IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CIVIL APPLICATION NO. 38/10 OF 2017

EFRASIA MFUGALE ..... APPLICANT

VERSUS

1. ANDREW J. NDIMBO
2. VALERIANA NDIMBO } **..... RESPONDENTS**

(Application for extension of time within which to apply for revision from the Decision of the High Court of Tanzania at Songea)

(Kalombola, J.)

dated the 19th day of July, 2011

in

Land Appeal No. 9 of 2008

.....

RULING

30th April & 3rd May, 2021

NDIKA, J.A.:

Efrasia Mfugale, the applicant herein, seeks extension of time within which to apply for revision of the decision of the High Court of Tanzania at Songea (Kalombola, J.) dated 19th July, 2011 in Land Appeal No. 9 of 2008. The application, predicated on Rule 10 of the Tanzania Court of Appeal Rules, 2009, is made by way of notice of motion supported by the applicant's affidavit sworn on 8th November, 2019.

The notice of motion cites two grounds to justify the extension sought as follows: one, that the delay involved was essentially technical rather than actual; and two, that the decision of the High Court the subject of the

intended revision is riddled with "serious illegality which goes to the root of the jurisdiction of the High Court."

In response, Andrew J. Ndimbo, the first respondent, swore an affidavit in reply. The second respondent, Valeriana Ndimbo, on her part, did not lodge any affidavit in reply.

At the hearing before me on 30th April, 2021, Mr. Edson Mbogoro, learned counsel, appeared for the applicant. Having adopted the contents of the notice of motion and the founding affidavit, Mr. Mbogoro, at first, revisited the background to this matter as narrated in the founding affidavit.

It is apparent that the appeal before the High Court (Land Appeal No. 9 of 2008) arose from the decision of the District Land and Housing Tribunal of Songea ("the District Tribunal") in Land Appeal No. 38 of 2007 originating from Land Application No. 10 of 2007 before the Ward Tribunal of Kilimani ("the Ward Tribunal"). The protagonists in the dispute were the two respondents.

At the centre of the aforesaid dispute was ownership of landed property described as Plot No. 1044, Block 'C', Ruhuwiko area, Mbinga Town. It was the first respondent's case that sometime in September, 2003 the second respondent sold the suit property to him but shortly thereafter she

sold the same property rather unlawfully to another person who is understood to be the applicant herein. Although the first respondent initially triumphed at the Ward Tribunal, the District Tribunal reversed that decision on appeal by the second respondent. However, on appeal to the High Court, Kalombola, J. restored the Ward Tribunal's decision in favour of the first respondent, who was, then, adjudged the lawful owner of the suit property.

Referring to paragraphs 11 and 12 of the supporting affidavit, Mr. Mbogoro stated the applicant was all along oblivious of the aforesaid proceedings as well as the decision of Kalombola, J. rendered on 19th July, 2011. She only became aware of that decision in August, 2014. Since then until 13th November, 2019 when she lodged the instant application, she moved back and forth in the corridors of the District Tribunal and the High Court seeking justice. In the course of that effort, she pursued a number of matters including the following: **one**, she instituted objection proceedings (Miscellaneous Application No. 115 of 2016) in the District Tribunal resisting execution of decree in the first respondent's favour. The matter ended in vain. **Two**, she lodged a suit (Land Application No. 11 of 2017) in the District Tribunal, against the first respondent and another person, for ownership of the suit property. Again, luck was not on her side as the action ended on 13th July, 2018 with the first respondent being adjudged the lawful owner of

the suit property primarily on the tribunal's reliance on Kalombola, J.'s verdict dated 19th July, 2011 in Land Appeal No. 9 of 2008. **Three**, between 13th July, 2018 and August, 2019 she appealed to the High Court against the District Tribunal's decision but later on she withdrew the appeal and, instead, pursued an extension of time to apply for review of the judgment of Kalombola, J. in Land Appeal No. 9 of 2008. She, too, withdrew that application, on 1st August, 2019, as she settled to pursue revision of the said judgment in this Court, hence this application.

When I probed Mr. Mbogoro if the applicant had fully accounted for every day of the delay between August, 2014 when the applicant became aware of the existence of the judgment of Kalombola, J. in Land Appeal No. 9 of 2008 and 13th November, 2019 when she lodged the instant application, he replied, with remarkable forthrightness, that was not the case. Accordingly, he abandoned the first ground for the motion.

Indeed, having carefully examined the chronology of the steps the applicant took in her pursuit of justice as revealed in the supporting affidavit and revisited by counsel, it is clear to me that certain periods of delay are unexplained. Two examples will sufficiently illustrate the point. First, while both paragraphs 12 and 13 of the supporting affidavit allude to the objection proceedings in the District Tribunal that the applicant initiated right after she

became aware of the decision of Kalombola, J., they do not indicate when the said proceedings were lodged. On that basis, it remains unclear if the applicant acted with promptitude after learning of the impugned decision.

Secondly, while in paragraphs 16, 17 and 18 of the supporting affidavit it is stated that on 21st November, 2018 the applicant withdrew her appeal to the High Court challenging the District Tribunal's decision in Land Application No. 11 of 2017 and then applied on 4th February, 2019 for extension of time to apply for review of Kalombola, J.'s judgment, no explanation is given of the period of sixty-five days between these two steps taken between 21st November, 2018 and 4th February, 2019.

Settled is the principle that in an application for enlargement of time, the applicant has to account for every day of the delay involved and that failure to do so would be fatal to the application: see, for example, the unreported decisions of this Court in **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011; **Crispian Juma Mkude v. Republic**, Criminal Application No. 34 of 2012; and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014.

Turning to the other limb of justification for the application that the judgment intended for revision is tainted with serious illegality, Mr. Mbogoro contended, briefly but forcefully, that even though it is manifest on the face of the judgment of Kalombola, J. that the action between the respondents was conducted while they were fully aware of the applicant's claim of title to the suit property, the matter proceeded from the Ward Tribunal to the High Court without her being impleaded as a party and heard on her rival claim. In the premises, he urged that the applicant be granted the extension of time sought so as to assail the aforesaid judgment that affected her claimed title to the suit property without affording her a hearing.

For the first respondent, Mr. Katara Mugwe, learned counsel, contended that the non-joinder of the applicant was not fatal as explained by the learned High Court Judge in terms of Order I, rule 9 of the Civil Procedure Code, Cap. 33 R.E. 2002 (now 2019). He supported the learned Judge's reasoning that as long as the non-joinder did not affect the determination of the controversy so far as regards the rights and interests of the parties before the court, the proceedings were not defective.

The second respondent, on her part, supported the application unreservedly.

Having examined the notice of motion and the affidavits and considered the submissions of the parties, it now behooves the Court to determine whether the delay involved should be condoned and, consequently, time be extended within which the applicant may lodge the intended application for revision.

At first, it bears reaffirming 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 a myriad of factors. One such factor, which happens to relevant to this matter, is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see **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 **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]

In the instant matter, it is uncontroverted that the first respondent proceeded against the second respondent before the Ward Tribunal and that the matter went on appeal through the District Tribunal up to the High Court. That the applicant was not a party to the aforesaid proceedings but the subject matter thereof was landed property to which she claimed title. In fact, her rival claim of title was acknowledged by the District Tribunal based on the evidence on record and that it was stated that at the time she still had possession of the contested property. By its decision dated 19th July, 2011 intended for revision, the High Court vacated the District Tribunal's decision and declared the first respondent the lawful owner of the disputed property thereby rivalling if not effacing the applicant's claimed title. The

applicant was all along unaware of the aforesaid proceedings. After becoming aware of the decision by Kalombola, J. in August, 2014 she took steps as narrated earlier to vindicate her claim of title. She may have not accounted for each and every day of delay between then and when she lodged this matter, but, in my view, her diligence and quest for justice cannot be questioned.

Taking into account the settled principle as explained in numerous decisions of the Court including **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251; **Director of Public Prosecutions v. Sabina I. Tesha & Others** [1992] TLR 237 and **Abbas Sherally & Another v. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) that a violation of a party's right to be heard renders the decision involved a nullity, I am convinced that on the face of the record the application raises a legal point of sufficient significance for the Court's attention by way of revision. I have considered that revision is the only recourse available to the applicant to challenge Kalombola, J.'s judgment as having not been a party to the proceedings that commenced at the Ward Tribunal obliterating her title to the disputed property she has no right of appeal to this Court – see **Halais Pro-Chemie v. Wella A.G.** [1996] TLR 269. See also the unreported decisions of the Court in **Chief Abdallah Said**

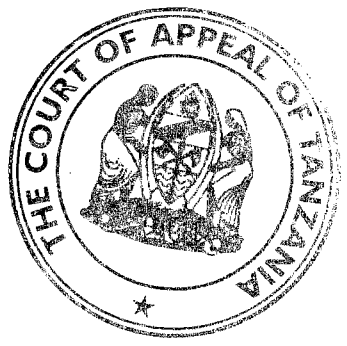
Fundikira v. Hilla A. Hillal, Civil Application No. 72 of 2002; **Mgeni Seif v. Mohamed Yahaya Khalfani**, Civil Application No. 104 of 2008; **Spring Realtors Limited v. Msindika Stores Ltd. & Nine Others**, Civil Application No. 129 of 2011; and **Attorney General v. Oysterbay Villas Limited & Another**, Civil Application No. 229 of 2016.

The upshot of the matter is that I find merit in the application and proceed to grant it. Accordingly, I order the applicant to lodge her application for revision within sixty days of the date hereof. Costs shall follow the event in the intended revision.

DATED at **IRINGA** this 1st day of May, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered this 3rd day of May, 2021 in the presence of Mr. Edson Mbogoro, counsel for the applicant, Mr. Kitara Mugwe, counsel for the 1st respondent and 2nd respondent present in person is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL