IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 566/01 OF 2022

NEHEMIA MUGASA suing as Attorney
of BEPHA MUGASA ..... APPLICANT

VERSUS

CMC MOTORS LIMITED..... RESPONDENT

(Application for extension of time to file an application for review against the Ruling and Order of the Court at Dar es Salaam)

(Munuo, Kimaro and Kalegeya, JJA.)

Civil Appeal No. 7 of 2003

RULING

3rd, & 21st November, 2023

ISMAIL J.A.:

This application seeks to move the Court to invoke its discretionary powers under rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), and grant an extension of time which will enable the applicant file an application for review. The impending action is intended to challenge the decision of the Court in Civil Appeal No. 7 of 2003. In the impugned decision, the Court acceded to the preliminary objection raised against the applicant's appeal, and struck out the appeal, on the ground that the same contravened the provisions of rule 77 (1) of the Tanzania Court of Appeal Rules, 1979,

now repealed and replaced by the 2009 Rules, as the applicant served the notice of appeal on the respondent 49 days from the date of filing. The law required that such notice be served within 14 days.

The Notice of Motion that founded the application is supported by an affidavit sworn by Nehemiah Mugasa, a holder of a power of attorney donated by Bepha Mugasa, the applicant. The application has encountered a formidable opposition from the respondent, through affidavit in reply sworn by Gerald Shita Nangi, learned counsel in the conduct of the matter.

The matter stems from Civil Case No. 206 of 1992 which was instituted by the applicant in the Resident Magistrates' Court of Dar es Salaam at Kisutu, claiming for terminal benefits that followed her lay off from employment. The court took the view that the termination was unfair. The contention by the applicant is that there were delays in the payment of her terminal benefits, necessitating a longer than anticipated wait. It took time for her to learn that the benefits were deposited into court. Subsequently, a disagreement ensued on the quantum payable as the applicant factored subsistence allowance in her claims. Her second engagement with the court was for enforcement of the decree which fell to naught as the court held

that repatriation costs would not be covered through payment of subsistence allowance.

Dismissal of the applicant's claims ignited her journey to the High Court where she instituted Extended Jurisdiction Civil Appeal No. 18 of 1999. This appeal was adjudged unmeritorious, culminating in the dismissal. Noting that the decision was not to her liking, the applicant scaled up his movement to this Court, through Civil Appeal No. 7 of 2003. The contest in the latter proceedings was settled by a preliminary objection which questioned the competence of the appeal whose manner of service of notice of appeal contravened rule 77 (1) of the repealed Rules. In the end, the Court struck out the appeal with costs.

So long after the decision of the Court, the applicant surfaced, this time with the instant application, seeking to stage a re-entry to the Court. Her intention is to move the Court to clear a way for her to institute an application for review of the decision of the Court. Illegality has been cited as the basis for her decision.

When the matter was called on for hearing, the applicant's attorney appeared in person, unrepresented, while the respondent enlisted the services of Mr. Gerald Nangi, learned counsel. Both parties informed the

Court that they had filed their respective written submissions, and that they did not wish to make any oral submission in addition to their written representations.

In her submission, the applicant argued that she was aware that applications for review have a time frame of 60 days within which they should be preferred, and that her application was preferred in dilatoriness, the impugned decision is laden with manifest errors on the face of it. She argued that the errors are so glaring and fundamental that they have occasioned a miscarriage of justice. The error is in the form stated in paragraph 8 of the supporting affidavit. This is that the decision was pronounced on an unknown date and that there is no indication that the parties appeared in court when the decision was pronounced. In the applicant's view, the omission by the Court was an affront to rule 39 (9) of the Rules, and that this error must be corrected lest an injustice is perpetrated. Relying on the decisions in **TANESCO v. Mfungo Leonard Majura & 15 Others**, Civil Application No. 94 of 2016; and **Finca (T) Limited & Another v. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (both unreported), the applicant contended that accounting for days of delay is inconsequential where illegality is invoked as a ground. She urged

the Court to interpret sufficient cause broadly in line with what the Court decided in **Felix Tumbo Kisima v. TTCL & Another** [1997] T.L.R. 154.

Addressing me on illness, the applicant referred me to the case of **Emmanuel R. Maira v. The District Executive Director Bunda District Council**, Civil Case No. 66 of 2010 (unreported). She contended that subsequent to the striking out of Civil Appeal No. 7 of 2003, the applicant fell ill and is still confined to her bed. She could not attend to her case. She implored me to be persuaded by the averments in paragraph 2 of the affidavit and medical chits, attached as Annexure BMN-02.

Reverting to the error on the impugned decision, the applicant was of the view that it was impossible to take action without having the ruling rectified and that the Court was in a position to do it on its own by invoking powers vested in it by rule 65 (1) (6) and rule 66 (2) of the Rules. She urged me to grant the application.

Mr. Nangi began by restating the legal position on extension of time. He submitted that the criterion for grant of extension of time is good cause, as set out in rule 10 of the Rules, and as accentuated in **Lyamuya Construction Company Limited v. Board of Trustee of Young Women's Christians Association of Tanzania**, Civil Application no. 2 of

2010 (unreported). He was of the view that the instant application has not demonstrated that good cause exists. On accounting for days of delay, Mr. Nangi was emphatic that the material placed before the Court does not enable the Court to ascertain the magnitude of delay and enable the Court to assess if days of delay were accounted for. He was of the position that even if the reason of illness covered the entire period subsequent to delivery of the impugned decision, a cutoff date can be 12th July, 2022, that date on which the applicant donated her powers under to his brother who is suing on her behalf. He wondered why the applicant waited until 21st September, 2022 to institute the instant application. Mr. Nangi argued that the applicant has failed to account for each day of delay, a mandatory requirement as set out numerous decisions of the Court a few of which are: **Iddi Nyange v. Maua Saidi**, Civil Application No. 132/01 of 2017; **Manson Shaba & 143 The Ministry of Works & Another**, Civil Application No. 244 of 2015; **Charles Nanduta & 2 Others v. Republic**, Criminal Application No. 22 of 2015; and **Saidi Ally Majeje @ Rico @ Kadeti & 2 Others v. Republic**, Civil Application No. 21 of 2015 (all unreported).

Adverting to illegality, Mr. Nangi firmly argued that errors pointed out by the applicant do not amount to illegality. They are minor errors or

omissions which are curable under rule 42 of the rules which could be rectified at any point after the decision had been pronounced. While quoting the reasoning in **Thamboo Ratman v. Cumarasamy & Another** [1964] 3 All E.R. 933, learned counsel urged the Court to hold that the application is devoid merit and dismiss it with costs.

The parties' rival arguments bring out a singular issue as to good cause has been shown to warrant enlargement of time.

As both parties appreciate, powers conferred on the Court by rule 10 of the Rules are discretionary and exercised upon demonstration of good cause. Good cause is shown when a party presents a credible case that convinces the Court to exercise its discretion and grant the application. The requirement under this provision is a legal certainty that has stood the test of the time. It goes back to more than half a century ago **Mbogo v. Shah** [1968] E.A. 93 when the East African Court of Appeal propounded the following principle:

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the*

appeal and the degree of prejudice to the defendant if time is extended."

Undoubtedly, and as emphasized in numerous decisions of this Court, exercise of such discretion must be judicious (See: **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. Civil Application No. 10 of 2015 [2016] TZCA 302 (13 October 2016, TANZLII). It is also emphasized that in interpreting good cause, a liberal interpretation should be adopted, presumably to ensure that the rule is not interpreted in a manner that is neither restrictive nor overly loosely as to allow sympathy to take a reign (See: **Dephane Parry v. Murray Alexander Carson** [1963] E.A. 546).

Regarding what constitutes good cause, the principles laid by the Court **Lyamuya Construction Company Limited** (supra), cited by Mr. Nangi, sum up everything about what good cause is. They entail accounting for each day of delay; ensuring that the delay is not inordinate; acting diligently and without negligence, apathy or sloppiness and; where illegality is alleged, then the same must be apparent and of sufficient importance. Notably, these principles have been widely acknowledged across jurisdictions. Courts have restated them, albeit in an extended way, and underlined their significance. In **Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd,**

Minister for Transport, Minister for Labour & Human Resource Development, Attorney General, Application No. 50 of 2014, the Supreme Court of Kenya lucidly stated as hereunder:

> *".... We derive the following as the underlying principles that a court should consider in exercise of such discretion"*
>
> 1. *extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
> 2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
> 3. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
> 4. *where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*
> 5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
> 6. *whether the application has been brought without undue delay; and*
> 7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

As alluded to earlier on, the applicant's quest for extension of time is predicated on two grounds. These are ill health as averred in paragraph 3, and illegality as introduced in paragraph 10 of the supporting affidavit. To support the averments, the applicant has attached medical reports that demonstrate the applicant's frequency of visitations to hospital for medical attention. They cover parts of 2010 and 2021. They do not provide the applicant's health status before and after these dates. Mr. Nangi did not submit on this, choosing to dedicate his energy to issues relating to accounting for days of delay and matters of illegality.

The legal position regarding ill health is settled in our jurisdiction. It is to the effect that, where the applicant is prevented from taking action because of ill health then the same may amount to good cause and it is excusable. A caution in that respect, however, is that such ailment must be sufficiently evidenced. One way of demonstrating that is through production of medical chits and reports that cover the period in question (See: **Richard Mlagala & 9 Others v. Aikael Minja & 3 Others**, Civil Application No. 160 of 2015; and **Power and Network Backup Ltd v. Olafsson Sequeira**, Civil Application No. 307/18 of 2021 (both unreported); and **Emmanuel R. Maira v. The District Executive Director Bunda District**

Council (supra)). In the instant application, such documents have been furnished to this Court and, true to what the applicant alluded to, her health failed her for the period that is covered in the documents. The question that should follow this reality is, should illness be considered to have covered the entire period of delay? My unflustered answer to this is in the negative. The evidence in question cannot be stretched to cover inaction that marred the proceedings before and after the evidenced period. It can neither operate in retrospect nor prospectively without any additional information that justifies the excluded periods.

Confinement of the period of illness to what the medical reports provide leaves time between the date of the last report to the date on which the instant application was filed in this Court. The applicant has attached a copy of the Special Power of Attorney that appointed her brother to take up the matter on her behalf. While there are qualms on the appointment, the significant fact worth noting is that the appointment was done on 12th July, 2022 and registration thereof was effected on 28th July, 2022. After registration the applicant's first step in the matter came on 21st September, 2022, when she filed the instant application. This means that the applicant

dawdled along for 52 days before he came to this Court. This is the period that is castigated by Mr. Nangi as having not been explained away.

The applicant's conduct defies this Court's position on the parties' need to act expeditiously. In **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 166 of 2008 (unreported), this Court held as follows:

> *"It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, acted very expeditiously and that the application has been brought in good faith".*

It is my conclusion that the applicant has not accounted for each day of delay.

The applicant has relied on illegality as a ground. Lack of the date on which the decision in Civil Appeal No. 7 of 2003 was delivered is what the applicant clings on as a ground. As unanimously submitted by the parties, illegality constitutes good cause for extending time (See: **Lyamuya Construction Company Limited** (supra). So critical is illegality that when successfully invoked, it supersedes every other ground and blurs the applicant's duty of accounting for each day of delay (See: **VIP Engineering**

and Marketing Limited and Three Others v. Citibank Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported)).

It is worth of a note that invocation of illegality as a ground has strings attached to it in that the ground of illegality must be apparent on the face of record and one that carries significant importance. These would include lack or improper exercise of jurisdiction, and denial of right to be heard. Mere decisional errors would not pass the test and be considered as a ground (See: **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019; and **Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another**, Civil Appeal No. 174 of 2020 (both unreported).

I have scrupulously reviewed the instances of illegality as stated in paragraph 10 of the affidavit. As stated earlier on, the applicant's disquiet resides in the Court's failure to put a date on which the impugned decision was delivered. While the omission is a contravention of rule 39 (9) of the Rules and creates uncertainty on the cut-off date of the decision, this is a mere key board error or a slip, in the mould of that can be rectified through a motion by any interested party. As correctly alluded to by Mr. Nangi, this is a small matter that can be taken care of by rule 42 (1) of the Rules. It is

not an error apparent on the face of the record amenable for review under rule 66 of the Rules. It is in view thereof that the ground of illegality fails.

In the upshot, I hold the view that the applicant has not shown good cause for moving the Court to grant extension of time. Consequently, the application is dismissed with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th day of November, 2023.

M. K. ISMAIL
JUSTICE OF APPEAL

This Ruling delivered this 21st day of November, 2023, in the presence of Mr. Alexander Roudossakis, hold brief for Mr. Gerald Nangi, learned counsel for the Respondent and in the absence of the counsel for the Applicant is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL