IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 463/01 OF 2017

MOTO MATIKO MABANGA.....APPLICANT

VERSUS

1. OPHIR ENERGY PLC
2. OPHIR SERVICES PTY LTD
3. BRITISH GAS TANZANIA LIMITED .....**RESPONDENTS**

(Application for extension of time from the Decision of the High Court of Tanzania, at Dar es Salaam)

(Mujulizi, Mkasimongwa, Mwandambo, JJJ.)

Dated the 19th Day of May, 2016
in
Misc. Civil Application No. 14 of 2014

RULING

05th & 17th April, 2019

KEREFU, J.A.:

The applicant, Moto Matiko Mabanga, has lodged this application seeking for orders of extension of time to lodge an application for revision against the decision of the High Court, at Dar es Salaam, (*'the High Court'*), (Mujulizi, Mkasimongwa, Mwandambo, JJJ) dated 19th May 2016 in *Misc. Civil Application No. 14 of 2014.* The application is brought by way of Notice of Motion lodged on 05th October, 2017 under Rule 10 of the Tanzania Court of Appeal Rules, 2009, GN 368 of 2009, *('the Rules')*. The

Application is supported by the affidavit of the applicant himself. On the other hand the respondents have filed affidavits in reply opposing the applicant's application.

On the day when the application was called on for hearing, Mr. Gabriel S. Mnyele, the learned counsel appeared for the applicant, Mr. Waziri Mchome, the learned counsel appeared for the 1st and 2nd respondents and Mr. Gerald Nangi, the learned counsel appeared for the 3rd respondent.

Submitting in support of the application, Mr. Mnyele commenced his submission by fully adopting the contents of the Notice of Motion, the supporting affidavit and his written submission. He then clarified that, the main reasons which delayed the applicant to lodge the application for revision in time is (i) *delay in securing the High Court's documents to accompany his application and (ii) that, there is serious error in the High Court's Ruling, which needs to be revised.*

Mr. Mnyele elaborated that, it was wrong for the High Court Judges to invoke the provisions of Section 8 of the Civil Procedure Code, Cap. 33 [R.E. 2002] and stay the proceedings in *Misc. Civil Application No. 14 of*

2014 pending the determination of *Commercial Case No. 185 of 2013.* He said, the two matters were not substantially the same. He referred to the *Annexure Mabanga-12'* where pleadings for the two cases are attached and argued that, prayers in the commercial case were on the breach of investment Agreement, while in the civil application were on the infringement of petitioners' constitutional rights.

Mr. Mnyele noted that, the applicant has not accounted for the delay of each day, because according to him, when there is an allegation of illegality the same constitutes good cause regardless of the period of delay. He finally prayed for the application to be granted.

In reply, Mr. Mchome also prayed to adopt his affidavit in reply together with the written submission to form part of his oral submission. He then contended that, the order of the High Court sought to be revised is interlocutory in nature, as the same has not conclusively determined the matter, but only stayed the proceedings in *Misc. Civil Application No. 14 of 2014* pending the determination of the proceedings in the *Commercial Case No. 185 of 2013.* He cited Section 5 (2) and (d) of the Appellate Jurisdiction Act, Cap. 141 [R.E. 2002], (*'the AJA'*) and argued that, it is not

viable to grant extension of time to revise an order which is not subject for revision.

Mr. Mchome disputed the claim by Mr. Mnyele that, when there is an allegation of illegality the applicant is not required to account for the delay of each day. He said, not every allegation of illegality carries out a day. He further argued that, since the applicant's allegations of illegality herein are unjustified, the application should be dismissed with costs.

On his part, Mr. Nangi commenced his submission by attacking the oral submission made by Mr. Mnyele. He argued that, pursuant to Rule 106 (15) of the Rules, Mr. Mnyele, was required to first seek for the leave of the court to be allowed to introduce new issues that were not part of his written submission filed on 05th December 2017. It was the strong view of Mr. Nangi that, since the said leave was not sought, the issue of illegality raised by Mr. Mnyele unprocedurally should be disregarded.

As for the reason that, the applicant delayed to lodge his application, while waiting for the High Court documents, Nangi said, the same is not one of the ground envisaged under Rule 10 of the Rules. To bolster his argument, he referred to **Said Ally Majeje @ Kadeti & 2 Others v. the**

Republic, Criminal Application No. 21 of 2015, (unreported) and **Lyamuya Construction Company Limited v. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 02 of 2010, (unreported).

Mr. Nangi also challenged the content of paragraph 9 of the supporting affidavit that, the information contained therein is hearsay and the applicant has not substantiated the same with an affidavit of his counsel to verify the same. He finally submitted that, the applicant has failed to submit good cause to warrant grant of this application.

In rejoinder submission, Mr. Mnyele argued that, the issue of interlocutory order was raised prematurely as the same cannot be considered at this stage. As for the failure to address the issue of illegality in his written submission, Mr. Mnyele conceded, but he said, the same has not prejudiced the respondents, because the issue of illegality is contained in paragraph 9 of the supporting affidavit and respondents have discussed it in their affidavits in reply and written submissions. In the same reasoning, Mr. Mnyele urged me to adopt his oral submission by invoking the provision of Rule 4 (1) of the Rules and depart from the requirement of Rule 106 (15) (supra). As for the claim that paragraph 9 of the supporting

affidavit contain hearsay information, Mnyele said, the same has been cured by the verification clause.

Having heard the Counsel for the parties on the issues above, the remaining task before me to resolve is *whether the applicant has submitted good cause for the delay to warrant grant of this application*. Pursuant to Rule 10 of the Rules, an application of this nature can be granted if the applicant has given good cause for the delay. For avoidance of doubt, I think it is instructive to extract the said Rule in full. Rule 10 provides that:-

> *"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 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." [Emphasis added].*

Under the above cited provision of the law, the requirement which the applicant has to satisfy is to show good cause for the delay in filling the application. There are numerous authorities to this effect and some of them have been cited by Mr. Nangi, but I wish to add on the list to include,

Kalunga & Company Advocates Ltd Vs National Bank of Commerce Ltd (2006) TLR 235 and **Attorney General V Tanzania Ports Authority & Another,** Civil Application No. 87 of 2016 at pg 11, to mention but a few.

In exercising its discretion to grant extension of time, the Court considers the following crucial factors; *the length of delay, the reason for the delay and degree of prejudice that the respondent may suffer if the application is granted.* It is therefore the duty of the applicant to provide the relevant material in order for the Court to exercise its discretion. See the **Regional Manager Tan Roads Kagera v Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, (unreported).

It has also been held in times without number that, the ground alleging illegality constitutes a good cause for extension of time. Among the decisions include, **Principal Secretary Ministry of Defence and National Service Vs Divram P. Valambhia** (1992) TLR 387; **Kalunga,** (supra) and **Arunaben Chaggan Mistry Vs Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016, (Arusha) (Unreported).

Now, in the application at hand, the first reason for the delay submitted by Mr. Mnyele is *delay in securing the High Court's documents.* It is on record that, the decision of the High Court sought to be revised was delivered on 19th May 2016. The applicant was required to file his application within sixty (60) days from the date of delivery of the decision. It ought to have been filed lately on 16th July 2016. Nonetheless, the application before me was lodged on 05th October 2017, which is, after lapse of more than seventeen 17 months, i.e about 510 days.

The reason that has been advanced by Mr. Mnyele and also found in paragraph 7 of the supporting affidavit is that, the applicant was waiting for the High Court's documents, which was availed to him on *11th July 2017*. Computing time from 11th July 2017 to *05th October 2017,* it is clear that, the application was lodged after lapse of almost eighty four *(84)* days, from the date when applicant was supplied with the High Court documents. The applicant was expected to account for such delay and give reasons in the supporting affidavit explaining why he stayed mute for almost eighty four (84) days. Unfortunately, that was not done. This fact was as well admitted by Mr. Mnyele.

It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and I wish to refer to **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported), where the Court emphasized that:-

> ***"...Delay of even a single day, has to be accounted for,*** *otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."* [Emphasis added].

I fully subscribe to the above authority and reasoning and I am thus constrained to sustain the submission by Mr. Mchome and Nangi on the first point, in that, the applicant has completely failed to account for the delay of each day and as such, the first reason for the delay argued by Mr. Mnyele cannot stand.

I now turn to the second point on illegality, which was said to have been raised by Mr. Mnyele during his oral submission, unprocedurally and contrary to Rule 106 (15) of the Rules. While I do agree with Mr. Nangi on this point, that, Mr. Mnyele was required to seek for the leave to include

that point in his oral submission, but I have noted that, the issue of illegality is clearly contained in the Notice of Motion *ground (b)* and *paragraph 9* of the supporting affidavit. It is also not in dispute that, the respondents have thorough responded on that point in their affidavits in reply (*See for instance paragraphs 11 in the affidavit for reply by the 1st and 2nd respondents and also paragraph 7 of the affidavit in reply by the 3rd respondent's),* respectively. I have as well noted that, the 1st and 2nd respondents have at length discussed the said point in their written submission. (*See items 2.9 – 2.12 of the 1st and 2nd respondents' submission*). Again, during their oral submissions before me, all counsel for the parties have adequately addressed me on that matter. I am therefore in agreement with Mr. Mnyele that, even if I decide to consider this matter the respondents will not be prejudiced, as they have exhaustively addressed their minds on the matter. In the event and for the interest of justice, I will proceed to consider the point of illegality raised by the applicant.

It is on record that, the issue of illegality was raised by Mr. Mnyele in respect of the decision of the High Court issued on 19th May 2016, staying the proceedings in *Misc. Civil Cause No. 14 of 2014* pending the

determination of *Commercial Case No. 183 of 2013*. Mr. Mnyele had since argued that, it was wrong for High Court Judges to invoke the provisions of Section 8 of the Civil Procedure Code, (supra) to stay the proceedings in that application, while the same was not substantially the same with the said commercial case. It was his strong view that, the said illegality constitutes a good cause for extension of time.

While Mr. Mchome and Mr. Nangi were in agreement with the principle cited by Mr. Mnyele that, ground of illegality alone may constitutes a good cause, but strenuously argued that, the decision of the High Court sought to be revised is an interlocutory decision, which is not subject for revision, as it has not conclusively determined the rights of the parties to the finality.

To ascertain the above arguments I have endeavored to reproduce the said order of the High Court which is indicated under page 14 of the High Court Ruling, contained in *Annexure Mabanga -1* to the supporting affidavit, which is couched in the following tone:- "***For that purpose it is just and equitable that we stay these proceedings pending***

determination of Commercial Case No. 185 of 2013." [Emphasis supplied].

I am mindful of the fact that, as a single Justice, I am not expected to dig deep into the matter to determine the alleged illegality, but suffice to hint that, by mere looking at the above High Court order, there is no doubt that, the same is an interlocutory decision, as it has not conclusively determined the rights of the parties therein. Pursuant to Section 5 (2) and (d) of AJA, as amended by the Written Laws, (Miscellaneous Amendments), (No.3) Act, No. 25 of 2002, such orders are not subject to revision. Even if an extension of time is granted, the intended application for revision would not yield any practical utility, as the same is barred by the provisions of Section 5(2)(d) of AJA. For the sake of clarity, Section 5(2)(d) of AJA provides that:-

> "***No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order*** *of the High Court* ***unless such decision or order has the effect of finally***

determining the *criminal charge or* ***suit.***"

[Emphasis added].

Considering the content of the above provision, as a single Justice, I can only hasten to remark that, the order the applicant is seeking to revise did not have the result of finally and conclusively determining the matter between the parties and the matter is still pending before the High Court.

I am also aware that, Mr. Mnyele has strongly argued that the above interlocutory order was wrongly invoked because the two matters were not similar. Either way, I do still find that, the point of illegality raised does not meet the established principle to constitute a 'good cause', as claimed by Mr. Mnyele. In the case of **Lyamuya,** (supra) the Court observed that:-

> "*Since every party intending to appeal seeks to challenge a decision either on points of law or facts,* ***it cannot in my view, be said that in VALAMBIA's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises point 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 supplied].

Again, in **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015, (unreported) the Court emphasized that, *the illegality in the impugned decision should be clearly visible on the face of record.*

Applying the foregoing principle to the application at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the record. Certainly, it will take a long drawn process to decipher from the impugned decision the alleged misdirection or non-direction on the point of law. i.e going through the two cases to certify if they are similar or completely un-related and whether the conclusion of one of them will

affect the other. I am therefore not persuaded that, the alleged illegality in this application constitutes a good cause.

In the event, it is my finding that the applicant has failed to advance good cause to justify the grant of extension of time. Consequently, the application is without merit and is accordingly dismissed with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 12th day of April, 2019.

R. KEREFU
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL