IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 28/17/2017

TUMSIFU KIMARO (The Administrator of the Estate of the Late ELIAMINI KIMARO) ..... APPLICANT

VERSUS

MOHAMED MSHINDO ..... RESPONDENT

(Application for extension of time within which to file revision from the proceedings and order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Ngwala, J.)

dated the 10th day of May, 2011
in
Land Appeal No. 56 of 2008

.....

RULING

1st June & 25th July 2018

NDIKA, J.A.:

By a notice of motion made under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), Tumsifu Kimaro, acting as the administrator of the Estate of the Late Eliamini Kimaro (the applicant) prays against Mohamed Mshindo (the respondent) for extension of time within which to apply for revision of the proceedings and order of the High Court of Tanzania, Land Division at Dar es Salaam (Ngwala, J.) in Land

Appeal No. 56 of 2008. The application is supported by an affidavit deposed by the applicant. The respondent filed no affidavit in reply.

The background to this application and the justification for it are contained in the notice of motion and the supporting affidavit. Briefly, the respondent had appealed to the High Court of Tanzania, Land Division at Dar es Salaam in Land Appeal No. 56 of 2008 against Eliamini Kimaro and two other persons to challenge the judgment and decree of the District Land and Housing Tribunal of Kinondoni District in Land Application No. 456 of 2006. As it turned out, the appeal was heard *ex parte* as the other parties defaulted appearance. By its judgment dated 18th December 2008, the High Court (Ngwala, J.) allowed the appeal and set aside the District Tribunal's decision. By then, the said Eliamini Kimaro had reportedly passed away and was allegedly not served with any notice of the hearing before the High Court.

Subsequently, the present applicant, acting as the administrator of the Estate of the Late Eliamini Kimaro, applied to the High Court for leave to join the proceedings in the place of the deceased and for an order setting aside the *ex parte* judgment of the Court. That application came to

naught as the Court (Ngwala, J.) dismissed it with costs on 10th May 2011 on the ground that it was time-barred. Aggrieved by that decision, the applicant lodged this application on 17th January 2017 for condonation of delay so as to lodge revision proceedings.

At the hearing before me, Mr. Michael Mwambeta, learned counsel, represented the applicant while the respondent appeared in person, unrepresented.

Having adopted the notice of motion, the supporting affidavit and the written submissions in support of the application, Mr. Mwambeta urged that the extension of time sought be granted essentially on two grounds: first, he contended that the delay to file the intended revision was caused by improper handling of the matter by the applicant's previous advocates upon whom he relied for their professional services. Secondly, he claimed that the impugned decision of the High Court is fraught with apparent illegalities. In elaboration, Mr. Mwambeta bemoaned that the High Court denied and abrogated the applicant's right to be heard by rejecting his plea to join the proceedings as the legal representative of the deceased's estate. He further argued that the presiding judge, having dealt with both

the appeal and the application for setting aside the *ex parte* judgment, was plainly biased against the applicant. It was his strong view that the judge erroneously dismissed the application instead of striking it out if at all it was time-barred. Concluding that these illegalities merit the attention of this Court by way of revision, Mr. Mwambeta urged that the application be granted to allow the Court to hear the parties and inquire into the said illegalities.

In his reply, the respondent adopted his written submissions in opposition to the application. In essence, his reply was twofold: first, he contended that the claim that the applicant's previous advocates improperly handled his intended quest for revision is unacceptable; it should be rejected because it seeks to front incompetence as a ground for condonation of delay. Secondly, he argued the applicant failed to demonstrate that impugned decision of the High Court was illegal on the face of it. He strongly supported the dismissal by the High Court on the ground that the matter was plainly time-barred.

Before dealing with the substance of this application in light of the rival submissions, I find it apposite to restate 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. Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands 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; **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014; **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).

Having considered all the material on the record in light of the submissions of the parties, I find justification for the respondent's criticism of the applicant's quest for extension of time. First and foremost, I recall that in his first limb of his plea for condonation of delay, the applicant bewailed the treatment he received from his previous advocates and cast the blame to them for mishandling his pursuit of justice. Upon reflection, this claim is neither elaborate nor credible. Apart from being a casual and wholesale excuse blaming unnamed "previous advocates", it offers no specific explanation that fully accounts for the whole period of delay extending over almost six years between 10th May 2011 when the impugned order of the High Court was made and 17th January 2017 when the applicant lodged this application. There is no denying that this period of delay 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**

applicant's blanket excuse of delay and hold him to have failed to account for each day of delay.

I now deal with 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 10th May 2011 is tainted with illegalities. As stated earlier, the alleged illegalities are that the High Court denied and abrogated the applicant's right to be heard by rejecting his plea to join the proceedings as the legal representative of the deceased's estate; that the presiding judge, having dealt with both the appeal and the application for setting aside the *ex parte* judgment, was plainly biased against the applicant; and that the judge erroneously dismissed the application instead of striking it out even if it was time-barred.

I would observe, at first, 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 good cause for the Court to extend the limitation period. 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 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 is 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 wholly subscribe to the above position.

Applying the above settled position to the instant case, the main issue to be decided is whether the application discloses illegalities manifest on the record and that they raise points of law of sufficient importance. In dealing with this question, I carefully examined the entire record particularly the impugned decisions of the trial tribunal and the High Court in the light of the competing submissions of the parties.

In my considered view, none of the alleged illegalities is apparent on the record. In order to demonstrate my position, I find it instructive to reproduce the relevant part of the High Court's reasoning (at page 3 of the typed ruling) by which the Court dismissed the applicant's quest for setting aside the *ex parte* judgment and joining the administrator of the estate in the place of the deceased. It reads thus:

"Item 5 of Part III to (sic) the Schedule of (sic) the Act provides the period [of limitation] to be thirty days. ***Therefore, it is my finding that this application was fixed (sic) out of the prescribed time.*** *Moreover, the* ***prayers to join Tumsifu Kimaro as the respondent hold no merits because the application to set aside the ex parte judgment cannot stand.*** *"*[Emphasis added]

I have supplied emphasis to the text above to underline that the High Court dismissed the application for setting aside the *ex parte* judgment on the ground that it was time-barred and, consequently, the prayers for the legal representative to be joined as a party could not stand as obviously the proceedings before that Court had been determined finally and conclusively. In the circumstances, the accusation that the Court violated the applicant's right to be heard is plainly untenable. I cannot help but wonder why the applicant remains insistent to join the proceedings before the High Court, which had been conclusively terminated upon the Court rendering its decision on 10th May 2011. Similarly, the complaint that the learned presiding judge was biased is hollow; it is unsupported by the record. Besides, it would be farfetched to infer bias solely on the ground that the learned judge dealt with both the appeal and the application, for

there is no law barring a judge from determining an application for setting aside his or her own *ex parte* judgment. Finally, it seems nothing but fanciful to label the dismissal of the application as illegal. The High Court, having been satisfied that the application was time-barred in terms of Item 5 of Part III of the Schedule to the Law of Limitation Act, Cap. 89 RE 2002, was enjoined by the express provisions of section 3 of that law to dismiss the said proceedings. With respect to Mr. Mwambeta, the Court had no option to strike out that application.

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 **DAR ES SALAAM** this 25th day of July, 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