IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 208/01 OF 2019

GOLDEN PALM LIMITED ..... APPLICANT

VERSUS

COSMOS PROPERTIES LIMITED .....RESPONDENT

(Application for extension of time within which to lodge an application for revision from the Ruling/Orders of the High Court of Tanzania, at Dar es Salaam)

(Mutungi, J.)

Dated the 6th day of June, 2017
in
Civil Case No. 157 of 2014

RULING

26th July & 19th November, 2019

WAMBALI, J.A.:

The applicant Golden Palm Limited who was the plaintiff in Civil Case No. 157 of 2014 sued the respondent Cosmos Properties Limited before the High Court of Tanzania at Dar es Salaam. Unfortunately, on 6th June, 2017 when the said case came up for hearing, it was only the counsel for the respondent who appeared and neither the applicant nor his advocate appeared. As a result, the High Court (Mutungi, J.)

dismissed the suit with costs for want of prosecution and ordered an ex-parte hearing of the counterclaim that was fixed for 30th August, 2017.

Following the dismissal of her suit, the applicant lodged before the same court Civil Application No. 318 of 2017 seeking for the orders of setting aside the said dismissal order and restoring the suit for hearing inter-partes.

After the High Court heard counsel for the parties and considered the pleadings, on 23rd August, 2018 the learned Judge dismissed the said application with costs as she was of the view that negligence of the counsel could not constitute good cause to warrant extension of time. To support her decision, she made reference to the unreported decisions of this Court in **Paul Martin v. Bertha Anderson,** Civil Application No. 7 of 2005 and **Abbas Yusuf Mwingamno v. Kigoma Malima,** Civil Application No. 7 of 1987 (both unreported).

The applicant did not give up as she lodged before the same court Miscellaneous Civil Application No. 516 of 2018 in which she sought to be granted extension of time within which to file an application for

review of the orders of the High Court in Civil Case No. 157 of 2014 which was dismissed for want of prosecution.

Unfortunately, too, the said application was dismissed with costs on 30th April, 2019 as it was ruled that the applicant did not demonstrate good cause to deserve extension of time.

The said dismissal prompted the applicant to lodge the present application before the Court seeking extension of time to lodge an application for revision against the Ruling/Order of the High Court in Civil Case No. 157 of 2014. The application which is through a notice of motion is supported by the affidavit of Mr. Taher Muccadam affirmed at Dar es Salaam. The notice of motion advances only one ground to the effect that **"The time within which to apply for revision has already expired."**

It is important, for the purpose of this application to point out that, the most relevant paragraphs of Mr. Taher Muccadam's affidavit are paragraphs 8, 10, 12, 13 and 14 as the rest deal with the history of what transpired at the High Court as summarized above. In the event, I deem appropriate to reproduce the said paragraphs hereunder:

8. *That advocate Eliya Hurbert Mbuya passed away before hearing of the application to set aside the dismissal order and I then engaged the services of advocate Joseph Rutabingwa who upon a reflection discovered that the claim being founded in a Land matter was wrongly filed as an ordinary suit and that it ought to have been filed as a Land case under the Land Registry and was therefore certain that the High Court of Tanzania as constituted lacked jurisdiction.*

10. *That as the time within which to do so elapsed, on 4th September, 2018 our advocate Joseph Rutabingwa filed an application for extension of time to apply for review citing among others the main ground of jurisdiction. A copy of the filed application and counter affidavit are attached hereto collectively marked as* ***'annexture D'.***

"12. That on 6th May, 2019 my advocate applied for a copy of the drawn order in respect of the application for extension of time to apply for review and the same was received on 17th May, 2019. A copy of a letter of application and the respective drawn order are attached hereto and marked as ***annexture 'E'*** *collectively. The said order was supplied to my advocates on 4th June, 2019.*

13. That on my understanding and as per the advice of my advocate Mr. Rutabingwa, the issue of jurisdiction is paramount and can be raised at any time and the trial judge of the High Court of Tanzania is now set to hear the counter claim while the suit dismissed and the remaining counterclaim is as good as nothing and the intervention of this Honourable Court is through exercise of revisional powers.

14. That from the time of the dismissal order on 6th June, 2017 to the time of preferring this application, the applicant has been actively engaged in numerous applications and the application for revision cannot be lodged without the enlargement of time as the sixty days allowed had already elapsed hence the current application.

On the adversary, the respondent, through the services of Mr. Daniel Bernard Welwel, learned advocate lodged an affidavit in reply and strongly countered the affidavit of Mr. Taher Muccadam. Specifically, in answer to the reproduced paragraphs Mr. Welwel states as follows in paragraphs 7, 8, 9 and 10: -

"7. As regards paragraphs 8 and 9 I note the untimely passing of advocate Mbuya, I dispute in the strongest terms possible the rest of the said paragraphs. I state further that:

(i) *Civil Case No. 157 of 2014 was, as against the Applicant, dismissed for want of prosecution according to law.*

(ii) *As the aforesaid suit is no longer before the Court the intended application for review (sic) is of no practical advantage. The same is an academic exercise.*

(iii) *My friend advocate Joseph Rutabingwa had the conduct of the Miscellaneous Civil Application No. 318 of 2017. It was open to him to raise the issue of jurisdiction at the earliest before that application was determined. He only raised the issue, as an afterthought when the lower court refused the application for setting aside dismissal order.*

(iv) Contrary to requirements of the law, the Applicant and my friend Mr. Rutabingwa have been very economical and vague in accounting for the delay.

(v) As the counter claim is still before the High Court it is premature for this Court to deal with it...

8. I note paragraphs 10 and 11 constituting record of the trial court. I hasten to add that the applicant did not meet the requisite requirements for extension of time to be granted.

9. I do not have personal knowledge of paragraph 12. I further reply I state that: -

(i) The Respondent applied for copies of ruling and order in

respect of Miscellaneous Civil Application No. 516 of 2018 by a letter dated 30th April, 2019 and the same were ready and were supplied to us on 6th May, 2019.

(ii) There is no documentary evidence that the order was supplied to the applicant's advocate on 4th June, 2019.

(iii) The time between 30th April, 2019, when the ruling was delivered and 7th May, 2019 when the applicant's letter requesting the record was received by the lower court has not been accounted for.

(iv) The time from 4th June, 2019 to 7th June 2019 has not been accounted for.

10. As regard paragraph 13, I state in response that:

(i) An issue of jurisdiction should be raised at the earliest opportunity.

(ii) The understanding of the deponent and the advice he obtained are erroneous.

(iii) The counter claim is still pending before the High Court and, as such, it is not ripe for consideration by this court by way of revision or otherwise.

11. As for paragraph 14 I repeat what I aver in paragraph 10 herein. I state further that the numerous applications

by the Applicant are a clear manifestation of negligence, laxity and clear intentions of blocking the justice."

It is also in record of the application that both parties through their counsel lodged their respective written submissions and lists of authorities for and against the application respectively.

At the hearing of the application, Mr. Joseph Rutabingwa learned advocate appeared for the applicant, while Mr. Daniel Welwel entered appearance for the respondent. They both adopted the parties' respective affidavits and written submissions respectively in support and against the application together with the list of authorities. They only briefly elaborated on the issue of the date on which a copy of the ruling and drawn order of Mutungi, J. in respect of Civil Application No. 516 of 2018 was supplied to the applicant. While Mr. Rutabingwa maintained that the same was supplied to him on 4th June, 2019, Mr. Welwel argued that the respondent was supplied with the same on 6th May, 2019.

Having heard and considered the written submissions of both counsel for the parties, the crucial issue for determination is whether

the applicant has advanced good cause to enable me exercise the discretion of the Court in granting extension of time within which to lodge an application for revision.

Admittedly, apart from some explanation on the cause of delay in the affidavit of Mr. Taher Muccadam, the only ground advanced in the notice of motion of the applicant is that the time within which to apply for revision has already expired.

Indeed, it is not disputed that the ruling of the High Court in Civil Case No. 157 of 2014 which is sought to be revised if extension of time is granted was delivered on 6th June, 2017. The said suit was dismissed with costs for want of prosecution under Order XIV Rule 8 of the Civil Procedure Code, Cap 33 R.E. 2002. The High Court also ordered an ex-parte hearing of the counter claim. It is clear therefore, that since in terms of Rules 65 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), an application for revision has to be lodged within sixty days from the date of the decision of the High Court, the intended application had to be lodged by 5th August, 2017.

Thus, until 11th June, 2019 when the current application was lodged, it is almost more than two years which have passed.

It is the argument of the applicant through paragraph 7 of the affidavit of Mr. Taher Muccadam that from 9th June 2017 the applicant started by lodging an application to set aside the ex-parte dismissal order. The said application was however dismissed on 23rd October, 2018. The applicant did not give up as upon discovering that the time within which to apply for review against the said decision expired on 4th September, 2018, she promptly lodged an application for extension of time within which to apply for review which was unfortunately, equally dismissed with costs for lacking merits on 30th April, 2019.

As a result, on 6th May, 2019 the applicant's advocate applied for a copy of the ruling and drawn order through a letter which was received by the Registrar of the High Court on 17th May, 2019.

According to paragraph 12 of Mr. Taher Muccadam's affidavit the said drawn order was supplied to Mr. Rutabingwa learned advocate on 4th June, 2019.

In this regard, the applicant maintains that throughout the said period of almost two years, she has been actively engaged in numerous application before the High Court. Mr. Rutabingwa therefore, strongly contended that the applicant did not remain idle throughout that period and thus he has been diligent in pursuit of her rights in the judicial system.

On the other hand, Mr. Welwel strongly argued that since the only ground in support of the application stated in the notice of motion is simply that the time to apply for revision has expired, the same cannot constitute good cause for granting enlargement of time. He thus urged me to reject it and find that it is not good cause.

Moreover, Mr. Welwel argued spiritedly that the applicant has not accounted for twelve (12) days through the affidavit which were taken before lodging Civil Application No. 516 of 2018 for extension of time to lodge an application for review after Civil Application No. 319 of 2017 for setting aside the dismissal order was delivered on 23rd August, 2018. To support his contention, Mr. Welwel referred me to the decision of this Court in **Vodacom Foundation v. Commissioner General (TRA),**

Civil Application No. 107/20 of 2017 in which the Court quoted with approval the decision in **Bushiri Hassan v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (both unreported) emphasizing that delay of even a single day has to be accounted for by the applicant.

Furthermore, Mr. Welwel submitted that the applicant has also not accounted for the days from 30th April, 2019 when the ruling in Civil Application No. 516 of 2018 was delivered to 6th May, 2019 when he applied to be supplied with a drawn order. Indeed, he argued that the applicant has not proved how the said copies of the ruling and drawn order were supplied to her counsel on 4th June, 2019 while the same were ready for collection before as they were supplied to the respondent on 6th May, 2019 as stated in his affidavit in reply. Mr. Rutabingwa opposed this contention arguing that the same is unfounded.

Nevertheless, the learned advocate for the respondent urged me to find that the applicant has not shown good cause for failure to account for each day of delay.

On my part, in view of the explanation advanced by the applicant that, she has been in the High Court corridors persuing justice for almost

more than two years, the stated period of twelve days between 30th April, 2018 and 6th May, which was taken before an application for extension of time within which to apply for review was lodged before the same High Court cannot be taken as inordinate. Indeed, even the learned advocate for the respondent did not suggest to that effect in his affidavit in reply. Besides, during that period the applicant had to make arrangement and contemplate the way forward before she lodged another application after the other was dismissed with costs.

I am thus of the view that the circumstances that led to the decision of the Court in **Bushiri Hassan** (supra) is distinguishable with the present matter. Indeed, it is not doubted that by that time, the period within which to apply for revision had expired since 5th August, 2017. The short lapses of the said period of delay in lodging another application in the same court, in my considered opinion, cannot be construed as inordinate as throughout the previous period the applicant was diligent and prompt in persuing her right before the High Court. Besides, it is not disputed that throughout the said period of almost two

years, the applicant was persistently in the court's corridors seeking legal remedy.

On the other hand, I am also of the settled view that the dispute on when the applicant was supplied with the drawn order cannot be easily sorted out in view of the existing record of the application. This is because the response of the learned counsel for the respondent in paragraph 9(i) of his affidavit in reply concerning the issue is too general.

In my respectful opinion, the respondent did not support his contention in paragraph 9(i) of Mr. Welwel's affidavit in reply by a letter showing that he indeed applied to be supplied with the copy of the ruling and drawn order on 30th April, 2019 as stated and that the same were supplied to him on 6th May, 2019. Therefore, his contention that there is no evidence that the said order was supplied to the applicant's advocate on 4th June, 2019 is equally unfounded. In this regard, it is unsafe, in my opinion, to conclude that by 6th May, 2019 the copy of the ruling and drawn order were ready and supplied to the respondent as stated in paragraph 9(i) of his affidavit in reply. In the circumstances, I

find that there is no sufficient evidence to impeach the applicant's counsel statement that, the said copy of the drawn order was supplied to him on 4th June, 2019.

The other point which was advanced by the respondent to oppose the application is that the intended application for revision is not tenable as there is no likelihood that the same will be granted. The applicant maintains that this issue cannot be determined at this stage.

On my part, I have no hesitation to state that at this stage, it is not open for me to determine whether the intended application for revision is tenable or otherwise. That will be determined by the Court if extension of time is granted as prayed by the applicant. At that stage the Full Court will be in a position to hear the parties not only on the competence, but also on the merits of the application. I think at this stage it is sufficient for a single Justice to be satisfied that the applicant has shown good cause and that he has a point of law to be considered by the Full Court on the propriety or legality of the proceedings and ruling of the lower court as alleged and explained in the affidavit. I therefore respectfully reject this contention.

Lastly, the applicant's submission in support of the application for revision is that there is the issue of lack of jurisdiction by the High Court and that it is an illegality which is intended to be argued before the Court. The respondent strongly resisted the applicant's contention arguing that the issue of jurisdiction should have been raised at the earliest stage when the applicant applied to set aside an ex-parte order that dismissed Civil Case No. 157 of 2014.

On my part, as the major point which the applicant intends to raise before the Court is based on illegality concerning the jurisdiction of the High Court as explained in paragraph 8 of Mr. Taher Muccadam's affidavit in support of the application, I think it suffices to enable me exercise the discretion to grant extension of time. As stated by the Court in several of its decisions, it is settled law that once a point of law involves the alleged illegality in the proceedings or judgment of the lower court a subject of the intended revision or appeal, that by itself constitutes sufficient reason to grant the applicant extension of time. For this stance, see **VIP Engineering and Marketing Limited and Two Others v. Citibank Tanzania Limited**, Consolidated Civil

Reference No. 6, 7 and 8 of 2006 (unreported) and **The Principal Secretary Ministry of Defence and National Service v. Devran Valambia**, [1992] TLR 185 to mention, but a few. Specifically, in **VIP Engineering and Marketing Limited and Two Others** (supra) the Court stated as follows:

> *"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules given by the applicant under the Rules to account for delay."*

It is important to note that Rule 8 of the Tanzania Court of Appeal Rules, 1979 referred in the above quoted holding of the Court is in *parimeteria* with the current Rule 10 of the Tanzania Court of Appeal Rules, 2009.

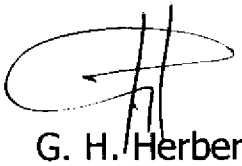
In the final analysis, based on what I have stated above, I have no hesitation to state that the applicant has sufficiently demonstrated that good cause exists to warrant my exercise of discretion to grant the

application. Accordingly, I extend time within which the applicant has to lodge an application for revision within sixty (60) days from the date of delivery of the ruling. I further order that costs shall be determined in the intended application for revision.

DATED at **DAR ES SALAAM** this 14th day of November, 2019.

F. L. K. WAMBALI
JUSTICE OF APPEAL

The ruling delivered this 19th day of November, 2019 in the presence of Ms. Ida Rugakingira, learned counsel for the applicant, and Mr. Erick Mhimba learned counsel for the respondent is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL