

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 234/17 OF 2019

KHALID HUSSEIN MUCCADAMAPPLICANT

VERSUS

NGULO MTIGA (as a Legal personal representative of
the estate of **ABUBAKAR OMAR SAID MTIGA**).....**1ST RESPONDENT**

TULIBAKO TABU KYOMAND RESPONDENT

**(Application for extension of time to apply for revision against the
decision of the High Court of Tanzania (Land Division))**

(Wambura, J.)

Dated 10th day of August, 2018

in

Land Case No. 184 of 2018

.....

RULING

1ST & 14th June, 2022

MAIGE J.A.:

Pursuant to rule 10 of the Tanzania Court of Appeal Rules, 2009 “(the Rules”), the applicant has initiated a motion for extension of time to apply for revision against the decision of the High Court of Tanzania, Land Division (“the trial court”) dated 10th August, 2018 in Land Case No. 184 of 2016. The dispute involved therein was between the first respondent who was the plaintiff on the one hand and the second respondent who was the defendant on the other. It pertained to a landed property described as Plot No. 320 Block “A” Mikocheni Area Dar es Salaam with certificate of title No. 21778 (“the

disputed property"). In its *ex parte* decision, the trial court decreed as follows:

- (1) *The plaintiff is herein declared to be the lawful owner of the suit premises situated on plot No. 320 Block "A" Mikocheni Area Dar es Salaam City.*
- (2) *The defendant is ordered to demolish all the structures thereon within 30 days from the date of the Order.*
- (3) *The plaintiff is to be paid a sum of Tshs. 10,000,000/= as general damages for being denied the right to develop the suit land.*
- (4) *Defendant to pay costs of this suit.*
- (5) *Exhibits which are original copies to be returned to the plaintiff immediately and certified copies to be returned in record.*

The applicant though not a party to the said decision, alleges that he has been adversely affected by the decision to the extent of the demolition order. At paragraph 5 of his affidavit, the applicant claims that, in accordance with the notice of demolition in execution of the decree posted on the wall enclosing his buildings on 24/5/2019 (annexure K-7 to the affidavit) and his conversation with the court broker, one Abdallah Makatta Mwinyimtumama t/a Sensitive Auction Mart and Court Brokers, the demolition order would affect his servant quarter, toilet and part of the main house. The applicant's ownership

on the buildings in question is pleaded in paragraphs 2 and 3 of the affidavit as follows:

"2. *That on 25th September, 2007 I purchased a built up property from TULIBAKO TABU KYOMA, as a legal personal representative of RAYMOND JOHN KYOMA, deceased; and since then I have been residing thereon without any disturbance. The property consists of the main house, a servant quarter and a toilet all fenced in one compound [with one main gate] enclosing Plot No. 320 and Plot No. 322 Block "A" Mikocheni Dar es salaam City.*

A copy of the Valuation Report that was shown to me at the time of the purchase is marked Annexure K-1, and Annexure K-2 is a sketch of the property I bought.

3. *That the said property was mortgaged to TWIGA BANCORP LIMITED and we executed Tripartite Agreement between the vendor, the Bank and me and it was agreed that I should pay part of the purchase price to the Bank , and the balance to the vendor.*

A copy of the Tripartite Agreement is attached hereto marked Annexure K-3, a copy of the Sale Agreement and Transfer of the Right of Occupancy is collectively marked Annexure K-4 and a copy of the Discharge of

Mortgage is annexure K-5 to form part of this affidavit".

The applicant has been aggrieved by the said decision in so far as it was made without him being afforded a right to be heard despite the adverse effect it has on his property. Since he was already out of time on 10th June, 2019 when he discovered about the existence of the decree, the applicant is moving the Court for a grant of an extension of time so that he can apply for revision against the decision.

The application has faced a serious opposition from the first respondent by way of an affidavit in reply. As to whether the applicant has any ownership interest on the disputed property, the first respondent deposes, at paragraph 3 of the affidavit in reply as follows:

"3. That the contents of paragraphs 2,3 and 4 of the affidavit are vehemently disputed. I further aver that the land which the applicant bought from the 2nd respondent is Plot No. 322 with CT. No. 186314/102 as per Annexure K1,K2,K3 and K4 to the Applicant's Affidavit. There is nowhere in the said documents/ annexures which shows that the Applicant bought Plot No. 320 as well. I state that Plot No. 320 with

C.T. No. 21778 belongs to me, as legal personal representative of the late Abubakar Omar Said Mtiga. The alleged valuation report , sale agreement and transfer deed as well as annexure K-6 are in respect of Plot No. 322, have absolutely nothing to do with my Plot No. 320, Block "A" Mikocheni Area. Copies of the Certificate of Title are appended therewith and marked annexure NM-1 and leave of this Court is craved to form part of this counter affidavit".

said property was mortgaged TWIGA BANCORP LIMITED and we executed Tripartite Agreement between the vendor, the Bank and me and it was agreed that I should pay part of the purchase price to the Bank , and the balance to the vendor.

At paragraph 5 of the affidavit in reply, the first respondent denies that the applicant became aware of the decree on 10th June, 2019 and asserts that he had been aware since in 2012 when the suit at the trial court was instituted. He further avers that, on 28th May, 2019, the applicant having been served with a notice of demolition, commenced objection proceedings which are still sub-judice at the trial court.

At paragraph 6 of the affidavit, it would appear, the applicant acknowledges to have commenced the objection proceedings in question.

At the hearing, Mr. Sylvester Shayo, learned advocate appeared for the applicant whereas the first respondent appeared in person without representation. The second respondent despite being duly served by way of substituted service, did not appear. He did not file any affidavit in reply too. Neither written submissions. In the circumstance, the hearing proceeded in his absence in terms of rule 63(2) of the Rules.

In their oral submissions for and against the motion, both Mr. Shayo for the applicant and the first respondent in person fully adopted the contents of their written submissions with few clarifications. It has to be noted that, the submissions for the first respondent were filed by advocates Anna Marealle and Kepha Mayenje who for the reason which may not be relevant in this decision, withdrew themselves from the conduct of the matter soon before the date of hearing.

At pages 3 and 4 of the written submissions filed on his behalf, the first respondent submits that in view of the factual depositions in

the affidavit and the annexures therein, the application is an abuse of the court process and should not be entertained. He assigned two reasons. **First**, while the demolition order in question was in respect of a landed property at Plot 320 Block "A" Mikocheni with CT No. 21778, the documents of title attached in the affidavit in support of the application establish that the applicant purchased a property at Plot No. 322 Bloc "A" with CT No. 186314/102 Mikocheni Area. **Second**, before initiating this application, the applicant had commenced objection Proceedings which are still pending at the trial court. He submits, therefore that, as the applicant has opted for objection proceedings, he cannot come for revision because in the event the objection proceedings are determined against him, he can institute a fresh suit to establish his right under O. XXI r. 62 of the CPC.

Though the issue of whether the applicant has ownership interest on the suit property and the effect of the pending objection proceedings in the instant application were apparent in the affidavit in reply, in his written submissions, Mr. Shayo did not make any comment thereon. Equally so in his oral argument at the hearing

date. So that the applicant cannot be denied a right to be heard on that issue, I requested Mr. Shayo to address me thereon.

On objection proceedings, it was Mr. Shayo's submissions that the same was related to the propriety of the execution and had nothing to do with a decree. In his view, the decree once issued, can only be varied by a higher court by way of appeal or revision. On the issue of whether the applicant has interest on the disputed property, it was his submissions that, the same could be addressed if the applicant who was in the possession of the building, was given a right to be heard at the trial. That, he submitted, is the essence of the intended revision.

In his oral submissions, the first respondent did not make any useful remark apart from placing reliance on what is in the written submissions.

Having prudently considered the rival submissions in line with the notice of motion, affidavit and the affidavit in reply, it is right time to determine the merit or otherwise of the application. In so doing, I am to examine whether good cause has been shown for the delay as rule 10 of the Rules requires.

At this juncture, it is worthy to note that, what amounts to good cause has not been defined by any statutory law. In accordance with the principle in **Masatu Mwizarabi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010(unreported), "*good cause 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*".

Through case law however, some criteria has been put in place to guide judges and magistrates in deciding whether good cause has been established. As for instance, **Henry Muyanga v. Tanzania Communication Company Ltd**, BK Civil Application No. 8 of 2014 (unreported) it was held:

"The discretion of the Court to extend time under Rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the Court may take into consideration, such factors as, the length of the delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is granted".

Dealing with a similar question, this Court observed in **R. v. Yona Kaponda & Others** [1985] T.L.R. 84 as follows:

" ... as I understand it, "sufficient reasons " here does not refer only, and is not confined to delay. Rather, it is sufficient reasons for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances , and the weight and implications of the issue or issues involved."

Much as I am in agreement with Mr. Shayo that, illegality can, in view of the principle in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] T.L.R 185 by itself suffice as a good cause, it is my humble opinion that, the said principle applies as a matter of necessity to enable the higher to correct the illegality. It cannot apply in a situation where the avenue for addressing the illegality at the lower court are not blocked.

As I said herein above, the declaratory and demolition decree of the trial court was in respect of the property described as Plot No. 320 Block "A" Mikocheni Area, Dar es Salaam City. The applicant's documents of titles are pleaded in paragraphs 2,3 and 4 of the affidavit. A quick glans over the said documents and more particularly the certificate of title in annexure K-6, Tripartite Agreement in annexure K-3 and deed of transfer in annexure K-4,

indicate in no uncertain terms that, the applicant purchased Plot No. 320 Block "A". Indeed, that is what, as rightly submitted for the respondent, the applicant pleaded in the Chamber Summons initiating the objection proceedings (Miscellaneous Civil Application No. 290 of 2019). It is pleaded in the affidavit in reply as annexure NM-2.

In my view, as the trial judge did not in the judgment, the subject of the intended revision, make any decision on the property at Plot No. 320 which the applicant purchased from the second respondent through Bancorp Bank Limited, whether the demolition order purporting to execute the said decree has any adverse effect on the applicant's plot, is an issue which relates to execution of the decree and not the decree itself.

In accordance with the affidavit, it is apparent, the applicant has already commenced objection proceedings. That, in my view, is an appropriate way-forward to deal with a situation where someone's property is alleged to have been attached in execution of a decree he or she is not privy thereto. Much as I agree with Mr. Shayo that, the decision on objection cannot reverse the judgment and decree, the subject of the execution, I cannot agree with him that, the procedure

thereof does not give room for the resolution of the dispute of ownership between the objector and the decree holder. For, as rightly submitted for the respondent, the objector or claimant has remedy, under O. XXI r. 62 of the CPC, to commence a fresh suit to establish his right should the objection proceedings be decided against him.

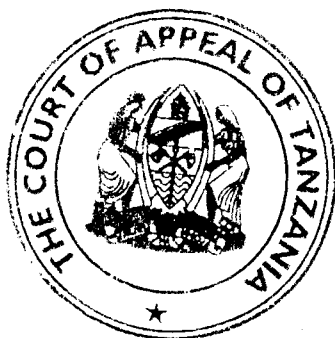
As the applicant opted to address the issue by way of objection proceedings, the instant motion in so far as it seeks to extend time to address the same issue, is unequitable and an abuse of the court process. This is more so considering the fact that, the status of the objection proceedings has not been disclosed in the affidavit in support of the motion. Nor in the submissions by the counsel for the applicant. This is so regardless of the fact that, if the said proceedings are disposed of in favour of the applicant, the intended action for revision may as well be disposed of. The applicant, as a matter of principle, was expected, before initiating the instant application, to either withdraw the objection proceedings at the trial court or exhaust all the remedies under O. XXI of the CPC, including filing a fresh suit, in the event that the objection proceedings fail.

It is for the foregoing reasons that, I find the application at hand as an abuse of the court process. It is accordingly struck out with costs.

DATED at DAR ES SALAAM this 13th day of June, 2022.

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered this 14th day of June, 2022 in the presence of the Ms. Benadeta Shayo, learned counsel for the applicant while the 1st respondent present in person and the absence of the 2nd respondent, is hereby certified as a true copy of the original.




D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL