

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CIVIL APPLICATION NO. 589/12 OF 2018

1. FINCA (T) LIMITED..... 1ST APPLICANT

2. KIPONDOGORO AUCTION MART 2ND APPLICANT

VERSUS

BONIFACE MWALUKISA RESPONDENT

(Application for Extension of Time within which to lodge application to file leave to appeal against the Judgment and Decree of the High Court of Tanzania at Iringa)

(Sameji, J.)

Dated the 13th day of September 2016

In

In Civil Appeal No. 8 of 2016

RULING OF THE COURT

14th & 16th May, 2019

KOROSSO, J.A.:

The applicants, FINCA (T) Limited and Kipondogoro Auction Mart lodged this application by way of notice of motion, made under Rule 45A(1)(b) and (3), Rule 48(1) and (2) and Rule 49(1) of the Tanzania Court of Appeal Rules, 2009 as amended by the Tanzania Court of Appeal (Amendment) Rules 2017 (the Rules), and supported by an affidavit sworn

by Monica Mushi, a Principal Officer of the 1st applicant. In this application, the applicants are in pursuit of extension of time within which to file leave to appeal against the Judgment and Decree of the High Court of Tanzania, at Iringa, in Civil Appeal No. 8 of 2016 dated 13th September 2016, and an order that costs of and all incidental to this application abide the results of the application.

The grounds for the application as set out in the Notice of Motion are summarized as follows, that:-

1. *The applicant's approached the High Court for an application for extension of time to file leave to appeal through Miscellaneous Civil Application No. 20 of 2017. The High Court in its decision dated 27th July, 2018 dismissed the application hence this second bite application by the applicants in this Court.*
2. *The applicant has, at all material times been vigilant in prosecuting the extension of time to file leave to appeal.*
3. *The decision against which extension of time to file leave to appeal is sought is tainted with illegalities and irregularities which if left to stand will set a bad precedent, more specifically the failure to include the pairs of shoes as inventory*

of the facility that was extended to the Respondent which led to the grant of general damages which is legally unfounded and baseless.

On the part of the respondent, he filed an affidavit in reply, sworn by Boniface Mwalukisa, the respondent himself, disputing the grounds set forth in the notice of motion by the applicants.

When the application was called for hearing, the applicants were represented by Mr. Alfred Kingwe, learned Advocate while the respondent, being unrepresented, appeared in person.

To better appreciate what prompted the filing of this application, it is important to depict, albeit brief, some background. The Respondent filed a suit against the applicants in the District Court of Njombe, in Civil Case No. 24 of 2014, seeking special and general damages jointly and severally against the applicants, alleging that they attached and sold some of his properties which were not part of the secured loan security. The trial court issued a judgment and decree in favour of the respondent. Dissatisfied by the decision, the applicants appealed to the High Court against the trial

court decision, in Civil Appeal No. 8 of 2016. The High Court decision was in favour of the respondent, upholding the decision of the trial court.

The applicants, not being aggrieved with the High Court decision, lodged a Notice of Appeal to this Court dated 29th 2016, received copies of Judgment and Decree on the 5th of October 2016 and a certificate of Delay issued by the High Court at Iringa. But that notwithstanding, the applicants failed to file for leave to appeal within time and filed an application for extension of time to apply for leave to appeal to this Court in September 2017. The said application was dismissed by the High Court Iringa on the 20th of July 2018, leading to the current application before this Court, being a second bite application.

Proceeding to the merits of the present contested application, the learned counsel for the applicants premised his submissions by inviting the Court to adopt the affidavit supporting the notice of motion and the written submissions filed in support of the application. Examining the affidavit, the illustrated grounds in the notice of motion are also reflected in the averments in paragraphs 5, 6, 7, 8, 10 and 11 of the supporting affidavit. All these, with intent to explain the delay in filing the application for leave to appeal within specified time. The learned counsel for the applicants oral

submissions at the hearing of this application, reiterated advanced reasons for delay presented in the notice of motion and as averred in the affidavit as amplified in the written submissions filed.

On the part of the respondent, his submission was brief, alluding that the grounds submitted by the applicants to explain the delay, are not meritorious and that the Court should adopt and consider what the respondent averred in the filed reply to affidavit. The respondent prayed that the application be dismissed.

The present application is filed under Rule 45A (1)(b) and (3) of the Rules which state:

45(1) "Where an application for extension of time to:- (b) apply for leave to appeal: is refused by the High Court, the applicant may within fourteen days of such decision apply to the court for extension of time.

(3) Every application under sub-rule (1) shall be accompanied by a copy of the decision against which it is desired to appeal and where application has been made to the High Court for extension of time and refused, by a copy of the refusal order".

The High Court decision in the application for extension of time was delivered by the High Court (Feleshi J., as he then was) on the 27th of July 2018. The current application was filed on the 7th of August 2018, and thus within the time prescribed, that is, of 14 days, after the High Court Ruling refusing the application for leave was delivered, and thus, within the precinct of Rule 45A(1)(c) of the Rules. Upon refusal by the High Court, to grant extension of time to file leave to appeal as sought, without doubt, the current application was lodged within time.

It is settled that where extension of time is sought, the applicant will be granted, upon demonstrating sufficient cause for the delay. Conversely, it is also well settled that the sufficient cause sought depends on deliberation of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur.

That being the position, having considered what is before the Court, in the present matter, in terms of submissions and affidavital evidence, it is my considered opinion that the first and second reasons elucidated by the advocate for the applicants, on the dismissal of their first application by the

High Court, and the claims of being vigilant in prosecuting the extension of time to file leave to appeal are not adequate to be seen as sufficient cause.

The requirement of accounting for every day of delay has been emphasized by the Court in a numerous decisions, examples are such cases of **Bushiri Hassan v. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (unreported) and **Karibu Textile Mills v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (unreported). In the **Bushiri Hassan case**, the Court stated:

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

From the reasons advance by the applicants, I find that they have not shown good cause and accounted for the delay to the standard required. The assertion that, the first appellant was going through restructuring and overhauling, is not enough without any averments in the affidavit on what this "*restructuring and overhauling*" entailed or how it led to their failure to proceed with an appeal.

Having said that, and in the circumstances of the application pertaining, I move to consider the last ground expounded in the notice of motion and the affidavit thereto, contending that the decision of the High Court sought to be appealed against is tainted with illegalities and irregularities which this Court needs to look into. There are several decisions of this Court, which considered this issue, where the ground of illegality of the impugned decision is raised. In **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) it was held:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay".

The issue was also considered in the case of **TanESCO vs Mufungo Leonard Majura and 15 Others**, Civil Application No 94 of 2016, (Unreported), where it was stated:

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account

for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court".

The present application, saw the applicants challenge various matters as averred in paragraphs 10.1 to 10.4, alleging that the trial court failed to consider various factors as required by the law, leading to granting of reliefs not commensurate to the evidence before it, and that the High Court also failed to properly re-evaluate the evidence leading to injustice on the part of the applicants. Arguing that, there was irregularities and illegality in the decision of the trial court which should lead the Court of Appeal to have an opportunity to determine upon, in the interest of justice.

It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. For instance, in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182

the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice.

We also subscribe to the views expressed by the Court in the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, when the Court observed:-

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

Applying the above mentioned statement of principle to the application under consideration, I have not been persuaded by what is before the Court, on the alleged illegality in the trial court decision, to lead

me to state that it is apparent on the face of it and thus can be discerned as a good cause for the Court to grant the prayers sought in this application.

In the event, I must conclude that, under the circumstances pertaining to this case, the applicants have failed to illustrate good cause that would entitle them extension of time as sought. This application is consequently dismissed and costs to be taxed. Order Accordingly.

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

W. B. KOROSSO
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL