IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 174 OF 2020

KABULA AZARIA NG'ONDI..... FIRST APPELLANT
ADIEL KUNDASENY MUSHI ..... SECOND APPELLANT
NEEMA ADIEL MUSHI ..... THIRD APPELLANT

VERSUS

MARIA FRANCIS ZUMBA ..... FIRST RESPONDENT
IGALULA AUCTION MART ..... SECOND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Land Division at Dar es Salaam)

(Maghimbi, J.)

dated the 9th day of March, 2020
in
Miscellaneous Land Application No. 188 of 2018

.....

JUDGMENT OF THE COURT

22nd & 30th March, 2023

NDIKA, J.A.:

The appellants, Kabula Azaria Ng'ondi, Adiel Kundaseny Mushi and Neema Adiel Mushi, unsuccessfully applied to the High Court of Tanzania, Land Division at Dar es Salaam (Maghimbi, J.) in Miscellaneous Land Application No. 188 of 2018 for extension of time to apply for review of the ruling and order of that court dated 20th October, 2017 in Miscellaneous Land Application No. 696 of 2017. They now appeal against the refusal of extension sought.

The facts of the case are essentially not in dispute. The first respondent, Maria Francis Zumba, successfully sued a certain Abdallah Maganga and nine other persons in the aforesaid High Court vide Land Case No. 95 of 2012 for recovery of a piece of land situated at Kimere, Mapinga in the Coast Region. Upon application by the first respondent for execution of the decree against the judgment-debtors, an eviction order was issued, and the second respondent, a court broker, was appointed to execute it. The appellants, who were not parties to the suit, appeared to have been surprised that the aforesaid decree was about to be executed against them. They vainly objected to the execution through Miscellaneous Land Application No. 696 of 2017, which was struck out on 20th October, 2017 for citation of wrong enabling provisions of the law. About 166 days later, on 4th April, 2018, the appellants lodged Miscellaneous Land Application No. 188 of 2018 seeking extension of time to apply for review of the ruling and order striking out Miscellaneous Land Application No. 696 of 2017.

The main justification for the delay was that after the striking out of Miscellaneous Land Application No. 696 of 2017, the appellants embarked on mobilization of funds for engaging an advocate to represent them and that they also went about inviting other affected occupiers of the land in

dispute to join in the litigation. The learned Judge was unimpressed; she dismissed the matter with costs for want of sufficient cause reasoning as follows:

> *"... the applicants' affidavit also admits that by 19/11/2017, they had an agreement with [Advocate Pater Nyangi] to represent them. However, this application was lodged on 04/04/2018, almost five months after the said agreement and* ***no reason for all that delay has been advanced****. I will not sympathise with the applicants on the lack of funds to hire a private lawyer because one; it is not mandatory that they are represented by a private lawyer and two; more importantly, by any means, five months is ... long time to have waited to file the current application."* [Emphasis added]

Before us Mr. Francis Stolla, learned counsel, appeared to prosecute the appeal for the appellants while Ms. Regina Herman, also learned counsel, represented the first respondent. In terms of rule 112 (2) of the Tanzania Court of Appeal Rules, 2009, the hearing proceeded in the absence of the second respondent who defaulted appearance.

Ahead of hearing of the appeal on the merits, Mr. Stolla invited us to invoke our revisional authority under section 4 (2) of the Appellate

Jurisdiction Act, Cap. 141 to rectify what he called a serious error in the execution proceedings before the trial court. He contended that the decree sought to be executed against the appellants was a nullity for contravening Order XX, rules 6 and 7 of the Civil Procedure Code ("the CPC") because its date, 23rd September, 2016, is different from the date on the judgment from which it was supposedly extracted. It is apparent from the record at page 25 of the record of appeal that the said judgment is dated **23rd September, 3016**.

Ms. Herman, on her part, acknowledged the error but stated that it was a keyboard mistake that was subsequently corrected by the trial court on 30th July, 2020 vide Miscellaneous Land Application No. 689 of 2018.

With respect, we think Mr. Stolla's submission on the effect of the error complained of is an attempt at stretching the truth of the matter. While we appreciate the requirement under Order XX, rule 7 of the CPC that a decree must bear the date of the day on which the judgment was pronounced, it would have been wrong for the decree in the present case to have been dated **23rd September, 3016** simply because the judgment was so dated. We entertain no doubt that the dating error on the judgment was an innocuous and excusable keyboard mistake particularly because at the top

page of the said judgment, revealed at page 19 of the record of appeal, it is shown to have been dated and pronounced on 23rd September, 2016. Moreover, given that the said error was corrected by the trial court on 30th July, 2020 after it had granted the first respondent's formal application, we find no cause for the appellants' further protest. In the premises, we find no basis for invoking our revisional jurisdiction.

Turning to the merits of the appeal, we wish, at first, to observe that section 14 (1) of the Law of Limitation Act, Cap. 89, upon which the appellants predicated their prayer for extension of time, vests in the High Court the discretion to extend time upon reasonable or sufficient cause being disclosed by the applicant. The said power is exercisable judiciously and flexibly by considering the relevant facts of the case. In view of the circumstances of the instant appeal, some of the matters that had to be considered included the reasons for the delay, the length of the delay and the question whether there was point of law of sufficient importance such as the illegality of the decision sought to be challenged: see, for instance, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; and **Eliya**

Anderson v. Republic, Criminal Application No. 2 of 2013 (all unreported). See also **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In **Mbogo & Another v. Shah** [1968] EA 93, at page 94, the erstwhile Court of Appeal for East Africa, the predecessor to this Court, stated that it would not normally interfere with the exercise by an inferior court of its discretion except on certain occasions:

> *"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision* ***is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision."***
> [Emphasis added]

In the present appeal, the appellants fault the refusal of extension of time on three grounds:

1. *That the learned trial judge erred in law and fact to dismiss Miscellaneous Land Application No. 188 of 2018 in total disregard of the allegation of illegality as a ground for extension of time while the said allegation of illegality was one of the grounds advanced by the appellants.*
2. *That the learned trial judge erred in law and fact to dismiss Miscellaneous Land Application No. 188 of 2018 on the ground that it was not mandatory that the applicants ought to be represented by a private lawyer.*
3. *That the learned trial judge erred in law and fact to dismiss Miscellaneous Land Application No. 188 of 2018 on the ground that five months was unexplainably long time to have waited to file the application for extension of time while reasonable explanations were given to account for the delay.*

We propose to deal, at first, with the second and third grounds above collectively. The common thread in these grounds is that they assail the reasoning by the learned High Court judge rejecting the appellants' explanation of the delay in lodging the intended application for review. As hinted earlier, the appellants averred that they could not act punctually because at the material time they were mobilizing funds for engaging an

advocate to represent them and enlisting other affected occupiers of the land in dispute in the litigation.

Mr. Stolla's essential submission on the two grounds was that the appellants' explanation of the five months' delay was reasonable, the said delay not being inordinate. He contended that the appellants had the right to legal representation, which they could only have exercised after raising sufficient funds to engage an advocate of their choice. He faulted the learned judge for disregarding the appellants' effort to raise funds and criticized her for her observation that the appellants did not need to be represented by a private lawyer in the matter.

It is common cause that the appellants' Miscellaneous Land Application No. 696 of 2017 was struck out on 20th October, 2017. Although they were aggrieved by the said ruling and order, they took no action until 4th April, 2018 when they instituted Miscellaneous Land Application No. 188 of 2018 seeking extension of time to apply for review of the aforesaid ruling and order. By our computation, there was an interlude of about 166 days. It is this delay that ought to have been accounted for.

In her ruling, the learned judge, in our view, appreciated that the appellants were entitled to legal representation, but she found it significant that they dawdled even after striking an agreement with Advocate Peter Nyangi as early as 19th November, 2017 for him to represent them. She wondered, rightly so, why they plodded for over five months until 4th April, 2018 to apply for extension of time. That delay, by any yardstick, is inordinate and could not be ignored. In this sense, we are satisfied that the learned judge neither misapprehended the facts before her nor did she consider matters that she should not have considered on whether the delay involved was accounted for.

Moreover, Ms. Herman made an unopposed submission on the issue, which must clinch the matter. She submitted that after Miscellaneous Land Application No. 696 of 2017 was struck out on 20th October, 2017, the appellants lodged two matters before they filed Miscellaneous Land Application No. 188 of 2018 on 4th April, 2018. The first one was Miscellaneous Land Application No. 932 of 2017 filed on 23rd October, 2017, praying for the same reliefs sought in the matter that had been struck out. The said matter having been dismissed on 19th February, 2018 due to being time-barred, the appellants filed yet another application – Miscellaneous

Land Application No. 119 of 2018 – on 9th March, 2018 for the same prayers. That matter met the same fate; it was dismissed for being time-barred. Given that the appellants instituted the two matters as aforementioned after the initial objection proceedings were terminated, their attempted explanation of the delay was an invented story. If they had no funds to lodge the intended application for review, we ask how did they manage lodging and prosecuting the two applications in the intervening period before applying for extension of time?

Moreover, the endeavour to blame the delay on the effort to enlist other affected occupiers of the land in dispute in the litigation is equally of no moment. Certainly, the said affected occupiers could not join in the review application as, in the first place, they were not parties to the terminated proceedings. Ultimately, we dismiss the second and third grounds of appeal.

Although Mr. Stolla submitted predominantly and considerably on the contention in the first ground that the learned judge erred in disregarding the allegation of illegality of the decision sought to be reviewed as justification for extension of time, we think we need not travel a long distance on the issue.

It is, indeed, true that in their written submissions in support of the application for extension of time, the appellants claimed that the striking out of their application (Miscellaneous Land Application No. 696 of 2017) for improper citation of enabling provisions was a self-evident illegality constituting sufficient ground for extension. It was elaborated that the learned judge erred in striking out the application, which contained proper enabling provisions of the law but mixed up with superfluous ones. Certainly, in striking out the matter, the learned judge reasoned that the application was incompetent because the appellants had cited sub-rules which do not exist in the CPC.

Submitting on the matter, Mr. Stolla reviewed a plethora of the decisions of the Court on the effect of wrong citation of enabling provisions to hammer home the point that citation of superfluous provisions along with proper enabling provisions of the law was inoffensive. On that basis, he posited that the termination of the objection proceedings was a blatant illegality that the learned judge should have considered as another ground for extension of time.

For her part, Ms. Herman started off by recalling that before the advent of the Overriding Principle, it was settled jurisprudence that the non-citation

or wrong citation of enabling provisions of the law rendered the proceedings incompetent as expounded by the Court in, notably, **Edward Bachwa & Three Others v. The Attorney General & Another** Civil Application No. 128 of 2008 (unreported). On that basis, she supported the refusal of extension of time sought, contending that the alleged illegality does not exist.

At first, we would acknowledge that the learned judge slipped into error by not considering and pronouncing herself on the appellants' allegation of illegality. As the point was fully canvassed by the appellants in their written submissions and since it is settled that in appropriate circumstances such an allegation could constitute sufficient ground for enlargement of time, the learned judge should have considered and determined the claim. That said, we feel that it is now our solemn duty to step into the shoes of the learned judge to consider and determine the claim. The pivotal issue is clearly whether the said allegation constitutes an illegality.

Recently, in **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported), we defined the term *"illegality"*, quoting Black's Law Dictionary, 11th Edition, as *"an act that is not*

authorized by law" or *"the state of not being legally authorized."* We then extracted a passage, with approval, from **Keshardeo Chamria v. Radha Kissen Chamria & Others** AIR 1953 SC 23, 1953 SCR 136, a decision of the Supreme Court of India:

> *"... the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with."*

Finally, we concluded in **Charles Richard Kombe** (supra) as follows:

> *"From the above definitions, it is our conclusion that for a decision to be attacked on the ground of illegality,* ***one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time-barred.***" [Emphasis added]

Looked at in the above context, the alleged error, assuming that it is indeed an error, is no more than a simple error of law committed by the learned judge in the exercise of her jurisdiction. It is a decisional error not amounting to the learned judge acting without jurisdiction. It is neither a

case where the learned judge dealt with a stale claim or one involving an abrogation of a party's right of hearing. In the premises, the first ground of appeal falls by the wayside.

In the upshot, we hold, as we must, that the appeal is without merit. We dismiss it with costs.

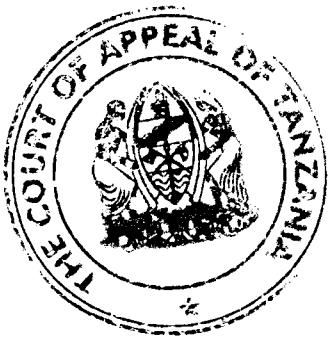
DATED at **DAR ES SALAAM** this 29th day of March, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of March, 2023 in the presence of Mr. Peter Nyangi, learned counsel for the Appellant and Ms. Deocadia Jones, learned counsel for the 1st Respondent and in the absence of 2nd Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL