IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 32/17 OF 2018

DAMAS ASSESY.....1ST APPLICANT
FLORA D. ASSESY.....2ND APPLICANT

VERSUS

1. RAYMOND MGONDA PAULA
2. VICENT BRUNO MINJA
3. THERESIA PAULA WILLIAM
4. SHAMIM ABSHIRI MSANGI
5. BRUNO MTETA PETER
6. GLADNESS PAULA
7. THE REGISTRAR OF TITLES
8. THE ATTORNEY GENERAL
9. THE KINONDONI MUNICIPAL COUNCIL
.....RESPONDENTS

(Application from the Decision of the High Court of Tanzania, (Land Division) at Dar es Salaam)

(Mgetta, J.)

Dated the 24th Day of April, 2014
in
Misc. Land Appeals Nos. 82, 83, 84, 88, 89, 101 & 106B all of 2011

RULING

02nd & 17th April, 2019

KEREFU, J.A.:

This is an application for extension of time to lodge an application for revision of the Proceedings, Judgement, Decree/Order of the High Court Land Division, at Dar es Salaam, ('*the High Court*'), delivered by Hon.

Mgetta, J. on 24th April 2014 in respect of *Misc. Land Appeal Nos. 82, 83, 84, 88, 89, 101, & 106B all of 2011.* The application is brought by way of Notice of Motion filed on 16th February 2018 under Rule 10 of the Tanzania Court of Appeal Rules, 2009, *('the Rules')*. The Application is supported by a joint affidavit duly sworn by the applicants. In addition, the Counsel for the applicants has filed written submission to expound the prayers sought in the application. In principle the application is based on three grounds that:-

(a) the applicants delayed to file an application for revision as they were not aware of the existence of the Judgement and Decree of the High Court Land Division in Misc. Land Appeal Nos. 82, 83, 84, 88, 89, 101, & 106B all of 2011 dated 24th April 2014 till 22nd & 23rd January 2018;

(b) though, the respondents had knowledge that the applicants had legitimate interest in the subject matters of the appeals did not seek to have the applicants be joined as necessary or interested parties;

(c) the respondents deliberately concealed material facts from the High Court concerning the manner in which the land forming the subject matter was owned, managed, surveyed and allocated to the 1st – 6th respondents;

(d) there were material irregularities and illegalities with regard to the manner in which the proceedings of the appeals were conducted

and adversely affected the rights and interests of the applicants, hence condemned unheard.

The application has, however, been resisted by the respondents in their affidavits in reply as well as the written submissions. In addition, the Counsel for the 7th, 8th and 9th respondents has filed a notice of preliminary objection challenging the competence of the application. However, on 2nd April 2019 when the matter was called on for hearing, Ms. Lesulie, the learned Senior State Attorney, who appeared for the 7th, 8th and 9th respondents informed me that, after going through the points of preliminary objection, they have decided to withdrawal it to allow the matter to proceed on merit. She, as such, prayed for the said preliminary objection to be marked withdrawn. Since the prayer by Ms. Lesulie was not objected to by Mr. Ngalo, the learned Counsel, who appeared for the applicants and Mr. Thomas Eustace Rwebangira, the learned Counsel for the 1st 2nd, 3rd, 4th, 5th and 6th respondents, the same was granted and the preliminary objection raised by the 7th, 8th and 9th respondents was marked withdrawn and the application proceeded for determination on merit.

I have thoroughly perused the Notice of Motion, the applicants' joint affidavit in support of the application together with respondents' affidavits

in reply and the submissions made herein and it is pretty clear that the matter arises from the decision of the High Court exercising its appellate jurisdiction and pronounced its decision on 24th April 2014. The gist of the appeal before the High Court was in respect of the notices of rectification of the Land Register to revoke the ownership of the six (6) respondents, in Consolidated Misc. Land Appeals Nos 82, 83, 84, 88, 89, 101 and 106B of 2011 in respect of twelve (12) plots namely plots Nos. 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126 and 1127). On 24th April 2014, the High Court allowed the appeal and declared the said six (6) respondents the lawful owner of the above plots. The applicants were not party to the said appeals, hence decided to lodge this application.

Submitting in support of the application, Mr. Ngalo commenced his submission by fully adopting the contents of the Notice of Motion, the supporting affidavit and his written submission. He then clarified that, the applicants delayed to lodge an application for revision because they were not parties to the appeals before the High Court. He said, they only became aware of the Judgement of the High Court on ***22nd or 23rd January 2018***, when they received a letter from the 9th respondent on the matter. Mr. Ngalo, emphasized that, despite the fact, that the

respondents had knowledge that, the applicants have a legitimate interest in the subject matter of the appeals, did not seek to join them as necessary or interested parties therein. Mr. Ngalo referred to paragraph 2 of the applicants' affidavit and argued that, the applicants are joint owners of Plot No. 622 located at Mikocheni, Kinondoni Dar es Salaam, which is neighboring the disputed plots. He contended further that, due to that exclusion the applicants have not been accorded the right to be heard, as one of the principle of natural justice.

In addition, Mr. Ngalo submitted that, the High Court's Judgement is tainted with illegalities which they are intending to raise, if this application is granted. He referred to the decisions in **Ally Ahmed Bauda v Raza Hussein Ladha Damji and 2 Others,** Civil Application No. 215 of 2016, at page 7, and **VIP Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Limited, Consolidated,** Civil References No. 6, 7 and 8 of 2006, at page 18, (all unreported) where allegations of illegality in the High Court Judgements were considered to constituted good cause to grant an application of this nature. As such, Mr. Ngalo concluded his submission by praying for the application to be granted with costs.

In reply, Mr. Rwebangira strenuously objected to the application, while arguing that, the decision of the High Court intended to be revised was delivered on ***24th April 2014*** and this application was lodged on ***16th February, 2018,*** which is after four (4) years from the date of Judgement and the applicants have not accounted for the delay of each day as required by the law. Mr. Rwebangira further disputed the claim by Mr. Ngalo that, the applicants became aware of the High Court's Judgement on **22nd and 23rd January 2018**. He said, applicants were required to tell the court the exactly date, when they became aware of the matter and not to give several dates which are confusing. He referred to paragraphs 11-17 of the applicants' affidavit and argued that, under paragraph 11 it is clear that, the applicants became aware of the matter on ***19th January 2018*** and hence, under paragraph 17, they instructed Mr. Ngalo to pursue and make follow-up on the same, but again the applicants have not accounted for that period between ***19th January 2018 – 16th February 2018***. Rwebangira argued further that, even if one decide to argued that, the applicants consulted Mr. Ngalo on ***13th February 2017*** as indicated under paragraph 21 of the applicants' affidavit, still the application was not lodged till ***16th February 2018***. He elaborated that, from ***19th January***

2018 to ***16th February 2018*** the delay is for twenty eight (***28)*** days, from ***13th February 2017 – 16th February 2018,*** the delay is for about ***eleven (11) months*** and from ***23rd January 2018*** to ***16th February 2018*** the delay is for twenty five (***25***) days, but under paragraph 31 the applicants indicated only the delay of twenty (***20)*** days, the fact which is not true. He said, the applicants' affidavit does not tell the truth. He also disputed the claim by applicants that they used twenty (20) days to consult their advocate. He argued that, as per the established principles, consulting an advocate for twenty days is a long period, which is not acceptable.

To bolster his argument, he cited decisions of the Court in **Mtumwa Mselem v Mahfoudh Masoud Salum,** Civil Application No. 04 of 2002 and **Lucy Chimba Bahonge v Suleiman Rashid Juma**, Civil Application No. 01 of 2008, (all unreported) and said, in **Mtumwa Mselem**, (supra), the consultation between the applicants and their advocate was said to be only a matter of a day. He further argued that, in this application, despite mentioning that they have consulted their Counsel for 20 days, the applicants have not attached the affidavit of the said Counsel to prove that fact and have not accounted for the delay of all those days. To support his position, he referred to **Joseph Paul Kyauka Njau & Another v.**

Emanuel Paul Kyauka Njau & Another, Civil Application No. 07/05/2016 and **Interchick Company Limited v Mwaitenda Ahobokile Michael,** Civil Application No. 218 of 2016, (all unreported) and prayed for the application to be dismissed.

Arguing on the issue of illegality, Mr. Rwebangira submitted that, the same should be vividly seen and must be apparent on the face of the record, as decided in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015, (unreported). He distinguished the current application with the decision in **VIP Engineering**, (supra) cited by Mr. Ngalo by arguing that, the same cannot be applied in this application, because in that case the alleged illegality was clear, as there was a *prima facie* facts that the respondent's debenture was annulled unheard. He said, in the application at hand, the applicants are intending to apply for the revision of a High Court's Judgement, which they were not supposed to be joined as parties. He elaborated that, the appeal before the High Court was challenging the decision of the Registrar of Titles rectifying names of the registered owners of the disputed twelve (12) plots in the Land Register by virtue of Section 99 (1), 102 (1) and (3) of the Land Registration Act, Cap. 334 [R.E. 2002]. He said, under the said provisions,

there is no way the applicants could have been made parties to the said proceedings, because they were not among the registered owners of those disputed plots. He argued further that, since the applicants were not the registered owners of the disputed plots, they did not have cause of action against the respondents and have no *locus standi* to be joined in those proceedings and even to pursue this application. He added further that, all the communications and correspondences attached to the application herein were between *Saint Florence Academy or Saint Florence Academy LTD* and *the KMC* and not the applicants. He finally prayed the application to be dismissed with costs.

On her part, Ms. Lesulie fully associated herself with the submission made by Mr. Rwebangira and prayed to adopt her affidavit in reply together with the written submissions filed on 16th May 2018. She also added her voice on the issue of illegality by referring to the case of **Ally Ahmed Bauda**, (supra), cited by Mr. Ngalo and said, in that case the applicant had proved his interest on the apartments in question, but in this application, the applicants have failed to prove their interest and have not adduced any good cause to enable the court to grant the application. She referred to **Lyamuya Construction Company Ltd v. Board of**

Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 02 of 2010, (unreported) and emphasized that the alleged illegality must be clearly demonstrated in the applicants' affidavit in support of the application. It was her view that, since the applicants have failed to show good cause for the delay, the application deserves to be dismissed with costs.

In a brief rejoinder, Mr. Ngalo clarified that, paragraphs 15 and 18 of the applicants' affidavit are clear that, the applicants became aware with the Judgement of the High Court on ***23rd January 2018 and not 22nd January 2018.*** He admitted that, the date (***13th February 2017)*** indicated in paragraph 25 of the applicants' affidavit is a typographical error. On the issue of days within which the applicants were supposed to consult him and attach the affidavit of their Counsel, Mr. Ngalo argued that, the decisions cited by Mr. Rwebangira in **Mtumwa Mselem** and **Lucy Chimba Bahonge**, (supra) are not the yardstick, each case should be determined on its own circumstances.

On the issue that, applicants have not properly described and demonstrated, in their affidavit, the specific plots they claim to have an

interest on, Mr. Ngalo argued that, the disputed plots are well described in the High Court's Judgement and it was not necessary for the applicants to repeat the same in this application. As for the issue of the applicants' *locus standi* and cause of action against the respondents, Mr. Ngalo also admitted that, the school is dully registered, but the same cannot sue on its own as it is not a body corporate. It was therefore the strong view of Mr. Ngalo that, applicants have made up their case by submitting the good cause for the delay. He thus prayed the application to be granted with costs.

From the foregoing, it cannot be doubted that the application before me is premised on the provisions of Rule 10 of the Rules. The said Rule empowers the Court to exercise its discretion in granting an application for the extension of time, if the applicant adduces good cause to justify the delay. For the sake of clarity, I have endeavored to reproduce the said Rule 10 herein below:-

> "*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 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." [Emphasis added].

Following the above Rule, it is apposite to restate that, although the Court's power to extend time under Rule 10 is both broad and discretionary, the same can only be exercised if '*good cause, for the delay* is shown. As a matter of general principle, the said discretion must be exercised judiciously and in accordance with the rules of reason and justice, not based on private opinion, arbitrarily, vaguely or fancifully, but according to the law and principles.

It is also important to note that, factors constituting sufficient reasons are not categorically explained or itemized, but the same depends on the circumstances of each case. It is however trite law that, in considering whether or not to grant such extension of time, courts take into account the following factors, *the length of the delay; the applicant must account for all the period of delay and must show diligence and not apathy, negligence or sloppiness in prosecuting action that he intends to take; and if the Court feels that there are other sufficient reasons, such as*

the existence of a point of law of sufficient importance, such as, the illegality of the decision sought to be challenged.

Now, in the application at hand, Mr. Ngalo has urged me to find out that applicants have made up their case by adducing good cause for the delay. Mr. Rwebangira and Ms. Lesulie have disputed this claim and I am in agreement with them, because if one closely follow all dates indicated in the ground (a) of the Notice of Motion and the applicants affidavit on when the applicants became aware of the High Court's Judgement together with the sequence of events chronologically itemized therein, will quickly discover that the same are confusing and the applicants have not managed to account for the delay of each day. It is also evident that, the applicants have failed to clearly demonstrate the alleged illegality in the impugned decision, as I will be portrayed below.

According to paragraphs 2, 3, 4 and 5 of the applicants' affidavit the applicants have stated that, they are joint owners of Plot No. 622 located at Mikocheni in Dar es Salaam on which they are running a school named Saint Florence Academy, *('the school'),* which is duly registered. Behind the said school there was a waterlogged parcel of land described as hazardous

land, (*'the suit land'*), which was under the control of the 9th respondent, the Kinondoni Municipal Council, (*'KMC'*). Since 2006 to January 2018 the applicants have applied to the KMC for permission to clear the suit land, planting trees and use the same as a playing ground for the school pupils. The KMC granted that request via letters dated 22nd July 2009, 31st October, 2017 and 10th January 2018, respectively, though the ownership and control over the said land was still under the KMC.

Paragraphs 11,12, 13 and 14 of the same affidavit, applicants states that, **on *19th January 2018,*** when the applicants entered on the suit land for purposes of carrying on the routine cleaning exercise, were blocked by one Vicent Bruno Minja, who claimed to be the rightful owner of the suit plot and it also happened that, the 2nd respondent had already reported the matter to the Oysterbay Police Station, where the applicants were summoned, informed on the High Court's Judgement delivered on **24th April 2014**, which declared the respondents the lawful owners of the suit land. Under paragraph 16, the applicants stated that, upon reading the Judgement, they were shocked to learn that, the suit land was surveyed in 2009/2010 under the instruction of the KMC and certificates of title issued to the respondents were revoked, hence the filing of the appeals before

the High Court without their involvement. According to paragraph 17, the applicants, *though without specifying the exactly date,* claimed to have instructed Mr. Ngalo to make a follow up on the matter and advise them accordingly. Again, under paragraph 21, the applicants stated that, on ***13th February 2017,*** they met with Mr. Ngalo to hear his opinion on the matter. Surprisingly, while it is already indicated under paragraph 11 that, the applicants became aware of the matter on ***19th January 2018***, but again under paragraph 25 and 27 the applicants claimed to become aware with the matter on ***22nd January 2018.*** Yet ground (a) in the Notice of Motion indicated that, applicants became aware on **22nd and 23rd January 2018.**

Though, I am mindful of the fact that, during his rejoinder submission and specifically when responding to the submission by Mr. Rwebangira on the date ***13th February 2017*** appearing under paragraph 21, Mr. Ngalo readily admitted that, the said date was a typographical error. I do wish to emphasize that Counsel for the parties are duty bound to inspect all the documents in support of the application before they file them in Court. It is therefore my respectful view that, the act of the counsel to trying to correct the date stated by the applicants, under oath,

in their supporting affidavit, during his oral submission, is illegal and unaccceptable. The said act depicts negligence and ignorance of court procedures. Anyhow, even if I decide to disregard the corrected date, i.e ***13th February 2017***, I do still find that, there are other different dates mentioned by the applicants in their affidavit and the Notice of Motion, which make it difficult for me to ascertain the exactly date, when the applicants became aware of the matter. It is my respectful view that, a specific date from when the applicants became aware of the matter is necessary for it is that day from which, the period of sixty (60) days limitation to lodged an application for revision, under Rule 65(4) of the Rules, would be reckoned.

According to paragraphs 15, 25 and 27 of the applicants' affidavit, the decision of the High Court, now sought to be challenged, was delivered on ***24th April 2014*** and this application was lodged on ***16th February 2018***, four (4) years from the date of the decision. As eloquently argued by Mr. Rwebangira, even if one considers that, the applicants became aware with the matter on ***19th January 2018,*** computing time from that date to ***16th February 2018,*** when this application was lodged, there is a delay of twenty eight (***28)*** *days*. If I take the date of ***22nd January 2018,***

which Mr. Ngalo insisted in his rejoinder submission that is the correct date, again there is a delay of *twenty five,* ***(25)*** *days* and not *twenty* ***(20)*** days indicated under paragraph 31 of the applicants' affidavit and all these days have not been accounted for.

It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and some of these have been eloquently cited by the Counsel for the respondents, but I wish to add on the list the decision in **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported) where the Court emphasized that:-

> ***"...Delay of even a single day, has to be accounted for,*** *otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."* [Emphasis added].

As portrayed above, the applicants' affidavit not only that it failed to account for the delay of each day, but the same contains untrue information. It is a well established principle that, an Affidavit containing

untrue information cannot be relied upon by the Court to determine any matter. See the decision of the Court in **Ignazio Messina V Willow Investments SPRL**, Civil Application No. 21 of 2001, and **Kidodi Sugar Estate and 5 Others V Tanga Petroleum Co. Ltd,** Civil Application No. 110 of 2009, (both unreported). In **Ignazio Messina's** case, (supra) at page 4, Lugakingira J, as he then was held that:-

> *"An **affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue"** [Emphasis added].*

Likewise, in the application at hand, since the applicants' affidavit contains untrue information, the same cannot be relied and acted upon to support the applicants' prayers.

Moving on to the ground of alleged illegality, I am mindful of the fact that Mr. Ngalo relied on the decisions in **Ally Ahmed Bauda** and **VIP Engineering,** (supra) and argued that, in those cases the ground of illegality was considered to be a good cause and he urged me to find that, the alleged illegality herein constitute good cause and suffice to grant this

application. However, both Counsels for the respondents have challenged Mr. Ngalo's line of argument by arguing that, the alleged illegality should be vividly seen and clearly demonstrated in the supporting affidavit. I have since perused all paragraphs in the applicants' affidavit and observed that, apart from mentioning the word '*illegality*' under paragraph 27.3 thereto, there is no other paragraph which tried to demonstrate or even highlight clearly the said illegality. The applicants have not indicated prima facie facts as to how the Judgement of the High Court in respect of Plots No. 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126 and 1127 (*that were the subject matter before the High Court and applicants are not registered owners*), have affected their interest. The applicants have not, even at least mention a specific plot(s) in that High Court's Judgement, which they believe to have an interest on. The Court in the case of **Lyamuya** (supra), made the following observation:-

> "*Since every party intending to appeal seeks to challenge a decision either on points of law or facts,* ***it cannot in my view, be said that in VALAMBIA's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal***

> ***raises point of law should, as of right, be granted extension of time if he applies for one.*** *The Court there emphasized that* ***such point of law must be that of sufficient importance and, I would add that, it must also be apparent on the face of the record,*** *such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process"* [Emphasis supplied].

Applying the foregoing principle to the application at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. To that end, I must conclude that the applicants have not demonstrated any good cause that would entitle them extension of time. In the result, this application fails and is, accordingly, dismissed with costs.

DATED at **DAR ES SALAAM** this 11th day of April, 2019.

R. KEREFU
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL