IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 521/01 OF 2016

JOACHIM MWINGIRA .... APPLICANT

VERSUS

AGATHA MWINGIRA .... FIRST RESPONDENT

JUDITH MWINGIRA .... SECOND RESPONDENT

(Application for Extension of Time within which to apply for revision of the proceedings and order of the High Court of Tanzania, Dar Es Salaam District Registry at Dar Es Salaam)

(Shangwa, J.)

dated the 18th day of May 2015
in
Probate Cause No. 6 of 2013

RULING

16th June & 1st August, 2017

NDIKA, J.A.:

By notice of motion made under rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), the applicant named above applies against the respondents for extension of time within which to apply for revision of the proceedings and order of the High Court of Tanzania sitting at Dar Es Salaam dated 18th May 2015 in Probate Cause No. 6 of 2013. The application is supported by the applicant's own affidavit. In

opposition to the application, the respondents filed a joint affidavit in reply.

The background facts in this matter may, I think, be stated briefly as follows: before the High Court of Tanzania sitting at Dar Es Salaam in Probate Cause No. 6 of 2013 lodged on 11th February 2013, the respondents applied for the grant of letters of administration of the estate of the late Joseph Mwingira who died on 28th April, 2012. On 6th May 2013, the applicant lodged a caveat under section 58 of Probate and Administration of the Estates Act, Cap. 352 RE 2002 and rule 82 of the Probate and Administration of Estates Rules, 1963. According to the aforesaid caveat, the applicant objected to the respondents' application and prayed that nothing be done in respect of the deceased's estate without due notice to himself and other twelve children of the deceased whom he apparently did not mention. It is averred in Paragraph 4 of the supporting affidavit, that the applicant took that action so as to oppose the respondents' application on the ground that he had already applied for and obtained letters of administration over the same deceased's estate from the District Court of Songea at Songea in Probate and Administration Cause No. 2 of 2013 issued on 29th April 2013, copies of which are annexed to the affidavit (Annexure JM-3). In response to the

caveat, the High Court issued a citation to the caveator dated 2nd July 2013 (also Annexure JM-3) but hearing was adjourned on several occasions.

On 18th May 2015, the matter came up for hearing before the High Court in the presence of the respondents herein but in the absence of the applicant who, as caveator, was supposed to appear. At the request of the respondents, the Court dismissed the caveat for the default of appearance by the caveator (i.e., the applicant herein) upon evidence that he had due notice of the hearing. Having dismissed the caveat, the Court granted the respondents herein letters of administration over the deceased's estate as joint administratrices.

Aggrieved by the aforesaid decision of the High Court, the applicant now intends to move this Court to revise that decision on a number of reasons. Since, according to rule 65 (4) of the Rules, the intended revision ought to have been lodged within sixty days from the date of the decision complained of and as the said limitation period supposedly elapsed on or about 17th July 2015, the applicant now prays for extension of time to lodge an application for revision.

Rule 10 of the Rules, cited as the enabling provisions for this application, confers on this Court broad and discretionary power to enlarge the time limited by the Rules for doing any act authorized or required by the Rules where good cause is shown. While it may not be possible to lay down an invariable or constant definition of good cause for extension of time, the Court must consider the merits or otherwise of the excuse cited by the applicant for failing to meet the limitation period prescribed for taking the required step or action. Apart from valid explanation for the delay, good cause would also depend on whether the application for extension of time has been brought promptly as well as whether there was diligence on the part of the applicant in the matter (see, for instance, this Court's unreported decisions in **Dar Es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; and **Yusufu Same and Hawa Dada v Hadija Yusufu**, Civil Appeal No. 1 of 2002). The crucial question in this matter is, therefore, whether the applicant has shown good cause.

The justification for this application, as shown on the notice of motion and elaborated in the supporting affidavit and written

submissions, is two-fold. First, the applicant contends that he was unable to lodge the intended revision application within the prescribed limitation period because the High Court delayed supplying him with the certified copies of the decision complained of, drawn order and the proceedings despite having applied for them on 21st May 2015, about three days after that decision was made. A copy of that letter is attached to the affidavit as Annexure JM-4 along with a subsequent reminder dated 14th August 2016.

At this point, I wish to note that the applicant deposed in Paragraph 11.3 of the supporting affidavit that:

> *"Despite the explicit request, the Applicant was (sic!) not yet received the requested documents on time."*

Upon reading the above deposition, I wondered what it meant exactly. Initially, I pondered whether it constituted an acknowledgement by the applicant that he received the certified documents out of time. Nonetheless, as I note that he has attached to his supporting affidavit what purports to be a copy of proceedings before the High Court, which is apparently unsigned and uncertified, it becomes clearly uncertain whether he has or has not collected the officially certified copies of the

decision, drawn order and proceedings. If he has collected them out of time, it is evident that the affidavit does not disclose the date on which collection was made. It should also be observed that if the above averment meant that the applicant was yet to be supplied with the requested documents by the High Court, one would be amazed whether the course taken by him to seek extension of time when he still does not have the necessary documents for the revision sought is impulsive, premature and imprudent.

The second line of justification for this application is chiefly based upon the contention that the applicant "does not have the right of appeal or further review of the decision of High Court" and that the intended revision is necessary for challenging the said decision of the High Court, which is tainted with illegalities and irregularities. It is claimed that the said decision was a nullity on account of being made without availing the applicant an opportunity to be heard on his caveat and that the proceedings of the High Court on the material day exhibited a state of confusion and procedural improprieties. In particular, the applicant contends that the High Court failed in its duty to cause the matter being registered and handled as a normal suit after the applicant had lodged the caveat and entered appearance. In the circumstances, it is

contended, the Court wrongly dismissed the caveat and erroneously granted the letters of administration to the respondents herein.

In her submissions in support of the application, Ms. Anna Marealle, learned Counsel for the applicant, restated the two grounds of justification as summarised above and beseeched the Court to grant the applicant. In particular, she made reference to the written submissions in support of the application whose thrust was based upon a number of authorities including: **Kalunga and Company Advocates v National Bank of Commerce Limited** [2006] TLR 235; **Said Issa Ambunda v Tanzania Harbours Authority**, Civil Application No. 42 of 2005, CAT at Dar Es Salaam (unreported); **Samson Ng'walida v The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 (unreported); **Mbeya-Rukwa Autoparts and Transport Ltd v Jestina George Mwakyoma** [2003] TLR 251; **Benedict Mumello v Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported); **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185; and **Victoria Real Estate Development Limited v Tanzania Investment Bank and Others**, Civil Application No. 225 of 2014 (unreported).

Both respondents, appearing in person without legal representation, resisted the application. They contended that the applicant was to blame for non-appearance in court on 18th May 2015 and for not acting promptly to pursue appropriate recourse if he was aggrieved by the High Court's decision rendered on account of him being a no-show at the hearing. The second respondent was particular that the matter before the High Court proceeded without any formal notification to the Court that the applicant had been appointed the administrator of the deceased's estate.

Mr. Silvanus Mayenga, learned Counsel who assisted Ms. Marealle, rejoined that the caveat lodged with the High Court included a notification that the applicant had been duly appointed the administrator of the deceased's estate and that the Court ought to have taken cognizance of that fact. I should interpose here to observe that I disagree, with respect, with Mayenga that the caveat includes a note on the applicant's appointment. It is evident that the copy of the caveat annexed to the supporting affidavit is unmistakably silent on that fact.

As indicated earlier, the question before this Court is whether there is good cause for exercising discretion in favour of the applicant. I

propose to deal, at first, with the explanation of the delay proffered by the applicant and, then, I will discuss the contention that time be extended to allow the applicant to seek revision of the High Court's decision because it is allegedly riddled with illegalities.

It is undisputed that the applicant submitted a written request to the High Court for being supplied with certified copies of the decision, drawn order and the proceedings on 21st May 2015, which was three days after that decision was made. As no documents were forthcoming for over fifteen months, the applicant's newly appointed advocates submitted to the Court a reminder dated 14th August 2016 (i.e., Annexure JM-4). Yet, what I find clearly problematic is that the supporting affidavit does not state definitively on whether the applicant was ever supplied by the High Court with the requested documents and if so, when. I hinted earlier that the applicant's own averment in Paragraph 11.3 on that aspect is nebulous, contradictory and unreliable. While mindful that this application was lodged on 21st December 2016, which was more than four months after the applicant had sent a reminder to the High Court, I am unable to determine if he acted promptly to pursue this matter as he has not disclosed with certainty whether he was actually supplied with the requested documents and if

so, when. By withholding that vital fact, the applicant has failed to account for each day of delay especially between 14th August 2016 when his advocates submitted the reminder to the High Court and 21st December 2016 when he lodged this matter. I am heedful of this Court's well-established position that any applicant seeking extension of time must account for each day of delay. Indeed, the Court has reiterated that position in numerous cases including **Bushiri Hassan v Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) by stating 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."*

On the basis of the foregoing analysis, I find it unproven that the delay to lodge the intended revision is fully attributable to the wait for the supply of necessary documents by the High Court.

As indicated earlier, the second line of justification for this application is predominantly premised upon the contention that the applicant does not have the right of appeal or further review of the decision of High Court because he was not a party to the matter before

the High Court even though he had an interest in that matter. It is, therefore, argued, it seems to me, that the intended revision is the only available avenue for challenging the said decision of the High Court allegedly tainted with illegalities and irregularities.

I must express at this point that I would agree with the applicant, for a start, that it is arguable the High Court handled the matter erroneously and irregularly. For in terms of sections 58 and 59 of Cap. 352 (supra) and rule 82 of the Probate and Administration of Estates Rules, 1963, the Court ought to have caused that matter to be registered and handled as a normal suit after the applicant herein had lodged the caveat and entered appearance in response to a citation. Had the said proceedings been converted or turned into a duly registered suit, to be determined in accordance with the provisions of the Civil Procedure Code, Cap. 33 RE 2002 as stated by section 52 (a) of Cap. 352 (supra), the parties, then, ought to have been directed to file relevant pleadings accordingly. It is unquestionable that the Court did not do so. In the circumstances, it should be arguable that the High Court's dismissal of the caveat and the subsequent grant of the letters of administration to the respondents herein were irregular.

Nonetheless, what I find absolutely unconvincing is the argument that the applicant has no remedy for challenging the arguably irregular decision of the High Court except recourse to revision by this Court of the High Court's decision. In my view, the applicant's claim that he does not have the right of appeal or review of the decision of High Court because he was not a party to the matter before the High Court even though he had an interest in that matter is plainly flawed and inaccurate. The applicant, being a caveator, was essentially a party to that matter and that he had standing to challenge the High Court's decision to this Court in accordance with the provisions of section 5 (1) of the Appellate Jurisdiction Act, Cap. 141 RE 2002. That is apart from his option to move the High Court in accordance with the provisions of Cap. 33 (supra) to set aside its dismissal of the caveat for his non-appearance. In my considered view, since the applicant sat idly by without pursuing either of the aforesaid two options, he cannot seek recourse to revision on the ground that the other two options have been extinguished by effluxion of time.

I find it particularly necessary to emphasize that the applicant's position is starkly different from that of the successful applicant in **Victoria Real Estate Development Limited** (supra) cited by Ms.

Marealle. In that case, this Court granted extension to that applicant who was not a party to the matter before the High Court to allow that party an opportunity to challenge the High Court's decision on the allegation that it was tainted with illegalities. It was obvious that the said person had no recourse other than revision.

It is firmly established in the jurisprudence of this Court that except in very extraordinary circumstances a party to proceedings in the High Court cannot be allowed to invoke the revisional jurisdiction of the Court as the alternative to the appellate jurisdiction of the Court: see, for instance, **Halais Pro-Chemie v Wella A.G.** [1996] TLR 269; and **Eric Sikujua Ng'maryo v Joseph Sinde Warioba**, Civil Application No. 10 of 2001, CAT at Dar Es Salaam (unreported). I have no doubt that this matter presents no extraordinary circumstances to qualify as an exceptional case.

In conclusion, it is my view that this application has failed to prove that the delay to lodge the intended revision is fully attributable to the wait for the supply of necessary documents by the High Court. In addition and more importantly, I hold that granting this application on account that the High Court's decision is riddled with illegalities or

material irregularities will be an exercise in futility because the applicant's intended invocation of this Court's revisional jurisdiction is untenable on the reason that he had other viable alternative recourses. On this analysis, I decline to exercise my discretion in favour of the applicant to extend time to apply for revision. In the result, this application is dismissed. In view of the nature of this matter, I order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 27th day of July 2017.

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL