

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CIVIL APPEAL NO. 82 OF 2017

BRUNO WENCESLAUS NYALIFA APPELLANT

VERSUS

**THE PERMANENT SECRETARY,
MINISTRY OF HOME AFFAIRS 1ST RESPONDENT**

THE HONORABLE ATTORNEY GENERAL 2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mwingwa, J)

Dated 14th day of December, 2016

in

(Misc. Civil Application No. 66 of 2016)

JUDGMENT OF THE COURT

4th & 14th December, 2018

MWARIJA, J.A.:

The appellant herein, Bruno Wenceslaus Nyalifa, instituted an application in the High Court of Tanzania at Moshi seeking to be granted extension of time to file an application for orders of *certiorari* and *mandamus* against the respondents; the Permanent Secretary, Ministry of Home Affairs and Hon. Attorney General. The application was filed by way of chamber summons under S. 14 (1) of the Law of Limitation Act [Cap. 89

R.E. 2002] and S. 95 of the Civil Procedure Code [Cap. 33 R.E. 2002]. It was supported by an affidavit sworn by the appellant. He attached to his affidavit, certified copies of the documents which he relied upon to support his averments.

The application was argued by Mr. Mhyellah, learned counsel. In his submission before the High Court, he contended that the appellant was late in filing the application for leave to apply for judicial review because he did not receive his dismissal letter until when the time for filing the intended application had expired. He stated those facts in paragraphs 6 and 7 of his affidavit as follows:

*"6. **That**, the copy of dismissal letter came into my hands on 23/11/2015, though it was prepared on 29th of October, 2015."*

*7. **That**, I was on (sic) Morogoro when the said dismissal letter was sent to my former duty station at Moshi, then at Arusha and I was notified to come and collect the letter on 23 day of November, 2015. Attached herewith is the copy of the dispatch book I signed marked annexure '**Bruno 3**'; I crave leave of this Honourable Court for it to form part of this affidavit."*

According to the learned counsel, after having received the dismissal letter, the appellant instituted an application for leave to file an application for a judicial review on 11/5/2016. That application, Misc. Civil Application No. 33 of 2016 was however, struck out. Still maintaining his quest to seek judicial review, the appellant filed the application for extension of time which gave rise to the impugned decision.

Mr. Kibwana, learned State Attorney who appeared for the respondent opposed the said application. He submitted before the High Court that the appellant had failed to establish a sufficient cause for the delay in filing the intended application. He challenged the allegation by the appellant in paragraph five of the affidavit that he wrote a letter to the Permanent Secretary asking for a copy of the decision immediately after his dismissal. He dismissed the contention as being a lie. He argued further that the contention that the appellant received the letter on 23/11/2015 is not true because a copy of the attached part of the dispatch book does not originate from the police. This, he said, is because the same does not bear the name of the police officer who dispatched the letter. He finally prayed to the Court to disregard the annexures to the affidavit on account that the same were not formerly tendered in Court.

In rejoinder, the appellant's counsel submitted that the respondent did not substantiate the contention that, since the rank and the force number of the police officer who dispatched the letter is not shown in the copy of the part of the dispatch book annexed to the affidavit, it is not certain that the dispatch book originated from the police. On the argument that the documents annexed to the affidavit should be disregarded because they were not tendered, the appellants' counsel replied that the same were to be tendered during the hearing of the intended application. He said however that he had the documents in court for perusal, but the High Court declined to examine them.

Having heard the submissions of the learned counsel for the parties, the learned judge found that the appellant had failed to establish that the delay was due to a sufficient cause. He was of the view, firstly, that the appellant did not substantiate the contention that he wrote a letter to the Permanent Secretary, Ministry of Home Affairs requesting for a copy of his dismissal letter and secondly, that he had failed to account for the delay as from the date of receipt of the letter, which the appellant alleged to be on 29/11/2015.

The learned judge was also of the view that, since the documents which were annexed to the affidavit were not tendered in court as exhibits, the same could not be acted upon to determine the application. He relied on the decision of this Court in the case of **Japan International Corporation Agency (JICA) v. Kaaki Complex Ltd**, Civil Appeal No. 107 of 2007 (unreported). On those considerations, the learned judge dismissed the application.

The appellant was dissatisfied with the decision of the High Court hence this appeal. In his memorandum of appeal he has raised the following three grounds:

- "1. The presiding High Court Judge erred in law and in fact in holding that the Applicant's counsel failed to tender documentary evidence at the time he was making his oral submission in support of the application as exhibits are not part of the submissions.*
- 2. The trial judge erred in law and in fact in holding that annexures in Applicant's affidavit were not tendered by the counsel for the Applicant during an oral submission and therefore not part of submission.*

3. The trial judge erred in law and in fact for failure to grant the prayers sought as there was no inordinate delay on the part of the Applicant.”

At the hearing of the appeal, the appellant was represented by Mr. Ally Mhyellah, learned Counsel whereas the respondents were represented by Mr. Ponziano Lukosi, learned Principal State Attorney.

The appellant's counsel had earlier on 12/4/2017, filed his written submission in support of the appeal. At the hearing of the appeal, he highlighted the points which he had raised in the written submission. With regard to the 1st ground of appeal, he argued that from the nature of the application, the learned counsel for the appellant could not tender as exhibits, the copies which were annexed to the appellants affidavit. He cited *inter alia* the cases of the **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 and **Bish International B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie & Bish Tanzania Limited**, Land Case No. 9 of 2006 (both unreported) to bolster his argument.

With regard to the cause of delay, the learned counsel submitted that the High Court erred in failing to find that the appellant had shown a good cause for the delay. According to Mr. Mhyellah, the appellant instituted his application for leave to file an application for orders of *certiorari* and *mandamus* (Misc. Civil Application No. 33 of 2016) within time. That application was however, struck out and had thus to apply for extension of time so as to institute a fresh application.

Mr. Mhyellah concluded that, the finding by the learned judge that the appellant had failed to show good cause on account that the documentary evidence attached to his affidavit were not tendered as exhibits, is erroneous. He added that, since the documents were annexed to the affidavit, they formed part of the deponent's evidence and therefore, ought to have been acted upon.

In reply, Mr. Lukosi argued that, the counsel for the appellant was obliged to cause the documents to be tendered as directed by the High Court. As to the cited cases, the learned Principal State Attorney submitted that the same are distinguishable in that, the same relate to attachment of exhibits to written submission, not attachment of the same to an affidavit.

With regard to the cause for the delay, Mr. Lukosi submitted that, apart from the fact that the appellant did not include in the record of appeal, a copy of the decision in Misc. Civil Application No. 33 of 2016, going by the appellant's statement, that the same was struck out on 23/11/2015, the application before the High Court would remain to be time barred. This, he said, is because the appellant has not accounted for the period between 23/11/2015 when that application was dismissed and 3/10/2016 when the application giving rise to this appeal was lodged.

He argued therefore that, the appellant was not only required to account for the period between the date of his dismissal and the date of filing Misc. Civil Application No. 33 of 2016 but also the period from the date on which that application was struck out to the date of filing, in the High Court, the application for extension of time. The learned Principal State Attorney added that, there was an inordinate delay in filing the application in the High Court.

We have duly considered the arguments made by the learned counsel for the parties. To begin with the 1st and 2nd grounds of appeal, the main complaint by the appellant emanates from the procedure which

was applied by the learned High Court judge in the course of hearing the application. We agree with the appellant's counsel that, from the nature of the proceedings, the learned judge erred in disregarding the documentary evidence annexed to the appellant's affidavit on the ground that the same were not tendered at the time when the appellant's counsel was making his oral submission.

As stated above, the application was brought by way of a chamber summons supported by an affidavit. The respondents countered it by filing their counter affidavit. In the circumstances therefore, during the hearing, the parties were only required to make submissions. As observed in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam** (Supra) cited by the learned counsel for the appellant.

". . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

We find further that the documents which were annexed to the appellant's affidavit should not have been disregarded on the ground that

they were not tendered in evidence. This is for obvious reason that, affidavit is evidence and the annexure thereto is intended to substantiate the allegations made in the affidavit. Unless it is controverted therefore, the document can be relied upon to establish a particular fact.

As stated above therefore, we agree with learned counsel for the appellant that it was wrong for the learned judge to disregard the documents which were annexed to the appellant's affidavit on account that the same were not tendered in court at the time of hearing the application.

In the 3rd ground, it is the appellant's contention that he had disclosed sufficient cause for grant of an order of extension of time. In determining this ground of appeal, we find it apposite to reiterate the guidelines to be followed by courts in exercising its discretion in deciding to grant or refuse an application for extension of time. The same were aptly stated by the Court in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) as follows:

- "(a) The applicant must account for all the period of delay.*
- (b) The delay must not be inordinate.*
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intended to take.*
- (d) If the court feels that there are 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."*

In the case at hand, the appellant based his application on two main factors; first that he obtained his dismissal letter after the prescribed period for filing the intended application had expired and secondly that, although he previously filed Misc. Civil Application No. 33 of 2016 timely, that application was struck out. He contended also that the delay was not inordinate. As stated above, the learned High Court judge found that the appellant did not show sufficient cause for grant of the application.

The immediate issue for our determination is whether the appellant accounted for all the period of the delay. Mr. Lukosi argued that, even if

the period spent by the appellant in prosecuting Misc. Civil Application No. 33 of 2016 is to be taken into account, the period from the date on which that application was struck out to the date of filing the application for extension of time in the High Court was not accounted for. We agree with the learned Principal State Attorney's argument. Indeed, the appellant did not say anything as regards the period between 26/9/2016 when the application for leave to apply for judicial review was struck out and 3/10/2016 when the application for extension of time was filed in the High Court. The requirement of accounting for every day of delay has been emphasized by the Court in a number of cases – See for example, the cases of **Bushiri Hassan v. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007, **Karibu Textile Mills v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshua Rwamata)**, Civil Application No. 4 of 2014 (all unreported).

In the first case, the Court stated as follows:

"Delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules

prescribing periods within which certain steps have to be taken.”

Since therefore, the appellant did not account for the period stated above, there is no gainsaying that his application for extension of time before the High Court was properly dismissed.

For the foregoing reasons, this appeal is devoid of merit. We therefore hereby accordingly dismiss it. From the nature of the parties' dispute we order that they shall bear their own costs.


DATED at **ARUSHA** this 13th day of December, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

The seal of the Court of Appeal of Tanzania is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text "THE COURT OF APPEAL OF TANZANIA" and a small star at the bottom.
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL