

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPLICATION NO. 574/17 OF 2017

PASKAL ARUSHA APPLICANT

VERSUS

MOSSES MOLLEL RESPONDENT

(Application for extension of time to file leave to appeal to the Court of Appeal as a second bite from the judgment of the High Court of Tanzania

at Arusha)

(Massengi, J.)

dated the 27th day of September, 2013

in

Land Appeal No. 8 of 2013

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RULING

5th & 11th October, 2018

MWANGESI, J.A.:

The application at hand has been preferred under the provisions of Rule 10 and 48 (1) and (2) of the Court of Appeal Rules, 2009 (**the Rules**), whereby, the applicant is moving the Court to grant him extension of time within which he can apply for leave to appeal to the Court of Appeal in a second bite, to challenge the decision of the High of Tanzania at Arusha (Massengi, J.) in Land Appeal No. 8 of 2013. The application has been supported by sworn affidavit of the applicant in which, he has

explained the reasons as to why he failed to lodge the application within the time prescribed by law.

The application has however, been confronted with strong opposition from the respondent as contained in the affidavit in reply, which was sworn by the respondent and lodged on the 3rd November, 2017. Additionally, the respondent raised a preliminary objection premised on non - compliance with the stipulation under the provisions of Rule 48 (4) of **the Rules**.

When the application came for hearing on the 5th day of October, 2018, Mr. Elibariki Happy Maeda, learned counsel, entered appearance for the applicant whereas, the respondent had the services of Mr. John Lundu, also learned counsel. At the very outset, Mr. Lundu prayed to withdraw the preliminary objection which they had earlier on raised, for the reason that he has discovered that, it was made under improper provisions of law in view of the amendment, which was made to the Court of Appeal Rules, 2009, by Government Notice No. 362 of 2017. The prayer having not been objected by the learned counsel for the respondent, it was marked withdrawn.

Arguing on the main application, Mr. Maeda requested to adopt the affidavit in support of the application to form part of his submission. He introduced his submission by arguing that, the applicant is being represented through legal aid of the Tanganyika Law Society (TLS), because he is indigent. He filed the application at hand for extension of time, so that he can apply to this Court in a second bite, for leave to appeal to the Court, to challenge the decision of the High Court, which was delivered on the 27th day of September, 2013. This followed the dismissal of his earlier application before the High Court, that is, Miscellaneous Land Application No. 161 of 2013, which was made on the 2nd day of May, 2014.

The applicant has deponed in paragraph 7 of his affidavit that, subsequent to the dismissal of his application for leave to appeal by the High Court, he ignorantly lodged an application for revision in this Court, which was however, struck out on the 31st day of October, 2014, with advice that he could wish to seek for legal aid from the Tanganyika Law Society, to assist him in pursuing for his rights. He has deponed further in paragraph 8 of his affidavit that, he could not promptly act on the advice which was given by the Court because, immediately after delivery of the ruling, he was involved in a motor vehicle accident as evidenced by

annexure 5 to his affidavit that is, a discharge summary from Mbulu District Hospital.

The affidavit by the applicant goes on to show in paragraph 9 of the affidavit that, after healing from the injuries which he suffered from the motor vehicle accident, he went to see the President of the United Republic of Tanzania, who referred him to the Vice President, who in turn, referred him to the Acting Chief Justice, who also in turn, referred him to the Tanganyika Law Society. It was such sequent of events, which led to the lodging of this application, concluded Mr. Maeda.

In the view of the learned counsel for the applicant, there were sound grounds which caused the applicant to fail to lodge the application as a second bite within the time prescribed by law. Since the applicant was dissatisfied by the decision of the High Court, which was tainted with serious irregularities and illegalities, he urged the Court to grant the sought extension of time, so that those irregularities can be addressed by this Court in his intended appeal.

As earlier pointed out above, the application was strongly resisted by the respondent. In countering the submission by his learned friend, Mr.

Lundu, also prayed to adopt the affidavit in reply by the respondent, to constitute part and parcel of his submission. To start with, the learned counsel argued that, the act by the applicant to opt to file an application for revision instead of lodging a second bite application, was made out the applicant's own ignorance, which cannot be deemed to be a defence.

The learned counsel also resisted the contention by the applicant that, he is indigent relying on annexure MM1 to the affidavit in reply, which is Chamber Summons that is, Miscellaneous Application No. 106 of 2008 at the District Land and Housing Tribunal for Manyara Region, in which the respondent lodged, praying for attachment of the applicant's listed properties, for attachment before judgment.

The contention by the applicant that, he had been involved in a motor vehicle accident was as well strongly disputed by the respondent, who argued in the affidavit in reply that, even the assertion by the applicant that, he had been admitted at the District Hospital of Mbulu, was day light lie. The respondent contended that, annexure A-5 to the affidavit of the applicant was a forged document as per the information which he obtained from the said Hospital, when he went to inquire about, after he had been served with the affidavit of the applicant.

Mr. Lundu concluded his submission on behalf of the respondent by arguing that, the applicant has miserably failed to demonstrate as to why he did not lodge his application for the second bite within the time prescribed by law. He therefore. Urged the Court to dismiss it for want of merit with costs because, the applicant is not an indigent as he cheated the Court in his affidavit.

The brief rejoinder by Mr. Maeda was to the effect that, the contention by the respondent that the applicant was not involved in a motor vehicle accident and admitted at Mbulu District Hospital, ought to have been countered by an affidavit sworn by a concerned person from the Hospital if they were to be believed. The absence of such an affidavit, renders the averment by the respondent to be mere hearsay.

With regard to the contention that the applicant is not an indigent, the view of the learned counsel for the applicant was that, the Chamber Summons which was lodged at the District Land and Housing Tribunal by the respondent, could not be relied upon as proof that, the applicant owned all those listed properties. This is from the fact that, the respondent could have listed anything and contend that, they belonged to the applicant just to please himself. According to him, the applicant is currently

indigent as he does not have even a fixed place of abode. He thus reiterated his previous prayer that, the application by the applicant for extension of time be granted.

In the light of the arguments raised by the learned counsel from either side above, the thrust on the Court is whether or not, the application by the applicant merits. My starting point is the provisions of Rule 10 of **the Rules** under which the application has been preferred. In its own words, the provision stipulates 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 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 supplied]*

The bolded words in the quoted provision above, connotes the determinant factor in granting the application for extension of time. The

issue therefore is as to whether or not, the applicant has managed to demonstrate good cause as inferred in the quoted provisions above. There is a plethora of authorities as to what is meant by good cause. See: **Godwin Ndewesi and Karoli Ishengoma Vs Tanzania Audit Corporation** [1995] TLR 200, **Regional Manager, Tanroads Kagera Vs Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Phiri M. K. Mandari and Others Vs Tanzania Ports Authority**, Civil Application No. 84 of 2013, **Joseph Paul Kyauka Njau and Another Vs Emanuel Paul Kyauka and Another**, Civil Application No. 7/5 of 2017, and **Lyamuya Construction Company Limited Vs Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported).

In **Lyamuya Construction Company Limited's** case (supra), the Court laid down some factors which can be used to assist the Court, in assessing as to what amounts to good cause. It stated them to be:

- 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 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 illegality of the decision sought to be challenged.*

Basing on what has been highlighted above, the Court is enjoined in this application, to consider as to whether it qualifies in terms of the factors enumerated above. It is common knowledge that in the instant application, there was inordinate delay by the applicant to lodge his application because the dismissal of the application by the High Court was made on the 2nd May, 2014, and this application was lodged on the 6th October, 2017. The account which has been given by the applicant for the delay was to the effect that, in the first instance, through ignorance, he preferred an application for revision in the Court of Appeal, which was not the proper course. And thereafter, he was involved in a motor vehicle accident, which occasioned him injuries and thereby causing him to fail to lodge his application within time.

While it is correct as argued by the learned counsel for the respondent that, taking a wrong course through ignorance cannot be taken as an excuse, what is evident however, is the fact that at that particular time, the applicant was making efforts to pursue for his rights though through an improper course. Regard being to the fact that, at the material time he had no legal representation, the excuse to some extent sounds merited.

And with regard to the contention by the applicant that he was involved in a motor vehicle accident, the counter argument by the respondent that, it was a lie, has failed to meet the requirement in that, as submitted by Mr. Maeda, an affidavit from a concerned person from the District Hospital of Mbulu, would have served the purpose. The absence of such an affidavit, leaves the averment by the applicant to stand.

I am as well constrained to join hands with the learned counsel for the applicant in believing the contention by the applicant that, he is a destitute. Either, annexure MM1 to the affidavit in reply by the respondent, has not managed to disprove the averment by the applicant. This is so from the fact that it was mere an application, which could not be used as proof that, the applicant was indeed owning the listed properties.

Upon dispassionately giving a deep thought to the sequence of events in the scenario explained by the applicant in his affidavit, and regard being to the fact that, it has also been complained by the applicant that, there were some illegalities in the judgment complained of, I am convinced to give way for the alleged irregularities and legal issues, to be addressed on appeal. In so holding, I am fortified by the decisions in **Principal Secretary, Ministry of Defence and National Service Vs Devram Valambia** [1992] TLR 185, **the Attorney General Vs Corporation Holding Corporation and Another**, Civil Application No. 26 of 2014, **Tropical Air (Tanzania) Limited Vs Godison Eliona Moshi**, Civil Application No. 9 of 2017, and **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and the Liquidator of Tri-Telecommunication (Tanzania)) Vs Citibank Tanzania Limited, Consolidated**, Civil References No. 6, 7 and 8 of 2006 (all unreported).

The Court held in the case of **VIP Engineering and Marketing Limited** (supra) that:

"It is settled law that, a claim of illegalities of the challenged decision constitutes sufficient reason for

extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules, regardless of whether or not reasonable explanation has been given by the applicant under the Rules to account for the delay.”

In line with the above exposition, I find merit in the application by the applicant. As a result, I grant the application with direction that, the applicant has to lodge his application within a period of fourteen (14) days from the date of this ruling.

Order accordingly.

DATED at **ARUSHA** this 10th day of October, 2018.

S. S. MWANGESI
JUSTICE OF APPEAL

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


B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL