

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 61 OF 2022

SALEHE SALMIN ABRI APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED RESPONDENT

RULING

10th, & 19th May, 2022

ISMAIL, J.

This application seeks to enlist the assistance of the Court in allowing extension of time within which to institute an application of review against the decision of the Court in Civil Case No. 31 of 2011. In the said decision, the applicant, the losing party, was held responsible as a mortgagor of a property on Plot No. 37 Block 1B Wilolesi Area, Iringa Township. The property was allegedly pledged to secure a loan facility issued by the respondent.

The applicant's latest initiative comes after what he alleges to be a discovery of new facts which were not available during trial and which, had they been available, would twist the case in the applicant's favour.

The application is supported by an affidavit sworn by January Raphael Kambamwene, learned counsel who has been instructed to take the conduct of the proceedings on the applicant's behalf. It sets out grounds on which the prayer for extension of time is premised. There is also a supplementary affidavit of Fatuma Rajabu Mbwana, an Assistant Superintendent of Police attached to the Police's Forensic Bureau. She is a handwriting expert who examined the Contract of Guarantee which constituted the crux of the parties' rival contention during trial.

The application has been valiantly opposed by the respondent. The view taken by Dickson Ikingura, the deponent of the counter-affidavit is that the question regarding validity of the mortgage of the applicant's landed property were finally determined by the Court and that decision emanating from the trial proceedings has not been reversed by this or any other court.

On the discovery of new facts, the respondent's take is that the applicant ought to have conducted investigation and procure a report ahead of time and have it tendered in court before determination of the matter.

The fact that he had means to obtain and avail the report and he did not do means that he was apathetic in the conduct of the matter.

At the hearing of the matter, the applicant was represented by Mr. January Kambamwene, learned advocate, while the respondent enlisted the services of Messrs Dickson Majaliwa and Thompson Luhanga and Ms. Butogwa Eliezer, learned counsel.

Mr. Kambamwene began by praying to adopt to the contents of the affidavits and a reply to counter affidavit as part of his submission. He submitted that his application is predicated on the Court of Appeal of Tanzania's decision in ***Tanzania Rent A Car v. Peter Kimuhu***, CAT-Civil Application No. 226/01 of 2017 (unreported), which has listed down conditions for granting an extension of time to apply for review. He argued that these conditions apply to this Court as well. He contended that, in terms of the said decision, the applicant need not justify the length of delay. Giving an account of what transpired between the date on which the decision sought to be reviewed was delivered and the date of filing the instant application, Mr. Kambamwene argued that during the period the matter was in the Court of Appeal, and that review could not be lodged. He said that it was after the report of the Forensic Bureau was out that it was now possible

to lodge an application for review. He took this to be a sufficient reason to constitute a good cause.

Learned counsel argued, as well, that the supporting affidavit is clear on the reasons and conditions for applying for review under Order XLI of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). He also argued that the affidavit is also clear that there was a discovery of new and important evidence which could not be available at the time.

Mr. Kambamwene further argued that the fact that the review has been preferred to this Court completes the list of key prerequisites for granting the application. He urged the Court to grant the application.

Mr. Majaliwa's submission was ferocious. He was strongly opposed to the granting of the application. While adopting the contents of the counter-affidavit sworn in opposition of the application, he fully subscribed to the settled position that granting of extension is subject to demonstration of good cause, as established in many a decision, and that these conditions for such grant are of universal application for all kinds of applications for extension of time. To fortify his contention, Mr. Majaliwa cited the case of ***Vedastus Raphael v. Mwanza City Council***, CAT-Civil Application No. 594/08 of 2021 (unreported). As he did that, he played down the decision

cited by his counterpart, holding that the same covers applications brought under Rule 66 of the Court of Appeal Rules, 2009 (as amended). Mr. Majaliwa argued further that, even if the same was applicable, it would still require the applicant to account for the period of delay.

Turning his attention to the application, Mr. Majaliwa argued that the same is falling short of the four conditions set out in the cited case. These include the failure to account for the duration of five years between delivery of the decision sought to be reviewed and the filing of the instant application. Learned counsel argued that there is also a period of one month that has not been accounted for, between the withdrawal of the appeal and the filing of the instant application. Mr. Majaliwa took the view that failure to account for each day of delay cannot be condoned, and on this, he referred me to the case of ***Karibu Textile Mills v. Commissioner General Tanzania Revenue Authority***, CAT-Civil Application No. 192/20 of 2016 (unreported).

The respondent's advocate imputed lack of diligence by the applicant and the argument is that what is alleged to be a discovery of a new fact ought to have been established ahead of time because filing of the suit was pegged on the alleged forgery of signature. Mr. Majaliwa argued that this is the reason why the Court condemned the applicant (page 13 of the

judgment) for failing to bring an expert witness who would testify on the allegation of forgery. It was his view that in the interest of bringing litigation to a speedy end, this application ought not to be entertained.

Addressing the Court on illegality, learned counsel submitted the illegality pleaded in paragraph 7 of the reply to the counter-affidavit, he submitted that illegality can only be a ground if it is of sufficient importance and apparent on the face of record. He invited the Court to disregard the plea of illegality.

In his rejoinder submission, Mr. Kambamwene maintained that conditions attached in applications for extension in review cases are distinct from those that apply in normal applications for extension of time. He contended that conditions set in ***Tanzania Rent A Car*** (supra) are synonymous with those enshrined in Order XLI of the CPC. Addressing the five-year delay, learned counsel submitted that the affidavit is clear on that, that the appeal to the Court of Appeal was the reason. He also contended that time prescription for filing review applications is 30 days, and that the instant application was lodged within that period.

On the discovery of new evidence, Mr. Kambamwene submitted that review is a relief that covers aspects of new discovery of facts, adding that

the revelation was in respect of facts which were not available when the decree was passed. He reiterated his prayer for granting of the application.

Having dispassionately considered the parties' rival contention, the broad question that requires a resolution is whether the application carries any merit to warrant its grant. It is common knowledge and a trite position, with respect to all forms of extension of time, that the decision to refuse or grant such extension is entirely a matter of discretion of the Court from which such grant is sought. Exercise of such discretion must be judicious and in conformity with rules of reason and justice, and consistent with the holding in the case of ***Mbogo v. Shah*** [1968] EA 93, quoted widely in the subsequent decisions. It was held:

"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: ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014); and ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA***, CAT-Civil Application No. 2 of 2010 (unreported).

Demonstration of sufficient cause remains to be the basic foundation for grant of extension of time, and this is what the Court of Appeal accentuated in the decisions cited by counsel, including the case of ***Tanzania Rent a Car*** (supra). The narrow question to be posed at this point is whether the applicant in the instant application has demonstrated the requisite good cause.

By and large, the instant application is predicated on the ground that the applicant was actively engaged in an appeal that was pending in the Court of Appeal for five years. While this is not in dispute, the contention by the respondent is twofold. One, that the applicant has not stated what he did with the 30 days of idleness after the appeal had been withdrawn. Two, that the ground for revision is a fact which was available on request and that the applicant ought to have pressed a request before the trial proceedings kicked off. The view held by Mr. Kambamwene on the former is that review applications have a 30-day time prescription for their preference. I have no qualms about the time prescription for filing review. What is of relevance and concern to the Court and the respondent is that, noting that the instant application is for extension of time, the delay in taking action has not been explained out. Time prescription and the explanation around it would, as posited by Mr. Kambamwene, would be relevant if what was at stake was

an application for review. But in the quest for enlargement, as is the case here, the only preoccupation is to justify what the respondent considers as procrastination in taking action. While this is sorted out with respect to the period during which the matter was in the Court of Appeal, I am not convinced that the delay that came subsequent to withdrawal of the appeal has been justified with good reason or at all.

Mr. Kambamwene has contended that the applicant's work in extension of time for filing review has been cut down to only adducing good cause and if he is able to demonstrate any of the infractions enumerated in the Rule 66 of the Rules. He also contended that these conditions apply to this Court as well. The reason advanced by the applicant for the intended review is the discovery of a new fact (call it evidence) on the allegation of forgery of the mortgage deed that alienated the suit property from him. In law, this is one of the grounds on which review can lie, and it is what Order XLII rule 1 of the CPC precisely caters for. It provides as follows:

"Any person considering himself aggrieved-

*(a) by a decree or order from which an appeal is allowed,
but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is allowed,
and who, **from the discovery of new and important***

matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.”[Emphasis is added]

The applicant contends that the evidence of forgery came to light when the Forensic Bureau was called upon to investigate the matter and issue its findings that the document was indeed a breed of forgery. What isn't clear is when exactly the Forensic Bureau was requested to carry out the investigation, but Annexure SSA-02 shows that the request for such investigation was sent to the Bureau on 13th January, 2021, four years after the decision of this Court had been delivered. This implies that no effort had been employed to try and gather a testimony on which the applicant's allegation of forgery would hang.

Thus, while such testimony may have not been in the knowledge of the applicant during trial, it is a piece of information which would be available had the applicant employed diligent effort to have it availed to him and use it to found claims against the respondent. This view draws convergence with

the contention made by Mr. Majaliwa that this is not a new discovery. It was simply a gem which was known to be in existence but, out of lack of exercise of due diligence, the applicant chose not to dig it out.

It is in view of the foregoing, that I hold that the applicant has not demonstrated that the delay in taking action was due to good cause. Consequently, I hold that the application has not met the threshold for granting an extension of time. Accordingly, the same is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 19th day of May, 2022.



M.K. ISMAIL

JUDGE

