IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 2 OF 2016

1 .ELIAKIM SWAI
2. FRANK SWAI } **..... APPLICANTS**

VERSUS

THOBIAS KARAWA SHOO ..... RESPONDENT

(Application for extension of time to file an application for revision of the decision of the High Court of Tanzania at Moshi)

(Makuru, J.)

dated the 4th day of December, 2014
in
Land Appeal No. 22 of 2011

RULING

20th & 27th February, 2017

MWAMBEGELE, J.A.;

By Notice of Motion, Eliakim Swai and Frank Swai; the applicants, are seeking the indulgence of this court to enlarge time within which to file a Notice of Motion for revision of the judgment of the High Court (Makuru, J.) in Land Appeal No. 22 of 2011 handed down on 04.12.2014.

The Notice of Motion has been taken under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") and supported by an affidavit duly sworn by Eliakim Swai; the

first applicant. It is resisted by the affidavit in reply sworn by Thobias Karawa Shoo; the respondent. The applicants and respondent had earlier filed their respective written submissions pursuant to the provisions of sub-rules (1) and (8) of rule 106 of the Rules, respectively.

In order to appreciate the issues of contention giving rise to the present application and on which the parties to this application have locked jaws, I find it appropriate to revisit the factual setting of the present matter. It is this: the parties to the present application were also parties in Application No. 2 of 2005 in the Ward Tribunal of Kindi, Moshi District, Kilimanjaro Region in which the respondent herein successfully sued the applicants for allegedly creating a path in an area he claimed was his. The judgment thereof was pronounced on 09.03.2005. In 2006, the applicants herein filed Application No. 115 of 2006 in the District Land and Housing Tribunal against the respondent and one Delfina J. Swai claiming for a right of way. That suit was decided *exparte* in favour of the applicants. Aggrieved with the decision of the District Land and Housing Tribunal the respondent successfully appealed to the High Court. The main

reason why the High Court decided the appeal in favour of the respondent herein was that the decision of the Kindi Ward Tribunal in Application No. 2 of 2005 was *res judicata*. The High Court decided that the decision of the Ward Tribunal of Kindi in Application No. 2 of 2005 should be maintained.

Consequent upon that, the applicants filed in this court Civil Application No. 1 of 2015 seeking to revise the decision of the High Court. However, that application, at the instance of the applicants' counsel, was struck out on account that the Notice of Motion thereof did not indicate section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (henceforth "Appellate Jurisdiction Act") which is the enabling provision for revision.

Undeterred, the applicants have filed the present application seeking an extension of time to exhume the gist of the application which was struck out by this court on 17.02.2016. The application was argued before me on 20.02.2017 during which both parties were represented. Mr. Peter Shayo, learned counsel appeared for the applicants while Mr. Martin Kilasara, also learned counsel, represented the respondent.

As can be gathered from the grounds in the Notice of Motion, the affidavit supporting the application as well as the written submissions and oral hearing expounding the application, the applicants have two reasons on which they urge this court to grant the prayer sought. First, that their former application was struck out for non-citation of an enabling provision for revision and secondly, that there is a point of law worth consideration by this court.

On the first point, the learned counsel for the applicants states that the non-citation of the enabling provision in the application for revision which was later struck out was done out of inadvertency by Mr. P. M Jonathan, learned advocate. Thus, time was wasted dealing with that application which was incompetent. On the second point, the learned counsel submits that the suit filed in the District Land and Housing Tribunal and the one in the Kindi Ward Tribunal are between different parties and on different subject matters. He clarifies that in the Ward Tribunal Delfina J. Swai did not feature and she is the one who is actually in possession of the disputed land; the respondent is just an interloper. On the causes of action in the two cases, the learned counsel states that in the Ward Tribunal the cause of action

was blockade and the applicants herein were ordered to remove the trees so that they could access their homes with which they complied. Upon compliance with the order, the learned counsel submits, thereafter came the respondent who totally blocked the entrance to the applicants' homes. The learned counsel cites **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 387 to bolster up his proposition.

The two grounds have been vigorously countered by the respondent through the affidavit in reply, reply submissions as well as during the oral hearing before me. The respondent deposes that the High Court was right to reverse the decision of the District Land and Housing Tribunal as the applicants were not legally justified to file a fresh suit in the District Land and Housing Tribunal on the same subject matter and between the same parties. As for there being a point of law worth determination by this court the respondent avers that there is none. The learned counsel for the respondent submits that the suit in the District Land and Housing Tribunal was between the same parties and on the same subject matter as the one

previously filed and determined in the Kindi Ward Tribunal. The learned counsel cites **Rozendo Ayres Ribeiro v. Olivia Daritta Siqueira E. Fachao and Lilia Ozlinda Pia Daritta Siqueira** (1934) 1 EACA 1 and **Metal Products Ltd v. Minister for Lands & Director of Land Services** [1989] TLR 5 to buttress his arguments.

I have dispassionately considered the learned rival arguments brought to the fore by both learned counsel. The ball is now is now in my court to determine the points of contention.

Let me start by stating that applications for extension of time within which to perform any in legal proceedings are controlled by the provisions of rule 10 of the Rules under which the present application has been made. Rule 10 reads:

> *"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."

It is apparent from the above provisions that extension of time may only be granted upon the applicant showing good cause of delay. It is trite law that such discretion is entirely in the discretion of the court to grant or refuse it. It is also trite that such discretion is judicial and so it has to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily – see: **Yusufu Same & Anor v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010, both unreported.

Admittedly, what amounts to "good cause" has not been defined under the Rules. This is so because extension of time being a matter within the Court's discretion cannot be laid down by any hard and fast rules but will be determined by reference to all the

circumstances of each particular case – see: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited,** Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, both unreported decisions of this court. In **Tanga Cement** (supra), for instance, this court, referring to its unreported earlier decision of **Dar es Salaam City Council v. Jayantilal P. Rajani,** Civil Application No. 27 of 1987, observed:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any explanation for delay, lack of diligence on the part of the applicant".*

Thus, as observed in **Lyamuya Construction** (supra), on the authorities on this point the following principles may be deciphered:

"(a)The applicant must account for all the period of delay;

(b) The delay should not be inordinate;

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

The last principle is a somewhat recent jurisprudence of the Court enunciated, I think, by **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 185 and has been consistently followed by the Court. In **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007 (unreported), relying on **Valambhia**, this court held that where a point of law at issue is the question of illegality, time will always be

extended and that leave to appeal to the court of appeal must be granted even where there is an inordinate delay. It is important to note that such illegality must be apparent on the face of the record – see: the **Valambhia** case (supra) and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported).

Applying the above principles to the case at hand, as already alluded to above, the applicants have, essentially, brought to the fore two points on which they urge the Court to grant the order sought. First, that their former application was struck out for non-citation of an enabling provision for revision and secondly, that there is a point of law worth consideration by this court. I will start with the examination of the first point.

The order of this court striking out Civil Application No. 1 of 2015 which sought to challenge the decision of the High Court in Land Appeal No. 22 of 2014 was given on 17.02.2016. The Notice of Motion in the present application was lodged in this court on 02.03.2016; about two weeks after the order was made. This considered, I think the applicants acted within the ambits of requisite promptness to lodge the present application. Admittedly, what

amounts to promptness is subjective to the facts of each case. It is my considered view that the circumstances of the present matter are such that the applicants acted but promptly.

It is not disputed that Civil Application No. 1 of 2015 was filed in time. Thus, as for the period of delay between the filing of Civil Application No. 1 of 2015 and 27.02.2016 when it was struck out for non-citation of section 4 (3) of the Appellate Jurisdiction Act which is the enabling provision for revision, that period can conveniently be termed as a "technical delay" on which the applicants are not to blame within the meaning of the decision of this court in **Fortunatus Masha v. William Shija And Another** [1997] TLR 154 at 155. In that case, at p. 155, the Court observed:

> *"... **a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays** in the sense that the original appeal was lodged in time but the present situation arose only because the*

original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. ***The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.*** *In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*

[Emphasis supplied].

The above situation falls in all fours with the present one, save that in **Fortunatus Masha** it was an appeal which was struck out while in the present instance it was an application which was struck out. The applicants applied for judgment and decree of the decision

of the High Court intended to be challenged on the same day the judgment was pronounced; 04.12.2014 the reminder letter was written on 22.12.2014. And the order of this court striking out Civil Application No. 1 of 2015 which sought to challenge the decision of the High Court in Land Appeal No. 22 of 2011 was given on 17.02.2016. The Notice of Motion in the present application was lodged in this court on 02.03.2016; about two weeks after the order was made. I think the applicants acted within the ambits of requisite promptness to lodge the present application. And in all fairness, and applying *mutatis mutandis* the holding in **Fortunatus Masha** (supra), the applicants cannot be blamed for the delay of the period during the pendency of Civil Application No. 1 of 2015. During that period, the applicant was busy prosecuting that application which was still pending in this court until 27.02.2016 when the Court struck it out for the reason stated. The filing of an incompetent application having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing a fresh application. As already said, the applicant acted immediately after the order of Court striking out Civil Application No. 1 of 2015.

As for the illegality of the decision of the High Court, I think, justice will triumph if the applicants re accorded an opportunity to argue before the Full Court whether or not the decision of the Ward Tribunal was *res judicata*. I will not indulge myself into the nitty gritty of the point lest I step onto the merits of the application on which I, as a single justice of appeal, am not bestowed with jurisdiction. I only wish to state that it is apparent on the record that the parties in the Kindi Ward Tribunal were Thobias Karawa Shoo on the one hand and Frank Swai and Eliakim Swai on the other while in the District Land and Housing Tribunal the parties were Eliakim Swai and Frank Swai on the one hand and Delfina Swai @ Delfina Ngoti and Thobias Karawa Shoo on the other. And the cause of action in the Ward of Tribunal was trespass by extension of the boundaries and in the District Land and Housing Tribunal the cause of action was, *inter alia*, right of way and assorted types of damages. These facts apparent on the record of the present application are within the empire of the Full Court to decide on whether or not they amounted to a situation such that the doctrine of *res judicata* could or could not apply.

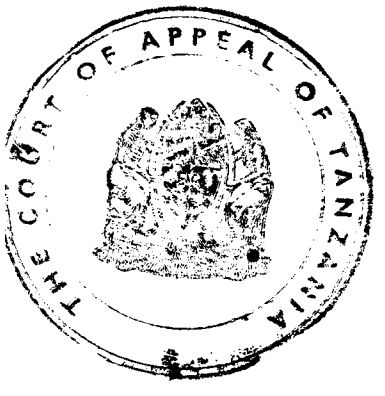
In the upshot, I find and hold that the applicants have explained away the delay for not filing the present application in time. Consequently, this application is granted. The application is given sixty (60) days reckoned from the date this ruling is pronounced within which to file that application. No order is made as to costs.

Order accordingly.

DATED at **ARUSHA** this 22nd day of February, 2017.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL