IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 502/17 OF 2020

KIBO HOTEL KILIMANJARO LIMITED.....APPLICANT

VERSUS

1. **THE TREASURY REGISTRAR**
   (Being the Legal Successor to PSRC)
2. **IMPALA HOTEL LIMITED**

.....RESPONDENTS

[Application for extension of time to file revision against the decision of the High Court of Tanzania, Land Division at Dar es Salaam]

(Maghimbi, J.)

dated the 20th day of July, 2020

in

Miscellaneous Land Application No. 456 of 2019

RULING

22nd February & 18th March, 2021

KWARIKO, J.A.:

The applicant sued the respondents in the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No. 198 of 2007 which was dismissed for being time barred on 18th June, 2008 (Mziray, J) (as he then was). Dissatisfied, the applicant unsuccessfully applied for review of that decision in Misc. Land Application No. 456 of 2019 dated 20th July, 2020 (Maghimbi, J). In this application, the applicant is seeking the

Court's order for extension of time to file application for revision against that decision.

The applicant has preferred this application under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (henceforth the Rules) by a notice of motion supported by an affidavit of one Frank Marealle, Principal Officer of the applicant.

In the said affidavit, the deponent averred that the impugned decision was delivered on 20th July, 2020 and the applicant started to make a follow up of a copy of the same. It was not until 4th November, 2020 when the copy of the said decision was supplied to the applicant. Subsequently, on 19th November, 2020 the applicant lodged this application. The deponent attributed the delay of lodging the revision to the High Court which delayed to avail the copy of the proceedings to him. It was also averred that the impugned decision is tainted with an illegality.

In response, the first respondent filed an affidavit in reply sworn by one Benson Hoseah, State Attorney. The deponent averred that the applicant has not accounted for each day of delay from 4th November,

2020 when he obtained a copy of the impugned decision to 19th November, 2020 when this application was lodged. He further averred that there is no illegality in the impugned decision because it was clearly stated that the court had no jurisdiction to entertain the matter as the suit was time barred hence the applicant failed to convince the High Court that there was ground for review.

On his part, the second respondent opposed the application through an affidavit in reply sworn by her advocate one Agnes Dominick.

The counsel for the applicant lodged his written submissions in support of the application pursuant to Rule 106 (1) of the Rules. On the other hand, in compliance with Rule 106 (7) of the Rules, the first and second respondents' advocates similarly filed their respective written submissions in reply to the applicant's submissions.

At the hearing of the application, Mr. Seni Malimi and Ms. Rita Chihoma, learned advocates represented the applicant. On its part, the first respondent was represented by Ms. Irene Lesulie, Principal State Attorney assisted by Ms. Kause Izina and Mr. Stanley Mahenge, both

learned State Attorneys; whereas Ms. Agnes Dominic appeared for the second respondent.

When Mr. Malimi was called upon to argue the application, he first adopted the applicant's affidavit and written submissions to be part of his oral submissions. Submitting in relation to the reasons for the delay, Mr. Malimi argued that the period of fifteen days, between 4th November, 2020 when the applicant was supplied with the copy of the impugned decision and 19th November, 2020 when this application was filed was used in preparation of this application. He submitted that this is good cause for the grant of this application. To support his stance, Mr. Malimi referred the Court to its earlier decision in **Andrew Athuman Ntandu & Another v. Dustan Peter Rima** ***(As Administrator of the Estate of the Late Peter Joseph Rima)***, Civil Application No. 551/01 of 2019 (unreported).

In addition, the learned counsel also cited the cases of the **Principal Secretary, Ministry of Defence and National Services v. Devram P. Valambhia** [1992] T.L.R 387 and **Hamis Mohamed** ***(As the Administrator of the Estate of the Late Risasi Ngawe)*** **v. Mtumwa Moshi** ***(As the Administratrix of the Estate of Late***

Moshi Abdallah), Civil Application No. 407/11 of 2019 (unreported), in respect of the factors amounting to good cause for extension of time to do a certain act.

In relation to the issue of illegality, Mr. Malimi argued that the impugned decision was intended to cure the illegality in Land Case No. 198 of 2007 where the High Court dismissed the suit instead of staying it as there was in existence Civil Appeal pending in this Court between the same parties and same subject matter. Thus, dismissal of the suit was illegal.

The learned counsel further argued that the High Court erred when it raised an issue and decided it without giving opportunity to the parties to be heard. To clarify on this point, he referred to page eleven of the impugned decision and cited the previous decision of the Court in **Kumbwandumi v. Ndemfoo Ndossi v. Mtei Bus Service Limited,** Civil Appeal No. 257 of 2018 (unreported).

Mr. Malimi submitted that the respondents stand no any prejudice if this application is granted but the applicant will suffer miscarriage of

justice owing to the procured illegality in Land Case No. 198 of 2007 and the impugned decision.

On her part, Ms. Lesulie prefaced her arguments by adopting the written submissions in amplification of the affidavit in reply. She argued that the applicant has not accounted for the delay of fifteen days reckoning from the date he was supplied with the copy of the impugned decision on 04th November, 2020 to 19th November, 2020 when this application was lodged. She went on that the applicant ought to have accounted each day of delay as it was stated by the Court in the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 (unreported).

On another aspect, the first respondent's counsel argued that the applicant has failed to establish a prima facie existence of illegality. Reference was made to the case of **Transport Equipment Limited v. D.P Valambhia** [1993] T.L.R 91 and **Kashinde Machibya v. Hafidhi Said,** Civil Application No. 48 of 2009 (unreported). She argued further that the impugned decision does not contain any illegality as the decision in that case was clear that the suit was dismissed for being time barred under section 75 (2) of the Land Act [CAP 113 **R.E. 2019]**

The second respondent's counsel also adopted the written submissions to form part of her oral arguments. She explained that the applicant failed to account for each day of delay and the fifteen days have remained unexplained. To bolster her argument the learned counsel referred the Court to its earlier decision in **Addija Ramadhan (Binti Pazi) v. Sylvester W. Mkama,** Civil Application No. 13/17 of 2018 and **Omary Ally Nyamalege *(As the Administrator of the Estate of the Late Seleman Ally Nyamalege)* & Others v. Mwanza Engineering Works,** Civil Application No. 94/08 of 2017 (both unreported).

On the issue of illegality, the second respondent's counsel argued that to amount to a good cause for extension of time to do a certain act, the same should be apparent on the face of record. To fortify her contention, she cited the court's decision in the cases of **Zitto Zuberi Kabwe & Others v. The Attorney General,** Civil Application No.365/01 of 2019 and **Ngao Godwin Losero v. Julius Mwarabu,** Civil Application No. 10 of 2015 (both unreported).

With the foregoing submissions, Ms. Dominic contended that the applicant has failed to prove that there is any illegality on the face of record in the impugned decision. The learned counsel argued that the reasoning in the impugned decision was that Land Case No. 198 of 2007 was dismissed for being time barred and not because there was pending appeal involving the same parties. She implored the Court to dismiss the application with costs as the applicant has failed to show good cause for the delay upon which this Court can exercise its discretion to grant extension of time to file revision.

In his rejoinder submission, Mr. Malimi reiterated his earlier arguments and added that the issue of limitation was never addressed by the parties but it was the one which the High Court relied upon to decide the matter.

Having considered the notice of motion and its supporting affidavit, the affidavits in reply and the written submissions made by the learned counsel for the parties, the major issue for determination is whether the applicant has shown good cause for this Court to exercise its discretion in granting the application for extension of time to file application for revision as required under Rule 10 of the Rules. It is trite

that, no hard and fast rule as what amounts to good cause but this Court has invariably considered certain factors to constitute good cause. In the case of **Tanga Cement Company Ltd v. Jumanne D. Masangwa & Another,** Civil Application No. 6 of 2001, the Court stated thus:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the application."*

Furthermore, another factor to be considered is the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. [See **Lyamuya Construction Company Ltd v. The Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 and **Ludger Bernard Nyoni v. National Housing Corporation,** Civil Application No. 372/01 of 2018 (both unreported).

The question which follows is whether the applicant has shown good cause for this Court to exercise its discretion in granting extension

of time. It is not in dispute that, following the delivery of the impugned decision on 20th July, 2020, the applicant applied to be supplied with a copy of that decision. He was supplied with the copy on 4th November, 2020 and this application was filed on 19th November, 2020. It is my considered view that the applicant ought to have accounted for the delay of 15 days after being supplied with the copy of the proceedings of the High Court. According to the applicant, he used the fifteen days to prepare for this application. The law is clear that in case of the delay to do a certain act, the applicant should account for each day of delay. The authorities of the Court to that effect are many, one of them include **Hassan Bushiri v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) where the Court stated:

> *"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".*

[See also, **Lyamuya Construction Company Ltd** (supra), **Zitto Zuberi Kabwe and Others** (supra) and **Bariki Israel v. R,** Criminal Application No. 4 of 2011 (unreported)]. According to these authorities, each day of delay must be accounted for and the delay should not be

inordinate. In the case at hand, the applicant only stated that he was preparing this application for fifteen days. It is my considered view that this line of reasoning is too casual because the applicant has not explained how he used the whole of fifteen days to prepare this application. I therefore find that the applicant has failed to account for the whole period of the delay.

Next, I will consider the issue of illegality raised by the applicant as another factor to be considered as a good cause for extension of time to file revision. In the case of **The Principal Secretary, Ministry of Defence and National Service** (supra), the Court held *inter alia* 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 (now Rule 10) of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance."*

According to this decision, where there is allegation of illegality of the decision being challenged, the point of law should be of sufficient

importance to constitute good cause within Rule 10 of the Rules. In the instant case, the decision being challenged is Misc. Land Application No. 459 of 2019 which rejected the application for review of the decision in Land Case No. 198 of 2007 (Mziray, J) (as he then was). In order to appreciate the alleged illegality of the impugned decision, I find it apposite to reproduce part of the decision in Land Case No. 198 of 2007 as follows:

> *"According to the pleadings the first defendant repossessed and handed the suit property to the second defendant on 15th March, 2007 and this suit was filed in this court on 6th August, 2007. It is 147 days after the suit property had been handed over to the second defendant. The plaintiff was supposed to file the suit within 90 days as provided for under section 75 (2). It failed to do so rendering the suit to be time barred. It cannot be allowed to stand. The only course available is to dismiss it.*
>
> *Another thing of importance to argue here, though not raised by any party, is on the appeal pending in the Court of Appeal involving the same parties and same subject matter. Both parties concede that there existed application No.*

147/2004 before the High Court of Tanzania involving same parties and subject matter. The plaintiff has informed us that the said application was dismissed for being incompetent. The plaintiff has appealed to the Court of Appeal against the said decision. As the appeal pending concerns the same parties and subject matter involved in this case, in my view the filing of this case is an abuse of the process of court.

With the above observations, I set aside the order of status quo and dismiss this suit with costs".

In essence, the learned Judge first found that the suit was time barred and dismissed it. He noted further that there was pending appeal before the Court of Appeal involving same parties and same subject matter as in that suit. However, because the suit was time barred, he could not keep it pending as it would amount to abuse of court process. On those observations, he dismissed it.

Refusing the application for review of that decision, the High Court Judge in Misc. Land Application No. 456 of 2019 stated thus:

"On those detailed findings, although the applicant just picked one part of the reason for

the dismissal of the suit to be reviewed, review is not a remedy available to her as this court had already ruled that the suit was time barred and proceeded to dismiss it. That said, it is conclusive the applicant has failed to convince the court on the ground for review, as the suit was dismissed for reason that it was barred by limitation under Section 75 (2) of the Land Act. The application beforehand is therefore misconceived and it is hereby dismissed".

In the impugned decision, the learned Judge just interpreted the decision which was subject of review. I do not see any illegality in it. If the applicant was dissatisfied with that decision, it cannot be said that there was illegality. In the same vein, the applicant alleged that the parties were not heard in relation to the issue of limitation but it is the one which the High Court used to decide the application for review. With due respect to Mr. Malimi, the learned Judge reiterated what was decided in Civil Case No. 198 of 2007 where it stated that the same was dismissed for being time barred. It did not invent something new. The case of **Kumbwandumi Ndemfoo Ndossi** (supra) cited by Mr. Malimi is distinguishable from the impugned decision. This is because in the cited case the learned Judge raised an issue *suo moto* in the course of

composing the judgment and decided it without calling upon the parties to address it.

It is trite that to constitute an illegality, the alleged point of law must be apparent on the face of record such as the question of jurisdiction. In **Lyamuya Construction Company Ltd** (supra), when referring to the case of **Valambhia** (supra), the Court said thus:

> *"The Court there emphasized that such point of law must be "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; not one that would be discovered by a long-drawn argument or process."*

Applying the above to the instant application, it is obvious that the alleged illegality is not sufficient to constitute good cause for extending the time. It is neither a point of sufficient importance nor is it apparent on the face of the record. It cannot be discovered without engaging into a long-drawn process of reasoning.

In the final analysis, I am satisfied that the applicant has failed to show good cause for the Court to exercise its discretion in granting

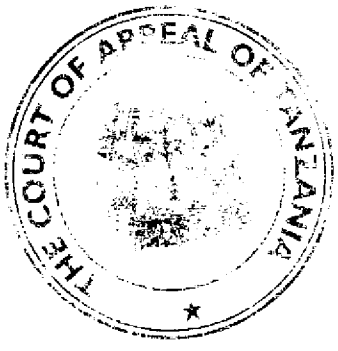
extension of time to file an application for revision. Consequently, the application is devoid of merits and it is hereby dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 12th day of March, 2021.

M. A. KWARIKO
JUSTICE OF APPEAL

This ruling delivered this 18th day of March, 2021 in the presence of Mr. Shabani Mwahita, learned counsel for the Applicant and Mr. Stanley Mahenge, learned State Attorney for the 1st Respondent and Ms. Agnes Dominick learned counsel for the 2nd Respondent, is hereby certified as a true copy of original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL