IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 403/01 OF 2020

JOHN RUMISHAEL MAEDA AND EUGENIA JOHN MAEDA (Administrators of the Estate of the late William Maeda ....APPLICANT

VERSUS

THE ADMINISTRATOR GENERAL (Administrator of the Estate of the late Nkipata Sandube) ....RESPONDENT

(Application for extension of time to apply for review from the Order of the Court of the Appeal of Tanzania at Dar es Salaam)

(Rutakangwa, Luanda and Mmilla, JJA.)

dated the 15th day of April, 2016
in
Civil Appeal No. 40 of 2014

....

RULING

24th October & 17th November, 2022.

SEHEL, J.A.:

The applicants, John Rumishael Maeda and Eugenia Maeda, Administrators of the estate of the late William Maeda, through the legal services of Tan Africa Law firm, filed the present application seeking for an extension of time within which to file an application for review of the Order of the Court dated 14th August, 2016 (Rutakangwa, Luanda and Mmilla, JJA.). The notice is made under Rule 10 of the Tanzania Court of Appeal

Rules, 2009 as amended (the Rules) and supported by an affidavit sworn by Mr. Peter Kibatala, learned advocate for the applicants. On the other hand, the respondent opposed the application by filing an affidavit in reply deposed by Pauline Fridoline Mdendemi, learned State Attorney.

The facts which are relevant to the application at hand are such that; the late William Maeda (the then plaintiff) instituted a suit against the late Nkipata Sanduke (the then defendant) before the District Court of Kinondoni at Kinondoni claiming among other things for declaratory order that he be declared a rightful and lawful owner of Plot No. 370, Mikocheni Medium Density Area, Dar es Salaam. The said suit, was dismissed and judgment was entered in favour of the defendant with costs. Aggrieved with the outcome of the case, the late plaintiff appealed to the High Court. The appeal was partly allowed and the late Nkipata Sandube was ordered to vacate the suit property and to demolish any structure erected therein at his own costs. He was also ordered to pay the costs of the suit. As the late Nkipata Sandube was aggrieved with the decision of the 1st appellate court, he filed an appeal to this Court vide Civil Appeal No. 40 of 2014, the subject of an intended review.

When that appeal was called on for hearing on 15th April, 2016, Mr. Salim Abubakar, learned advocate appeared for the appellant, whereas, the respondent, Mr. William Maeda, was absent. On that date, Mr. Abubakar notified the Court that Nkipata Sandube was no more. He thus sought an adjournment. Before entertaining the prayer for adjournment, the Court invited Mr. Abubakar to address it on the competency of the appeal on account that the decree of the District Court appealed to the High Court was incurably defective. Mr. Abubakar readily conceded and urged the Court to invoke the revisional powers to quash and set aside the proceedings and judgment of the High Court in Civil Appeal No. 141 of 2010. The Court was inclined to Mr. Abubakar's prayer. It thus invoked its revisional power provided under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now R.E. 2019) and revising and nullifying the proceedings of the High Court. It also set aside the judgment of the High Court and struck out the appeal without an order as to costs. It further directed the appellant to institute a fresh appeal before the High Court, if he so wished, subject to the Law of Limitation. As stated earlier, the applicants intend to challenge that order of the Court by way of review. The time to file an application for review, as prescribed by Rule 66 (3) of

the Rules, is sixty (60) days from the date of judgment or order sought to be reviewed. Since, the applicants were late, on 24th September, 2020, they lodged the present application.

In the notice of motion, the applicants advanced the following grounds:

i) That, the Court erred in making an Order that affected the applicants (the late William Maeda), in particular the nullifying and setting aside of the proceedings in the High Court in Civil Appeal No. 141 of 2014, without affording them the right to be heard, by not ascertaining why the said applicant was not in Court on the date of the hearing. The ruling of the Court is devoid of any query regarding the absence of the applicant, including on the question of proper and adequate service of notice of hearing.

ii) That, the Court erroneously in permitting advocate for the respondent, Nkipata Sandube, at the material time to proceed to address it on substantive matters that led to the Court making substantive decisions, in particular the nullifying and setting aside of the proceedings in the High Court in Civil Appeal No. 141 of 2010, while upon the death of the respondent, Nkipata Sandube which

death was duly communicated to the Court, the said advocate had no instructions or legal capacity to proceed with any proceeding in the Court.

iii) That, even if the Court was correct in proceeding as it did despite grounds no. (i) and (ii) above, the Court erred in exercising its revisional jurisdiction selectively since had it also considered the judgment in and decree of the District Court of Kinondoni at Kinondoni in Civil Case No. 199 of 2000 it would have noted that; (i) the said judgment was procedurally flawed because the same purported to confer ownership to the respondent herein while there was no counter claim. (ii) there was no manifest proof of notice of the date of judgment to the applicant per the mandatory dictates XX Rule 1 of the Civil Procedure Code, Cap. 33."

At the hearing of the application, Mr. Peter Kibatala, learned advocate, appeared for the applicant, whereas, Ms. Grace Lupondo assisted by Mr. Urso Luoga and Ms. Adelaide Masama, all learned State Attorneys, appeared for the respondent.

Arguing the application, Mr. Kibatala briefly submitted that the order of the Court is tainted with illegalities. **First**, the applicants were denied a right to be heard. He contended that despite the record of appeal being

clear that the appellant (the respondent in the application) passed away, the Court permitted the counsel for the respondent to proceed with the hearing on the issue that was raised by the Court. It was his argument that the instruction of the counsel ceased upon the demise of the respondent thus the counsel had no authority to represent the respondent. In that respect, it was his submission that the respondent was denied a right to be heard.

Secondly, he argued that the respondent (the applicants herein) was also denied a right to be heard because the order of the Court does not disclose as to whether the Court made any efforts to ascertain the service of the notice of hearing was duly effected upon the late William Maeda.

Relying on the case of **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil Appeal No. 60 of 2019 (unreported), he contended that a claim of illegality in the application for extension of time is sufficient cause for the Court to grant the requested extension. With that submission he prayed that the application for extension of time be granted.

On the part of the respondent, Ms. Lupondo appreciated the position of the law that the Court has discretionary power to extend time in

application for extension of time. Nevertheless, she contended that the applicants ought to have demonstrated good cause as to why such time should be extended as required by Rule 10 of the Rules. To cement her argument, she referred me to the case of **Kalunga & Company Advocates v. National Bank of Commerce Limited** [2006] T.L.R. 235 where it was held that where there is inaction or delay on the part of the applicant, there ought to be some kind of explanation or material upon which the Court may exercise the discretion given.

On the raised illegalities, she first acknowledged that illegality is one of the good grounds for the extension of time. Citing the cases of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Hamisi Mohamed (as Administrator of the estate of the late Risasi Ngawe) v. Mtumwa Moshi (as administratix of the estate of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019 (both unreported), she argued that such illegality must be of such importance and apparent on the face of record,

like the question of jurisdiction, time limitation and a right to be heard that do not require a long-drawn argument or process.

Countering the illegalities complained by the applicants, she contended that the raised illegalities require a long-drawn process of reasoning for one to discover and establish. For instance, she argued that the contentions that; the counsel had no instruction, the parties were denied a right to be heard and there was no proof of service of the notice of hearing entailed the bringing of evidence to establish the truth of such arguments. She pointed out that, the order itself is crystal clear that Mr. Abubakar was appearing for the appellant (now the respondent) hence it was wrong to contend that he was denied a right to be heard. It was therefore her submission that the alleged illegalities do not constitute a good cause for extension of time.

She further argued that the applicants failed to account for each and every day of delay. Referring to the Court's order delivered on 15th April 2016, she contended that there was no single explanation given in the affidavit as to why and what happened from the date the order was delivered to the date of filing the application on 24th September, 2020. She

added that paragraph 2 of the affidavit indicates that the counsel was engaged to handle the matter on 20th September, 2020 but no explanation was given as to why the application was filed four days after the date of his engagement. She therefore urged me to hold that the applicants failed to advance good cause as they failed to account for every day of delay. In support of her submission, she referred me to the cases of **Finca (T) Limited and Another v. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 and **Karibu Textile Mills v. Commissioner General, Tanzania Revenue Authority (TRA)**, Civil Application No. 192/20 of 2016 (both unreported), For those reasons, she urged me to dismiss the application with costs.

Mr. Kibatala briefly re-joined that a denial of the right to be heard is fundamental that is why there is Rule 66 of the Rules. He also argued that the order is clear from the face of it that one cannot discern as to whether the late William Maeda was duly served with the notice of hearing. He therefore beseeched me to find that the order is tainted with illegalities and such illegalities are sufficient cause to move the Court to grant the extension of time to file review.

The issue which stands for my deliberation and determination, in the light of the applicant's notice of motion, affidavit in support and in reply opposing the application and the submissions made by the learned counsel for the parties, is whether the applicants have advanced good cause to warrant the Court to exercise its discretionary power to extend time within which to file an application for review. I wish to start my deliberation with the provisions of Rule 10 of the Rules that bestows upon me a discretionary power to grant extension of time. It provides:

> *"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."*

From the above provision of the law, it is upon the party seeking extension of time to give not only reason but also good cause for the Court to exercise its discretionary power - see: **Kalunga and Company**

Advocates (supra), **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd.**, Civil Application No. 13 of 2010; and **Victoria Real Estate Development Limited v. Tanzania Investment Bank & 3 Others**, Civil Application No. 225 of 2014 (all unreported).

The term "good cause" is not defined in the Rules. Nonetheless, in numerous decisions of the Court, it was stated that in assessing whether there is "*good cause*", each case has to be considered on its own peculiar facts and circumstances and the court must always be guided by the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily - see: **Yusufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported) and **Lyamuya Construction Company Ltd.** (supra).

In the present application, I have extensively reproduced the grounds upon which the applicants rely in seeking extension of time. Essentially, they listed three grounds. However, when Mr. Kibatala was submitting on the grounds, he only focussed on the 1st and 2nd grounds as he submitted

that they all boil down to illegalities. On the other hand, Ms. Lupondo submitted that the alleged illegalities are far-fetched because one needs to hear the evidence to see whether there is any illegality and that there was no single explanation as to why the applicants delayed in filing the application for review. I shall start with the contention that the applicants ought to have explained the delay.

Having gone through the affidavit in support of the application, I noted that it has a total of twenty paragraphs. The 1st, 2nd and 3rd paragraphs give a narration as to who is the deponent and how he was retained and acquitted with the facts of the case. The 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th paragraphs of the affidavit outline the background details of the matter at hand. In the 12th, 13th, 14th, 15th, 16th, 17th, 18th and 19th paragraphs of the affidavit, the deponent tried to analyse and examine the Court's order. In the last paragraph, he deposed that he filed a notice of withdrawal of the intended appeal that was filed to this Court against the ruling and order of the High Court of Tanzania in Misc. Civil Application No. 770 of 2016. It should be noted here that there is no single paragraph in the affidavit in support of the present application accounting for delay.

As rightly submitted by the learned State Attorney, in an application of this nature, each and every day of delay must be accounted for. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), the Court emphasized the need of accounting for each day of delay within which certain steps could be taken. It 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."*

As stated earlier, the Court struck out the respondent's appeal on 15th April, 2016 and the application at hand was filed on 24th September, 2020. Counting from the date the Court made the order of striking out the appeal to the date when the application was filed, it took the applicants three (3) years and five (5) months to take steps. However, as already alluded to above, the applicants did not give any explanation as to why there was such an inordinate delay of three good years. I therefore fully concur with Ms. Lupondo that the applicants ought to have at least accounted for delay.

I am fully aware with the settled position of the law that, a claim of illegality of the challenged decision constitutes a good cause for extension of time whether or not a reasonable explanation has been given by the applicant and that in the application for extension of time, the Court has a duty to consider the ground of illegality raised by the applicant – see: the cases of **VIP Engineering and Marketing Limited and 2 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) and **Vodacom Tanzania Limited** (supra).

But in the case of **Lyamuya Construction Company Limited** (supra) it was insisted that:

> *"In **VALAMBHIA's** case (supra) this Court held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time. But in that case, the errors of law, were clear on the face of the record."*

The Court then went on to state that:

> *"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 that in VALAMBHIA's*

case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. ***The Court there emphasized that such point of law, must be that "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."* (emphasis added).

Given the above position of the law, the alleged illegalities advanced by the applicants in their motion and forcefully submitted by Mr. Kibatala are not self-evident because they entail the calling of evidence to establish whether there was no proper service of the notice of hearing on part of the applicants and whether the counsel had no instruction to address the Court. Further, they are not of sufficient importance that would need the attention of the Court worth for granting an extension of time.

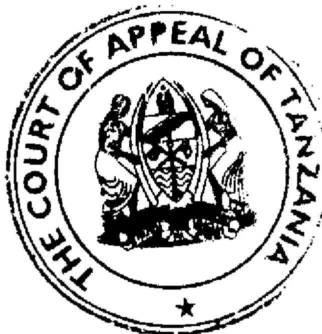
In view of the reasons stated herein, I find that the applicants failed to advance any reason for the extension of time let alone good cause for

the Court to exercise its discretion. Accordingly, the application is dismissed with costs for lacking merit.

DATED at **DAR ES SALAAM** this 16th day of November, 2022.

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 17th day of November, 2022 in the presence of Ms. Grace Ndera, learned counsel for the Applicant and Mr. Urso Luoga, State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL