IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 675/01 OF 2022

THERESIA MBONELA KUYANGANA ..... 1ST APPLICANT
JOSEPH LEON SIMBAKALIA ..... 2ND APPLICANT

VERSUS

NEEMA ADELA MBONELA ..... RESPONDENT

(Application for extension of time to file Notice of Appeal against the ruling and order of the High Court of Tanzania at Dar es Salaam)

(Kulita, J.)

dated the 31st day of March, 2020

in

Misc. Civil Application No. 431 of 2018

RULING

6th & 21st November, 2023

ISMAIL J.A.:

This application is before this Court as a second bite, following an unsuccessful attempt in the High Court where Miscellaneous Civil Application No. 229 of 2021. In that application, the applicant's quest for extension of time to file a notice of appeal fell through on what the High Court considered to be insufficiency of grounds for extension of time. At stake in the impending appeal is the ruling and order of the High Court (Kulita, J.) in Miscellaneous

Civil Application No. 431 of 2018 in which it was ordered, *inter alia*, that vacant possession of a house on Plot No. 288 Block "C" Kijitonyama, Kinondoni, Dar es Salaam, be handed over to the respondent, a sole rightful heir of her late father, Mathias Sibomana Mbonela.

In the instant application, the Court is moved by a notice of motion predicated on the provisions of rule 45A (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009. Supporting the motion are twin affidavits of sworn by the 2nd applicant and Mr. Daniel Bernard Welwel, the latter of whom is under instruction to represent the applicants in this application. Together with the notice of motion, the affidavits set out grounds on which the prayer for extension of time is based.

The brief factual of this matter is deduced from the record and it is easily appreciable. Mathias Sibomana Mbonela who has since died was survived by a child known as Neema Mathias Mbonela, a sole beneficiary of her estate. In 1995, vide Probate & Administration Cause No. 18 of 1995, the applicants, along with Emmanuel Mentheakis applied for letters of administration of the late Mathias Mbonela who died intestate. By an order

issued on 19th July, 1998, the High Court (Bubeshi, J) appointed the applicants as administrators of the late Mbonela's estate. Besides the appointment, the court recognized the respondent as a beneficiary who was entitled to open and operate a bank account which would be operated by the administrators, as the respondent was not yet of age. It was also ordered that the house on Plot No. 288 Block "C" Kijitonyama, Kinondoni, Dar es Salaam should remain as part of the family property that included the respondent.

When the respondent became of age, she moved to the High Court where she instituted Misc. Civil Cause No. 525 of 2016, praying for orders that would compel the respondents to pass on the estate of the late Mbonela to the rightful heir. Simultaneously, the court was beseeched to grant an order that the administrators should file inventory and accounts of the estate. The application was granted. On 13th April, 2018, the applicants filed an inventory that showed that the only asset left of the deceased's estate is the Kijitonyama house.

Feeling shortchanged by the applicants, the respondent walked back to the High Court, this time vide Misc. Civil Application No. 431 of 2018 in which several reliefs were prayed. Generally, the court was moved to order the administrators to reflect a true and full inventory of the estate; bequeath the properties constituting the estate of the deceased, including giving vacant possession of the Kijitonyama house. The applicants were also blamed for what the respondent considered to be a misappropriation of the deceased's estate. The High Court was convinced that the respondent's arguments were plausible and meritorious. It granted the application with an order that the order in Misc. Civil Application No. 525 of 2016 be complied with. Simultaneously, the applicants were ordered to hand over vacant possession of the Kijitonyama house to the applicant, the sole and rightful heir who had already become of age. This is the application against which an appeal is contemplated.

At some point a review was attempted through Misc. Civil Application No. 289 of 2020, only to be withdrawn when the applicants found that no basis existed for that action. This triggered the instant application.

The depositions by the applicants point to what they consider to be an illegality that resides in the decision of the High Court to in Misc. Civil Application No. 431 of 2018 which disregarded the court's own previous order in Probate and Administration Cause No. 18 of 1995, which finally determined that the house is to be a family house.

The deponents of the affidavits have also given an account of the steps they took after the decision of the High Court on extension of time and what it took to get certified copies of the ruling and drawn order in readiness for this application.

The application has been valiantly contested by the respondent. Regarding the change of advocates, the respondent was of the view that such change cannot constitute the basis for applying for extension of time, adding that change of advocates cannot be used as a leeway for rectifying the mistake committed and circumventing the preliminary objection raised. On the alleged illegality, the respondent's averment is that there is none as the requirement of filing true inventory and accounts were the conditions set out under the law and the fact that the respondent was a sole heir of the

deceased's estate. The respondent was of the view that the applicants had failed to account for the days of delay.

At the hearing of the application, the applicants were represented by Mr. Erick Mhimba, learned advocate, pitted against Mr. Grayson Laizer, learned counsel whose services were enlisted by the respondent.

In his submission, Mr. Mhimba argued that good cause within the meaning of rule 10 of the Rules is also predicated on taking into account factors stated in many of our decisions, including **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 111 of 2009. In the said decision, this Court held that factors to be considered include length of the delay; reasons for the delay; degree of prejudice to the respondent if the application is granted; and chances of appeal succeeding if the application is granted. He acknowledged that grant of extension of time is dependent on the ability by the applicant to demonstrate good cause.

Accounting for the days of delay, Mr. Mhimba argued that the period between 31st March, 2020, when the High delivered the impugned decision,

and 19th May, 2021, when the application for extension of time was filed in the High Court, the applicants were pursuing an application for review (Misc. Civil Application No. 289 of 2020) which has since been withdrawn. He argued that the refused application was filed immediately after the withdrawal. In the learned counsel's contention, the delay during the period is what is known, in legal parlance, as technical delay as the applicants were busy prosecuting the withdrawn application. Mr. Mhimba implored me to apply the reasoning in the Court's decision in **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154, in which technical delay was held to be inexcusable and a good cause for extension of time.

Regarding illegality, learned counsel took the view that the illegality is laden with illegality for disregarding orders made in Probate and Administration Cause No. 18 of 1995. He underscored the legal position which is to the effect that illegality constitutes a ground for extension of time, irrespective of whether the application for extension of time was inordinately filed. On this, he referred me to several decisions of the Court. These are: **The Principal Secretary, Ministry of Defence and National**

Service v. Devram Valambhia [1992] T.L.R. 185; **VIP Engineering and Marketing Limited & 2 Others v. Citibank (T) Ltd,** Consolidated Civil References Nos. 6, 7 and 8 of 2006; **Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010; and **Serengeti Breweries Limited v. Hector Sequeiraa**, Civil Application No. 373/18 of 2018 (all unreported).

The argument by Mr. Mhimba is that the impugned decision is problematic in two respects. **One**, that it ordered implementation of an order that had already been complied with. He is of the view that, having filed the inventory and accounts of the estate, the applicants finalized their duties and were discharged from their duties and that subsequent proceedings against them were a nullity. On this, he referred me to **Andrew C. Mfuko v. George C. Mfuko**, Civil Appeal No. 320 of 2021 [2022] TZCA 741. Two, the decision to bequeath the Kijitonyama house was done while the High Court had no powers to reverse its earlier decision on the matter.

Mr. Mhimba addressed me as well on the chances of the impending appeal succeeding if the application is granted. He acknowledged that this, though, was not a necessity. He prayed that the application be granted.

Mr. Laizer's submission began by insisting that discretion of the Court is properly invoked where good cause is shown by a party wishing that such discretion be exercised in his favour. This, he argued, must also go hand in hand with accounting for each day of delay, and that the delay should not be inordinate.

Regarding the lengthy of delay, Mr. Laizer shrugged off the reason and what the applicants call technical delay as before the institution of the application for review that was a delay of 60 days which were not accounted for. With respect to reasons for delay, the view by Mr. lazier is that technical delay would serve as a reason only if the application for review was filed timeously. He added that it is a settled position that neither ignorance of the law nor a mistake or lack of diligence by counsel constitutes good cause for extension. On this, he referred me to decisions of the Court in **Omari R. Ibrahim v. Ndege Commercial Services Limited**, Civil Application No.

83/01 of 2020; and **Umoja Garage v. National Bank of Commerce** [1997] T.L.R. 109.

Mr. Laizer scoffed at the averments in paragraph11 and 14 of the applicants' affidavits and contended that it took 9 months for the successor advocate to withdraw the application. He expressed his doubts on whether the application for review was withdrawn amidst an opposition that there cannot be a withdrawal after an objection has been raised. It is why a copy of the withdrawal order was not attached.

Submitting on the reasons for the delay, the learned advocate denied that an illegality existed or that there were two conflicting orders of the High Court. Besides pointing out issues that cast aspersions on the authenticity of the High Court's previous order, Mr. Laizer leapt to the defence of the decision by Kulita, J., as it correctly stated that the respondent was of age and that she is the only beneficiary of the estate of her late father.

On the degree of prejudice, the respondent's counsel was of the view that the respondent stands to be more prejudiced if the application is granted as she has suffered for 24 years of the applicants' inaction. He argued that

the applicants have benefitted illegally from the estate of the deceased. Mr. Laizer addressed the Court on the chances of success but, as stated earlier on, I do not consider this to be a sound ground for consideration. He was of the view that the application is lacking in merit and it must be dismissed with costs.

The parties' rival submissions bring out one critical question for my consideration. It is whether the applicant has submitted any material for the grant of extension of time.

The law in respect to extension of time is settled in country. It is to the effect that extension of time is in the discretion of the Court. It is also a legal certainty that exercise of such discretion requires the applicant to conform to the requirements of rule 10 of the Rules by establishing good cause for extension of time.

The fact that grant or refusal of extension of time is entirely in the discretion of the Court was encapsulated by this Court in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), in the following words:

"To begin with, I feel it is instructive to reiterate, as a matter of generai principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice."

As held time and again, exercise of such discretion requires looking at the circumstances of each case. In each of the cases, the Court ensures that only excusable delays are given a consideration. Thus, in **Allison Xerox Sila v. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998 (unreported), this Court observed as follows:

".... It does seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of his counsel, should be extended extra time merely out of sympathy for his cause."

As unanimously agreed by the parties, good cause entails observing key principles as laid down in the case of **Mbogo v. Shah** [1968] E.A. 93. They include looking at the length of delay, the reason of delay, whether

there is an arguable case on appeal and the degree of prejudice to be suffered should the extension be extended. Subsequent decisions such as **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra); and **Lyamuya Construction Company Limited v. Board of Trustees of YWCA** (supra), cited by Mr. Mhambi have brought in another point for consideration. This is illegality and that such illegality must that of the decision to be challenged, either on appeal or revision. There is also technical delay where it is proved that time caught up with the applicant while he was in court diligently prosecuting other matters (See: **Victor Rweyemamu Binamungu v. Geofrey Kabaka & Another**, Civil Application No. 602/08 of 2017 (unreported)).

Regarding technical delay, the contention by Mr. Mhambi is that time lost between the date of the decision of Kulita, J., and 19th May, 2021 should not be blamed on the applicants as they were actively pursuing the application for review. The respondent's counsel has raised a few question on that, key among them is that there was an unexplained delay before the period of time that the applicants call me to exercise a mercy on. I will come

to that in due course. What is clear is that Mr. Laizer has not disputed the fact that there is a pendency, during the period in question, of an application taken at the instance of the applicants. During the period, the applicants could not pursue any other legal action. This is where technical delay can be rightly invoked and have the delay excused. This is the position that this Court took in **Victor Rweyemamu Binamungu v. Geofrey Kabaka & Another** (supra), when it held:

> *"Be it as it is, he first applied for revision which was however struck out on 4th December 2017 on account of time limit. This period from the date of the decision intended to be revised to the date of striking out Civil Application for revision No. 26 of 2017, is what has acquired the name of technical delay which cannot be blamed on the applicant."*

It is my considered view that the applicant has sufficiently made a case in respect of the period of the pendency of the review.

Mr. Laizer has raised an issue on the uncertainty regarding the status of the application for review. He appears to suggest that there is a possibility that such matter is still pending. I do not consider this to be a serious

assertion, knowing that it is a matter that involves his client as a party. He is in a position of privilege of getting to know if that matter is still alive. In any case, the respondent has acknowledged the fact that the said matter was withdrawn. This is found in paragraph 11 of the affidavit in reply.

Turning on to illegality, the argument by the applicants is that illegality in the impugned decision resides in two main aspects. One, that the decision has altered or vacated from its previous position in which it held and ordered that the Kijitonyama house be the property to be enjoyed by the entire family, the respondent inclusive. Two, that the applicants were ordered to do what they had already complied with when Mkosimongwa, J., ordered that the inventory and accounts of the estate be filed in court.

Mr. Mhimba has submitted, correctly so in my view, that the trite position is that where illegality is successfully invoked, the same can be the basis for extension of time. The condition precedent for reliance on illegality is that the alleged illegality must be apparent and on the face of record and that the point of law constituting illegality must be of sufficient importance (See: **Lyamuya Construction Company Limited v. Board of Trustees**

of YWCA (supra)). I will also add that such illegality must pass the test articulated by the Court. In its recent decision in the case of **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported), the Court grappled with the question on what constitutes an illegality. It did, as a starting point, extract the definition of illegality from the Black's Law Dictionary, 11th Edition, wherein illegality was defined to mean: *"an act that is not authorized by law" or "the state of not being legally authorized"*.

To drive the point closer home, the Court adopted the persuasive definition enunciated by the Supreme Court of India in **Keshardeo Chamria v. Radha Kissen Chamria & Others** AIR 1953 SC 23, 1953 SCR 136. In it, illegality was held to mean as hereunder:

> *"... **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 formalities which the law prescribes have been complied with."* [Emphasis is added]

See also: **Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another**, Civil Appeal No. 174 of 2020 (unreported).

From the foregoing excerpt, narrow question to be resolved is: is the alleged illegality one that fits into the description of illegality accentuated in the cited decisions. I am constrained to answer this question in the affirmative. My scrupulous review of the two orders, that is to say, one by Bubeshi, J and the other by Kulita, J. reveals that the two present two diametrical positions. While the latter has bequeathed the Kijitonyama house to the respondent, at the exclusion of all others, the former let the property serve as a family property on which none of the members enjoyed an exclusive ownership right. The polar positions of the two decisions of the same court are a serious cause for concern. They are problematic and incapable of being reconciled at the stage of the High Court which, in the eyes of the either or both of the parties, is culpable of the current confusion.

In my considered view, this point qualifies as a point of law of sufficient importance, in the mould described in the **Lyamuya Construction**

Company Limited v. Board of Trustees of YWCA (supra) and **Charles Richard Kombe v. Kinondoni Municipal Council** (supra).

In sum, I hold that circumstances obtaining in this case sufficiently convince me to hold that good reason has been demonstrated to trigger exercise of the Court's discretion. Consequently, I grant an extension of time to file a notice of appeal against the decision of the High Court in Misc. Civil Application No. 431 of 2018. Such notice should be filed within 30 days from the date hereof.

It is so ordered.

DATED at **DAR ES SALAAM** this 20th day of November, 2023.

M. K. ISMAIL
JUSTICE OF APPEAL

This Ruling delivered this 21st day of November, 2023, in the presence of Mr. Erich Mhimba, learned counsel for the Applicant and in the presence of Mr. Grayson Laizer, learned counsel for the Respondent is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL