IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

CIVIL APPLICATION NO. 142/12 OF 2023

MS. SPEED SECURITY LIMITED ..... APPLICANT

VERSUS

HUSSEIN ABDALLAH KANIKI ..... 1ST RESPONDENT

EMMANUEL KURES LOVOYO ..... 2ND RESPONDENT

(Application for extension of time to file a notice of appeal against the judgment and decree of the High Court of Tanzania at Tanga)

(Rugazia, J.)

dated the 30th day of June, 2015

in

Civil Case No. 3 of 2005

RULING

29th April & 7th May, 2024

ISMAIL J.A.:

This is a second bite application, the latest of the applicant's efforts to put his quest for appeal on course. At stake is the decision of the High Court of Tanzania at Tanga, in respect of Civil Case No. 3 of 2005. In that case, the respondents sued for damages, specific and general, for what they contended to be mental torture and strain, unlawful arrest and detention, defamation and costs incurred during the period of their restraint. The respondents' restraint and incarceration came after it was alleged that the duo was found with a consignment of coffee suspected

to be a stolen property. The criminal indictment culminated in the declaration of non-blameworthy on the respondents' part, triggering the tort proceedings commenced through Civil Case No. 3 of 2005.

In the decision handed down on 30th June, 2015, the High Court (Rugazia, J) awarded general damages to the respondents, to the tune of TZS. 100,000,000.00 plus interest thereon at the court's rate of 7% per annum to the date of full payment. Costs were also awarded to the respondents.

Irked by the decision, the applicant instructed her advocate to institute a notice of appeal and take such other steps as are essential in the institution of the appeal. The applicant's contention is that, she came to learn later that her advocate had opted for a review instead of an appeal. It was later discovered, however, that not even the review was filed. Acting through the services of another counsel, the applicant instituted Miscellaneous Civil Application No. 29 of 2020, moving the High Court to extend time within which to file an extension of time to file the notice of appeal. This application was withdrawn and was immediately replaced by Miscellaneous Civil Application No. 8 of 2022. This latter application was dismissed for want of merit.

The instant application is supported by an affidavit sworn by Catherine A. Lyasenga, the applicant's counsel. Of relevance in the said

depositions are paragraphs 3, 4, 5 and 6 which blame the inaction on the applicant's erstwhile counsel, a Mr. Myovela who, instead of filing the notice of appeal against the decision by Rugazia, J., he chose to institute a review that never was. The applicant allegedly came to know of the inaction in September, 2019, when she was served with an application for execution and that, on enquiry to the applicant's previous counsel, the latter allegedly demanded that he be paid fees before he could pursue the matter. It was not until Mr. Myovela's successor perused the court file that she realized that no steps had been taken by the applicant.

The application has been contested by the respondents whose joint affidavit in reply has scoffed at the averments made by the applicant. The respondents' contention is that there is no proof that the applicant instructed or paid Mr. Myovela to challenge the impugned judgment. They further averred that, Ms. Lyasenga, who perused the file, was never asked by the applicant if an appeal or application for review existed in the High Court. They maintained that the applicant failed to adduce sufficient reasons for the extension of time.

At the hearing of the application, the applicant was represented by Ms. Catherine Lyasenga, learned counsel, while her counterpart, Mr. Mohamed Muya, learned advocate, carried the mantle for the

respondents. Neither of the learned counsel preferred written submissions, meaning that they both relied on the oral representations.

Ms. Lyasenga's submission revolved around three issues. The first was whether the applicant took all efforts in the prosecution of the appeal. The learned counsel referred us to paragraphs 3, 4, 5 and 6 of the supporting affidavit and argued that, the applicant employed steps and efforts to let Mr. Myovela contest the decision of the High Court. This, she argued, included payment of fees as evidenced by annexure SP1, and that these were payments for subsequent steps. Ms. Lyasenga contended that the applicant realized that her predecessor misrepresented the facts when she was served with an application for execution. The second question was whether there was a technical delay. On this, the applicant's counsel's point of reference was paragraphs 7 and 8 of the supporting affidavit. Ms. Lyasenga argued that the instant application came after the applicant had been in court corridors between June, 2020 and March, 2022, diligently prosecuting the matters which were in court. This period ought to be excluded, she contended.

The last issue was whether the decision sought to be impugned is tainted with illegalities. Ms. Lyasenga's answer to this question was in the affirmative, and that the details of what constitutes the alleged illegality is stated in paragraph 9 of the affidavit. The learned counsel argued that,

whereas the issues framed touched on the tortious liability, the impugned decision was based on vicarious liability. She argued that the cause of action in the suit was neither considered nor determined. In her contention, this is an illegality which is on the face of the record, and one that bears sufficient importance.

Probed on why the applicant and Mr. Myovela did not depone on what happened, the argument by Ms. Lyasenga is that need did not arise for an affidavit from the applicant as depositions by Ms. Lyasenga sufficed. Regarding Mr. Myovela, the learned counsel argued that this colleague of hers did not cooperate. The learned counsel urged the Court to grant the application.

Mr. Muya rebuffed the contention by his counterpart, arguing that the question which must engross the Court is whether good cause has been shown. He contended that good cause is gathered from the facts in the affidavit. Mr. Muya argued that no effort was employed by the applicant to prosecute the appeal within time. He denied that there was any instruction issued to Mr. Myovela to represent the applicant in challenging the decision. He contended that the vouchers attached to the affidavit were for representation in Civil Case No. 3 of 2005. He made light of the contention that the vouchers were prepared by a lay person,

arguing that this was a submission from the bar and not from the affidavital evidence.

On technical delay, Mr. Muya's argument was that the period of technical delay does not take away the fact that he was already late for in excess of five years, and that there was no explanation on this dilatory conduct. Regarding illegality, the learned counsel's argument is that illegality would only count if: it was on a point of law; it was of sufficient importance; and it is on the face of the record. He argued that the contention that the case was not proved would involve calling for the High Court file with a view to seeing if the allegations were proved and if they had any credence. This, he said, would not be appropriate at this stage of the proceedings. He maintained that the applicant failed to account for each day of delay and urged the Court to dismiss the application with costs.

The parties' depositions and rival contentions by the learned counsel bring out one key question for my determination. This is as to whether the applicant has exhibited good cause in her quest for extension of time.

Applications for extension of time in this Court are predicated on rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). This provision requires that the applicant must demonstrate good cause for

extending time to do an act under the Rules. Grant of extension of time is discretionary, and in exercising such discretion, the Court looks at the material placed before it, and it includes the affidavital evidence that supports the notice of motion. In gauging if good cause exists, several factors are put into consideration. These factors have been stated in a multitude of decisions. In **Mbogo v. Shah** [1968] E.A. 93, the defunct Court of Appeal for East Africa held as follows:

> *"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."*

See also: **Lyamuya Construction Company Limited v. Board of Trustee of Young Women's Christians Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

It is significant, as well, that, generally, failure to utilize the time set out for doing an act is excusable but only where there is a valid excuse for such failure. Thus, in **Allison Xerox Sila v. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 (unreported), the Court guided as follows:

> *".... It does seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of his counsel, should be extended extra time merely out of sympathy for his cause."*

What is crucially distilled from the quoted decisions and many others is that, the obligation to show good cause carries with it the duty to demonstrate that the applicant acted with diligence and not negligence, apathy or procrastination which are, in their very nature, consistent with lack of diligence. Thus, **Luswaki Village Council and Paresui Ole Shuaka v. Shibesh Abebe,** Civil Application No. 23 of 1997 (unreported), we held:

> *"... those who seek the aid of the law by instituting proceedings in court of law must file such proceedings within the period prescribed by law...Those who seek the protection of the law in the court of justice must demonstrate diligence."*

As summarized above, the prayer for extension of time is predicated on a trio of grounds which are: the previous advocate's inaction; technical delay; and illegality. Because of the potential decisive importance, my disposal journey will begin with the ground of illegality.

The law is settled in this country, and it is to the effect that, once illegality is pleaded as a ground on which extension of time is premised, the same takes precedence and that all other considerations, such as accounting for days of delay, or previous counsel's conduct, play second fiddle. This means that, successful proof of illegality spares an applicant from the pains of having to account for days of delay or to prove that he acted diligently – see: **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185; **Lyamuya Construction Company Limited** (supra); and **VIP Engineering and Marketing Limited & 3 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported). The consistent message gathered from the cited decisions is that the alleged illegality can only serve as a ground if it is apparent on the face of record, and if it bears sufficient importance. Such illegality would include, time bar; lack of jurisdiction; and denial of the right to be heard.

In the instant matter, illegality cited by the applicant and fervently argued on by Ms. Lyasenga is that the trial court did not pronounce itself on the cause of action from which the issues were framed. It dwelt, instead, on matters of vicarious liability, a new and distinct question. Mr. Muya has cast aspersions on his counterpart's contention, arguing that

the alleged illegality would require leafing through the record and indulge in a long-drawn process to discover it, if any. I find that the contention by Mr. Muya is as plausible and resonating as it is resounding, and I fully subscribe to it. In my view, to be able to state, with any semblance of certainty, that there has been a misapprehension of issues, or failure by the trial court to address the issues raised at the commencement of the trial, requires a thorough review of the impugned judgment and the proceedings, and make sense of what was decided. It is only then, that a conclusion may be drawn on the legality or otherwise of the course of action taken by the trial Judge. It is quite in order to hold, as Mr. Muya rightly contended, that the alleged point of law is not apparent on the face of the record.

There is yet another question to be resolved on illegality. It is whether the court's failure to pronounce itself on the question of vicarious liability is indeed an illegality. Ms. Lyasenga's answer to this question was in the affirmative, much to the chagrin of Mr. Muya. As I move to resolve this question, I need to remind the learned counsel that not every point of dissatisfaction or unhappiness in the judgment is an illegality worth of any consideration as the basis for extension of time. Where the consternation resides in a mere decisional error the same cannot be said to be an illegality, and the settled position is that the error should not be

considered as an illegality. It is in view thereof that, in **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported), the Court relied on the definition extracted from the Black's Law Dictionary, 11th Edition, in which illegality is defined as:

> *"an act that is not authorized by law" or "the state of not being legally authorized".*

Enriching the quoted definition, the Court borrowed a leaf from the persuasive decision in **Keshardeo Chamria v. Radha Kissen Chamria & Others** AIR 1953 SC 23, 1953 SCR 136, in which the Supreme Court of India defined the term illegality in the following words:

> *"... **the words "illegally" and "material irregularity" do not cover either errors of fact or law**. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after formalities which the law prescribes have been complied with."* [Emphasis is added]

The Court concluded in **Charles Richard Kombe** (supra) that illegality which would merit the attention of the Court must be that which is graver than mere decisional errors which are a common feature in many

decisions and can be corrected through an appeal process. It was observed, in the final analysis, as follows:

> *"From the above definitions, it is our conclusion that for a decision to be attacked on the ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time-barred."*

See also: **Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another**, Civil Appeal No. 174 of 2020 (unreported).

My unfleeting review of what Ms. Lyasenga contends as an act of illegality leads me to the conclusion that the alleged failure to resolve a cause of action neither falls in the realm of illegalities enumerated in the quoted excerpt nor does it carry the gravity that would open a new frontier of illegality in respect of which extension of time may be sought. At best, this is a normal error of law, and, in my considered view, it fails the test of an illegality.

Moving on to the first issue, the argument by Ms. Assenga is that the applicant took all necessary steps to institute the appeal process by issuing instructions to Mr. Myovela, her advocate who, despite receiving payments in respect thereof, took no steps before he shifted goal posts

and claim that he had preferred a review to an appeal, before contending later that he had not been paid. This contention has been given a wide-berth by Mr. Muya who argued that there is not evidence to that effect.

I have considered both arguments by the learned counsel. I have also reviewed annexures attached to the founding affidavit. Nothing demonstrates that the applicant issued any instructions for any action to be taken by Mr. Myovela in respect of the impending appeal or review. It is an assertion gathered from the depositions made by Ms. Lyasenga who took over the matter after the lapse of about five years. While I would have no qualms on the source of information of Ms. Lyasenga's deposition, it is apparent that some of what she deposed is based on the information received from her client and this includes what the applicant contended that she did after the decision in Civil Case No. 3 of 2015 was delivered. Since this is a matter of information which is otherwise a hearsay, the settled law is that such deposition ought to have been validated by an affidavit of the said third person, in this case, the applicant's principal officer, while questions surrounding the steps allegedly taken by Mr. Myovela, his affidavit was important. This position, a legal certainty, has been pronounced in numerous decisions, including **Sabena Technics Dar Limited v. Michael J. Luwuza**, Civil Application No. 451/18 of 2020; and **Benedict Kimwaga v. Principal Secretary Ministry of**

Health Civil Application No. 31 of 2000 (both unreported). In the absence of these sworn depositions, reliance on the counsel's deposition is unsafe and I resist the temptation to accede to the applicant's invitation to do so.

Coming to the second issue, the contention by Ms. Lyasenga is that from June, 2020 to March, 2022, time should be excluded since the applicant was in court corridors pursuing applications all of which were unsuccessful. Mr. Muya did not express any serious opposition to this prayer. He was quick to submit, however, that this does not leave the application unscathed as action was taken five years after the decision, while the filing of the notice of appeal that the applicant seeks extension for was to be done within 30 days from the date of pronouncement of the judgment. I shall come to the last segment of the Mr. Muya's contention in a bit.

Regarding technical delay, the settled law is that, where technical delay is properly invoked as a reason that prevented the applicant from pursuing a legal action, the same may result in the exclusion of the time during which the pursuit was done. This position has been underscored by the Court, time and again. In **Victor Rweyemamu Binamungu v. Geofrey Kabaka & Another**, Civil Application No. 602/08 of 2017 (unreported), the Court held:

"Be it as it is, he first applied for revision which was however struck out on 4th December 2017 on account of time limit. This period from the date of the decision intended to be revised to the date of striking out Civil Application for revision No. 26 of 2017, is what has acquired the name of technical delay which cannot be blamed on the applicant."

Ms. Lyasenga is right to urge the Court to exclude time ranging between June, 2020 to March, 2022, since that is the period during which a couple of applications were filed and determined, before the matter was escalated to this Court. It is a period of technical delay which did not arise out of the applicant's indolence in pursuing her rights. I agree with Ms. Lyasenga that, during that time, no further action could be taken as the applications were in pendency.

Chalking off of the time from June, 2020 to March, 2022 does no favours to the applicant as such exclusion has only taken care of a tiny fraction of the applicant's total inaction. Nothing was done from 30th June, 2015, when the High Court delivered the judgment. It is during this time that Mr. Myovela is alleged to have been on the driver's seat, preparing an onslaught against the impugned judgment. But as Mr. Muya has rightly contended, nothing evidences this allegation as not even Mr. Myovela himself was called upon to testify on this contention. It is only through

the affidavital evidence of Ms. Lyasenga that this factual account is gathered and, as I alluded to earlier on, this is a story that lacks the veracity necessary for its reliance. There is simply no sufficient material on which to exercise the Court's discretion favourably, and it cannot be said that the days of delay have been accounted for.

But even if I were to agree with Ms. Lyasenga and attribute the tardiness or inaction to Mr. Myovela, the most I can do is to feel pity for the applicant, but such feeling of pity would not culminate in the granting of extension of time for, it is trite law that, negligence of an advocate cannot constitute good cause for extension of time. See: **Umoja Garage v. National Bank of Commerce** [1997] T.L.R. 109; and **Omari R. Ibrahim v. Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (unreported). In the latter, this Court held:

> *"I sympathise with the applicant. If what he has deponed in his affidavit is true, then the advocate who handled the matter was professionally negligent. ... However, this is not a Court of sympathy but it is a Court of law. There is a chain of authorities that an error of an advocate is not sufficient reason under rule 8 for extending the time."*

In the upshot of all of the foregoing, I am of the settled view that the application is lacking in merit. Consequently, the same is dismissed with costs.

Order accordingly.

DATED at **TANGA** this 6th day of May, 2024.

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 7th day of May, 2024 in the presence of Ms. Catherine Lyasenga, learned Counsel for the Applicant – linked through Video facility from Court of Appeal of Tanzania at Dar es Salaam and the 1st Respondent while the 2nd Respondent was absent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL