IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 407/08 OF 2020

DENIS T. MKASA .....APPLICANT

VERSUS

FARIDA HAMZA (Administratrix of the

Estate of the late Hamza Adam)..... 1ST RESPONDENT

GEOFREY KABAKA ..... 2ND RESPONDENT

(Application for Extension of Time to file an Application for Revision against the judgment of the High Court of Tanzania)

(Maige, J.)

Dated 14th day of June, 2017

in

Land Appeal No. 155 of 2016

.....

RULING

02nd & 8th December, 2022.

RUMANYIKA, J.A.:

Denis T. Mkasa, the applicant, is seeking an order of the Court for the grant of an extension of time to file an application for revision against the decision of the High Court in Land Appeal No. 155 of 2016. The application is made under Rule 10 of the Court of Appeal Rules, 2019 (the Rules). It is supported by an affidavit deposed by the applicant. Only Farida Hamza, the 1st respondent filed an affidavit in reply to oppose it.

The background of the application is briefly stated that, the applicant herein purchased, on an auction the Houses on Plot Nos. 19, 41 & 42 Block B 11 situate at Mkuyuni area in Mwanza City (the Disputed Property). However, that sale lasted short, as it was nullified by the court vide Misc. Land Application No. 130C of 2008. It was further alleged by the applicant in the affidavit that, he was not aware of the said nullification of the sale until such time when he found the 1st respondent back repossessed with the disputed property and from there, he made all the necessary follow ups to file an application for revision on 29th September, 2017 which unfortunately was struck out on 18/06/2020 for being time barred. Undaunted, he filed the present application on 01/07/2020, as above said, seeking an order granting him extension of time to file an application for revision.

At the hearing of the application on 02/12/2022, the applicant appeared in person without representation whereas, Farida Hamza (Administratrix of the Estate of the Late Hamza Adam) and Geofrey Kabaka, the 1st and 2nd respondents respectively, also appeared unrepresented.

The applicant pressed his reliance on his written submissions, pursuant to rule 106 (1) of the Rules filed on 28/08/2020, without any oral averments to expound it.

The 1st respondent filed hers on 12/08/2020 which incorporated two limbs of a Preliminary Objection, (the P.O.), in essence they are as follows: **one**, that, an affidavit supporting the Notice of Motion was defective as it did not contain a statement of facts except arguments and speculations and **two**, that, the Notice of Motion did not raise any ground to justify grant of an extension of time. Arguing the p.o., first of all she dropped the first limb. About the remaining limb, she contended nothing orally or in writing.

Having heard the parties, I reserved my ruling which I promised to incorporate it in the substantive ruling. This is it, which I am set to give.

As regards the said remaining 1st limb of the p.o., which concerns the omission to state in the notice of motion the grounds for delay, I had sufficient time to read all 8 paragraphs of affidavit in support of the Notice of Motion. However, I found none. If anything, the applicant gave two grounds for the delay in his written submissions, namely **one**, that, he was not aware of the impugned judgment until on 14/09/2017 late in the day and **two**, that, he was caught up in court prosecuting a related matter which eventually was dismissed for being time barred. He contended, therefore, that, his delay was justified and he is entitled to get an extension of time. Supporting his point, he cited the decisions of the Court in **Victor**

Rweyemamu Binamungu v. Geofrey Kabaka and Another, Civil Appeal No. 602 of 2017 and **Hassan Assajee v. Amirali Abdul Husein Hassanal**, Civil Application No. 83 of 1998 (both reported).

The law is settled that technical delay constitutes sufficient cause for an extension of time, if it is pleaded in the supporting affidavit and sufficiently demonstrated by the applicant. However, as above indicated, the applicant herein did not attempt to depose such materials in his affidavit. It follows therefore, that the reason for delay he stated in the written submissions was, but after thought and unreliable evidence and it counts nothing, as that is evidence from the bar which cannot be acted upon. That one was our proposition in a number of cases including **Farida F. Mbarak & another v. Domina Kagaruki & 4 Others**, Civil Reference No. 14 of 2019 where we cited **Karibu Textile Mills Limited v. Commissioner General Tanzania Revenue Authority**, Civil Reference No. 21 of 2017 (both unreported), that:

> *"The explanation that he gave us in his written and oral submission, that the applicant spent the thirty days period preparing, drawing up and filing the application for extension of time, is nothing but a statement from the bar that cannot be acted upon.*

Nor could it have been acted upon by the learned single Justice, had it been made in the applicant's submission before him."

Upon the hearing of the application on merits therefore, I am settled in mind that, the p.o. was meritorious and I sustain it. It is equally significant to state that, unlike in ordinary cases where evidence is adduced *viva voce*, a formal application, as here, should be premised on factual evidence adduced by way of an affidavit. In the former, to be tested by way of cross examination and, in the latter case by an affidavit in reply.

As hinted before, just as did in the p.o, on his part the applicant had nothing useful to submit on the merits of the application. He stressed reliance on his written submissions.

Basically, the 1st respondent reiterated what she had contended about the p.o., about the applicant's failure to cite, in the notice of motion, the reasons for the delay. However, she added that, by applying for revision before the court belatedly as of right, without seeking and obtaining the requisite extension of time, that one demonstrated a degree of negligence on the part of the applicant's advocate which is not executable, as it constituted no sufficient cause. To support her point, she cited our

proposition in **William Shija v. Fortunatus Masha** (1997) TLR 213 much as, she further contended, the delay is counted from 14/06/2017 which is the date of pronouncement of the impugned judgment or three years as the case may be, was in ordinate and inexcusable.

The 2nd respondent supported the application and pressed for speedy end of justice. He contended that, he had interest in it, as the dispute began way back in 2008, and that, for hearing this application, he had travelled all the way from the DRC Congo where he boarded three flights to access the Court which is costly.

From a foregoing therefore, the issue is no longer whether the applicant did not state reasons for the delay, but whether the said ailment may leave the present application safe.

It is not disputed that; the applicant did not depose in his affidavit the grounds for the delay to support the application. He did it in his written submissions only, which the Court cannot act upon. Therefore, it cannot be said that the applicant has shown requisite good cause and adduce evidence to support the application.

The above said therefore, the 2nd respondents' concession to the application cannot assist the applicant as the applicant is duty bound to

justify the delay. Encountered by the like situation in **Paulo Mbogo v. R. Criminal Application No. 111/01 of 2018** we proposed that:

> *"...where like here, an application for extension of time is not opposed, the Court is still under duty to see to it, and satisfy itself that the rules governing such an application have been followed to the letter".*

Moreover, it is a trite law logically, that, parties cannot confer jurisdiction which a court does not have or, like here, by consent suspend operation of the law, in this case the rules on adducing evidence in formal applications. See- our decision in **Sospeter Kahindi v. Mbeshi Mashini,** Civil Appeal No. 56 of 2017 where we cited **Shyam Thanki and Others v. New Palace Hotel** [1971] 1 EA 199.

Without prejudice to the foregoing discussion, the applicant also verified the contents of paragraph 2 of his affidavit that, following an advertisement made by Wassa Royal Auctioneers, the disputed property was auctioned and sold on 09/05/2016, which fact, according to him, was true to the best of his knowledge. It means therefore, that the applicant became aware of the said sale not on 14/09/2017 as deposed at paragraph 6 of his affidavit, but on 09/05/2016, the date of the said auction and sale. He did not therefore, account for each day of the delay which is about four years

or state how possible he could not have visited the disputed property from the date of the auction until about four years later consecutively on 01/07/2020, when he filed this application.

Consequently, I dismiss the application with costs as the applicant has not stated good cause, leave alone cause for the delay. Order accordingly.

DATED at **MWANZA** this 8th day of December, 2022.

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered on 8th day of December, 2022 in the presence of the applicant and respondents present in persons, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL