

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL REFERENCE NO. 3 OF 2015

1. ANCHE MWEDU LTD.
  2. REGINALD A. MENGI
  3. MRS. MERCY A. MENGI
- }.....APPLICANTS

VERSUS

TREASURY REGISTRAR (SUCCESSOR OF  
CONSOLIDATED HOLDING CORPORATION).....RESPONDENT

(Application for reference from the decision of the single Justice of the  
Court of Appeal of Tanzania at Dar es Salaam)

(Mugasha, J.A.)

dated the 21<sup>st</sup> day of October, 2015

in

Civil Application No. 228 of 2013

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RULING OF THE COURT

5<sup>th</sup> October, 2018 & 8<sup>th</sup> February, 2019

MKUYE, J.A.:

This reference arises from a ruling of a single Justice of this Court (Mugasha, J.A.) dated 21<sup>st</sup> October, 2015. By that ruling the single Justice granted an application by the applicant (now the respondent) for an extension of time to file a notice of appeal against the High Court's judgment and decree in Civil Case No. 197 of 1993 delivered on 9<sup>th</sup>

October, 2008 following the refusal of a similar application before the High Court.

Dissatisfied by the decision of the single Justice, the applicants filed this reference seeking a reversal of the said ruling and the order thereof; and the substitution with an order dismissing the respondent's application for extension of time to issue a notice of appeal with costs to the applicants.

In order to appreciate the gist from which this reference emanates, we find it necessary to give a background of the matter between the parties. It goes like this:

In Civil Case No. 197 of 1993 before the High Court, the respondent, Treasury Registrar (Successor of Consolidated Holding Corporation) was sued by the first applicant ANCHE MWEDU LTD (former plaintiff) as the 4<sup>th</sup> defendant. She was sued together with the Bank of Tanzania (1<sup>st</sup> defendant), Societe General De Surveillance S.A. (2<sup>nd</sup> defendant), SGS India Private Ltd. (3<sup>rd</sup> defendant) and J. G. Vacuum Flask (5<sup>th</sup> defendant).

At one stage the 1<sup>st</sup> applicant filed an Amended Plaintiff. In reply, the respondent filed an Amended Written Statement of Defence together with a counter-claim against the 1<sup>st</sup> applicant being joined with Reginald Abraham Mengi and Mercy Anna Mengi who were joined as 6<sup>th</sup> and 7<sup>th</sup> defendants, on account of unpaid overdraft, loan and non-performing accounts to which the 1<sup>st</sup> applicant was operating which were guaranteed by its directors and shareholders (2<sup>nd</sup> and 3<sup>rd</sup> applicants).

After hearing all the parties the High Court (Mihayo, J.) entered judgment against the 5<sup>th</sup> defendant in favour of the 1<sup>st</sup> applicant and dismissed the respondent's counter-claim in its entirety.

Aggrieved, the respondent lodged a notice of appeal and applied for copies of proceedings, judgment and decree (appeal documents). She also, incidentally, filed a memorandum of appeal and the record of appeal within time on the 15<sup>th</sup> of January, 2009. After having lodged the record of appeal, the respondent's advocate realized a mistake in the notice of appeal for having not included the names of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants (Reginald Abraham Mengi and Mercy Anna Mengi) in the citation of the said notice of appeal though in the memorandum of

appeal (Civil Appeal No. 3 of 2009) they were properly cited. Thereafter, the respondent lodged a notice of motion seeking among other reliefs, an amendment of the title to the notice of appeal and extension of time to file an amended record of appeal containing the amended notice of appeal. However, the said application was greeted by an affidavit in reply objecting it.

The respondent also filed Civil Application No. 27 of 2009 on the 26<sup>th</sup> of February, 2009 seeking extension of time to apply for proceedings, judgments and decree, documentary exhibits; and extension of time to serve a letter applying for proceedings on the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.

The applicants similarly, filed an affidavit in reply opposing the application.

During hearing (Kimaro, J.A.) consolidated the two applications and through her ruling date the 12<sup>th</sup> of August, 2009 allowed the application.

Aggrieved, on 17<sup>th</sup> August, 2009 the applicants filed a reference to the Court to challenge the said decision and was allowed by the Court by

its ruling dated 20<sup>th</sup> August, 2010 (Mbarouk, J.A, Luanda J.A, Massati, J.).

Following that decision, the respondent filed an application for extension of time to file notice of appeal out of time in the High Court but the same was on 31<sup>st</sup> May, 2013 dismissed with costs (Muruke, J.). Still dissatisfied, the respondent filed another application in this Court. She also through her new advocate applied for a copy of a ruling of the High Court on 4<sup>th</sup> June, 2013, the letter of which was duly served on the Registrar. As the copy of ruling was not forthcoming, the other reminder letters dated 11<sup>th</sup> June, 2013, 24<sup>th</sup> July, 2013 and 24<sup>th</sup> September, 2013 were sent to the High Court. Though the notice of appeal to the Court of Appeal was also issued, still no copy of the ruling was forthcoming until on 15<sup>th</sup> October, 2013 when Mr. Richard Rweyongeza, learned advocate for the respondent got a copy of the said Ruling. However, the said application was yet, resisted by the applicants through their affidavit in reply and the written submissions thereof.

It was stated in paragraph 20 of the affidavit in support of the application before the single Justice as regards the reason for delay thus:

*"That the applicant has diligently been pursuing her rights after the counsel representing the applicant omitted to include the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents [applicants] in the notice of appeal in respect of Civil Appeal No. 3 of 2009".*

Further to that, in para 22 of the same affidavit the respondent averred:

*"That the problem facing the applicant was compounded by the fact that all documents supplied by the **High Court upon an application by the applicant did not include in the citation in the judgment and decree, the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents [applicants]**".*

*[Emphasis added]*

Upon hearing all parties the single Justice granted the respondent extension of time. In her ruling granting the application, the single Justice based on two main factors which were illegality and an account

for delay. On the illegality, the single Justice found the award of shillings five hundred million (Tshs.500,000,000/=) damages without proof an illegality warranting the extension of time; and on the delay she found that the respondent had not been idle or dormant in pursuing the appeal as she had been vigilantly seeking to pursue the appeal to the Court.

Besides that, the single Justice also considered the issue of negligence raised by the applicants and stated as follows:

*"Besides, even if there was an attributed negligence on the part of the applicant's advocate, yet; from the articulated reasons above, the applicant deserves grant of the sought leave for extension of time. This tally with what this Court has occasionally observed as such in the case of **PAUL JUMA VS. DIESEL & AUTOELECTRIC SERVICES LIMITED & 2 OTHERS**, Civil Application No. 54 of 2007."*

As hinted earlier on, the applicants are now challenging the said ruling of the single Justice on the grounds which can be conveniently extracted as follows:

- 3.1. *The single Justice failed to hold that the respondent's application for extension of time was out of time.*
- 3.2. *The single Justice erred in holding that there was an issue of law including award of Tshs. 500 million as general damages awarded without proof.*
- 3.3. *The single Justice erred in finding that the respondent has never been supplied with a copy of judgment and decree citing all the parties in Civil Case No. 197 of 1993 without proof of their having been applied or followed up by the respondent.*
- 3.4. *The single Justice erred in law and fact in finding and holding that the delay was attributable to the High Court and not to be shouldered on the respondent.*
- 3.5. *The single Justice erred in law and fact in failing to hold that there was negligence on the part of the respondent and its previous advocate which was a good reason to refuse an extension.*
- 3.6. *The single Justice erred in law and fact in taking a simplistic approach, consideration and determination of the application*



*without adverting to and taking into account the peculiar and relevant facts and circumstances of the whole matter i.e. long standing case (old case).*

*3.7. The single Justice of appeal erred in law and fact in finding and holding that the application for extension of time to file a notice of appeal is meritorious and granted.*

At the hearing of the application before us, Mr. Michael Ngalo and Mr. Deogratias Ringia learned counsel appeared for the applicants. For the respondent, it was Mr. Killey Mwitasi, learned Senior State Attorney who appeared.

Before embarking on arguing the application on merit, Mr. Ngalo sought and leave was granted to abandon grounds Nos. 3.1 and 3.7; and to argue grounds No. 3.3 and 3.4 together and the remaining grounds Nos. 3.2, 3.5 and 3.6 separately.

Submitting in support of ground 3:2 of the application, Mr. Ngalo while adopting the submissions relied upon before the single Justice contended that, though the single Justice based her decision on among other reasons, that there was an issue of illegality including an award of

shillings five hundred million without having been proved, such issue was neither mentioned in the notice of motion nor affidavit in support thereof. Nevertheless, he added, the High Court did not award such damages and that even if it was awarded, it was not awarded against the respondent.

With regard to grounds No. 3.3 and 3.4, Mr. Ngalo submitted that the failure to include names of applicants in the notice of appeal was not attributable to the High Court but rather it was the fault of the respondent's counsel. At any rate, he said, the respondent's counsel admitted the omission in the affidavit and written submission in support of the application. For that matter, he wondered as to where the single Justice got availed with such evidence.

As regards ground No. 3.5, Mr. Ngalo argued that the single Justice did not consider the issue of negligence. He was of the view that the delay was due to the previous advocate's negligence.

As for ground No. 3.6, Mr. Ngalo faulted the single Justice for not taking into account the peculiar circumstances of the case including the case being an old one instituted since 1993 and decided in 2008. He

also urged the Court to take note that, apart from that there were two applications for amendment of the notice of appeal filed in court.

For those reasons, Mr. Ngalo culled it up that there was no good cause shown by the respondent to warrant the grant of extension of time. He, thus, urged the Court to reverse the single Justice's decision.

In reply, Mr. Mwitasi, apart from adopting what was presented by the applicant before the single Justice, he submitted that the single Justice was correct to extend the time. Arguing in support of the single Justice's ruling, he contended that **one**, the single Justice explained the factors to be considered by the Court in an application for extension of time. **Two**, the respondent had never remained home and dry or rather idle in pursuit of his right. **Three**, the delay was not attributable to the respondent but rather to the High Court. **Four**, the issue of illegality in awarding of shillings five hundred million as damages fell within ground No. (c) in the notice of motion which was based in the interest of justice. **Five**, the negligence of previous advocate was a minor issue considering the fact that the respondent was at all the time pursuing the matter. For

those reasons, he argued that the single Justice of Appeal cannot be faulted and implored the Court to sustain the single Justice's decision.

In rejoinder, Mr. Ngalo argued that issue of illegality was relied upon without hearing. He also added that the issue of negligence of the advocate was fatal.

We wish to preface our determination by stating that the notice of motion before the single Justice was for extension of time to file a notice of appeal following the refusal of the initial application before the High Court. The said application was made under Rule 2 and 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The power of granting extension of time under the said Rules is discretionary and that such discretion must be exercised judiciously and flexibly in accordance with the pertaining facts of a particular case. It is also noteworthy that there is no clear definition on what constitutes a good cause in the Rules. However, this Court has endeavoured to outline some reasons or factors, **which may not be exhaustive**, including the length of delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended - (See **Dar es Salaam City Council v. Jayantilal**

**D. Rajani**, Civil Application No. 27 of 1987; and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwaiwanda**, Civil Application No. 6 of 2001 (both unreported)).

Likewise, times without number, this Court has held the ground alleging illegalities to constitute good cause for extension of time - (See **Principal Secretary, Ministry of Defence and National Services v. Devram P. Valambhia**, [1992] TLR 185; and **Arunaben Chaggan Mistry v. Naushat Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016 (ARS) (unreported). For instance in **Principal Secretary, Ministry of Defence and National Services's** case (supra), the Court unreservedly stated that:

*"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 is established, to take appropriate measures to put the matter and the record right."*

Similarly, the Court in the case of **Prosper Bartazar Kileo and Another v. Republic**, Criminal Application No. 1 of 2010 (unreported)

while quoting with approval a Ugandan case of **Boney N. Katatumba v. Waheed Karim**, Civil Application No. 27 of 2007 (unreported), considered the factor of causing injustice in case of shutting the door for the appeal to constitute a good cause. In that case it was stated as follows:

*"... But even where the application is unduly delayed, the Court may grant extension of time **if shutting out the appeal may appear to cause injustice.**"*

[Emphasis added]

Further to that, in the case of **William Malaba Butabutemi v. Republic**, MZA Criminal Application No. 5 of 2005, (unreported), the Court referred with approval the case of **CITIBANK (Tanzania) Ltd. v. TTCL, TRA & Others**, Civil Application No. 6 of 2003 (unreported) where the Court took the stance that each case is to be looked at and considered on its own facts, merit and circumstances before arriving to a decision whether or not sufficient cause (now good cause) has been shown. Also in the same case the Court approved the position taken in an English case of **Property & Revisionary Investment Corporation**

**Ltd. v. Temper & Another**, [1978] 2 All E.R. 433, where special circumstances showing why the applicant should be given opportunity to argue the appeal out of time were considered in the application for extension of time.

As already alluded to earlier on, the learned single Justice granted the respondent an extension of time to file a notice of appeal on two limbs. One such factor which was considered by the single Justice was the existence of special circumstances, moreso, an award of shillings five hundred million damages awarded without proof which was taken as an illegality required to be addressed by the Court of Appeal. Mr. Ngalo has forcefully resisted such finding on account that it was neither raised in the pleadings nor in the submissions thereof.

On our part, we think that the argument might have some truth as the issue does not come out clearly. However, we would go along with Mr. Mwitasi's line of argument that it fell within ground (c) of the notice of motion which related to the interests of justice. We have taken such stance on two grounds. **One**, as we have alluded to earlier on, the definition of "good cause" is not exhaustive. In most cases it depends on

the circumstances of each case. **Two**, the term "in the interests of justice" is very wide. It is one of those terms which do not have a definite definition. In most cases it would depend on the prevailing circumstances of the case.

We are increasingly of the considered view that the respondent ably showed how she would be prejudiced if her application would not be granted. The respondent in her affidavit and written submissions in support of the application which were considered by the single Justice showed that the amount which was claimed in her counter-claim was a colossal amount of money advanced to the 1<sup>st</sup> applicant but secured by the 2<sup>nd</sup> and 3<sup>rd</sup> applicants to which she persuaded the learned single Justice to have a glance on the grounds in the intended memorandum of appeal filed in Court. We think it is a situation whereby shutting out the appeal may cause injustice - (See **Prosper Bartazar Kileo's** case (supra). Though the issue of illegality might not have been specifically mentioned in the said affidavit and written submissions, we are of the considered view that it fell within the broad term of special circumstances and/ or interests of justice -(See **William Malaba Butabutemi** (supra); and **CITIBANK (T) Limited** (supra).



When looking at the circumstances of the matter in that, even the High Court did not include the names of the 2<sup>nd</sup> and 3<sup>rd</sup> applicants in the citation of the judgment and decree to-date; that the respondent did not lie idle or dormant but she had been all through pursuing her rights in relation to the appeal process; and that the applicants might have been also attributable to the delay due to the fact that they had filed two applications for reference to the Court in respect of a similar matter, we think the respondent cannot shoulder the blame on her own. The applicants also contributed to the delay.

On the other hand, when taking into account the huge sum claimed by the respondent out of unpaid overdraft and non performing accounts operated by the 1<sup>st</sup> applicant while guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> applicants, we think, in the interests of justice, it warranted the grant of extension of time to allow the matter to be addressed by the Court. To put it differently, such issue fell within the ambits of special circumstances which include illegality taken into account by the single Justice.

We have also considered the applicants' claim that the single Justice could have considered the fact that the case has been a long standing one. We, however, think that such an issue is also relative. We are of such view because, **one**, each case must be considered on its own circumstances. In this case each party might have to a certain extent contributed to the delay. **Two**, a long standing case should not be taken to curtail one's desire to pursue his/her rights on the pretext that litigation must come to an end. At any rate, as we have alluded to earlier on, the respondent had not sat on her rights. She had been consistently pursuing her rights through the appeal process as required by law.

Likewise, we have considered the issue of negligence on the part of the respondent's advocate. However, we subscribe to the learned single Justice's stance that it was not fatal when considering other factors such as the seriousness of the issue to be addressed by the Court.

After having scrutinized the application and the submissions in their totality, we are settled in our mind that the applicants have not been able to convince us on what went wrong in the decision put under

reference. In our view, the learned single Justice properly invoked the principles guiding the extension of time and came to the conclusion that there were good reasons warranting the grant of extension to file notice of appeal of which we see no ground to fault it.

In view of the foregoing, we find the application for reference devoid of merit. It is accordingly dismissed with costs.

**DATED at DAR ES SALAAM this 4<sup>th</sup> day of February, 2019.**

K. M. MUSSA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**