IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 226/01 OF 2017

TANZANIA RENT A CAR ..... APPLICANT

VERSUS

PETER KIMUHU ..... RESPONDENT

(Application for extension of time within which to Lodge an Application for Review from the Ruling of the Court in Civil Appeal No. 84 of 2012)

(Kimaro, Mmilla and Lila, JJA.)

dated the 18th day of October, 2016
in
Civil Appeal No. 84 of 2012

RULING

22nd February & 7th May, 2019

MWAMBEGELE, J.A.:

By a notice of motion taken out under rule 10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules), the applicant seeks an extension of time to lodge an application for review against the ruling of the Court in Civil Appeal No. 84 of 2012. The notice of motion is supported by an affidavit deposed by Brysoni Shayo, advocate for the applicant. It is resisted by an affidavit in reply sworn by Odhiambo Kobas, advocate for the respondent.

When the application was placed before me for hearing on 22.02.2019, Messrs. Brysoni Shayo and Odhiambo Kobas appeared for the applicant and respondent, respectively.

It was Mr. Shayo for the applicant who kicked the ball rolling. Having adopted the notice of motion and the flanking affidavit as well the written submissions in its support, Mr. Shayo had nothing useful to add. In the written submissions, Mr. Shayo had submitted that in the affidavit of the applicant from paragraph 11 to 13 that after Civil Appeal No. 84 of 2012 was dismissed, the applicant instructed Advocate Edward Lisso to restart initiating the appeal process in the High Court. In acting upon those instructions the said Lisso Advocate filed two applications in the High Court at Dar es Salaam - Miscellaneous Civil Application No. 747 of 2016 for extension of time to file a notice of appeal and Miscellaneous Civil Application No. 835 of 2016 for an order of stay of execution of the judgment and decree of the High Court. He added that when he was engaged to replace Mr. Lisso, the two applications were withdrawn because they had formal defects including indication of the wrong date on which the judgment and decree of the High Court was delivered which error also appeared in the impugned order of the Court. He submitted that

the applicant had not seat idle but, rather, she was taking some necessary steps to redeem its appeal back after the former appeal had been dismissed on a technicality. He went on to submit that the view that Civil appeal No. 84 of 2012 was dismissed instead of being struck out and thus even the filed applications would collapse on the same ground with the errors which were manifestly seen in the Order of the Court. The learned advocate added that after discovery of all the highlighted errors, he thought there was need to rectify them before further processes of restarting the appeal.

The written submissions went on to unveil that chances of success of an intended review were high in that Civil Appeal No. 84 of 2012 ought to have been struck out; not dismissed as happened.

The learned counsel submitted that the fact that the record of appeal in Civil Appeal No. 84 of 2012 had some errors on the face of the record to the effect that the index of the documents, certificate of correctness of the record, notice of address for service and memorandum of appeal all indicated that the said appeal was against the judgment and decree of the High Court of Tanzania at Dar es Salaam (Massengi, J.) dated 11.05.2012 in Civil Case No. 126 of 2003, while the appeal was against the judgment

and decree of the High Court of Tanzania at Dar es Salaam (Massengi, J.) dated 11.05.2011 in Civil Case No. 126 of 2003 and the same was reflected in the Order of the Court dated 18.10.2016, was another ground which show that the intended review stands at a great chances of succeeding. The Court was invited to follow **Tanzania Revenue Authority v. Tango Transport Co. Ltd and Tango Transport Co. Ltd v. Tanzania Revenue Authority**, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 (Unreported) in which the factors that the Court should take into account in considering whether or not to grant extension of time were also considered. He clarified that in that case the length of the delay, the reason for the delay, 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 the degree of prejudice to the defendant if the application is granted.

The applicant also canvassed on the point of illegality. He submitted that there is a point of law on illegality of the decision sought to be challenged by way of review. He argued that as Civil Appeal No. 84 of 2012 originated from the decision of the High Court of Tanzania in Civil Case No. 126 of 2003 delivered on 11.05.2011 (Massengi, J.) and not on

11.05.2012 as some of the record of appeal documents showed as well as order of the Court of 18.10.2016, there was no judgment and decree delivered on 11.05.2012 involving the parties herein and therefore the impugned Order of this Court was also illegal. He relied on our decision in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 182 followed in **Kalunga and Company, Advocates v. National Bank of Commerce Limited** [2006] TLR 235 wherein this Court held:

> *"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 straight."*

Mr. Shayo concluded that the point at issue is one alleging illegality of the Order of the Court delivered on 18.10.2016 by this Court and prayed that the Court be guided by our decision in **Principal Secretary, Ministry of Defence and National Service** (supra) and find that good cause under rule 10 of the Rules has been established.

Responding, Mr. Kobas also adopted the affidavit in reply and submitted that the applicant had failed to account for each day of delay and the depositions in the affidavit had simply expressed negligence and lack of diligence which do not constitute a good cause as held by the Court in **Omari Shamba and others v. National Housing Corporation**, Civil Application No. 49 of 2006 (unreported) quoting **Metal Product Ltd v. Minister for Lands** [1989] TLR 5..

Mr. Kobas added that the applicant complains at para 6 of the affidavit that the High Court in Civil Cause No. 126 of 2003 ought to have struck out the case instead of dismissing it. He argued that on the authority of **Hashim Madongo and Two Others v. The Minister for Industry and Trade and Two Others;** Civil Appeal No. 27 of 2003 (unreported), the High Court was quite justified to dismiss the appeal instead of striking it out as argued by the applicant.

Mr. Kobas, went on to submit that an apparent error on the record is another ground; the error referred to is that the decision was made in 2012 while it was made in 2011. He argued that at para 6 of the affidavit in support of the notice of motion as well as the notice of appeal, the applicant indicated correctly the date and year of the decision which was

being appealed against. That is, the applicant knew that he was appealing against the decision of 2011. The judgment and decree of the High Court attached the record bore 11.05.2011 as the judgment date. Thus the error on the record to the effect that it was made on 11. 05. 2012 did not any how prejudice the applicant and it has not been stated how prejudiced was he by the said error, he argued. Even if the correct date was substituted the appeal could still be time barred, he charged. So his application to seek extension of time to file a review came in as an afterthought after his endeavours to go back to the High Court to seek extension of time hit a snag. The afterthought has the intention to apply the overriding objective principle recently put in the Appellant Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (the AJA) but Mr. Odhiambo was quick to state that a time barred matter goes to the root of the case and thus the overriding objective cannot apply. He referred me to the decision of the Court in **Elia Kasalile and 20 Others v. Institute of Social Work**, Civil Appeal No. 145 of 2016 (unreported) wherein the question of prejudice was addressed. He also drew my attention to the decision of the Court in **Gibb Eastern Africa Ltd v. Syscon Builders ltd and two others**, Civil Application No. 5 of 2005 (unreported) wherein it was observed (P. 10) that the principle that the Rules of the Court and the associated rules of

practice must be observed. Mr. Kobas added that the applicant is the maker of the error he wants to take advantage of. In the circumstances, he submitted sufficient reasons have not been given to warrant the Court exercise its powers to extend the time sought. He prayed that the application should therefore be dismissed with costs for want of merit.

In rejoinder, Mr. Shayo submitted that the applicant has properly accounted for time of delay. He clarified that at paras 2, and and 13 of affidavit supporting the notice of motion, it is clearly shown that after the dismissal of the applicant's appeal, she quickly rushed to the High Court to apply for extension of time to file a fresh notice of appeal and stay of execution. The applicant decided to withdraw the application in the High Court having realized that the matter was dismissed. Mr. Shayo stated that they did so because they understood that even if they could be allowed to file a fresh appeal, the same would not sail the said matter having been dismissed instead of being struck out.

On the assertion of negligence on the part of the applicant raised by the respondent, Mr. Shayo submitted that the error on the dates was human error and prejudiced the applicant as she could cannot use it in any application. He agreed that the appeal was filed out of time. That it has

been the practice of the Court to dismiss matters which have been heard on merits. The fact that it was dismissed, the appellant is barred from bringing a fresh appeal.

Mr. Shayo prayed that the Court should find the application meritorious and allow the applicant file an application for a review out of time.

I have accorded due consideration to the reasons for delay brought to the fore by the applicant. Let me start by the premise that in an application for extension of time to apply for review, an applicant is not only supposed to show good cause for the delay but also that the review application would be predicated on one or more of the grounds mentioned in rule 66 (1) of the Rules. The Court has pronounced itself so in a number of decisions – see: **Eliya Anderson v. R.,** Criminal Application No. 2 of 2013, **Laureno Mseya v. R.,** Criminal Application No. 8 of 2013, **Deogratias Nicholaus @ Jeshi & Another v. R.**, Criminal Application No. 1 of 2014, **Philmon Zuberi v. R.**, Criminal Application No. 6 of 2014, **Salum Nhumbuli v. R.**, Criminal Application No. 8 of 2014, **Kafuba Mwangilindi v. R.,** Criminal Application No. 15/08 of 2015, **Charles John Mwaniki Njoka v. R.**, Criminal Reference No. 2 of 2014, **Nyakua**

Orondo v. R., Criminal Application No. 2 of 2014 and **African Fish Processors v. Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018 (all unreported), to mention but a few. In **Laureno Mseya** (supra) for instance, the Court observed:

> *"An application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay but has also established by affidavit evidence, at that stage either explicitly or implicitly, that the review application would be predicated on one or more of the grounds mentioned in Rule 66 (1) and not on mere personal dissatisfaction with the outcome of the appeal ..."*

Likewise, in **Salum Nhumbili** (supra) the Court recited its earlier decision in **Eliya Anderson** (supra) wherein it was held:

> *"An application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but has also established by affidavit evidence, at the stage of extension of time, either implicitly or explicitly, that if extension is granted, the review application would be predicated on one*

or more of the grounds mentioned in paragraphs (a) or (b) or (c) or (d) of (e) of Rule 66 (1)."

Adverting to the case at hand, the million dollar question is; has the applicant shown a good cause for the delay as well as that the intended review application would be predicated on one or more of the grounds mentioned in rule 66 (1) of the Rules? This is the question to which I now turn.

Let me start with the imperative to explain the delay. The decision of the Court intended to be challenged by the intended application for review was handed down on 18.10.2016. After that the applicant went back to the High Court where she filed two applications; one for extension of time to file a fresh notice of appeal and another one for stay of execution. At a later stage, after engaging Mr. Shayo in the place of Mr. Edward Lisso who handled the matter previously, it was learnt that no fresh appeal could be lodged as the appeal was not struck out but dismissed. It was resolved that an application for review of the dismissal order was ideal. Mr. Shayo thus withdrew the applications for extension of time to file a fresh notice of appeal in the High Court and the one for stay of execution and filed the present application as time within which the applicant could assail the Order of the Court by way of review had elapsed. Mr. Shayo is of the view

that he has brought good cause for the delay to act promptly. Mr. Kobas dubs the process as sheer negligence which does not amount do good cause to trigger the Court to exercise its discretion under rule 10 of the Rules. I think Mr. Kobas is right on the assertion that the applicant has not brought good cause for the delay to be granted the extension sought. The main reason for the delay that comes out in the affidavit is that the applicant's counsel filed applications in the High Court instead of applying for review in the Court. Mr. Shayo shifts the buck upon Mr. Lisso, the then advocate for the applicant who filed the applications complained of. I am not prepared to accept that excuse. The Court was confronted with an akin problem in **Omari Shamba** (supra), the case cited to me by Mr. Kobas. In that case, at p. 4 of the typed ruling, the court relied on **Metal Products Ltd** (supra) wherein it was held:

> *"... categories of explicable inadvertence causing delay to make an application do not include ignorance of procedure, or blunder by counsel".*

And at p. 5 of the same ruling, the Court recited the following excerpt from its previous decision in **Calico Textile Industries Ltd v. Pyaraesmail Premji** [1983] TLR 28:

"Failure of counsel to check the law is not sufficient ground for extending the period of appeal".

I think the above case falls in all fours with the present case as regards advocates for the applicants taking wrong course of action and failing to check the law. In the case at hand, if his argument is correct, the applicant's counsel knew or ought to have known that the applicant's appeal; Civil Appeal No. 84 of 2012 was dismissed and therefore that had no chance of coming back to the Court through a fresh appeal. That was inadvertence and failure to check the law on the part of the applicant's counsel which, on the authorities cited, do not constitute good cause under rule 10 of the Rules. For the avoidance of doubt, the position is the same irrespective of the fact that the inadvertence was occasioned by an advocate who is not the present advocate representing the applicant.

Worse still, the applicant has not accounted for every day of delay. After Civil Appeal No. 84 of 2012 was dismissed on 18.10.2016, the applicant's counsel filed two applications in the High Court which were later on withdrawn by the applicant's counsel to pave way for the present application for extension of time to file a review. However, the applicant does not state the dates on which those applications were filed in the High

Court. Neither does the applicant state when they were withdrawn. That information is vital to measure the promptness when the present application was filed on 26.05.2017. The applicant has therefore failed to account for every day of delay which failure would not trigger the Court to exercise its discretion to grant the extension sought – see: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014, **Saidi Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004 and **Abood Soap Industries Ltd v. Soda Arabian Alkali Limited**, Civil Application No. 154 of 2008 (all unreported). In **Bushiri Hassan** (supra), for the instance, the Court observed:

> *"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".*

The sum total of the foregoing discussion is that the applicant has failed to show good cause to trigger the Court exercise its discretion to grant the extension sought.

The second limb which the applicant was required to establish, as already alluded to above, is that the application will be predicated upon one, or more, of the paragraphs for review stipulated under rule 66 (1) (a) to (e) of the Rules. That is, the applicant ought to have shown in either the notice of motion or in the supporting affidavit that if the present application succeeds, she will predicate upon one, or more, of the grounds under rule 66 (1) paras (a) to (e) thereof. The applicant has not explicitly stated in his notice of motion as well as the affidavit supporting it, that she is predicating her application on one of the limbs in rule 66 (1) of the Rules. However, I note that she has implicitly stated so when she deposed through her advocate that Civil Appeal No. 84 of 2012 ought to have been struck out instead of being dismissed as happened. This, on the authority of **Laureno Mseya** (supra) is what is referred to as implicit reference to the provisions of rule 66 (1) (a) to (e) of the Rules on which the intended application for review will be predicated. Besides, Mr. Shayo has made it clear at para 3.8 of the written submissions supporting the application to the following effect:

> *"**Honourable Justices of Appeal**, chances of success of an intended review. It is our humble submission that the chances of success of an*

intended review are great in both the law and practice. The fact that Civil Appeal No. 84/2012 between the parties herein was dismissed instead of being struck out is one of the grounds among others that the intended review application stands at great chances of succeeding."

In view of the above, I think the applicant has sufficiently attempted, by implication, to establish that the intended application will be predicated upon one, or more, of the paragraphs under rule 66 (1) of the Rules. The applicant has thus succeeded to prove the second limb. But, as already pointed out above, on the authorities of the cases cited above, in application of this nature, an applicant can only succeed in an application for extension of time to file a review if he shows both, good cause for the delay as well as establishing that the intended application will be predicated upon one or more of the grounds under Rule 66 (1) paras (a) to (e) thereof. These two conditions must exist cumulatively. In the circumstances, for failure to establish the first condition, the present application must fail.

I am aware that the applicant has attempted to plead what he seems to call illegality. It is claimed in the written submissions that by dismissing

Civil Appeal No. 84 of 2012, the Court has blocked the way of filing a fresh appeal and any process to challenge the decision of the High Court in Civil Case No. 126 of 2003; the subject of Civil Appeal No. 84 of 2012. The only way is to challenge the order in Civil Appeal No. 84 of 2012 and upon being successful, the way to challenge the decision will be paved. I find no merit in this argument. The law as it stands now is that an application for review must be filed within sixty days reckoned from the date of delivery of the decision or order sought to be reviewed see: rule 66 (3) of the Rules. If the application is not filed timeously, the intending applicant ought to seek and obtain an order for extension of time upon showing a good cause for the delay – see: rule 10 of the Rules – and establishing that the intended application will be predicated upon one, or more, of the paragraphs under rule 66 (1) of the Rules as shown in the cases cited above. The two conditions must be established cumulatively.

I have also considered the question of illegality argued by Mr. Shayo. With respect, I am unable to agree with him that there was any illegality in the order of the Court. A difference should be made between an illegality and an error in the decision. While the former amounts to good cause under rule 10 of the Rules, the latter will not. After all, in the light of

Hashim Madongo (supra); the case cited to me by Mr. Kobas, it is doubtful if the only way to challenge the order of the Court is by way of review.

The above discussion culminates into a finding that the applicant has not been able to show good cause for the delay. He has, however, succeeded to show chances of succeeding in one of the grounds under rule 66 (1) paras (a) to (e) thereof. As the two prerequisites must be established cumulatively and the applicant has failed to so establish, the present application must fail. It stands dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 30th day of April, 2019.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL