**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 482/17/2017**

1. **HARRISON MANDALI**
2. **MEKEFASON MANDALI**
3. **REHEMA R. KANGE**
4. **MARIAM MAGERO**
5. **EZRA J. MATOKE**
6. **MARY KILIAN JOSEPH MCHAU (Legal Representative of KILLIAN J. MCHAU)**
7. **ABDALLAH J. MVUNGI**
8. **ELIHURUMA MREMI**
9. **RUKIA ATHUMAN**
10. **MAJUTO RAJAB MBISA (Administrator of the Estate of ABUU M. BASAI)**

........................ **APPLICANTS**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE ARCHDIOCESE OF DAR ES SALAAM** ........................................ **RESPONDENT**

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

**(Mkuye, J.)**

**dated the 22nd day of July, 2016**

**in**

**Land Case No. 181 of 2009**

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## RULING

19th July & 4th September, 2019

**NDIKA, J.A.:**

This ruling resolves a motion made by the applicants under Rule 10 of the Tanzania Court of Appeal Rules, 2009 for extension of time within which to apply for revision:

*"1. [a]gainst the decision of the High Court (Land Division – Hon. Lady Justice Mkuye, as she then was) dated 22nd July, 2016 in Land Case No. 181 of 2009.*

*2. **IN THE ALTERNATIVE**, against the decision of Hon. Mzuna, J. dated 4th August, 2017 in Misc. Land Application No. 619 of 2016, refusing leave to appeal against the decision of Hon. Mkuye, J. in Land Case No. 181 of 2009."*

The notice of motion cites five grounds to justify the extension sought as follows: first, that the delay to apply for revision within the prescribed period of sixty days from 22nd July, 2016 when the impugned judgment was pronounced arose from the applicants' pursuit of an application for leave to appeal which, having been refused by Mzuna, J. on 4th August, 2017, resulted in the appeal process being blocked. Consequently, the applicants now have to resort to seeking revision for which extension of time is now being sought. Secondly, that the intended revision involves an important point of law to be determined by this Court with regard to the remedy available to an aggrieved party in a land case upon being denied leave to appeal by the High Court under section 47 (1) of the Land Disputes Courts Act, Cap. 216 RE 2002.

In the third ground it is claimed that the impugned judgment is tainted with illegalities in the following manner: one, that Mkuye, J. (as she then was) irregularly succeeded Mutungi, J. in the proceedings on 2nd April, 2015 without complying with the provisions of Order XVIII, rule 10 (1) of the Civil Procedure Code, Cap. 33 RE 2002 (the CPC) rendering the ensuing proceedings a nullity; two, that Mkuye, J. (as she then was) wrongly quashed the proceedings before Mutungi, J. on the ground of invalidity due to the absence of assessors at the trial but she had no jurisdiction to do so; three, that the trial was conducted without affording the parties an opportunity to raise objection, if any, to the assessors that sat with the presiding Judge; and four, a witness of the plaintiff (PW11) was improperly recalled to testify and tender documentary evidence after the parties had closed their respective cases.

As regards the fourth ground, it is stated that the proceedings leading to the impugned judgment and decree are irregular on the ground that the mediation proceedings were manifestly mishandled by the mediator (Ngwala, J.).

The final ground is a contention that Mzuna, J.'s refusal in Miscellaneous Land Application No. 619 of 2016 to grant leave to appeal against the decision of Mkuye, J. (as she then was) on the ground that there was no sufficient cause was based on reasons which are extraneous. In support of the application, the applicants deposed a joint affidavit. In response, Mr. Michael J.T. Ngalo, an advocate acting for the respondent, swore an affidavit in reply.

At the hearing before me, Mr. Samson Mbamba, learned counsel for the applicants, pursued extension of time to apply for revision of the decision of Mkuye, J. (as she then was) but abandoned the alternative prayer in respect of the decision of Mzuna, J. He, then, adopted the contents of the notice of motion, the founding affidavit and the written submissions as part of his argument and prayed that the matter be granted as presented.

In his written submissions, Mr. Mbamba maintains that the delay to apply for the intended revision arose from the applicants' botched pursuit of an appeal having lodged a notice of appeal on 29th July, 2016 and applied for leave to appeal which was refused by Mzuna, J. on 4th August, 2017. Reference was made to the decision of the Court in **Dero**

**Investment Limited v. Heykel Berete**, Civil Appeal No. 92 of 2004 (unreported), which was quoted in **Mercy Kimambo v. Jamal Hamza Mohamed & Another**, Civil Appeal No. 144 of 2016 (also unreported), as well as the decision in **Tumsifu Anasi Maresi v. Lubende Jumanne Selemani & Another**, TBR Civil Application No. 184/11/2017 (unreported) for the holding that a party aggrieved by a refusal of leave to appeal under section 47 (1) of Cap. 216 (supra) has no right to apply to this Court for leave as a second bite. It was thus argued that the applicants, having been refused leave to appeal, could not continue pursuing their intended quest for appeal. Further reliance was placed on the decision of the Court in **Barclays Bank Tanzania Ltd v. Physician Hussein Mcheni**, Civil Application No. 176 of 2015 (unreported) for the statement of principle that a prosecution of a misconceived application with due diligence amounts to a good cause for condonation of delay as it shows that the applicant was genuinely pursuing the matter albeit mistakenly.

As regards the argument that the impugned decision is illegal, it is, at first, contended that that Mkuye, J. (as she then was) succeeded Mutungi, J. without assigning any reason for the succession contrary the provisions of Order XVIII, rule 10 (1) of the CPC as interpreted and applied in **National Insurance Corporation of Tanzania Ltd v. Jackson Mahali,**

Civil Appeal No. 94 of 2011 (unreported). It is further argued that Mkuye, J. (as she then was) wrongly quashed the proceedings before Mutungi, J. on the ground of invalidity due to the absence of assessors but she had no jurisdiction to do so as was held in **Freeman Aikaeli Mbowe & Another v. Alex O. Lema**, Civil Appeal No. 84 of 2001 and **Mohamed Enterprises (T) Ltd v. Masoud Mohamed Nassor**, Civil Application No. 33 of 2012 (both unreported). In addition, it is contended that the trial was conducted without affording the parties an opportunity to raise objection, if any, to the assessors that sat with the presiding Judge, and that a witness of the plaintiff (PW11) was improperly recalled to testify and tender documentary evidence after the trial had ended.

It is further contended, as hinted earlier, that the proceedings leading to the impugned judgment and decree are irregular on the ground that the mediation proceedings were manifestly mishandled by the mediator (Ngwala, J.) in that whereas the mediation proceedings of 22nd March, 2011 appear to have been presided over by Hon. Mlacha, then the Deputy Registrar, they were signed by Ngwala, J. Extension of time was thus sought on the authority of **Tanzania National Parks (TANAPA) v. Joseph K. Magombi**, Civil Application No. 471/18/2016 (unreported), which relied upon an earlier decision of the Court in **Patrobert**

**Ishengoma v. Kahama Mining Corporation Ltd (Barrick Tanzania Bulyanhulu) & 2 Others**, Civil Application No. 2 of 2013 (both unreported), that an allegation of illegality of the decision intended to be challenged warrants extension of time even if considerable delay is involved.

On the other hand, Mr. Michael T.J. Ngalo, learned counsel for the respondent, strongly resisted the application. Relying on the affidavit in reply, he contended that the applicants failed to account for each day of delay between 22nd July, 2016 when the impugned decision was handed down and 25th October, 2017 when this matter was lodged. He particularly faulted the applicants for not acting with promptitude between 4th August, 2017 when the application for leave was refused and 25th October, 2017 when this matter was lodged even though he acknowledged that they could not pursue revision until 6th October, 2017 when they received the order of the Court dated 28th September, 2017 withdrawing the notice of appeal.

On another front, Mr. Ngalo criticized the applicants' contention that their right of appeal had been blocked following the refusal of leave to appeal. On this point, he made two alternative submissions: first, that on

the authority of the decision of the Court in **Masato Manyama v. Lushamba Village Council,** Civil Application No. 3/08/2016 (unreported), the applicants had an option to appeal to this Court against the refusal of leave to appeal instead of seeking revision. Secondly, citing a decision of a single Justice of the Court in **Lala Wino v. Karatu District Council**, Civil Application No. 132/02/2018 (unreported), which interpreted the recent amendment of section 47 (1) of Cap. 216 (supra) by section 9 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018, Act No. 8 of 2018, to the effect that leave to appeal is no longer required for any appeal from a decision of the High Court in exercise of its original jurisdiction in a land matter, he argued that the applicants could appeal against the impugned judgment as of right rendering their intended pursuit of revision uncalled for.

As regards the alleged illegalities and irregularities, Mr. Ngalo argued, relying on Paragraph 14 of the affidavit in reply, that the illegalities complained of were chiefly an afterthought and that they were not apparent on the face of the impugned judgment in the manner stated in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). He added that at this stage the Court should only look at the face of the judgment, as opposed to the record of proceedings, to

determine if there are any manifest illegalities to be investigated in the intended revision.

The learned counsel contended further that even if the alleged improprieties existed, they were not fatal in view of the recently enacted Oxygen Principle as it has been applied in a number of recent decisions including **Chacha Jeremiah Murimi & Three Others v. Republic**, Criminal Appeal No. 551 of 2015 and **Ashraf Akber Khan v. Ravji Govind Varsan**, Civil Appeal No. 5 of 2017 (both unreported). He added that the joint affidavit is silent on whether the said illegalities caused any injustice to the applicants. In conclusion, he urged that the application be dismissed with costs.

In a brief rejoinder, Mr. Mbamba made two points: first, he refuted that the delay between 6th October, 2017 and 25th October, 2017 was unaccounted for. He attributed it to the time spent for the preparation and lodgment of a sheer bulky record of the present application, also insisting that the said delay was not inordinate. Secondly, Mr. Mbamba argued that at this stage the applicants only needed to do no more than establish that the alleged illegalities were apparent on the face of the record. He insisted

that they had met that crucial test and so, he beseeched that the application be granted.

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

But, before I deal with the merits of the application, I find it necessary to dispose of Mr. Ngalo's contention raised in his reply, based upon a number of authorities that he cited including **Masato Manyama** (supra), that the intended application for revision for which extension of time is sought is untenable as the applicants, if anything, ought to have pursued an appeal against the High Court's refusal of leave to appeal. Related to that contention is the claim, on the authority of **Lala Wino** (supra), that the applicants could still appeal to the Court as appeals from the judgments of the High Court sitting as a land court in exercise of its original jurisdiction no longer require leave to appeal. To answer this issue, I find it apt to extract from the decision of a single Justice of the Court in **Tanzania Portland Cement Company Limited v. Khadija Kuziwa**, Civil Application No. 437/01/2017 (unreported) where the same issue was confronted:

*"I should, next, address the contention by the learned counsel for the respondent to the effect that the application for revision is after all, untenable on the ground that the same cannot be entertained in lieu of an appeal. my short answer to this contention is that, in an application for extension of time, the Court is primarily concerned with ascertaining whether or not good cause has been shown to support a grant.* ***The Court, more so, a single judge, may not venture so far as to speculate the merits of the desired application for revision before granting an extension****."*

[Emphasis added]

I am fully guided by the above position. Accordingly, I reject Mr. Ngalo's invitation to find the intended appeal unsustainable at this stage. Having disposed of the foregoing preliminary issue, I think it bears restating 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 Courtconsistently 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** [1992] TLR 185; 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 undisputed that following the delivery of the judgment the subject of the intended revision dated 22nd July, 2016, the applicants duly manifested their intention to appeal to this Court by lodging a notice of appeal and then applying for the requisite leave to appeal. The application for leave having been refused on 4th August, 2017,

the applicants viewed the refusal as a blockage of their path to appeal and thus applied to this Court to have their notice of appeal withdrawn, a request that was granted on 28th September, 2017 and that a certified copy of the Court's order to that effect was obtained on 6th October, 2017. By then, the applicants had requested for and obtained a certified copy of the proceedings in Land Case No. 181 of 2009 and the application for leave to appeal. In my considered view, the entire period of delay from 22nd July, 2016 when the assailed judgment was rendered until 6th October, 2017 when a copy of the order for withdrawal of the notice of appeal was supplied to the applicants constitutes a clearly excusable delay – see, for instance, **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 of 2017; **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 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** (all unreported). The applicants

cannot be accused of any dilatory conduct during this period; for, they were diligently pursuing an appeal by taking all essential steps including seeking the requisite leave to appeal. It was certainly essential for the notice of appeal to be withdrawn after leave was refused before they could take any step towards applying for the intended revision because the law would not let them ride two horses at the same.

Mr. Ngalo criticized the applicants for not acting promptly after 6th October, 2017 following the withdrawal of their notice of appeal with leave

of this Court. That they dawdled for nineteen days until 25th October, 2017 when they lodged this application. With much respect to Mr. Ngalo, I am inclined to accept Mr. Mbamba's submission attributing the delay to the time spent for the preparation and lodgment of a noticeably bulky record of the instant application in two volumes.

The foregoing apart, I am aware that one of the issues to be raised in the intended application for revision is the question of illegality or irregularity of the assailed decision of Mkuye, J. (as she then was) dated 22nd July, 2016 in Land Case No. 181 of 2009. 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; **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).

In **Lyamuya Construction Company Limited** (supra), a single Justice of the Court elaborated that:

> *"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points 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 be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."*** [Emphasis added]

Applying the principle as stated in the above authorities, I am persuaded that the alleged illegalities, irregularities and improprieties in the proceedings and the judgment of the High Court in Land Case No. 181 of 2009 are a further ground for granting the extension of time sought in this matter. Without delving into the substance of the intended revision, I took account of the allegations that Mkuye, J. (as she then was) irregularly succeeded Mutungi, J. in the proceedings on 2nd April, 2015 without

complying with the provisions of Order XVIII, rule 10 (1) of the CPC; that Mkuye, J. (as she then was) wrongly quashed the proceedings before Mutungi, J. on the ground of invalidity due to the absence of assessors without any jurisdiction to do so; that the trial was conducted without affording the parties an opportunity to raise objection, if any, to the assessors that sat with the presiding Judge; that a witness of the plaintiff (PW11) was improperly recalled to testify and tender documentary evidence after the parties had closed their respective cases; and finally, that the impugned judgment and decree were irregular on the ground that the mediation proceedings were manifestly mishandled by the mediator (Ngwala, J.). I am satisfied that these complaints raise issues of sufficient importance and that there is justification for extension of time to afford this Court an opportunity to investigate and determine them. Of course, I am alert that Mr. Ngalo was of the view that the alleged illegalities and improprieties were not fatal by dint of the application of the Oxygen Principle as it has been the case in a number of recent decisions of the Court. Whether he is right or not, it is not for me as a single Justice of the Court, but the full court itself, to consider and determine the tenability of the applicants' allegations.

All said and done, I find merit in the application, which I grant. As a result, I order the applicants to lodge their 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 3rd day of September, 2019.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

This Ruling delivered this 4th day of September, 2019 in the presence of Mr. Emmanuel Hando, learned advocate for the applicant and Mr. Sisty Bernard, learned advocate for the Respondent is hereby certified as a true copy of the original.

S. J. KAINDA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**