IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 538/8 OF 2019

NAIMA SULEIMAN (suing as a next friend of
ZAKARIA OMARY SALUMU SHIGHELA (Minor) ..... APPLICANT

VERSUS

IDU BUSANYA MUGETA (Administrator of the
late **Lazaro Busanya)** .....**1ST RESPONDENT**
RESTITUTA B. MUGETA (Administrator of the estate
of the late **Lazaro Busanya)** ..... **2ND RESPONDENT**
SOPHIA CHIZI ..... **3RD RESPONDENT**
AMOS NJILE LILI ..... **4TH RESPONDENT**
GEORGE NYAMTEKI ..... **5TH RESPONDENT**
ISANGI COURT BROKER ..... **6TH RESPONDENT**

(Application for extension of time to apply for revision against the decision of the High Court at Mwanza)

(Bukuku, J.)

dated the 18th day of March, 2014

in

Miscellaneous Civil Appeal No. 21 of 2008

.....

RULING

30th Nov. & 8th Dec., 2022

SEHEL, J.A.:

The applicant, through the legal services of Mvungi & Co. Law Attorneys, filed the present application seeking for an extension of time within which to file an application for revision against the decision of the High Court of Tanzania at Mwanza (the High Court) dated 18th March, 2014.

(Bukuku, J.). The application is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and supported by an affidavit sworn by Naima Suleiman, the applicant. On the other hand, the 1st and 2nd respondents opposed the application by filing a joint affidavit in reply. The 3rd, 4th, 5th and 6th respondents did not file any affidavit in reply.

The facts giving rise to the application at hand started way back in 2006, in Miscellaneous Civil Application No. 28 of 2006 where George Nyamtaki (the then plaintiff) sued Integrated Security Guard Ltd (the then defendant) before the Resident Magistrates' Court of Mwanza at Mwanza (the RM's court). In that application, the plaintiff obtained a decree in his favour issued on 15th October, 2006 to the effect that he be paid the sum of TZS. 3,558,000.00 by the defendant. In order to realize the decree, the decree holder, George Nyamtaki, applied for attachment and sale by public auction a house at Plot No. 580 Block "GG" Nyakato Mwanza (the suit premises). By order of the court, the same was sold and bought by the 4th respondent through a public auction held on 26th December, 2006 and on 27th December, 2006 the sale was declared absolute.

On 9th January, 2007, the late Busanya (now represented by the 1st and 2nd respondents) filed an application before the executing court seeking to set aside the sale and a release order from attachment claiming that the suit premises belonged to him since 1993 and the same was rented to the 3rd respondent who was by then the Director of the Integrated Security Guard Co. Ltd. He further claimed that he had never been a party in the proceedings giving rise to the execution proceedings and that he was neither a director nor a shareholder of the judgment debtor, the Integrated Security Guard Co. Ltd to warrant his house to be sold.

However, the said application was not heard on merit as it was faced with a preliminary objection which was upheld by the executing court that the sale was absolute. On appeal, the High Court found that the sale was not absolute since the certificate certifying the same was prematurely issued. That it was issued before the lapse of thirty (30) days within which a party may apply to set aside the sale. Accordingly, the High Court set aside the order of sale and ordered the demise property to be handed over to the 1st and 2nd respondents.

It is noteworthy to point out here that while the suit premises was still being litigated before the High Court, the 4th respondent sold it to one, the late Maria Sweke, the mother of the Bernadetha Charles, George Charles, Imakulatha Charles, Marcel Charles and Lucia Charles on 29th September, 2009. The children then sold it to the applicant on 11th December, 2013.

The applicant, who claimed to be a *bonafide* purchaser of the suit premises, now wants to challenge that decision of the High Court by way of revision.

The grounds for extension of time in the notice of motion are such that:

> *"1) the proceedings of the High Court are a nullity for failure to avail the applicant with opportunity to be heard in a matter to which had interest.*
> *2) There has been occasioned a long and inordinate delay in obtaining certified copies of court record which constitutes an integral part of the record of the intended revision. the applicant applied for the proceedings on 15th May, 2019 whereas until time of*

filing this application the certified copies of the court records were not supplied.

3) *The judgment and decree of the High Court are illegal for they deprive the applicant of the landed suit property located at Plot No. 580, Block "GG" Nyakato Mwanza city.*

4) *The cited proceedings of the High Court of Tanzania are tainted with irregularities and impropriety which have prejudiced the applicant who not the party to the suit contrary to the rule of natural justice.*

5) *There is a good and sufficient cause for grant of extension of time to lodge the application for revision because:*

    i) *The cited proceedings plus pronounced order of the High Court of Tanzania are tainted with illegalities, irregularities and impropriety which have prejudiced the applicant contrary to the principles of natural justice.*

    ii) *There is true confusion of proceedings which once left to stand will prejudice and likely to render the image and reputation of judiciary impaired.*

    iii) *It is in the interest of justice that the correctness, propriety and legality of the cited*

proceedings and decision of the High Court of Tanzania be examined by this Court."

At the hearing of the application, Mr. Bruno Mvungi assisted by Ms. Martha Mtiti, both learned advocates, appeared for the applicant, whereas, Mr. Elias Hezron, learned advocate, appeared for the 1st and 2nd respondents. The 6th respondent was present in person, unrepresented. The 3rd, 4th and 5th respondents did not enter appearance despite being duly served with the notice of hearing. The 4th respondent was personally served on 22nd November, 2022 while the 3rd and 5th respondents were served by publication through Uhuru newspapers of 19th November, 2022. Accordingly, in terms of Rule 63 (2) of the Rules, the applicant was granted leave to proceed with the hearing of the application in the absence of the 3rd, 4th and 5th respondents.

Arguing the application, Mr. Mvungi adopted the notice of motion, affidavit and the written submissions to form part of his oral submission. He briefly highlighted three issues. **First,** he argued that the applicant had, at all material times, been in actual and lawful possession and occupation of the suit premises but had never been accorded a right to be heard. She

was surprised to find notice of execution affixed on the wall of her home on 29th April, 2019 requiring the attendance of the 3rd respondent for hearing of the Execution No. 27/2018. Having seen the notice of execution, the applicant made an inquiry and found out that there had been a case before the RM's court and later on an appeal before the High Court but the applicant was never made a party in both proceedings. Relying to the cases of **Samson Ngw'alida v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 (unreported) and **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251, he submitted that the right to be heard is so basic that no decision should be left to stand even if the same result would have been reached had both parties been heard.

Secondly, Mr. Mvungi contended that the intended impugned decision of the High Court is tainted with illegalities and irregularities since, apart from nullifying the proceedings of the RM's court, the High Court declared the 1st and 2nd respondents as rightful owners of the suit premises without there be any evidence. It was his submission that a claim of illegality in the application for extension of time is sufficient cause for the Court to grant

the requested extension. He referred me to the cases of **the Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185 and **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2014 (unreported).

Thirdly, Mr. Mvungi contended that the applicant was belatedly supplied with the record for her to take immediate action. To cement his argument that the inordinate delay caused by the court registry in furnishing copies of proceedings was a good cause, he referred me to the cases of **Benedicto Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported) and **Foreign Mission, Board of the Southern Baptist Convention v. Alexander Panomaritis** [1984] T.L.R. 146

With the above submission, Mr. Mvungi urged me to find that the applicant had advanced good cause for the Court to grant the requested extension of time.

Responding to the submission, Mr. Hezron first adopted the affidavit in reply and argued that the applicant was not telling the truth because annexure JLC-1 attached to the affidavit in reply proves that the applicant

was aware of the impugned decision since 6th October, 2014 when she instituted a suit against the respondents before the High Court, Land Case No. 51 of 2014 but withdrew it on 21st November, 2017 and did nothing thereafter until she filed the present application. Relying to the case of **Ignazio Messina v. Willow Investments SPRL**, Civil Application No. 21 of 2001, he submitted that an affidavit which tell lies cannot be used to support the application.

Mr. Hezron further argued that the applicant failed to account for each and every day of delay. Referring to the High court's order that withdrew Land Case No. 51 of 2014, he contended that there was no single explanation given in the affidavit as to why and what happened from that date to the date of filing the application on 3rd October, 2019. He therefore urged me to hold that the applicant failed to advance good cause as he failed to account for each and every day of delay. In support of this submission, he referred me to the cases of **Said Issa Ambonda v. Tanzania arbours Authority**, Civil Application No. 177 of 2004 (unreported).

On the claimed illegalities, he first acknowledged that illegality is one of the good grounds for the extension of time. Citing the case of **Felix Pantaleo Mselle and 8 Others v. Tanzania Commission of Science and Technology**, Civil Application No. 60/17 of 2018, he contended that at the time parties were litigating before the RM's court and the High Court, the applicant had no interest as the sale was done while parties were still in court. He therefore argued that since her interest, if any, came later while parties were still in court litigating the same, the claim of a right to be heard had no substance. He added that a claim of illegality must be of such importance and apparent on the face of record, like the question of jurisdiction, time limitation and a right to be heard that do not require a long-drawn argument or process but in the matter at hand, the alleged illegality is not so apparent. That, the applicant had no right to challenge the validity of the High Court's decision that declared lawful owners the 1st and 2nd respondents.

On the issue of *bonafide* purchaser, he contended that such issue cannot be litigated in revision but rather through objection proceedings where the court would have an opportunity to consider all questions

relating to the title and interest in the property. It was also his submission that since the applicant has an alternative remedy, the revision as a remedy is not opened to her hence granting it would be a futile exercise. The said position, he contended was stated in the case of **Martha Iswalwile Vicent Kahabi v. Marietha Salehe and 3 Others**, MZA Civil Application No. 5 of 2012 (unreported). For those reasons, he urged me to dismiss the application with costs.

The 6th respondent did not have anything to submit as he contended that he was performing his duties as a court broker thus he was ready and willing to comply with any decision to be issued by the Court.

Mr. Mvungi reiterating his earlier submission and further re-joined that at the time the applicant instituted Land Case No. 51 of 2014, she was not aware of the pending appeal before the High Court that led to eviction order. He therefore beseeched me to find that the decision of the High Court is tainted with illegalities and such illegalities are sufficient cause to move the Court to grant the extension of time to file revision.

From the submissions, the issue which stands for my deliberation is whether the applicant has advanced good cause to warrant the Court to

exercise its discretionary power to extend time within which to file an application for revision. The law, that is, Rule 10 of the Rules, requires a party seeking for an extension of time to advance good cause for the Court to exercise its discretionary power to grant extension of time for doing any act authorized or required by the Rules. This position of the law was also reiterated by the Court in its numerous decisions, including the **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited,** Civil Application No. 96 of 2007; **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (both unreported); and **Victoria Real Estate Development Limited** (supra).

The term "good cause" is not defined in the Rules. Nonetheless, the Court has stressed that in assessing whether there is "*good cause*", each case has to be considered on its own peculiar facts and circumstances and the court must always be guided by the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily. This position was stated in the cases of **Yusufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported) and **Lyamuya Construction Company Ltd** (supra).

In the present application, the applicant intends to file an application for revision against the decision of the High Court that was delivered on 8th March, 2014. According to Rule 65 (4) of the Rules, an application for revision has to be lodged within sixty (60) days from the date of the decision. I have extensively reproduced the grounds upon which the applicants rely in seeking extension of time. Essentially, the applicant deposed that she could not file the application for revision within the prescribed time because she belatedly became aware of the decision on 30th April, 2019 when summons was affixed on the wall of her home as she was not a party in the case. She further deposed that since she was not a party and was not accorded a right to be heard, the remedy open for her was to challenge the decision by way of revision.

I am fully aware with the settled position of the law that, a person who was not a party in court proceedings has no right of appeal and the only remedy available for that party is to apply for revision – see: the case of **Ahmed Ally Salum v. Ritha Baswali and Another**, Civil Application No. 21 of 1999 (unreported).

But in the case of **Martha Iswalwile Vicent** (supra), the applicant who was not a party in the lower court proceedings sought an extension of time to file revision before the Court. She wanted to challenge the marriage between the 1st and 2nd respondents that her marriage still subsisted hence the marriage between the 1st and 2nd respondents was null and void. Further, she wanted to assert that she had an interest in a house no. 001/148 at Buswelu, Bulola village in Mwanza region to which the High Court declared it a matrimonial property hence subject to matrimonial division. Having considered the arguments by the applicant, the Court found that the granting of the application would be futile because the applicant has a right, subject to the law of limitation, under rule 85 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, to make an application to set aside the sale of property or to file a civil action against the 1st and 2nd respondents to claim for the said property.

In the same vein, as rightly submitted by the counsel for the 1st and 2nd respondents, the applicant has a right to assert her right over the suit premises by filing objection proceedings. It is common ground that where there is already an alternative remedy provided by law, like in the matter at

Hand, the applicant cannot properly move the Court to use its revisional jurisdiction.

In view of the above, I find that the applicant failed to advance any reason for the extension of time let alone good cause for the Court to exercise its discretion. Accordingly, the application is dismissed with costs for lacking merit.

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

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered this 8th day of December, 2022 in the presence of Mr. Bruno Mvungi, learned counsel for the 1st appellant and also holding brief for Mr. Elias Hezron, learned counsel for the 1st & 2nd respondents and absence of the 3rd, 4th, 5th and 6th respondents, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL