IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 70/17 OF 2019

ROSE IRENE MBWETE

(*Administrator of the Estate of the Late*

***MARY DOTNATA WATONDOHA*)**.....**APPLICANT**

VERUS

PHOEBE MARTIN KYOMO.....**RESPONDENT**

(Application for Extension of Time to appeal against the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Ngwala, J.)

dated the 23rd July, 2013

in

Land Case No. 247 of 2010

.....

RULING

8th February & 10th March, 2023.

FIKIRINI, J.A.:

This is a ruling in respect of an application by a notice of motion made under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is seeking for extension of time to appeal against the ruling in Land Case No. 247 of 2010, delivered on 23rd July, 2013. The notice of motion is supported by an affidavit deponed by Mr. Daniel Haule Ngudungi, learned advocate. The respondent resisted the

application through an affidavit sworn by Mr. Mashaka Edgar Mfala, learned advocate. Following the affidavits for and against, the learned advocates filed written submissions in terms of rules 106 (1) and (8) of the Rules.

At the hearing, the same set of advocates appeared for their respective parties. Getting the ball rolling, Mr. Ngudungi started by adopting the notice of motion, affidavit, and written submission, all in support of the application. In his brief, albeit straight forward submission, Mr. Ngudungi contended that the application before the Court was hinged on two grounds that: (i) the decision of the High Court emanating from a preliminary point of objection was a mixture of facts and law and not a pure point of law, and (ii) parties were not afforded right to address the court on the issue of cause of action, the point raised *suo motu*, by the court yet reflected in the decision.

According to Mr. Ngudungi, the decision did not go well with the cardinal principles of natural justice on the right to be heard. He further contended that the two grounds, plus other reasons advanced in the

applicant's affidavit and written submission filed, were plausible and had advanced good cause warranting the grant of the application. He urged for the granting of the application.

Mr. Mfala, on his part, also adopted his affidavit and the written submission filed objecting to the grant of the application as no good has been shown as to why the applicant did not file the intended appeal on time. He also contested the argument that illegality issues existed and needed this Court's interference.

Expounding on his position, he argued that the applicant had not mentioned in a proper way why she was late in filing the intended appeal. And that the applicant had taken refuge in the withdrawal of the application overtaken by the operation of the law as the cause for the delay in the timely filing of the appeal. Mr. Mfala disputed this by stating that the applicant did not show seriousness in pursuing her intended appeal, even though right after the decision, the applicant lodged a notice of appeal and requested certified copies of the necessary documents but failed to make the follow-up. Given the chronology of

events, he submitted that after a request letter dated 26th July, 2013, there was no follow-up until a year later, to be precise on 23rd September, 2014. After being supplied with the requested documents, an application for extension of time to file for leave to appeal to the Court of Appeal was filed on 27th October, 2014. According to Mr. Mfala, there was no need to wait for the necessary documents because the application was to be before the same Court seized with record and would probably have been before the same Judge.

Another concern was that the applicant made a mistake when lodging her application. Instead of registering it as a Miscellaneous Application No....., the application was registered as Land Case No. 247 of 2010, the main case. The applicant admitted in paragraph 7 of the affidavit in support of the omission; hence the applicant had no one to blame other than herself. According to Mr. Mfala, that was pure negligence on the applicant's part.

Besides wrong registration, there was no follow-up for five (5) years, from October, 2014 up to 9th January, 2018, when the applicant

wrote a letter following up with the Registrar. The Registrar's reply letters dated 28th March, 2018 and later 24th April, 2018, asked the applicant to file a fresh application as the one claimed filed was nowhere to be seen. A fresh application was filed on 17th May, 2018 but was later withdrawn after learning that by operation of law, leave was no longer required. The inordinate delay of five years was, according to Mr. Mfala, indicated negligence and that the applicant had no desire to appeal, an indication she was satisfied with the decision.

On illegality claimed, Mr. Mfala contested that as an afterthought to justify the delay. Otherwise, there is no illegality, as the preliminary point of objection raised was a pure point of law that the suit was time-barred. The other remark that the plaintiff (now applicant) had no cause of action against the defendant (now respondent) was made after the decision had already been made, making that part of the decision an" obiter dictum." He further argued that it would not have altered the outcome even if parties were to address the Court on the point.

In conclusion, Mr. Mfala urged the Court to adopt the principle it has adopted in its other decisions that: "there must be an end to a matter, and the case cannot continue indefinitely." And this can only happen if the aggrieved party takes proper action outright and does not lazying around.

On the strength of his submission, he has urged for the dismissal of the application with costs.

In rejoinder, Mr. Ngudungi responded to Mr. Mfala's lengthy submission by correcting him on the assertion that no reasons for the delay were mentioned by stating that the notice of motion, affidavit, and written submission adopted covered everything extensively. He described paragraphs 3-12 to have accounted for the delay and discounted the submission that there was a five-year delay. Narrating what transpired, he stated that the applicant acted promptly right after the decision, as reflected in NCA1. A request to be furnished with certified copies of the necessary documents was made as the

requirement for leave to appeal to the Court of Appeal was still a must by then.

On filing the application using a main case number, Mr. Ngudungi admitted the oversight. He explained that to have been the practice then, while the current approach commenced in 2015. The applicant should not be blamed, and filing the application for extension of time in the main case file was, therefore, not a misdirection as submitted by Mr. Mfala.

He further submitted that the operation of the law later overtook the intended application for extension of time. A party was no longer required to seek leave to appeal to the Court of Appeal in a land matter where the High Court exercised original jurisdiction. It was thus not correct that the applicant was hiding under the said application, as alleged by Mr. Mfala.

On the follow-up allegation, Mr. Ngudungi disputed that there were no follow-ups for five years. Explaining what occurred, Mr. Ngudungi stated that after filing the application, what follows is for the

application to be assigned to a Judge, and the rest follows. As for this application, even with the follow-up, there was no response from the Registrar. On pressing further, as submitted by Mr. Mfala, the findings were the record could not be traced, which led to the filing of a fresh application. Mr. Ngudungi contended that Mr. Mfala's submission could be valid had the applicant not acted after the application was struck out or dismissed, which was never the case. In the circumstances of the present application, he argued the applicant could not act until after the Registrar's letter dated 24th April, 2018 instructing the applicant to file a fresh application since the admitted timely filed application could not be traced. Unfortunately, it was during the pendency of the application the law changed, and the applicant had to withdraw her application.

Challenging Mr. Mfala's submission that the issue of illegality was an afterthought without assigning reasons, Mr. Ngudungi stated that the illegalities were cited in the notice of motion initially filed and the amended one later. Additionally, he submitted that the only opportunity to explain those illegalities was in the affidavit, written and oral submissions, and nowhere else.

On the preliminary point of objection that the suit was time-barred, Mr. Ngudungi referred to pages 3-5 of the ruling, that the decision was made after a long process of assessing documents, contrary to the principle stated in the **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd.** (1969) 696. Since this was mixed facts and points of law, evidence was required, making it not a pure point of law.

Another point of illegality was that the Judge decided on "cause of action," a point not raised by the parties or the court before the parties. The records are silent. However, in the decision, the Judge considered both issues by concluding that the suit was time-barred and that the plaintiff had no cause of action against the defendant without hearing parties.

Winding up his submission, Mr. Ngudungi stressed that the grounds of illegalities were stated in the notice of motion and expounded in the affidavit and written submission. He thus prayed for the grant of the application.

I have dispassionately considered the notice of motion, affidavits, written submissions, and rival oral submissions by the learned advocates. The pertinent issue in this matter is whether or not the applicant has shown good cause for the delay.

Rule 10 of the Rules, upon which this application is hinged, provides 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."*

In **Benedict Mumello v. Bank of Tanzania,** [2006J E. A. I. R Vol. I, the Court, in elaborating on the discretionary powers bestowed to the Court under rule 10 of the Rules, held as follows:-

> *"It is trite law that an application for extension of time is entirely in the discretion of the Court to*

grant or refuse it and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

Therefore, as a matter of general principle, it is in the discretion of the Court to grant or not to grant extension of time. However, that discretion must be exercised judiciously, according to the rules of reason and justice, and not permit private opinion or arbitrarily. The term '*good cause'* has not been defined, but it can be interpreted depending on the circumstances of each case. In **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd.,** Civil Application No. 13 of 2010, the Court stated that:

"What constitutes good cause cannot be laid down by any hard and fast rules. The term ***"good causes"*** *is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

The above position has been echoed and illustrated further in our various decisions, including **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, **FINCA (T) Limited & 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) to list a few.

In the **Lyamuya Construction Company Limited** (supra), those principles were illustrated as follows:

a) The applicant must account for all the period for the 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."

After outlining the principles, let me revert to the application before me, which has two limbs: **one**, on the delay in applying for extension of time, and **two,** if illegalities pleaded warrant grant of the application. In paragraphs 3-12, the applicant has explained what caused the delay, which is the account contested by Mr. Mfala, terming the delay was out of negligence. I agree with Mr. Mfala to some extent that the applicant has not exhibited diligence in pursuing her application for extension of time. The reasons for my position are not farfetched. After writing the Registrar requesting certified copies of the necessary documents on 23rd July, 2013 (NCA1), the applicant never followed up until a year later, to be exact, on 9th April, 2014 (NCA2), which was almost eight or so months later. The requested documents were ready for collection on the 23rd September, 2014 (NCA-3), meaning they were not yet ready when the follow-up was made.

By the time the requested documents were availed, time to appeal had elapsed, and the applicant had to apply for extension of time, which she did on 27th October, 2014 (NCA4). The application lodged was registered as Land Case No. 247 of 2010, the main case number. No follow-up was made until 9th January, 2018, when the applicant wrote the Registrar inquiring about the pending application for extension of time. This was almost four (4) years or more. The response from the Registrar, as per the letter dated 28th March and 24th April, 2018, admitted the application was filed timely but informed the applicant that the records were nowhere to be seen, advising the applicant to file a fresh application.

Notwithstanding the applicant's explanation that they were expecting the application to be assigned to the Judge, and things would have been on track from there. In my view, the period between October, 2014 and January, 2018, almost four (4) years or more, is undoubtedly a long time in between without a follow-up. This is more so considering the decision aggrieved the applicant, and she intended to challenge it. Thus, more vigilance and diligence were expected from her.

Even without the operation of law that resulted in the application for leave to appeal to the Court of Appeal before the High Court was withdrawn on 19th February, 2019, the applicant had, for a considerable time, failed to follow up on the said application before 9th January, 2018. In **Ratman v. Cumarasamy & Another** [1964] 3 All ER, dealing with an application of this nature, the Court stated:-

> *"The rules of the Court must prima facie be obeyed and, in order to justify a court in extending time during which some step in the procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, any party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules, which is to provide a timetable for conduct of litigation."*

Emphasizing the need to show cause by accounting for each day of the delay and diligence exercised in taking action, the Court, in the case of **Dr. Ally Shabbay v. Tanga Bohora Jamaat** [1997] T. L. R. 305, observed:

"Those who come to courts of law must not show an unnecessary delay in doing so; they must show great diligence."

In the present application, the reasons advanced by the applicant accounting for the delay in filing this application are without any merits. This limb fails.

Turning to the second limb, it is a settled position in our jurisdiction that an alleged illegality, if established, is sufficient to move the Court to extend time. The Court clearly stated this in the case of **Principal Secretary, Ministry of Defence and National Services v. Durvam Valambhia** [1992] T.L.R 387, cited by the applicant's counsel, the Court, while considering a ground of illegality submitted before it, held that: -

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is sufficient importance to constitute sufficient reason within the meaning of rule 8 [now rule 10) of the Rules for extending time. To hold otherwise would

amount to permitting a decision, which in law might not exist, to stand."

The Court went on to state that:

"In our view, when the point at issue is one alleging the 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 right."

The Court restated the position in the case of **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil Appeal No. 60 of 2019 (unreported), echoing its position in the **Principal Secretary, Ministry of Defence and National Services** (supra), underlined this:-

"We are of the considered opinion that the learned Judge ought to have exercised his discretion judiciously to ***consider even the ground of illegality which was also pleaded by the appellant because "sufficient reason" does not only entail reasons of***

delay, but also sound reasons for extending time. *In particular, whether the ground of illegality raised by the appellant was worth consideration in determining whether or not to grant the application...."* [Emphasis added]

In paragraphs 10 and 11 of the affidavit in support, the applicant has pleaded the alleged illegalities. For ease of reference, the paragraphs are reproduced below:-

"10. That in reading the decision of the trial court in Land Case No. 247 of 2010, the dismissal of the suit was on failure by the plaintiff to disclose a cause of action against the defendant, an issue raised by the court suo motu without affording the parties a right to be heard on the raised issues. A copy of the said Ruling is appended hereto and marked as "Annexture – NCA-7" collectively forming part of this affidavit.

11. That disposal of the case at a preliminary stage on matters of mixed facts and law on preliminary stage and deciding the case on matters raised by the court suo motu without

affording the parties the opportunity to be heard is an iilegality which needs attention of the court of appeal."

Borrowing from the settled principles stated in **Principal Secretary, Ministry of Defence and National Services and Vodacom Tanzania** (supra), I find the application deserves granting considering the existence of the two pointed out illegalities, even though the applicant failed miserably to account for the delay.

In **I.P.T.L. v. Standard Chartered Bank (Hong Kong) Ltd,** Civil Revision No.1 of 2009 (unreported), the Court stressing a right to be heard before an adverse decision is made, held that:-

"No decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

In the present application, the court dealt with the issue not raised by the parties or court or invited parties to address on the raised issue,

yet considered the issue in arriving at its decision. By so doing, the court infringed parties' right to be heard.

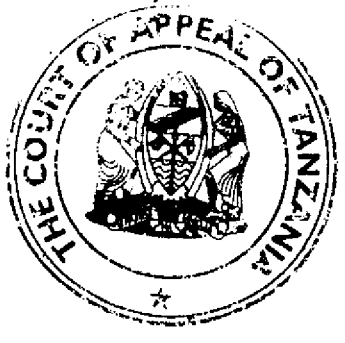
For the foregoing reasons, I find the second limb on illegalities has been well established to warrant the grant of the application, consequently proceeding to grant the application for extension of time. The applicant is to file her appeal within sixty (60) days from the date of this ruling. Costs in due cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 9th March, 2023.

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 10th day of March, 2023 in the presence of Ms. Jackline Kulwa, learned counsel for the Applicant and Mr. Mashaka Mfala, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL