

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

CIVIL APPLICATION NO. 93/15 OF 2018

ZUBERI NASSOR MOH'D.....APPLICANT

VERSUS

**MKURUGENZI MKUU SHIRIKA LA
BANDARI ZANZIBAR.....RESPONDENT**

**(Application for extension of time to lodge a notice of
appeal out of time from the decision of the
High Court of Zanzibar, at Vuga)**

(Sepetu, J.)

dated the 4th day of May, 2016

in

Civil Case No. 4 of 2012

RULING

7th November, 12th & 14th December, 2018

MKUYE, J.A.:

This is an application for extension of time to lodge a notice of appeal out of time brought under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The grounds canvassed by the applicant in the notice of motion are as follows:

"1. *The applicant herein was (sic) not sit idle in filing the application for extension of time to file notice of intention to appeal to the Court of Appeal but there appeared an overlooking on the part of the applicant, that he did not annexed (sic) the ruling and order of the High Court of Zanzibar dismissed (sic) his first application to apply for extension of time to file notice of appeal out of time.*

(b). That my bicycle was stole (sic) which accompanies (sic) together with my plastic bag which has (sic) my documents of the Court.

(c). The judgment and decree is problematic.

(d). The applicant will suffer irreparable loss and great hardship if the time (sic) not extended.

(e). That the applicant (sic) intended appeal raises serious points of illegality which needs the adjudication of the Court of Appeal of Tanzania."

The application is supported by the affidavit of the applicant affirmed on 25/1/ 2018.

On the other hand, the application has been resisted through the affidavit in reply deponed by Mr. Rajab Abdalla Rajab, the learned advocate for the respondent.

The historical background leading to this application is as follows:

The applicant had unsuccessfully sued the respondent for unfair termination from his employment in the Industrial Division of the High Court in Civil Case No. 04 of 2012. In his judgment (Sepetu, J.) handed down on 4/5/2016, it was held that the applicant's termination was fair but was entitled to be paid among other benefits already paid out, his gratuities, if any. On

top of that, it was ordered that each party should bear its own costs for the suit.

Aggrieved with that decision the applicant intended to appeal. However, realising that he was late to file a notice of appeal against that decision, he filed in the High Court Civil Application No. 40 of 2016 seeking an extension of time to file the notice of appeal out of time but the same was dismissed on 23/6/2017 (Rabia, J.). On 6/7/2017 he filed an application to this Court on a second bite. This Court (Mbarouk, J.) in a Ruling handed down on 8/12/2017 struck out the said application with costs for being incompetent after having failed to annex the Ruling and Order of the High Court. Hence, on 25/1/2018 he filed this application.

At the hearing of the application, the applicant appeared in person and unrepresented and the respondent was represented by Mr. Rajab Abdalla Rajab, learned advocate.

Submitting in support of the application, the applicant who in the first place adopted his notice of motion and the affidavit in

support of the application, contended that the delay to file the notice of appeal was occasioned by the delay in the supply of the documents necessary to be attached to the application. This is because, he said, the documents which he had earlier on were stolen on 29/12/2016 together with his bicycle which had the bag containing the said documents. Upon prompt by the Court as to whether the theft incident was reported to the police he said it was not. He clarified further that he had to look for a court clerk who could assist him in getting other documents for processing another application.

On the other hand, Mr. Rajab resisted the application. While adopting the affidavit in reply filed on 26/10/2018 to form part of his submission, he contended that the applicant has not shown any sufficient reason to warrant the grant of the application. He pointed that, **one**, the reason that his bicycle was stolen was not supported by any evidence as he never reported it to the police station. **Two**, he has not accounted for the delay from 22/6/2017 when Rabia, J. delivered her ruling to 25/1/2018 when he filed this application. **Three**, though he averred that he

contacted a court clerk to furnish him with the copies of documents after his first set of document was stolen together with his bicycle, he has neither mentioned the said clerk nor attached an affidavit of the said court clerk in support of his claim. He added that, the applicant did not even attach to any letter which was used to apply for, or/and to supply those documents to him.

Mr. Rajab argued further that much as the applicant has stated in the grounds of notice of motion that the judgment is problematic; that he will suffer irreparable loss; and that the intended appeal raises some serious points of illegalities, he has not explained them. He said, such matters ought to have been clearly explained to enable the other party understand them. He concluded that, since the applicant has failed to show sufficient cause for the delay, the application be dismissed with costs.

I should state here that in the course of composing this ruling, the Court on 12/12/2018 re-summoned the parties in order to satisfy itself on whether this being an application for extension of time brought on a second bite was properly brought

under rule 10 in view of the introduction of rule 45A which specifically provides for such an application on a second bite. Mr. Rajab was of the view that since the matter started before the amendments under the Tanzania Court of Appeal (Amendment) Rules, 2017 (GN No.362 of 2017), then the new law was inapplicable. Of course, the applicant did not have anything substantial to comment.

On its part, the Court is satisfied that the new law could not apply because it cannot be possible to meet the period of 14 from 22/6/2017 when Rabia, J. refused the first application. On top of that, the amended Rules were yet to be published. Therefore, the application was properly made under rule 10 of the Rules.

Rule 10 of the Rules which has been invoked by the applicant to move the Court provides:

*"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 expiration of that time and 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."

[Emphasis added]

What can be gathered from the above provision is that the power of the Court to extend time is discretionary and that it can be exercised if the applicant demonstrates good cause. This stance was emphasized in the case of **Kalunga & Company Advocates Ltd. v. National Bank of Commerce Ltd**, [2006] TLR 235 where the Court stated that:

"The Court has discretion to extend time but such extension in the words of Rule 8 [Now Rule 10] can only be done if "sufficient reason has been shown".

Also in the case of **Samwel Sichone v. Bulebe Hamisi**, Civil Application No. 8 of 2015 (unreported) this Court while quoting from the case of **Henry Muyaga v. TTCL**, Civil Application No. 8 of 2011 (unreported) stated that:

"The discretion of the Court to extend time under rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the courts may take into consideration, such factors as the length of delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is not granted."

As for what constitutes "sufficient cause", it has not been explained in the Rules but in most cases it depends on the circumstances of each case. Many attempts have been made to list/identify such factors. For instance, in the case of **Attorney General v. Tanzania Ports Authority & Another**, Civil

Application No. 87 of 2016 at page 11 (unreported) the Court had observed as follows:

"What amounts to good cause includes whether the application has been brought promptly, absence of any invalid explanation for delay and negligence on the part of the applicant."

The crucial issue to be determined by this Court is whether there is/are good cause(s) to warrant the Court exercise its discretion to grant extension of time to file a notice of appeal.

In his account for the delay to file a notice of appeal, the applicant has, in item (b) of his notice of motion, paragraph 5 of the affidavit in support of the application and oral submission in Court, shown that it is attributable to his bicycle which had carried the plastic bag containing the documents relevant for the filing of the notice of appeal being stolen. He did not, however, produce any police lost report to that effect for having not reported the incident to the police for lack of trust in recovering

his stolen bicycle and his documents. He added that, thereafter, he had to contact the court clerk who could assist him in getting another set of documents required for the lodging to this Court the application of extension of time to file a notice of appeal.

However, I agree with Mr. Rajab that a mere statement from the bar without substantiation that, indeed the bicycle was stolen with some documents, cannot constitute a sufficient reason. In my view, the applicant was expected to produce a police lost report relating to the allegedly stolen bicycle and the documents which were very crucial in the appeal process. Otherwise, failure by the applicant to report on the lost bicycle which was his means of transport by sheer belief of not recovering it, leaves a lot to be desired. But again and more importantly, even if the bicycle was stolen on 29/12/2017, still, it has no link with his delay in filing the notice of appeal after the decision which was handed down by Sepetu, J. on 4/5/2016.

Besides that, the applicant's account that he had to find a court clerk to supply him with another set of documents is not supported by any evidence. Indeed, as was correctly argued by

Mr. Rajab, the applicant did not mention even the name of the said clerk. Neither did the said court clerk swear/affirm an affidavit to substantiate his allegation.

This Court has been insisting for the applicants for extension of time, to account for every day of delay. For example in the case of **Bariki Israel v. Republic**, Criminal Application No 4 of 2011) it was held that:

"...in an application for extension of time, the applicant has to account for every day of delay. The applicant has failed to..."

Even in this case, the applicant has failed to account for each day of delay from when Sepetu, J. delivered the judgment on 4/5/2016 until when he filed this application.

On the other hand, the applicant has stated in the grounds (c) and (e) of the notice of motion that, the judgment and decree is problematic; and that there are serious points of illegality in the intended appeal which need to be adjudicated by

the Court of Appeal. Mr. Rajab has lamented that the applicant has not stated the exact problem or illegality he has observed.

It is now settled law that where the point of law at issue is an illegality of the decision sought to be challenged, it can constitute a sufficient cause [See **Robert D. Ishengoma v. Kahama Mining Corporation Ltd. & 2 others**, Civil Application No. 2 of 2013 (unreported)].

In the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182 when the Court was faced with an issue alleging illegality, it held that:

"In our view when the point at issue is one alleging 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."

It is, however, noteworthy that in those cases the illegalities were explained. For instance in **Patrobert's case (supra)** the illegality complained against was the denial of the right to be heard to the applicant. Similarly, in **Valambhia's case (supra)** the illegality involved was that no opportunity to be heard was afforded to the Government/applicant.

In this case, unlike the above cited cases, though the applicant has stated in grounds (c) and (e) of the notice of motion that, the judgment is problematic and that the intended appeal raises serious points of illegality which need to be adjudicated by the Court, he did not explain such problems or illegalities so as the Court can be in position to see them. I think, as was rightly submitted by Mr. Rajab, the applicant ought to have explained the nature of such problems or illegalities in the decision sought to be challenged so as to enable the Court see whether or not they deserve consideration by the Court. Otherwise, leaving the Court to search for such problems or illegalities may lead the Court to the risk of going into the merits of the case by searching as to which would be the alleged

problems or illegalities in the said judgment. Hence, these grounds are devoid of merit.

All said and done, I satisfied that the applicant has failed to show sufficient cause for the delay to warrant this Court grant the application. Therefore, the application is hereby dismissed with costs.

Order accordingly.

DATED at ZANZIBAR this 14th day of December, 2018.

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

