IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CIVIL REFERENCE NO. 1 OF 2010

JOSEPHINA A. KALALU .... APPLICANT

VERSUS

ISAAC MICHAEL MALLYA .... RESPONDENT

(Reference from the Ruling of the Court of Appeal of Tanzania at Mwanza)

(Mbarouk, J.A.)

dated the 5th day of May, 2010
in
Civil Application. No. 5 of 2009

RULING OF THE COURT

24 & 28 FEBRUARY, 2011

RUTAKANGWA, J.A.:

This reference under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the 2009 Rules) has its origin in Mwanza RM's Court, Civil case No. 121 of 1994 in which the applicant was the Plaintiff. The respondent herein was a co-defendant with one Ainaman Kalalu (the

applicant's husband). May be a short factual background will help in the appreciation of what impelled the applicant to come up with this reference.

The applicant and Ainaman Kalalu are/were wife and husband. They owned and/or resided in one house in Mwanza which all along has been referred to as a matrimonial home and we shall so conveniently refer to it. At one time a loan was obtained from a Bank. The said matrimonial house was mortagaged as security for the loan. When the loan was not paid as scheduled, Ainaman sold the house to the respondent's mother (Amina M. Malya), now deceased. The applicant went to court. She was seeking a declaration to the effect that the house was sold illegally. The sale contravened the provisions of section 59 (1) of the Law of Marriage Act, 1971, she alleged. She was successful. In its decision dated 28th July, 1997, the trial RM's Court decreed, **inter alia,** that:-

> *"The 1st defendant ordered to refund back the money he received from the 2nd defendant."*

The respondent was aggrieved and she successfully appealed to the High Court at Mwanza, **vide** Civil Appeal No. 37 of 1997.

In determining the appeal, the learned first appellate judge had appreciated the parties' evidence as follows:-

> *"The plaintiff and the first defendant were man and wife. They had a company called Leather Arts Company. Both, these, two were Directors of the Company. There was a third Director of the Company called Mr. Mshiu. These people went to the National Bank of Commerce and secured a loan there. They mortgaged this house, the subject matter of this case.* ***They failed to pay back the loan and the National Bank of Commerce, on the strength of the contract they had entered, seized the house and sold it.*** *The argument of the wife, the plaintiff, was that her husband mortgaged it*

without her consent. The learned magistrate agreed with her and acting on the provisions of S. 59(1) of the Law of Marriage Act 1971 declared that it could not be sold."

After castigating both the husband and wife for being dishonest as they appeared to have colluded in order to save the house from sale, he went on to say:-

> *"Bank loans, are, to put it mildly, very risky loans..... Banks in this country, have powers to auction such mortgaged houses even when they are matrimonial or residential houses. The power of Banks to do so is derived from the* ***English Conveyancing and Law of Property Act 1881,*** *which is applicable to Tanzania by virtue of section 2 of the Land (Law of Property and Conveyancing) Ordinance. Cap. 114." (Emphasis supplied).*

The learned judge, reasoned that as the applicant knew very well that their house had been mortgaged to the Bank and had taken no steps to enter a caveat, was estopped from complaining. The Bank had the right to sell the house, he concluded. The appeal was accordingly allowed.

The applicant was aggrieved by the decision of the High Court (Masanche, J.). She resolved to appeal to this Court. She lodged a notice of appeal but she was, however, late in lodging the application for leave to appeal. She accordingly lodged Misc. Civil application No. 63 of 2003 in the High Court at Mwanza. From her affidavit evidence it could be gleaned that she was prevented from lodging the application for leave in time as she had left for Moshi immediately after lodging the notice of appeal to nurse her then 73 years old mother who was gravely ill. She stayed in Moshi for about two months. The learned High Court judge did not purchase this story. It was not a good reason, he said. Very callously, if we may respectfully be permitted so to say, the learned judge, adding insult to injury, ruled thus:-

> ***"Mothers, like anybody else, fall sick or even die,*** *but the law of limitation does not provide for such situations...." (Emphasis is ours).*

The application was accordingly dismissed with costs. This was on 5th June, 2007. She was aggrieved by the decision. The law provided her a remedy. Being a lay person, it appears, she was totally ignorant of the appropriate avenue to follow. She thought her remedy lay in an appeal to this Court against the dismissal order of Mchome, J.

On 16th July, 2007, she lodged an application in the same High Court seeking leave to appeal to this Court against the ruling of the High Court dated 5th June, 2007. The High Court (Mackanja,J.) convinced that the said application was competently before it, dismissed it with costs. It was dismissed because in terms of Rule 43(a) of the then Tanzania Court of Appeal Rules, 1979 (henceforth the Rules) the applicant had to lodge her application for leave within fourteen (14) of days of the decision of Mchome, J.

We respectfully think that the proceedings before Mackanja, J. were wrongly entertained. The Appellate Jurisdiction Act, Cap 141 R.E. 2002, confers, in section 5(1) (c), concurrent jurisdiction on both this Court and the High Court, power to grant leave to appeal to this Court. The said Act, equally confers on the High court, in section 11(1), jurisdiction to extend time for giving notice of intention to appeal, making an application for leave to appeal or for a certificate on a point of law.

All the same, Rule 44 of the Rules provided that "whenever an application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court..." Established law is that if a party failed in the bid to get an order of such extension of time from the High Court, a second bite in this Court was permissible under Rule 8 of the Rules and thereafter an aggrieved party would have proceeded by way of a reference under Rule 57. So having failed to get an order of extension of time from Mchome, J., the applicant had a right to a second bite in this Court. Such application, however, had to be made within 14 days of the order of Mchome, J. This was not done. Hence the application, before a

single Judge of the Court which gave rise to this reference. This was Civil Application No. 5 of 2009.

In the said application, the applicant, by Notice of Motion under Rules 8 and 44 of the Rules, sought two orders. These were:-

(i) extension of time to file notice of intention to appeal to the Court, and

(ii) extension of time to file application for leave to appeal to the Court.

The applicant premised the prayer for the two orders on these grounds:-

"(i) The Hon. Justice MASANCHE, J. misapprehended the fact of the case by holding that the suit premises was sold by the bank exercising their power under the mortgage deed while the premises in question was sold by AINAMAN KALALU.

(ii) The Hon. Justice MASANCHE, J. did not make a specific finding that the transaction of sale was still incomplete therefore no property passed."

The Notice of Motion was supported by the applicant's own affidavit to which she annexed the decision of Masanche, J., Mchome, J., and Mackanja, J. The respondent resisted the application.

After hearing both parties, the learned single Judge of the Court dismissed the application with costs. In his reasoned ruling he said:-

> *"It is common knowledge that in order for the Court to exercise it's discretionary power under Rule 8 of the Court of Appeal Rules, 1979,* ***sufficient reason*** *for the delay has to be shown. In the instant application, the affidavital information shows no reason which led to the applicant's delay in filing her notice of intention to appeal...."(Emphasis supplied).*

On **"sufficient reason",** the learned single Justice had this to say:-

> *"Even if it is difficult to say with certainty what constitutes, sufficient reason to warrant extension of time, but in the instant application, the applicant failed to show any reason which led her delay in filing her notice of appeal and application for leave to appeal."*

We are in agreement with the learned single judge in his observation that "it is difficult to say with certainty what constitutes sufficient reason." We equally agree with him that the applicant had a duty to show such reasons before the Court could exercise its discretion in her favour. This Court has had on many occasions in the past shed some light on what should be taken as "sufficient reason" under Rule 8. One such occasion presented itself in the case of VERONICA FUBILE V. THE NATIONAL INSURANCE CORPORATION & 2 OTHERS, Civil Application No. 168 of 2008 (unreported).

In VERONICA FUBILE's case (supra), the Court said:-

*"... The Rules did not define what the phrase **sufficient reason** meant. However, it is settled law that the applicant must show good cause why he should be given more time. The '**more persuasive reason**', per the East African Court of Appeal in* <u>*SHANTI V HINDOCHE & OTHERS*</u> *[1973] E.A. 207, **that he can show .... is that the delay has not been caused or contributed by dilatory conduct on his part....**' But, that is not the only reason."*

Hence, this Court in the case of <u>CITIBANK (TANZANIA) LTD V T.T.C.L & OTHERS</u> Civil Application No. 97 of 2003, held that there were many and varied **special circumstances,** which an applicant can show in pressing to be allowed to argue his appeal out of time. One such special circumstance, the Court held is:-

> *".....a claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision".*

It will be recalled that Masanche, J., dismissed the applicant's appeal because the Bank had rightly exercised, in accordance with the provisions

of the "English Conveyencing and Law of Property Act, 1881," applicable to Tanzania by virtue of section 2 of the Land (Law of Property and Conveyancing) Ordinance, its power of sale under the Mortgage Deed. It was the contention of the applicant before the learned single Judge and before us that the learned High Court judge erred in law because the sale was not done by the N.B.C and so the provisions of the law relied on by the judge were not applicable. This point, which we should quickly point out was not considered by the learned single Judge, brings in the issue of the legality or otherwise of the sale of the matrimonial house in view of the mandatory provisions of section 59 of the Law of Marriage Act. To us this constituted "reasonable reason" to grant extension of time to lodge the notice of appeal and application for leave to appeal out of time. We are, therefore, of the respectful opinion that had the learned single Judge considered this legal aspect, he would not have refused to grant the orders sought in the Notice of Motion.

In view of the above findings, and the respondent having conceded before us that the house was sold to them by Ainaman Kalalu and not by the

N.B.C, we feel constrained to allow this reference. We accordingly reluctantly reverse the decision of the learned single Judge. The applicant is granted the orders sought in the Notice of Motion. She must lodge her notice of appeal against the decision and decree of Masanche, J. and the application for leave to appeal within fourteen days from the date of this ruling. We order costs to be in the cause as prayed.

DATED at MWANZA this 26th day of February, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL