IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 392/01 OF 2020

JALIYA FELIX RUTAIHWA ..... APPLICANT

VERSUS

1. KALOKORA BWESHA
2. CECILIA BONIFACE SHIYO } **..... RESPONDENTS**

(Application for extension of time in which to apply for revision of the Ruling the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Kakolaki, J.)

dated the 5th day of June, 2020
in
Miscellaneous Civil Application No. 196 of 2020

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RULING

23rd February & 4th March, 2021

NDIKA, J.A.:

This ruling resolves an application lodged on 22nd September, 2020 by Ms. Jaliya Felix Rutaihwa ("the applicant") for extension of time in which to apply to this Court for revision of the ruling of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (Kakolaki, J.) dated 5th June, 2020 in Miscellaneous Civil Application No. 196 of 2020. The application, made under Rule 10 of the Tanzania Court of Appeal Rules ("the Rules"), is supported by an affidavit deposed to by the applicant on

7th September, 2020. The motion is strongly resisted by Mr. Kalokora Bwesha and Ms. Cecilia Boniface Shiyo ("the respondents") who swore a joint affidavit in reply dated 7th October, 2020.

The essential facts of the case are as follows: the applicant is a caveator in the ongoing proceedings in the High Court in Probate Cause No. 9 of 2020 where the respondents herein are seeking a grant of probate of the applicant's deceased son, Ali Abdul Mufuruki, who died in Johannesburg, South Africa on 8th December, 2019. Pending the hearing and determination of the aforesaid probate cause, the respondents lodged in that court an *ex parte* application vide Miscellaneous Civil Application No. 196 of 2020 for a grant of probate *pendente lite*.

According to the applicant, although the application was supposed to have proceeded for hearing and determination as an *ex parte* motion, she was ordered to file a counter affidavit and allowed to appear in court for hearing through her advocate, Mr. Stephen Mosha. On 5th June, 2020, the High Court rendered its ruling, the subject of this matter, granting the probate *pendente lite* prayed for. It is her contention that the said ruling is

manifestly tainted with illegalities and thus she intends to challenge it by way of revision to this Court.

In terms of Rule 65 (4) of the Rules, the intended revision should have been lodged within sixty days of the decision, which, as already indicated, was handed down on 5th June, 2020. It means that the aforesaid limitation period expired on or about 4th August, 2020 but the intended application was yet to be filed.

In seeking to justify the extension prayed for, the application cites two grounds: one, "that the ruling sought to be challenged is tainted with illegalities to the extent that the orders of *pendente lite* were granted without considering the caveat which raised doubt on the legality of the will and the alleged executors." Two, that the applicant's failure to lodge an application for revision within the prescribed time was caused by her "serious sickness and long distance."

The first ground is elaborated in paragraphs 8 to 13 of the supporting affidavit. Briefly, it is averred that the grant of probate *pendente lite* was irregular in that, instead of the matter proceeding *ex parte* as per the applicable procedure, it proceeded *inter partes* with the applicant being

required to file a counter affidavit and appear at the hearing. That the grant of probate *pendente lite* rendered the caveat nugatory. That the learned High Court Judge ignored that the caveat raised doubt on the authenticity of the will.

The second ground is covered by paragraphs 14 to 17 of the supporting affidavit. In essence, it is averred in paragraphs 13 to 15 that the applicant was diagnosed in 2013 with Kaposi sarcoma and has since been in very poor health. That on 15th July, 2020 she received certain documents drawn up by Mr. Stephen Mosha, her advocate, for lodging the intended revision but before she signed them she was admitted at the Geita Regional Government Hospital from 20th July to 4th August, 2020 by which time she was already out of time. In paragraph 16, it is averred that after her discharge from hospital, she learnt from her advocate that she could only apply for revision after seeking and obtaining extension of time. Most tellingly, the applicant deposes in paragraph 17 as follows:

> "17. *That from the 4th of August, 2020 my advocate started preparation of this application and sent to me for signature on the 30th day of August, 2020, which I received on the 1st of September, 2020 and*

signed the same on the same date and sent back on the 2nd September, 2020. My advocate then received the same on the 4th September, 2020 where he found that there was a mistake in the signing of the same. He therefore reprinted the same and sent back to me on the 5th September, 2020. I received the same on the 7th September, 2020 and signed the same day and sent back on the 8th September, 2020. The same was received by my advocate on the 11th September, 2020 and started the process of filing on 14th September, 2020." [Emphasis added]

In their joint affidavit in reply, the respondents confirm that both parties were heard at the High Court before the court granted the probate *pendente lite* for preservation of the deceased's estate and that the process involved was fair and just to both parties. Apart from denying that the deceased's will was forged, they aver that the existence of the caveat lodged by the applicant did not preclude the High Court from hearing and determining the application for probate *pendente lite*. As regards the applicant's alleged inability to act in time due to ill-health, it is stated in paragraph 14 of the replying affidavit that the applicant was fully aware of

her illness and that she relied on her advocate for preparation of the documents. On that basis, her advocate was in a position to do everything that was necessary to be done to have the intended revision lodged in time.

Mr. Stephen Mosha, learned counsel, prosecuted the matter at the hearing for the applicant while Ms. Margaret J.R. Ngasani, learned advocate, stood for the respondents.

Having adopted the contents of the notice of motion and the supporting affidavit, Mr. Mosha urged that the application be granted. In essence, he stressed that the applicant could not lodge the intended revision in time due to a debilitating illness that resulted in her hospitalization in Geita. She was so incapacitated that she could not sign in time the documents he prepared in Dar es Salaam and dispatched to Geita for signature for the intended application to be lodged. He also contended that the intended revision is for challenging the decision of the High Court which is tainted with an illegality as explained in paragraphs 9 to 13 of the supporting affidavit. He maintained that the application for probate

pendente lite was irregularly dealt with *inter partes* and that it pre-empted the caveat which assailed the authenticity of the will.

Conversely, Ms. Ngasani, relying on the affidavit in reply, faulted the applicant for seeking an extension to challenge a ruling on an interlocutory matter. That the impugned order was only meant for the preservation of the deceased's estate and that the final order whether to grant probate or not would be issued following an *inter partes* hearing necessitated by the caveat lodged by the applicant. She added that the matter in the High Court was coming up for hearing on 15th March, 2021 and so, the present application was nothing but a ploy to delay the ongoing proceedings in the High Court.

Moreover, Ms. Ngasani wondered that if the applicant had been sick since 2013, what prevented her advocate from signing the drafted documents on her behalf so as to lodge the application in time. On that basis, she urged me to find the application unmerited and proceed to dismiss it.

Rejoining, Mr. Mosha stated that he had no instructions to sign the documents on the applicant's behalf.

I have examined the materials on record and taken account of the contending submissions of the learned counsel for the parties. The crisp issue is whether this is a fitting occasion to condone the delay involved and proceed to extend time to institute the intended revision.

It is apt to reiterate that the Court's power for extending time under Rule 10 of the Rules is both extensive and discretionary but it is exercisable judiciously upon good cause being shown. Although there is no invariable or constant definition of the phrase "good cause", the Court consistently looks at 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; and 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: 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. Also to be considered 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).

It is common ground that in the instant matter, the ruling the subject of the intended revision was handed down on 5th June, 2020. As indicated earlier, in terms of Rule 65 (4) of the Rules, the intended revision should have been lodged within sixty days of the decision but by the expiry of that period on or about 4th August, 2020 none was filed.

In explaining the delay, the applicant blamed her ill-health for her travails. That although the documents intended for lodging the revision were drawn up and dispatched to her in Geita for signature in good time, the revision could not be instituted due to an incapacitating illness that resulted in her hospitalization in Geita, rendering her unable to sign the

documents. That may or not have been so but I do not accept this explanation for two reasons: first, it is my respectful view, and Ms. Ngasani is partly right, that if the applicant has been incapacitated by an enduring illness since 2013 why didn't Mr. Mosha, her advocate, explore signing and lodging the documents for and on her behalf. Certainly, I am aware that Mr. Mosha's ability to act for the applicant was limited to making depositions in support of the intended revision on her behalf on matters of his own knowledge and those based on information believed to be true. Nonetheless, Mr. Mosha's statement from the bar that he had no instruction to sign the documents was too casual and unacceptable.

Secondly and more importantly, I find the averment in paragraph 17 of the supporting affidavit, reproduced herein above and which is no doubt the bedrock of the application, is on its face tainted with material falsehood and hence, unreliable. For, while the said affidavit was signed by the deponent and attested in Geita on 7th September, 2020, rather strangely, it deposes in the aforesaid paragraph 17 of events that occurred subsequently (between 8th and 14th September, 2020). To hammer the

point home, I find it apt to let the relevant part of that paragraph speak for itself:

> "He therefore reprinted the same and sent back to me on the 5th September, 2020. I received the same on the 7th September, 2020 and signed the same day and sent back on the 8th September, 2020. The same was received by my advocate on the 11th September, 2020 and started the process of filing on 14th September, 2020." [Emphasis added]

It is evident from the above extract that if the applicant received from her advocate the notice of motion and the accompanying affidavit on 7th September, 2020, which she signed on the same day as is revealed on the record, how come then she averred in the same affidavit a chronology of events that supposedly occurred subsequent to the affidavit being made, between 8th and 14th September, 2020. It can only be inferred from this averment that either the said chronology of events is a palpable lie or that the affidavit was not made on 7th September, 2020 but on a later date. It is elementary that an affidavit that contains material falsehood cannot be acted upon: see, for instance, **Ignazio Messina v. Willow Investments**

SPRL, Civil Application No. 21 of 2001; and **Kidodi Sugar Estates & 5 Others v. Tanga Petroleum Company Ltd.**, Civil Application No. 110 of 2009 (both unreported). In **Ignazio Messina** (*supra*), it was expounded that:

> "An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."

In the premises, I find it unsafe to act on the supporting affidavit that patently contains substantial untruths tending to muddy the waters but work in favour of the applicant.

I now turn to the other facet of the application that extension prayed be granted on the reason that the decision intended to be challenged is tainted by an illegality.

Certainly, as held by the Court in **Devram Valambhia** (*supra*) at page 188 that where "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." In giving the rationale for that position, the Court stated that:

> "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** (*supra*), a single Judge of the Court expounded that:

> *"Since every party intending to appeal seeks to chalienge 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 hls 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 my considered opinion, the circumstances of this matter do not, by any yardstick, bring in the application of the principle in the **Devram Valambhia** case. For a start, the contention that the grant of probate *pendente lite* was irregular because the matter proceeded *inter partes* instead of *ex parte* as per the applicable procedure is plainly misconceived. Of course the application had originally been instituted as an *ex parte* motion, but there was no conceivable prejudice to the applicant for her being allowed by the High Court to file a counter affidavit and be heard at

the hearing. If anything, it was the respondents that should have complained about the applicant's involvement in the matter.

Equally flawed is the argument that the grant of probate *pendente lite* rendered the caveat nugatory and that the learned High Court Judge ignored that the caveat raised doubt on the authenticity of the will. To be sure, the application for the grant of probate *pendente lite* was made under, inter alia, section 38 of the Probate and Administration of Estates Act, Cap. 352 RE 2002 *"pending the determination of any proceedings touching on the validity of the will."* The said provision is express that:

> *"**Pending the determination of any proceedings touching the validity of the wiii of a deceased person** or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of such deceased person, **who shall have all the rights and powers of a general administrator other than the right of distributing such estate**, and every such administrator shall be subject to the immediate control of the court and shall act under its direction."* [Emphasis added]

As the order made under the above provision was "pending the determination of any proceedings touching on the validity of the will," the applicant's complaint that the said order rendered the caveat nugatory is evidently implausible. That interim order did not prejudge or preempt the caveat. Ms. Ngasani is entirely correct that the said order was only intended to facilitate the preservation of the deceased's estate by empowering the respondents to act as interim administrators with all the powers and rights of a general administrator other than the right of distributing the estate. To be fair to the learned Judge of the High Court, he was alive to that position of the law as he stated at page 12 of his typed ruling thus:

> *"In the upshot, I am satisfied that the applicants have managed to advance sufficient reasons to move this court to grant the application.* ***The caveator can still successfully challenge the grant of probate in the main petition by stating the reasons for objecting the grant of the petition and her rights and interest therein.****"*[Emphasis added]

In the circumstances, I am unpersuaded that the decision the subject of the intended revision is fraught with an illegality raising a point of law of sufficient importance to warrant this Court's attention.

For the above reasons, I find the application unmerited and proceed to dismiss it with costs.

DATED at **DAR ES SALAAM** this 2nd day of March, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered on this 4th day March, 2021, in the presence of Mr. Nafikile Mwambona, learned counsel for the applicant and Ms. Margaret Ngosani, learned counsel for the respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL