IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 338/01 OF 2020

WAHEEDA YAKUB SULEIMAN .... APPLICANT

VERSUS

MARY ATUPELE MUNGAI...1ST RESPONDENT
JAMES JOSEPH MUNGAI (The Legal
Representative of the lat**e JOSEPH MUNGAI) ....2ND RESPONDENT**

(Application for extension of time to apply for Revision of the decision of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

dated the 23rd day of February, 2016
in
Matrimonial Cause No. 2 of 2013

RULING

20th July & 9th August, 2022

KENTE, J.A.:

The salient facts constituting the background to this application are neither of any considerable length nor intricate. Both admitted and at issue, they are briefly as follows.

The first respondent herein Mary Atupele Mungai is a widow of the late Joseph James Mungai. Before the death of her husband, she petitioned the High Court (sitting at Dar es Salaam) in a matrimonial dispute impleading him and the present applicant one Waheeda Yakub Suleiman as respondents. In the grounds set out in support of her petition, the first respondent accused her husband of having illicit

relationships with the present applicant and transferring some of their jointly acquired matrimonial properties to two children born out of wedlock namely Sandra Mungai and Jacob Mungai. Another ground was the allegation that the applicant had moved from the house which the late Joseph Mungai had bought for his illegitimate son Jacob Mungai and gone to live in concubinage with her husband on Plot No. 230 Mtwara Crescent area at Oyster Bay Dar es Salaam, contrary to her wishes. In the said petition, the first respondent complained resentfully that she suffered the humiliation and embarrassment of losing the properties jointly acquired with her husband after self-denying toil. Tired of perpetual and escalating grief, she petitioned the High Court praying for the following substantive orders:

i) A declaration that she was a co-owner of the landed properties on Plot No. 230 Mtwara Crescent Oyster Bay Dar es Salaam, Plots No. 1A and 1B in Mlalakuwa/Kawe Beach Dar es Salaam, Plot No. 1 Block C Mafinga, Iringa, Plot No. 76 Block B1 Wilolesi Area Iringa Municipality, Plots No. 125 and 126 Wilolesi/Sabasaba Area Iringa Municipality, Plot No. 540 Block B Mafinga township Iringa, Farms in

Nyambya Kilosa Village in Ihanu Ward and a farm at Kisaada Village Nyololo Mufindi.

ii) A declaration that the second respondent (now the applicant) has no right to enter or occupy any part of the house on Plot No. 230 Mtwara Crescent Oyster Bay Dar es Salaam during the subsistence of the marriage between her (first respondent) and her deceased husband; and

iii) A declaration that the transfer of properties made by her husband to his illegitimate son and daughter Jacob Mungai and Sandra Mungai on Plots No. 125 and 126 Wilolesi/Sabasaba Area Iringa Municipality is null and void.

As one would expect, the petition was resisted by the applicant and the late Joseph Mungai with great vigour. Unfortunately however, before the hearing of the said petition could start in earnest with the view to determining the dispute between the parties on merit, Joseph Mungai passed away. Upon his death, his son the second respondent herein James Joseph Mungai was appointed administrator of the estate of his deceased father. After the second respondent stepped into the

shoes of his deceased father, the first respondent went ahead and withdrew the petition against the applicant. On the same day, in what seems to have been thought out in advance, not surprising, blood being thicker than water, the respondents who are respectively a mother and son reached a quick settlement purportedly ending hostility between the first respondent and her deceased husband.

In the said settlement which was adopted by the trial court as to form its consent judgment and decree, the first respondent's claims raised in the petition were virtually admitted by the second respondent, while the rights and interests of the applicant and her two children were technically extinguished. That was after the applicant had fallen for the strategic withdrawal of the petition against her hook, line and sinker. It was when the respondents sought to execute the settlement decree that the applicant begun to feel the heat. She then belatedly realised that she had been hoodwinked into believing that the withdrawal of the petition against her was probably for her and her children's advantage and relief.

Bloody but unbowed, by way of a Notice of Motion taken under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as "the Court Rules"), the applicant has now applied for

extension of time within which she can apply for revision of the said consent judgment and decree. To bring the present dispute between the parties into a proper perspective, we take the liberty to quote verbatim but with necessary refinements the applicant's grounds of complaint in support of the application. Through Mr. Jeremia Mtobesya learned counsel the applicant has complained that the impugned decision of the High Court was fraught with illegalities in that;

i) Some of the properties that were the subject-matter of the settlement between the respondents belonged to her children who were not parties to the matrimonial cause that was before the High Court; hence denied the right to be heard.

ii) In recording the agreement as a consent judgment, the High Court determined ownership of landed properties while not sitting as a Land Court; and

iii) The manner in which the out of court settlement was reached at was a bit questionable; while the late Joseph Mungai had vigorously contested the petition by the first respondent, the second

respondent who is the legal representative of his deceased father readily agreed to every claim that was put forward by the first respondent.

Submitting in support of the application, Mr. Mtobesya did not have any particular arguments to put forward. He only spent an agonizing half an hour contending that the above-quoted three grounds of complaint clearly indicated the illegalities and injustice apparent on the decision sought to be revised. He also argued that the applicant could neither appeal nor apply for review of the impugned decision of the High Court as she was no longer a party to the petition following the first respondent's decision to withdraw the claim against her. On that account, the learned counsel contended that the applicant had demonstrated that indeed there are special circumstances for this Court to exercise its discretionary powers and grant the application. To buttress his argument, Mr. Mtobesya relied on our earlier decision in **Amour Habib Salim v. Hussein Bafagi,** Civil Application No. 52 of 2009 (unreported).

On the opposite side, Mrs. Crescencia Rwechungura and Mr. Jamhuri Johnson learned Advocates representing the respondents were staunchly opposed to the application. Citing **Isidore Leka Shirima and**

Another v. The Public Service Social Security Fund and Two Others, Civil Application No.152 of 2016 (unreported), Mrs. Rwechungura contended that, candidly speaking, this application was uncalled for as the applicant could have appealed to challenge the impugned decision of the High Court or she could have applied for its review by the same court. According to Mrs Rwechungura, the present application was preferred as an afterthought after the applicant and her counsel who were present in court when the impugned decision was made had procrastinated before resorting to dilatory tactics such as using the applicant's daughter Sandra Joseph Mungai to resist execution of the High Court decree, but all in vain.

The learned counsel refuted the alleged illegality or injustice caused by the High Court decision saying that, the applicant knew well that, the properties in dispute were jointly acquired by the first respondent and her deceased husband who, however, as it turned out, had decided to give them away simply because of his meshugaas and all-consuming deep affection for the applicant.

Commenting on the complaint by the applicant's counsel that the High Court had wrongly usurped the powers which are ordinarily exercisable by the Land Division of the High Court, Mrs. Rwechungura

submitted that, in terms of sections 56 and 57 of the Law of Marriage Act, Cap 29 R.E. 2019, a court determining a matrimonial dispute has jurisdiction to determine land related matters which are incidental to the matrimonial dispute. On that account, she faulted Mr. Mtobesya who had strenuously contended that upon realising that the dispute between the parties in Matrimonial cause No. 2 of 2013 involved the ownership of some landed properties, the learned High Court judge ought to have stayed the proceedings before her and referred the matter to the land court. Moreover, as if the landed properties in dispute were movable, the learned counsel for the respondent contended that, the present application had been overtaken by events as the decree of the High Court which is sought to be challenged on revision had already been executed to its satisfaction.

Lending a helping hand to Mrs. Rwechungura, Mr. Jamhuri submitted in respect of Mr. Mtobesya's contention that the late Joseph Mungai had bequeathed the disputed properties to his two children, that, since the ownership of the disputed two houses on Plots Nos. 125 and 126 Wilolesi/Sabasaba Iringa Municipality is a subject of litigation before the High Court (at Dar es Salaam) in Probate No. 32 of 2018 in which the present applicant is the petitioner, the question as to who is

the lawful owner of the said properties will be determined there. All in all, the two learned counsel representing the respondents were of the view and they accordingly submitted that the applicant had fallen short of showing that indeed there was good cause for this court to exercise its discretionary powers and extend time under Rule 10 of the Rules.

For purposes of making an informed decision, I have found it appropriate to reproduce in full, the provisions of Rule 10 of the rules which is pertinent to the matter now under scrutiny. Rule 10 provides that;

> *"10. The Court may, upon good cause shown, extend the time limited by the Rules or by any decision of the High Court or tribunal for the doing of any act authorised 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."*

I also need to point out at this moment that, it is settled law under our jurisdiction and the learned counsel herein cannot help but be aware of which, that, where a point of law involved in the intended appeal or application for revision is a claim of the illegality of the impugned

decision, that in itself constitutes good cause for the court to extend the limitation period. (See **Tumsifu Kimaro the Administrator of the Estate of the Late Eliamini Kimaro) v. Mohamed Mshindo,** Civil Application No. 28/17/2017, **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI – Telecommunications (T) Ltd v. Citibank (T) Ltd, Consolidated** Civil Reference No. 6, 7 and 8 of 2016 (both unreported) and **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185.

In the last cited case, the Court held 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 Rules) for extending time."*

It must be noted however that, when deciding whether or not to extend time like now, a single Justice of the Court is neither required nor expected to determine the existence or otherwise of the alleged illegality. That is the preserve of the full Court. I am saying so advisedly as at the hearing of this application, Mr. Mtobesya on one side and Mrs.

Rwechungura and Mr. Jamhuri on another side were constantly at each other's throats and the judicial atmosphere was so charged following the spirited arguments which they marshalled in disagreement on the existence or otherwise of the alleged illegality in the impugned decision of the High Court. Given their premature arguments, it is inescapable and indeed instructive to observe that, put in a situation like in the instant case where the court is called upon to extend time on the ground of illegality of the decision sought to be appealed against or revised by a higher court, the main issue to be decided, obviously by the reserved judge who, in his ruling, should speak little, is whether the application for extension of time discloses, albeit on a balance of probabilities, some illegalities manifest on the record and whether the said illegalities raise a point or some points of law of sufficient importance. (See the case of **Tumsifu Kimaro** (supra).

In an endeavour to determine the above-posed question and, in view of the conceded facts and circumstances obtaining in the instant case, I cannot resist the temptation to associate myself with the submissions made by of Mr. Mtobesya. Having anxiously and carefully considered this matter, I am satisfied on a balance of probabilities that, taken together with other complaints raised by the applicant, the

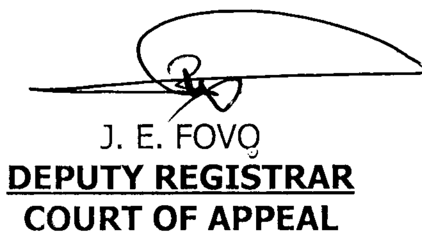
decision of the High Court unreservedly sanctioning the withdrawal of the petition by the first respondent against the applicant who was also representing her children, thereby placing their rights at the mercy of the respondents, suggests rebuttably, the existence of some arguable issues which raise some points of law worthy of consideration by the full Court, upon application for revision.

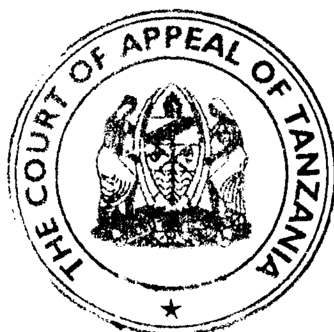
In the light of the above discussion, it is my conclusion and I am satisfied, that indeed, the application discloses good cause for the Court to enlarge time in terms of Rule 10 of the Rules. I accordingly allow the application and direct the applicant to lodge the intended application for revision within thirty days of this ruling, if she is so desirous. The costs of this application shall be in the cause.

DATED at **DAR ES SALAAM** this 2nd day of August, 2022.

P. M. KENTE
JUSTICE OF APPEAL

The ruling delivered this 9th day of August, 2022 in the presence of Mr. Nashon Nkungu, learned advocate for the applicant and Mr. Jamhuri Johnson, learned advocate for the respondent is hereby certified as a true copy of the original.





J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL