

TANZANIA / JUDGMENT

florence mwilinga vs laiton mwilinga

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IN THE COURT OF APPEAL OF TANZANIA AT SUMBAWANGA CIVIL APPLICATION NO. 11/09 OF 2024 FLORENCE MWILINGA.....APPLICANT VERSUS LAITON MWILINGA.....RESPONDENT (Application for extension of time within which to file an application for extension of time to apply for a certificate on a point of law on a second bite arising from the decision of the Resident Magistrates' Court of Rukwa with Extended Jurisdiction at Sumbawanga) (Mutaki. SRM- Ext. Juris) dated the 17th day of February, 2021 in Land Appeal No. 04 of 2020.

RULING

14th & 18th March, 2024 MWAMPASHI. 3.A.: On 17.02.2021, in Land Appeal No. 04 of 2020, the decision of the District Land and Housing Tribunal of Rukwa at Sumbawanga (the DLHT) in Land Application No. 08 of 2019 which was in the applicant's favour, was reversed by the Resident Magistrate's Court of Rukwa at Sumbawanga with Extended Jurisdiction (Mutaki, SRM, Ext. Juris). In that decision, apart from the DLHT's decision being upset, the Kalambanzite Ward Tribunal's decision which was to the effect that the applicant was a trespasser over the respondent's land was retained. 1 Aggrieved by the said decision of the Resident Magistrate's Court (Mutaki, SRM, Ext. Juris) dated 17.02.2021, the applicant duly lodged a notice of appeal and a request for the certified copy of the proceedings for appeal purposes, on 09.03.2021 and 12.03.2021 respectively. As the matter had its origin from the Ward Tribunal, the applicant could not file a competent appeal to this Court without first having applied and obtained a certificate on a point of law. However, allegedly for the reason of being a layman, the applicant did not apply for a certificate on a point of law within the prescribed period of time. He delayed in doing so. That being the case, the applicant had to file Miscellaneous Land Application No. 01 of 2021 for extension of time within which to apply for a certificate on a point of law. Unfortunately to him, the application was dismissed on 30.08.2021 by Mutaki, SRM, Ext. Juris. Undaunted and still desirous of presenting her grievances to the Court, the applicant filed to this Court Civil Application No. 697/09 of 2021, for extension of time within which to apply for a certificate on point of law on a second bite which was however, struck out on 22.02.2022, for not being accompanied with a decision sought to be appealed against. Thereafter, the applicant filed a fresh application vide Civil Application No. 191 of 2022. This application was again struck out by the Court on 21.09.2023

for being time barred hence the instant application seeking for extension of time within which to apply for a certificate on a point of law on the second bite which was filed on 05.10.2023. The instant application is by way of a notice of motion brought under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the rules) and it is supported by an affidavit sworn by the applicant, Florence Mwilinga. No affidavit in reply has been filed by the respondent. Although no ground of the relief sought is stated in the notice of motion as it is required by rule 48 (1) of the Rules, the grounds on which the application is premised, as they can be gathered from the supporting affidavit are two; One, that the applicant was diligent and never stayed idle as he filed several applications which were however struck out on technical reasons and two, that the impugned decision is tainted by illegalities. At the hearing before me, while the applicant appeared in person, unrepresented, the respondent was represented by Mr. Peter Kamyale, learned counsel. It is also worth noting, at this stage, that before the commencement of the hearing of the application, a notice of preliminary objection on the point that the application is time barred, which had earlier been filed on 08.03.2024 by Mr. Kamyale for the respondent, was marked withdrawn at the instance of Mr. Kamyale. In his submission in support of the application, the applicant just adopted his written submissions he had earlier filed on 05.10.2023 and prayed for the application to be granted. In the written submissions, it is insisted by the applicant that after the delivery of the judgment by the Resident Magistrates' Court with Extended Jurisdiction, the applicant never slept but had ever since been in court corridors pursuing his rights. It is contended that the applicant has always been diligent and that the delay is not inordinate. On the ground based on illegalities, it was submitted by the applicant that the proceedings and decisions of the Ward Tribunal and the DLHT are tainted with illegalities. In elaboration, it was contended that while in the Ward Tribunal the gender of assessors was not indicated in the coram, in the DLHT the opinion of assessors was not recorded by the Chairman. It was further submitted that the Resident Magistrates' Court with Extended Jurisdiction (Mtaki, SRM, Ext. Juris) and the DLHT lacked jurisdiction to entertain the appeals. It was finally submitted that illegality by itself constitutes good cause for extension of time and further that the illegalities pointed out merit the attention of this Court. In support of the application, the following decisions of the Court were cited and relied upon by the applicant; Kalunga and Company Advocates v. N.B.C Ltd [2006] T.L.R. 235, The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia

[1992] T.L.R. 387 and Tubone Mwambeta v. Mbeya City, Civil Appeal No. 287 of 2017 (unreported). In his submissions against the application, Mr. Kamyale for the respondent, opposed the application on two main reasons; One, that the applicant has not accounted for every day of delay as required by the law. He pointed out that, the period of 14 days from 21.09.2023 when the applicant's Civil Application No. 191 of 2022 was struck out by this Court for being time barred to 05.10.2023 when the instant application was filed, has not been accounted for. He further argued that the applicant has also not accounted for the delay from 22.02.2022 when his Civil Application No. 697/09 of 2021 was struck out by the Court to 02.03.2023 when he filed Civil Application No. 191 of 2022. Finally, in regard to the duty to account for delay, it was submitted by Mr. Kamyale that generally, the applicant has failed to account for the delay from 30.08.2021 when his application for extension of time

was dismissed by the Resident Magistrates' Court with Extended Jurisdiction to 05.10.2023 when the instant application was filed. Regarding the ground on illegality, Mr. Kamyalile argued that the alleged illegalities are not apparent on the record. He submitted that the complaints in regard to the coram of the Ward Tribunal and about the opinion of assessors before the DLHT are misconceived because the alleged illegalities relate to the decisions of the Ward Tribunal and the DLHT and not to the impugned decision, that is, the decision by the Resident Magistrates' Court with Extended Jurisdiction. Mr. Kamyalile further argued that failure to indicate gender of assessors in the coram is not a fatal omission as it raises no point of sufficient importance and also that the proceedings and judgment of the DLHT are not part of the record accompanying the notice of motion. As for the ground that the DLHT and the Resident Magistrates' Court with Extended Jurisdiction lacked jurisdiction, it was argued by Mr. Kamyalile that the applicant has totally failed to elaborate and show how the said two courts lacked jurisdiction. He thus prayed for the application to be dismissed with costs. In his very brief rejoinder, the applicant reiterated his prayer for the application to be granted adding that apart from the reasons he has given for the delay, he had to travel all the way from Sumbawanga to Mbeya to look for assistance from advocates who could draw the application for him. 6 Having examined the notice of motion, the affidavit in support of the application and also having considered the submissions made for and against the application, the issue for my determination is whether good cause has been shown by the applicants warranting extension of time as sought by the applicant. Before I delve into the determination of the above posed issue, I find it apposite to first restate that the mandate to extend the limitation period derived from rule 10 of the Rules, is discretionary and can only be exercised if good cause is shown. Though there is no universal definition of what constitutes good cause, in exercising such powers, the Court is required to consider not only the prevailing circumstances of the particular case but also a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. See- *The Principal Secretary, Ministry of Defence and National Service (supra)*, *Dar es Salaam City Council v. Jayantilal P. Rajan*, Civil Application No. 27 of 1987 and *Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania*, Civil Application No. 2 of 2010 (both unreported). Worthy restating is also the settled position of the law that, illegalities in an impugned decision constitute good cause for purposes of extension of time. To this effect, the Court in *VIP Engineering and Marketing Limited and 2 Others v. Citibank Tanzania Limited*, Consolidated References Nos. 6, 7 and 8 of 2006 (unreported), stated that: "We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reason" within the meaning of rule 8 (now rule 10) of the Rules for extending time". Further, in *Lyamuya Construction Company Limited (supra)* the Court observed that: "Since every party intending to appeal seeks to challenge a decision either on point 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 demonstrates 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 be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process". [Emphasis supplied] It is also a settled jurisprudence of the Court that in applications for extension of time, the applicant is required to account for each day of delay. This was emphasized by the Court in *Elius Mwakalinga v. Domina Kagaruki and 5 Others*, Civil Application No. 120/17 of 2018 (unreported) where it was stated that: "Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken". See also - *Bushiri Hassan v. Latifa Mashayo*, Civil Application No. 2 of 2007 and *Bakari Israel v. Republic*, Criminal Application No. 4 of 2011 (both unreported). Guided by the above settled principles and position of the law, I should first consider whether the applicant has accounted for the delay as it is required by the law. The relevant period of delay needed to be accounted for, is that from 30.08.2021 when Miscellaneous Land Application No. 01 of 2021 for extension of time within which to apply for a certificate on a point of law, which was filed by the applicant was dismissed by the Resident Magistrates' Court with Extended Jurisdiction (Mtaki, SRM, Ext. Juris) to 05.10.2023 when the instant application was filed. My considered view is however that, the period from 30.08.2021 after the dismissal of Civil Application No. 01 of 2021 to 22.02.2022 when Civil Application No. 697/09 of 2021 was struck out by this Court and again up to 21.09.2023 when Civil Application No. 191 of 2022 was struck out by the Court for being time barred is excusable. The delay is technical. The position of the law is settled that where a party has been diligent in taking essential steps in the furtherance of his intended matter, but on the way, he is caught up in the web of technicalities, sufficient cause is to be taken to have been shown for the delay. See- Felix Tumbo Kassim

- v. Tanzania Telecommunication Co. Ltd and Another [1997] T.L.R. 57, *Fortunatus Masha v. William Shija and Another* [1997] T.L.R. 154 and *Dalia Burhan Nindi v. Zainah Ismail Msami*, Civil Application No. 235/17 of 2021 (unreported). The remaining period is that from 21.09.2023 when Civil Application No. 191 of 2022 was struck out by this Court for being time barred to 05.10.2023 when the instant application was filed. This is a period of 14 days which, as rightly argued by Mr. Kamyalile, have not been accounted for, by the applicant. It is not explained neither in the notice of motion nor in the supporting affidavit as to what were the reasons that made the 10 applicant delay for 14 days in filing the instant application. The applicant's explanation, at the hearing of the application, that the delay for 14 days was caused by the fact that he had to travel from Sumbawanga to Mbeya to seek legal assistance in drawing the application, is regarded as nothing but an afterthought because the same was not stated in the supporting affidavit. The claim that the applicant had any legal assistance in drawing the application is also found doubtful because it is indicated in the notice of motion instituting the instant application and in the supporting affidavit that

the notice of motion and the affidavit were drawn and filed by the applicant himself. Bearing in mind that the law requires that in an application for extension of the period of limitation, the applicant has to account for every day of the delay, I find that, in the instant application, the applicant has failed to account for the delay of 14 days. This takes me to second ground on illegality. The applicant's ground on illegality, as I have alluded to earlier, is based on the claim that the gender of assessors who sat in the Ward Tribunal was not indicated in the coram, that the opinion of the assessors in the DLHT was not recorded by the Chairperson and finally that the DLHT and the Resident Magistrates' Court with Extended Jurisdiction lacked jurisdiction. It is my observation, at the outset, that, as rightly ii I argued by Mr. Kamyalile, this ground is baseless and misconceived. First of all, while generally the alleged illegalities ought to be related to the impugned decision, in the instant application the alleged illegalities relate to the Ward Tribunal and the DLHT. Further, the applicant complains about the omission by the Chairperson of the DLHT to record the assessors' opinion but the record of the DLHT is not part of the record of the instant application. There is therefore no way I can have a glance at the proceedings of the DLHT and see whether the opinion of the assessors is really missing or not. The complaint that the DLHT and the Resident Magistrates' Court with Extended Jurisdiction, lacked jurisdiction, is a mere allegation which has not been substantiated by the applicant. Apart from just stating that the two lower courts lacked jurisdiction the applicant did not bother to explain and show how did the said courts lack jurisdiction. It is therefore my considered view that non of the alleged illegalities raise any point of sufficient importance. The alleged illegalities are also not apparent on the face of the record of the impugned decision, that is, the decision by the Resident Magistrates' Court with Extended Jurisdiction (Mutaki, SRM-Ext.Juris) dated 17.02.2021 in Land Appeal No. 04 of 2020. 12 In the event and for the above reasons, I find that no good cause has been shown upon which discretionary powers under rule 10 of the Rules, can be exercised to extend time within which the applicant may file an application for extension of time to apply for a certificate on a point of law on a second bite. The application is therefore dismissed with costs. DATED at SUMBAWANGA this 18th day of March, 2024. A. M. MWAMPASHI JUSTICE OF APPEAL The ruling delivered this 18th day of March, 2024 in the absence of the applicant though duly notified and in the presence of Mr. Peter Kamyalile, learned counsel for the respondent, is hereby certified as a true A. L. KALEGEYA DEPUTY REGISTRAR COURT OF APPEAL 13

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