

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 68/17 OF 2018**

**FARIDA F. MBARAK ..... 1<sup>ST</sup> APPLICANT**

**FARID AHMED MBARAKI ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**DOMINA KAGARUKI ..... 1<sup>ST</sup> RESPONDENT**

**TANZANIA BUILDING AGENCY ..... 2<sup>ND</sup> RESPONDENT**

**THE COMMISSIONER FOR LANDS ..... 3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**ELIUS MWAKALINGA ..... 5<sup>TH</sup> RESPONDENT**

**(Application for Extension of time to file an application for review of the Judgment  
of this Court**

**(Mjasiri, Mugasha, And Mwangesi, JJA's)**

**Dated 19<sup>th</sup> day of June, 2017**

**In**

**Civil Appeal No. 60 of 2016**

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**RULING**

**30<sup>th</sup> Oct. 2018 & 22 May, 2019**

**MUSSA, J.A.**

The applicants seek extension of time within which to lodge an application for the review of the decision of this Court (Mjasiri, Mugasha and Mwangesi, JJA) dated the 13<sup>th</sup> June, 2017 in Civil Appeal No. 60 of

2016. It is, perhaps, noteworthy that this is not the first time the applicants make a quest towards the review of the referred Civil Appeal No. 60 of 2016. In an earlier Civil Application No. 359/17 of 2017, the applicants sought a review of the decision but, as it turned out, on the 2<sup>nd</sup> March, 2018 their application was struck out for non-citation of the enabling provision of the law (Mjasiri, Mugasha and Lila, JJA), hence the present quest.

The application is by way of a Notice of Motion which is predicated under the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit of Mr. Richard Karumuna Rweyongeza who happens to be one of the learned Advocates for the applicants.

The application has been resisted by the first respondent through an affidavit in reply sworn by Mr. Thomas Eustace Rwebangira, who happens to be her advocate. The second, third and fourth respondents have just as well resisted the application through an affidavit sworn by a learned State Attorney, namely, Mr. Hangi Matekeleza Chang'a. It is noteworthy that the

fifth respondent did not oppose the application and indicated that much through his counsel at the commencement of the hearing.

Through their respective learned counsel, all the parties, save for the fifth respondent have enjoined written submissions either in support or to counter the application.

When the application was placed before me for hearing, the applicant were represented by Mr. Rosan Mbwambo, learned Advocate. The first respondent was represented by two learned Advocates, namely, Messrs Eustace Rwebangira and Joseph Rutabingwa. As I have already hinted, the second, third and fourth respondents had the services of Mr. Hangi Chang'a, learned State Attorney. The fifth respondent had the services of two learned Advocates, namely, Messrs Gasper Nyika and Fabian Karoli.

In support of the application, Mr. Mbwambo commenced his address by fully adopting the Notice of Motion as well as the affidavit in support thereof. The learned counsel for the applicant also brought to my attention the applicant's written submissions as well as his list of authorities desired to be relied upon which he similarly adopted. Having adopted the referred documents, Mr. Mbwambo informed the Court that he

had nothing of material substance to add and urged me to allow the application.

In their written submissions, the applicants claim that they have demonstrated in their supporting affidavit that they have been diligently and actively pursuing their rights in court ever since the decision desired to be reviewed was delivered on the 13<sup>th</sup> June, 2017. According to them, they, for instance, timely filed the Civil Application No. 359/17 of 2017 for review only to be struck out for non-citation of the enabling provisions of the law on the 2<sup>nd</sup> March 2018. Thereafter, five days later, on 7<sup>th</sup> March, 2018 they lodged the application at hand. Furthermore, in paragraphs 11 and 12 of their written submissions the applicants stated thus:-

*"11. As pointed earlier the Court was moved to strike out Civil Application No, 359/17 of 2017 on the basis of the decision in the case of Commissioner General, **TRA vs Pan African Energy (T) Ltd**, Civil Application No. 206 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported). This decision was handed down on the 29<sup>th</sup> May, 2017 while the application for review Annexure FF2, was filed in August, 2017. Hardly three months later. As unreported as it is, it did*

*not come to the attention of the public including the Applicants before they filed their application for review.*

*12. It is therefore, evident that the Applicant's application for review, was caught up by a newly developed principle of law which was unfortunately, not in a law report and thus could not be readily and immediately accessed. The non-citation of the section was therefore, not as result of any inaction nor negligent (sic) on the part of the Applicants and their lawyers. This we submit is a sufficient reason warranting. This Court to exercise its discretion and grant the extension..."*

In addition, the applicants finally claim that there are serious issues of law in the judgment of the Court which is sought to be reviewed. They, for instance, intimate that the Court overlooked the need to give the applicants a chance to be heard on some of the key issues in the case; and that the Court erroneously relied upon a document (not disclosed) not tendered and admitted as evidence at the trial. With respect to the alleged illegalities, the applicants conclusively submitted that the same are alone sufficient cause for granting the requested extension of time.

To buttress their contentions, the applicants referred to me one reported decision of the Court - viz- **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] TLR 182. In similar vein, they also sought reliance on the unreported Civil Application No. 206 of 2016 – **Commissioner General, TRA vs Pan African Energy (T) Ltd** . As I have hinted upon, Mr. Nyika for the fifth respondent did not oppose the application and fully endorsed the applicants Notice of Motion, the supporting affidavit, as well as the written submissions.

The application was, however, strenuously resisted by the first respondent. Mr. Rwebangira who took the floor on her behalf, commenced his submissions by fully adopting his affidavit in reply, his client's written submissions as well as the list of authorities desired to be relied upon.

To begin with her written submissions, the first respondent faults the applicants for not disclosing the grounds upon which they seek the requested extension in both the Notice of Motion and the supporting affidavit. Expounding the contention, the first respondent submits that, of the 12 paragraphs deponed in the supporting affidavit of the applicants, paragraphs 1 to 10 are wholly concerned with the telling of a history or

background befallen by the applicants which led to the striking out of their application for review. Paragraph 12, she further contended, simply unnecessarily refers to the Notice of Motion without relating any grounds or reason for the delay. It is only through paragraph 11 of the affidavit that the applicants apparently seek to justify the application for being filed "*without undue delay*". The same is the case with the Notice of Motion which, according to the respondent, does not disclose any good cause to justify the application.

The first respondent goes on to submit that, even in their written submissions, the applicants mainly address the historical background of the matter which has canvassed in paragraphs 1 to 7 of the submissions. According to the first respondent in the subsequent paragraphs, the applicants raise three grounds upon which the quest for extension is predicated. **First**, the applicants contend that they were throughout diligent and that there was no inaction or negligence on their part in pursuing the application. **Second**, the applicants further contend that their application for review was struck out on account of being caught up by a newly developed principle of law which was not easily accessible and; **third**, the applicants finally allege that the decision sought to be reviewed

is fraught by the apparent illegalities which are worth a consideration by the court. Addressing these grounds, the first respondent categorically stated that the same are neither stated in the Notice of Motion nor the accompanying affidavit.

In this regard, the first respondent contends that the raised grounds ought to have been demonstrated through factual evidence by way of affidavit and not through the submissions as was done by the applicants.

To support their contentions in the written submissions the first respondent referred to a plethora of unreported decisions of the Court – viz- Civil Application No. 244 of 2015 – **Manson Shaba and 143 Others v. The Ministry of Works and Another**; Civil Application No. 14 of 2013 **Hadija Muyaga v. TTCL Ltd**; Civil Application No. 14 of 2013 **Hadija Adamu v Godbless Tumbo**; BK Civil Application No. 1 of 2013 – **Henry Muyaga v TTCL Ltd**; Civil Application No. 218 of 2016 of 2016 – **Interchick Co. Ltd v. Mwaitenda Michael**; Civil Application No. 132/01 of 2017 – **Iddi Nyange v. Maua Saidi**; Civil Application No. 7/05 of 2016- **Joseph Njau and Another v. Emmanuel Njau and Another**; Civil Application No. 211 of 2016 – **Yara (T) Ltd v. BD Shapriya & Co. Ltd**;



Civil Application No. 7 of 2001 **Joseph John v. Chandrakant shimji Shah**; Civil Application No. 10 of 2015 – **Ngao Losero v. Julius Mwarabu**; Civil Application No. 150 of 2011 – **Bank of Tanzania v. Saaid Marinda and 30 Others**; and Civil Application No. 5 of 2014 – **Martha Khotwe v. Miston Mwanjamila**.

On his part, Mr. Chang'a, the learned State Attorney for the second, third and fourth respondents also adopted the written submissions which were drawn and filed on behalf of the referred parties. In the written submissions, the second, third and fourth respondents echo the complaint raised by the first respondent to the effect that the grounds sought to be relied by the applicants were not raised in either the Notice of Motion or its accompanying affidavit. Rather, the same were only raised in the submissions. In sum, the second, third and fourth respondents just as well contend that the applicants have not demonstrated any good cause for the delay and accordingly, the application should be dismissed with costs.

To buttress their written submissions, they referred to me three unreported decisions – viz- Civil Application No. 218 of 2016 – **Interchick Co. Ltd v. Mwaitanda Michael**; Civil Application No. 2 of 2010 –

**Lyamuya Construction Co. Ltd v. The Board of Trustees YWCA;** and  
Civil Application No. 4 of 2014 **Sebastian Ndaula v Grace Rwamafa.**

Having heard the learned counsel submissions either in support or to counter the application, it is now incumbent upon me to determine the application. The vexing issue confronting me is whether or not the applicant has demonstrated good cause to deserve an extension of time within which to lodge an application for review. I propose to approach the issue by going through the applicant's Notice of Motion as well as the supporting affidavit to explore the grounds which are raised. I will, additionally, seek reliance on the decided cases of the Court, more particularly, the unreported Consolidated Civil Application No. 4 of 2009 – **Tanzania Revenue Authority V. Tanga Transport Co. Ltd.** In that case, the Court laid down the following factors worthy of consideration in determining applications for extension of time. These are:-

*"(a) The length of the delay;*

*(b) the reasons for the delay;*

*(c) Whether there is an arguable case such as whether there is a point of law on the illegality or*

*otherwise of the decision sought to be challenged;  
and*

*(d) the degree of prejudice to the defendant if the  
application is granted."*

To begin with, in order to address the complaint raised by the first to fourth respondents with respect to the alleged inadequacies of the Notice of Motion and its supporting affidavit, I deem it apposite to reproduce the relevant portions of the two documents in full:-

**"NOTICE OF MOTION**

*(Made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 GN 368 as amended by GN No.362 of 2017).*

*Take Notice that on the .....day of  
.....2018 at .....o'clock in the  
morning/afternoon or as soon thereafter as they  
can be heard Mr. Richard Karumuna Rweyongeza  
Advocate and Mr. Rosian Mbwambo Advocate for  
the above named applicants, will move Court for an  
order that the applicants be granted an extension of  
time within which to file an application for Review  
of the Judgment of the Court in Civil Appeal No. 60  
of 2016 dated 19<sup>th</sup> June 2017 on the grounds that:*

- (a) *The applicants had filed an application for review of the judgment of this court in Civil Appeal No. 60 of 2016 dated 19<sup>th</sup> June, 2017 but the application was struck out for non citation of the enabling act under the appellate Jurisdiction Act. Cap 149 R.E. 2002 as amended provision by Act No. 3 of 2016.*
- (b) *The intended application for review is intended to address the failure by the Court to give the applicant a chance to be heard on some of the issues in the case and several errors on the record such as the Court relying on a document not tendered at the trial in evidence.*

### **AFFIDAVIT**

***I RICHARD KARUMUNA RWEYONGEZA, Adult, Christian resident of Dar es Salaam do hereby take oath and state as follows:***

- 1. THAT, I am an advocate of the High Court of Tanzania and subordinates courts thereto other than Primary Court on that capacity having the conduct of this case at the instructions of the applicants and I am conversant with the facts I am about to depose as hereunder.***

- 2. THAT,** I am wearing this affidavit at the instructions of the applicants who are 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively in Civil Appeal No. 60 of 2016. **A copy of the Judgment is appended herewith marked annexure FF1.**
- 3. THAT,** the respondents who were appellants in the said appeal had their appeal partly allowed and the Court allowed the disputed plot to be portioned but the applicants were aggrieved by the said decision and within the prescribed period decided to challenge the decision. **A copy of Notice of Motion with the supporting affidavit in Civil Application No. 359/17 of 2017 is appended herewith marked annexure FF2.**
- 4. THAT,** in the said application the applicants were complaining about the denial of right to be heard and errors on the face of the record that included the use of an exhibit which had not been tendered in evidence.
- 5. THAT,** while waiting for the application to be set for hearing, the 1<sup>st</sup> respondent raised a point of preliminary objection. **A copy of the**

***preliminary objection is appended herewith marked annexure FF3.***

***6. THAT, a few days before hearing of the applicant decided to withdraw of the Notice of preliminary objection. A notice of intention to abandon the preliminary objection is appended herewith marked annexure FF4.***

***7. THAT, when the matter came up for hearing on 2<sup>nd</sup> March, 2018 Mr. Rosian Mbwambo of Law Associates appeared for the applicants in Civil Application No. 359/17 of 2017.***

***8. THAT, before the application No. 359/17 of 2017 was called; the Court called Civil Application No. 285 of 2017. The application involved the same parties though the applicant was one Elius Mwakalinga and the applicants in Application No. 359/17 of 2017 were the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively. A cop of the said application is appended herewith marked annexure FF5.***

***9. THAT, when the other application was called or hearing there was an objection on non citation of***

*the provisions of the provisions of the law and the application was struck out.*

**10. THAT, application No.359/17 of 2017 was suffering from the same defence was equally struck out. A copy of the Court Order striking out Civil Application No. 359/17 of 2017 is appended herewith marked annexure FF6.**

**11. THAT, the applicant has filed this application without undue delay.**

**12. THAT, I am swearing this affidavit in support of the reliefs sought in the Notice of Motion.**

For a start, if I may cull from the Notice of Motion, paragraph (a) simply informs that the applicants had filed an application for review which was struck out for non-citation. The paragraph does not, so to speak, by any stretch of construction, constitute an account for the delay deserving a consideration under Rule 10 of the Rules. As regards paragraph (b), again, the same simply informs the issues which the applicants intend to address the court in the application for review. Thus, by paragraph (b) the applicants, rather ironically, place the cart in front of the horse and inform

as to what they intend to argue in the application for review. With respect, while paragraph (b) may be relevant to the application for review itself, if granted, what is required in the application at hand is to assign good cause to deserve extension of time. To say the least, in the Notice of Motion applicants did not assign any ground worth my determination.

I propose to advance to the supporting affidavit so as to determine whether or not the omission to account for the delay in the Notice of Motion can be cured by deducing from it. Having perused through the affidavit, it is noteworthy paragraphs 1 to 10 exclusively address the background of the matter and, more particularly, what was decided in Civil Appeal No. 60 of 2016 and what befell on their subsequent Civil Application No. 359/17 of 2017. Apart from paragraph 11 in which the applicants aver *"THAT, the applicant has filed the application without an undue delay;"* there is no single paragraph in the affidavit which alleges a ground worth the consideration of this court. Thus, the vexing issue is whether or not the court may deduce the grounds for an extension from the submissions of the parties where, as is the case here, the Notice of Motion and its accompanying affidavit are barren. I think the answer is in the negative issue the Court was moved under Rule 10 which, when read



in conjunction with 48 of the Rules imperatively requires the applicant to, *inter alia*, state the grounds for relief in the Notice of Motion or the accompanying affidavit.

To this end, the only ground worth my consideration is the one raised in paragraph 11 of the affidavit relating to the diligence and lack of inaction of the applicants in pursuing the matter at hand. The applicants contend that his earlier application for review was caught up by a newly developed principle of law which was unfortunately not in a law report and thus could not be readily accessed. They then concluded that the non-citation of the section was, therefore, did not result from any inaction or negligence on the part of the applicants. Incidentally, in their submissions the applicants claim that in striking out their application for review, the Court was moved by the case of **Commissioner General, TRA v Pan African Energy (T) Ltd**. But, in reality, the Order of the Court striking out the appeal did not refer to any decision but simply stated:-

*"Given the circumstances, we find this application incompetent for not citing section 4(4) of AJA which clothes the Court with jurisdiction to entertain and hear applications for review."*

More particularly, section 4(4) of AJA, which was referred by the Court, was introduced into that legislation by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 which came into force on the 8<sup>th</sup> July, 2016. It should be noted that Civil Application No. 359/17 of 2017 was lodged on the 10<sup>th</sup> August 2017 that is, more than any year after the promulgation of Act No. 3 of 2016. That being so, in their claim that the application was struck out on the basis of a newly developed principle of law, the applicants are, in effect, pleading ignorance of law. It is settled law that on applicants' ignorance of law and its attendant of procedure has never been accepted as a sufficient reason or good cause for extension of time. (See the unreported Civil Application No. 14 of 2013 – **Hadija Adamu v. Godbless Tumba** and Civil Application No. 10 of 2015 **Ngao Godwin Losaro v. Julius Mwarabu**).


In his submissions, the applicants state that it took them only five days to file the application at hand after Civil Application No. 359/17 of 2017 was struck out. But, it is common ground they did account for the delay and, so to speak, even for those five days by affidavit.

In sum, I take the position that the applicants have failed to demonstrate good cause to deserve the grant of the application for extension of time. In the result, the application is, accordingly, dismissed with costs. It is so ordered.

**DATED at DAR ES SALAAM** this 20<sup>th</sup> day of May, 2019.

K. M. MUSSA  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**