

IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

CIVIL APPLICATION NO. 90/11 OF 2022

HAMZA K. SUNGURA APPLICANT

VERSUS

THE REGISTERED TRUSTEES

OF JOY IN THE HARVESTRESPONDENT

**(Application for extension of time within which to lodge an application
for Review against the judgement of the Court of Appeal of Tanzania,
at Tabora)**

dated 28th day of April, 2021

in

Civil Appeal No. 149 of 2017

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RULING

8th & 12th June, 2023

SEHEL, J.A.:

This is a ruling on an application for extension of time within which to apply for review out of time. The application is brought by way of a notice of motion made under the provisions of Rules 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). It is supported by an affidavit deposed by the applicant, himself. The ground upon which the motion is made is that there is illegality in the proceedings of the High Court as the decree of the District Court has different date with the date of judgment.

On the other hand, the respondent, through Mr. Method Raymond Gabriel Kabuguzi, learned counsel, filed an affidavit in reply to oppose the motion.

The background of this matter is that; the applicant instituted a suit, Civil Case No. 38 of 1996, against the respondent in the District Court of Kigoma (the trial court) claiming, among other reliefs, for a declaration that he was the lawful owner of a parcel of land located at Plot No. 299A Kibirizi area in Kigoma Township (the suit property). The said plot was previously owned by one, Vrushamk Desai who later surrendered it to the Regional Development Land Office, Kigoma. In the trial court, the case for both parties was that the suit property was allocated to it after the surrender. At the end of the trial, the judgment was entered in favour of the applicant and he was declared the lawful occupier of the suit plot.

The respondent was aggrieved thus he unsuccessfully appealed to the High Court of Tanzania sitting at Kigoma (the High Court), Civil Appeal No. 41 of 1998. After hearing the parties, the High Court upheld the trial court's decision and dismissed the appeal with costs. Still not satisfied, the respondent further appealed to the Court, Civil Appeal No. 149 of 2017 (the subject of the intended review). It thus reversed the

findings of the two lower courts and declared the respondent a lawful owner of the suit plot. The applicant was also condemned to bear costs of the suit.

This decision did not please the applicant and wants to challenge it by way of review. As he was late, the applicant lodged the present application on the above stated ground.

At the hearing of the application, Mr, Yudathade Paul, learned advocate appeared for the applicant, whereas, the respondent had the legal services of Mr. Method R. G. Kabuguzi, also learned advocate.

Having adopted the notice of motion and the supporting affidavit, Mr. Paul submitted that the applicant is seeking an extension of time on ground of illegality that the date of decree of the trial court differs with the judgment from which the decree was extracted from. He elaborated that the judgment was dated 13th November, 1998 while the decree extracted therefrom was dated 16th December, 1998. He further submitted that it was unfortunate that the High Court did not notice the error thus proceeded to determine the appeal on merit which was wrong. It was further submitted that since the date of the decree did not tally with the judgment, the proceedings of the High Court and its judgment and decree were null as it emanated from a defective decree.

It is in that respect, he said, the decision of the Court in Civil Appeal No. 149 of 2017 (the subject of the intended application for review) was tainted with illegality. He explained that the High Court determined the appeal in favour of the applicant as such the respondent made several applications seeking to appeal to the Court alleging illegality. He pointed out one of the applications was for leave to appeal in which the respondent claimed that the proceedings and judgment before the High Court were a nullity as the date of the decree differed with the date of judgment. However, Mr. Paul contended, when the respondent lodged Civil Appeal No. 149 of 2017 to the Court, she did not include in her memorandum of appeal the ground of illegality, thus, the Court determined the appeal without directing its mind to the issue of illegality. It was his submission, that was an error on the face of the record which the applicant intends to move the Court by way of review to correct it. Mr. Paul further pointed out that in paragraph six (6) of the affidavit in reply, the respondent admitted that the issue of illegality was not heard and determined by the Court. Mr. Paul supported his submission that illegality is one of the factors and the strongest ground for grant of extension of time by citing the case of **Omary Shabani Nyambu vs Dodoma Water Sewerage Authority**, Civil Application No. 146 of 2016 and **Amour Habib Salim vs Hussein Bafagi**, Civil Application

No. 52 of 2009 (both unreported). He thus urged that the application be allowed with costs.

Having fully adopted the affidavit in reply, Mr. Kabuguzi strongly opposed the application and gave five reasons. **One**, the claim of illegality raised by the applicant's counsel as a ground for extension of time is an afterthought because it was not raised before the High Court. **Two**, according to the Court's order granting leave appearing at page 144 of the record of the application, leave to appeal was granted to the respondent without stating that it was granted due to illegality and thus it cannot be a basis to grant extension of time. **Three**, all annexures attached to the applicant's affidavit were not certified copies thus they cannot be used to support the application. **Four**, the applicant has not accounted for each day of delay since there is a delay of eight (8) months but no account of such inordinate delay. To fortify his argument, he cited the case of **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014 (unreported). **Five**, the claimed illegality is not apparent on the face of the record of appeal in Civil Appeal No. 149 of 2017 where the Court has no power of review. In conclusion, it was his submission that even if such illegality existed, no miscarriage of justice

was occasioned to the applicant and thus what the applicant is pursuing is just an academic exercise. Accordingly, he urged me to dismiss the application with costs.

The applicant's counsel, Mr. Paul, briefly rejoined that the law does not define what amounts to sufficient cause but it has been interpreted by the Court to include illegality. He thus reiterated his submission in chief and urged me to grant the application so that the Court can rectify the illegality.

Having dispassionately followed the rival submissions for and against the application advanced by the counsels for both parties, the issue for determination is whether the applicant has managed to show good cause for the grant of an extension of time within which to apply for review. I wish to state at the outset that, the power of the Court to enlarge time for doing any act authorized or required by the Rules is governed by Rule 10 of the Rules that 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 doing of the act, and any reference in these Rules to any

such time shall be construed as a reference to that time so extended."

It be noted that there is no single definition of the term 'good cause' stated in the above Rule, but there are some guiding factors which the Court may consider to ascertain whether there is good cause or not. These factors, depending on the circumstances of each particular case, are such as, the applicant must account for all the period of delay; the delay must not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged - see: **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 [2011] TZCA 4; [03 October, 2011, TANZLII], **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 [2004] TZCA 45; [08 April, 2004, TANZLII], **Regional Manager TANROADS, Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported), and **Benedict Shayo v. Consolidated Holdings Corporation as Official Receivers of Tanzania Film**

Company Limited, Civil Application No. 366/01/2017 [2018] TZCA 252; [11 September, 2018, TANZLII].

In this application, although the applicant has not accounted for the delay the only sole ground for extension of time is illegality of the decree of the District Court which Mr. Paul said it bears a different date with the judgment from which it was extracted. The counsel for the appellant submitted that since the said decree was defective; the proceedings and judgment of the High Court were also a nullity and so was the judgement and decree of the Court. This argument was strongly countered by the respondent's counsel who submitted that to constitute a good cause for extension of time the alleged illegality must be apparent on the face of the record of the impugned decision which was not the case in this application.

Indeed, as rightly submitted by Mr. Kabuguzi that it is not in every situation where there is a claim of illegality, the time will be extended. In the case of **Lyamuya Construction Company Limited** (supra), after the Court had referred to its previous decision in the case **the Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185, it said:

*"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)*

It follows then that an allegation of illegality must be apparent on the face of the record in order to persuade the Court to exercise its discretionary power to enlarged time to do any act authorised or required by the Rules.

As earlier on stated, the applicant in this application is seeking an extension of time in order to apply to the Court to review its own decision on account of illegality found in the decision of the High Court which he alleged it emanated from the defective decree of the trial court. Since the applicant seeks to challenge what transpired at the High Court and not the impugned decision, obviously that does not constitute a good cause to grant extension of time to apply for review. Much as I

agree with the submissions of the counsel for the applicant that illegality constitutes a good cause for the delay as was stated in **Amour Habib Salimu** (supra) cited to me by him, I am not prepared to go along with him in this application because the pointed-out illegality does not exist on the face of the record.

Regarding the challenge that the copies of documents annexed to the affidavit were not certified the law is clear that affidavits are not subject to the Rules of evidence as such the documents attached to the affidavits need not be certified or original tendered in court as the Court said in the case of **Exim Bank Tanzania Limited v. Trulite Investment Limited and Three Others**, Civil Appeal No. 446/16 of 2020 [2023] TZCA 171 (4 April 2023; TANZLII).

As to the submission by the respondent's counsel that the applicant has not accounted for each day of delay, I wish to briefly state that where a Court finds that there is a valid claim of illegality of the challenged decision, that ground alone constitutes a good cause for extension of time and it does not matter whether or not a reasonable explanation has been given by the applicant - see: the cases of **VIP Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006

(unreported) and **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil Appeal No. 60 of 2019 (unreported). Nonetheless, in the present application, I have found that the claimed illegality is neither here nor there hence I do not see the need to repeat myself.

For the above given reasons, I find that no sufficient cause has been shown to warrant the extension of time sought by the applicant. Accordingly, I dismiss the application with costs.

DATED at **KIGOMA** this 10th day of June, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 12th day of June, 2023 in the presence of Mr. Method R. G. Kabuguzi, learned advocate for the respondent also holding brief for Mr. Yudathade Paul, learned advocate for the applicant is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL