IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 60/17 OF 2018

1. **FELIX PANTALEO MSELLE**
2. **SARAH SABATH**
3. **IBRAHIM JOHN MUSHI**
4. **ALLY MWINYIBOHARI**
5. **AMEDEUS MOSHA**
6. **CATHBERT AKARO**
7. **BEATRICE STANSLAUS WAMBURA**
8. **FADHIL DADIA**
9. **RODGERS GUMBO**

..... **APPLICANTS**

VERSUS

TANZANIA COMMISSION OF SCIENCE AND TECHNOLOGY ..... **RESPONDENT**

(Application for extension of time to apply for revision against the judgment of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Hon. Ruhangisa, J.)

dated the 8th day of April, 2016

in

Land Case No. 175 of 2012

RULING

3rd April & 27th May, 2019

KOROSSO, J.A:

The applicants filed the application by way of notice of motion made under section 4(2) and (3) of the Appellate Jurisdiction Act, Cap 141 RE 2002 and Rule 10 of the Tanzania Court of Appeal Rules, 2009, read together with

Rule 4(2) (a)(b) and (c) Tanzania Court of Appeal Rules, 2009. The application is filed under a Certificate of Urgency supported by an affidavit sworn by Twaha Taslima, Learned Advocate.

This application pursues to move the Court to grant extension of time to file an application for Revision, against the judgement of the High Court of Tanzania (Land Division) at Dar es Salaam (Ruhangisa, J) in Land Case No. 175 of 2012 dated 8th April 2016. On the ground that they were denied opportunity to be parties to the case and they were not aware of the case before the High Court until when they were notified by their neighbours who were parties to that case when it had already been decided. That the intended revision intends to challenge errors committed by the High Court in the relevant above cited land case No. 175 of 2012. The applicants also sought for an order that costs of and incidentals to this application abide by the result of the said intended application for revision.

The respondents duly filed an affidavit in reply, sworn by Jerome Joseph Msemwa learned Advocate. A matter to note, is that on 5th April 2019, there was a notice of change of advocates filed, after the Court was informed on this development on the date fixed for hearing. The oral and written notice, were to the effect that the Solicitor General was taking over as the

counsel representing the respondents, that is, Tanzania Commission for Science and Technology and it was recorded as such. Despite this, the counsel representing the respondents, adopted all the relevant documents filed on behalf of the respondents in response to the application before the Court.

On the date of hearing, the applicants were represented by Mr. Twaha Taslima, Learned Advocate and the respondents were represented by Mr. Abubakar Mirisha, Learned Senior State Attorney. On this date, when the matter was called for hearing, in the presence of counsels for the applicants and the respondents, the counsel for the applicants prayed to withdraw the notice of preliminary objection filed on 24th of March 2019. Soon after, the counsel representing the respondents, also presented submissions to withdrawal the notice of preliminary objection they filed on 1st of April 2019. The Court acceded to the prayers from both the counsels for the applicants to withdraw pertinent notice of preliminary objections. The Court assented and thereafter granted the prayers and then proceeded to record and mark the relevant preliminary objections as withdrawn.

Proceeding to the hearing, hearing proceeded were counsels for the applicant and the respondent proceeded to substantiate the context of their

positions/cases as discerned from affidavital evidence, filed written submissions, and citation of various decisions of the Court and also oral submissions made in Court.

The background to the matter before the Court is presented in the affidavits supporting the notice of motion, and also the reply to the affidavit. Briefly, what is averred is that the 1st to the 9th applicants claim to be lawful owners of various plots situated at Block B at Boko area Dar es Salaam as specified in paragraph 2 of the said affidavit. That the applicants had acquired the said plots and land which were unsurveyed at the time, through purchase from various previous owners from the year 2003 and that they have erected permanent buildings on the said plots. That Land Case No. 175 of 2012, instituted at High Court Land Division was instituted by the respondents, whereas the applicants were not parties thereof. That the said case proceeded *exparte* and ended in favor of the respondents. The said judgment, ordering that the improvements made in the plots alleged to belong to applicants and claimed by the respondents be demolished.

The applicants counsel advanced grounds for the sought relief in this application. Arguing that the delay to file for revision in time was caused by various reasons. First, that there is illegality in the proceedings leading to

the judgment sought to be revised, in that the applicants were denied chance to be heard. That no efforts have been shown by the respondents (defendants), during the hearing of the case, to express summon the applicants was effected. That this fact is substantiated by there being no evidence on record to show that the applicants were summoned to appear. The applicant's counsel submitted that such occurrence/happening, vitiates the proceedings at the trial. There argument was that the applicants were denied rights to be heard. To cement this argument, they referred the Court to the decision of the Court of Appeal in Civil Application No. 2 of 2010, ***Lyamuya Construction Company vs. Board of Trustees of Young Christian Women Association of Tanzania.***

The Second issue raised by the applicants, is that the failure to account for each day of delay is due to the fact that the applicants were not parties to the trial case for which they seek revision. That the time required of 60 days for an aggrieved party to seek revisionary proceedings is for those who are parties to the case and should not be considered for those other interested parties not parties to proceedings. Thus submitting that, since there is nothing on record to show that the applicants were summoned to attend proceedings related to Case No. 175 of 2012, the applicants should

not then be penalized for failure to account for each day of delay from the time a judgment is delivered. The counsel for the applicants continued to submit that despite that being the position, the Court should take into account the fact that there is nothing to show there was inordinate delay. That the applicants had shown diligence in pursuing their rights in that as soon as they became aware of the existence of the judgment, they initiated process to seek their legal rights.

The applicant's counsel also implored the Court to grant the application, stating that if the High Court decision is left to stand, it will mean and lead to massive destruction of houses situated in the disputed plots of land, and thus prayed for the application to be allowed and costs be met by the respondents.

On the part of the respondents, submitting that the assertion by the applicants counsel of the massive construction in the disputed plots is not a point for consideration of the Court at this juncture, in line with established principles in ***Lyamuya's case*** (supra) with regard to applications for extension of time. The learned Senior State Attorney argued that, the applicants have failed to comply with one of the principle, which requires for each day of delay to be accounted for by the applicants. That paragraph 7

of the affidavit, supporting the notice of motion, fails to show the specific date the applicants became aware of the impugned judgment which is necessary to respond to the principle of accounting for each day of delay.

The learned counsel for the respondents, also submitted that the applicants have failed to prove that the delay in filing the application was not inordinate, in view of the applicant's failure to show specific date they became aware of the challenged judgment. With regard to the third principle for consideration when addressing prayers for extension of time, related to need to show diligence not apathy or negligence on the part of the one seeking extension of time. That non specification of date hinders proper determination of this principle in the present application. With regard to the third principle on the issue raised, that is illegality in the proceedings, can be a ground for extension of time, the respondents counsel submitted that the applicants have failed to show there being any illegality in the trial proceedings. That the applicants claims of not being summoned to appear during the trial, cannot stand because at the time they were not parties to the proceedings and therefore there is nothing to show there was any illegality in the proceedings.

In their brief rejoinder, Mr. Twaha Taslima learned advocate for the applicant reiterated their submitted stance on the fact that they have managed to expound all the relevant conditions as outlined by case law, which should lead the Court to find that they have shown good and sufficient cause to warrant the prayers sought, that is, extension of time, to file an application for revision as expounded in their notice of motion.

The Court has gone through the arguments presented by counsels for both sides with regard to the matter before the Court. The issue before the Court, in line with the requirements in Rule 10 of the Tanzania Court of Appeal Rules 2009 (as amended), is whether the applicants have provided good and sufficient reasons for the Court to exercise its discretion and grant the prayers sought.

In this situation, the Court, whilst being aware of the numerous authorities by this Court expounding on conditions and principles to guide the Court when exercising its discretion on whether or not to extend time, I will be guided by the principles established one of these decisions. A case cited by counsels for both sides, that is, ***Lyamuya Construction Company Limited vs. Board of Trustees of YWCA of Tanzania*** (supra). Where in short, it guides the Court when exercising its discretion to grant extension of

time, it should consider such factors as the length of delay; the reason for the delay; the applicant must account for the delay of each day and degree of prejudice that the respondent may suffer if the application is granted.

It should be borne in mind that, where illegality in the proceedings, is raised as a ground, this can also be considered as a good cause for extension of time. This can be discerned from various decisions of this Court such as **Kalunga and Company Advocates Ltd vs. National Bank of Commerce Ltd** (2006) TLR 235 and the **Principal Secretary, Ministry of Defence and National Service vs Divram P. Valambhia** (1992) TLR 387. What amounts to good cause has not been defined by the Rules but the jurisprudence of, the Court has it that extension of time being a matter within the discretion of the court, cannot be laid down by any hard and fast rules but, rather, will be determined upon consideration of all the circumstances of each particular case, as also discussed and determined in **Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported).

The applicants reason for the delay, has expounded by their counsel is that, they were unaware of the filed case in the High Court Land Division, that is, Land Case No. 175 of 2012. Therefore, they contended, they were

not aware when the Judgment was delivered. That they were not summoned to appear during the trial, being interested parties. The fact that the applicants were not party to the said Land case has not been disputed, and records reveal this, so it is a fact.

The Court has considered the applicant's counsel averment in the affidavit supporting the notice of motion which addresses this point and submissions, and finds that the reason stated do not clearly expound, how the applicants became aware of the existence of the case, and the date they became aware. Where the reason is grounded on lack of knowledge, one would have expected an affidavit of a person or who informed the applicants of the case or that of the applicants themselves on how they came to the knowledge of the existence of the disputed case. In the least, to give weight to this assertion, the affidavit supporting the notice of motion should have given the exact date or probable dates, when the applicants were privy to such information. I have perused through the relevant affidavit and there is nothing to this effect.

The Judgement for which the applicants seek to challenge was delivered on the 8th of April 2016 and the application before the Court and under consideration was filed about 671 days after, that is, on the 18th day

of February 2018. There is nothing in the applicant's submissions to assist the Court to consider whether the delay was not inordinate. Since it has no dates, nor any assertions on when exactly and from whom the applicants came to the knowledge of the disputed land case and the Judgement. Having considered all the factors before the Court on this issue, we find that the applicants have failed to show that the delay was not caused by negligence on their part or that it was not inordinate.

The second ground asserted by the applicants, is that there is illegality in the proceedings of Civil Application No. 175 of 2012, asserting that the applicants were denied the right to be heard, that there is no record in the trial proceedings to show that the applicants were summoned.

Whilst it is fully established that the Court at this juncture cannot consider on whether or not this assertion of illegality in proceedings have been proved. The Court is also aware of the position of this Court stated in ***Mbeya Rukwa Autoparts, and Transport Ltd. vs Jestina George Mwakyoma*** (2003)TLR 251 on the importance of parties to be accorded the right to be heard. But as asserted by the Learned Senior State Attorney for the Respondents, this case is distinguishable. It should be noted that in the present case, the applicants were not known by anyone, no evidence

provided by applicants that they were known to the respondents. That being the position, it is improbable that the Court could have summoned the applicants, who were not parties to the suit. It should also be remembered that vide paragraph 2 and 3 of the affidavit supporting the notice of motion, the applicants acquired the disputed plots, that is, Plots No. 137, 138, 141, 142, 143, 144, 145, 146, 147, 149, 150, 151 and 152 at Block B Boko area Dar es Salaam from various previous owners since the year 2003. Unfortunately, the said previous owners are not specified, nor is it stated that the respondents were part of the previous owners.

Not being very specific in the affidavit, leaves the Court with nothing on the face of the application and affidavit to consider and determine whether or not the assertion of being denied right to be heard is something which should be scrutinized further by this Court and therefore warrant the Court to find, that the assertion on illegality of proceedings, is a good cause to warrant the Court exercise its discretion and grant extension of time. As stated in the case of Lyamuya (supra), while discussing an issue of illegality raised in an appeal, stated that the assertion on illegality when raised must be apparent on the face of the record.

Thus, while it is not the Court's intention to discuss and consider the merit of the ground of illegality raised by the applicants, the Court finds that the assertion that there was illegality in the proceedings of the trial Court, specifically, denying the applicants the right to enter appearance and be heard, is not apparent on the face of the record before the Court. We find that this ground also fails to move the Court to exercise its discretion to extend time as prayed by the applicants.

The last ground by the applicants is that failure to grant the application will lead to massive destruction of houses in the said area, a ground which upon further scrutiny I find is not a matter for consideration of this Court at this juncture, not going to the root of what is required under Rule 10 of the Tanzania Court of Appeal Rules, 2009 when considering an application for extension of time. But at the same time being aware that the Court is also duty bound as guided by case law, already referred to hereinbefore, that Courts also consider, when determining on whether or not to extend time, that is, on the degree that the respondent may suffer if the application is granted. We find that granting extension of time under the circumstances will prejudice the respondents since, from the records, the applicants only came in at the late stage, and having regard to the contents of the affidavit

supporting the applications without any dates of purchase, no name of those the purchased from and thus could interfere with any claims they have on the said plots.

With respect to the applicants, I also find that there is no ground advanced by the applicants which has brought forth reasons or ground which the Court can state is good cause to warrant grant of application.

All said and done, the applicants have failed to show good cause for the delay in filing the application, to warrant the Court to extend time as sought. Therefore the application is devoid of merit and it is thus dismissed with costs.

DATED at **DAR ES SALAAM** this 27th day of April, 2019.

W. B. KOROSSO
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL