

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 725/01 OF 2022

WAZIRI ABDALLAH APPLICANT

VERSUS

ALMASI CHARLES MVUNGI 1ST RESPONDENT

JAMILA HASSAN MUYONGA 2ND RESPONDENT

**(Application for extension of time to file an application for revision of
the judgment and decree of the Resident Magistrate Court, at**

Kinondoni, Dar es Salaam)

(Lyamuya, PRM-Ext. Jur.)

Dated the 20th day of December, 2021

in

Extended Misc. Land Appeal No. 148 of 2020

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RULING

15th & 23rd November, 2023

ISSA, J.A.:

This is an application made by way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking extension of time within which to file an application for revision of the judgment and decree of the Resident Magistrate Court at Kinondoni, Dar es Salaam (Lyamuya, PRM) dated 20.12.2021 in Extended Misc. Land Appeal No. 148 of 2020. The application is supported by an affidavit affirmed by Waziri Abdallah, the applicant.

The following brief background facts will serve the purpose of appreciating the essence of the present application. In 2017 the 1st respondent filed a case, Civil Application No. 1 of 2017, against Ameir Saleh, Khamis Kimote, Salim Talal Islam, Elizabeth Mkoba, Salum Juma, Enea Kingota, Felix Kombe and Gerson Nduiu at District Land and Housing Tribunal (DLHT) for Morogoro. He claimed that those people trespassed on his land. The application was decided in favour of the 1st respondent on 18.5.2018.

In December 2019, another incident occurred and the 1st respondent filed a case against the 2nd respondent, Application No. 2 of 2020, at the DLHT for Morogoro. The 1st respondent alleged that, the 2nd respondent without any colour of right trespassed on the said land and started constructing a house. The 2nd respondent, on the other hand, disputed the claim and averred that she purchased a plot no. 73 Block B Mkundi ward within Morogoro Municipality from the applicant.

The DLHT decided in favour of the 2nd respondent who was declared the lawful owner of the plot no. 73. The 1st respondent not pleased with that decision she appealed to the Resident Magistrate Court with Extended Jurisdiction in Extended Misc. Land Appeal No. 148 of 2020. The appeal was decided on 20.12.2021 in favour of the 1st

respondent who was declared the owner of that land. The applicant was informed about the outcome of the appeal by the 2nd respondent. Since the applicant was not a party to the main suit or appeal, he approached this court for extension of time to file for revision. His application is predicated on the following grounds:

a) There is illegality on the decision of DLHT in Land Application No. 2 of 2020.

b) The judgment on appeal is tainted with illegalities.

c) The applicant was not aware of the judgment on appeal until 13.11.2022 when he met the 2nd respondent who informed him about the outcome of the appeal.

At the hearing of the application the applicant was represented by Mr. Juma Nassoro, learned advocate. The 1st respondent and his advocate did not enter appearance whereas the 2nd respondent appeared in person. Mr. Herald Samson Matagi, who claimed to be the brother of the 1st respondent, was present in Court. He informed the Court that, his brother has disappeared and their efforts to find him has proved futile. He prayed for the matter to be heard by way of written submission.

Mr. Nassoro was not amused, he submitted that the 1st respondent was being represented in this case by advocate Kay

Makame Zumo of Amnek Attorneys, Morogoro who not only filed an affidavit in reply, but also lodged a notice of preliminary objection on 24.11.2022. After looking at the summons served on advocate Zumo on 26.10.2023, he prayed for the Court to proceed with the hearing in the absence of the 1st respondent. The 2nd respondent joined hands with Mr. Nassoro that we should proceed with the hearing in the absence of the 1st respondent.

The Court acceded to the prayers to proceed with the hearing in the absence of the 1st respondent, because the advocate representing the 1st respondent has received the summons on 26.10.2023 and this matter was called on for hearing on 15.11.2023. This gave him enough time to prepare for hearing and if there was something inevitable he had ample of time to inform the Court, but he just chose to remain mute. Secondly, Mr. Herald is a stranger in this application and he had no locus to request how the hearing should proceed.

Turning to the application in hand, Mr. Nassoro, learned advocate for the applicant adopted the contents of the notice of motion, and the affidavit of the applicant. He submitted that, the applicant has filed this application for extension of time within which to apply for revision as the applicant was not involved in the dispute between the

1st and 2nd respondents, but he was affected by the order of the Resident Magistrate with extended jurisdiction. The applicant is the one who sold the land to the 2nd respondent, but he was neither a party to the dispute before DLHT nor a party before the Resident Magistrate Court, hence, he had no right of appeal. The only remedy available to him is revision.

Mr. Nassoro proceeded to show that, there were illegalities in the decisions of DLHT as well as that of Resident Magistrate Court on appeal. The illegality which is seen in DLHT's judgment is that Regulation 19(2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 was not observed. The assessors did not give their opinion before the Chairman of DLHT, hence making the decision a nullity. Further, there has been a change of assessors at the middle of the hearing. The case started with two assessors, Ms. Ngazija and Mr. Mukama, but when the defence case started the assessors were Ms. Ngazija and Mr. Mpite.

Mr. Nassoro added that, there was also illegality on the appeal before Resident Magistrate who mentioned in the judgment that the applicant got the documents of ownership fraudulently and then sold the land to the 2nd respondent. This conclusion was reached without

hearing the applicant. Therefore, the applicant was condemned unheard. Further, he submitted that the learned RM should have ordered a fresh trial and make the applicant a necessary party as he was the one who sold the land. It was a case of non-joinder of a necessary party, which is fatal. Finally, he submitted that, these grounds are of sufficient importance and they are on the face of the record. He relied on the case of **Victoria Real Estate Development Ltd v. Tanzania Investment Bank**, Civil Application No. 225 of 2014 (unreported).

The second respondent did not have much to say, she submitted that she has no objection on the applicant being granted extension of time.

I shall now proceed to determine the matter on the basis of the arguments and legal principles raised. I have to restate two principles to pave way for my deliberations. One, the application was brought under Rule 10 of the Rules, but the jurisdiction under Rule 10 has to be exercised according to the rule of reason and justice and not according to private opinion or arbitrarily. See **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christians Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

Two, there is no universal definition of what amounts to good cause. The Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. This position of law has been restated by the Court in a number of cases including; **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R. 387 and **Lyamuya Construction Co. Ltd** (supra).

In this application there are two issues to be determined. One, is the length of the delay and whether that delay has been accounted for. Two, is the illegality of the decision sought to be challenged.

Starting with the issue of delay, the applicant in his affidavit averred that he got the information from the 2nd respondent about the outcome of appeal on 13.11.2022 and he filed this application for extension of time within which to file for revision on 24.11.2023 after 11 days. This averment was not disputed in the affidavit in reply filed

by 1st respondent. There, it is the finding of this Court that the delay of 11 days is not inordinate.

Turning to the issue of illegality, the law is very much settled. In **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) this Court stated:

"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" within the meaning of Rule 8 of the Rules for extending time."

The Court in **Lyamuya Construction** (supra) has further expounded that such point of law must not only be of sufficient importance but must also be apparent on the face of the record; not one that would be discovered by a long drawn argument or process.

In this case, the applicant submitted that there are illegalities which are found in DHLT's judgment and there are also illegalities found in Resident Magistrate's judgment. In DLHT the illegalities were in terms of assessors not giving their opinion before the judgment is pronounced, and also the fact that one assessor was replaced in the

middle of hearing. The learned advocate was right in this respect that, these illegalities are found on the face of the record and would have been sufficient to extend the time. Unfortunately, this Court is not moved for the reason that the judgment of DLHT is not the one which is a subject of intended revision. It is the judgment of Regional Magistrate with extended jurisdiction which is subject of revision. The law as it stands is that, the illegality should be apparent on the face of record which is subject of appeal or revision. See: **Khadija Kuziwa v. Portland Cement Company**, Civil Reference No. 4 of 2018.

With respect to the illegalities found in Resident Magistrate's judgment, Mr. Nassoro argued that the applicant was condemned unheard. It is worth here to reproduce what the Resident Magistrate wrote on page 4 of the judgment:

"In this, I can tell the source of all the disputes surrounding the disputed land. It is Waziri Abdallah Mwikalo who sold the plot to the respondent, is a land officer who works with ministry of land - Morogoro. He surveyed the disputed land. Using or misusing his office, he grabbed a portion of land from the appellant land. He surveyed it and made all the documents for himself in his office."

That is not all, from the record the learned Resident Magistrate went further and advised the 2nd respondent to demand her money from the applicant. He wrote:

"I can understand the respondent predicament, nevertheless, she should ask for her money back from Waziri Abdallah Mwikaio and if she wishes, she can sue for damages".

There is no dispute that the applicant is the one who sold the land to the 2nd respondent, and there was no dispute that the applicant was not a party to the appeal before the Resident Magistrate. The above verdict surely works injustice. The court has condemned the applicant without affording him a right to be heard. In **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251 this Court stressed that, the right to be heard was not only a fundamental right, but a constitutional one, and that where a party may not have been afforded such a right, the proceedings are a nullity.

I am of the settled mind that, due to the illegality apparent on the face of the record, extension of time should be granted. Accordingly and for the stated reasons, I grant the application and I

order the intended application for revision to be lodged within 60 days of the delivery of this ruling. Costs to be on the cause.

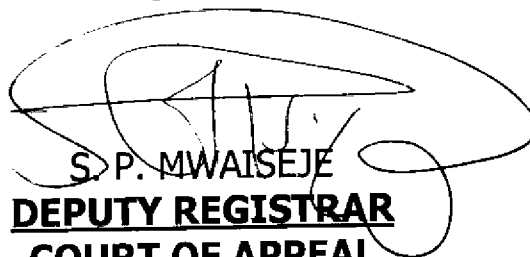
It is so ordered.

DATED at DAR ES SALAAM this 21st day of November, 2023.

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Juma Nassoro, learned Counsel for the Applicant, who is also holding brief for Mr, Kay Makame Zumo, learned counsel for the 2nd Respondent and in the absence of the 1st Respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL