IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 76/08 OF 2018

THE DIRECTOR GENERAL LAPF PENSIONS FUND ..... APPLICANT

VERSUS

PASCAL NGALO ..... RESPONDENT

(Application from the Order of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 7th day of December, 2017
in
Civil Appeal No. 34 of 2014

.....

RULING

5th & 10th June, 2020

KITUSI, J.A.:

The applicant went to the High Court in an attempt to challenge the decision of the Magistrate's Court of Mwanza but her appeal was rejected for being time barred. The applicant believes that the High Court Judge who made that order acted wrongly. She applied for a review of that decision but another learned Judge taking the view that the order of the High Court could only be rectified by way of an appeal to the Court, dismissed that application for being misconceived.

As the applicant was, by that time, out of the statutory time, she made an application for extension of time to lodge a Notice of Appeal

and apply for leave to appeal. She made that application in what is commonly known as the first bite, but the same was refused by the High Court. This application under rule 45 A (1) (b) (3) (3) and 48 (1) and (2) of the Court of Appel Rules, 2009, seeks to take a second bite.

The present application is supported by an affidavit of Steven Thomas Biko, a Senior Legal Officer of the Applicant which details the reasons for the delay. Under the rules conferring me with powers to extend time, the reasons for the delay are paramount, in that the applicant must account for the delay.

In a bid to secure an order of extension of time the appellant lodged written submissions as well. The applicant's prime reason for the delay is that she was engaged in pursuit of the same matter in court, first by an application for review before later unsuccessfully applying for the first bite. The application is, however, resisted by the respondent who took an affidavit in reply and filed a reply to the written submissions.

At the hearing of the application Mr. Eliadi Mndeme, learned counsel, first addressed an obvious omission to cite rule 10 of the Rules. He moved me to ignore the omission by treating it as inconsequential in terms of the proviso to rule 48 (1) of the Rules and by considering the

need to achieve substantive justice. In his address, the respondent who stood in person took the omission to be fatal arguing that had the rule been cited, he would have prepared submissions in relation to it. I shall determine this aspect in due course.

Turning to the substance, Mr. Mndeme submitted that the law obliges a party seeking extension of time to appeal to apply to the High Court first under section 11 (1) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002], (the Act). He cited the case of **William Shija v. Fortunatus Masha** [1997] TLR 213 to rationalize the time that was lost in pursuing the first bite.

Mr. Mndeme called another factor to his aid. He submitted that the applicant acted promptly in taking requisite steps. First, upon becoming aware of the rejection of the appeal she applied for a review, and immediately the latter was dismissed, she applied for extension of time at the High Court. The case of **Tanzania Revenue Authority v. Tango Transport Company Ltd.,** Civil Application No. 5 of 2005 (unreported) was cited to support the argument on the promptness of the applicant as being a factor to consider.

On his part the respondent moved me to take the applications that were previously filed by the applicant to have been mala fide, aimed at

denying him, an old retired servant, the fruits of the decree. He submitted that the applicant being legally represented should have known better than file "frivolous and vexations" applications. He cited Law JA in **Dias v. Ahmed Salum Sued** [1960] EA 985 castigating advocates who had then taken to filing unnecessary applications and points of objection. A long paragraph from that decision is reproduced by the respondent and it shall be my duty to determine its relevancy to the present case.

There has been an attempt by the parties to submit on the justification of the order of the High Court rejecting the applicant's appeal. As intimated earlier, the applicant attacks it as erroneous, while the respondent justifies it. I shall refrain from addressing this aspect because it is not what the motion is all about. The motion is for extension of time, drawn under the provisions earlier referred to, omitting rule 10 of the Rules.

Let me determine the preliminary arguments by the parties on the effect of the omission to cite rule 10 of the Rules. For the applicant, counsel has taken refuge to the proviso to rule 48 (1) of the Rules but the respondent complains that by not citing that rule, the applicant caused him not to address it.

The respondent's argument on this aspect is hollow, I am afraid, because in the written submissions by counsel for the applicant, rule 10 of the Rules is referred to and contents thereof reproduced. Since the respondent made a reply written submission, he cannot validly complain that he was oblivious of rule 10 being applicable.

It may be useful to observe that this is not a novel situation. A similar situation happened in **Amani Girls Home v. Isack Charles Kenela,** Civil Application No. 365/08 of 2019 (unreported) and it was dealt with by invoking the proviso to rule 48 (1) of the Rules as hereunder;

> *"That aside, it is my considered opinion that although the applicant herein was supposed to cite Rule 10 of the Rules in his application which he did not, the Court's jurisdiction to entertain this application has not been ousted by such failure. The law is settled, whenever such omission occurs the Court has power to order parties to inset the omitted provision in terms of Rule 48(1) of the Rules. For ease of reference, the proviso to Rule 48(1) of the Rules provides as follows:*

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

It is also important to observe that this point was raised by the counsel for the applicant without any objection being raised. In view of the position of the law as it stands, and bearing in mind that the applicant's written submissions refer to rule 10, and that the applicant's counsel raised the matter before any objection had been raised, I shall treat the omission as inconsequential and proceed to determine the merit of the application.

The applicant's main explanation for the delay is that time was lost when she was pursuing matters in court. This, I think, constitutes what is known as technical delay, developed by caselaw from **Fortunatus Masha v. William Shija and Another** (supra) by a single Justice, to **Salvant K. A. Rwegasira v. China Henan International Group Co. Ltd.,** Civil Reference No 18 of 2006 (unreported) by the Court. In the

latter case, the Court adopted the principle that had been developed by the single Justice in the former, to wit;

> *"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

I stand by that position, and it is my conclusion that in view of the account made by the applicant's counsel, the delay involved in this case was merely technical. The alleged bad intention on the part of the applicant is unsubstantiated, and if there was negligence as submitted by the respondent, the applicant was penalized for it by having the matters decided against her. I should also consider the cited statement of Law JA in **Dias v. Ahmed Salum Swed** (supra). It is clear, in my view, that the said statement is not relevant to the facts of this case

where one finds herself late to take an appropriate action in court because she was in court pursuing the same matter though in a different and probably wrong style. It is like in the Law of Limitation Act, Cap 89 R.E. 2002, which I know does not apply in matters before the Court, section 21 provides for a more or less similar consideration, in computing the period of delay.

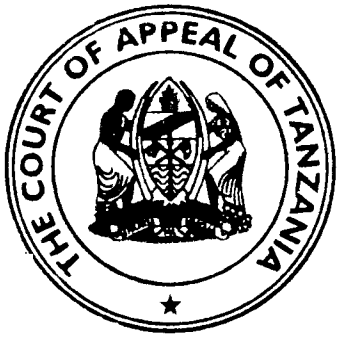
All said, I find merit in the application and hereby grant it. I order the applicant to file the intended notice and application for leave within fourteen days of the delivery of this ruling. Given the circumstances of this case which involves a retired employee, I make no order as to costs.

Order accordingly.

DATED at **MWANZA** this 9th day of June, 2020.

I. P. KITUSI
JUSTICE OF APPEAL

The ruling delivered this 10th day of June, 2020 in the presence of Ms. Mariam Ukwaju, counsel for the applicant and the presence of the respondent in person is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL