

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 494/02 OF 2021

PHILEMON VANAI SAITERU MOLLEL.....APPLICANT

VERSUS

WILLIAM TITUS MOLLEL (The Administrator
of the Estate of the Late **TITUS ARON MOLLEL**)**1ST RESPONDENT**

PETER FRIDOLIN TEMU (The Administrator
of the Estate of the Late **TITUS ARON MOLLEL**)**2ND RESPONDENT**

**(Application for Extension of Time to Serve the Respondents with Notice
of Appeal and Letter Requesting for Proceedings and Judgment, arising
from the Judgment and Decree of the High Court of Tanzania,
at Arusha)**

(Mzuna, J.)

dated the 7th day of May, 2021

in

Land Case No. 01 of 2017

.....

RULING

18th September & 2nd October, 2023

MDEMU, J.A.:

This is an application for extension of time within which to serve the respondents with the notice of appeal and a letter applying for proceedings from the High Court. The application is by way of notice of motion premised under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The supporting affidavit of the applicant was also deposed in support of the application.

Briefly, the High Court of Tanzania at Arusha, in Land Case No.1 of 2017, decreed in favour of the respondents in respect of the suit premises. Prior, the suit premises belonged to the estate of the late Titus Aron Mollel in which, one Jimmy Titus Aron Mollel was appointed by Arusha Urban Primary Court to administer that estate through Probate Cause No. 247 of 2009. Later, the said administrator sold the suit land to the applicant herein who thereafter, converted it into a business complex. It later came to the knowledge of the applicant that, Jimmy Titus Aron Mollel ceased to hold letters of administration of the said estate as they were revoked through Civil Revision No. 1 of 2011 by Arusha District Court. As said, Land Case No. 1 of 2017 was instituted by the respondents herein to determine ownership in which they became victorious.

On 10th May, 2021, the applicant lodged notice of appeal and also requested to the Deputy Registrar of the High Court for certified copies of proceedings, submissions, the judgment, the decree and various exhibits for appeal purposes. However, the said letter and notice of appeal were not served within time to the respondents, hence the instant application to have time extended. The notice of motion comprises of four grounds persuading me to hold that they constitute sufficient cause, but for reasons apparent to follow, only the first and fourth grounds in the notice

of motion will be the subject of consideration which are reproduced as follows:

1. The applicant did not timely serve the respondents with the notice of appeal and a letter applying for proceedings as the applicant and his advocate Farida Magesa was prevented by the breach of the peace that involved the use of firearms between the applicant and the respondents that started on the 14th May, 2021 and the threat of the use of firearms continued each day to the 3rd September, 2021.

4. The grant of the order of extension of time within which to serve the respondents with the notice of appeal and a letter applying for proceedings will give meaning to the applicant to exercise his right of appeal.

At the hearing of this application on 18th September, 2023, the applicant was represented by Mr. Francis Stolla, learned advocate whereas the respondents had the service of Mr. Mosses Mahuna assisted by Mr. Andrew Moses Maganga, both learned advocates.

Before the commencement of hearing the application, I had a dialogue with both counsels regarding competence of the notice of preliminary objection filed by the respondents on 13th of October, 2021 challenging the competence of this application. It is through the outcome of that dialogue which prompted the respondents to have a further reflection and consequently prayed to withdraw the notice of preliminary objection. The applicant's counsel did not resist, I thus marked the said preliminary objection withdrawn.

Back to the main application, Mr. Stolla adopted the notice of motion, supporting affidavit and his written submissions in support of the application. The respondent did not file written submissions. Having adopted the supporting affidavit and his written submissions, Mr. Stolla had nothing to expound thus prayed to have reliefs sought for in the notice of motion be granted. He also prayed for costs to follow the outcome of the appeal.

The main thrust in the adopted written submissions hinged on the following aspects: **One**, the applicant delayed due to breach of peace being the outcome gun shots by the respondents such that, the circumstances were not conducive to allow effective service. **Two**, there is overwhelming chances towards success of the intended appeal. **Three**,

existence of illegality in the impugned decision as the High Court declared that Jimmy Titus Aron Mollel in his capacity as administrator of the estate had no legal capacity to sell the land in dispute to the applicant. Mr. Stola thought this to be an illegality and cited the following cases insisting that to be a sufficient cause to enlarge time: **Principal Secretary, Ministry of Defence and National Service v. Devran Vallambhia** [1992] T.L.R. 185; **The Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No.26 of 2014 (unreported); **Kalunga and Company Advocates v. the National Bank of Commerce Limited** [2006] T.L.R. 235; **Amour Habit Salim v. Hussein Bafagi**, Civil Application No.52 of 2009 (unreported); **Eliakim Swai and Another v. Thobias Kawara Shoo**, Civil Application No. 2 of 2016 and **Ezron Magesa Malyogo v. Kassim Mohamed Said and Another**, Civil Application No.227 of 2015.

He concluded in point **four** by urged me to rely on the principle of overriding objective in the sense that, in the event time is not extended to serve the respondents with the notice of appeal and the request letter to the Deputy Registrar, the appeal will be struck out. This, in his considered view, is a technicality which will then cause the applicant herein to commence appeal processes afresh. Regarding this ground, the

learned counsel cited the case of **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No.55 of 2017 (unreported)

On his part, Mr. Mahuma resisted the application for want of good cause. He first adopted an affidavit in reply filed on that behalf. In his oral submissions, Mr. Mahuma attacked the entire supporting affidavit because, in his view, reasons for delay are wanting. He added that, what the applicant has so far managed to explain is nothing other than failure to serve to the respondents the notice of appeal and the letter requesting for copies of appeal documents. This, he insisted, is not an account for the days of delay being an important undertaking in application for extension of time.

Looking at paragraph 12 of the supporting affidavit which seems to him to constitute grounds for delay, Mr. Mahuma submitted that, as the applicant managed to serve the respondents other documents relating to that appeal, breach of peace deposed by the applicant being a preventive factor in serving the respondents the alleged documents, is nothing, but an afterthought. He elaborated further that; breach of peace due to gun shots ended on 14th May, 2021 whereas the service was to be completed by 24th May, 2021. Equally, there is no explanation as to where the

applicant was from 3rd to 8th September, 2021. It was his strong view that, the applicant had failed to account for the days of the delay.

Referring to paragraph 13 of the supporting affidavit; the learned counsel submitted that, unless one Farida Magesa swears an affidavit, information regarding repeated threats which prevented her to serve the respondents the alleged documents in time remain hearsay. So do paragraph 2 of that affidavit where an affidavit of one Jimmy Titus Aron Mollel is wanting. On this one, he cited the case of **Franconia Investment Ltd v. TIB Development Bank Ltd.** Civil Application No.270/01 of 2021 (unreported) emphasising that, information of a person named in the affidavit is valuable only where that person swears an affidavit to that effect, else would be hearsay.

Regarding illegality as a ground for extending time, the learned counsel submitted that, there is no illegality in the impugned judgment. In his view, allegation on disposition of property through sale alleged by the applicant to constitute illegality is not, rather, is a ground of appeal which, in his considered submissions, is not an error on the face of record. The learned counsel on that note, urged me to provide a clear distinction between illegality as an error on the face of the record and grounds of appeal for appeal purposes. Accordingly, he referred me to the case of

The Board of Trustees of the Free Pentecostal Church of Tanzania v. Asha Selemani Chambanda & Another, Civil Application No. 63/07 of 2023 (unreported) to support her argument.

As to good chances of success to the intended appeal, the learned counsel cited the case of **Airtel Tanzania Limited v. KMJ Telecommunications Limited**, Civil Application No.393/16 of 2021 (unreported) submitting that to be no longer a good ground for enlargement of time. He also faulted the learned counsel for the applicant to import the principle of overriding objective because, to him, overriding objective principle may not be deployed to circumvent mandatory provisions of the law. In this, he referred me to the case of **Lucy Theresia Kundi & Another v. Aloyce Clemence Kundi**, Civil Appeal No.202 of 2020 (unreported) to bolster his assertion. He, in all, urged me to dismiss the application with costs.

As said earlier, I will determine this application on two aspects only contained in ground one and four of the notice of motion I quoted above. In ground one, the applicant's delay to serve the notice of appeal and a letter requesting for proceeding and judgment is premised on the fact that, the applicant was prevented to effect service due to breach of peace caused by the respondents through threats using firearms. May this

constitute a sufficient cause? I will come to this later. As of now, it be suffices to recall that, in terms of rule 10 of the Rules, time may be extended upon good cause shown by the applicant. In it therefore, the applicant has to show sufficient cause by accounting for the days of delay for him to benefit on the letters of the law. I must admit at this stage on presence of a number of authorities by this Court in this area. I will just mention one, that is, **The Board of Trustees of the Free Pentecostal Church of Tanzania v. Asha Selemani Chambanda & Another** (supra) where it was held at page 4 of the ruling that:

*"Be it as it may, the issue whether the delay is ordinate or not is settled through decided cases. It revolves around the applicant accounting for each day of delay. See for instance: **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania (YMCA)**, Civil Application No. 2 of 2010 and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (both unreported)".*

Given the foregoing position, and as I alluded to above, the applicant's position is that, breach of peace and threats existed through gun shots prevented them to serve the respondents as deposed in paragraphs 10, 11, 13 and 14 of the supporting affidavit. This fact has

been forceful contested by the respondents in twofold: **one**, it did not prevent the applicant because it is in the same alleged period when the applicant effected service of other documents to the respondents and **two** that, it is the applicant who caused breach of peace. In whichever averment and by who, the uncontested factual issue is this that, there was breach of peace and threats resulting from firearms. This, in my view, is settled. The question now is whether those acts did prevent service and whether existed all through. In this one, I entirely agree with the respondents as deposed in paragraph 11 of the affidavit in reply that, breach of peace could not prevent the applicant to serve the respondents the notice of appeal and the request letter for certified documents on one hand and allow the same applicant to serve the respondents other documents such as memorandum of appeal, additional record of appeal and written submissions on the other hand. The said paragraph is reproduced as hereunder:

"11. THAT, without prejudice to the contents of paragraph 10 herein above, the respondents further states that, the applicant has through his lawyers did successfully managed to serve the respondents with court documents between the alleged date of 14th May, 2021 and 3^d September, 2021, these documents were served

upon the respondents' counsel on diverse dates and are; with memorandum of appeal (in the intended civil appeal served upon the respondents on the 13th July, 2021; the additional record of appeal (in the intended civil appeal served upon them on the 22nd July, 2021; written submission in support of the application for execution (civil application No.234/02 of 2021-in the Court of Appeal of Tanzania served on the 16th August, 2021."

The applicant therefore defaulted to account each day of the delay, thus no sufficient cause has been demonstrated to that effect regarding this ground.

Mr. Stolla however, implored me to look on the ground of illegality. Well, in his written submissions, he pointed out the said illegality in the impugned judgement such that one Jimmy Titus Aron Mollel who was the then administrator of the estate of the late Titus Aron Mollel had no legal capacity to sell the disputed land to the applicant. This fact is also deposed in paragraph 6 of the supporting affidavit.

The respondents' counsel contested this ground of illegality to constitute sufficient cause because to him it qualifies to be a ground of appeal and asked me, relying on **the Board of Trustees of the Free**

Pentecostal Church of Tanzania v. Asha Selemani Chambanda & Another (supra), to draw a line of difference between what amounts to grounds of appeal and illegality in the impugned decision. I also find the difference have to be drawn. That notwithstanding, in my considered view, parties are at one that Jimmy Titus Aron Mollel sold the estate to the applicant. This person, as said, was the administrator of the estate and sold the estate on that capacity. Was he entitled to do so? I may not be in a position to resolve this. As alluded to, and also as to what parties are in agreement is this that, by the order of the court, letters of administration were revoked to the said Jimmy Titus Aron Mollel. In my considered view, the foregoing amount to good cause hence warrant the grant of extension of time.

As I have demonstrated above, the applicant has failed to account on the days of the delay. Now that I have found existence of the ground of illegality in the impugned decision, the question is whether discretion in enlarging time may be exercised on that account even when one, the applicant in this case, has not accounted for each day of the delay. In **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil appeal No.60 of 2019 (unreported) at page 9 on the raised scenario, the Court observed that:

*"We are of the considered opinion that the learned Judge ought to have exercised his discretion judiciously to consider even the ground of illegality which was also pleaded by the appellant because "sufficient cause" does not entail only reason for the delay but also sound reasons for extending time. In particular, whether the ground of illegality raised by the appellant was worth consideration in determining whether or not to grant the application, the position is well settled in **Principal Secretary, Ministry of Defence, National Service** (supra) as follows:*

When the point at issue is one alleging illegality on the decision being challenged, the court has a duty, even if 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."

This was also the position in **Rose Irene Mbwete (Adminstrator of the estate of the Late Mary Dotnata Watondoha) v. Phoibe Martin Kyomo**, Civil Application No.70/17 of 2019 (unreported) where time was enlarged regardless of failure on the part of the applicant to account for the delay. As alluded to, the act of the administrator disposing the estate

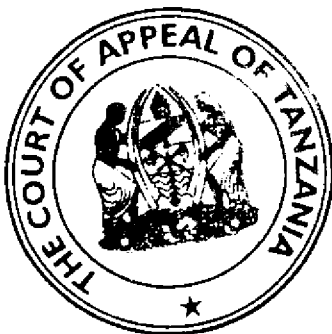
through sale as contained in the impugned judgment constitutes sufficient cause to enlarged time.

As the two grounds discussed above has disposed of the whole application, I do not therefore intend to deliberate on the remaining grounds in the notice of motion. On such premises, and for the foregoing, this application is allowed. Costs to follow the outcome of the intended appeal.

DATED at **ARUSHA** this 30th day of September, 2023.

G. J. MDEMU
JUSTICE OF APPEAL

The ruling delivered this 2nd day of October, 2023 in the presence of Mr. Nathanael Philemon Mollel, son of the applicant and Mr. Andrew M. Maganga, learned advocate for the respondents is hereby certified as a true copy of the original.



A handwritten signature in black ink, consisting of a large, sweeping loop followed by a horizontal line and a smaller, more intricate flourish.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL