IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 344/17 OF 2022

MTENGETI MOHAMED... APPLICANT

VERSUS

BLANDINA MACHA...RESPONDENT

(Application for extension of time to file application for revision of the decision of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Ngwala, J.)

Dated the 7th day of March, 2013
in

Land Case No. 40 of 2011

RULING

24th March & 12th June, 2023

KENTE, J.A.:

On 7th March, 2013, the High Court of Tanzania (Ngwala, J. as she then was), delivered its judgment in Land Appeal No. 40 of 2011. In the said Judgment, the learned High Court Judge made a declaration to the effect, that, as opposed to the decision made by the Kinondoni District Land and Housing Tribunal (the DLHT) which had decided that a house bearing number KHW/546 located at Manzese Kilimahewa Area within Kinondoni District, in Dar es Salaam was jointly owned by the then appellant Blandina Macha (the present respondent) and the respondent Mtengeti Mohamed, (now the applicant), the said house belonged to the present respondent together with her deceased husband the late Pascal

Mathew and that, the respondent (now the applicant) had no share or interest whatsoever in the said property.

With a questing spirit, nine years down the lane, the applicant has moved the Court to extend the time within which to file an application for revision of the said judgment and decree of the High Court. The application is brought by a notice of motion taken under Rules 10 and 48 of Tanzania Court of Appeal Rules, 2009 (hereinafter referred to as the Rules).

The only ground cited in the notice of motion upon which the application is predicated is that, the decision of the High Court sought to be revised which was in favour of the respondent Blandina Macha, was tainted with some material irregularities and illegality as to prejudice the applicant.

As a norm, the application is supported by an affidavit deponed by Mr. Mashaka Edgar Mfala the applicant's counsel. It is alleged in paragraph 6 of Mr. Mfala's affidavit that, instead of dismissing the appeal for want of prosecution when the appellant (now the respondent) failed to comply with the order of the High Court requiring her to file written submissions in support of the appeal and, upon failure to enter appearance on the hearing date, the High Court Judge went on to

determine the appeal despite the appellant's (respondent's) absence to prosecute it.

On the other hand, the applicant is put to strict proof of his assertions through the respondent's affidavit in reply. Specifically, the respondent contends under paragraph 6 of her affidavit that, the learned Judge of the High Court had gone through the record before the trial District Land and Housing Tribunal prior to determining the appeal on merit. So the respondent resisted the application and urged for its dismissal with costs.

During the hearing of the application, the applicant was represented by Messrs. Mashaka Mfala and Alphonce Kubaja learned Advocates while Mr. Amani Joakim learned Advocate from the Legal and Human Rights Center appeared to represent the respondent.

Submitting in support of the application and, after adopting the notice of motion and the supporting affidavit, Mr. Mfala contended through his oral submissions that, the judgment of the High Court which is sought to be revised was fraught with some material illegality. Elaborating, the learned counsel submitted that, after the appellant (now the respondent) had successfully applied to argue the appeal in the High Court by way of written submissions and, upon her failure or neglect to

file the said submissions within the prescribed period, his client was drawn into a legal quagmire as not to know what to do. As if that was not enough, Mr. Mfala further submitted, the learned High Court Judge went on to determine the appeal on merit without according a hearing to the parties.

Going by the position of the law which must sound trite by now that, failure by a party to file written submissions has always been equated with non-appearance as to lead to dismissal of an appeal or application, it was Mr. Mfala's strong argument that, there were such illegalities in the decision of the High Court as it was reached at without according a hearing to the parties. The learned counsel relied on our earlier decisions in the cases of **Kalunga and Company Advocates v. National Bank of Commerce Limited [2006] TLR 235, The Principal Secretary Ministry of Defence and National Service v. Devram Valambhia [1992] TLR 185** and **Laurent Simon Asenga v. Joseph Magogo and Two Others,** Civil Application No. 50 of 2016 (unreported) to augment his position.

In reply, Mr. Joackim begun by adopting the respondent's affidavit in reply and thereafter he went on challenging the applicant for not specifically pleading denial of the right to be heard which is the

connerstone of the applicant's complaint in the founding affidavit. Mr. Joackim submitted further that, the contention by Mr. Mfala that the applicant was denied the right to be heard is a mere assertion from the bar which was not specifically pleaded. The learned counsel accused the applicant for allegedly violating the rule that, in civil proceedings, litigants are bound by their respective pleadings.

Regarding the claim by the applicant that the impugned decision of the High Court was fraught with some material illegality, Mr. Joackim relied on our decision in the case of **Lyamuya Construction Company Limited v. The Board of Registered Trustees** and finally argued that, as a ground for extension of time, illegality must be clearly pleaded and he further cautioned that, erroneous decisions are different from illegal decisions. The learned counsel went on cautioning that, I would be opening doors for persons who had gone into deep slumber such as the applicant if I failed to differentiate between illegal and wrong decisions. Given the circumstances, Mr. Joachim urged me to dismiss the application saying that, when arriving at the impugned decision, the High Court Judge, was guided by sections 95 and 3A of the Civil Procedure Code which respectively provide for the inherent powers of the court and the overriding objective principle.

Going forward, Mr. Joachim contended that, as the applicant had not been able to demonstrate the illegality allegedly contained in the judgment of the High Court, the benchmark for determination of this application should be narrowed down to the applicant's accounting for each day of the delay. It was then all downhill for Mr. Joackim as he knew that the applicant could not and indeed had not accounted for the period of almost nine years of the delay.

As it has always been the case, in any application under Rule 10 of the Court Rules, the issue is always whether the applicant has furnished good cause to warrant an extension of time. Moreover, as it was held in the unreported case of **Laurent Simon Assenga v. Joseph Magoso and Two others,** Civil Application No. 50 of 2016, what is good cause is a question of fact depending on the facts of each case and for that reason, many and varied circumstances could constitute good cause in any particular case. And going straight to the point, is the case of **Devram Valambhia** (supra) in which we stated categorically that, where the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of Rule 8 (now rule 10) of the Rules for extending time.

However, in view of the contending arguments between the applicant's and respondent's counsel which presented the image of a hearing of the intended application for revision by a full Court, it behoves me to observe that, when a single Justice of this Court is called upon to determine an application for extension of time and when the point at issue is the illegality or otherwise of the decision sought to be challenged, he is neither required nor expected to decide on the existence or non-existence of the alleged illegality as that is within the exclusive precinct of the full Court. In that connection as we held in the case of **Tumsifu Kimaro (the Administrator of the Estate of the late Eliamini Kimaro) v. Mohamed Mshindo,** Civil Application No. 28/17/2017 (unreported), where the Court is called upon to extend time on the ground of illegality of the decision sought to be appealed against or revised by a higher Court, the issues is whether the application for extension of time discloses, at least on a balance of probabilities some illegalities manifest on the record and whether the said illegalities raise any point or some points of law of sufficient importance.

Coming to the present case, the crucial question for consideration that arises is whether or not the applicant has demonstrated, on a balance of probabilities the existence of some material illegalities on the record as to raise a point or some important points of law. Given the fact that the

learned Judge of the High Court had ordered the appeal before her to be argued by way of written submissions which were to be filed in accordance with the prescribed sequence in which the present respondent was required to, but did not start the ball rolling thereby drawing the whole process to a standstill, it can be convincingly argued as did the applicant that indeed the impugned judgment of the High Court stemmed from illegality in so far as both parties were consigned to the sideline and not accorded a hearing.

However, it is to be observed that, being in the discretion of the Court as it is, an order for extension of time like the one which is sought by the applicant in the instant case, is an equitable right. It is a principle of equity that, **vigilantibus, non dormientibus, jura subvenient,** that is to say, equity aids the vigilant and not the indolent. By way of explanation, suffice it to say that, as a general rule, the law favours those who exercise vigilance in pursuing their rights and disfavours those who rest on their legal rights by failing to act to protect their rights in a reasonable period of time.

As stated earlier, the decision of the High Court against which an application for revision is ultimately sought, was pronounced on 7th March, 2013. It is needless to say that, by any standard, the present application

has been brought after a considerable delay which has not been accounted for. In view of this, I would but reiterate here what this Court held in the case of **William Kasian Nchimbi and three others v. Abas Mfaume Sekapala and Two Others,** Civil Reference No. 2 of 2015 that, illegality cannot be used as a shield to hide against inaction on the part of the applicants. And if I may add, the position set by our previous decisions is that, irrespective of the nature of the grounds advanced by the applicant in support of an application for extension of time, he must as well show diligence, and not apathy, negligence or **ineptness** in the prosecution of the action that he intends to take. (See **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Appeal No. 2 of 2000 (unreported).

Having subjected the applicant's evidence as contained in his supporting affidavit to a very objective scrutiny, I have found nothing to explain his inordinate inaction for almost nine years after accurence of the alleged illegality. That, goes to demonstrate his seemingly dishonesty and bad faith in the pursuit of what he believes to be his rights. In this connection, it becomes pertinent but very elementary to remark that, when applying the law, normally the courts do not deploy whims and spontaneity. They look at the intent of the parties involved and adhere to a standard of good faith and fair play instead of applying the letter of the

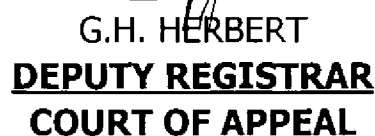
law in a way that would violate fundamental principles of fairness and consistency. On that account, after nine years of the applicant's inertia, I feel increasingly disinclined to turn the respondent's triumph into a hollow victory after a court battle that lasted for five years.

It is for the foregoing reasons that, I find the application to have no merit and I accordingly dismiss it with costs.

Dated at Dar es Salaam this 7th day of June, 2023

P.M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 12th day of June, 2023 in the presence of Ms. Miriam Moses, learned counsel for the Applicant, and in the absence of the Respondent, is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL