

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 476 OF 2019

(Arising from the Decision of the High Court Land Division in Misc. Land Appeal
No. 15 of 2017)

LEOCADIA RUGAMBWA APPLICANT

VERSUS

1. ASIA MZEE MKWANGA]

2. ALFRED NDUNGURE]

..... **RESPONDENTS**

RULING

Date of Last Order: 09/06/2021 &
Date of Ruling: 02/07/2021

S.M KALUNDE, J:-

The Application at hand is brought under **Section 11 (1)** of **The Appellate Jurisdiction Act, Cap. 141 R.E. 2019**, whereby the applicant is moving this Court to grant extension of time within which to file an application for leave to appeal to the Court of Appeal against the judgment and decree of this Court in respect of **Miscellaneous Land Appeal Case No. 15 of 2017** dated 10th day of December, 2018. The application has been supported by an affidavit that has been sworn by Mpaya Kamara, learned advocate for the applicant.

On their part, the respondents filed a joint counter affidavit in reply to the application. The counter affidavit was sworn by **Asia Mzee Mkwanga** and **Alfred Ndungure**. In essence the respondents strongly

objected to the grant of the orders sought and prayed that the application be dismissed.

Leave of the Court was granted for the application to be disposed by way of written submissions. The applicants' submission were drawn and filed by learned counsel **Mr. Mpaya Kamara** while those of the Respondents were drawn in gratis by **Ms. Irene Felix Nambuo** from Legal and Human Right Centre.

Submitting for the application, the counsel for the applicant sought to adopt, as part of his submissions, the contents of the affidavit filed in support of the application. He went on to argue that, delay in filing the appeal arose from the fact that the applicants lost track of the case. In support of this contention he contended that on 05th November, 2018 the firm representing the applicant lost one of the partners as a result the partners travelled to Bukoba for funeral and burial of their partner. When they came back they notified the applicant that judgment would be delivered upon issuance of notice of delivery of judgment. The applicant waited for the Notice in vain until he was served with summons in relation to an **Application for Execution No. 415 of 2019** filed at the District Land and Housing Tribunal for Kinondoni District. Mr. Kamara argued that a Notice for delivery of judgment was a mandatory requirement under the provisions of **order XX rule 1** of the **Civil Procedure Code, Cap. 33. R.E. 2019** and the decision in **Cosmas Constructions Co. Ltd vs. Arrow Garments Ltd (1992)** T.L.R. 127.

Further to that, Mr. Kamara argued that, the decision in Miscellaneous Land Appeal Case No. 15 of 2017 contained illegalities

hence it was essential for the extension for time to be granted so that the Court of Appeal can be afforded with an opportunity to take care of the illegality. To support this contention, he cited the case of **Etiennes Hotel vs. National Housing Corporation**, Civil Reference No. 32 of 2005 (Unreported) and **Principal Secretary, Ministry of Defense and National Service vs. Devram Valambhia** (1992) T.L.R 185.

Ms. Nambuo, counsel for the respondents forcefully challenged to the application. Relying in the authority in **Tanga Cement Company Limited vs. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 06 of 2001 and the statement of **Lord Mansfield** (in **Rex vs. Wilkes** (1770) 4 Burr as cited by **Sir Jocelyn, P**, in **Povey vs. Povey** (1971) 2WLR 381 at 387, the counsel argued that extension of time was a discretion of the Court exercisable upon demonstration of good cause or sufficient cause. The counsel went on to argue that the applicant has failed to advance good cause to warrant the Court to exercise its discretion.

In rejoining, Mr. Kamara insisted that the decision sought to be challenged was tainted with illegality which required the intervention of the Court of Appeal to remedy the situation. To bolster his position he cited the case of **Arunaben Chaggan Mistry vs. Naushad Mohamed Hussein and 2 Others**, Civil Application No. 6 of 2016 (unreported) where illegality was considered as a good cause for extension of time.

Having examined the pleadings and record before me and considered the opposing submissions of the counsel representing the parties, it now behooves this Court to determine whether the application is merited.

The present application is brought under section 11 of the Appellate Jurisdiction Act [CAP. 141 R.E. 2019]. The section reads:

"Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired."

In line with the above provision, it has been held that for this Court to extend time, it must be satisfied that there exists a **good cause** to do so. However, what amount to good cause has never been defined in any provision of law. The only available guidance is to be found in case law. For today, I find no better case law than the case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported) wherein the Court of Appeal, **Massati, J.A** outlined the basic conditions which have to be considered before a Court holds that there is sufficient cause. These conditions are:

- 1 The applicant must account for all the period of delay.
- 2 The delay should not be inordinate.
- 3 The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
- 4 If the Court feels that there are other reasons. such as the existence of a point of law of

sufficient importance, such as the illegality of the decision sought to be challenged.”

In line with the above section and cited case law, my task now is to consider, whether in the present application, there has been advanced sufficient reasons for this Court to exercise its discretion in granting the orders sought.

In the present case, the impugned decision sought to be challenged was delivered on the 10th December, 2018 and immediately thereafter copies of the certified judgment were made available for collection by the parties. In accordance with rule 83 (2) the 30 days for filing notice expired on the 10th January, 2019, however, the present application was filed on 23rd August, 2019, almost seven (7) months after expiry of the time limit fixed by law.

To support the application, the applicant advanced two main reasons as contained in paragraphs 4, 5, 6, 7, 8, 9 and 10. The first ground is that, the applicants were not informed of the date of delivery of judgment and hence they lost track of the case. The records show that the appeal Misc. Land Appeal No. 15 of 2017 was argued by way of written submissions. Submissions in chief were to be filed by 10th October, 2018, reply submissions were due to be filed by 24th October, 2018 and a rejoinder by 31st October, 2018. The matter was then scheduled for mention on 06th November, 2018. Admittedly, parties complied with the scheduling order and submissions were accordingly filed.

The counsel for the applicants argued that, on 05th November, 2018, a day before a date fixed for mention, one of their partners

passed away and they travelled to Bukoba for funeral and burial ceremonies. The burial took place on 09th November, 2018 and they returned in mid-November and made follow ups but they were not told when the matter was coming for Judgment. They kept waiting for notice judgment until on the 03rd August 2019, when the applicant was served with a notice of execution through Execution No. 415 of 2019. On the basis of the above account, Mr. Kamara was of the view that the delay in filing the appeal was not his, or his clients making.

It is a settled position of the law that, grounds and supporting materials in the application of this nature, must be contained in the affidavit. See **The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006, CAT at DSM (unreported); **Kalunga and Co. Advocates v National Bank of Commerce Ltd** (124 of 2005) [2006] TZCA 87; (24 April 2006); **Helen Jacob v Ramadhan Rajab** (1996) 6 TLR 139 and in **Ratman vs Cumarasamy and Another** [1964] All 3 933. In **Ratman Case** it was held that:

*"The rules of the Court must, prima facie be obeyed, end, in order to justify a Court extending the time during which some step in procedure requires to be taken, **there must be some material on which the Court can exercise its discretion.** If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which provide a time table for the conduct of litigation." [Emphasis mine]*

Unfortunately, Mr. Kamara did not provide any materials to support the contention that, indeed one of his partners passed on the

05th November, 2018. The present application was filed in August, 2019, by then there must have been some documents to support his claim. But he did not attach them, it either they do not exist or that he did not consider them to be relevant. Unfortunately, that leaves his argument hanging.

Even assuming that he, indeed, travelled to Bukoba for funeral and burial ceremonies, he admitted himself that he came back in mid-November, 2018. As a counsel representing the applicants he was well aware that the matter had been scheduled for mention on 06th November, 2018 the date which he did not appear. It was his duty to make a follow up to ascertain what transpired on the date and what orders were given. His argument was simple, he made a follow up but he was not appraised. He did not say what steps were categorically taken or attach any supporting letter requesting the appraisal from the Court or that he paid fees to peruse the Court records. I think that demonstrates some degree of laxity and inaction on his part. He was therefore not diligent in prosecuting his matter.

Mr. Mpaya placed reliance in the decision of **Cosmas Constructions** (supra), for an argument that he ought to have been supplied with a notice of the date for judgment. However, I wish to make a point that, that case is not applicable or is distinguishable with the present circumstances because in **Cosmas Constructions** (supra) the matter had proceeded **ex-parte** against the appellant. Hence he was to be notified of the date of judgment. In the present case, however, parties had complied with orders to file written submissions and were aware of the date fixed for mention. However, the counsel for the applicant nor his client, who ought to be following up on his case,

did not appear on the next date fixed for mention or the subsequent date when the matter was fixed for judgment. When he came back from the alleged burial ceremony he did not make proper follow up to know the status of the case. But, he did not do so, or at least there is no explanation why he did not follow up and no evidence shows he did. This argument is thus not merited and it is dismissed.

There is also a complaint that the impugned decision is tainted with illegality. I am aware that the position of our law is settled to the effect that when there is an allegation of illegality of the decision being challenged the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right. See **The Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 182; [[1992] TZCA 29; (03 July 1992); 1992 TLR 185 (TZCA)].

I am also aware that, not all allegations of illegality are sufficient to warrant to the Court to extend time. In each case the Court must be satisfied that the alleged allegations are apparent on the face of record. For otherwise parties will always allege illegality with the understanding that the Court will straight ahead grant the application. In **Lyamuya Construction Company** (supra) the Court of Appeal held that:

*"Since every party intending to appeal seeks to challenge a decision either on a point of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises a point of law should, as of right, be granted extension of time if he applies for one. **The Court there emphasized that such point of law***

must be that of sufficient importance and, would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

However, it does not mean that the alleged illegality must be established in application for extension of time as that would tantamount to consideration of the merits of an appeal. Each situation must be determined on its own merits regard being the circumstances surrounding the case. The threshold required is that the illegality must be apparent on face of record. See *FINCA (T) Limited & Kipondogoro Auction Mart vs. Boniface Mwalukisa*, Civil Application No. 589/12 of 2018, Court of Appeal at Iringa (unreported); and *Elias Masija Nyang'oro & Others vs Mwananchi Insurance Co. Ltd* (Civil Appl. No. 552/16 of 2019) [2021] TZCA 61; (02 March 2021).

In *FINCA (T) Limited* (supra) after citing its decisions in **VIP Engineering and Marketing Limited and Three Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported); **TANESCO vs. Mufugo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016, (unreported); **Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 182; [[1992] TZCA 29; (03 July 1992); 1992 TLR 185 (TZCA)] and **Lyamuya Construction Company Ltd** (supra), the Court of Appeal (**Korosso, J.A**) stated thus:

"It is however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and should borne in mind that, in those cases were extension of time was granted upon being satisfied that there

*was illegality, the illegalities were explained. For instance in **Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 182 the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice."*

The Court went on to conclude that:

"Applying the above mentioned statement of principle to the application under consideration, I have not been persuaded by what is before the Court, on the alleged illegality in the trial court decision, to lead me to state that it is apparent on the face of it and thus can be discerned as a good cause for the Court to grant the prayers sought in this application."

It dismissed the application with costs thereon. On my part, after a careful consideration of the above position of the law, I find that the alleged points of illegality raised by the applicants do not constitute good cause warranting extension of time sought. I find the application wanting in merits. It stands dismissed. No order for costs is made.

Order accordingly.

DATED at DAR ES SALAAM this 02nd day of July, 2021.



S.M. KALUNDE

JUDGE