IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 2 OF 2010

LYAMUYA CONSTRUCTION COMPANY LTD.....APPLICANT
VERSUS

BOARD OF REGISTERED TRUSTEE OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA.....RESPONDENT

(Application from the ruling, of the High Court of Tanzania at Moshi)

(Mugasha, J.)

dated 26th day of February, 2010
in
Civil case No. 46 of 2006

RULING

30th Sept. & 4th October, 2011

MASSATI J.A.:

The applicant had filed civil case No. 16 of 2001 against the respondent in the High Court of Tanzania at Moshi. The suit was dismissed on 1/6/2005. The applicant filed on application for review of the ruling. On 7/6/2006 that application was also dismissed. The applicant then proceeded to file an application for extension of time in the High Court so as to file a Notice of Appeal against the dismissal of the suit. On 26th February 2010, that application was also dismissed. The applicant has now

filed the present application for extension of time for a second bite, so to speak.

The application is made under Rules 10 and 48(1) of the Court of Appeal Rules, 2009 and supported by the affidavit of Mr. Peter M. Jonathan, learned counsel. The respondent filed an affidavit in reply taken out by Elizabeth Maro Minde, learned counsel. Mr. Jonathan also prosecuted the application in this Court, whereas, Mr. E.J. Kipoko, learned counsel, appeared for the respondent.

At the hearing of the application, Mr. Jonathan adopted his affidavit and submitted that his 40 paragraph affidavit disclosed, not only that he diligently pursued the matter, but also tried to show that the High Court ruling was problematic, and pointing to its illegality. In his view this was a good cause for extension of time under the rule. On the other hand, Mr. Kipoko resisted the application by first adopting the affidavit in reply, and then submitting that no good cause has been shown by the applicant to deserve extension of time. He prayed that the application be dismissed.

After the submission of the learned counsel, I asked the learned counsel to address me on whether Rule 48(1) of the Court of Appeal Rules,2009 was complied with, as no grounds were disclosed in the Notice of Motion; and if not, what was the effect? Mr. Jonathan, was quick to admit that there were no grounds shown in the Notice of Motion; but went on to argue that the grounds can be found in the affidavit which should be read together with the Notice of Motion; and so the defect was no fatal. But Mr. Kipoko, disagreed. He argued that in view of the wording of Rule 48(1), that puts the requirement mandatory, the defect was incurable. But none of the learned counsel cited any authority in support of their views. I now have to determine, first, whether non-compliance with Rule 48(1) of the Court of Appeal Rules 2009 was fatal; and two, if not, whether the application disclosed a good cause for extension of time?

I will start with Rule 48(1). That rule provides:-

> *"Subject to the provisions of sub rule (3) and to any other rule allowing informal applications, every application to the Court shall be by notice of motion supported by affidavit. It shall cite the special rule*

under which it is brought and state the ground for the relief sought."

It is therefore clear that, it is necessary to state the grounds for the relief in the Notice of Motion. There is also no dispute that in the present application, no grounds were stated in the Notice of Motion. But, how fatal was the omission?

In my considered view, Rule 48(1) has a purpose; and it is; to make the applicant's case known; that is why the grounds and the relief(s) sought, and the rule under which it is brought, must be shown. It is intended not only to minimize the element of surprise to the Court and the opposite party, but also to confine the applicant to the stated grounds and reliefs stated, instead of wandering in the wild in their search. So I would venture to say that in the absence of the reliefs sought and the grounds thereof, the application becomes purposeless, as would a memorandum of appeal, without grounds or the reliefs sought. However, in **THE PRINCIPLAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE V DEVRAM VALAMBHIA** (1992) TLR 387, the applicant did not show the relief demanded in Rule 45(1)of the revoked/replaced Court

of Appeal Rules, 1979, and the respondent objected to that omission. The Court held:-

> *"a notice of motion and the accompanying affidavit are in the very nature of things complementary to each other, and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the basis of that it is clear what relief is being sought then the court should proceed to consider and determine the matter regard being had to the objection if any, raised by the opposite party."*

The principle that can be extracted from this holding is that the omission to cite the relief in the Notice of Motion is not necessarily fatal, if that relief can be gleaned from the accompanying affidavit. If the principle is taken broadly, it would, I think, also, include the omission to state the grounds as in the present case, from which one may conclude that, it too, is not necessarily fatal, if the grounds are shown in the accompanying affidavit. Although I am aware of several decisions of this Court, to the contrary. I am not aware, whether the rule in **VALAMBHIA's** case (supra) has been properly departed from. So, on the premises, and on the principles of

stare decisis I believe the rule in **VALAMBHIA's** case is still good law, given that, save for the inclusion of the need to also cite the specific rule, Rule 45(1) of the old Rules is identifical to Rule 48(1) of the current Rules. So, Mr.Jonathan is right, and I will take that as the position of the law and adopt it in the present ruling.

The next question is, whether the accompanying affidavit discloses a good cause for extension of time, a prerequisite for the exercise of the Court's powers under Rule 10 of the Court of Appeal Rules; as Mr. Jonathan has suggested?

As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:-

(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.

(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.

Mr. Jonathan, learned counsel, has urged me to find that his affidavit discloses that he was diligent in pursuing the matter, there was no inordinate delay and that the impugned decision is fraught with misdirections on points of law and therefore illegal Let us turn to the affidavit and follow the sequence chronologically.

According to paragraph 5, the ruling now sought to be challenged was delivered on 1/6/2005. The applicant then filed an application for review. He did not file any notice of appeal. The application for review was filed on 28/7/2005 and was dismissed on 7/6/2006. He obtained a copy of the ruling on **10/7/2006**. He advised the applicant to file an application for extension of time in which to file a Notice of Appeal and he filed it on **25/7/2006**, which was about two weeks from the date of receipt of the ruling. The application was not determined until 26/2/2010. For the benefit of the applicant, the period between 25/7/2006 and 26/2/2010 should be excluded. According to paragraph 23 he obtained a copy of the ruling on the application for extension of time on 12/3/2010.

The present application was filed on 23rd of March 2010, which is 11 days later from the date of collecting the copy of the ruling. From this explanation, there is not a single paragraph to account, for the two weeks between obtaining the copy of the decision/ruling on review and the filing of the application for extension of time in the High Court. But there is also no explanation for the delay of the 11 days, between the date of obtaining a copy of the ruling dismissing the application for extension of time by the High Court, and the day the present application was filed. This, in my reckoning, makes, a total of 25 days un-accounted for, and I cannot ignore it. The applicant's diligence is therefore called in question; but the conclusion that the applicant has not fully accounted for all the period of delay is inescapable.

In **VALAMBHIA's** case (supra) this Court held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time. But in that case, the errors of law, were clear on the face of the record. The High Court there had issued a garnishee order against the Government, without hearing the applicant, which was contrary to both the Government Proceedings Rules, and rules of natural justice. Since every party intending

to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrate 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.

In the present case, the applicant has deponed in paragraphs 17,18 and 19 of the affidavit, in essence, that, the trial judge arrived at a wrong conclusion as to the date the cause of action accrued. In paragraph 6 of the affidavit in reply, the respondent deponed that it was a contradiction for the applicant to suggest that the cause of action accrued in December, 1996, when during trial he had argued that it accrued in June 1999.

I agree with the respondent here. In his written submission against the preliminary objection in the High Court, which appears on page 41 of the record; Mr. Jonathan submitted:-

> *"The final letter on the matter is dated 23/6/1999.....It is submitted that the period of limitation started to run from such date in terms of section 6(a) of the Law of Limitation Act, 1971"*

But in paragraph 19 of the affidavit, Mr. Jonathan states on oath; that "If the High Court had observed that the cause of action had accrued in the month of December 1996, it would have held the suit had been instituted in time".

Certainly, the two paragraphs, cannot be reconciled, and it would take a long drawn out process to get to the bottom of this, and decipher "the point of law" or "illegality" in the decision that is sought to be challenged. I must therefore conclude that the applicant has also failed to convince me that there is a point of law of sufficient importance, involved in the intended appeal, to warrant an extension of time.

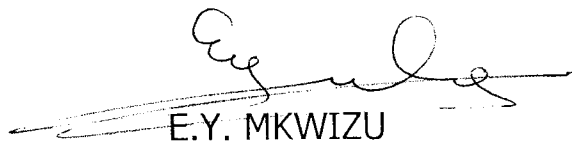
It is for the above reasons that I dismiss this application with costs.

Order accordingly.

DATED at ARUSHA this 3rd day of October, 2011.

S.A. MASSATI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL