

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 83/01 OF 2020

OMARI R. IBRAHIMAPPLICANT

VERSUS

NDEGE COMMERCIAL SERVICES LTD.....RESPONDENT

(Application for Extension of time to file Revision out of time from the decision of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated 4th day of June 2004

in

Civil Appeal No. 246 of 2003

RULING

17th & 5th February, 2021

LEVIRA, J.A.:

This is an application for extension of time within which to file revision application out of time. It is brought by way of a notice of motion made under the provisions of Rules 10 and 48 of the Tanzania Court of Appeal Rules 2009 (the Rules). The notice of motion is supported by the applicant's affidavit deposed on 16th March 2020. The application is opposed by the respondent vide an affidavit in reply.

The background of this matter is that, the respondent instituted Civil Case No.114 of 1999 in the District Court of Kinondoni at Kinondoni following a dispute over ownership of a parcel of land located at Plot No. 5 Block 'H' Tegeta area, Kinondoni District, Dar es salaam between the applicant (OMARI R. IBRAHIM) and one ABU

RAJABU IBRAHIM who is not a party to these proceedings and the respondent. In the said suit, the respondent claimed against the applicant and his fellow jointly and severally for declaration order that the respondent (plaintiff) is a legal owner of the said parcel of land, among other claims. On 12/5/2000 a default judgment in favour of the respondent was entered for nonappearance of the defendant who according to the name appearing on the record was ABU IBRAHIM NKYA. However, the decree issued following the default judgment indicates the names of both, ABU RAJABU IBRAHIM and OMARI R. IBRAHIM.

Being aggrieved by the default judgment and the decree, the applicant filed an application for extension of time to file review against the said decision which was granted on 3/5/2002. However, following the grant of the said application, the respondent filed an application for revision instead of review in the High Court of Tanzania, at Dar es salaam (Masati, J. as he then was) which was struck out on 11/7/2003 for being incompetent. Thereafter, the case file was remitted back to Kinondoni District Court where the review application was determined, the proceedings were quashed and the default judgment was set aside on 14/12/2003. Aggrieved by that decision, the respondent appealed in the High Court in Civil Appeal No. 246 of 2003 against the decision of Kinondoni District Court granting extension of time to file review application and the ruling setting aside default judgment of the same court.

The High Court (Mihayo, J.) on 2/7/2004, nullified the ruling of the District Court on the ground that, there were no sufficient reasons advanced by the applicant for reviewing the *ex parte* decree. Aggrieved, the applicant preferred application for review

of the decision of the High Court but the same was struck out for being filed out of time on 9/8/2005. Aggrieved again, the applicant filed an application for extension of time and leave to appeal to the Court against the said decision of the High Court. Both applications were granted by the High Court (Kaduri, J.) on 5/10/2012. The applicant filed an appeal (Civil Appeal No. 101 of 2013) to the Court. However, the Court on 30/8/2016 through its Order directed the applicant to file revision instead of appeal as the matter originated from review proceedings.

Later, the applicant realized that the review application which he had filed in the High Court was out of time and its dismissal by the High Court was just and fair. Since review application was not determined on merit by the High Court, the only decision he has was the judgment and decree dated 4/6/2004 which overturned the decision of Kinondoni District Court and restored the *ex parte* order; the applicant has decided to appeal against that judgment of the High Court in Civil Appeal No. 246 of 2003 but he found himself out of time. Therefore, the applicant filed application for extension of time to file a notice of appeal out of time and leave to appeal to the Court vide Civil Application No.604 of 2017, however, the same was dismissed by the High Court (Mgetta, J.) on 20/3/2019 on the ground that, he should have filed revision and not appeal as stated in the Order of the Court in Civil Appeal No.101 of 2013 dated 30/8/2016.

Later, the applicant filed another application to the Court for extension of time to file a notice of appeal and leave to appeal to the Court against the decision of the High Court (Mihayo, J.) of 4 /6/2003 in Civil Case No. 246 of 2003. However, on

11/2/2020 the said application was withdrawn because the intended appeal had already been dealt with by the Court as indicated above, that the applicant was supposed to file revision instead of appeal; hence, the current application to remedy the situation.

At the hearing of this application on 17th February 2021, Mr. Hassan Ruhwanya learned advocate appeared for the applicant, whereas, the respondent had the services of Mr. Josephat Mabula, learned advocate. Having adopted the notice of motion and supporting affidavit, Mr. Ruhwanya submitted that, the judgment of the High Court is tainted with illegalities as there was misdirection of the High Court in overturning the order of the trial magistrate which allowed extension of time to file review. He clarified that this is due to the fact that the default judgment was against one ABUI RAJAB NKYA while the decree was against ABU RAJABU IBRAHIM and OMARI R. IBRAHIM.

In the circumstance, he argued that, the High Court erred in law and fact by holding that, the applicant did refuse to receive summons as a result, he was denied the right to be heard. Since there was no service on the applicant, he said, the High Court wrongly allowed the appeal by holding that there was no sufficient cause for extending time without considering errors on the default judgment which would have been corrected if a review was done.

Apart from illegality, the learned counsel also submitted that the applicant was sick for almost six months. To prove that, medical chits were attached in paragraph 18 of the supporting affidavit as annexure ORI-12. According to Mr. Ruhwanya, if extension of time is refused it will amount to shutting the doors of justice to the applicant. In addition, he said, the respondent will not be prejudiced if this application is granted. In

support of his arguments, he cited the following cases: **Zuberi Musa v. Shinyanga Council**, Civil Application No.3 of 2007, **Elly Peter Sanya v. Ester Nelson**, Civil Appeal No.151 of 2018, **Richard Mlagala and 9 others v. Aikael Minja & 3 others**, Civil Application No.160 of 2015, **Josephina A.Kalulu v. Issack Maiko Mallya**, Civil Reference No.1 of 2010, **Tropical Air Tanzania Ltd v. Godson Eliona Moshi**, Civil Application No.9 of 2017, **Mohamed Salum Nard v. Elizabeth Jeremia**, Civil Reference No.14 of 2017, **Principal Secretary and Tanesco v. Mufungo Leonard Majuwa & 15 others**, Civil Application No.94 of 2016 (all unreported).

Finally, Mr. Ruhwanya urged the Court to consider Article 13(6) of the Constitution on fair hearing and grant this application.

In reply, Mr. Mabula parted ways with the applicant's counsel as he submitted on the point of illegality to the effect that, whenever illegality is raised in applications of this nature, it must be clearly seen on the face of record and must raise an important point of law. According to him, the alleged illegality by the applicant is just a typing error which could be corrected by the trial court upon applicant's request. He added that, the applicant was not a party of the proceedings before the trial court due to his own fault as he refused service of summons on him. To fortify his argument, he cited the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No.10 of 2015, **Principal Secretary and Tanesco v. Mufungo Leonard Majuwa & 15 others**, Civil Application No.94 of 2016 (both unreported).

Regarding the applicant's sickness, Mr. Mabula submitted that the same is the act of God and thus, it cannot be faulted. However, he said, the applicant has not accounted for the period of about 10 months and 27 days when he was not sick, from 1st October, 2016 when the Court struck out his appeal in Civil Appeal No.111 of 2013 to 27th September 2017 when he filed Miscellaneous Civil Application No.4 of 2017 in the High Court seeking for extension of time.

Mr.Mabula submitted further that, the applicant has failed to pursue his rights due to his own ignorance and negligence and that of his advocates. He insisted that, a delay of even a single day must be accounted for. He relied on the decision of the Court in **Sebastiani Ndala v. Grace Ruamiatha**, Civil Application No.4 of 2014 (unreported).

He also argued that, the respondent will be prejudiced if extension of time is granted. According to him, some developments of the disputed land have been done since when he was declared a lawful owner of the said land which should not be disturbed otherwise it will be a loss on his part.

In a brief rejoinder Mr. Ruhwanya, submitted that, the un-accounted for period of delay was effectively used by the applicant in seeking legal advice from various lawyers including University of Dar es salaam, School of Law; who advised him that, extension of time to file revision to the Court is granted by the Minister of Constitution and Legal Affairs as stated in paragraphs 20 and 21 of the supporting affidavit. On other aspects, he reiterated his submission in chief.

I have dispassionately followed the rival submissions for and against the application. I wish to state at the outset that, it is settled position that the discretionary

powers of the Court to extend time for an applicant to do an act authorized by the Rules after the expiry of the prescribed time, are exercised upon good cause being shown as provided for under Rule 10 of the Rules.

I am mindful of the fact that there is no single definition of the term 'good cause' stated in the above Rule, but the Court in determining good cause, may consider all the material factors brought by the applicant for it to exercise its discretionary powers to extend time in given circumstances. In the case of **Henry Leonard Maeda and Another v. Ms. John Anael Mongi**, Civil Application No. 31 of 2013 (unreported), it was stated that:

"In considering an application under the rule, the courts may take into consideration, such factors as the length of delay, the reasons for the delay and the degree of prejudice that the respondent may suffer if the application is granted."

In the light of that established position, the question to be determined herein is whether or not the applicant has been able to show good cause to justify his application.

Submitting on the grounds justifying the application, Mr. Ruhwanya raised a point of illegality to the effect that, the judgment of the High Court is tainted with irregularities and illegalities. It was his argument that the High Court misdirected itself in overturning the order of the trial magistrate. This he said, is because the default judgment and decree which was subject of review are tainted with material irregularities and illegalities as the default judgment was against ABU IBRAHIM NKYA while the

decree was against ABU RAJAB IBRAHIM and OMAR R. IBRAHIM, the applicant herein as indicated above.

It was his further argument on the point of illegality that, the High Court erred in law and fact by holding that the applicant did refuse to receive summons hence, barred his right to be heard. According to him, if review would have been determined the issue of service of summons would have been resolved. The applicant's grounds of illegality were vehemently opposed by the respondent on the ground that, the alleged illegality does not raise any point of law as it is just a mere typing error which could be corrected upon applicant's request by a letter to the Registrar.

The law is settled that, when a claim of illegality is raised in an application for extension of time, the same is considered as good cause to grant extension as stated in various decisions of the Court. However, with respect, I wish to state at the outset that, the error complained of herein in the judgment and decree, as evidenced by annexure ORI-4 to paragraph 8 of the supporting affidavit is not and cannot be termed as illegality. As intimated earlier, both names appearing in the decree are found in the plaint. The applicant does not dispute the fact that he was once sued together with ABU RAJAB IBRAHIM.

Now, whether he was issued summons or not on the hearing date can be deduced from the record. The trial court stated categorically at page 10 of the record that the applicant was served with summons to appear but did not enter appearance, then it entered default judgment. I do not find the illegality complained of by the

applicant. I agree with Mr. Mabula's submission, that the omission to indicate the name of the applicant in the title of the proceedings is curable upon application to the trial court. It is my settled opinion that, the alleged illegality cannot raise any arguable point of law worth to be addressed by the Court. In 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 (unreported) the Court stated that: -

"Since every party intending to appeal seeks to challenge a decision either on points 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 points 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, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.

Being guided by the above decision, I must state that nothing on the record of this application is suggesting that there was illegality worthy of consideration by the Court that justifies Court's exercise of its discretionary powers to extend time as sought by the applicant.

Now, reverting to the reasons for delay advanced by the applicant, I do not think that I need dwell on the long background of this matter. I will go straight to consider the unaccounted-for delay as there is no dispute between the parties that the applicant

was sick for about six months. This period is from 30th August, 2016 when the Court struck out Civil Appeal No. 101 of 2013 to 27th September, 2017 when the applicant filed in the High Court Miscellaneous Civil Application No. 604 of 2017 seeking for extension of time to file appeal to the Court, while he was in good health but failed to file the current application until 19th March, 2020 when this application was filed.

The counsel for the applicant submitted on the identified delay to the effect that, the said period was spent by the applicant while seeking legal advice as it appears in paragraphs 20 and 21 of the supporting affidavit and evidenced by annexure ORI-14 & ORI-15. I find it important to reproduce paragraph 20 of the said affidavit:

*"20. That, being a layman I kept struggling and spent time consulting several lawyers including University of Dar es Salaam School of Law through it's Legal Aid Committee who advised me that the extension of time to file revision to the Court of Appeal of Tanzania is granted by the Minister of Constitution and Legal Affairs and on 30th March, 2017 the said Committee wrote a letter to the Minister to request for the said extension of time. Copy of the letter is attached hereto and marked as annexure **ORI-14**. Leave of this Honourable Court is craved for the same to form part of this affidavit.*

As it can be observed from the above paragraph, the applicant pleaded ignorance of law and misguidance by the lawyers. As it can be seen, the applicant resorted to the claimed legal aid after the order of the Court directing him to file revision. However, instead of filing the said revision, he decided to appeal in Civil Appeal 101 of 2013 unsuccessfully.

In the circumstances, I entirely agree with the counsel for the respondent, who rightly argued, in my view, that the applicant has failed to account for delay of more than 10 months. The Court has been insistent that every day of delay must be accounted for. In **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No.4 of 2014 (unreported) the Court stated that, delay of even a single day has to be accounted for, otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.

I am not persuaded by the applicant's submission that he was vigilant throughout the time in court corridors pursuing for his rights. From the above, it can be noted that the applicant's delay was due to his own negligence as he turned down the directives given to him by the Court on 30/8/2016 to file revision application. Instead, he filed an application for extension of time to appeal which was rejected by the Court as the applicant admits in paragraph 17 of the supporting affidavit. Also, in paragraph 16, 20, 21 and 25 of the applicant's affidavit, it is observed that the applicant has spent most of his time consulting various lawyers who wrongly advised him.

It should be stated once that, neither ignorance of the law nor counsel's mistake constitutes good cause in terms of Rule 10 of the Rules. (See **Bariki Israel v. The Republic**, Criminal Application No. 4 of 2011 and **Charles Salungi v. The Republic**, Criminal Application No. 3 of 2011 (both unreported)). In the case of **Umoja Garage v. National Bank of Commerce**, [1997] TLR 109, the Court stated that lack of diligence on the part of the counsel is not sufficient ground for extension of time. In the

current application, the record speaks loudly that the applicant was negligent on the path he chose which culminated into inordinate delay which he failed to account for.

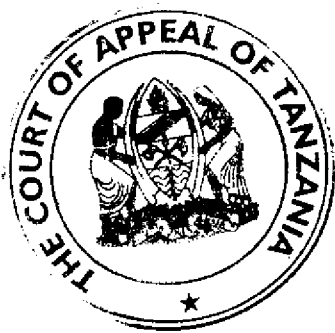
For the foregoing and taking into consideration the circumstances pertaining in the current application, it is my view that no good cause has been shown by the applicant to warrant extension of time sought. In the final result, this application is devoid of any merit and the same is dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 3rd day of February, 2021.

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 5th day of March, 2021 in the presence of the applicant in person, and Mr. Josephat Mabula, learned Counsel for the Respondent, is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL