IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CIVIL APPLICATION NO. 120/03 OF 2020

DOMINIC YOHANA ..... APPLICANT

VERSUS

SALMA SHITE ..... RESPONDENT

(Application for Extension of Time to Apply for Leave to Appeal to the Court of Appeal from the judgment and decree of the High Court at Dodoma)

(Kalombola, J.)

Dated the 19th day of July, 2018

in

Misc. Land Appeal No. 33 of 2016

RULING

26th & 31st May, 2021

MWAMBEGELE, J.A.:

In the High Court of Tanzania sitting at Dodoma, the applicant, Dominic Yohana was refused extension of time to file an application for leave to appeal to this Court. He intended to assail the decision of the High Court (Kalombola, J.) in Misc. Land Appeal No. 33 of 2016. In refusing him the application, the High Court (Mansoor, J.) was of the view that the applicant had not shown good cause for the delay to warrant it grant the extension sought. Still wishing to challenge the decision of the

High Court (Kalombola, J.), the applicant has come to the Court by way of what is commonly known as a second bite seeking the same extension of time which was refused by the High Court (Mansoor, J.) on 15.11.2019.

The application has been made under the provisions of rule 10 and 45A of the Tanzania Court of Appeal Rules (the Rules) having duly obtained a certificate of delay in terms of rule 45A of the Rules. The course of action is allowable by the provisions of rules 10 and 45A of the Rules, under which the application has been made. The application is supported by an affidavit deposed by Dominic Yohana, the applicant.

When the application was placed for hearing before me on 25.05.2021, the applicant appeared through Ms. Sophia Gabriel, learned advocate. Though duly served, neither the respondent nor her advocate entered appearance. The notice of hearing shows that the respondent was duly served on 07.05.2021 through Advocate Sedrick Kallen Mbunda of a law firm going by the name M. N. Associates of the City of Dodoma. Given the circumstances, Ms. Gabriel prayed for, and was granted, leave to proceed with the hearing of the application in the absence of the respondent in terms of rule 63 (2) of the Rules.

When given the floor to argue her application, Ms. Gabriel first sought to adopt the notice of motion and the supporting affidavit as forming part of her oral arguments. She told the Court that the respondent had not filed any affidavit to resist the application. That being the case, she submitted, it should be taken that the respondent did not intend to oppose the application. To buttress this proposition, she referred me to the decision of the Court in **Alhaji Abdallah Talib v. Eshakwe Ndoto Kiweni Mushi** [1990] T.L.R. 108 in which it was held that a respondent who intends to oppose an application, must do so by filing a counter affidavit.

Regarding the gist of the application, Ms. Gabriel was very brief but to the point. She submitted that the reason why the applicant could not timely file the application is deposed at para 8 of the supporting affidavit that the applicant was not conversant with the process of appeal to the Court. For this reason, and the fact that the application was not contested, Ms. Gabriel prayed that the application be allowed with costs.

Before going into the nitty gritty of the determination of the application, I start with the premise that this application in not contested. I agree with Ms. Gabriel that a respondent who intends to challenge an

application must do so by filing a counter affidavit. In **Alhaji Abdallah Talib** (supra); the case cited to me by the learned counsel, it was succinctly held at p. 110:

> *"... if the respondent wished to challenge the application, the proper thing to do here was to file a counter affidavit. That would not only avoid confusion and multiplicity of actions, but would also make the proceedings neat and orderly."*

In the case at hand, if the respondent intended to resist the application, she would have filed an affidavit in reply to challenge it. For the avoidance of doubt, whether it is an affidavit in reply or a counter affidavit is just a matter of nomenclature. The same document is referred to as an affidavit in reply in the Court of Appeal but it is a counter affidavit in courts below.

I also wish to state at this juncture that the fact that the application was not contested, it does not *ipso facto* mean the application will be allowed as of right. There are decisions of the Court that underline this fact – see: **M.B. Business Limited v. Amos David Kasanda and Two Others**, Civil Application No. 66 of 2014 and **Tanzania Breweries Ltd v. Leo Kobelo**, Civil Application No. 64/18 of 2020 (both unreported).

It is now settled law that an application for extension of time will only be granted upon the applicant showing good cause for the delay. There is no dearth of authorities on this point – see: **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015, **Sebastian Ndaula v. Grace Rwamafa (legal personal representative of Joshua Rwamafa)**, Civil Application No. 4 of 2014, **Yazid Kassim Mbakileki v. CRDB (1996) Ltd Bukoba Branch & Another**, Civil Application No. 412/04 of 2018 and **Tanzania Bureau of Standards v. Anitha Kaveva Maro**, Civil Application No. 60/18 of 2017 (all unreported), to mention but a few.

Adverting to the case at hand, I have considered the notice of motion, the supporting affidavit and the submissions of the learned counsel for the applicant at the hearing of the application. The reason why the applicant could not timely file the application for leave to appeal to the Court for which enlargement of time is sought is found at paras 4 and 8 of the supporting affidavit. For easy reference, I take the liberty to reproduce them as under:

At para 4, the applicant deposes:

"4. *THAT, as I left that I was not conversant with procedures for appealing to the Court of appeal of Tanzania, I approached an Advocate one Mr. Mcharo who after going through my documents informed me that I need to apply for leave to appeal to the Court of Appeal and that by the time I went to him, time for filing application for leave to appeal, had then lapsed.*"

Likewise, at para 8 it is deposed:

"6. *THAT, on 18th November, 2019 I, applied to be supplied with the copies of Ruling, Drawn Order and Proceedings to enable me to apply to the Court of Appel of Tanzania for extension of time to apply for leave to appeal to the Court of appeal of Tanzania. A copy of letter is attached as* ***Annexure DY5.***"

It is apparent from the reproduced two paragraphs that the applicant did not timely apply for leave because he could not come to grips with the procedure for appealing to the Court. The crisp issue in this application is therefore whether the applicant, for not being conversant with the procedure to appeal to the Court, has brought to the fore good cause in

terms of rule 10 of the Rules to trigger the Court to enlarge the time sought. This issue is not a virgin territory. It has been traversed by the Court before in a string of decisions which hold that ignorance of the procedure does not fall within the scope and purview of good cause envisaged by rule 10 of the Rules – see: **Metal Products Ltd v. Minister for Lands & Director of Land Services** [1989] T.L.R. 5 and **Ali Vuai Ali v. Suwedi Mzee Suwedi**, Civil Application No. 1 of 2006, **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015, **Charles Machota Sarungi v. Republic**., Criminal appeal No. 3 of 2011 and **Wambura N. J. Waryuba v. The Principal Secretary Ministry of Finance & Another**, Civil Application No. 225/01/2019 (all unreported). In **Ngao Godwin Losero** (supra), for instance, it was observed:

> *"... I will right away reject the explanation of ignorance of the legal procedure given by the applicant to account for the delay. As has been held times out of number, ignorance of law has never featured as a good cause for extension of time (see, for instance, the unreported ARS. Criminal Application No. 4 of 2011 -* ***Bariki Israel Vs. The Republic****; and MZA. Criminal Application No. 3 of 2011 -* ***Charles Salugi Vs. The Republic****). To say*

the least, a diligent and prudent party who is not properly seized of the applicable procedure will always ask to be apprised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness."

To clinch it all, in **Metal Products Ltd** (supra), confronted with a similar situation, it was held:

"Categories of explicable inadvertence causing delay to make an application do not include ignorance of procedure ...."

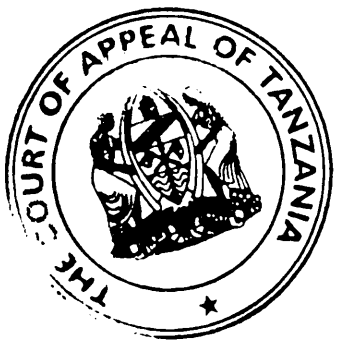
In the case at hand, as seen above, the only reason brought to the fore by the applicant for not filing the application for leave to appeal to the Court is his inability to come to grips with the procedure for appealing to this Court. This does not fall within the scope and purview of good cause envisaged by rule 10 of the Rules. If the applicant was diligent enough, he should have timely sought to be apprised of the process of appeal to the Court. He did not act timely. When he consulted an advocate for the way forward to his appeal, as deposed at para 4 of the supporting affidavit, he was already on borrowed time.

In the end, I find no iota of merit in this uncontested application and dismiss it. As the respondent did not enter appearance at the hearing of this application and never filed an affidavit in reply to resist the application, I make no order as to costs.

DATED at **DODOMA** this 28th day of May, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

This Ruling delivered this 31th day of May, 2021 in the presence of Ms. Caroline Lyimo, learned advocate for the Applicant and in absence of the Respondent, is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL