

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 309/17 OF 2021

GILBERT ZEBEDAYO MREMA APPLICANT

VERSUS

MOHAMED ISSA MAKONGORO RESPONDENT

**(Application for extension of time to apply for Revision of the Decision of
the High Court of Tanzania (Land Division) at Dar es Salaam**

(Mzuna, J.)

Dated the 22nd day of February, 2018

in

Land Case No. 107 of 2015

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RULING OF THE COURT

25th October and 13th December, 2022

KAIRO, J.A.:

At the High Court of Tanzania Land Division, the respondent sued the applicant over the ownership of the property situate on plot No. 89, Block B Medium Density, Makunguni Street, Mikocheni B, Kinondoni District, with Certificate of Title No. 28113.

It is in the applicant's affidavit that the property was initially mortgaged to the National Bank of Commerce by the respondent to secure a loan in favour of Ms. Bulk Suppliers (EA) Ltd (the borrower) who was not a party to the proceedings at the High Court. That following a default and in an attempt to rescue the suit property from being disposed by the Bank, the borrower and the respondent sold the suit property to the applicant and the purchase price was used to repay the outstanding loan.

The applicant further deposed that, the transfer process was accordingly effected and the property was transferred to the applicant who later mortgaged the suit property to National Microfinance Bank PLC so as to obtain a loan.

The applicant went on to submit that on an apparent turn of events, the respondent started to dispute the sale and transfer of the suit property to the applicant and went on to file Land Case No. 107 of 2015 against the applicant claiming the ownership of the suit property. He further contended that the suit was heard ex-parte due his advocate's default to appear in court and the decision was delivered against him on 22nd February, 2018. However, he contended; the court's decision, neither declared the applicant nor the respondent to be a lawful owner of the suit property at the end of the trial, but the respondent's father, one Issa Mohamed Makongoro who testified at the trial as PW2. The applicant went on to depose that he was aggrieved and filed a notice of appeal and further applied for an extension of time within which to lodge the appeal but the application was withdrawn on 28th June, 2022 for want of competence. That the applicant then prayed to be supplied with the ruling and order of the Court on 1st July, 2021 and the same was supplied to him on the same day. The applicant later on 2nd July, 2021 withdrew the notice of appeal and the copies to that effect was returned to the applicant

on 5th July, 2021. The applicant eventually lodged this application on 6th July, 2021.

At the hearing of the application, the applicant was represented by Mr. Deogratias Lyimo Kiritta, learned counsel while the respondent was enjoying the legal services of Mr. Jovinson Kagirwa, learned counsel.

Arguing for the application, Mr. Kiritta first adopted the notice of motion and the supporting affidavit of the applicant as part of his oral submissions. He submitted that under Rule 10 of the Rules, the grant of extension of time is the Court's discretion and that for the Court to do so, good cause has to be exhibited by the applicant. He went on to submit that, what the applicant has stated in the notice of motion and the affidavit constitute good cause to warrant the Court exercise its discretion and grant the prayed relief. Mr. Kiritta elaborated that, the applicant has first stated what transpired from 22nd February, 2018 when the judgment sought to be challenged was delivered by the High Court to 6th July, 2021 when this application was filed, as above narrated. According to him, the applicant was all along in the Court corridors pursuing his right to challenge the High Court decision. As such, the applicant has accounted for all the days as he considered them to be a technical delay.

Mr. Kiritta further contended that the judgment and decree of the High Court under impunity is problematic as it is tainted with illegality to the extent that it cannot be enforceable. He gave four (4) instances of the

said illegalities which the applicant listed in paragraph 18 of his affidavit as follows:

- (a) That the High Court declared PW2, Issa Mohamed Makongoro who is the father of the respondent as the lawful owner of the suit property.*
- (b) That PW2 was not a party to the suit and there was no prayer for him to be declared the lawful owner of the suit property.*
- (c) That the decree of the Court in favour of a person who is not a party to the case cannot be executed by PW2 or the respondent.*
- (d) That the prayer sought are different from the one granted.*

He went on to submit that the pointed illegalities are apparent on the face of the judgment itself. He further contended that, in an application for extension of time, the Court has times without number stated that, where there is an allegation of illegality, it is important for the Court to grant the extension of time so that the alleged illegality can be considered by the Court. To support his contention, he referred the Court to the case of **Tanzania Breweries Limited vs. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 and **Omary Ally Nyamalege (as the administrator of the estate of the late Seleman Ally Nyamalege) And 2 Others**, Civil Application No. 94/08 of 2017 (both unreported). He also submitted that the Court has gone further and stated that the allegation of illegality once raised and if it constitutes sufficient reason for extension of time, it matters not whether the applicant has accounted for

the delay or not. He referred the Court to the case of **Kibo Hotel Kilimanjaro Limited vs. The treasury Registrar and Another**, Civil Application No. 502/17 of 2020 (unreported) listed by the respondent in his list of authorities, to fortify his contention. In conclusion he prayed the Court to find that the applicant has advanced sufficient cause to warrant the Court to exercise its discretion to grant the extension of time sought.

In his reply, Mr. Kagirwa refuted Mr. Kiritta's contention that the delay has been accounted for. He however conceded to the legal position that, illegality is one of the grounds under which the Court may extend time but hastened to add that, not all illegalities constitute sufficient cause for the purpose of extending time. He substantiated his contention by citing to me the case of **Fatma Hussein Shariff vs. Alkhan Abdallah and 3 others**, Civil Application No. 536/17 of 2017. He elaborated that, the case has stipulated three conditions to be present in a judgment sought to be challenged, for illegality to be considered as a good cause for extending time. He listed them to be **one;** point of law of sufficient importance, **two;** it must be apparent on the face of record, and **three;** not one that would be discovered by a long-drawn arguments or process. Mr. Kagirwa contended that the claimed illegalities at paragraph 18 are not sufficient cause as they do not meet the threshold listed in **Fatuma Hussein Shariff** (Supra). He thus invited the Court to dismiss the

application for failure to exhibit sufficient cause to warrant the grant of extension of time sought.

Rejoining on ground of illegality, Mr. Kirrita dismissed Mr. Kagirwa's contention that the pointed-out illegalities have not met the threshold stipulated, to constitute sufficient cause. He invited the Court to look at the judgment at pages 2 to 3 wherein the trial court framed the issues to guide the parties in determining the dispute adding that, none among them concerns the ownership of the property in dispute by PW2. He went on that at page 5 paragraph 3, the trial court has made its finding to the effect that the property at issue belonged to PW2 while there was no prayer to that effect. He referred the Court to the decree of the trial Court to verify his contention. He added that, on that basis, the trial court did not determine the rights of the parties to the dispute and the decision delivered cannot be executed. He thus reiterated his prayer to grant the prayer sought.

Having dispassionately weighed and considered the rival arguments from both counsel, the central issue for determination is whether or not sufficient reason has been advanced to warrant the grant of the extension of time sought. Rule 10 of the Rules under which this application is predicated confers the Court with wide discretionary powers to grant extension of time where good cause has been exhibited. However, what amounts to good cause has not been defined and the Court has invariably

considered various factors which include; to account for all period for delay, the delay should not be inordinate, the applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action he intends to take and the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged [See: **Tanga Cement Company Limited vs. Jumanne D. Masangwa and Another**, Civil Application No. 60 of 2001, **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372/01 of 2018 and **Wambura N.J. Waryuba vs. The Principal Secretary Ministry of Finance and The Attorney General** (all unreported)] to mention but a few.

In the case at hand, Mr. Kiritta has submitted that though the decision of the case sought to be challenged was delivered on 22nd February, 2018, and the application was lodged on 6th July, 2021 that is after more than three years, the applicant was diligent and not sloppy as he was all along in court corridors pursuing his right. It was his argument that all the days of delay therefore, were accounted for. However, I do not subscribe to his contention on that aspect, with much respect and I will state the reason:

The applicant is very clear on ground No. (iii) of the notice of motion wherein he associated the delay with the negligence of his advocate. For ease of reference, I hereby reproduce the excerpt as follows:

" (iii) That due to the negligence of the advocate for the applicant, the letter asking for proceeding was not served to the plaintiff (respondent herein) in the High Court proceedings to activate the grant of the certificate of delay by the registrar of the High Court for the time taken to obtain proceedings and other necessary documents for appeal purposes as requested.

(v) That due to the failure to serve the said letter, the application for extension of time could not be sustained and was accordingly marked withdrawn on 28th June, 2021."

Again, in paragraph 11 of his supporting affidavit, the applicant has associated his ordeal of having delayed to challenge the ex-parte judgment of the High Court with the negligence of his advocate who defaulted to enter appearance. The law is settled that negligence on the part of the counsel/advocate is not sufficient reason for extending time under rule 10 of the Rules [See: **William Shija vs. Fortunatus Mosha** [1977] T.L.R. 213 at page 219]. On that basis therefore, I hereby reject the explanation that the applicant's delay was a technical one and find that the days of delay were not accounted for.

I now go to the alleged illegality of the decision desired to be impugned. Various decisions of the Court have considered this issue. In the case of **Principal Secretary Ministry of Defence and National**

Service vs. Devram Valambhia [1992] T.L.R. 182 it was stated as hereunder:

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

The position was reiterated in **VIP Engineering and Marketing Limited And Three others vs. Citi Bank Tanzania Limited**, Consolidated Civil Reference No. 6,7, and 8 of 2006 (unreported) where it was stated that:

"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" within the meaning of rule 8 (now rule 10) of the Rules for extension of time."

When rebutting the presence of illegalities in the decision sought to be challenged, Mr. Kagirwa contended that, the listed four instances of illegalities did not meet the threshold stipulated in the case of **Fatuma Hussein Sharrif** (Supra). I have gone through the decision at issue and observed the points upon which Mr. Kiritta hinges his allegation of illegalities he thinks that the trial court went wrong in paragraph 18 of the

applicant's affidavit as above stated. The points in my view centred on the declaration that PW2 is a lawful owner while he was not a party to the proceedings and there was no relief prayed to that effect at trial court. Thus, with much respect, Mr. Kagirwa's contention is not supported by the record of the application. **In Motor Vessel Sepideh & Pemba Island Tours And Safaris vs. Yusuf and Ahmad Abdullah**, Civil Application No. 91 of 2013 (unreported), the Court held that for the purpose of extension of time, the applicant is not required to prove that the illegalities and irregularities can sustain revision, rather it is adequate to show that there are illegalities and /or irregularities in the decision sought to be revised.

I am aware that the applicant has failed to account for the days of delay, but the law is now settled that, the claim of illegality of the decision sought to be challenged constitutes sufficient reason for extension of time regardless of whether or not reasonable explanation has been given by the applicant under the rules, to account for the delay. The Court has given the stated position in various of our decisions including **VIP Engineering and Marketing Limited And Two Others** (Supra), **TanESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016 (both unreported), to mention but a few.

In view of the fact that there is allegation of illegalities in the decision sought to be challenged, I find it appropriate to allow this

application on the basis of this point so that the issues may be considered by the Court.

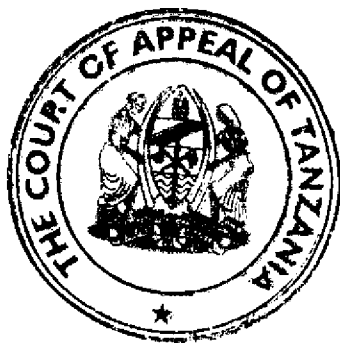
For the reason stated above, the application is granted. The applicant is granted 60 days within which to file the application for revision from the date of delivery of this ruling. Costs to be in the cause.

It is so ordered.

DATED at DAR ES SALAAM this 7th day of December, 2022.

L. G. KAIRO,
JUSTICE OF APPEAL.

The Ruling delivered this 13th day of December, 2022 in the presence of Mr. Levis Lyimo, learned counsel for the Applicant who holds brief for Mr. Jovinson Kagirwa, learned counsel for the respondents is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL