IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 48/17/2018

M.B. BUSINESS LIMITED ..... APPLICANT

VERSUS

AMOS DAVID KASSANDA
COMMISSIONER FOR LANDS ..... **RESPONDENTS**
ATTORNEY GENERAL

(Application for extension of time within which to apply for revision of the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(De Mello, J.)

dated the 29th day of November, 2012
in
Miscellaneous Land Appeal No. 61 of 2012

.....

RULING

19th July & 7th August, 2019

NDIKA, J.A.:

I am called upon in this matter to decide whether I should exercise my discretion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 to extend time within which the applicant can apply for revision of an *ex parte* judgment and decree of the High Court of Tanzania, Land Division at Dar es Salaam in Miscellaneous Land Appeal No. 61 of 2012 dated 29th November, 2012. For the sake of convenience, in this ruling I shall refer to the aforesaid appeal as "the appeal."

The notice of motion cites six grounds for extension of time as follows: first, that despite the applicant *"being the lawful owner of Plot No. 1070, Block 'N', Tabata Area in Dar es Salaam with Certificate of Title No. 43982 was not a party to the proceedings",* it was not made *"aware of the proceedings"* in the appeal although all the respondents had prior knowledge of the applicant's title to the disputed property. Secondly, that the *"applicant was condemned unheard and as a result it stands to be deprived of its landed property."* Thirdly, that the appeal *"was filed in total abuse of due process of the court as the 1st respondent had already applied to be joined in Land Case No. 187 of 2009 which was pending in the High Court of Tanzania, Land Division at Dar es Salaam"* and thus the *"subsequent filing of Misc. Land Appeal No. 61 of 2012 over the same matter was unlawful."* Fourthly, that the High Court *"had no jurisdiction"* to hear and determine the appeal as against the Commissioner for Lands because the matter had to be instituted and proceeded with as a normal suit. Fifthly, that the High Court entered judgment for the first respondent in the appeal *"without receiving evidence (sic) from either side."* And finally, that the applicant initially filed revision in this Court vide Civil Application No. 206 of 2014 against the High Court's decision in the appeal *"but the same was struck out for being incompetent"* and that as a result

"the applicant cannot challenge the decision of the High Court which is likely to deprive it of the property without time being enlarged."

Mr. Wilson E. Ogunde, learned counsel, appeared to argue the application on behalf of the applicant. Relying on the founding affidavit sworn on 9th February, 2019 by Silvery B. Buberwa, the applicant's Managing Director, Mr. Ogunde urges, in essence, that the application be granted as the delay to lodge the intended revision was not occasioned by any indolence on the part of the applicant. In the written submissions in support of the application, he contends that the decision sought to be challenged is riddled with an illegality in that the High Court entered an adverse decision against the applicant without according it an opportunity to be heard. He cites the decision of the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185 for the proposition that time should be extended whenever illegality of the decision sought to be challenged is raised.

The first respondent appeared in person. He opposes the application as being totally bereft of merit. Relying on his affidavit in reply dated 22nd March, 2018 as well as his written submissions in opposition to the application, he faults the applicant for failing to utilize an extension of time it was granted by a single Judge of the Court (Rutakangwa, J.A.) vide Civil

Application No. 66 of 2014 on 22nd September, 2014 to lodge the intended revision. He thus urges that the matter be dismissed with costs.

Ms. Mercy Kyamba, learned Principal State Attorney representing the second and third respondents, did not resist the application.

Having heard the contending submissions of the parties, it now behooves the Court to determine whether this is a fitting occasion to condone the delay involved and proceed to enlarge time to lodge the intended application for revision.

To begin with, I wish to restate that the Court's power for extending time under Rule 10 of the Rules is both wide-ranging and discretionary but it is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers factors such as the length of the delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: 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; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014. See also **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra); and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In the instant application, it is common ground that the applicant was unaware of the existence of the appeal before the High Court in respect of which that Court handed down the *ex parte* judgment and decree dated 29th November, 2012. It could not apply for revision within the period of sixty days prescribed under Rule 65 (4) of the Rules, 2009 as it became aware of the said adverse *ex parte* judgment and decree on 20th March, 2014, the said limitation time having expired. Besides, it is undisputed that the applicant successfully applied to the Court (Rutakangwa, J.A.) vide Civil Application No. 206 of 2014 for extension of time to apply for revision. The record bears it out that the applicant, then, duly lodged in the Court an

application for revision (Civil Application No. 206 of 2014) within the sixty days as prescribed by the order of the Court dated 22nd September, 2014. Thus, the first respondent's criticism, based upon his affidavit in reply, that the applicant failed to utilize the extension granted has no shred of truth in it.

It is further on record that the applicant's initial application for revision was barren of fruit; the Court struck it out on 7th February, 2018 due to incompetence that arose from omission from the record of certain core documents. The resulting delay following the aforesaid termination of the revision certainly amounts to an excusable technical delay – see **Fortunatus Masha v. William Shija and Another** [1997] TLR 154. See also **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.,** Civil Reference No. 18 of 2006; **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05/2017; **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16/2016; **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20/2017; **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17/2017; and **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342/01/2017 (all unreported).

To resuscitate its quest for revision, the applicant on 20th February, 2018 lodged the instant application for condonation of the delay. This happened only thirteen days after the initial revision was struck out. I would not consider this intervening period inordinate in the circumstances of this matter and so, I am satisfied that the delay was not occasioned by any indolence on the part of the applicant. The applicant took action with promptitude to refresh its intended pursuit of revision.

The foregoing apart, I recall that one of the issues intended to be raised in the application for revision is the question of illegality or irregularity of the assailed *ex parte* judgment and decree. In **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra) at page 188, this Court held that:

> *"... where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules [now rule 10 of the 2009 Rules] for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in*

fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law."

See also: **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006; **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; **Eliakim Swai and Frank Swai v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016; and **Mgombaeka Investment Company Limited & Two Others v. DCB Commercial Bank PLC**, Civil Application No. 500/16/2016 (all unreported).

Guided by the above authorities, I am persuaded that the alleged illegality of the impugned judgment and decree is a further ground for granting the relief sought in this matter. In my considered view, the complaint that the court below disposed of the appeal thereby stripping the applicant of its title to the disputed property without affording it any hearing is an issue of sufficient importance as it goes to the root of the impugned *ex parte* judgment and decree. It is a question that is apparent on the face of the record taking into account that the applicant was

certainly not a party to the appeal the subject of the intended revision. Thus, there is justification for extension of time to afford this Court an opportunity to investigate and determine the alleged illegality.

The upshot of the matter is that I find merit in the application, which I grant. As a result, I order the applicant to lodge its intended application for revision within sixty days from the date of the delivery of this ruling. Costs shall follow the event in the intended revision.

DATED at **DAR ES SALAAM** this 26th day of July, 2019.

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered this 7th day of August, 2019 in the presence of Mr. Sylvester Korosso holding brief for Mr. Wilson Ongunde, Counsel for the Respondent and in the presence of the applicant in person, is hereby certified as a true copy of the original.

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL