

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CIVIL APPLICATION NO. 471/01 OF 2021

ERNEST SEBASTIAN MBELLE APPLICANT

VERSUS

SEBASTIAN SEBASTIAN MBELLE1ST RESPONDENT

ABDUL MHAGAMA 2ND RESPONDENT

KASIAN MAHAI.....3RD RESPONDENT

(Application for Extension of Time within which to lodge an application for review from the decision of the Court of Appeal of Tanzania at Iringa)

(Ndika, Wambali And Sehel, JJ.A)

Dated the 4th day of May, 2021

in

Civil Appeal No. 66 of 2019

RULING

6th & 14th December, 2023

KIHWILO, J.A.:

This application was heard remotely owing to the inability of the applicant and the respondents to appear physically in Iringa. To be more precise, the applicant appeared remotely through video link from Dar es Salaam whereas, the first and third respondents appeared remotely through video link from Mbinga District Court but unfortunately the second respondent who had at his disposal an opportunity to attend remotely through video link from Mafia District Court did not appear,

and in terms of rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), I ordered the matter to proceed for hearing in his absence since notice of hearing was duly served on him on 28th November, 2023, according to the affidavit of service of the process server.

In this application, the Court is being asked to extend time within which the applicant can lodge an application for review from the decision of the Court in Civil Appeal No. 66 of 2019 dated 4th May, 2021. The application is predicated on rule 10 as well as rule 48 (1) and (2) of the Rules and the same is supported by the affidavit of the applicant sworn on 24th August, 2021. The grounds for his application can be put in a nutshell that the application was timely lodged in court but the delay to admit the application within the time prescribed by the law was occasioned by the court. These reasons are deponed in paragraphs 4, 5, 6, 7 and 8 as follows:-

"4. That, the judgment was read and delivered on 4th May, 2021 in favour of the respondents.

5. That, on 2/7/2021 the applicant delivered the notice of motion at the Court of Appeal seeking review of the judgment with which the Court acknowledged receipt on the same date which was within 60 days as per Court of Appeal Rules, 2019- Please see annexure ESM No. 1.

6. That, from 2/7/2021 the applicant made follow-up of the notice of motion, but the document was still in process within the Court up to the closure of office and thereafter it was followed by the Saturday and Sunday-non-working days.

7. That, on Monday which was 5/7/2021, the document was still in the process until 6/7/2021 when the applicant was allowed to pay and then filled and lodged- Please see annexure ESM No. 2.

8. That, it was entirely in the Court's office procedure, that is, from the submission date up to the issuing date which was 2/7/2021 to 6/7/2021."

The application was on the other hand not resisted by the respondents who did not lodge any affidavit in reply.

I wish to interpose here and point out that, ordinarily, failure to lodge an affidavit in reply, save for legal matters, the factual matters deposed in the affidavit are taken not to have been disputed. See, for instance, **Irene Temu v. Ngasa M. Dindi and Two Others**, Civil Application No. 278/17 of 2017, **Fweda Mwanajoma and Another v. Republic**, Criminal Appeal No. 174 of 2004 and **Jonas Betwel Temba v. Paul Kisamo & Another**, Civil Application No. 10 of 2013 (all unreported). However, in this application for reasons that will become apparent I will take a different cause.

When invited to amplify his application, the applicant prayed to adopt the notice of motion and the accompanying affidavit and momentarily submitted that, failure to lodge the application for review in time was occasioned by the Court and therefore, the applicant has good cause warranting the extension of time sought. Elaborating, he described in minute details that, the impugned judgment was delivered on 4th May, 2021 and the applicant lodged the instant application on 2nd July, 2021 two days before the expiry of the sixty (60) days required to lodge the application of this nature. Unfortunately, the process of admitting the application was not completed on 2nd July, 2021 up until the close of business day, and on Monday 5th July, 2021 the documents were still in process until on Tuesday 6th June, 2021 when the applicant was allowed to pay but, it was already beyond the sixty (60) prescribed by the law. Illustrating further, the applicant contended that, he was compelled to lodge the instant application seeking for extension of time to lodge the application for review.

Upon my prompting on whether, he accounted for the delay from the 6th July, 2021 when he realized that the application was out of time to 5th October, 2021 when the instant application was lodged, the

applicant was very quick to respond and admittedly submitted that, the affidavit in support of the application was evidently silent on that.

In reply, the first and third respondents who submitted in turn, concisely argued that, the quest was no more than a delaying tactic and an abuse of the court process since the applicant did not account for each day of the delay, and therefore, the prayer was barren of results. In all, they urged the Court to disallow the application.

In a brief rejoinder, the appellant reiterated his earlier submission and prayer.

I would like to begin by stating the obvious that the discretion of the Court to extend time under Rule 10 of the Rules is upon the applicant advancing good reasons for his/her failure to do what ought to have been done within the time set forth by the law. This has been stressed in a number of cases, including those of **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 and **Victoria Real Estate Development Ltd. v. Tanzania Investment Bank & 3 Others**, Civil Application No. 225 of 2014 (both unreported).

However, it is not insignificant to emphasize that the Court's discretion in deciding whether or not to extend time must be exercised

judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice – **See Shah v. Mbogo and another** [1967] E.A. 116.

I wish to reaffirm that although what amounts to sufficient cause has not been defined, the Court has intermittently state that a number of factors have to be take into-account. They include whether or not the application has been brought promptly, the absence of any or valid explanation for the delay; and lack of diligence on the part of the applicant – See, the case of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported).

In the light of the foregoing circumstances, the vexing issue which stands for my determination is whether or not the applicant had sufficient cause, considering factors stated in **Tanga Cement Company Limited** (supra). In my view, this should not detain me much as the answer to this issue is not far-fetched, because the instant

application was not brought promptly as it took three (3) months from 6th July, 2021 when the applicant realized that time to lodge an application for review had expired to 5th October, 2021 when the instant application was lodged in Court. Furthermore, the affidavit of the applicant did not assign any reason for the delay leave alone valid explanation for the delay hence the applicant did not account for the delay of three months. There is, a considerable body of case law in this area to the effect that, in an application for extension of time, the applicant is duty bound to account for each day of delay. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), faced with analogous situation we held that:

"Delay of even a single day has to be accounted for otherwise there would no point of having rules prescribing periods within which certain steps have to be taken."

Corresponding observation was also made in the case of **Bariki Israel v. Republic**, Criminal Appeal No. 4 of 2011 (unreported).

I fully subscribe to the position of the law expressed above. As to the case at hand, the logical conclusion drawn from the above is that, the applicant was not diligent enough in seeking to pursue his application before this Court.

Furthermore, in the application for extension of time to file review, the applicant is duty bound to show grounds of review as it was held in the case of **Eliya Anderson v. Republic**, Criminal Application No. 3 of 2011 (unreported) where this Court had this to say:-

"I believe it would not be a monstrous justice to hold that an application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but has also established by affidavital evidence, at that stage, either implicitly or explicitly, that the review application would be predicated on one or more of the grounds mentioned in rule 66 (1), and not on mere personal dissatisfaction with the outcome of the appeal, which appears patently to be the case in this application. If we want to remain truly faithful to the much cherished public policy which calls for finality to litigation and certainty of the law as declared by the court of last resort, then we cannot divorce the application of the strict provisions of rule 66(1) from proceedings of this type."

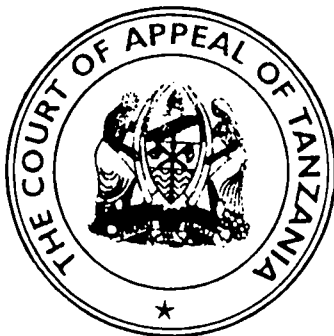
Therefore, the applicant has not been able to show good cause for the delay which is the precondition for the extension of time to lodge

application for review. In the result, this application fails and is, accordingly, dismissed with costs.

DATED at **IRINGA** this 12th day of December, 2023.

P. F. KIHWELO
JUSTICE OF APPEAL

The Ruling delivered this 14th day of December, 2023 in the absence of the Applicant and 2nd Respondent and in the presence of the 1st and 3rd Respondents present in person, through video link from Mbinga District Court, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL