

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 120/17 OF 2018**

**ELIUS MWAKALINGA ..... APPLICANT**

**VERSUS**

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

**FARIDA F. MBARAKI .....2<sup>ND</sup> RESPONDENT**

**FARID AHMED MBARAK.....3<sup>RD</sup> RESPONDENT**

**TANZANIA BUILDING AGENCY ..... 4<sup>TH</sup> RESPONDENT**

**THE COMMISSIONER FOR LANDS .....5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....6<sup>TH</sup> RESPONDENT**

**(Application for Extension of time within which to file review Against Judgment and Order of the Court of Appeal of Tanzania at Dar es salaam)**

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

**Dated 13th day of June, 2017**

**In**

**Civil Appeal No. 60 of 2016**

**RULING**

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

**MUSSA, J.A.**

The applicant seeks 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 applicant makes a quest towards the review of the referred Civil Appeal No. 60 of 2016. In an earlier Civil Application No. 285/17 of 2017, the applicant sought a review of the decision but, it turned out on the 2<sup>nd</sup> March, 2018 his 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 Rules 10 as well as 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by two affidavits of Messrs Elius Mwakalinga (the applicant) and Mluge Karoli Fabian who happens to be counsel for the applicant.

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 fourth, fifth and sixth respondents have just as well resisted the application through an affidavit sworn by a learned State Attorney, namely, Baraka Nyambita. Through their learned counsel, the first, fourth, fifth and sixth respondent additionally enjoined preliminary points of objection details of which I need not recite, the more so as, at

the commencement of the hearing, both Messrs Eustace Rwebangira and Hangi Chang'a the learned State Attorney for the fourth to sixth respondents abandoned their respective preliminary points of objection. The second and third respondents did not lodge any affidavit in reply and, as it turned out, at the hearing, Mr. Rosan Mbwambo, the learned advocate who entered appearance on their behalf, indicated that he was not resisting the application.

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

In support of the application, Mr. Nyika commenced his address by fully adopting the Notice of Motion as well as the two affidavits in support thereof. The learned counsel for the applicant also brought to my

attention his list of authorities desired to be relied upon which he similarly adopted. In sum, Mr. Nyika contended that the grounds upon which the application is taken are tripartite and that the same are discernible from the Notice of Motion and the affidavits. If I may cull from the Notice of Motion, the applicant disclosed the following grounds, namely:-

- "1. That the applicant filed review in time but the same was strike out (sic) on 2<sup>nd</sup> day of March 2108 on ground (sic) of wrong citation of laws.*
- 2. That the applicant is still willing wrongly deprived of an opportunity to be heard as he was not aware of the date of hearing and judgment as he was enjoying the service of Mr. Zahran Sinare from Rex Attorney Chambers who did not enter appearance on the days in question and didn't inform the applicant of the same and therefore the applicant could not be able to enter appearance on the hearing date.*
- 3. that the court's decision was a nullity that need to be tabled before the Justice of Appeal again for determination which if not done the applicant's right will be in jeopardy on the*

*ground that the order of resurveying the applicants' property (sic) amount to demolition of the applicant's erectect structure for no body's interest (sic)."*

The foregoing extracted grounds are more or less replicated in the two affidavits supporting the application. In his submissions, Mr. Nyika paraphrased the tripartite grounds thus: **First** that the delay in lodging the application for review was necessitated by the striking out of the previous Civil Application No. 285/17 of 2017 on account of the non-citation of the enabling provision of the law; **second**, that Civil Appeal No. 60 of 2016 was heard and determined in the absence of the applicant. To him, this amounted to a denial of the right to be heard and, ultimately, constitutes an illegality which is a sufficient cause for the grant of an extension and; **third**, that the applicant was deligent in that he did not delay in filing the application at hand, as it were, in the wake of the striking out of Civil Application No. 285/17 of 2017 which occurred on the 2<sup>nd</sup> March, 2018.

To buttress his contentions, the learned counsel for the applicant referred to me two reported decisions of the Court - viz- **Principal Secretary, Ministry of Defence and National Service v. Devram**

**Valambia** [1992] TLR 182 and; **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154. In similar vein, he also sought reliance on the unreported Civil Application No. 5 of 2006 **Tanzania Revenue Authority v. Tango Transport Company Ltd**; Civil Application No. 263 "B" PF 2015 – **Convergence Wireless Networks (Mauritius Limited and Three Others v. WIA Group Limited and Two Others** Civil Application No. 73 of 2015 – **Attorney General v. The Board of Trustees of the Cashew nut Industry and Development Trust Fund v. Hammars Incorporation Co. Ltd** and; Consolidated Civil Reference Nos. 6,7 and 8 of 2006 – **VIP Engineering and Marketing Ltd and Two Others v. Citibank Tanzania Ltd.** As already intimated, Mr. Mbwambo for the second and third respondents went along and fully supported the submissions of the learned counsel for the applicant.

In reply, Mr. Rwebangira, who resisted the application similarly fully adopted his affidavit in reply and, more particularly, he deplored the assigned cause for the applicant's non – attendance to Civil Appeal No. 60 of 2016 as being unsubstantiated. No affidavital information, he submitted, was sought from Mr. Zahran Sinare so as exonerate the applicant from

the wrath of non- appearance. Thus, he said, to the extent that the applicant did not assign convincing reasons for the non-appearance of his advocate, the claim that he was denied an opportunity to be heard is a far cry. Besides, Mr. Rwebangira added, if at all the applicant had good cause for defaulting appearance, it was still open to him to apply for a re-hearing under Rule 112(2) of the Rules instead of seeking, as he intends to do now, to nullify the decision of the Court.

As regards the applicant's contention that he approached the matter diligently, the learned counsel for the first respondent contended that, on the ground, the conduct of the applicant was quite the opposite: **First** when Civil Appeal No. 60 of 2016 was called for hearing, the applicant as well as his advocate defaulted appearance for unsubstantiated reasons; **second**, the previous application for review was negligently lodged without the citation of the enabling provision of the law and; **third**, the applicant did not account the thirty seven (37) days delay from the 2<sup>nd</sup> March, 2018 to the 19<sup>th</sup> April 2018 when, respectively, Civil Application No. 285/17 of 2017 was struck out by the Court and the application at hand was lodged.

To fortify his arguments, Mr. Rwebangira referred to me three unreported decisions of the Court-viz-Civil Application No.1 of 2013 – **Henry Muyaga v. Tanzania Telecommunication Ltd**; Civil Application No. 244 of 2015 – **Manson Shaba and 143 others v. The Ministry of Works and Another**; and Civil Application No. 218 of 2016 - **Intercluck Company Ltd v. Mwaitenda Ahobokile Michael**.

On his part, Mr. Hangi Chang'a for the fourth, fifth and sixth respondents just as well resisted the application by adopting the affidavit in reply of his colleague and he also adopted as his the submissions of the first respondent.

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 by the applicants' tripartite grounds which were paraphrased by Mr. Nyika. 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, as correctly formulated by Mr. Nyika, granted that this application was prompted by the striking out of the Previous Civil Application No. 285/17 of 2017 but, as meticulously countered by Mr. Rwebangira, the applicant did not quite account for the thirty seven (37) days delay from the 2<sup>nd</sup> March, 2018 to the 19<sup>th</sup> April, 2018 when, respectively, Civil Application No. 285/17 of 2017 was struck out by the Court and the application at hand was lodged. In this regard, I am obliged

to reiterate this Court's firmly entrenched position that an applicant seeking extension of time under Rule 10 of the Rules is required to account for each day of the delay. In, for instance, the unreported Civil Application No.3 of 2007 – **Bushiri Hassan v. Latifa Lukio Mashayo**, the Court observed:-

*"... a 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 second ground taken by the applicant relates to Civil Appeal No. 60 of 2016 which is sought to be reviewed. As it were, the referred appeal was determined in the absence of the applicant. In effect, Mr. Nyika contends that the *ex parte* hearing amounted to a denial of the right to be heard and, ultimately, the same constitutes an illegality which is a sufficient cause for the grant of an extension. In reality, however, the applicant defaulted appearance despite the fact that his advocate, namely, Mr. Zaharan Sinare was duly served. The applicant presently squares the blame on Mr. Sinare but, as pointed out by Mr. Rwebangira, no affidavital information was sought from the advocate so as to exonerate the

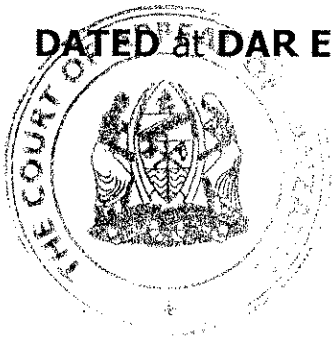
applicant from the wrath of non-appearance. To this end, the non-appearance of the applicant in Civil appeal No. 60 of 2016 stands unsubstantiated. By defaulting appearance in the appeal, I would say, the applicant hoisted himself with his own petard and he cannot be allowed to turn around and claim, as he presently attempts, that in the wake of the *ex parte* hearing, he was denied of his right to be heard. To say the least, the issue of illegality does not feature at all.

In the third ground, the applicants sought to impress the Court that he was diligent in promptly filing the application at hand in the wake of the striking out of Civil Application No. 285/17 of 2017 but, as I have already intimated, it took more than thirty seven (37) days for the applicant to recollect himself and lodge the application at hand. To me, such a delay is inordinate and, much worse, as again already intimated, the delay was not accounted for.

In sum, in the light of my foregoing findings on the applicants grounds for his quest, I take a firm position that the applicant has 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**