IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 512/01 OF 2018

REGISTERED TRUSTEES OF SHADHILY ..... APPLICANT

VERSUS

MUHFUDH SALIMOMARY BIN ZAGAR (Administrator of the

Estate of the Late SALIM OMARY).....RESPONDENT

(Application for extension of time to file an Application for Restoration of Civil Appeal No.89 of 2010 from the High Court of Tanzania at Dar es Salaam)

(Massati, Oriyo, & Mwarija, J.J.A.)

Dated the 10th day of February, 2016
In
Civil Appeal No. 89 of 2010

RULING

13th & 29th May, 2019

MWANDAMBO, J.A.:

Before me is an application by way of Notice of Motion made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 GN N0. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, GN N0. 362 of 2017 (hereinafter referred to as the Rules).The Registered Trustees of Sadhily, the applicant seek an order for extension of time within which they can file an application for restoration of Civil Appeal No. 89 of 2010 dismissed by the Court on 10th February 2016 for non- appearance. The affidavit of Mohamed Selemani Rupinda has been annexed to the Notice of

Motion supporting the application. The applicant has predicated her application on six grounds, namely:

1. *That Civil Appeal No. 89 of 2010 filed in time was dismissed for want of prosecution;*
2. *That the applicant was not afforded its right to be heard;*
3. *That the applicant became aware of the dismissal order on 04th April 2016 when the respondent served an order of eviction;*
4. *That after the service of notice of eviction, the applicant was pursuing an incompetent application namely; Civil Application No. 257/17 of 2016;*
5. *That Civil Appeal No. 257/17 of 2016 was preferred against a dead person; and,*
6. *That Civil Appeal No. 89 of 2010 was improperly dismissed instead of being struck out for being incompetent.*

Resisting the application, the respondent who is represented by Capt. Ibrahim Bendera learned Advocate has filed an affidavit in reply in pursuance of rule 56 of the Rules.

The background facts which are material to the determination of the application as discerned from the affidavit are as follows. The applicant and

respondent were appellant and respondent respectively in Civil Appeal No. 89 of 2010. The applicant had at all material times enjoyed the services of M/s. R.K. Rweyongeza & Co. Advocates. The said firm of advocates prayed to withdraw from representing the applicant on 10th February 2016 after a letter written to the Registrar of the Court expressing their intention to do so. That letter was copied to the applicant. All the same, an advocate from the said firm going by the name of Sang'udi appeared in Court on 10th February 2016 the date on which the appeal was scheduled for hearing and successfully prayed to withdraw from the conduct of the appeal. Considering that the applicant who appeared to have been copied with the advocates' letter did not appear when the appeal was called for hearing, the Court (Massati, Oriyo and Mwarija, JJA) dismissed that appeal instantly for non-appearance. Slightly above one month later, the applicant was served with a notice to show cause by the Deputy Registrar of the High Court at Dar es Salaam in relation to the execution of the decree in Civil Case No. 35 of 1982 from which Civil Appeal No. 89 of 2010 emanated. Despite the above, the applicant says through the affidavit that she became aware of the dismissal of the appeal in Civil Appeal No. 89 of 2010 on 4th April 2016 and subsequently, the trustees of the applicant contacted

Ms. R.K. Rweyongeza & Co. Advocates on the fate of the appeal only to learn that the said firm of advocates had withdrawn from the conduct of the appeal on 10th February 2016 on the date the appeal was dismissed. Subsequently, on 15th September 2016 the applicant sought to have the dismissal order reviewed by the Court but the time for doing so had long expired and so she filed an application for extension of time to pursue that remedy through Chuwa & Co. Advocates vide Civil Application No. 275/17 of 2016. That application was marked withdrawn by this Court (Mugasha, JA) on 28th August 2018 and hence the filing of the instant application two months later, on 15th November 2018.

The respondent's affidavit in reply is a complete denial of most of the averments in the applicant's affidavit branding them as blatant lies and falsehoods. In particular, the respondent denies that Civil Appeal No. 89 of 2010 was preferred against a dead person because the respondent in that appeal died on 13th July, 2016 and substituted by the current respondent by a consent order in Civil Application No. 62/16 of 2017. The respondent prays thus that the application be dismissed.

At the hearing of the application, Mr. Edward Chuwa learned Advocate appeared for the applicant and adopted the written submissions he had filed pursuant to rule 106(1) of the Rules. The respondent was represented by Capt. Ibrahim Bendera learned Advocate who, unlike the applicant's learned Advocate had not filed any submissions in reply in terms of rule 106(2) of the Rules. Mandated by rule 106(10) of the Rules, I heard his oral submissions before Mr. Chuwa took the floor to rejoin.

At the start of his submissions, Mr. Chuwa faulted the Court for dismissing the appeal for want of prosecution despite the fact that Mr. Sang'udi an Advocate from R.K. Rweyongeza & Advocates who informed the Court that his firm had no instructions to represent the applicant and prayed to withdraw from that appeal. The learned Advocate submitted further that there was no proof that the letter that dated 8th February 2016 to the registrar of this court copied to the applicant was actually delivered and received despite which, the applicant chose to default appearance on the date the appeal was called for hearing. Mr. Chuwa was emphatic and argued that dismissing the appeal as the Court did on 10th February 2016 for want of prosecution in such circumstances amounted to denying

the applicant her fundamental constitutional right to be heard and referred me to this Court's previous decision in **Victoria Real Estates Development Limited vs Tanzania Investment Bank and 3 Others,** Civil Application No. 225 of 2014. That decision cited **Mbeya-Rukwa Auto Parts and Transport Ltd vs. Jestina George Mwakyoma** [2003] TLR 259 for the proposition that denial of fundamental right to a hearing renders the proceedings a nullity. On the other hand, the learned Advocate sought reliance from **Victoria Real Estate Development Ltd** (supra) to bolster the principle that a claim of illegality in an application for extension of time constitutes good cause warranting an order extending the time sought.

Earlier, Mr. Chuwa had made reference to a passage extracted from the decision of the Supreme Court of Uganda in **Rwabinumi vs Babimbisomwe** [2010] E.A 337 which is quoted to have held that errors of counsel and blunders of counsel should not necessarily be visited on the client. The above decision was cited to reinforce the argument that R.K. Rweyongeza & Co. Advocates hitherto representing the applicant committed errors by failing to ensure that the letter withdrawing

instructions had not only been sent to but also delivered on the applicant before the hearing date. On the whole, the learned advocate urged the Court to grant the application.

Next, Mr. Chuwa canvassed the point that the Court should hold that the applicant has accounted for the delay because, one, she was not aware of the dismissal order until 4th April 2016 when an eviction order was served by the respondent, two, upon being aware of the said order, she promptly filed an application namely; Civil Application No. 275/17 of 2016 for extension of time to apply for review which was subsequently marked withdrawn, three, in between, the respondent applied to be joined as a legal representative vide civil application No. 62/16 of 2016 which contributed to the delay in filing the instant application.

Finally, the learned Advocate argued that at any rate, the dismissal order was irregular because the appeal was incompetent and the only course open was to strike it out instead of dismissing it for the two attract different consequences. Winding up his submissions, the learned advocate drew my attention to a decision of this Court in **Attorney General vs Tanzania Ports Authority & Another,** Civil Application No. 87 of 2016

(unreported) restating the principle on what amounts to good cause in applications for extension of time.

Capt. Bendera felt unmoved by the submissions in support of the application. The learned Advocate marshaled a fierce attack against the affidavit branding it as containing falsehoods which should not be acted upon by the court. As to the merits of the application, the learned Advocate submitted that a party inviting the Court to extend time in his favour, must explain away the delay by showing the reason for the delay and accounting the length of the delay, demonstrating the chance of success and in appropriate cases showing illegality in the impugned decision. However, the learned Advocate argued that the applicant has not succeeded in any of the factors to be considered by the Court in the application. I will pause here and say that contrary to Capt. Bendera, chance of success has been held not to be a relevant factor by itself for the Court in an application for extension of time is not concerned with the merits of the intended application or appeal rather on whether the applicant has shown good cause for the order sought. Discussing chances will not only be beyond the power of the Court in such applications but also

premature on the authority of this Court's previous decision in **The Regional Manager Tanroads Lindi vs DB Shapriya and Company Ltd,** Civil Application No. 29 of 2012 (unreported). I think the above will be sufficient to dispose Capt. Bendera's argument, on that point.

Regarding accounting for the delay, Capt. Bendera argued that the applicant has failed to explain away the delay from the date Civil Appeal No. 89 of 2010 was dismissed and 15th November, 2018 when the instant application was filed. In elaboration, the learned Advocate submitted that if the time the applicant was pursuing the application for extension of time to pursue a review in Civil Application No. 275/17 of 2016 to 28th August 2018 was to be discounted, still, there are 76 days to the date when the instant application was filed which have not been accounted for by the applicant. As to illegality, it was Capt. Bendera's contention that none has been show to exist warranting the Court exercising its discretion in the applicant's favour. The learned Advocate argued that the alleged incompetence of Civil Appeal No. 89 of 2010 is misplaced and in any event, it does not constitute illegality apparent on the face of the decision sought to be restored in the event the instant application succeeds.

In rejoinder, Mr. Chuwa challenged Capt. Bendera for failing to address the substance of the submissions in support of the application based on the grounds set out in the Notice of Motion. The learned Advocate submitted that the illegality lies in the fact that the applicant's right of hearing was breached when the Court dismissed Civil Appeal No. 89 of 2010 without being satisfied that the notice of withdrawal of instructions by the former advocates had been proved to have reached her before the date of hearing. On the other hand, Mr. Chuwa reiterated that it was irregular for the Court to have dismissed an incompetent appeal rather than striking it out. After some exchange with the Court, Mr. Chuwa was man enough to concede that on the facts, the applicant has not accounted for the delay. However, as any other brave soldier would have done, the learned Advocate urged the Court to grant the application on account of illegality as the overriding factor independent of the applicant's failure to account for the delay.

I have examined the submissions by the learned Advocates in the light of the Notice of Motion as well as the affidavit in support and against. It is common ground that Civil Appeal No. 89 of 2010 was dismissed by the

Court on 10th February 2016 in the absence of the applicant. It is common ground too that Ms. R.K. Rweyongeza & Co. Advocates were at all material time representing the applicant and indeed Advocate Sang'udi from that firm appeared in Court on that date to withdraw from the conduct of the appeal for lack of instruction having written a letter, annex **RTS 3** to the Registrar two days earlier with a copy to the "client" (the applicant). It is on the basis of the contents of the said letter as well as the oral address by Mr. Sang'udi that the Court found it compelled to dismiss the appeal for non-appearance. The parties part company on the issue whether the dismissal was legally justified and this is the crux of the applicant's claim that the order dismissing Civil Appeal No. 89 of 2010 was made without affording the absent applicant her right of hearing which was a breach of the fundamental and constitutional right to be heard which in itself should be found to constitute good cause within the meaning of rule 10 of the Rules. I will revert to that shortly after highlighting some crucial aspects to an application of this nature in the context of rule 10 of the Rules which provides:

10. "*The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.*"

Trite law is that the Court's discretion under rule 10 of the Rules is very wide but it must be exercised judiciously and in doing so, the Court has developed several parameters to guide it in determining such applications. Obviously, the application of the parameters will depend on the facts of each individual case. Accordingly, an applicant in an application for extension of time has to demonstrate in his affidavit, reason and length of the delay in taking a step in the case followed by a full account for each day of the delay(see: **Sebastian Ndaula vs Grace Rwamafa**, Civil Application No. 4 of 2014; **Saidi Ambunda vs. 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 addition, appropriate cases, the applicant has to demonstrate that there is any other relevant factor including the existence of such grounds as illegality in the impugned decision (if any). Authorities on this aspect shall be highlighted later in this ruling.

It has been shown above that the reason for delay in applying for restoration of Civil Appeal No. 89 of 2010 is attributed to the applicant's absence on the date the appeal was called for hearing and so she could not been aware of the dismissal order made on 10th February, 2016. There being no serious contention on that aspect, the next consideration will be to ascertain the length of the delay on which, yet again there is hardly any dispute judged from the date on which the applicant filed the application and the date the impugned order of this Court was made. The only issue remaining for my consideration would be whether the applicant has accounted for that delay. Although the applicant had initially contended that the delay has been accounted for, Mr. Chuwa conceded in his rejoinder that the applicant has failed to explain away the delay by making a full account of each day of delay to succeed in the application. I would accordingly endorse Capt. Bendera's argument that the applicant has not

surmounted the hurdle by accounting for the delay. Ordinarily, that would have been sufficient to dispose of the application. However, the applicant has claimed illegality which Mr. Chuwa would have the Court find to be paramount and sufficient to exercise its discretion under rule 10 of the Rules.

Capt. Bendera, and not surprisingly so, thinks otherwise. Whilst admitting that existence of illegality will justify making the order sought, the learned Advocate submitted that no such ground exists apparent on the face of the order dismissing the appeal. Considering that the law is settled in cases which an applicant claims existence of an illegality, I need not belabor the point further on that aspect. The cases illustrating this aspect are abound represented by **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 185 referred in **Victoria Real Estate Development Ltd** (supra) and a host of other case I need not make reference to. I must confess that determining the existence of illegality has not been straight forward as it would appear to be and that seems to have prompted a single justice in **Lyamuya Construction Company Ltd vs. Board of Trustees of**

Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2020 (unreported) to express himself as he did that a claim of illegality is not necessarily sufficient to extend time. Such illegality must be apparent on the face of the record not entailing long drawn process of arguments. Furthermore, it must be shown that such a point is of significant importance.

The claim here is that the dismissal order was made in breach of the constitutional and fundamental right to be heard. In my view, a point involving alleged breach of the right to be heard is undoubtedly not insignificant to be ignored. Whether or not there is merit in that claim is beyond the purview of this ruling. The Court need only be satisfied that there exists an issue involving illegality apparent on the face of the record. It has been claimed in the affidavit that there was no proof that the applicant received a notice of withdrawal from the conduct of the case by way of a letter to the Registrar copied to the applicant to justify an order dismissing the appeal for non-appearance. As observed earlier, it is beyond my purview to discuss the merits of that claim upon being satisfied that the ground has been sufficiently disclosed. I would, in the circumstances hold

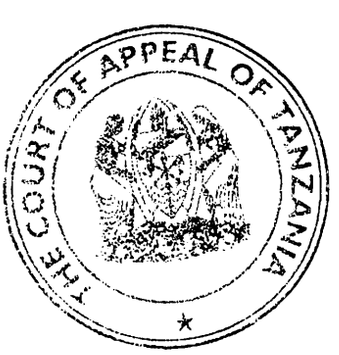
that despite the fact that the applicant has not accounted for the inordinate delay in filing the application, the existence of illegality claimed to be apparent in the order dismissing the appeal for non-appearance warrants the exercise of discretion under rule 10 of the Rules in favour of the applicant. Having so held, I need not consider the other arguments canvassed in the Advocates' submissions because their determination will not change the outcome of this application.

In the upshot, the application is hereby granted. The applicant is ordered to file her application for restoration in connection with Civil Appeal No. 89 of 2010 within thirty (30) days from the date of delivery of the ruling. Costs shall be in the cause. Order accordingly.

DATED at **DAR ES SALAAM** this 27th day of May, 2019.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

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



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL