IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

MZA CIVIL APPLICATION NO. 5 OF 2012

MARTHA ISWALWILE VICENT KAHABI.....APPLICANT

VERSUS

1. **MARIETHA SALEHE**
2. **VICENT KAHABI**
3. **AFISA MTENDAJI WA KATA YA BUSWELU**
4. **KAGO MARTINA NKWABI** ..... **RESPONDENTS**

(An Application for extension of time to file an application for revision from the decision of High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 17th day of November, 2011
in
(PC) Matrimonial Appeal No. 2 of 2009

RULING

22nd & 24th October, 2014

MSOFFE, J.A.:

In its contents and demands it is apparent that in this application the applicant is essentially seeking enlargement of time to file revisional proceedings against the decisions of the High Court, Mwanza, in PC Matrimonial Appeal No. 2 of 2009; the District Court of Nyamagana in Civil Revision No. 7 of 2009; and Mwanza Urban Primary Court in Matrimonial Cause No. 54 of 2007; respectively. Whether or not a revision could lie

against all the above decisions at one and the same time is not the issue of the moment. It will suffice to say that it is common ground that the applicant herein was not party to proceedings in the above decisions. The action before the Primary Court was between the first and the second respondent, respectively, who had cohabited since 1995 to 2005 and in the process, so it was alleged, they built a house at Buswelu, Bulola village, Mwanza (House No. 001/148) and following divorce proceedings an order was made for dissolution of the "marriage" and division of the matrimonial property. This decision was subject of revision by the District Court of Nyamagana. On appeal to the High Court, the decision of the Primary Court was restored. So, rightly or wrongly the decision that stands to date is that of the Primary Court because it has not been challenged and set aside by any court of competent jurisdiction.

In the meantime, the applicant has come up with this application, contending in effect and basically that, she has an interest in the property; and that she cannot appeal against the decision of the High Court because she was not party to proceedings before the High Court and the lower courts. Citing this Court's decision in **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 182

she is of the view that there are illegalities in the decision of the High Court which can only be remedied by a revision. According to her, one of the illegalities is the "*averment of existence of marriage between the 1st and 2nd respondent under customary rites while there is subsisting marriage between the applicant and 2nd Respondent".*

This application need not detain me. It is common ground that an application of this nature is at the discretion of the court. In exercising the discretion the Court must be satisfied that there are good grounds to decide in favour of an applicant.

As already observed, there is no dispute that the applicant was not party to the proceedings before the lower courts. It is also undisputed that, as per her averment under paragraph 2 of her affidavit in support of the notice of motion, she became aware of the judgment of the High Court on 10/5/2012 when she was at Ukerewe. Since the decision of the High Court was given on 17/11/2011 by that time she was already time-barred to file an application for revision by virtue of the provisions of Rule 65 (4) of the Tanzania Court of Appeal Rules, 2009, which requires an application of this nature to be filed within a period of 60 days from the date of the decision sought to be revised. Thus, once she became aware of the

decision she promptly filed this application on 5/6/2012. To this extent, it could safely be said that she was keen to pursue her intended rights promptly. But, for purposes of this application, her promptness in filing this application is not the determining factor. The crucial issue is whether or not there is good and sufficient reason to grant the application.

It is evident from the record before me that the applicant's interest in the intended revision is basically two-fold. **One**, to contest the marriage between the first respondent and the second respondent where she expects to say that her marriage with the second respondent is still subsisting. **Two**, if the application is granted she will assert that in view of the subsisting marriage between her and the second respondent she has an interest in the above property.

I will begin with the applicant's contention that if the application is granted she intends to question the alleged marriage between the first respondent and the second respondent. In my view, I am not convinced that she is likely to succeed in this intended endeavour. I say so because from the record before me I do not get the impression that this point was conclusively taken up and decided by the lower courts. Even assuming that it was, it is unlikely that she will succeed because she was not party to

the proceedings before the lower courts. In other words, I do not think that she will be able to question a marriage she was not party to. In an ideal case, and in the circumstances of this matter, I do not think the remedy open to her would be a revision. If she seriously thought and believed that she is still married to the second respondent perhaps the best remedy open to her would be to file a suit in a claim of damages for adultery.

This brings me to the other key point. On this, I am persuaded by the submission made by Mr. Deya Outa, learned advocate for the fourth respondent. Mr. Outa asserted, correctly in my view, that it was, and presumably still is, open to the applicant subject to the law of limitation, to proceed under Rule 85 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, in an application to set aside sale of the property in question.

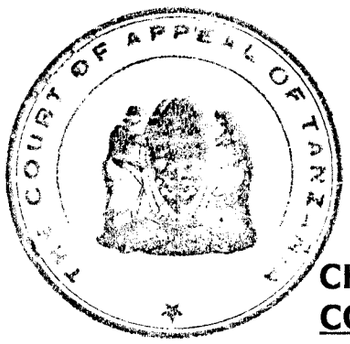
Secondly, and this is in the alternative, I am also in agreement with Mr. Outa that it was, and presumably still is, open to the applicant to proceed by way of a civil action against the first and second respondent, respectively, in a claim for the property in question.

My strong view is that granting the application will be an exercise in futility. For this reason, I will and I hereby decline the invitation to extend time to file an application for revision. Henceforth, the application is dismissed with costs.

DATED at MWANZA this 23rd day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

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



I. P. KITUSI
CHIEF REGISTRAR
COURT OF APPEAL