

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

CIVIL APPLICATION NO. 412/04 OF 2018

YAZID KASSIM MBAKILEKIAPPLICANT

VERSUS

- 1. CRDB (1996) LTD BUKOBA BRANCH
2. JACKEM AUCTION MART & COURT BROKERS LTD } RESPONDENTS**

(Application for extension of time to lodge an application for leave to appeal to the Court of Appeal against the decision of the High Court of Tanzania, at Bukoba)

(Mussa, J.A.)

dated the 22nd day of August, 2008

in

Civil Appeal No. 6 of 2002

RULING

31st August & 6th September, 2018

WAMBALI, J.A:

The applicant, Yazid Kassim Mbakileki has lodged a notice of motion supported by an affidavit seeking extension of time within which to lodge an application for leave to appeal to the Court of Appeal against the decision of the High Court in Civil Appeal No. 6 of 2002. To support his application, the applicant also lodged written submission, a reply to the written submission of the first respondent and a list of authorities.

The respondents sought and obtained the services of Mr. Aaron Kabunga learned advocate who in response to the application also lodged the affidavit in reply and a written submission. The respondents oppose the application.

When the application was called on for hearing, the applicant appeared in person, unrepresented while Mr. Kabunga represented the respondents.

It is important to note that as the parties had earlier on lodged written submissions in support and opposition to the application, they were allowed to clarify few matters which they thought were important.

On his part, the appellant requested the Court to take into consideration the grounds contained in the notice of motion, the affidavit, the written submission and the list of authorities which he lodged before the hearing. On the permission of the Court the appellant also added two other authorities to his list of authorities. Apart from the emphasis which he put on some important points, the appellant generally urged the Court to grant his application as the High Court did not do justice when it dismissed his application for extension of time. He also prayed for costs.

On his part, Mr. Kabunga learned advocate for the respondents similarly urged the Court to take into account the affidavit in reply and the written submission which was lodged by the respondents. He also urged the Court to consider the list of authorities which he submitted in support of the position of the respondents.

In short, Mr. Kabunga observed that the applicant has not demonstrated any sufficient cause to enable the Court to extend time. He submitted that the application has no basis and it should be dismissed as the applicant is using delaying tactics to restrict the first respondent to enjoy the benefit of decision of the subordinate court.

From the foregoing, it cannot be doubted that this application is premised on the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is therefore important, I think, to reproduce it hereunder:

"10 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 authorised 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."

In view of the submissions of the parties and the relevant law, the issue I am supposed to determine in this application is whether there are sufficient reasons for exercising the discretion of the Court in granting the application for extension of time.

It is now accepted that in order for the Court to exercise its discretionary power in extending time under Rule 10 of the Rules, good cause for the delay must be shown by the applicant. Thus what constitutes good cause depends on the circumstances of each case. Good cause will therefore vary from one case to another.

However, good cause has not been defined. It is therefore up to the applicant to sufficiently convince the Court that good cause exist. In **Tanga Cement Company Ltd v. Jumanne D. Masangwa and Amos A. Mwalavanda**, Civil Application No. 6 of 2001 (unreported), Nsekela, J.A. (as he then was) observed as follows:

" What amounts to sufficient cause has not been defined. From decided case a number of factors have to be taken into account, including whether

or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant.”

It is my considered opinion that in order to appreciate the gist of this application, it is important to reproduce the relevant paragraphs of the affidavit of the applicant in support of the notice of motion. These are paragraphs 7-13: -

- “7. Accordingly after being dissatisfied with the decision of the first appellate court I filled Msc. Civil application No 30 of 2008 vide ERV No. 32794425 of 2nd September 2008, this was done within 14 days unfortunately the same was found to be incompetent for containing an affidavit that did not bear proper signature of the deponent.*
- 8. That in view of what has been state (sic) in paragraph 5 above I was compelled to file*

Civil Application No. 47 of 2008 on 31st October, 2008 seeking to amend the said application, ultimately on 2nd April 2009 the High Court before the Hon A.A. M. Shayo Judge decided not to proceed to hear that application instead it advised me to withdraw the initial civil application No. 30 of 2008 with a leave to refile it afresh. A copy of the said withdrawn order is enclosed herewith and marked "C2".

9. *That on 21st April 2009 I filed civil application No. 14 of 2009 seeking a leave to appeal to this Hon. Court the said application was struck out by the High Court on 29th April 2014 for being incompetent on the ground that it was brought under the provisions of the Tanzania Court of Appeal Rules instead of the relevant section of the Appellate*

Jurisdiction Act. A copy of the said ruling is attached herewith and marked "D".

10. *That since the said application was dismissed not on merit but on technical grounds on 13th June 2014 I decided to file civil application No. 20 of 2014 seeking extension of time under which to file a fresh application for leave to appeal to this Hon. Court.*
11. *Unfortunately that application was wrongly dismissed by the High Court as a foresaid already in paragraph 2 of this affidavit. A copy of the said chamber application and ERV No. 51499454 are enclosed herewith and marked "D1" and "D2" for easy of reference.*
12. *That the said ruling of the High Court apart from dismissing my application during the hearing and determination of the preliminary and determination of the*

*preliminary objection stage, the learned judge also acted **suo motu** to determine the merits of that application without affording me any opportunity to be heard and advance my arguments in support of the same.*

13. That as a result of that unprocedural measures taken by the judge of the High Court I was compelled to seek an extension of time under which to file an application for leave to appeal to this Hon. Court as a second bite as I hereby do."

I think it also important to state that the applicant in paragraphs 2 and 3 of the affidavit criticizes the judge of the High Court who dismissed his application and states that he was therefore compelled to come to this Court. On the other hand, paragraphs 4-6 of the affidavit of the applicant consist the history of how the case started in the District Court up to the High Court and how he has been litigating throughout the period from 2000 to 2008.

It must be noted also that the notice of motion contains many grounds from (a) to (i). Indeed, the applicant contends in paragraph 17 of the affidavit that those matters mentioned in the grounds are legal issues which need to be determine by this Court in the intended appeal.

Lastly, in paragraph 10 of the affidavit, the applicant depones that those contentious legal points make him believe that an application for leave and the intended appeal to this Court stands a great chance of success.

The issue for determination thus is whether the applicant has shown good cause to be eligible for extension of time within which to apply for leave to appeal.

I must state here that going through the notice of motion, the affidavit and the written submission of the applicant, I am of the opinion that there is a lot of mis understanding by the applicant as on what is the bases of this application. This is so because in most of the grounds he has raised in the notice of motion, the applicant criticizes the judge of the High Court who dismissed his prayer for extension of time in Civil Application No. 20 of 2014 without explaining sufficiently that good cause exist to warrant this Court to grant him the extension of time.

In my view, it is important to underscore the fact that the centre of this application is on Civil Appeal No. 6 of 2002 which was decided by the High Court (Mussa, J.).

It is that appeal which led the applicant upon being dissatisfied with its decision to lodge Civil Application No. 30 of 2008 for leave to appeal to this Court. That was done after the applicant lodged his notice of appeal on 27/8/2008. According to the record, Civil Application No. 30 of 2008 was withdrawn by the applicant on 2/4/2009. The order of the High Court indicates that the application was withdrawn with leave to file a fresh application.

In the circumstance, in my opinion up to the time when the applicant withdrew Civil Application No. 30 of 2008, he was still in time. This is so because the applicant was given permission to lodge another application a fresh. Thus a fresh application was supposed to be lodged within fourteen days as required by Rule 45 (a) of the Rules.

A quick glance at paragraph 9 of the applicant's affidavit shows that he lodged a fresh application (No. 14 of 2009) on 2/4/2009. The application was therefore lodged after the period of fourteen days. In my respectful opinion, the applicant was supposed to account why he did not lodge that application in time while he was the one who prayed

to withdraw it with leave to refile. In paragraph 8 of the affidavit of the applicant reproduced above, the applicant states that it was the judge of the High Court who advised him to withdrawal the application. However, a copy of the proceedings and the order of the High Court which the applicant attached to his affidavit as "C2" does not bear witness to the statement of the applicant. For the purpose of clarity, I wish to quote part of the proceedings on that day thus:

"Applicant: *I have a prayer to make. I pray to withdraw my application so that I be allowed to file a fresh.*

Mr. Kabunga: *I have no objection to the prayer but we ask for costs.*

Applicant: *I pray that as I am a layman let the costs follow the event*

Order: *The application is hereby marked withdrawn with leave to file afresh and costs to the respondent.*

***A. A. M. Shayo
JUDGE
2/4/2009."***

It follows that the statement made by the applicant in paragraph 8 of his affidavit in support of this application is not correct in view of what transpired in court on that day.

Thus although the applicant's application No. 14 of 2009 was not objected on account of limitation of time but for being lodged on wrong provision of the law, it was time barred. Indeed, the applicant has not stated anywhere in his affidavit why it took him 18 days to lodge that application after he withdrew Civil Application No. 30 of 2008 which was aimed to be granted leave to appeal.

Nevertheless, it is on record that Civil Application No. 14 of 2009 was struck out by the High Court (Khaday, J) on 29/4/2014 for wrong citation of the law after the respondents raised objection. It was that decision which prompted the applicant to lodge Civil Application No. 20 of 2014 where he sought extension of time within which to lodge an application for leave to appeal against the decision of the High Court in Civil Appeal No. 6 of 2002. Unfortunately that application was dismissed, hence the present application.

Moreover, It is important to note that in this application the applicant attached a copy of the chamber summons and the affidavit in

respect of Civil Application No. 20 of 2014. According to that copy, it is indicated that the application was lodged on 13/6/2014.

It is my considered view that, the applicant has also not explained why it took him almost 45 days after the application for leave was dismissed before he lodged an application for extension of time.

Thus, although there is no requirement of the law that an application for extension of time must be lodged within a specified period, but the promptness of the applicant in taking action is questionable.

I must state that promptness of the applicant in taking action is one of the consideration for granting extension of time as observed by this Court in **Tanga Cement Company Ltd** (supra).

It is noted that this matter was also raised by the High Court judge at page 16 of the ruling in which it was observed that the applicant had not accounted for the delay of 45 days in taking action.

It must be insisted that this Court has consistently emphasized on the requirement for the applicants for extension of time to account for every day of delay (See **Bariki Israel v. The Republic**, Criminal Application No. 4 of 2011 and **Sebastian Ndaula v. Grace Rwamafa**

(legal personal representative of Joshua Rwamafa) Civil Application No. 4 of 2014 (both unreported).

Indeed, in **Sebatian Ndaula** (supra) the Court went further and stated that the need to account for every day of delay becomes more important especially in a matter which has taken longtime since it was decided.

In this regard, in view of what I have stated above and going through the application together with the supporting documents and the written submission which was placed before this Court, it cannot be said with certainty that the applicant has demonstrated sufficiently that good cause exist to enable the Court to exercise its jurisdiction to grant extension of time.

I understand that the applicant stated some factors which could be considered in granting extension of time like being a layman and the issue of illegality. However, I must concede that I have carefully gone through the notice of motion, the affidavit, the written submission and several authorities which were submitted by the applicant, but I regret that there is no good cause which has been shown. Certainly the written submissions appear to be attractive in reading but there is no

substantial point to assist the applicant in his application in view of what I have laid above concerning promptness in taking action.


In the circumstances, I agree with the submission of the counsel for the respondents that this application has no bases as the applicant has not succeeded to show that good cause exist to entitle him to an extension of time within which to lodge an application for leave. I have also taken into consideration the written submission of counsel for the respondents and the affidavit in reply and reply to the written submission of the first respondent by the applicant before arriving to this conclusion.

In the end, in view of what I have observed and exemplified above, I am satisfied that this application must fail. I accordingly dismiss it with costs.

DATED at **BUKOBA** this 6th day of September, 2018.

F. L. K. WAMBALI
JUSTICE OF APPEAL

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


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL