

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 559/01 OF 2018

1. CHRISTMAS ELIMIKIA SWAI
2. ABULLAHI HAMIS LEMA APPLICANTS
3. ALLY ABDULLAHI LEMA

VERSUS

1. TANZANIA ELECTRIC SUPPLY CO. LTD }
2. THE TREASURY REGISTRAR } **RESPONDENTS**

(Application from the decision of the High Court of Tanzania, at Moshi)

(Sumari, J.)

dated the 14th day of August, 2016

in

Misc. Civil Application No. 40B & 40 of 2016

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RULING

22nd August, & 2nd September, 2019.

KOROSSO, J.A.:

This application has been lodged by way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules 2009 (the Rules) with a supporting affidavit sworn by Masumbuko Roman Mahunga Lamwai, the Learned Advocate who also represented the applicants when the application came for hearing. Relief sought is for the applicants to be granted extension of time within which to file an application for revision of

the orders of the High Court, Moshi District Registry at Moshi dated the 20th day of July and 14th day of August 2016 in Miscellaneous Civil Application Number 40 of 2016 and Miscellaneous Civil Application Number 40B of 2016.

The grounds for the application extrapolated from the notice of motion intimate that the delay to file the application within time was due to many factors. The applicant through the notice of motion and supporting affidavit reveals that not being supplied with proceedings and orders necessary for the intended application as requested took a long time, and that though he proceeded to file an application thereafter in this Court seeking similar prayers in Civil Application No. 17 of 2016, the application was struck out, these grounds are found in paragraphs 4, 5, 6 and 7 of the supporting affidavit and also the fact that the applicant also sought recourse through various channels both legal and administrative.

On the part of the respondents, the 1st respondent did file an affidavit in reply sworn by Howa Hira Msefya, learned Advocate and also written submissions filed on the 16th of April 2019 and the 2nd respondent filed an affidavit in reply deposed by Mr. Ponziano Lukosi, learned Principal

State Attorney disputing most of the expounded reasons for delay to file the application averred in the notice of motion and the affidavit supporting the notice of motion and on the on the date of hearing, the 2nd respondent was represented by Ms. Janeth Makondoo, learned Senior State Attorney. Mr. Howa Msefya also appeared for the 1st respondent when the application came up for hearing.

Before venturing into consideration and determination of the application, it is prudent to bring forth, albeit briefly, the background to the application. The applicants instituted a suit at the High Court Moshi District Registry, Civil Case No. 6 of 2002 seeking compensation for destruction of their houses alleged to have been caused by electrical fault fronted by the 1st respondent being the main electricity supplier. The suit proceeded at a snail like pace, occasioned by a lot of factors including change of presiding Judges and absence of counsel for parties up to the 14th of June 2016 when the suit was struck out for want of prosecution. Upon the suit being struck out, the applicant counsel filed an application seeking an order to set aside the order striking out the suit, Miscellaneous Civil Application No. 40 of 2016. The filed application was summarily rejected on the 27th of July

2016 by the High Court judge for reason that it was incompetent and noted that the remedy for orders of striking out a suit was to bring a fresh suit.

The aftermath of the High Court summarily rejecting Miscellaneous Civil Application No. 40 of 2016 was for the applicant's counsel to file an application for review of the order which was registered as Miscellaneous Civil Application No. 40B of 2016, this application was also summarily dismissed being found to be incompetent. Thereafter the applicant lodged Civil Application No. 17 of 2016 in this Court which ended being struck out on the 3rd day of October 2018, for being incompetent. All of the above actions taken led to the current application filed on the 7th of November 2018.

On the day of hearing, the counsel for the applicant, the 1st respondent and the 2nd respondent implored the court for the notice of motion, affidavit supporting the application, affidavits in reply and the written submissions to be adopted respectively to form part of their submissions respectively. to be part of their overall case.

Taking into consideration the notice of motion and supporting affidavit by the applicant and the affidavit in reply for both the 1st and 2nd

respondent, written and oral submissions before me, I discerned two issues for consideration and determination. First is whether the delay to file the intended application for revision within time was for a good cause and second, whether there are errors or illegalities in the High Court proceedings apparent on the face of the record that merit consideration.

When amplifying on reasons for the delay to file the intended application the counsel for the applicant challenged the High Court orders leading to the rejection of Miscellaneous Civil Application No. 40 of 2016; and Miscellaneous Civil Application No. 40B of 2016 as averred in the affidavit supporting the notice of motion particularly paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 and also expose the efforts made by the applicants through their counsel to revive the dismissed suit and rejected application but to no avail.

The counsel for the applicants contended that the end result of the said applications being struck out was for them to pursue the matter further and file appropriate applications and that he spent some time trying to reach his clients to get proper instructions on how to proceed since the applicants (his clients) are retired officers who now live in Hai District

Kilimanjaro region. The applicants counsel stated that he managed to secure attestation from his clients on the 5th of November 2018 and signatures in the notice of motion but despite this there was delay in filing it in the High Court being filed on the 7th of December 2018. That between the application which was struck out on the 3rd of October 2018 that is, Civil Application No. 17 of 2016 and the time of filing the current application it was 63 days and thus over the time by only 3 days. Arguing that this being the case, and the filing of the application being delayed for just 3 days, the applicants satisfied the condition of filing the application promptly.

The applicants counsel also submitted that the affidavit supporting the application and the written submissions highlight illegalities in the proceedings and decisions of the High Court, mainly grounded on the wrong interpretation of the law by the judge and also denying the applicants the right to be heard shown by the way the High Court judge summarily struck out the two applications already alluded to herein. That there was misinterpretation of Order IX Rule 9 Subrule 1 of the Civil Procedure Code, Cap 33 RE 2002 by the High Court which led to the illegal decision.

The counsel further maintained that a court is not expected to dismiss a suit without hearing the parties as to what transpired in the current matter. Thus asserting that the decision is illegal based on misinterpretation of the law. The counsel conceded to the error in Civil Application No. 17 of 2016 for failure to advance grounds and stated that it was an error of the counsel and not the applicants. The counsel thus implored the Court to grant the prayers sought and order for each party to pay own costs bearing in mind the financial circumstances of the applicants, being retired officers.

In reply, the counsel for the 1st respondent submitted that the delay in completion of adjudication of the case was solely occasioned by the conduct of the applicants' themselves and/or their counsel leading to the dismissal of the suit for want of prosecution on the 14th day of June 2016. Arguing that despite noting the efforts by the applicants' counsel to revive the suit and that the efforts were without grounding and even if the filed applications would have been heard, it would have led to the same ending. The counsel stated that the applicants failed to account for each day of delay, and that the assertions advanced by the applicants counsel to explain the delay are not sufficient, not falling within the ambit of

established guidelines on factors to be considered as found in the holdings in cases cited by the applicant counsel such as, **Omary Shaban Nyambo vs. Dodoma Water and Sewerage Authority**, Civil Appeal No. 146 of 2016 (unreported) and **Sebastian Ndaule vs Grace Rwamata (Legal Personal Representative of Joshua Rwamata)** Civil Application No. 4 of 2014 (unreported).

The applicant's contention that the time used soliciting for clients' instructions is one of the reason that caused the delay was challenged by the respondent counsel that it does not constitute a good cause for delay, and thus arguing that the decision cited by the applicants in **National Bank of Commerce Ltd vs. Sao Ligo Holdings Ltd and Margareth Joseph**, Civil Application No. 267 of 2015 (unreported) does not help the case for the applicant on this issue because such reason for delay alluded to by applicants does not fall within the ambit of the respective decision.

With regard to allegations of illegality in proceedings and orders of the High Court, the counsel for the 1st respondent stated that even if this was the case, the applicants had an opportunity to challenge the said illegality which they did not utilize, since they filed an application with

improper documents. Therefore he argued that this ground should also fail because it was not properly substantiated nor sufficient to warrant grant of the prayers sought and that the application be dismissed with costs. On the part of the counsel for the 2nd respondent, she supported arguments by the counsel for the 1st respondent that the reasons for delay in filing the application in time by the applicants are not sufficient reasons and that it should be found to be the case by the Court.

The respondent's counsel also challenged the assertion that the applicants were neither given an opportunity to be heard nor heard, arguing that record shows that on the 14th of June 2016, the applicants were absent hence the dismissal of the suit for the second time and for the same reason of want of prosecution. That again, the applicants did not seize the opportunity available to fix the anomalies since when they filed an application it was found to be defective and therefore struck out. It was thus the 2nd respondent counsel contention that the applicants failed to expound good reasons for the delay in a way to move the Court to find good cause for the delay, and prayed that the application be dismissed with costs.

Perusing through the proceedings in the High Court it reveals that on the 22/1/2014, Civil Case No. 6 of 2002 was dismissed for want of prosecution (Munisi J.). On the 23rd of March 2013, the suit was restored before the judge (Sumari J.) with an order to proceed with hearing on the 6/4/2016. Record show that on 6/4/2016, the application for restoration of the suit was heard and an order that the matter proceed to 1st Pre-Trial Conference was made and finalized on the same day. Mediation was then ordered for 29/4/2016 and on the date set for Mediation that is on the 17/6/2016, the Court concluded that mediation failed. On the 14/6/2018, upon prayers from defendants counsel the court ordered for the suit to be struck out for want of prosecution.

There is also Miscellaneous Civil Application No. 40 of 2016 filed on the 8th of July 2016 seeking the Court to set aside the dismissal order of 14th day of June 2016, a prayer I find a bit strange since the challenged order was not for dismissal but for the suit to be struck out. On the 20/7/2016, the High Court (Sumari J.) summarily rejected the application alluding to the fact that the order dated 14/6/2016 was one of striking out the suit and not a dismissal order. On the 4th of August 2016, Miscellaneous Civil Application No. 40B was filed by the applicant, by way

of a memorandum of review which was also summarily dismissed on the 16/8/2016 with an order that parties were at liberty to file a fresh a fresh suit subject to the Law of Limitation. An order which the counsel for the applicant submitted the Court to find was unfair because the respective suit was filed in 2002 and thus obviously the limitation period to file such a suit had expired.

It is important to point out that the discretion of this Court to extend time under Rule 10 of the Rules is dependent on the applicants advancing good reasons for failure to do all things that could have been done within the time set forth by the law as stressed in numerous decisions of this Court such as; **Oswald Masatu Mwizarubi vs Tanzania Fish Processing Ltd.**, Civil Application No. 13 of 2010 (unreported) and **Victoria Real Estate Development Ltd vs. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2015 (unreported) and **Omary Shaban Nyambu vs Dodoma Water Sewerage Authority**, Civil Application No. 146 of 2016 (unreported).

The case of **Tanga Cement Company Limited vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001

(unreported) revealed factors for consideration on determining whether the delay was caused by sufficient cause. The factors include; whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, and lack of diligence on the part of the applicant are matters to be considered when determining this issue.

Assessing the submissions, notice of motion, affidavit supporting the notice of motion, replies to affidavit and considering written and oral submission before me, I am of view that, from the records and the number of application filed by the applicants to try to rectify errors made, it is clear that they did not fully account for each day of delay in filing the application. Claims of delay such as alluding to the time spent seeking the whereabouts of clients to get proper instruction, I believe this is not tenable by any standards since one cannot expect a counsel to lose contact or the whereabouts of his clients where diligence is exercised. Also the fact that from the records, delay was also caused by filing defective applications, which the learned counsel for the applicant has conceded reveal nothing else but negligence on the part of the legal counsel for the applicants.

As alluded to above, taking into consideration all the initiatives by the applicants on this issue, I find that the actions have not in any way given a valid explanation nor shown diligence expected. That the said actions were not prompt, and this factor was conceded by the counsel for the applicant, stating it took them 63 days to file the application intended to address some of the anomalies they believe can be found in the proceedings and decisions in the High Court. The fact that the applicant counsel conceded to filing a defective application under the circumstances shows lack of proper care.

I am mindful of the fact that reasons for delay is not the only factor to be considered in applications for extension of time, as no particular grounds or reasons have been set out as good cause as stated in **Abdallah Salanga and 63 Others vs Tanzania Harbours Authority**, Civil Application No. 4 of 2001 (unreported). Therefore it is imperative to also consider allegations of illegality in the decisions and proceedings of the High Court, that is, whether there are errors apparent on the face of the record which require intervention and consideration of the Court so that there is no miscarriage of justice to the applicant.

It has been held by this Court in **Principal Secretary of Defence and National Service vs Devram Valambhia** [1992] TLR 185 and **VIP Engineering and Marketing Limited and 3 Others vs Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported), that illegality may constitute sufficient cause for Court to exercise its discretion and extend time as prayed.

Considering the averments in paragraphs 3, 4, 5, 6 and 7 of the affidavit supporting the notice of motion on what transpired in the High Court, from the fact that the pending Civil Case No. 6 of 2002 was struck out and whether that was in line with the provisions of the governing law, upon filing Civil Applications No. 40 of 2016 and No. 40B of 2016 and the orders by the Court, I find all these facts reveal some apparent errors in the conduct of proceedings in the High Court leading to the decisions being challenged. This being the case I am of the view that justice will be done if the Court will be given an opportunity to consider the errors which I find to be apparent on the face of the record. Having stated this conclusion I find no need to venture into consideration of other alleged anomalies stated by the applicant in his submissions.

For the above stated reasons, I find that under the circumstances there is no other option but to grant extension of time to file an application for revisions as prayed. Time is extended for sixty days from the date of this Ruling. Having considered the circumstances of this case, each party to bear own costs. Order Accordingly.

DATED at DAR ES SALAAM this 29th day of August, 2019.

W. B. KOROSSO
JUSTICE OF APPEAL

The ruling delivered this 2nd day September 2019 in the presence of Ms. Jackline Masawe, Counsel for the Applicants, Mr. Howa Msefya, Counsel for the first Respondent and Ms. Janet Makondo, Senior State Attorney for the second respondent is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL