IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 188/17 OF 2019

MUSSA S. MSANGI.....1ST APPLICANT

RAFIA S. MSANGI.....2ND APPLICANT

AND

ANNA PETER MKOMEA.....RESPONDENT

(Application for extension of time within which to file revision from the proceedings, judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Ngwala, J)

Dated the 29th day of November, 2012.
in
Land Appeal No. 10 of 2010.

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RULING

28th June, & 14th July, 2021

MWAMPASHI, J.A.:

This is an application for extension of time within which to apply for revision of the proceedings, judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam (Ngwala, J) in Land Appeal No. 10 of 2010. The Notice of Motion is made under Rules 10, 48 and 49(1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and it is supported by two affidavits; that of the 1st applicant and the other of Mr. K. M. Nyangarika learned advocate for the applicants. On her part and in opposing the application, the respondent filed an affidavit in reply sworn by her learned advocate Mr. Joseph Ishengoma Rutabingwa.

According to the Notice of Motion the application is based on the following three grounds;-

1. *That the applicants' right of appeal to this Court has been blocked by judicial process.*
2. *That there are sufficient reasons amounting to exceptional circumstances for extending time.*
3. *That there are allegations of fraud committed manifestly and apparent on the face of the record upon tempering with the record of the First Appellate Court as well as that of the Tribunal.*

For the purpose of appreciating the nature and essence of the application the relevant background facts, albeit in brief, need to be given. It all started when the applicants instituted Land Application No. 29 of 2007 in the District Land and Housing Tribunal for Kinondoni at Magomeni (the Tribunal). It was the applicants' case that the respondent and her late husband were refusing to handover a house which the applicants had bought from the respondent and her late husband. After a full trail, the Tribunal decided in the applicants' favour but when the matter reached the High court by way of an appeal in Civil Appeal No. 10 of 2010, the Tribunal's decision was on 29/11/2012 reversed on a ground that the purported sale transaction was null and unenforceable for lack of consent from the respondent.

Being dissatisfied with the High Court decision, the applicants did on 22nd November, 2012 duly lodge a Notice of Appeal and on the same date they also applied for certified copies of proceedings, judgement and decree for appeal purpose. Thereafter, the applicants applied for leave to appeal which was granted on 30/01/2014 by the High Court. On 05/08/2014, the applicants were notified that certified copies of the proceedings, judgment and decree were ready for collection. After collecting the record, the then applicants' advocate (ASYLA ATTORNEY) realized that according to the record supplied to them the date on which the judgment was delivered was 29/11/2012 and not 19/11/2012 which was the date indicated in the Notice of Appeal they had earlier on filed. Further in the certificate of delay which was issued to the applicants on 17/08/2014, it was certified that the period of time to be excluded was from 23/11/2012 the day copies of the requisite documents were applied for by the applicants to 05/08/2014 when the copies were ready for collection. This is the point when the snag, in as far as the applicants' wish to challenge the High Court decision in Civil Appeal No. 10 of 2010, emerged.

Although it is being claimed by the applicants in their supporting affidavit that the problem or confusion on the date the High Court judgment was delivered became known to them in August, 2014 the

record shows that well before August, 2014 the applicants had on 25/09/2013 filed Civil Application No. 173 of 2013 before this Court for amendment of the Notice of Appeal. This application was withdrawn by the applicants on 16/03/2015. Thereafter the applicants filed Civil Application No. 121 of 2015 in the High Court for extension of time within which to apply for correction of the date of judgment, but again, this application was withdrawn by the applicants on 20/05/2015. They again filed another application (Civil Application No. 150 of 2015) in this Court which was also withdrawn by the applicants on 05/09/2018. Then on 19/10/2018, in Civil Application No. 36 of 2018, the Notice of Appeal that had been filed since 22/11/2014 was also withdrawn by the applicants. The same happened to Civil Application No. 481 of 2018 which was again, withdrawn by the applicants on 10/05/2019 hence ending the seven(7) years applicants' pursuit of challenging the High Court judgment and decree dated 29/11/2012.

It was after the withdrawal of the above mentioned Civil Application No. 481 of 2018 on 10/05/2019 that the applicants abandoned the appellate route and decided to challenge the High Court decision by way of revision. Since in terms of Rule 65(4) of the Rules, revision must be lodged within 60 days from the date of the decision sought to be revised, which in this case is 29/11/2012, the applicants found themselves well out of time and thus they filed this application at hand on 27/05/2019

seeking for extension of time within which to apply for revision of the decision of the High Court as introduced above.

At the hearing of this application, Mr. Kassim M. Nyangarika, learned advocate, represented the applicants while the respondent was represented by Mr. Joseph Rutabingwa and Ms. Ida Rugakingila, learned advocates.

In his submission in support of the application Mr. Nyangarika firstly adopted the two supporting affidavits as well as the Notice of Motion and his written submission filed on 16/07/2019. He then argued that there are sufficient and exceptional reasons in support of the application at hand. It was submitted by him that the applicants have been compelled to seek extension of time within which they can file an application for revision mainly because their right to appeal has been blocked by judicial process and also because the record of both the Tribunal and High Court are tainted with illegality. As on the ground that the appeal process has been blocked it was contended by him that there is a confusion in regard to the date the High Court judgment was delivered. He argued that the date indicated on the High Court judgment as the date the judgment was delivered does not tally with the date indicated in the Notice of Appeal as well as in the applicants' letter for certified copies of the requisite documents for appeal purpose. He explained further that while the

judgment and the decree show that the judgment was delivered on 29/11/2012 there is evidence in abundance showing that the judgment was delivered on 19/11/2012 and not on 29/11/2012.

Mr. Nyangarika also pointed out that the Notice of Appeal filed by the applicants show that the judgment was delivered on 19/11/2012 as it is for the letter by the applicants applying for certified copies of the proceedings, judgment and decree which is dated 22/11/2012. He added that even the certificate of delay sufficiently show that the judgment could not have been delivered on 29/11/2012 but on 19/11/2012 because the period of time certified to be excluded is from 23/11/2012. It was insisted by him that because of the confusion on the date the judgment was delivered the applicants could not appeal and they were left with no any other option but to ask the Court to invoke its revisionary powers but time was not in their favour hence the current application.

It was Mr. Nyangarika's further submission that the High Court acted on tampered Tribunal's proceedings. He argued that the record of proceedings of the High Court and also of the Tribunal are either missing or have been altered or changed, removed or tampered with. He, for instance, pointed out that one page containing evidence of the key witness for the applicants was plucked from the record and replaced by a

new one containing different evidence. He insisted that the said page is in different font and style from other pages the fact that prove that the record was tampered with.

Mr. Nyangarika did also argue that since under Rule 10 of the Rules the Court has a broad discretion in extending time and further since each case has to be decided on its own facts and circumstances then the application should be granted because it entails exceptional circumstances sufficient for extension of time within which to file an application for revision. He insisted that the claim of illegality of the High Court and Tribunal's record constitutes sufficient reasons for extension of time under Rule 10 of the Rules. To buttress his argument on the question of illegality the learned advocate for the applicants referred the Court to decisions of the Court in Consolidated Civil References Nos 6,7 and 8 of 2006 between ***VIP Engineering and Marketing Ltd & 2 Others vs. City Bank (Tz) Ltd*** and in ***The Principal Secretary, Ministry of Defence & National Service vs. D.P Vaiambia*** (1992)TLR 185.

Lastly, it was insisted by Mr. Nyangarika that the anomaly on the date of the delivery of the High Court judgment confused the applicants' counsel who had to spend considerable time researching on what had to

be done to rectify the anomaly. He contended that whenever the applicants filed their applications in the High Court and before this Court for the rectification of the defect in regard to the date of the judgment delivery and the Notice of Appeal for the sole purpose of pursuing their appeal, the respondent's advocate kept on raising objections in order to block or frustrate the applicants to pursue their intended appeal. It was also argued by him that the steps the applicants took show how their counsel were diligent in the process of rectifying the defects. He further submitted that the aim of resorting to the revisionary jurisdiction of the Court is to protect the image and integrity of the administration of justice in the eyes of the general public. He therefore prayed for the application to be granted.

The application was strongly contested by Mr. Rutabingwa, the learned advocate for the respondent. He firstly adopted the affidavit in reply and his written submission filed on 15/10/2019 as part of his submission against the application. It was his argument that the submission by Mr. Nyangarika is focused on what would be grounds in support of the intended application for revision and not on the application at hand which is for extension of time. He pointed out that in as far as the application at hand is concerned, the applicants were required to

show good cause as to why they could not file their intended application for revision in time which they have completely failed to do.

Mr. Rutabingwa did also submit that no judicial process has blocked the appeal process. He contended that the applicants had earlier duly filed the Notice of Appeal and had applied and were granted leave to appeal on 30/01/2014 as required by S.5(1) (c) of the Appellate Jurisdiction Act, Cap 141. It was further pointed out by him that up to that point the applicants were on the right truck. He submitted that upon realising that the date on the Notice of Appeal did not tally with the date of the judgment the applicants filed Misc. Land Application No.122 of 2015 in the High Court (Mtungi, J) applying for extension of time within which to apply for amendment/correction of the date of delivery of High Court judgment in Civil Appeal No. 10/2010. However, before the application could be heard the issue was resolved that the correct date of the judgment should remain the date indicated in the judgment by the High Court Judge (Ngwala, J.) i.e. 29/11/2012. Mr. Rutabingwa insisted that it was after the issue had been so resolved that the applicants withdraw the said application on 20/05/2015. He also argued that at this point the applicants had an open course to apply before the High Court for extension of time within which to file a fresh Notice of Appeal under S.

11 (1) of the Appellate Jurisdiction Act, Cap 141 but that the applicants did not take that course which was open to them.

It was further submitted by Mr. Rutafungwa that since the applicants did not apply for extension of time to file a fresh Notice of appeal bearing the correct date of the judgment and as there is no order of the High Court refusing extension of time, the applicants cannot be heard arguing that their right of appeal has been blocked by judicial process. He also contended that under these circumstances the applicants intend to use revision as an alternative to appeal which is wrong. Mr. Rutabingwa did further argue that the applicants who had initiated the appeal process and who decided to abandon the appeal process after filing a number of applications, all of which ended up being withdrawn by them, cannot be allowed to come to the Court through the back door.

It was also argued by Mr. Rutabingwa that the allegations that the Tribunal's record was tampered with are unfounded and were not raised before the High Court. He argued that the fact that there is a page in different font and style does not necessarily mean that there was any tampering of the record. He explained that the page was missing in the first typed proceedings and that the missing page had therefore to be retyped by a different typist and computer but using the original

handwritten proceedings hence the difference in font and style. It was insisted that what is on the said page is exactly what is in the handwritten proceedings.

Mr. Rutabingwa lastly submitted that the applicants had not exhausted all available remedies before resorting to revisional jurisdiction. He insisted that the applicants had alternative remedies to the High Court and even to this Court and therefore that time should not be extended for the applicants to file an application for revision.

For the above reasons it was prayed by Mr. Rutabingwa that the application be dismissed with costs because the applicants have failed to show good cause and also because there is right to appeal.

In his brief rejoinder Mr. Nyangarika reiterated his earlier argument that the confusion on the date the High Court judgment was delivered attributed to the delay and the blockage of the appeal process. He also contended that the confusion was never resolved. It was further argued by him that the tampering of the record was discovered after the appeal had already been determined by the High Court and that is the reason the issue was not raised before the High Court. He therefore repeated his prayer for the application to be granted.

I have duly considered the submissions made for and against the application and I wish to point out at the outset that the argument by Mr. Rutabingwa that the submission by Mr. Nyangarika in support of the application goes beyond what is necessarily needed in applications for extension of time, has substance. The submission for the application, particularly in the 17 pages long written submission, is mainly of what might be argued in the intended application for revision, which, as for now, is not the application before the Court. It is in those circumstances that in determining this application at hand the Court will be on guard lest it falls into the trap of overstepping the boundary by going into determining an intended application for revision which, as alluded above, is not which is before the Court. This, however, does not mean that this court can totally not poke its head into looking as to whether, under the circumstances of this matter, the course intended to be taken by the applicants in case the application is granted, i.e moving the Court to invoke its revisional jurisdiction, is right and lawful. The grounds on which the application is based particularly the grounds that there are exceptional circumstances calling for revision and also that the appeal process has been blocked by judicial process make it inevitable for the Court to also look, though very cautiously, the tenability of the intended application for revision.

The only issue before this Court in as far as this application for extension of time within which to apply for revision is concerned, is therefore whether or not the applicants have managed to satisfactorily explain why they have, for the period of seven (7) years, delayed in filing the intended application for revision within the prescribed period of 60 days i.e from 29/11/2012 which is the date of the decision intended to be revised.

The power of the Court to extend time for the doing of any act authorised or required by the Rules is given to the Court by Rule 10 of the Rules under which it is provided as follows;-

> *"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 so extended".*

The power of the Court under Rule 10 of the Rules is discretionary and is exercisable only when good cause for delay is shown. For an applicant in an application for extension of time to succeed, he must

explain and give good reasons that prevented him from taking the required act, within the prescribed period of time.

As to what amounts to *good cause*, there is no an invariably agreed definition. In ***Osward Masatu Mwizarubi vs. Tanzania Fish Processing Ltd***, Civil Application No. 13 of 2010 it was stated by this Court thus;-

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

The discretionary powers given under Rule 10 of the Rules, is judicial and it must always be exercised according to the rules of reasons and justice and not according to private opinion or arbitrarily. The above position and the guidelines under which the discretion must be exercised have been reiterated by this Court in a number of cases. ***In Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 (unreported) the following guidelines were formulated;-

(i) The applicant must account for all the period of delay

(ii) The delay should not be inordinate

(iii) *The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

(iv) *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.*

Further, in ***Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) vs. Mohamed Mshindo,*** Civil Application No. 28/2017 (unreported) this Court again had the following to say;

> *"Whereas it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion under rule 10, the Court must consider factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stand to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the legality of the decision sought to be challenged".*

Applying the above guidelines to the case at hand, it is firstly an observation of the Court that the fact that the delay is inordinate cannot be disputed by anyone. The High Court decision intended to be challenged and for which extension of time is being sought, was delivered

in November, 2012 and the application at hand was filed on 27/05/2019. The period of seven (7) years is a very long period of time. Though for the period of seven (7) years the applicants had been in court corridors, but, with due respect, there is nothing of substance that has, for all those years, been done, by the applicants. A number of applications were filed by the applicants, in the High Court as well as in this Court but all of them ended up being withdrawn by the applicants. Also with due respect, the applicants conduct cannot be interpreted in any other way rather than that the conduct was dilatory and sloppy.

Further, while it can also not be much disputed that there was a bit confusion in regard to the date the High Court judgment was delivered as there are some documents, some issued by the High Court, in which it is indicated that the judgment was delivered some few days before 29/11/2012, it is still a considered view of the Court that the problem was not of that much substance. The confusion or problem in question could have been easily rectified. In raising this issue as one of the reasons for the delay the applicants are only trying to make a mountain out of a mouse mound. In fact, the applicants made several applications for the sole purpose of rectifying and correcting the problem but as pointed out earlier the applications filed for that purpose ended up being withdrawn by the applicants. The Court is also in agreement with Mr. Rutabingwa

that the issue on what is the correct date of the High Court judgment appear to had been settled in the course of the High Court Misc. Land Application No. 122 of 2015 (Mtungi, J) in which the applicants had applied for extension of time within which to apply for amendment/correction of the date of delivery of High Court judgment of Civil Appeal No. 10 of 2010. The Court finds no reason not to agree with Mr. Rutabingwa that the only reasons the said application was withdrawn by the applicants on 20/05/2015, was the fact that the confusion had been cleared and settled that the correct date the High Court judgment was delivered is the date indicated in the judgment i.e 29/11/2012. It should also be borne in mind that the sanctity of court record has to be observed always.

After the confusion of the date of the judgment had been cleared on 20/05/2015 the applicants could have applied for the withdrawal of their earlier filed Notice of Appeal and for extension of time within which to file a fresh Notice bearing the correct date of the judgment and from there they could have proceeded with their appeal. This was not done but the applicants filed another application (Civil Application No. 150/2015) in this Court which was however also withdrawn by the applicants on 05/09/2018. From this it cannot therefore argued that the right of appeal or appeal process was blocked by judicial process. The applicants' right of

appeal was still open but it is the applicants themselves who decided to abandon it. The appeal process was therefore not blocked by any judicial process. It should be insisted that where a party has decided and started challenging a decision by way of an appeal, he must pursue it to its logical conclusion before resorting to the revisional jurisdiction of the Court. Revisional jurisdiction of the Court cannot be invoked as an alternative to the appellate jurisdiction of the Court. (see **Hallais Pro – Chemie vs. Wella A G** (1996) TLR 269.

It was also argued for the applicants that the delay in filing an application for revision was attributed by their former advocate and the fact that they had to look for another advocate who after taking time in studying the record opined that the only option was for filing revision. It is also a considered view of the Court that the attempt by the applicants to throw the blame on their former advocate cannot be accepted and it does not relieve them from being held responsible for whatever snag their wish to challenge the High Court decision is encountering. Ignorance by an advocate of what procedure needed to be followed and the changing of hands of a case between different advocates does not constitute a good case for extension of time. This position was taken by this Court in ***Exim Bank (Tz) Ltd vs. Jacquilene A. Kweka,*** Civil

Application No. 348 of 2020 (unreported) where the Court held among other things that;-

> *"The reason that the matter has changed hands from one law firm to another cannot persuade the court to grant an application for extension of time. This is due to the fact that firms are manned by lawyers who ought to know court procedures. In fact, failure of the advocate to act within the detect of law cannot constitute a good cause for enlargement of time".*

In another case of ***Omar Ibrahim vs Ndege Commercial Services Ltd***, Civil Application No.83 of 2020 (unreported) the Court stressed that neither ignorance of the law nor counsel's mistake constitutes good cause. It was further held that Lack of diligence on the part of the counsel is not sufficient ground for extension of time. See also ***Wambura N. J. Waryuba vs The Principal Secretary Ministry of Finance & Another***, Civil Application No. 320 of 2020 (unreported).

As on the second ground that there are sufficient reasons amounting to exceptional circumstances for extending time it is a considered view of this Court that as also argued by Mr. Rutabingwa there are no such exceptional circumstances entitling the applicants to resort to the revisional jurisdiction of the Court. In ***Mansoor Daya***

Chemical Ltd vs National Bank of Commerce, Civil Application No. 464/2014 (unreported) the Court restated the principle that if there is a right of appeal the right has to be pursued first unless there are sufficient reasons amounting to exceptional circumstances which will entitle a party to resort to the revisional jurisdiction of the Court. As pointed out above the fact that there was that little confusion of the date the High Court judgment was delivered does not amount to exceptional circumstances entitling the applicants to resort to the revisional jurisdiction of the Court.

The ground and argument on illegality is also not substantiated. Where illegality is raised as one of the grounds for extension of time it must be satisfied that really there is that illegality. Further, in accordance with ***In Lyamuya Construction Company Ltd*** (*supra)* the illegality in question must be that raises a point of law of sufficient importance and must be apparent on the face of record not one that would be discovered by a long-drawn argument or process. Applying this principle to the application at hand this Court is not persuaded at all that there is any illegality apparent on the face of record that can be discerned as a good cause for the Court to extend time within which to file an application for revision. The allegations that the lower courts record was altered, removed, missing, changed, tampered with or that there is a page with

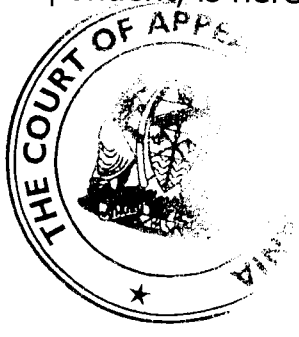
no evidence are not apparent on the face of record and most of them require a long-drawn argument or process to be discovered.

In the upshot and for the above reasons and observations, it is a finding of the Court that the applicants have failed to show good cause for the Court to exercise its powers and extend time as prayed by the applicants in the Notice of Motion. The application is therefore accordingly dismissed in its entirety with costs.

DATED at **DAR ES SALAAM** this 12th day of July, 2021.

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 14th day of July, 2021 in the presence of Mr. Deogratius Ogunde holding brief of Mr. Nyangarika, learned counsel for the applicant and Mr. Evodius Rutabingwa, counsel for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL