

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 225 OF 2014

VICTORIA REAL ESTATE DEVELOPMENT LIMITED APPLICANT

VERSUS

1. TANZANIA INVESTMENT BANK
2. M/S KABILA INDUSTRIES LTD
3. JOHN MOMOSE CHEYO
4. NGULA VITALIS CHEYO

} **RESPONDENTS**

(Application from the decision of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

dated the 1st day of December, 2014

in

Commercial Case No. 27 of 2002

RULING

5th June & 10th July 2015

MMILLA, J.A.:

In this application, Victoria Real Estate Development Limited (the applicant), is seeking this Court's order for extension of time in which to file an application for revision against the settlement order dated 26.3.2012 which set aside the sale of the property in Plot 1472 with CT No. 32132 in Commercial Case No. 27 of 2002, High Court of Tanzania, Commercial Division at Dar es Salaam, on the ground of illegalities. This is expressed in the Notice of Motion and the accompanying affidavit in

support of this application. The application is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The applicant was represented by Mr. Juma Nassoro, learned advocate. On the other hand, Mr. Seni Malimi and Ms Rita Chihoma, learned advocates, appeared for the second, third and fourth respondents. They also held the brief of Mr. Zaharani Sinare, learned advocate, for the first respondent.

The essence of the applicant's contention is that, if afforded an opportunity to file the intended application for revision, she will show that the settlement order of 26.3.2012 which resulted in setting aside the sale of the house in Plot 1472 with CT No. 32132, Msasani Peninsular in Dar es Salaam was illegal. The applicant asserts that having been the lawful purchaser of the said property, she had a lawful interest in the said house, therefore that it was wrong for the High Court to determine the settlement and subsequently to vacate the sale in respect of that property, without giving her opportunity to be heard. After all, it was further submitted, at the time the respondents sat and came up with the Settlement Deed with a view of setting aside the sale of the said house, there was nothing to settle because the title of that property had already passed to the

applicant. It is on this basis that Mr. Nassoro urged the Court to extend time to afford the applicant opportunity to file an application for revision so that the latter may contest or challenge the illegality. He relied on the cases of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185 and **Kalunga and Company, Advocates v. National Bank of Commerce Limited** [2006] T.L.R. 235. He submitted that these cases are to the effect that illegality may constitute good cause for purposes of attracting the Court to grant the prayer for extension of time.

On Ms Chihoma's allegation in her affidavit in reply on behalf of the second respondent that the applicant was not a party to the settlement proceedings, therefore that she had no interest in the said property because the sale was set aside, Mr. Nassoro submitted that it's the act of setting aside the sale of that property that prompted the applicant to seek the proposed remedial measures, and that since she was not a party in the complained of proceedings, the only way open for his client is to file an application for revision. He also said that the existence of a letter constituted in annexure TIB1 which was authored by M.A. Ismail Co, Advocates, cannot be used to legalize an illegal act or omission.

Mr. Nassoro refuted similarly the assertion by Mr. Malimi that one Betwel from M.A. Ismail Co., Advocates, represented the applicant in the settlement proceedings of 26.3.2012, and that even assuming that he was present, which he refuted, could not have cured the complained of illegality.

Mr. Malimi marshaled the submissions on behalf of all the respondents. He submitted in the first place that the applicant failed to show good cause as contemplated by Rule 10 of the Rules to attract the Court to exercise its discretion to grant the order sought. He elaborated that the order being complained of is dated 26.3.2012 and this application was filed on 1.12.2014, and that though the applicant was fully aware of the Settlement Deed, they did nothing until 18 months had elapsed. He referred the Court to the affidavits of Ms Martha Maeda for the first respondent and Ms Joyce Masele for the second, third and fourth respondents in which a letter from the applicant's former advocates dated 19.8.2013 was attached wherein she (the applicant) asked the trial court to refund her money. Mr. Malimi added that this was also reflected in his (Seni Songwe Malimi's) supplementary affidavit, particularly paragraphs 6 and 8 thereof. Indeed, he submitted, that showed as well that the

applicant was aware of the Settlement Deed a long time ago. He stressed that the applicant and her advocates were duty bound to account for that inordinate delay.

Even, he submitted, though it is stated in paragraph 11 of the affidavit in support of the application that they obtained the Settlement Deed and drawn order on 1.12.2014, they did not say whether or not they applied to be supplied those documents, and no any previous correspondences or at least a mention of follow-ups was made.

On another point, Mr. Malimi submitted that in actual fact there was no any illegality. He elaborated that the applicant was not part of the bidding process, meaning that he was not a bidder, more so that he did not attend the public auction on the said day as stated in paragraph 8 of the affidavit of John Momose Cheyo. He referred the Court to annexure JC1 featuring in the affidavit of the said John Momose Cheyo which constituted the affidavits of Suleiman N. Alhilal, Azim Hooda and Philemon N. Mgaya. In those affidavits, the deponents were clear that the applicant was neither the successful bidder, nor that she attended the auction itself. On the basis of that, Mr. Malimi submitted that the applicant was not the lawful purchaser of the property comprised in CT 32132 in Plot 1474,

Msasani Peninsular in Dar es Salaam in an auction that took place on 5.11.2004 as purported. This, Mr. Malimi added, explains why he was not made a party in the settlement proceedings which are the hub of this complaint. In view of this, Mr. Malimi submitted, apart from the fact that such facts do not reflect illegality, even if the prayer sought is granted, it will be an exercise in futility. He relied on the case of **Martha Iswalwile Vicent Kahabi v. Marietha Salehe and Others**, Civil Application No. 5 of 2012, CAT (unreported) in which he said, the Court declined to grant the prayer for extension of time on account that it was an exercise in futility.

Mr. Malimi caped it all that having shown that the perceived illegality is not actually an illegality, the applicant failed to show good cause for extension of time, and that the cases of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** and **Kalunga and Company, Advocates v. National Bank of Commerce Limited** (supra) which the applicant relied on are irrelevant in the circumstances of the present case because in both those cases the Court was availed with the facts of illegality, which is not the case here.

He lamented that in their view, it is the applicant who wants to commit an illegality. He urged the Court to dismiss the application with costs.

In a brief rejoinder to what Mr. Malimi said, Mr. Nassoro submitted in the first place that they accounted for the delay in as much as the respondents admitted that the applicant was not a party to the settlement proceedings or rather that she was not served to appear in court, further that they were supplied with the Settlement Deed and the order setting aside the sale on 1.12.2014. Since the present application was filed on 16.12.2014, that means there was no delay in filing it.

Concerning the aspect of illegality, Mr. Nassoro stuck to his guns that the applicant was the lawful purchaser of that landed property, hence that she ought to have been heard before her rights and interests in that property were taken away. On the allegations that he was not a bidder, or that he was not at the auction on 5.11.2004, Mr. Nassoro submitted that had that been the case, the respondents ought to have challenged that by filing in court an application seeking to set aside the sale under Order XX Rule 88 of the Civil Procedure Code. He stressed that after certificate of sale was issued to the applicant, in terms of Order XX Rules 93 and 94 of the Civil Procedure Code, the interest of the judgment debtor to the

property was transferred to the purchaser, therefore that it is not proper to allow this application so that it may pave way for the applicant to be heard. This is the more so, he submitted, because the Court cannot rule out at this stage that so long as he was not a bidder, or that he never attended the auction on 5.11.2004, then he was not a lawful purchaser. He pressed the Court to grant the application with costs.

It is plain and certain that, a party seeking the Court to exercise its discretion to grant the application for extension of time in which to do a certain thing, he/she is duty bound to **show good cause** for having failed to do what ought to have been done within the prescribed time. This requirement is entrenched in Rule 10 of the Rules under which this application is founded. That Rule provides that:-

*"The Court may, **upon good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

The duty for the applicant to show good cause has consistently been restated by the Court in various cases, past and present, including those of **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No 13 of 2010, CAT and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 4 of 2014, CAT (both unreported).

In **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd** (supra), the Court observed at page 5 of the judgment that:-

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term **"good cause"** is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

The rationale for this was attempted in the old English case of **Ratnam v. Cumarasamy and Another** [1964] 3 All E.R. 933 where it was stated that:-

"The rules of court must, prima facie be obeyed, and, in order to justify a court extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were

otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time – table for the conduct of litigation.”

The above is, but amongst the principles that require to guide the Court on the point.

In the present case, there is sufficient ground to believe that the applicant was aware of the settlement order early enough, but she took no measure to file the application for revision which is why she filed this application for extension of time after 18 months had elapsed. This is so because as submitted by Mr. Malimi, the letter from the applicant's former advocates dated 19.8.2013 bears evidence that they were aware of the Settlement Deed a long time ago. However, there is nothing on record, and Mr. Nassoro did not afford any information that the applicant ever applied to be supplied with the proceedings and the order which is the subject of the contemplated revision. Since she was duty bound to explain the inordinate delay that was, and because she did not take any such steps as aforesaid, *ipso facto* the applicant larched.

On the other hand however, the Court is conscious that reasons for the delay in an application for enlargement of time is not the sole ground -

See **Republic v. Yona Kaponda & 9 others** [1985] T. L. R. 84. The court seized with duty to consider an application of this nature has to judge not only whether or not there are **sufficient reasons for the delay**, but also **for extending the time** to take the intended steps. To be precise, the Court said in that case that:-

*"... as I understand it, "sufficient reasons" here does not refer only, and is not confined to the delay. **Rather, it is sufficient reasons for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved...**"* [Emphasis added].

There is no doubt that this explains why illegality may, in fit cases, constitute sufficient cause for the delay as was found in the cases of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** and **Kalunga and Company, Advocates v. National Bank of Commerce Limited** (supra) and **VIP Engineering and Marketing Ltd & Others v. Citibank Tanzania Ltd**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CAT (unreported) being relied upon by Mr. Nassoro.

In **Devra Valambhia's case**, the counsel for the applicant had submitted, in effect, that the High Court put a wrong interpretation on rule 2A of order 21 of the Government Proceedings (Procedure) Rules 1968 (G.N. 376 of 1968), and thereby came to the erroneous conclusion that the decree could properly be executed by issuing a garnishee order when it could not. In that regard, the Court stated that:-

*"In our view when the point at issue is one alleging illegality of the decision being challenged, **the Court has a duty even if it means extending the time for the purpose of ascertaining the point and if the alleged illegality be established to make appropriate measures to put the matter and the record right.**"* [Emphasis is added].

In our present case Mr. Nassoro alleges that, having been the lawful purchaser of the said property, the applicant had a lawful interest in the said house, therefore that it was wrong for the High Court to determine the settlement and subsequently to vacate the sale thereof, without giving her opportunity to be heard.

A careful scrutiny of the facts availed in this case reveal that there is no serious disputed that the applicant, who had purchased the said house, was not invited to participate in the settlement process that culminated into setting aside the sale of the property in issue, therefore that she was condemned unheard. Surely, to do so works injustice - See the case of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T. L. R. 251 in which the Court stressed that the right to be heard was not only a fundamental right, but a constitutional one, and that where a party may not have been afforded such a right, the proceedings are a nullity.

I have taken into consideration the argument raised by Mr. Malimi that sometimes, the alleged illegality must be looked at together with other factors, such as where, he says, extension of time may be an exercise in futility for which he relied on the case of **Martha Iswalwile Vicent Kahabi v. Marietha Salehe and Others**, (supra). He has said that because the applicant was not part of the bidding process, also that he was not present at the auction, to allow this application will be an exercise in futility.

In **Martha Iswalwile Vicent Kahabi v. Marietha Salehe and Others** case, the applicant was not a party to the proceedings before the lower courts. She became aware of the judgment of the High Court after 60 had elapsed, such that she could not have straight away filed for revision. The alleged illegality on which she anchored her request for extension of time was validity or otherwise of the marriage between her and the second respondent. In refusing the application, the Court said that it was unlikely that the applicant was going to succeed to convince the court that her marriage with the second respondent subsisted because that point was not taken up and decided by the lower courts, which Mr. Malimi opined as having amounted to saying it was an exercise in futility.

In the views of this Court, those facts and circumstances were dissimilar, thus distinguishable, to those obtaining in the present case. In the present case the applicant asserts that he was the lawful purchaser of the said property and was granted certificate of ownership thereof, therefore that she had a lawful interest in the said house, hence that it was wrong for the High Court to determine the settlement and subsequently to vacate the sale in respect of that property, without giving her opportunity to be heard.

The above facts clearly show that in the circumstances of this case, **illegality is in issue**, whence that it does not subscribe to Mr. Malimi's view that if the application will be granted, that will be an exercise in futility as evidence will necessarily be required in order to resolve it. As such, the Court cannot rule out at this stage that so long as he was not a bidder, or that he never attended the auction on 5.11.2004, then he was not a lawful purchaser. Certainly, deciding at this stage whether or not the illegality, if upheld, will be an exercise in futility may border closer to going into the merits of the application intended to be filed if time is extended. See the case of **The Regional Manager – TANROADS Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 CAT (unreported) in which the Court warned that:-

"...it is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issues before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews."

See also the case of **Motor Vessel Sepideh and Another v. Yusuf Moh'd Yussuf and Another**, Civil Application No. 91 of 2013, CAT (unreported).

In view of what I have expressed above, I find and hold that this is not the proper forum to tackle the issue whether or not the illegality was well founded.

That said and done, I find that the applicant has shown good cause to attract the Court to grant the application for extension of time as I accordingly do. Thus, time is extended for a period of 60 days from the date of delivery of this ruling. Costs to be in the course.

DATED at **DAR ES SALAAM** this 3rd day of July, 2015.

B. M. MMILLA
JUSTICE OF APPEAL.

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL