

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 378/01 OF 2019**

**MARY RWABIZI T/A AMUGA ENTERPRISES APPLICANT
VERSUS
NATIONAL MICROFINANCE PLC.....RESPONDENT**

**(Application for extension of time to file an application for review of the
judgment of the Court of Appeal of Tanzania at Dar es Salaam)**

(Mziray, Kwariko and Mwandambo, JJA)

Dated the 11th day of June, 2019

in

Civil Appeal No. 296 of 2017

.....
RULING

13th May & 15th July, 2020

WAMBALI, J.A.:

The applicant, Mary Rwabizi t/a Amuga Enterprises was the respondent in Civil Appeal No. 296 of 2017 whose judgment was delivered by the Court on 11th June 2019 in favour of the respondent who was the appellant. As clearly indicated in the present application, the applicant was dissatisfied with that decision of the Court and she thus lodged Civil Application No. 347 of 2019 to challenge the same through a review. Noteworthy, the date when the said application was lodged is not indicated as per the current record of the application. Be that as it may, the applicant through a letter to the Registrar with Ref. No. CA/MS/32/19 dated 21st

August, 2019 applied to withdraw the said application on the reason that she discovered some defects which could have rendered the application incompetent. The respective letter is attached to the affidavit in support of the application. However, as per the record of the application, there is no indication that it was replied by the Registrar.

Following the stated withdrawal of the earlier application, the applicant thus, on 6th September, 2019 approached the Court through the present application seeking extension of time within which to lodge an application for review. The notice of motion is supported by the affidavit of Ms. Crescencia Rwechungura, learned advocate who also appeared to represent the applicant at the hearing of the application. The learned advocate also lodged written submission in support of the application.

The application is strongly contested by the respondent who through the services of Mr. Ndanu Emmanuel learned advocate lodged in Court an affidavit in reply deposed by Ms. Consolata Resto, Principal Officer of the respondent. He also lodged the written submission. Mr. Emmanuel also appeared to represent the respondent at the hearing of the application and adopted the affidavit in reply and the written submission.

At the hearing of the application, the learned counsel for the applicant briefly emphasized what she had stated in the written submission and urged

me to grant the prayer for extension of time with costs. In short, she submitted that the applicant's delay to lodge an application for review is due to two reasons; first, that the previous application for review, namely Civil Application No. 347 of 2019 which was lodged in time was withdrawn and by that time the prescribed period within which to lodge another application for review had elapsed. She relied on the case of **Fortunatus Masha v. William Shija** (1997) TLR 154 to support her contention that the delay was technical one and thus the applicant cannot be penalized for the earlier mistake. Two, that there is an error in the judgment of the Court in Civil Appeal No. 269 of 2017 which has to be corrected by way of review. She stressed that the said error on the face of the record rendered the decision of the Court illegal. To buttress her submission in favour of the issue of illegality, she made reference to the decisions of the Court in **The Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387 and **Kalunga and Company Advocates v. National Bank of Commerce Limited** [2006] TLR 235.

To this end, Ms. Rwechungura spiritedly urged me to grant the applicant extension of time as she has demonstrated good cause to deserve the decision of the Court in her favour.

On his part, as intimated earlier on, Mr. Emmanuel strongly countered the submission of Ms. Rwechungura contending that, the applicant has not demonstrated good cause to deserve extension of time to lodge an application for review. He elaborated that the applicant has not even indicated the period of delay before she lodged the present application to enable the Court to determine whether the delay is inordinate or otherwise. The learned counsel submitted that the applicant has not indicated through the affidavit of her learned counsel when she lodged application No. 347 of 2019 which was withdrawn, to enable the Court to ascertain whether the same was lodged within the prescribed period of sixty days. Besides, he argued, the applicant has not shown the exact date when the application was withdrawn as what is in the record is the letter containing a notice to the Registrar praying to withdraw the application, but there is no indication that the Registrar issued an order to mark the application withdrawn.

In the circumstances, Mr. Emmanuel stated that the applicant has not accounted for every day of delay as emphasized by the Court in **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 which was relied upon in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (both unreported). He therefore,

urged me to reject the applicant's contention that she has demonstrated good cause for delay.

With regard to the issue of illegality, Mr. Emmanuel equally contended that the applicant has not pointed out clearly how the judgment of the Court is illegal as alleged. He stated that the decisions of the Court referred by the applicant to support the position that once the issue of illegality is raised, it is sufficient for the Court to grant extension of time, cannot rescue the situation as the circumstance in this case is different. Finally, relying in the decisions of the Court in **Aziz Mohamed v. The Republic**, Criminal Application No. 84/07 of 2019; **Mtesigwa Lugola v. The Attorney General and Inspector General of Police**, Civil Application No.34/06 of 2017; **Dar es Salaam City Council v. S. Group Security CO.LTD**, Civil Application No. 234 of 2015; **Daudi Haga v. Jenitha Abdon Machafu**, Civil Reference No. 1 of 2000 and **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (all unreported) prayed for the dismissal of the application with costs.

Having considered the submissions of counsel for the parties the crucial issue for determination is whether the application has merits.

It is my considered opinion that there is no doubt as rightly pointed out by the learned counsel for the respondent that, in view of the record of the application, it is difficult to conclude that the applicant has sufficiently established the period she has delayed in lodging the application for review. According to the record of the application, although the fact that Civil Application No. 347 of 2019 was lodged is not disputed, there is no indication of the exact date on which it was lodged in Court. It is therefore difficult given the material in the record to establish whether it was lodged within time, that is, sixty days from the date the judgment of the Court which was delivered on 11th June, 2019. This is so because the only indication in the record of the application is that the applicant wrote a letter to the Registrar on 21st August, 2019, which was received in the Registry of the Court on the same date, concerning the notice to withdraw the said application. However, it is not stated even in the learned counsel's affidavit and the written submission the exact date when the application was marked withdrawn. Therefore, in view of the record of the application, there is no evidence that the said application was marked to have been withdrawn by the Registrar as required in terms of Rule 58 (4) of the Rules.

In the absence of that relevant information in the record of the application, it is without doubt that the proper application for review was

supposed to have been lodged by or on 10th August, 2019 in order to be within the period of sixty days from the date of the judgment of the Court. Consequently, it is taken that the period of delay in lodging the application for review is almost twenty-six days as the present application was lodged on 6th September, 2019. This is the period which the applicant was obliged to account for the delay in lodging the application for review. Unfortunately, the applicant has not sufficiently accounted for the said period of delay. She cannot therefore rightly rely on the decision of the Court in **Fortunatus Masha v. William Shija** (supra) to justify that the delay is technical.

The next ground for consideration in support of extension of time is the issue of the alleged illegality in the judgment of the Court. The counsel for the applicant strongly contended both in the supporting affidavit and the written submission that the error apparent in the face of the record has rendered the judgment of the Court to be illegal. In her submission, extension of time will therefore enable the applicant to be heard on review concerning the alleged illegality.

At this juncture, I think it is prudent to reproduce the relevant paragraphs of the applicant's counsel affidavit in support of the alleged illegality thus: -

"3. The applicant is dissatisfied with the whole judgment of the civil appeal no 296/2017, based on errors apparent on the face of the record which have caused injustice to the applicant and renders the Judgment illegal.

4. The record contains misconception of the facts of the case which misled the court to arrive at an incorrect and illegal decision.

5. The law of contract was misapplied to discharge the respondent from the claim of negligence arising from the respondent's breach of duty in closing the 1st defendant's bank account which caused injuries to the applicant.

6. There is error of procedure in dismissing the claims against the respondent in the appeal..."

On the other hand, the learned counsel for the respondent was of the firm opinion that the alleged illegality has not been fully demonstrated by the applicant. He emphasized that in **Lyamuya Construction Company Limited v. The Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) the Court stressed that in **Valambhia's** case it was not meant to say that

whenever an illegality is pleaded in an application for extension of time the application should be granted as of right. Rather, he argued, the illegality must be apparent in the face of the record, which the applicant has failed to show in the present application.

On my part, having considered the submissions of the counsel for the parties, I am of the opinion that an allegation by the applicant that the error in the judgment of the Court has made the decision to be illegal, is a serious matter which deserves the attention of the Court on review. I think the question of the existence of real or perceived illegality in judicial proceedings of the final court, like in this case, is not one of the issue to be taken lightly.

Thus, since the intention of the applicant is to place before the Court on review the argument that the error apparent on the face of the record has made the decision of the Court to be illegal, there is, in my view, no need of going further at this stage of the application to demand the applicant to divulge further and better particulars of alleged illegality. Certainly, if given opportunity, the applicant will expound further the allegation contained in the above reproduced paragraphs of the affidavit in support of the application. It is noteworthy that in the said paragraphs the thrust of the applicant's claim on the illegality of the judgment of the Court is that the same is based on incorrect facts of the case. Therefore, to

demand further explanation at this stage, will in my view, be prejudicial to what the Court will have to deal with if an application for extension of time is granted. It is equally inappropriate at this stage, I think, for me to go further and determine the substance of the claim of illegality.

It is in this regard that in **Devram P. Valambhia** (supra) the Court stated among others at page 189 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 be established, to take appropriate measures to put the matter and the record straight".

Indeed, in **VIP Engineering and Marketing Limited and Two Others v. City Bank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported) the Court stated that: -

"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" within the meaning of Rule 8 of the Rules for extending time". (Noteworthy,

Rule 8 referred above is the current Rule 10 of the Rules).

(See also the decisions of the Court in **Kalunga and Company Advocates v. National Bank of Commerce Limited** [2006] TLR 235 and **CRDB Bank Limited v. George M. Kilindu and The Attorney General**, Civil Application No. 87 of 2009 (unreported).

In the premises, in view of the circumstances obtaining in the present application, the observation of the Court in **Lyamuya Construction Company Limited** (supra) cannot apply.

It follows that although in the present application the applicant has not sufficiently explained the delay of twenty-six days in lodging an application for review, which delay is not inordinate, she deserves consideration of the Court on the allegation of illegality. Thus, seeking inspiration from the above referred decisions of the Court on the issue of illegality and applying it in the circumstances of this application, I am of the decided opinion that the discretion of the Court in terms of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (as amended) can be properly exercised to grant the application.

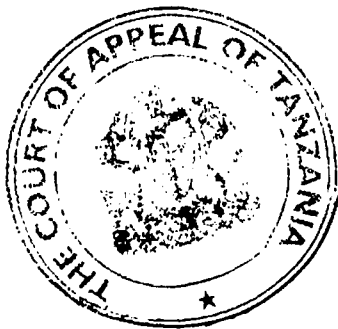
Consequently, the applicant is granted extension of time to file an application for review. It ordered that the requisite application should be lodged within sixty days from the date of the delivery of the ruling.

Nevertheless, in the circumstances of this application, I order that parties shall bear their respective costs. It is so ordered.

DATED at DAR ES SALAAM this 30th day of June, 2020

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Ruling delivered this 15th day of July, 2020 in the Absent of applicant through dully served and Mr. Rahim Mbwambo, counsel for the Respondent is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "E. G. MRANGU", is written over a horizontal line.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL