IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 171/08 OF 2020

THERESIA THOMAS MADAHA.....APPLICANT

VERSUS

PAULINA SAMSON NDAWAVYA..... RESPONDENT

(Application for extension of time to apply for review from the judgment of the Court of Appeal of Tanzania, at Mwanza)

(Mugasha, Mwandambo and Levira, JJ.A.)

11th day of December, 2019
in
Civil Appeal No. 45 of 2017

RULING

29th November & 8th December, 2022

MAIGE, J.A.

This application has been preferred under rule 10 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is for extension of time to apply for review of the Judgment of the Court dated 11th December, 2019. In the said judgment, the Court reversed the decision of the High Court in favour of the applicant on the ownership of the suit property and declared the respondent the lawful owner of the same.

In accordance with the affidavit in support of the motion, the appeal in question was heard and determined while the respondent had already demised and without the Court being informed thereabout. It is also in the affidavit that, the hearing of the appeal proceeded without the applicant being afforded a right to be heard. Indeed, the applicant claims to have been unaware of the proceedings until in the late January, 2020 when she was served with an application for execution of the decree of the Court. The applicant further claims that, she did not instruct the advocate who appeared in the appeal proceedings on her behalf. In the circumstances, the applicant urges the Court to find that, there are serious illegalities involved in the proceedings which justify an extension of time in order that the same can be corrected by way of review.

It is on the record that, on 23rd day of November, 2021 when the matter came up for hearing, Mr. Jonas Samson herein after referred to as the "administrator", informed the Court that the respondent expired on 1st August, 2018 and that, on 19th September, 2018, he was appointed as the administrator of the respondent's estate. He, therefore, prayed, which was granted, for an adjournment so that he

could complete the process of being joined as a legal representative in the place of the deceased respondent.

When the matter came up again on 29th November, 2021, Mr. Elisa Abel Msuya, learned advocate appeared for the applicant. Mr. Elias Hezron, learned advocate appeared for the respondent. He was accompanied with the administrator. Before hearing could commence, Mr. Hezron informed the Court that despite the last order of the Court as afore mentioned, no application for joinder of the administrator to succeed the proceedings has been made. He did not assign any reason. Initially, Mr. Hezron had made an informal application for the joinder of the administrator but upon a brief dialogue with the Court, he opted to withdraw it.

As the last order of the Court had not been complied with notwithstanding that more than twelve months have passed, Mr. Msuya argued that, it is in the interest of justice that, the application proceeds in the absence of the respondent. I granted Mr. Msuya's prayer with a note that, the reason for my decision would be incorporated in the final Ruling.

Submitting in support of the application, Mr. Msuya in the first place adopted the notice of motion and affidavit in support thereof to read as part of his submissions. On the first ground of the application, Mr. Msuya submitted that, for the reason of the hearing of the appeal continuing at the instance of the deceased respondent without the Court being informed therefor, there is an element of serious illegalities which would, in view of the authority in the **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambhia** [1992] T.L.R. 185, justify an extension of time. On the second and third grounds which he argued concurrently, Mr. Msuya contended that, in not being notified of the existence of the appeal proceedings, the applicant was denied a right to be heard which would again justify extension of time. When asked by the Court whether the four months period from January 2020 to April 2020 has been accounted for, the learned counsel admitted that, it has not. The counsel however urged the Court to take into account, in its decision that, the applicant is an elder layperson who is ignorant of the court procedure.

Before I consider the merit or otherwise of the application, it is imperative to explain why I opted to proceed with the hearing of the application in the absence of the legal representative of the respondent. As the record speaks, the administrator appeared in Court on 23rd November, 2021 when the matter came up for hearing at the last time. On the said date, the administrator in essence confirmed the facts in the affidavit as substantiated by copies of the death certificate and the letters of administration that, the respondent had expired since 2018 and he was appointed in the same year to be the administrator of her estate. The record shows that, the said administrator applied, which was granted, for an adjournment so that he could formally cause to be joined in the place of the respondent. Conversely, no such application has been initiated. This is so notwithstanding that more than a year has passed since the grant of the order of the Court adjourning the matter therefor.

Though under rule 53 (4) of the Rules, the application would have been marked abated, we think, in the circumstance of this case, such an order cannot be granted without causing an obvious injustice. This is for three main reasons. **One**, the administrator who has been in a possession of letters of administration of the estate since 2018 has

unreasonably not applied to be joined as a successor respondent despite expiry of more than a year from the date of the order of the Court adjourning the hearing for that purpose. In such a situation, I submit, there is no doubt that, marking the application abated would be tentamount to allowing the said administrator to benefit from his own wrong. **Two**, granting such an order while the administrator unreasonably omitted to comply with the last order of the Court is an obvious abuse of the court process. **Three**, in accordance with the facts in the affidavit in support of the application, the prosecution of the appeal by the administrator without being joined in the place of the deceased is one of the proposed issues in the intended application for review. In my opinion, therefore, this is a fit case wherein I can invoke the inherent powers under rule 4 (2) of the Rules and depart from the requirement under rule 53 (4) of the Rules and thus proceed with the hearing of the application *exparte*. Those are the reasons why I took this approach.

Having said that, I now proceed with determination of the application on merit by having regard to the notice of motion, affidavit and the counsel submissions. As I revealed above, the applicant's main ground for the application is illegality. It has two elements. **First,**

Applicant's denial of a right to be heard as the appeal was heard without her being served. **Second**, the appeal at the Court was heard and determined at the instance of a dead person. As rightly submitted by Mr. Msuya, it is now a settled principle of law that, Illegality can by itself constitute a good cause for an extension of time. This is in line with the decision in **Valambia** case (supra) where it was held:

> *"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending time for the purpose, to ascertain the point and, if the alleged illegality be established to take appropriate measures to put the matter and record right".*

It is also the law that, for illegality to constitute sufficient cause, it must be apparent on the face of the record and of significant importance to deserve the attention of the Court. This position was stated in among others, **Valambia** Case (supra) and **Kalunga and Company Advocates vs. the National Bank of Commerce Limited** [2006] T.L.R .235.

From the affidavit and its annexures which has not been opposed, it would appear to me, the applicant has reasonably

demonstrated that, the respondent was not alive when the hearing of the appeal was being conducted. Certainly, this alone suffices to establish a *prima facie* case of illegality. I will in the circumstances, not consider the other elements of the alleged illegality.

In the final result and for the foregoing reasons, the application is granted with no order as to costs. The intended application for review should be filed within thirty days from the date hereof.

It is so ordered.

DATED at **MWANZA** this 6th day of December, 2022.

I. J. MAIGE

JUSTICE OF APPEAL

The Ruling delivered this 08th day of December, 2022 in the presence of Mr. Elias Abel Msuya, learned counsel for the Applicant and in the absence of the respondent, is hereby certified as a true copy of the original.

C. M. MAGESA

DEPUTY REGISTRAR

COURT OF APPEAL