IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 491/17 OF 2018

ENOCK KALIBWANI ..... APPLICANT

VERSUS

1. AYOUB RAMADHANI RESPONDENT
2. RAYMOND JACOB ELIKANA as administrator of the Deceased estate of JACOB ELIKANA MURO
3. YUSUFU MHANDORESPONDENT
..... RESPONDENTS

(Application for extension of time to serve the respondents with the Properly endorsed Notice of Appeal out of time in lieu of the Previously served one against the Decision of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Kente, J.)

dated the 13th day of August, 2015
in
Land Case No. 113 of 2008

RULING

12th July & 16th August, 2019

LEVIRA, J.A.:

The applicant herein lodged this application under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking for extension of time within which to serve the respondents with the properly endorsed Notice of Appeal in lieu of the previous served one. The Notice of Motion is supported by the affidavit duly deposed by Mr. Daniel Haule Ngudungi, learned advocate for the applicant.

The Notice of Motion contains the following grounds:

i. That, the applicant through his counsel filed seven (7) copies of the notice of appeal but only two copies were duly signed,

and endorsed by the Registrar and in advertently unendorsed notices of appeal were served to the respondents.

ii. That, there is an illegality on the face of the record in that:-

a) The suit against the applicant was res judicata after being conclusively determined in Civil Case No. 92 of 2002 before the District Court of Kinondoni which was exhibited as Exh. D-3 in the High Court Land Case No. 113 of 2008.

b) That the judgment was pronounced by the court in favour of the stranger to the proceedings as the second respondent was not a party to the Land Case No. 113 of 2008.

Available information on record gives the background of this application to the effect that, the first respondent herein (Ayoub Ramadhani) was the plaintiff in Land Case No. 113 of 2008 and Elikana Muro, Yusuph Mhando and Enock Kalibwani were the first, second and third defendants respectively. It is worth noting here that, the third defendant, the applicant herein was a defendant and an interested party in that suit. The plaintiff prayed against the first and second defendants the declaration that the defendants have breached the contract of sale (of the land in dispute) made between the plaintiff and the defendants on the 5th day of September, 2007. He also prayed for the first and second defendants to pay him (the plaintiff) the sum of Tshs. 130,000,000/=as special damages and that the defendants pay the plaintiff the sum of Tshs. 40,000,000/=as general damages.

The record reveals further that, at the trial the plaintiff prayed to be declared the lawful owner of the property (the land in dispute) known as plot No. 95 situated at Mwenge Savei Area within the City of Dar es salaam with Certificate of Title No. 39115 issued on 20th December, 1991. On 15th July, 1996 the plaintiff entered into a contract with an interested party (third defendant) and sold to him part of his property. Also there were further agreements, that the area be surveyed and the said Certificate No. 39115 be split into two so that the plaintiff and the third defendant can have their own titles. Sometimes on 5th September, 2007 the plaintiff entered into an oral and written agreements to sell part of the registered property to the first defendant (second respondent herein) at per agreed consideration of Tshs. 26,000,000/= which was to be paid in two instalments. However, the first defendant paid only Tshs. 7,000,000/=. The remaining balance of Tshs. 19,000,000/= was not paid as agreed and to the surprise of the plaintiff, on 6th November, 2007 the first defendant bulldozed the plaintiff's property and caused him to suffer loss and damage and hence, the institution of the suit (Land Case No. 113 of 2008) as introduced above.

In the said suit, the first defendant (second respondent herein) raised a counter claim praying to be declared a lawful owner of the disputed land and that the third defendant (the applicant herein) is a trespasser. According to the first defendant's amended written statement of defence (Annexure NEA

5 at page 93 of the record of this application), the name appearing in the said statement is as introduced above (Elikana Muro) but, in the counter claim at page 94 of the record of application, the plaintiff was Jacob Elikana Muro.

In its judgment, the High Court (Land Division) after due consideration to the entire dispute and exhibits tendered, found that the plaintiff failed to abide by and accomplish the sale agreement executed between him and the first defendant. As a result, the court entered judgment in favour of the first defendant's counter claim where the claimant's name is Jacob Elikana Muro. The court made orders and declarations, among them, the third defendant was declared a trespasser and thus, he was ordered to give vacant possession to the first respondent. Aggrieved by that decision, on 25th August, 2015 the applicant lodged the notice of appeal subject to this application.

At the hearing of this application, the applicant was represented by Mr. Daniel Ngudungi, learned counsel whereas, the first respondent appeared in person, unrepresented and the second respondent was represented by Mr. Francis Mgale, learned counsel. The third respondent did not enter appearance despite being duly served with the Notice of Hearing through LRK Law Chambers on 2nd July, 2019, where the said notice was received by

one Pendo E. Ulonu. That being the position, hearing of the application proceeded ex parte against the third respondent under Rule 63 (2) of the Rules.

In his oral submission in support of the application, Mr. Ngudungi highlighted the two main grounds in this application. The first ground being that, the applicant's failure to serve the respondents with properly endorsed notices of appeal was due to an advertently unendorsed notices of appeal which were supplied to the applicant by the Registrar of the High Court, Land Division. This ground is also elaborated in paragraph 10 of his affidavit as follows:

> *"That the applicant through his then advocate Mr. Michael Thomas Masaka lodged notice of appeal to the Registrar of the High Court, but inadvertently the Registrar endorsed two copies out of several copies lodged and the Respondents were then served with unendorsed notice of appeal. A copy of a served notice of appeal is hereto attached and marked NCA-7 forming part of the affidavit."*

The second ground in support of this application is the point of illegality. In this regard, Mr. Ngudungi submitted that the matter before the High Court was res judicata as the applicant had in the year 2002 successfully sued the first respondent vide Civil Case No. 92/2002 on the same land in

dispute and the judgment was entered accordingly as per annexure NCA-3 to paragraph 5 of the supporting affidavit.

Another complaint by the counsel for the applicant was that, the judgment of the High Court in Land Case No. 113 of 2008 gave victory to a person who was not a party to the suit as also stated in paragraph 9 of the supporting affidavit. Expounding on this point, the counsel for the applicant stated that parties in the original case were Ayoub Ramadhani as the plaintiff, Elikana Muro as the first defendant, Yusufu Muhando, the second defendant and Enock Kalibwani (applicant herein), the third defendant. He went on submitting that, the second defendant raised counter claim in his written statement of defence but, under the name of Jacob Elikana Muro and not Elikana Muro.

According to him, even the exhibit which was tendered during trial was of Jacob Elikana Muro. Relying on the difference of names appearing in the original suit and the counter claim, Mr. Ngudungi was of the firm view that, the judgment was pronounced to a stranger to the suit because those were two different people. He argued that the person who was not a party to the suit got the judgment. Basing on those two major grounds, the notice of motion, all annexures and written submissions, Mr. Ngudungi prayed for the application to be granted.

Before making a reply submission, Mr. Mgale brought to my attention that the second respondent did not file written submission as he received summons for hearing of this application before expiry of time fixed for filing the same. He thus prayed to make oral submission in terms of Rule 106(10)(b) of the Rules.

In responding to the application, Mr. Mgale submitted that in terms of Rule 10 of the Rules, the applicant is supposed to show good cause for the delay to serve the respondents with the properly endorsed notice of appeal. He went further submitting that, the applicants grounds raised in this application cannot move the court to grant extension of time. To support his stance, Mr. Mgale was of the view that the applicant has failed to account for the delay from the date he alleges that he filed seven (7) notices of appeal to the High Court Land Division and that only two of them were endorsed. According to him, the applicant was not having good reasons to serve the respondents with unendorsed copies after four years since when the notice was lodged in Court; that is from 28/5/2015 to 16/5/2019. Mr. Mgale added that, the notice of appeal relied upon by the applicant in his explanations was declared to be a defective notice of appeal as per **annexure MCA 11** in Civil Application No. 195/2015 between the same parties. According to him, since the said notice was declared to be a defective notice, it could not be served to the respondents. The learned

counsel was of the view that the applicant was supposed to apply for extension of time to file notice of appeal and not to serve the defective one. Mr. Mgale faulted the applicant for failure to counter check the notices to make sure that they were endorsed before serving the same to the respondents. He was of the further view that the applicant was negligent.

In regard to the ground of illegality of the impugned decision raised by the applicant, Mr. Mgale opined that the same is not the sole ground justifying extension of time. While citing the case of **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] T.L.R 77 he stressed that, time may be extended when illegality is raised but this will depend on the circumstances of each case.

It was a submission by the counsel for the second respondent that, in the current matter there is no any illegality justifying extension of time. According to him, the case was not res judicata as claimed by the applicant as per annexure AR2 to the record of application. In the alternative Mr. Mgale was of the view that, even if it will be seen that the case was res judicata, the issue of jurisdiction was supposed to be raised as a preliminary objection at the earliest possible time at the High Court and not on appeal. However, he went further submitting that, even if it could have been raised

there, the said objection would not have been sustained because the parties and the subject matter were different.

Regarding the second limb of illegality, that the judgment was given to a stranger, Mr. Mgale submitted that the issue of names as to whether Elkana Muro and Jacob Elkana Muro were different people was supposed to be raised at the trial. He noted that the said issue could not stand because the difference could be cured under Order 1 Rule 10(1)(2) of the Civil Procedure Code, Cap 33 RE 2002. Mr. Mgale added that the respondent would not have been prejudiced as he said, Jacob Elkana Muro and Elkana Muro is one and the same person. To support his averment he cited the case of **National Bank of Commerce Limited v. Alfred Mwita,** Civil Application No 172 of 2015 where among preliminary issues determined by the Court was the omission of the middle name of the respondent. In its determination the Court found that, such omission did not prejudice the respondent because he was not prevented from filing affidavit in reply.

Regarding the cases relied upon by the counsel for the applicant, Mr. Mgale was of the view that the said cases are distinguishable from the present case. He specifically referred the case of **Tanzania Sewing Machines Company Limited v. Njake Enterprises Limited,** Civil Application No. 56 of 2007; where he said, the Registrar gave the parties

unsigned decree but the applicant did not apply to serve defective decree to the other party as the case in the current matter, where the applicant is applying to serve the respondents with defective notices of appeal. Having distinguished the cited cases by the applicant's counsel, Mr. Mgale prayed for this application to be dismissed with costs.

Mr. Ramadhani, the first respondent supported the application as he said, the High Court gave judgment to a person who was not a party to the case. He as well prayed for this application to be granted.

In rejoinder Mr. Ngudungi clarified that the notice of appeal was not invalidated by the High Court as stated by Mr. Mgale. According to him, there were two notices of appeal endorsed out of seven supplied to the applicant by the Registrar. He clarified that, the notice of appeal which the applicant intends to serve the respondents is the one signed by the Registrar (Annexure MCA 11) and not the one rejected by the Court in the application for stay of execution (Annexure MCA 10).

Mr. Ngudungi denied the condemnation by Mr. Mgale that the applicant was negligent. He was of the view that, omission to sign the notice of appeal was an error committed by the officer of the court and therefore the applicant is not wholly to blame. According to Mr. Ngudungi, the only

mistake done by the applicant was to fail to counter check the documents supplied to him.

Regarding the point of illegality, he insisted that the matter was res judicata and that the counter claim was raised by a person who was not a party to the suit. The evidence brought to the trial was of Jacob Elikana Muro as a result the High Court gave judgment to a stranger to the original suit. In conclusion, Mr. Ngudungi prayed for this application to be granted for the respondents to be served with proper notice of appeal.

Rule 10 of the Rules under which this application is brought requires the applicant to show good cause warranting extension of time. It reads:

> *"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 expiration of that time and 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].*

Being guided by the above provision, the issue which I need to consider in this application is whether the applicant has shown good cause warranting extension of time. It is important to note at this juncture that the term good

cause referred under the law is not only intended to cover the reasons for the delay but also other circumstances surrounding the matter at the particular point of determination. In **Osward Masatu Mwizarubi vs. Tanzania Fish Processing Ltd,** Civil Application No. 13 of 2010, while interpreting the term 'good cause' the Court had this to say:

> *"What constitutes good cause cannot be laid down by any hard and fast rules. The term* ***"good causes"*** *is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

The first ground relied upon by the applicant in his argument and struggle to convince me to grant the application is that, failure to serve the respondents with endorsed notice of appeal was not deliberate but it occurred inadvertently. While responding to Mr. Mgale's reply submission, Mr. Ngudungi agreed that he was duty bound to ensure that the documents he received from the court were properly endorsed, the duty which he did not discharge. However, he invited me to apportion the liability by finding that the Registrar of the High Court also was duty bound to ensure that the documents were proper before supplying them to the parties. Following that invitation, he urged me to grant the application. I am afraid, I am not persuaded by such an invitation due to the fact that, the allegation by Mr.

Ngudungi that the Registrar supplied the applicant with only two signed notices of appeal out of seven is not substantiated. There is no affidavit of the said Registrar to that effect attached in this application to support this point. In paragraph fourteen of the affidavit the applicant stated that he discovered that there was properly endorsed copy of the notice of appeal in the court record after having made a follow up to the Registry but, he does not state when and whom he did consult. Annexure NCA II referred by Mr. Ngudungi in his submission was lodged on 26th August, 2015 and the current application was lodged on 16th May, 2019. Mr. Ngudungi in his oral submission did not account for that delay of almost four years as correctly stated by Mr. Mgale. It is a well- established principle that, the applicant who applies for extension of time must account for the delay.

I wish also to comment on the issue raised by Mr. Mgale in regard to the defective notice of appeal while referring to Annexure NCA 10, the Ruling of the Court in Civil Application No. 195 of 2015. According to him, the said Ruling declared the Notice of Appeal which was attached in the record of that application to be defective and therefore, the same cannot be served on the respondents. I went through the Ruling referred to by Mr. Mgale but, it is so unfortunate that the notice he referred was not specified to enable me consider whether the said notice is the same which the applicant intends to serve the respondents now. However, I must admit that

reference in that Ruling was on unendorsed notice of appeal while the notice which the applicant intends to serve the respondents in this application is the indorsed one. In my view, the notice which was declared defective is different from the one which the applicant intends to serve the respondent regardless of when and how it was procured.

Apart from accounting for the delay, there are some exceptional circumstances particularly when illegality is raised as ground in the application for extension where, time can be extended regardless the extent and reasons for the delay. I am mindful of the fact that it is not a must that time is extended in every situation when and where illegality is advanced as a ground. Whether or not to extend time where illegality of the impugned decision is raised will depend on the circumstances of each case. In **VIP Engineering and Marketing Limited and Three Others vs. Citi Bank Tanzania Limited, Consolidated** Civil Reference No. 6, 7 and 8 of 2006 (Unreported), the Court stated:

> *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."*

In the matter at hand, the applicant claimed that the suit against the applicant was res judicata as the same was conclusively determined in Civil Case No. 92 of 2002; and that, the High Court pronounced judgment in favour of a stranger to case. These grounds were faulted by Mr. Mgale who contended that, the matter before the High Court was not res judicata and that, the alleged stranger by the applicant was in fact, not a stranger. I wish to state that, the two raised issues cannot be determined in this application for extension of time. Whether parties in the suits were the same or the subject matter was the same before the lower courts to render the suit before the High Court res judicata are matter which touch on the jurisdiction of the court. Regarding the judgment pronounced whether it was pronounced to the stranger or a party to the suit is also another issue which cannot be determined in this application. Since reasons for delay is not the only ground to relay for extension of time, I subscribe to the decision of the Court in **Victoria Real Estate Development Limited vs. Tanzania Investment Bank and Others, Civil Application No. 225 of 2014, CAT- Dar es Salaam** (unreported) where it was stated at pp 10-11 that:

> *"The court is conscious that reasons for delay in an application for enlargement of time is not the sole ground- see* ***Republic v. Yona Kaponda and 9 Others [1985] T.L.R 84.*** *The Court seized with duty to consider an application of this nature has to judge not only*

whether or not there are sufficient reasons for the delay, but also ***for extending the time*** *to take the intended steps."*

Basing on the above discussion, it is my considered opinion that, the applicant has been able to show good cause for me to extend time. In exercise of my discretional powers, I hereby grant the application for the applicant to serve the respondents with the Notice of Appeal within fourteen (14) days from the date of delivery of this Ruling.

Costs in the cause.

DATED at **DAR ES SALAAM** this 7th day of August, 2019.

M.C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of August, 2019 in the presence of Mr. Elia Mwingira, leaned Counsel for the Applicant; Mr. Ayubu Ramadhani present in person (unrepresented) and in the absent of the second and third respondent is hereby certified as a true copy of the Original.

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL