IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

CIVIL APPLICATION NO. 146/12 OF 2023

D. B. SHAPRYA & CO. LTD ..... APPLICANT

VERSUS

NEW BUILDERS LTD ..... RESPONDENT

(Application for extension of time within which to lodge an application for review against the decision of the Court of Appeal of Tanzania at Tanga)

(Mussa, Lila and Mkuye, JJ.A.)

dated the 22nd day of March, 2019

in

Civil Appeal No. 62 of 2017

RULING

30th April, & 9th May, 2024

MASHAKA, J.A.:

By notice of motion lodged on 2nd November, 2022, under rule 10 of the Tanzania Court of Appeal Rules, 2019 (the Rules), the applicant is seeking an order for extension of time within which to lodge an application for Review against the decision of the Court (Mussa, Lila and Mkuye, JJ.A.) dated 22nd March, 2019 in Civil Appeal No. 62 of 2017. The notice of motion is supported by an affidavit duly affirmed by Dipackumar Chandrakant Kotak, Managing Director of the applicant.

On the other hand, the respondent resisted the application by filing an affidavit in reply sworn by Erick Alfred Akaro, the learned counsel representing the respondent.

To appreciate the context in which this application arose, I find it pertinent to briefly provide the material facts of the matter as obtained from the record of the application. It arises from an agreement between the respondent and the applicant in which the respondent was to undertake civil works for the construction of flow meters. The meters were meant to monitor fuel flowing into the country. However, in the said agreement, the parties did not sit and sign a formal document to govern their business undertakings. Their terms were based on Bills of Quantities (BOQs) through which the respondent gave his quotation to the applicant. At the initial stages of the contract, all went well as the respondent prepared revised BOQs and presented to the applicant. The document presented reflected an outstanding amount of USD 66,647.73.00 and it was after the deduction of all payments already made by the applicant. The applicant received the document and sent an e-mail assuring the respondent that she will make the payment. It was at that moment, the contractual relationship turned sour. Later the assurance was not honoured, the respondent sent a

demand notice to the applicant. Due to the lack of response, the respondent sought a legal redress thus the suit.

During hearing, the applicant (defendant) called only one witness, Ramadhani Haruna (DW1), the Project Coordinator. He admitted to have acknowledged the issued BOQs of the respondent. However, he did not make the payment because the work done was unsatisfactory as some of the walls had cracks and the doors were not properly closing which caused the applicant to incur costs to repair the defects. The respondent (plaintiff) called one witness Arvind Par Piat (PW1), the Managing Director of the company who deposed that he had quoted USD 48,608.09 for one site out of the three sites and one Kishori Shapriya the Managing Director of the applicant had acknowledged receipt. Upon the request by the applicant, PW1 prepared a quotation for the three sites amounting to USD 172,992.55 and a quantity surveyor from the applicant and PW1 went through all works done and prepared a revised BOQs which document (exhibit P3) was presented to the applicant reflecting an outstanding amount of USD 66,648.73 and it was after deductions of all payments paid to the respondent. The applicant sent an e-mail (exhibit P4) assuring the respondent of payment. The assurance was not honoured, a demand note exhibit P5 was sent to the

applicant. As earlier stated, for the lack of response, the respondent sought for legal redress thus the suit.

Having heard the parties, the High Court delivered its judgment in favour of the respondent. Being displeased, the applicant preferred his appeal to the Court which heard the parties and delivered its judgment in favour of the respondent and dismissed the appeal on 11th March, 2019. Still discontented, the applicant intends to challenge the decision of the Court but, found that she was out of time to file an application for review, hence this application.

This application is founded on paragraphs 4 and 6 of the supporting affidavit which states:

> 4. *"That the applicant was not aware of the decision of this Court on Civil Appeal No. 62/2017 since her previous counsel did not inform her of the same until when she was served with application for execution before the High Court of Tanzania at Dar es Salaam.*
>
> 6. *That, the said decision is marred by illegalities on the face of it which calls upon intervention of this Hon. Court to put records straight. The illegality complained of is:*
>
> *i. The decision of the Court of Appeal to uphold the decision of the High Court on*

the aspect that the court cannot summon a witness as a witness was made per incuriam of the decision in case of ***DPP vs. Peter Roland Vogel*** *(1987) TLR 100 and the decision of* ***John Magendo vs. N.E Govani*** *(1973) LRT No. 60.*

ii. *The appellant (now applicant) was not afforded right to be heard by failing to take additional evidence of one Andrew in order to resolve the real controversy between the parties".*

At the hearing of the application, the applicant was represented by Mr. Moses Mollel Ebenezer and Ms. Linda Lugano, both learned advocates. Mr. Ebenezer adopted the contents of the notice of motion and the supporting affidavit, and submitted that paragraphs 4 and 5 of supporting affidavit show the first reason for the delay which is that the applicant was not aware of the date of delivery of the judgment, and that her advocate at that time did not inform her timely on the said delivery. However, the applicant could not tell me exactly when did she become aware of the decision and Mr. Ebenezer stated that he is not sure of the date. He continued to argue that, it was after the applicant was served with the application for execution before the High Court that she became aware and, upon going through it, she was aggrieved by

the decision of the Court. She decided to fault it but found out that the time for filing a review had elapsed. The learned counsel further argued that the decision of the Court was marred by illegalities as averred at paragraph 6 (i) and (ii) of supporting affidavit, and that the decision by the Court to uphold the decision of the High Court on the aspect that the court cannot summon a witness to testify was made per incuriam of the decisions in the cases of **DPP v. Peter Roland Vogel** (1987) T.L.R. 100 and **John Magendo v. N. E. Govani** (1973) LRT 60. It was his contention that the applicant was not afforded the right to be heard by failing to take additional evidence of the said witness for the purpose of resolving the actual controversy between the parties. It was the view of Mr. Ebenezer that these are good causes for me to consider and exercise my discretion to extend time.

In resisting the application, Mr. Erick Akaro, learned advocate representing the respondent commenced by adopting the contents of affidavit in reply, and submitted that the applicant was duly represented by an advocate and if she was diligent enough, she would have known the outcome of the appeal and that there is no any illegality in the impugned decision. He argued that no good cause has been shown by the applicant to deserve extension of time. He impressed upon the duty of the applicant to account for each day of delay. He maintained that

the impugned judgment was delivered on 22/03/2019 and the applicant had sixty (60) days to file the application for review as required under rule 66 (3) of the Rules. He further argued that, the applicant has not stated the date she was informed of the impugned decision by her learned advocate Mr. Muganyizi, who represented her at the High Court and before the Court. He referred me to annexure D 3 and page 3 of the proceedings in Application for Execution No. 30 of 2019 which shows that the appellant was represented by her principal officer hence, aware of the execution proceedings which had commenced. He contended that this application was lodged on 2/11/2022 almost three years after the delivery of the impugned decision and the applicant was aware of the execution proceedings since 10/10/2019. For that reason, he claimed that the applicant has not accounted for the delay since 10/10/2019 to 01/11/2019 in her supporting affidavit or her written submission. To bolster his position, he referred me to the cases of **Bharya Engineering and Another v. Hamoud Ahmed Nassor** [2018] T.L.R. 50 **and Safari Petro v. Boay Tlemu**, Civil Application No. 320/17 of 2017 (unreported).

On the issue of illegality, the learned counsel for the applicant submitted this ground in two folds; one, the High Court did not call a witness and; two, they were not given right to be heard. Mr. Akaro

referred the case of **Damatico General Supply v. Maweni Limestone Limited,** Civil Application No. 129/12 of 2020 (unreported) at page 12, where the Court stated that a manifest error under rule 66(1) of the Rules must be so obvious such that it strikes in the eyes immediately after looking at the records and it does not require a long-drawn process of reasoning on points where they may be possibly two options. He argued that, there is no illegality because both the trial and first appellate courts addressed the issue on who had the duty to call Andrew, the project manager of the applicant as a witness. He added that there is nothing per incuriam in the decision as alleged by the learned counsel. He referred me to the definition of the term per incuriam at page 1254 of the Black's Law Dictionary 9th Edition which includes those decisions which are given by ignorance or forgetfulness of the existence of the law. He argued that, the applicant was duty bound to prove to the Court that, it made a decision in ignorance of the applicable law and the duty of the applicant to call Andrew as a witness. Hence the submissions of the learned counsel for the applicant falls short to meet the threshold of rule 66(1) of the Rules, he submitted.

He distinguished the authorities cited by Mr. Ebenezer, in particular, the case of **DPP v. Peter Roland Vogel** (*supra*) at page 100 that the Court is not justified in interfering with the findings of the lower courts

in order to enable the prosecution to adduce evidence which it had no opportunity to produce at the time of the proceedings in the court of first instance. Hence, the court could not call the witness as it would be interfering with the trial court. He concluded that the application lacks merit and prayed that it be dismissed with costs.

In rejoining, Mr. Ebenezer acknowledged that the applicant became aware after she was served with notice for execution sometime in October, 2022 and filed this application on 02nd November, 2022. He stated that the copy of notice of execution was received by Decorum Attorneys asserting that they had not been instructed by the applicant. He referred the execution proceedings which show that the applicant was duly represented by a principal officer on 10/10/2019 and she was not aware of. It was his contention that the applicant became aware in October, 2022, and that time should count from when she was duly served the notice for execution. On the reason that the impugned decision of the Court was tainted with illegalities, he emphasized that I am duty bound to extend time as it was held in the case of **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** (1992) T.L.R 387 so that the Court can have an opportunity to right the wrong decision as a result of the failure to call the crucial

witness Andrew by the Court. He reiterated his submission in chief and prayed the extension of time be granted.

Having examined the record of the application and considered the submissions made by the parties, the issue for determination is whether or not the the applicant has demonstrated sufficient cause to grant extension of time to lodge an application for review. This application is predicated under rule 10 of the Rules which provides:

> *"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."*

Under the said rule, it is upon the party seeking such order to provide good cause for having not done what ought to have been done within the time prescribed by the relevant statute. See: **Michael Lessani Kweka v. John Eliafye** [1997] T.L.R. 152; and **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported).

The discretion of the Court to extend time under rule 10 is unfettered, but in **Tanzania Revenue Authority v. Tango Transport Co Ltd, Tango Transport Co Ltd v. Tanzania Revenue Authority**, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 (unreported), the Court held, in considering an application under the rule, the courts may take into consideration factors such as, the length of the delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is granted.

In a number of decisions by the Court, there are reasons to be considered as good cause. I find it relevant to echo the benchmarks articulated in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported), where the Court emphasized on several factors to be taken into consideration in granting or refusing extension of time. These are: -

> *"(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 the point of law of sufficient importance; such as the illegality of the decision sought to be challenged****". (Emphasis added)*

With respect to applications relating to review, there is also a requirement of showing that reasons for review are one of the reasons spelt in rule 66 (1) of the Rules. See: **Deogratius Nicholaus @ Jeshi v. Republic** (Criminal Application 1 of 2014) [2015] TZCA 289 (16 February 2015) TanzLII and **Nicholaus Mgonja @ Makaa v. Republic** (Criminal Application No. 8/12 of 2023) [2024] TZCA 279 (29 April 2024) TanzLII.

In the present application, the applicant, in a nutshell, has advanced two reasons for her delay; one, that the delay is due to the fact that she was not aware that the decision in Civil Appeal No. 62 of 2017 had been delivered on 22nd March, 2019 because her previous learned advocate did not inform him, and two; that the impugned decision is tainted with illegalities.

Starting with the ground that she was not aware of the date when the impugned decision was delivered and was not informed by her advocate, the issue is whether that reason is within the domain of a sufficient cause or reason as provided under rule 10 of the Rules which

sets the principles and guidelines when a Judge is exercising its discretionary powers to extend time and further propounded in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra). In this application, the applicant is required to account for each delay of delay in taking action. The applicant is seeking extension of time to lodge an application for review and pursuant to section 66(3) of the Rules and the said application had to be filed within sixty days from the date of the impugned judgment which was delivered on 22nd March, 2019. Thus, this application ought to have been lodged on or before 22nd May, 2019, but it was lodged on 2nd November, 2022. That being the position, the applicant is required to account for each day of delay from 22nd May, 2019 when the time to lodge application for review expired until 2nd November, 2022 when she lodged the present application which is almost three years and six months. The first reason for the delay is that the applicant was not aware of the delivery of the decision as his previous counsel did not inform him. In **Abdallah Juma Kambale v. Noradi Tiliko Mongelwa,** Civil Appeal No. 231 of 2018 [2023] TZCA 17730 (5 October 2023) TANZLII, the Court held that, a party to a case who engages the service of an advocate is reasonably expected to closely follow up the progress and status of his case. Being

the Court's stance, the applicant's assertion cannot hold water as she had an obligation to follow her case closely despite the fact that she engaged an advocate.

I have gleaned from the proceedings of the Application for Execution No. 30 of 2019 in the record shows as follows:

> *"Date: 10/10/2019*
>
> *Coram: Hon. F. J. Kabwe, DR*
>
> *D/Holder: Mr. A. J. Akaro, advocate for*
>
> *J/Debtor: Mr. Idd Mwinyi, Principal Officer of the company J. Debtor*
>
> *Court clerk: Rafiki*
>
> ***Mr. Akaro (Adv)***
>
> *Your Honour,*
>
> *We are before you for the Judgment debtor to show cause why decree should not be executed.*
>
> ***Mr. Iddi Mwinyi***
>
> *We are praying for time to settle out of the Court. We are disputing the commercial rate which is beyond that is provided under the BOT.*
>
> ***Mr. Akaro (Adv)***
>
> *No objection as to adjournment.*
>
> ***Order:*** *Showing cause on 31/10/2019.*
>
> ***Signed: F. J. Kabwe, DR***

10/10/2019"

The excerpt above displays that the applicant was aware of the application to show cause why execution of the decree should not proceed against her. Her principal officer, one Iddi Mwinyi, seems to be cognisant about the matter and informed the Hon. DR that they needed more time so they and the respondent could settle the matter out of the court. In addition, he qualified that they were disputing the commercial rate to be beyond that provided by the BOT, the abbreviation meaning Bank of Tanzania. It is certain that the applicant was aware that the judgment in Civil Appeal No. 62 of 2017 had been delivered and had proceeded to the execution stage and her principal officer had attended the proceedings on 10/10/2019. Be as it may, the applicant did not state as to when she was aware of the delivery of the impugned decision so the counting of the days can be reckoned. Going by the execution proceedings, it is clear that the applicant was aware of the execution of the said judgment on 10/10/2019 and not October, 2020 as alleged by the learned counsel for the applicant. Thus, I find that the applicant became aware on the 10/10/2019 as shown in the said proceedings which were filed by the applicant accompanying this application and the applicant has not accounted for each day of delay

from 10/10/2019 to the 02/11/2020 when this application was lodged. In that regard, this ground fails.

Apart from the applicant being required to advance the reasons for the delay, in an application like the one at hand, she also has to establish that she has an arguable case. She is required to demonstrate in the application of extension of time that she is intending to predicate his application for review on the grounds listed under rule 66(1) of the Rules. This position was stated in **Mwita Mhere v. Republic**, Criminal Application No. 7 of 2011 (unreported):

> *"But in application of this nature, the law demands that the applicant should do more than account for the delay. To succeed in showing that he has a good cause under Rule 10 of the Rules, it must be shown further that the applicant has an arguable case. An arguable case is one that demonstrates that the intended ground of review is at least one of those listed in Rule 66 (1) of the Rules"*

Also see: Robert **Nyengela v. Republic,** Criminal Application No. 42 of 2019 [2021] TZCA 166 (3 May, 2021) TanzLII.

The applicant has deposed that she intends to file an application of review on grounds that; one the court had failed to summon one

Andrew and two; she was not accorded the right to be heard as the Court did not order for additional evidence from the said witness. From the outset, these are not grounds for review stipulated under rule 66(1) of the Rules rather they are factual findings of the Court.

In additional to that, the applicant contends that there is illegality based on the above-mentioned grounds. It is trite law that where there is an allegation of illegality in the decision sought to be reviewed, the Court has a duty, even if it means extending the time to enable the alleged illegality to be ascertained and corrected to put the record straight. In **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185, the Court had this to say:

> *"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." [Emphasis added]*

An allegation of illegality must be apparent on the face of the record to persuade me to exercise discretionary power to enlarged time to do any act authorised or required by the Rules. As earlier on stated, the applicant in this application is seeking an extension of time in order to apply to the Court to review its own decision on account of illegality for upholding the decision of the High Court that it cannot call one Andrew, a project manager of the applicant to testify. Further, the trite position is that not every decisional error amounts to illegality. See: **Charles Richard Kombe v. Kinondoni Municipal Council** (Civil Reference No. 13 of 2019) [2023] TZCA 137 (23 March 2023) TanzLII and **Kabula Azaria Ng'ondi and Others v. Maria Francis Zumba and Another** (Civil Appeal 174 of 2020) [2023] TZCA 162 (30 March 2023) TanzLII. Much as I agree with the submissions of the counsel for the applicant that illegality constitutes a good cause for extension of time, I am not prepared to go along with him in this application because the pointed-out illegality does not exist on the face of the record.

It is a settled position that each case has to be decided on its own peculiar circumstances. The delay of over three years certainly demonstrates inaction and unqualified lack of diligence on part of the applicant in taking essential steps towards pursuing the intended application.

For the above given reasons, I find that no sufficient cause has been shown to warrant the extension of time sought by the applicant. Thus, I dismiss the application with costs.

DATED at **TANGA** this 9th day of May, 2024.

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of May, 2024 in the presence of Ms. Frida Akaro, learned Counsel for the Respondent and also holding brief for Ms. Linda Lugano, learned Counsel for the Applicant is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL