

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 534/17 OF 2021

DORICE RWAKATARE (As administrator of the estate
of the late **FELISTA THEONEST RWELENGERA****APPLICANT**

VERSUS

ANTHONY TUME MAKANI..... **1ST RESPONDENT**

GETRUDE PAGALILE RWAKATARE **2ND RESPONDENT**

**(Application from the decision of the High Court of Tanzania, Land Division
at Dar es Salaam)**

(Mkuye, J.)

dated the 5th day of May, 2016

in

Land Case No. 263 of 2015

.....

RULING

6th November & 18th December, 2023

MURUKE, J. A:

Present application has been preferred by a notice of motion under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is seeking extension of time within which to apply for revision against the decision of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No. 263 of 2015. The notice of motion is supported by an affidavit of Dorice Rwakatare as an administratrix of the estate of her late mother Felista Theonest Rwelengera.

On the other hand, the first respondent filed his own affidavit in reply to oppose the application, whilst for the second respondents only Muta Robert Rwakatare filed affidavit in reply.

The material facts of the case upon which this application arose can briefly be stated as follows:- The applicant is the administratrix of the estate of her late mother Felista Theonest Rwelengera, who contracted Civil Marriage in 1979 with Kenneth Ford John Rwakatare, and the applicant was one of the issue of the marriage.

During substance of the applicant's parents marriage they acquired, various properties including house Block 40, Drive Estate, upon resurvey is now known plot No. 657 Block F Msasani Village. The property was used as Matrimonial home, in which the applicant and her other siblings together with their parents until 1990, when their father moved out of matrimonial home, leaving their mother until she passed away in 2021.

In 1994 their father attempted to force the applicant and her mother out of their residential house (the house in dispute). Consequently the applicant's late mother instituted Matrimonial Cause No. 06 of 1994, in which their late father was permanently restrained from disposing in any how the property on plot no. 657 Block "F" Msasani Village formally known

as Block 40, Drive Estate. After the court injunctions, the applicant and her late mother lived peacefully even after death of their late father in 2013.

In 2019, the applicant's late mother was given a copy of the late that was addressed to the first respondent to the effect that, there has been transfer of the disputed property, by way of gift from their late father Kenneth Rwakatare to the late Getruda Pagalile Rwakatare and then from Getruda Pagalile Rwakatare to the first respondent Anthony Tume Makani.

On 22nd December, 2020, one month before the applicant's late mother passed away, she was served with Notice of eviction by the court broker issued by the High Court, Land Division at Dar es Salaam. Upon the applicant being appointed administratrix and making a follow up at Land Court, it was revealed that, the 1st respondent had instituted a suit against Getruda Pagalile Rwakatare, who did not file defence thus default Judgment was entered.

The applicant attempted twice to seek right to challenge the decision that had negative effect on her and other siblings of the late Felista Theonest Rwelengera who have lived on the disputed house for more than 35 years, but each time her application was struck out.

The applicant has filed present application to be able to file revision, to represent her late mother interest, because she was not given opportunity to be heard. The first and one of the 2nd respondents filed affidavit in reply refusing most of the averments in the affidavit in support requesting for strick proof of the facts averred.

In essence, paragraph 14 of the applicant's affidavit discloses three issues as follows:

One: - That there was a total disregard of principles of natural justice for denying the late Felista Theonest Rwelengera the right to be heard.

Two; That, the High Court did not hear the parties as per principles did down by the law.

Three; The High Court, entered the Judgment in misconception of there being a lawful order vide Matrimonial Cause No. 06 of 1994 at the Resident Magistrate's Court of Kisutu at Dar es Salaam, against the late Kenneth Ford John Rwakatare permanently restrained him from disposing the house, formerly on premises designed as Block 40, Drive Estate, presently upon being renumbered as Plot No.

657 Block "F" Msasani Village, Dar es Salaam by way of sale, gifts or lease.

On the hearing date, the applicant was represented by Mr. Imam Daffa, learned counsel, whilst the first and the second respondents had service of Mr. Emmanuel Augustino, learned counsel.

Upon taking the floor to argue the application, Mr. Daffa adopted the notice of motion and the supporting affidavit. The applicant narrated what is contained in the affidavit evidence on what transpired to the filing of this application. More important the applicant has shown sufficient cause for the grant of this application. It was further submitted that, there is sufficient material in the affidavit to enable the Court to exercise its discretion to grant extension to file revision, basing on illegalities demonstrated at paragraph 14 of affidavit in support of the application. The applicant's counsel referred the case of **Rose Irene Mbwete administratrix of the estate of Mery Dotnata Walondoha v Phoebe Martin Kyomo**, Civil Application No. 70/17 of 2019, Court of Appeal of Tanzania, where at page 20 it was held that illegalities has been well established thus grant of the application.

The respondent's counsel submitted in brief that, the applicant was not party to Civil Case No. 263 of 2015 at the High Court Land Division. She has not demonstrated in her affidavit how her rights have been infringed. The applicant in any way, will not be prejudiced with subsequent orders. In totality the applicant has not shown sufficient cause, arguing the respondent's counsel while referring Court to the case of **Mtengeti Mohamed v. Blandina Macha**, Civil Application No. 344/17/2022, in which at page 8-9 has put argument of raising illegality after a long time. In totality the respondent's counsel argued court to dismiss the application, for want of merits.

In rejoinder, the applicant's counsel apart from insisting what he submitted earlier on illegality he submitted further that, the case cited by the respondent's counsel of Mtengeti (supra) facts are different. In the present application there exist sufficient cause, insisted Mr. Daffa for the applicant, who then pressed for application to be granted.

Having examined the notice of motion, the supporting affidavit as well as the affidavit in reply and submissions by both parties; the issue for determination is whether the applicant has sufficiently advanced good cause for the Court to extend time to apply for review.

The Court's power to enlarge time for taking any action authorized by the Rules is provided under Rule 10 of the Rules that:

"The Court may upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal for the doing of any authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to the time as so extended".

It is undisputed that though the Court's powers to extend time under rule 10 of the Rules are discretionary, such powers can only be exercised where good cause is shown. It is a settled position of the law that, for the Court to exercise its discretion to extend time, there must be a "*good cause*" shown by an applicant that upon becoming aware that he is out of time, and there being circumstances beyond his control that prevented him to act in time prescribed he promptly acted to persuade the Court to exercise its discretion in granting an extension of time. What constitutes good cause has not been laid down by any hard and fast rules, it depends upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion. There are number of

factors which have to be considered in determination if good cause has been shown. Some was discussed in the decision of the Court in the case of **Lyamuya Cosntruction Company Ltd v. Board of Registered Trustees of Young Wemen’s Christian Association of Tanzania**, Civil Application No. 2 of 2010 [2021] TZCA 4; [03 October, 2021, TANZILII] as follows; **one**, an applicant must account for all the period of delay; **two**, the delay should not be inordinate; **three**, an applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; **four**, if the Court feels that there are other sufficient reasons, such as the existence of the point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In terms of affidavit evidence sworn by the applicant at paragraph 14 in support of the application, the alleged illegality is very much apparent on the face of the record. Whether or not the trial court was correct in its decision is not the prerogative of this Court at this stage. In our jurisdiction the law is settled that where illegality is an issue in relation to the decision being challenged, the Court has a duty to extend time so that the matter can be looked into. The applicant’s mother was not made

a part to Land Case No. 263 of 2015 of the High Court (Land Division) at Dar es Salaam. Eviction Order has the effect of touching her rights on the estate of which the applicant is her personal legal representative. Without being given an opportunity to be heard, her interest will be in jeopardy bearing in mind an injunction order of a lawfully order of the court in Matrimonial Cause No. 06/1994 of the Resident Magistrate Court of Kisutu at Dar es Salaam. One of the celebrated decisions of the Court on this aspect is the case of **Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] T.L.R. 185, where it was held that:

"(i) Where, as here, 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;

(ii) When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it 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"

In the case of **VIP Engineering and Marketing Limited & Three Others v. Citibank Tanzania Limited, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006** (unreported), the Court stated thus:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 (now rule 10) regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay,"

[See also: **Kalunga and Company Advocates v. National Bank of Commerce** [2006] T.L.R. 235; **Mohamed Salum Nahdi** (supra); **Andrew Athuman Ntandu & Another v. Dustan Peter Rima** (*As an Administrator of the Estate of the late Peter Rima*), Civil Application No. 551/01 of 2019; and **Tanzania Breweries Limited v. Herman Bildad Minja**, Civil Application No. 11/18 of 2019 (both unreported)]. Pursuant to the cited decisions, allegation of an illegality is good cause for extension of time even if the applicant has failed to account for each day of delay.

Consequently, since the applicant has alleged that there is illegality in the impugned decision, I find the application meritorious which I hereby grant. The applicant is ordered to file the intended application for revision within sixty days from the date of the delivery of this ruling. Costs of this application shall abide the outcome of the intended revision.

DATED at DAR ES SALAM this 15th day of December, 2023.

Z. G. MURUKE
JUSTICE OF APPEAL

The ruling delivered this 18th day of December, 2023 in the presence of Mr. Emmanuel Augustino learned counsel for the Respondents also holding brief for Mr. Imam Daffa, learned counsel for the Applicant, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL