IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 539/08 OF 2019

SAMWEL MUNSIRO ....APPLICANT

VERSUS

CHACHA MWIKWABE .....RESPONDENT

(Application for Extension of time in which to apply for Certificate from the decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 19 day of April, 2016
in
Land Appeal No. 4 of 2013

RULING

25th & 27th March, 2020

MMILLA, J.A.:

Samwel Munsiro (the applicant), is moving a single justice of the Court to grant an order extending time within which he may apply for a certificate on a point of law in an endeavour to later on challenge the decision of the High Court of Tanzania, Mwanza Registry, in Land Appeal No. 4 of 2013. It is brought under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), and is supported by an affidavit sworn by Mussa Joseph Nyamwelo, who is the applicant's advocate.

The application is being opposed by Chacha Mkwabe (the respondent) who, on 06.01.2020, filed an affidavit in reply sworn by him in person, vide which he says the allegation that the decision of the High Court is tainted with irregularity is baseless and/or unfounded. In essence, he says, the application is devoid of merit and should be dismissed.

On the date of the hearing of this application, Mr. Mussa Joseph Nyamwelo, learned advocate, did not appear though served, but the respondent appeared in person, fending for himself. Luckily, the applicant was present and informed the Court that he desired for the hearing to proceed. I accepted his prayer, and invited him to proceed.

At the commencement of hearing, the applicant prayed to adopt the Notice of Motion, the affidavit in support of the application and the written submissions he filed in terms of Rule 106 (1) of the Rules.

The substance of his written submissions is that there is an illegality in respect of the decision of the High Court intended to be impugned as averred in paragraphs 9, 11, 12 and 13 of the affidavit in support of the application. It is pointed out that the decision of the High

Court is tainted with illegality because it misconstrued the scope, interpretation and the application of the principle of adverse possession. It has also been submitted that in the course of composing the judgment, the learned High Court judge raised an issue which was neither pleaded nor canvassed by both parties, and predicated her decision on the said issue. Relying on the cases of the **Principal Secretary, Ministry of Defend & National Service v. Devram Valambhia** [1992] T.L.R. 387 and **Kalunga and Company Advocates v. NBC Ltd** [2006] T.L.R. 235, the Court is urged to find that since there are issues of illegality in the judgment of the High Court, the applicant has shown sufficient cause to attract the Court to extend time within which to file an application for a certificate on a point of law.

On the other hand, the respondent likewise prayed to adopt his affidavit in reply and the written submissions in reply he filed on 21.01.2020. The nucleus of his submission is that the applicant has not shown good cause for the delay. He relied on the case of **Ratman v. Cumarasamy** [1964] 3 All E.R. 993 in which it was emphasized that the rules of the Court must *prima facie*, be obeyed, and in order to justify a

Court in extending time during which some steps in procedure requires to be taken, there must be some material on which the court can exercise discretion. The respondent submitted that no cogent material has been placed before the Court in the circumstances of present case. He has likewise cited the case of **William Shija v. Fortunatus Masha** [1993] T.L.R. 203 in an endeavor to emphasize that the applicant is required to account for every single day of the delay. Unfortunately however, he did not say anything regarding the aspect of clams of illegalities in the decision of the High Court.

I need to point out at this stage that this being a second bite, the Court would have been properly moved where the application could have been anchored on Rule 10 of the Rules, together with Rule 45A (1) (c) of the Rules, the provision under which a second chance/bite is provided. However, the omission is inconsequential in view of the provisions of Rule 48 (1) of the Rules which states that:-

> *" R. 48 (1): Subject to the provisions of sub-rule (30 and any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit and*

shall cite the specific rule under which it is brought and state the ground for the relief sought:

Provided that where an application omits to cite any specific provision of the law or cites a wrong provision, but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the court may order that the correct law be inserted."

In terms of Rule 10 of the Rules, the Court may grant an application for extension of time in which to do what ought to have been done within time prescribed by law where a party seeking such an order may have shown good cause for the delay. That Rule provided that:-

*"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." [The emphasis is mine].

As we know it, the phrase "good cause" has not been define anywhere in our laws. In essence however, it means an applicant is duty bound to show adequate or substantial grounds sufficient to convince the Court to grant the order sought - See the cases of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, and the **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Ltd.**, Civil Application No. 99 of 2007 (both unreported). In **Regional Manager, TANROADS Kagera** (supra), the Court stated that:-

"What constitutes good sufficient reason (as it were in the old Rules) cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each case. This means that the applicant must place before the Court material which will move the court to exercise its judicial discretion in order to extend the time limited by the Rules."

See also the case of **Ratman** (supra) where, as hinted above, it was stated that there must be some material before the Court on which it

can exercise such discretion. It should be insisted here that the applicant is duty bound account for every single day of the delay – the case of **William Shija** (Supra).

In the circumstances of the present case, the applicant has anchored his application on the ground of there being an illegality in the decision of the High Court. He has sought support from, among others, the case of the **Principal Secretary Ministry of Deference & Natural Sources** (supra). In that case, the Court stated that:-

> *"where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute a sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance."*

As often stressed by the Court, for this ground to stand, the illegality of the decision subject of challenge must clearly be visible on the face of the record, and the illegality in focus must be that of sufficient importance. This is indeed what we said in **Lyamuya**

Construction Company Limited (supra). In that case, the Court said that:-

> *"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 Valambhia'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, (but) not one that would be discovered by a long drawn argument or process."*

Looking at the matter at hand, I apprehend that if in the course of composing the judgment, the learned High Court judge raised an issue which was neither pleaded nor canvassed by both parties, and predicated her decision on it, I believe it will be proper to conclude, as I do, that the trial court's decision is tainted with an illegality supposed to

be addressed by the Court. As such, I am convinced that they have constituted good cause for the delay and I endorse it.

Consequently, time is extended as prayed. The applicant is granted a period of 30 days from the date of delivery of this ruling within which to apply for certificate on a point of law before the High Court.

Order accordingly.

DATED at **MWANZA** this 26th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

The ruling delivered this 27th day of March, 2020 in the presence of Mr. Mussa Nyamwelo, counsel for the applicant and the respondent appeared in person is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL