IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATON NO. 365/01 OF 2019

1. ZITO ZUBERI KABWE
2. SALIM ABDALLA RASHID BIMANI } .....APPLLICANTS
3. JORAN LWEHABURA BASHANGE

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

(Application for extension of time to lodge an application for Revision against the Ruling and Order of the High Court of Tanzania at Dar es Salaam).

(Masoud, J.)

dated the 14th day of January, 2019
in
Misc. Civil Cause No. 31 of 2018

RULING

12th May & 12th August, 2020.

MKUYE J.A:.

Before the High Court, the applicants had filed a petition to challenge the constitutionality of section 8(3) of the Basic Rights and Duties Enforcement Act, Cap 3 R.E 2002 (BRDEA) and the Bill for enactment of the Political Parties (Amendment) Act, 2018. The applicants sought for declaratory orders that the said provision and the intended law are null and void.

On the other hand, the respondent, filed a Notice of Preliminary Objection (PO) consisting ten points and the High Court upon hearing the same sustained the 3rd and 8th points of objection that **one,** the petition was defective and bad in law for containing omnibus applications and prayers whose determination entail different yardsticks and redress; and **two**, that the petition was frivolous, incompetent and lacking in merit for contravening section 8(3) of the BRDEA. Subsequently, the petition was struck out.

Dissatisfied with that decision, the applicants desired to file an application for revision but found themselves to have run out of time to do so, hence, they have brought this application for extension of time within which to lodge an application for revision against that Ruling and Order of the High Court of Tanzania in Misc. Civil Cause No. 31 of 2018 dated 14/1/2019 (Masoud, J.). The application is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by an affidavit deponed by Mr. Daimu Halfani, learned advocate of the applicants. The grounds for the application are that:

(1) The applicant applied for certified copies of Ruling, drawn order and proceedings in Misc. Civil Cause No. 31 of 2018

from the Registrar of the High Court but the copies of certified copies of Ruling and drawn order were supplied on 1st July, 2019 and proceedings were supplied and obtained on 9th August, 2019 when the period of limitation for lodging the application for revision had expired.

(2) *There are illegalities and irregularities in the impugned decision including the preliminary objection being heard by a single judge instead of three judges as required by the Basic Rights and Duties Enforcement Act, Cap 3 R.E 2002.*

The respondent resisted the application. As alluded to earlier on, she lodged a notice of preliminary objection on ten grounds of objection. Both parties also filed written submissions for and against the application together with lists of authorities.

When the application was called on for hearing, the applicants were represented by Mr. Daimu Halfani, learned advocate; whereas the respondent was represented by Mr. Gabriel Malata, learned Deputy Solicitor General (as he then was) assisted by Ms. Grace Lupondo and Ms.

Nalindwa Sekimanga, both learned State Attorneys who at the outset, prayed for leave to abandon the Notice of Preliminary Objection they had filed earlier on to pave way for the hearing of the application on merit.

When Mr. Halfani was given the floor to elaborate on the application, he first sought to be adopted by the Court the notice of motion, affidavit and written submission in support of the application together with the list of authorities filed earlier on. After having done so, he submitted that the applicants were late to file the application for revision because the copies of Ruling, drawn order and the proceedings which were necessary documents for the preparation of the said application were supplied to them when the time limitation for filing it had expired. He said, they first received the copies of Ruling and drawn order on 1/7/2019 and the copy of proceedings was supplied to them on 9/8/2019. When he was asked what he was doing from 9/8/2019 after having been supplied with all the documents to 27/8/2019 when this application was filed, he said, it was an oversight.

Mr. Halfani further contended that the decision sought to be impugned contains illegalities and irregularities which need to be addressed by this Court. In the written submission the learned counsel explained the

alleged illegalities and irregularities being, **one,** the preliminary objection was heard and determined by a single judge instead of a panel of three judges in accordance with section 10(1) of the BRDEA and Rule 7(2) of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014 (BRDE (Practice and Procedure) Rules)) which require a single judge to determine the preliminary objection on court's jurisdiction, frivolousness and vexatiousness. **Two,** the matter that was initially assigned to a panel of three judges of the High Court (Sehel, J. (as she then was), Maghimbi, J. and Masoud, J.) as per section 10(1) of the BRDEA was heard and determined by a single judge (Masoud, J.) without there being a re-assignment by the Principal Judge or the judge in charge to him. **Three,** the single judge heard and determined all ten (10) points of preliminary objection although seven out of them were fit to be heard and determined by a panel of three judges. **Four,** the principle of omnibus application or prayers was misapplied in determining the preliminary objection raised on the application because such principle is applicable to civil suits as opposed to a matter like the instant. The case of **Hon Attorney General v. Rev. Christopher Mtikila,** Civil Appeal No. 20 of 2007 (unreported) Pg 11 was cited in support. In the end, he prayed to the Court to find that the applicants have shown good cause and grant it.

In reply, Mr. Malata also before proceeding with his arguments sought to adopt the affidavit and written submission in reply together with two lists of authorities they had filed earlier on. Having done so, he submitted that the reason advanced by the applicants that they were late to file an **application for revision** because they were supplied with the copies of the Ruling, drawn order and proceedings after the time for filing it had lapsed is not tenable. While relying on the case of **Mabalanganya v. Sanga**, (2005) IEA 236, he argued that **the necessary documents required for filing of application for revision,** were only the copies of ruling and drawn order. In this regard, he was of the view that counting of days should start from 1/7/2019 to 27/8/2019 which was after a lapse of 56 days. This was not accounted for, he said. He added that, assuming the applicants were supplied with a copy of proceedings on 9/8/2019, still the applicants have failed to account for 17 days from 9/8/2019 to 27/8/2019 when this application was filed. He stressed that, the applicants ought to account for each day of delay and he referred the Court to a number of cases decided by this Court such as **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010; **Omary Ally Nyamalegi (As the Administrator of the estate of the late Seleman**

Ally Nyamalegi) and 2 Others v. Mwanza Engineering Works, Civil Application No. 94/08 of 2017; and **FINCA (T) Limited and Another v. Boniface Mwalukisa,** Civil Application No. 518/12 of 2018; **Vodacom Foundation v. Commissioner General (TRA),** Civil Application No. 107/20 of 2017; and **Zawadi Msemakweli v. NMB PLC,** Civil Application No. 221/18 of 2018 (all unreported).

In relation to the issue of illegalities and irregularities, Mr. Malata contended that though it was raised in the notice of motion, it was not supported by any evidence through the affidavit in support of the application as per the dictates of Rules 48(1) and 49(1) requiring the notice of motion to be supported by an affidavit or affidavits. Since the illegalities and irregularities are not reflected in the affidavit, there is no material before the Court to enable it exercise its discretion, he said. He added that even if the applicants might have explained it in the written submission, such written submission is not part of evidence.

On the issue that the preliminary objection was heard and determined by a single judge instead of three judges he contended that, it was a misconception as in practice and procedurally the POs are determined differently from petitions. Whereas under section 10(1) of

BRDEA, the petitions are determined by three judges, the POs are heard and determined by a single judge in terms of Rule 7(2) of the BRDE (Practice and Procedure) Rules 2014.

As regards the applicants' contention that the principle of omnibus application and prayers was misapplied, Mr. Malata argued that the applicants ought to file a fresh petition at the High Court instead of coming to this Court with this application. In the end, he urged the Court to find that the applicants have failed to show good cause and dismiss the application with costs.

In rejoinder, Mr. Halfani reiterated what he submitted in chief adding that since they were supplied with copy of proceedings which was also a necessary document on 9/8/2019, then the time started to run from 9/8/2019. At any rate, he argued, the period of delay is not inordinate. Lastly, he urged the Court to consider all the grounds and grant the application with costs.

I have dispassionately considered the notice of motion, affidavits together with the rival oral and written submissions from both sides. The issue for this Court's determination is whether the applicants have shown good cause to warrant it grant the application.

Rule 10 of the Rules gives powers to this Court to grant an application for extension of time if the applicant has shown good cause. For ease of reference, I find it appropriate to reproduce such Rule as follows:-

> *"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."*

According to the above cited provision the power of the Court is discretional and it is exercised where good cause for the delay is shown. It is also noteworthy that such discretion is to be exercised judicially. It is also notable that there is no definite interpretation of what constitutes "good cause" for the Court to grant extension of time. However, it is now settled that the Court must consider certain factors though they may not be exhaustive. Some of them were stated in the case of **Lyamuya Construction Company Limited** (supra) as under:-

(a) *The applicant must account for all the period for delay;*

(b) *The delay should not be inordinate;*

(c) *The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*

(d) *If the court feels that there are other sufficient reasons, such as the illegality of the decision sought to be challenged"*

(See also **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another,** Civil Application No. 6 of 2011 (unreported).

But again, in the case of **Bushiri Hassan v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported), the issue of accounting for each day of delay was emphasized. The Court stated as follows:-

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

In this case, Mr. Halfani argued that the applicants were not able to file the application within time because, though they were furnished with copies of Ruling and order on 1/7/2019, they were waiting for the copy of

proceedings which were supplied to them on 9/8/2019. On the other hand, Mr. Malata was of the view that only the copies of Ruling and drawn order furnished on 1/7/2019 were necessary for filing the revision. However, with respect, I do not agree with the proposition by the respondent that the copy of proceedings was not necessary for such an application.

In the case of **Benedict Mabalanganya** (supra), cited by the respondent the Court grappled with an akin situation and stated as follows:-

> *"...revision entails examination by this Court the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings before the High Court.*
>
> *So* ***the record of proceedings of the High Court, and in the case of the appellate jurisdiction of the High Court, then the record of proceedings of the lower court or courts, must be before this Court.***
>
> ***This is glaringly certain from the very definition of what revision entails and if the Court is to perform that function.***

This does not depend on the existence of any rules to that effect. The rules, if any, will just state the obvious."
[Emphasis added]

(**See also the Board of Trustees of National Social Security Fund (NSSF) v. Leonard Mtelepa,** Civil Application No. 140 of 2005 (unreported).

So, according to the excerpt from **Mabalanganya's case** (supra), the copy or record of proceedings of the High Court as well as those from subordinate court in case the High Court acted in its appellate jurisdiction are necessary documents for an application for revision. Applying the above principle in the case at hand, it means that the copy of the proceedings was a necessary document in an application for revision. In this regard, I find that there was justification for the applicants to wait for it as among the necessary documents for the preparation of the application for revision.

That notwithstanding, in this case, the decision sought to be impugned was handed down on 14/1/2018. The applicants were supplied with the copies of Ruling and drawn order on 1/7/2019 and the copy of proceedings on 9/8/2019. This application was filed on 27/8/2019. Since the copy of proceedings was a necessary document for preparation of

application for revision, then the days are to be counted from 9/8/2019. This means that, if the days are counted from 9/8/2019 to 27/8/2019, 2019 then this application was filed after 17 days had lapsed from when they were supplied with all the necessary documents including the copy of proceedings. These days have not been accounted for as rightly pointed out by Mr. Malata. At one stage Mr. Halfani contended that the delay was due to an oversight, but I am afraid, that reason does amount to a good cause for the delay. Even his argument that the delay was not inordinate, in my view, cannot stand in the absence of justification or explanation for the delay having been shown first – (See **Republic v. Yona Kaponda and 9 others** [1985] T.L.R. 84). In this regard, I find that the applicants have failed to account for the delay.

The applicants' other ground for this application is that the decision sought to be revised contains illegalities and irregularities which need this Court's intervention. Mr. Malata took an issue that as the same was not supported by the affidavit as required by Rules 48 and 49 of the Rules, there is no material before the Court to work on. On the other hand, Mr. Halfani relying on paras 4 and 5 of the affidavit in support of the application controverted him arguing that the illegalities and irregularities

were explained. I agree with Mr. Malata that in the affidavit the issue of "illegality" or "irregularity" do not feature anywhere. In the said paras the counsel for the applicants gave a sequence of events pertaining to the matter sought to be impugned. It is notable that the same was explained extensively in the written submission. However, in my view, though the said ground was not mentioned in the affidavit, so long as it was explained in the written submission suffices.

Be it as it may, I am alive that the law as it is now is well established that where there is an allegation of illegality in the decision sought to be challenged, the Court has the duty even if it means extending the time to enable the alleged illegality to be ascertained and make the proper correction if it is established. This Court has considered the issue of illegalities in numerous cases such as **Principal Secretary, Ministry of Defence and National Services v. Devram Valambhia,** [1992] T.L.R. 185; **Attorney General v. Tanzania Ports Authority and Another,** Civil Application No. 87 of 2016; **VIP Engineering and Marketing Limited and 2 Others v. Citibank, (T) Ltd,** Consolidated Civil References No. 6, 7 and 8 of 2006; and **Lyamuya Construction Company Limited's** case (supra). For instance, in the case of **Principal**

Secretary Ministry of Defence and National Service (supra) it was stated as follows:

> *"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 record straight."*

Also in the case of **Tanzania Ports Authority and Another,** case (supra) it was stated as follows:-

> *"Moreover it is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."*

Yet in the case of **Lyamuya Construction** (supra) **to which I subscribe,** the Court emphasized that an alleged illegality must be apparent on the face of it. In that case it was stated as follows:-

> *"But in that case,* ***the errors of law, were clear on the face of the record.*** *The High Court there had issued a garnishee order against the Government, without hearing the applicant, which was contrary to both Government*

Proceedings Rules, and rules of natural justice. ***Since every party intending to appeal seeks to challenge a decision either on points of law or fact,*** *it cannot, in my view be said 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 of right, be granted extension of time if he applies for one.* ***The Court emphasized that such point of law, must be that of "sufficient importance" and I would add 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."*** [Emphasis added]

Having applied the foregoing principle to the instant case, I am far from being convinced that the alleged illegalities and irregularities are clearly apparent or obvious on the face of the impugned decision. The issue that the PO was heard and determined by a single judge instead of a panel of three judges involves interpretation of the law which, in my view, cannot be taken as illegality or irregularity. As to the absence of a re-assignment of the matter which was initially assigned to the panel of three judges to one judge by the Principal Judge or Judge In-charge, to say the least is a matter of fact and not of law which would need to be discovered after a long drawn argument or process. That, the single Judge dealt with

all ten points of objection the record does not bear it as the presiding Judge decided the matter on only two points of objection; and this is confirmed when the judge clearly stated that he was convinced that the matter could be disposed of without dealing with each point of objection as shown at page 7 of the Ruling sought to be impugned. Likewise, in relation to the contention relating to omnibus prayers, I hold the same view that it is not apparent on the face of it. This is so because the single judge dealt with the propriety of the petition that was before the court whether it was proper for advancing omnibus prayers in a single petition and upon examining the provision under which the petition was brought he found that it was not.

To cull from the foregoing, the alleged illegalities and irregularities raised by the applicants, in my view, are not apparent on the face of the record. They will require a long drawn process to be discovered from the impugned decision. Hence, it is my finding that the same do not constitute good cause for warranting extension of time.

In the totality of the foregoing, I would conclude that the applicants have failed to show any good cause for this Court to extend time within

which to file an application for revision. In the result, the application fails and it is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 11th day of August, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

This Ruling delivered on 12th day of August, 2020 in the presence of Ms. Loveness Denis, counsel for the applicants and Mr. Deodatus Nyoni learned Principal State Attorney assisted by Ms. Nalindwa Sekimanga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. K. Nkya
Ag. SENIOR DEPUTY REGISTRAR
COURT OF APPEAL