at their own costs their respective structures that they had erected on the suit property.

Having had their appeals dismissed by the High Court on 16th November, 2001, the applicants duly lodged a joint Notice of Appeal on 22nd November, 2001. Subsequently, they applied to the High Court for leave to appeal vide Miscellaneous Civil Application No. 245 of 2001. That application came to naught as the court (Masanche, J.) dismissed it on 28th September, 2004 on the reason that it was time-barred. Afterwards, the

applicants re-approached the High Court yet again applying for leave to appeal (Miscellaneous Civil Application No. 141 of 2004). In its decision dated 24th September, 2013, the High Court (Mwangesi, J. as he then was) struck out the aforesaid application on the reason that it was misconceived. Mwangesi, J. (as he then was) took the position that following the "dismissal" by Masanche, J. of the earlier application, the applicants had two options:

> *"... either to file an application for extension of time in [the High] Court to lodge their application for leave or, within fourteen days of the refusal by [theHigh] Court, to file their application for leave at the Court of Appeal in terms of the provision of Rule 45 (b) of the Court of Appeal Rules. Unfortunately, on their part, none of those options got utilized and thereby, letting their matter to turn completely stale."*

As it turned out, it was only the first applicant who took and acted on the above counsel by the High Court. While he approached this Court vide Civil Application No. 16 of 2015 applying for extension of time to apply for leave, the second and third applicants took no action. Nonetheless, like the previous applications, Civil Application No. 16 of 2015 bore no fruit; it was

marked withdrawn on 2nd December, 2015. Undeterred, the applicants, then, lodged the present joint application on 1st September, 2016, which was obviously ten months after the withdrawal of the first applicant's last quest for leave to appeal.

At the hearing of the application, the applicants appeared in person, unrepresented. On the adversary side, Mr. Gian Kalsi Singh, the Managing Director, appeared.

Having adopted the Notice of Motion, the supporting affidavits and the written submissions in support of the application, the first applicant urged me to grant the application on the grounds that there was good cause for condonation of the delay and that the decision of the High Court intended to be challenged was fraught with an illegality. The second and third applicants had nothing to say; they simply supported the submissions of their co-applicant.

In the supporting affidavits and the written submissions in support of the application, the delay is attributed to the following: first, the decision by Masanche, J. dismissing their pursuit for leave was so befuddling that they did not know the next course to take in their pursuit of appealing to the Court of Appeal. Secondly, the death of the original first applicant

(Seleman Ally Nyamalege) on 1st January, 2010 led to the delay as they had to wait for the appointment of an administrator of his estate. Thirdly, their previous advocate, a Mr. Muna,died suddenly following a road accident and that his demise interrupted their pursuit for justice because being lay persons they did not know how to move about the legal thicket of procedure.

On the other hand, the respondent, having adopted the affidavit in reply along with the opposing written submissions, argued that the application failed to disclose any good cause for the delay and that it ought to be dismissed with costs.

Before dealing with the substance of this application in the light of the competing submissions, it bears restating that although the Court's power for extending time under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. Even though it may not be possible to lay down an invariable definition of the phrase "good cause" so as to guide the exercise of the Court's discretion under Rule 10, the Court invariably considersfactors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondentstands to suffer if time is extended, whether the applicant was

diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: (see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001;**Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014). See also**The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

I have given due consideration to all the material on the record in the light of the submissions of the parties. The question that I have to determine is whether there is a good cause for condonation of the delay.

It is common ground that the applicants duly lodged their joint Notice of Appeal on 22nd November, 2001 following the dismissal of their consolidated appeals by the High Court on 16th November, 2001.

Subsequently, they duly applied to the High Court for leave to appeal vide Miscellaneous Civil Application No. 245 of 2001 but that application was dismissed by the court (Masanche, J.) on 28th September, 2004 on the reason that it was time-barred. Afterwards, the applicants re-approached the High Court yet again applying for leave to appeal (Miscellaneous Civil Application No. 141 of 2004) but that effort proved futile as it was struck out, rightly so in my view, by the High Court (Mwangesi, J. as he then was) on 24th September, 2013 on the reason that it was misconceived.

Admittedly, the delay between the date when the High Court's decision sought to be appealed against was handed down (that is, 16th November, 2001) and the termination of the application for leave by the High Court (Mwangesi, J. as he then was) on 24th September, 2013 could be held to constitute an excusable delay.For that delay arose from the time they spent in the corridors of the High Court in a pursuit of justice in good faith.Nonetheless, I find justification in the respondent's criticism of the applicants' explanation of the delay in respect of the period after 24th September, 2013. As already pointed out, while the second and third applicants took no action from that time until 1st September, 2016 when they lodged this matter jointly with the first applicant, the first applicant waited for over two years before he lodged the ill-fated Civil Application

No. 16 of 2015 in this Court. The explanation offered for the delay in this period is plainly hollow and unacceptable; it is no less than a smokescreen for inaction. I will demonstrate my position herein below.

For a start, if the original first applicant (Seleman Ally Nyamalege) passed away on 1st January, 2010 during the pendency of Miscellaneous Civil Application No. 141 of 2004, I do not see his passing to be a cause of delay especially because Omary Ally Nyamalege, the administrator of the deceased's estate was appointed by the Nyamagana Urban Primary Court about four months later (that is 31st May, 2010) as evidenced by the letter of appointment annexed to the affidavit of the first applicant as Annexure A. It is my firm view that the death of Seleman Ally Nyamalege and the process for the appointment of the administrator of his estate had absolutely no bearing on the applicants' delay in taking action for pushing forward their quest to appeal. Likewise, the sudden passing of the applicants' previous advocate, Mr. Muna, on an unmentioned date in 2015 offers no explanation why the applicants took no prompt action to pursue their intended appeal after Miscellaneous Civil Application No. 141 of 2004 was struck out on 24th September, 2013. It seems to me that by claiming that in the aftermath of Mr. Muna's death the applicants could not navigate their way through the maze of legal procedure, they are necessarily citing

ignorance of law as the cause of the delay involved. But, it has been held many times without number that ignorance of law has never been accepted as a sufficient or good cause for extension of time – see, for example, **Charles Machota Salugi v. Republic**, MZA Criminal Application No. 3 of 2011 (unreported).If they could not act promptly without legal representation, I wonder why they did not engage another advocate in the place of their departed counsel. I would add that even though the first applicant went ahead on his own and pursued the matter to this Court vide Civil Application No. 16 of 2015, he dawdled after that matter was marked withdrawn on 2nd December, 2015 for ten months until 1st September, 2016 when he lodged this matter.

On the whole, the period between 24th September, 2013 and 1st September, 2016 is, in my view, not fully accounted for. There is no denying that the delay involved was so inordinate. It is settled that in an application for enlargement of time, the applicant has to account for every day of the delay: see, for example, the unreported decisions of this Court in **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; **Bariki Israel v.Republic**, Criminal Application No. 4 of 2011; and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014. In the circumstances,

I reject the applicants' explanation of the delayinvolved and hold them to have failed to account for each and every day of the delay.

The above finding takes me to the second limb of the justification for the application that time be extended on the ground that the impugned decision of the High Court dated 16th November 2001 is vitiatedby illegalities. Unfortunately, other than alleging in the Notice of Motion generally that the said decision is fraught with illegalities, the applicants shied away from pointing out specifically the illegalities they are complaining about.

I wish to remark, at this point, that it is settled jurisprudence of the Court that where a point of law involved in the intended appeal is a claim of the illegality of the impugned decision, that in and of itself constitutes a good cause for the Court to extend the limitation period involved. The earliest decision of the Court on this point was **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185. It held, at page 189, as follows:

> *"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of*

rule 8 of the Rules [now rule 10 of the New Rules] for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law."

The above position was re-emphasized in **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) as follows:

"We have already accepted it as established law in this country that where the point of law at issue is illegality or otherwise of the decision being challenged, that by itself constitutes 'sufficient reason' within the meaning of rule 8 of the Rules [rule 10 of the New Rules] for extending time.... As the point of law at issue in these proceedings is the illegality or otherwise of the decision of the High Court annulling the respondent's debenture with Tri-telecommunications (Tanzania) Ltd, then this

point constitutes 'sufficient reason' ... for extending the time to file a notice of appeal and applying for leave to appeal. This is notwithstanding the fact that the respondent brought the applications very belatedly ..."

More recently, in **Lyamuya Construction Company Limited** (*supra*), a single Justice of the Court elaborated that:

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that ***such point of law must be that 'of sufficient importance' and,I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."*** [Emphasis added]

I subscribe, unreservedly, to the above position.

Applying the above settled position to the instant application, I have no difficulty in holding that the applicants' contention that the decision sought to be challenged is fraught with illegalities is nothing but an unsubstantiated general complaint. Without the details of the alleged illegalities, it is impossible to determine whether the said illegalities are apparent on the face of the record and that they are of sufficient importance to merit the attention of this Court. I would, therefore, reject this argument.

In the upshot, it is my finding that this matter discloses no good cause for the Court to exercise its powers to enlarge time. Accordingly, I dismiss this application in its entirety with costs.

DATED at **MWANZA** this 2nd day of October, 2018.

G. A. M. NDIKA
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL