IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

BK CRIMINAL APPLICATION NO. 1 OF 2018

CAT NO. 109/04/2018

JOHN LAZARO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for extension of time within which to lodge an application for revision from the judgment of the Court of Appeal of Tanzania at Bukoba)

(Munuo, Massati, Mandia, JJ,A.)

dated the 28th day of November, 2011
in
Criminal Appeal No. 230 of 2010

RULING

14th & 16th May, 2019

MWARIJA, J.A.:

In this application, the applicant John Lazaro has moved the Court to grant him extension of time within which he can lodge an application for revision. Although that is the purpose of bringing the application, the title of his notice of motion is couched in the following words:

> *"(In criminal application for extension of time, from the decision of the court of appeal*

at Mwanza full bench of the Hon. E.N. MUNUO, J.A., S.A. MASSATI, J.A. and W.S. MANDIA, J.A.) dated 28th of Nov. 2011 in court of Appeal of Tanzania at Mwanza in criminal Appeal No. 230 of 2010"

The supplementary affidavit of ACP Mwampashe, the Superintendent of Bukoba prison who forwarded the application, bears the same heading. According to the notice of motion, the grounds upon which the applicant seeks an order granting him extension of time are stated as follows:

"1. *That, All persons are equal before the law and are entitled and without discrimination, when rights and duties of any person shall be entitled for a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned, while searching for liberty and freedom out of JUSTICE as stated by the constitution of the united Republic of Tanzania Article 13(1) (6) (a) of the 1977.*

2. *That, the application was unrespectability into rule 66(1) eg (a) (b) (c) (d) and (e) non of subsections were indicated to prepare the application for review because of that, the application with drawn for the fact that, to lodge the new application for Revision."*

In the affidavit filed on 8/10/2018 in support of the notice of motion, the applicant narrates the background facts giving rise to this matter. Because of the novel nature of the application, I find it appropriate to reproduce the contents of the affidavit as hereunder):

"1. *That, I'm the applicant in the instant application and the original appellant in criminal Appeal no 230 of 2010, which was dismissed by the court on 28th Nov.2011, more over from knowledge and recollection of the event and awareness of the matter in issue and facts of the case I'm authorized to depone the affidavit.*

2. *That, I was charged with murder in the high court (T) at Bukoba in criminal session case no 88 of 2004 and consequently, the applicant was convicted sentenced to death by hanging.*

3. *That, being aggrieved by such decision I, unsuccessfully appealed to court of appeal (T) Mwanza in criminal Appeal No. 230 of 2010.*

4. *That, in the judgment delivered on 28th Nov. 2011 may appeal was dismissed, and after that, I, wrote the application for review instead of application for revision and was registered review No. 8 of 2012.*

5. *That, the application after has been received by the office of the Registrar the Hon. Registrar found that there was the problem of rules need to be filed.*

6. *Then the Hon. Registrar restored it to Butimba C prison, the applicant was informed about it where upon the*

Admission officer lawyer told me that my application have reformation in rule only this movement caused my application to received out of time.

7. *That, at the hearing the notice of motion was found out of time and also it was prepared as appeal with no fundamental of Review and after suomottu the point that the application was time barred, I conceded and prayed to withdraw it.*

8. *That, main point, the application was signed on 21.12.2011 by applicant and was received on 20.12.2012 by Registrar office.*

9. *That, any person seeking justice is entitled to appeal in any other agency while searching for liberty and freedom out Justice, as stated by the constitution of the united Republic of Tanzania Article 13 (6) (a) of the 1977.*

10. *That, in the interest of the fair administration of justice if is fit proper*

that the application for Extension of time be heard and determined by single judge of this court as per grounds of this Affidavit, be granted.

11. *That, after (23) day I was given a typed transcripts for signing at admission office where after signing I left them over with the prison authorities for transmission this 15th 01/2012."*

From the substance of the affidavit and the documents attached therewith, including the judgment of the Court which was handed down on 1/3/2017, it is clear that the applicant was charged with and convicted of the offence of murder by the High Court of Tanzania at Bukoba in Criminal Sessions Case No. 88 of 2004. He was consequently sentenced to suffer death by hanging. His appeal to the Court in Criminal Appeal No. 230 of 2010 was unsuccessful. Being further aggrieved by the decision of the Court, he intended to apply for review but found that the time for doing so was not on his side. He therefore lodged Criminal Application No. 34/4 of 2017 seeking extension of time to file the intended application for review.

That application was however, dismissed by the Court on 27/8/2018. Undaunted, the applicant lodged the present application on 26/10/2018.

At the hearing of the application, the applicant appeared in person, unrepresented while the respondent Republic was represented by Mr. Shomari Haruna, learned State Attorney.

Submitting in support of his application, the applicant was emphatic that he is seeking extension of time to file an application for revision challenging the decision of the High Court in Criminal Sessions Case No. 88 of 2004. He insisted that, although he had unsuccessfully challenged that decision by way of appeal, he intends to challenge it further by way of revision. According to the applicant, he has the right to do so in terms of Rule 65 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

As for the cause of delay, he submitted that the grounds are contained in his supporting affidavit and the affidavit which was filed in support of Criminal Application No. 8 of 2012, the matter which he withdrew on 1/3/2017. According to that affidavit, he said, the

delay was caused by the prison or the Court because he signed his application and handed it to the prison authorities on 21/12/2011 but the same was filed in Court a year later on 20/12/2012.

In reply, Mr. Haruna, learned State Attorney opposed the application. He argued that, since from the record of the application, the applicant had exhausted the available remedies for challenging the decision of the High Court, the applicant is not entitled to go back and apply for revision of the same decision of the High Court. The learned State Attorney submitted thus that the application is untenable. He added that, in any case, the applicant has not established as good cause for the delay in filing the intended application. He submitted that, under Rule 65 of the Rules, an application for revision is supposed to be filed within 60 days from the date of the decision sought to be revised. In this case, he said, the decision is dated 6/8/2010 and therefore the limitation period expired on 5/10/2010. He contended that the applicant ought to have established the cause of delay of seven (7) years. He relied on the case of **Lyamuya Construction Company Limited v. Board**

of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, cited in the case of **John Lazaro v. The Republic**, Criminal Application No. 34/4/ of 2017 (both unreported).

The learned State Attorney argued further that the application is mixed-up because, whereas the applicant contends that he seeks an extension of time to lodge an application for revision, the title thereof indicates that he seeks extension of time to institute an application for review of the decision of the Court dated 28/11/2011.

On those arguments, the learned State Attorney prayed that the application be dismissed because it has been brought without due regard to the law hence an abuse of the process of the Court.

In rejoinder, the applicant maintained that he has a right to file an application for revision of the decision of the High Court notwithstanding the fact that he had unsuccessfully appealed against that decision. He submitted further that, although in the title of the application, it is shown that the same arose from the decision of the Court dated 28/11/2011, his intention is to file an application for

revision of the judgment of the High Court and therefore, the defect of title is an anomaly which should be ignored by the Court.

It is clear from the submissions made by the applicant and the learned State Attorney that, after his conviction by the High Court, the applicant exercised not only his right of appeal but also applied for review. He was unsuccessful on his invocation of both remedies. Although there is a mix-up in the way on which his notice of motion has been drafted, he has insisted in his submission, that he seeks extension of time to institute an application for revision.

I think it is pertinent that before I proceeds to consider the issue whether or not the applicant has established a good cause for the delay in filing the intended application for revision, it is apposite to determine the propriety or otherwise of the application. Mr. Haruna has submitted that the same is not tenable. On his part, the applicant argued that he is entitled to apply for revision notwithstanding the fact that he had preferred an appeal against the decision of the High Court. He relied on Rule 65 of the Rules.

It is certain that in taking that move the applicant has acted under misconception. The Court's power of revision is derived from s.4(2) and (3) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002]. Rule 65(1)-(7) of the Rules merely provides for the procedure on which such an application may be instituted and dealt with by the Court. The powers of revision vested in the Court are, furthermore, not to be exercised where a party to a case has a right to appeal and where that right has not been blocked by a judicial process. In the case of **Mrs. Yonnie Virginia Ruth Chopra v. M/s Lake Duiuti Estates Ltd.**, Civil Application No. 17 of 2013 (unreported) the Court underscored that principle in the following words:

> *"The law on revision as opposed to appeal is long settled. (See **Halais Pro-Chemie versus Wella A.G.** [1996] TLR 269; **Mosses Mwakibete versus The Editor Uhuru Ltd** [1995] TLR 134). It evolves around the principle that revisional powers conferred to the Court are not meant to be used as an alternative to the appellate jurisdiction of the Court. Therefore, the Court cannot be removed to use its revisional*

jurisdiction where an applicant may invoke his/her right of appeal to the Court."

In this case, the applicant did not only have the right of appeal. He exercised that right by preferring the said Criminal Appeal No. 230 of 2010. Having lost in that appeal, he filed an application for review but was again, unsuccessful. After having exhausted those legal remedies which were available to him, there is no gainsaying, as submitted by the learned State Attorney, that the applicant can seek invocation of the Court's revisional jurisdiction. I agree with Mr. Haruna that the move would amount to total abuse of the process of the Court.

Since therefore, the application which is intended to be filed by the applicant is not tenable, even if he can succeed to establish a good cause for the delay, it will serve him no purpose to institute the intended application. I find therefore, that the need to consider that aspect of the application does not arise. I am supported in that view by the case of **Paulina Thomas v. Prosper John Mutayoba & Anr**; Civil Application No. 77/8 of 2017 (unreported).

In that case, the applicant applied for extension of time to file an application for leave to appeal against the decision of the High Court sitting as a Land Court. Having considered that, under s.47(1) of the Land Disputes Courts Act [Cap. 216 R.E. 2002], as it was by then, it was the High Court which was vested with exclusive jurisdiction to grant leave to appeal to the Court against a decision in a Land Case, the Court observed as follows:

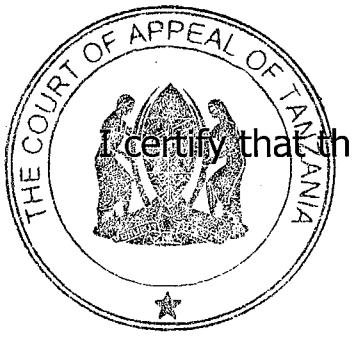
> *"As it is, the provision does not vest such powers to the Court of Appeal. This means that, in this case, even if extension of time is granted to file an application for leave to appeal to the Court, the Court cannot entertain it because it does not have such powers."*

In the present case, since the Court has already heard and determined the appeal which arose from Criminal Sessions Case No. 230 of 2010, it cannot for the reasons stated above, entertain the same decision by way of revision.

On the basis of the foregoing therefore, I find that the application is incompetent. In the event, the same is hereby struck out.

DATED at **BUKOBA** this 15th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL



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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL