IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CIVIL APPLICATION NO. 583/03 OF 2021

SALEHE OMARY ITITI ..... APPLICANT

VERSUS

NINA HASSAN KIMARO ..... RESPONDENT

(Application for Extension of Time to Apply for Revision Against the Decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 23rd day of October, 2020
in
(PC) Civil Appeal No. 02 of 2020
.....

RULING

27th April & 9th May, 2023

KWARIKO, J.A.:

By a notice of motion taken under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant has moved the Court for extension of time to apply for revision against the decision of the High Court of Tanzania at Dodoma (the High Court) in (PC) Civil Appeal No. 02 of 2020. The notice of motion is supported by an affidavit sworn by the applicant.

In his affidavit, the applicant deponed that, following the filing of the appeal by the respondent before the High Court, on 04th February, 2020, summons was issued but it was not duly served to him. That the

record shows that when the appeal was called on for hearing before the High Court one Lucas Komba, learned advocate from Kidumage & Associates (Advocates) appeared to represent him but in fact he had not engaged that advocate to act for him in that appeal.

The applicant averred further that, since he did not instruct the said advocate to represent him, the appeal was decided without him being accorded opportunity of being heard. He went on to depone that, he became aware of the decision of the High Court at the end of October, 2021 when the respondent informed him that she had won the appeal against him and she was about to execute the decree in that regard. Thereafter, he followed up for a copy of judgment and it was supplied to him at the end of October, 2021.

It was the applicant's further averment that apart from denial of his constitutional right to be heard, the impugned decision is tainted with illegality for awarding the respondent a relief to be given a plot of land, a prayer which was not made before the trial Primary Court of Utemini.

This application was contested by way of an affidavit in reply taken by the respondent. Essentially, she deponed that the applicant instructed and was well represented by his advocate one Lucas Komba from Kidumage & Associates (Advocates) during hearing of the appeal before

the High Court. She averred further that, the claim of a plot of land was part of the reliefs contained in the deed of settlement between the parties. The applicant also disputed that she had initiated execution process as alleged by the applicant. She averred that the applicant has failed to account for the delay to apply for revision.

The respondent's affidavit was also supported by the affidavit of Lucas Alto Komba, learned advocate who deponed that, he is an associate in the law firm known as Kidumage & Associates Company (Advocates) and it was the firm that was engaged by the applicant to represent him in the High Court. He deponed further that, he was assigned the brief of the case and indeed he appeared to represent the applicant when the appeal was called on for hearing and was accorded opportunity to be heard on that behalf.

Perhaps, at this point, it is apposite to give a brief background to this matter. The court record shows that, the applicant and respondent are spouses. They were doing a joint business of selling bananas in the market. However, a dispute arose between them following the applicant's failure to refund some money the respondent had taken as loan from her "Kikundi" (association) and gave him to start another business. The respondent lodged a suit in the Primary Court of Utemini against the

applicant claiming a sum of Tshs. 9,000,000/= and a plot of land. She lost the suit and unsuccessfully appealed in the District Court of Singida. Undaunted, the respondent appealed to the High Court and this time, she was successful.

The applicant was aggrieved by that decision and he claims to have intended to challenge it by way of revision but was late to do so hence this application, which was lodged on 29th October, 2021.

During the hearing of the application, Mr. Christopher Malinga, learned advocate represented the applicant, whereas the respondent had the services of Mr. Ezekiel Amon, also learned advocate.

In his submission in support of the application, Mr. Malinga adopted the affidavit of the applicant and reiterated its averments. He essentially submitted that, the applicant was denied his right of to be heard as he was not summoned to appear during hearing of the appeal before the High Court and he did not engage Advocate Komba to represent him. He further argued that the impugned judgment is tainted with an illegality as the respondent only prayed to be paid Tsh. 9,000,000/= but the High Court awarded her that amount plus a plot of land which was not claimed. Basing on this submission, Mr. Malinga urged the Court to grant this application with costs.

In response, Mr. Amon started by adopting the affidavit in reply. He contended that, even if Mr. Komba acted without authority from the applicant, there is no proof that any disciplinary action was taken against him. This shows that he was duly engaged to represent the applicant. He argued further that this matter needs evidence and it cannot be resolved by this Court in the present application. To lend credence to his argument, Mr. Amon referred the Court to the decision in the case of **Salum Said Matumla v. Ecobank Tanzania Limited & Three Others,** Civil Application No. 370/16 of 2020 (unreported).

As to the alleged illegality, Mr. Amon argued that the claim for a plot of land was dealt with by the trial court and the district court and that is why the High Court dealt with the same as reflected at page 11 of the judgment. The learned counsel argued further that, the applicant did not prove that he was informed about the impugned judgment by the respondent. For this submission, Mr. Amon contended that the applicant has not accounted for the delay to lodge this application. He thus implored the Court to dismiss this application with costs for being devoid of merit.

In rejoinder, Mr. Malinga argued that the summons directed to the applicant was not endorsed by him and there is no evidence to show that he directed the summons to be sent to his advocate.

As regards disciplinary action against Mr. Komba, Mr. Malinga argued that the applicant has decided to assail the judgment of the High Court through the intended application for revision.

In relation to the alleged illegality, the learned counsel contended that it is apparent in the face of the judgment of the High Court. He argued that even the submission by the advocate of the respondent did not reflect the claim of a plot of land.

Having considered the notice of motion, affidavit, the affidavit in reply and the submissions made by the learned counsel for the parties, the issue to be decided is whether the applicant has shown good cause for extension of time to apply for revision. It is a trite law in our jurisdiction that in an application before the Court for extension of time to take a particular action, the applicant must show good cause upon which the Court can exercise its discretion to grant the application. Rule 10 of the Rules in that regard provides thus:

> *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 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.

Some of the Court's decisions which gave practical effect to the foregoing principle include: **Kalunga and Company Advocates v. National Bank of Commerce** [2006] T.L.R. 235 and **Yusufu Same and Hawa Dada v. Hadija Yusufu,** Civil Appeal No. 1 of 2002 (unreported). For example, in the case of **Yusufu Same** (supra), the Court said thus:

"An application for extension of time is entirely in the discretion of the Court to grant or refuse it. This discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing."

Going further, what entails good cause has not been codified although from various case law, several factors have to be taken into account. These factors include; whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; the lack of diligence on the part of the applicant. (See the cases of **Samwel Sichone v. Bulebe Hamisi,** Civil Application No. 8 of 2015, **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority**, Civil Application No. 146 of 2016 and **Rev. Elihuruma Minya**

& Two Others v. Athumani Idd Fundi, Civil Application No. 81/12 of 2022 (all unreported).

From the foregoing, the issue to be answered is whether the applicant has shown good cause for this Court to exercise its discretion to grant extension of time as prayed.

The applicant has fronted two reasons in support of this application. **One,** that he was not aware of the hearing date and the date when the impugned decision was delivered. He has gone further to deny instructing the advocate who appeared on his behalf when the appeal was heard by the High Court. I have considered this reason, and I agree with the respondent's counsel that the same is easily defeated for, the record before the High Court shows that on 21st July, 2020 when the appeal was called on for mention, Mr. Lucas Komba appeared to represent the applicant and he is the one who prayed for the date of hearing. The matter was subsequently fixed for hearing on 27th July, 2020 but neither the applicant nor his advocate appeared and at the instance of the respondent's counsel, the hearing was adjourned to 24th September, 2020. On that date, Mr. Lucas Komba appeared for the applicant and the appeal was heard. All-important, Mr. Komba was accorded the opportunity to be heard. The date of judgment was fixed on 23rd October, 2020 and

it was really delivered in the presence of Mr. Lucas Komba, learned advocate for the applicant who also was holding brief of Mr. Mussa Chemu, learned advocate for the respondent.

Now, the applicant has disowned Mr. Komba. I have two reasons to reject this plea. **One,** there has not been an affidavit of Mr. Komba to prove that he was not instructed by the applicant or affidavit from his law firm by the name of Kidumage and Associates Company (Advocates) (the firm) denying that the applicant had never engaged them to represent him. Instead, it is the respondent who has filed the affidavit of Mr. Komba confirming that indeed the applicant had engaged the services of the firm and he was the advocate who was assigned to appear in that behalf. See also the Court's earlier decision in the case of **Salum Said Matumla** (supra).

Two, in the absence of the evidence to the contrary, the court record which shows that the applicant appeared by representation when the appeal was heard and determined remains as it is. It is a settled law that, a court record is a serious document that it cannot be impeached lightly. In the decision of the Court of **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527, where the record of the High Court was questioned, it was held as follows:

"(i) A court record is a serious document; it should not be lightly impeached;

(ii) There is always a presumption that a court record accurately represents what happened".

See also: **Hellena Adam Elisha @ Hellen Silas Masui,** Civil Application No. 118/01 of 2019 (unreported).

Flowing from the above analysis, had the applicant wished to successfully impeach the court record, he ought to have presented evidence showing that Mr. Komba was really an impostor. He did not tender evidence that he had successfully preferred a disciplinary action against him, otherwise, the court record is clear that the applicant was present by way of representation when the appeal was heard and determined.

The applicant has presented summons which he claimed was prepared by the High Court Registry but neither served to him nor endorsed that it was supposed to be sent to his advocate. What I can say about this document is that, it ought to be supported by the affidavit of either the Registrar of the High Court, a registry clerk or a court process server to prove its authenticity.

I am therefore of the settled mind that, the claim that the applicant was late to apply for revision within sixty days from the date of judgment of the High Court because he was not summoned to appear before the court, fails.

The applicant's other ground in support of the application is the alleged illegality of the impugned decision. He has alleged that the High Court awarded a relief which was not prayed for by the respondent. He explained that at the trial court, the respondent claimed for payment of Tsh. 9,000,000/= only but the High Court awarded her that amount plus a plot of land.

Again, it is a settled principle of law in our jurisdiction that where an illegality in the decision being challenged is raised, the Court is supposed to grant the application for extension of time so that the matter can be considered. One of the Court's decisions to that effect is in the case of **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited,** Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported). That notwithstanding, the applicant should successfully show that the alleged illegality can really be seen on the face of the record. Going through the impugned decision, at page one, the High Court stated that before the trial court, the respondent claimed against the

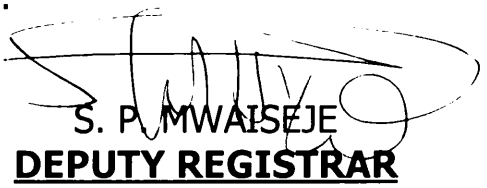
applicant for payment of Tsh. 9,000,000/= and a plot of land. After consideration of the appeal, the court allowed the respondent's appeal by granting her the stated claims. Now, if one has to see whether there is an illegality in the impugned decision, he has also to peruse the record of the case in the trial court, the district court and the High Court. I do not think this is the duty of this Court in an application for extension of time. That means the alleged illegality should be apparent on the face of the record of the impugned decision. This ground too fails.

In the event, I am satisfied that the applicant has failed to show good cause upon which this Court may exercise its discretion to grant extension of time to apply for revision. Consequently, I find the application devoid of merit and I hereby dismiss it. In the circumstance of the parties, I make an order that each party shall bear its own costs.

DATED at **DODOMA** this 9th day of May, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered on 9th day of May, 2023 in the presence of the Mr. Christopher Malinga, learned counsel for the applicant and Mr. Ezekiel Amon, learned counsel for the respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COUTY OF APPEAL