IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 66 OF 2010

EMMANUEL R. MAIRA ..... APPLICANT
VERSUS
THE DISTRICT EXECUTIVE DIRECTOR
BUNDA DISTRICT COUNCIL ..... RESPONDENT

(Application for extension of time, to file a Notice of Appeal out of time; time to apply for copies of Proceedings, judgment, decree and drawn Order, and, to file an appeal out of time from the Ruling of the High Court of Tanzania at Mwanza)

(Masanche, J.)

Dated the 27th day of August, 2002
In
Civil Case No. 9/2001

RULING

29 July & 13 August, 2010

KALEGEYA, J.A.:

The Applicant represented by Mr. Magesa, Advocate, by way of a Notice of Motion filed under Rules 10,48 (1) (2) and 51 (1) of the Tanzania Court of Appeal Rules, 2009, seeks from the Court orders extending *"time of filing a notice of appeal"* ; *"time of applying for copies of proceedings, judgment, decree and drawn order"*, and, to file *"his appeal against the*

decision of the High Court of Tanzania at Mwanza (Masanche, J.) dated 27/8/2002 out of time".

The matter proceeded exparte as the Respondent though duly served did not turn up.

The Notice of Motion is supported by an affidavit of the Applicant in person, which was wholly a dopted by Mr. Magesa in his submissions.

Principally, the counsel urges that the Applicant's delay was caused by two sufficient reasons: one; that when the ruling was delivered (27/8/2002) he (Applicant) was in Dar es salaam undergoing treatment which took him 6 months up to March 2003 when he returned to Mwanza, and, two, that upon his return, he was engaged in two applications in the High Court and which were dismissed on technicalities and so is another one in the Court of Appeal, and, explains off this on the basis of ignorance of the law, being a layman. Further to the above, he added that he has pertinent legal issues to be determined by the Court and which include unjustifiable departure from a mediation schedule to making a ruling, and, delivering a ruling which over-ruled a decision of another judge on same matter.

The record and submissions establish the following facts.

The Applicant was summarily dismissed by the Respondent in 1996. He subsequently instituted a suit in the High Court challenging the dismissal. The Respondent's preliminary objections that the Applicant had no cause of action in that he failed to give due notice to challenge the action as per s. 183(1) (2) of Act No. 7/82, and to appeal against the RC's action within 6 months were dismissed by the court (Mlay, J) on 5/3/2002 and which held that the action was properly before the court. The case was put on a scheduling conference track and fixed for mediation. On 27/8/2002, Masanche, J. struck it out on grounds of incompetency, having made a finding that summary dismissal could only be entertained by the High Court if it was channeled through the requisite procedure – Labour Officer, Board and finally the Minister. He concluded that it could only come to the Court to challenge the latter's decision by way of certiorari or mandamus.

Now, for the merits.

Indeed, the medical chits tendered as Exhibits display that the Applicant was on treatment in Dar es Salaam between July, 2002 and March, 2003. Thus, on 27/8/2002, when the ruling by Masanche, J, was delivered he was absent as he was already in Dar es Salaam.

Upon his return to Mwanza, and upon being made aware of the dismissal Order, on 16/4/2003 the Applicant duly filed an application, seeking, among others, an extension of time to file a notice of appeal against the decision of Masanche, J. On 9/11/2007 the Court, (Sumari, J)dismissed the application for lack of *"substantive reason"* upon holding that a delay for 7½ months was inordinate having been *"caused by inertia and lack of diligence".* Dissatisfied, the Applicant filed an application before the same Court seeking leave to appeal against the decision. The Court (Nyangarika, J) struck out the said application for incompetency upon holding that the High Court having *"dismissed a similar application for extension of time it was open to the applicant to file a fresh application to the Court of Appeal and not to this Court again".*

Unsubdued, the Applicant came to this Court armed with a Notice of Motion which sought for two orders, one for *"extension of time within which to apply to this Court for leave to appeal to this Court from the decision of the High Court (Hon. Masanche, J) dated 27/8/2002...",* and two, *"for leave to appeal to this Court".*

In the course of hearing, the Court (Massati, J.A.) sought clarification regarding the prayers as they were clothed with uncertainties. Mr. Magesa, learned counsel, conceded to the obvious and sought leave to

amend the motion. The Court having concluded that the motion contained confusious applications including the superfluous one which sought leave to appeal when the decision impugned was handed down by the Court in its original jurisdiction, granted leave to amend the Notice of Motion hence this application.

In terms of Rule 10 of the Tanzania Court of Appeal Rules, 2009, extending time limited by the rules or decision by the Court or tribunal can be made upon applicant furnishing a *"good cause"* for the failure to act in time. The question is whether the two reasons advanced herein by the Applicant meet the standards required. I am persuaded that an answer should be in the affirmative.

Starting with treatment and medication, the medical chits relied upon bail out the Applicant. They are consistent and spread out, ryhming with the period stated (July, 2002 – March, 2003). Health matters, in most cases, are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike. Applicant's failure to file the Notice of Appeal between the handing down of the decision (27/8/2002) and March, 2003, has a good cause behind: first, he was not notified of its existence, and secondly, the health incapacitation bail him out.

The above aside, the record also shows that the Applicant made determined efforts to pursue the matter upon being made aware of the impugned decision although using wrong approaches. I have detailed the chronological sequence of those attempts to bring this out.

Mr. Magesa, learned Counsel, made reference to CAT decisions in *Felix Tumbo Kissima vs Tanzania Telecommunication Co. Ltd and Another* (1997) T.L.R. 57; *Michael Lessani Kweka vs John Eliafye* (1997) T.L.R. 152 and *Fortunatus Masha William Shija and Another* (1997) T.L.R. 154 to buttress his point that where a party is shown to have diligently taken steps only to be caught up in web of technicality and even if the error is shown to have been caused by an advocate, a sufficient cause is generally taken to have existed for the delay.

In ***Kissima*** Case, the Court allowed the Applicant to file an appeal out of time, his advocate having failed to act in time due to personal interests. In the ***Kweka*** Case time was extended to serve the Respondent with copies of a notice of appeal and a letter to the Registrar applying for copies of proceedings although the said copies had not been so served inadvertently. In granting the order, the Court insisted that inadvertence is not sufficient ground, but that it is, where a party acts reasonably diligently and takes steps. In ***Masha*** Case, the Court granted extension of time

within which to file an appeal instisting that a distinction should be drawn between cases involving real or actual delays and those involved in technical delays.

For the period starting from March, 2003, the Applicant has acted diligently to pursue his cause only that he was technically being knocked out as demonstrated above. In my considered view, this kind of situation coupled with the undisputed incapacitation by sickness, indeed provide *"good cause"* for delay entitling the Applicant to the orders sought.

For reasons discussed, time within which to file a Notice of appeal and applying for copies of proceedings, judgment, decree and drawn order is accordingly extended. The same to be filed within four days of delivery of this ruling. The other order sought is superfluous as it flows therefrom in accordance with the Rules as provided. Costs to follow event.

DATED at DAR ES SALAAM this 6th day of August, 2010.

L.B. KALEGEYA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL