THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL REVISION NO. 2 OF 2019

(Originates Civil No. 26/2018 Primary Court at Kyela and Civil Appeal No. 14/2018 District Court, Kyela)

1. OBI MWAKANUSYA
2. EZEKIEL CHARLES CHUBU }.....**APPLICANTS**

VERSUS

BODI YA WADHAMINI WA KANISA LA LAST CHURCH OF GOD TZ.....RESPONDENT

RULING

Date of last Order: 05.05.2020

Date of Ruling: 14.5.2020

DR. A. J. MAMBI, J.

This Ruling emanates from an application filed by **OBI MWAKANUSYA** and **EZEKIEL CHARLES CHUBU** (referred as the applicants). In their application supported by an Affidavit the applicants filed an application (Civil Revisions NO. 02/2019) for revision. The application was filed under Order XLIII Rule 2 and Section 79 (1) of the Civil Procedure

Code Cap 33 [R.E.2002]. The applicants prayed the following orders:

1) Calling of records from the District Court of Kyela in civil appeal No.12 of 2018, Civil Appeal No.14 of 2018 and the decision of the Kyela Urban Primary Court in Civil Case No.26 of 2018
2) Revise and quash the rulings in in civil appeal No.12 of 2018, and Civil Appeal No.14 of 2018 and Judgment of Kyela Primary Urban Court in Civil Case No.26 of 2018

During hearing, parties agreed to argue by way of written submission.

During hearing applicants were represented by the learned Counsel Mr. Thomas Msuta while the respondent appeared was represented by Judith .P. Kyamba.

The applicants through submitted that there were illegalities at the Trial Primary Court proceedings and the District Court ignored those irregularities. They referred decision of the court in ***Omary Shabani Nyambu vs Dodoma Water Sewage Authority CAT 2016***. They argued that applicants sought for an order for extension of time to file an Appeal out of time against the Judgment the Primary Court but the application was struck out without reasons.

In response, the respondents briefly submitted that the application has no merit since the District Court was right in its decision. They argued that the applicants did not comply with the order of the court to submit their written submission

in time. They referred decision of the court in Tanzania Breweries vs Edson & others Civil Aplic. of 2006.

Before I addressed the key issues, I wish to highlight that this Court has been properly moved though revisions under the relevant provisions of the laws. Generally, the High Court can exercise its revisional jurisdiction either *suo moto* or on application as in our case. In Tanzania. The High Court has the power to revise the proceedings of the District Land and Housing Tribunals if it appears that there has been an error material to the merits. The inherent revisionary powers of the High Court are enshrined under both section 43 (1) (b) of the Land Disputes Courts Act, Cap 216 [R.E2002] and Section 79 of CPC Cap 33 [R.E. 2002] respectively. Indeed this court has power on its own motion or *suo moto* if it appears that there has been an error material to the merits of the case involving injustice, to revise the proceedings and make such decision or order therein as it may think fit. See ***Benedict Mabalanganya v Romwald Sanga civil Application 1 of 2001, Court of Appeal of Tanzania at Mbeya (2004) (unreported***). This is provided under Section 79 of CPC Cap 33 [R.E. 2002] respectively. For easy reference section 79 (1) (b) the Land Disputes Courts Act provides that;

> *"(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears–*
> *(a) to have exercised jurisdiction not vested in it by law; or*
> *(b) to have failed to exercise jurisdiction so vested; or*

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fi"

Reference can also be made to other laws. In the regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2002] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers* ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

The underlying objects of the above provisions of the two laws are to prevent subordinate courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. See ***Major S.S Khanna v. Vrig. F. J. Dillon, Air 1964 Sc 497 at p. 505: (1964) 4 SCR 409; Baldevads v. Filmistan Distributors (India) (P) Ltd., (1969) 2 SCC 201: AIR 1970 SC 406.*** The provisions cloth the High court with

the powers to see that the proceedings of the subordinate courts are conducted in accordance with law within the bounds of their jurisdiction and in furtherance of justice. This enables the High Court to correct, when necessary, errors of jurisdiction committed by subordinate courts and provides the means to an aggrieved party to obtain rectification of non-appealable order. In other words, for the effective exercise of its superintending and visitorial powers, revisional jurisdiction is conferred upon the High Court. See *C.K.Takwani in Civil Procedure in India, 7th edition, New Delhi 2015 at page 587-612.*. See also ***Manick Chandra v. Debdas Nandy, (1986) 1 SCC 512 at pp. 516 -17: AIR 1986 SC 446.***

From the above findings and reasoning, I hold that from the above provision of the law including various decisions by the court, this court is right in exercising its supervisory and revisionary power on the matter.

Coming to the key issues at hand arising from the submission made by both parties, the key issues centres on the point of law that is illegalities that was addressed at the District Court as the ground for the application. I have considerably perused the application supported by an affidavit. I have also keenly considered the submissions made by both parties in line with perusal of the records from the lower courts to find out whether this application has merit or not. My findings will be based on determining the issue as to whether the applicant has advanced sufficient reasons for this court to consider his

application for an extension of time to file an appeal out of time. There is no doubt that the respondent support this application. They argued that they believe there was no any material irregularity as claimed by the applicants.

In my considered view the main issue in this matter is whether the applicants have properly moved this court in their application and whither the District Court properly considered the applicants' application. It is clear on the records that the applicants were seeking extensions of time at the District Court. However, the District Court dismissed the application.

The applicants in their submission at the District Court and this court submitted that their reasons for application of extension of time were mainly based on illegality. However, looking at the Judgment of the District Court, it is clear that the court did not address and determine the issue of illegality apart from discussing minor issues that were not addressed by the parties. I am aware that where any party seeks for an extension of time to file an appeal out of time he is required to advance sufficient reasons in his affidavit before the court can consider and allow such application. This is the position of the law with and case studies. In this regard, I wish to refer the decision of the Court of Appeal of Tanzania in ***REGIONAL MANAGER, TANROADS KAGERA V. RUAHA CONCRETE COMPANY LTD CIVIL APPLICATION NO.96 OF 2007 (CAT unreported).*** The court in this case observed that;

"the test for determining an application for extension of time, is whether the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted".

This means that in determining an application for extension of time, the court has to determine if the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted. This means that the court needs to consider an issue as to whether the applicant in his affidavit has disclosed good cause or sufficient reasons for delay. In other words, the court need to take into account factors such as reasons for delay that where the applicant is expected to account of cause for delay of vey day that passes beyond the aforesaid period, lengthy of the delay that is to shown such reasons were operated for all the period of delay.

Reference can also be made to the decision of the court in ***BARCLAYS BANK TANZANIA LTD VERSUS PHYLICIAN HUSSEIN MCHENI;*** Civil Application No 176 of 2015 Court of Appeal of Tanzania at Dar es Salaam (Unreported) underscored that;

"Among factors to be considered in an application for extension of time under Rule 10 of the Court of Appeal Rules, 2009 are:-

(a) The length of the delay

(b) The reason of the delay – whether the delay was caused or contributed by the dilatory conduct of the applicant?

(c) Whether case such as whether there is a point of law or the illegality or otherwise of the decision sought to be challenged."

Worth also at this juncture referring the decision of the court in ***MEIS INDUSTRIES LTD AND 2 OTHERS VERSUS TWIGA BANK CORP; Misc Commercial Cause No. 243 of 2015*** (Unreported) where it was held that:

"(i) An application for extension of time is entirely in the discretion of the Court to grant or to refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause..."

Indeed the illegality is the point of law that needs to be considered as one of the grounds of granting extension of time thought it is the discretion of the court. However, the District Court didn't consider this point law that was raised by the applicant as their ground for seeking an extension of time. Worth making reference to the decision of the court in ***VICTORIA REAL ESTATE DEVELOPMENT VERSUS TANZANIA INVESTMENT BANL AND 3 OTHERS***, Civil Application No. 225/2015 (unreported). In this case the court clearly addressed the point of illegality that:-

"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 of ascertaining the point and if the alleged illegality be established to make appropriate measures to put the matter and the record right".

It appears the District Court focused more on the submission by the respondents and ignoring the grounds and submission of the applicants. This in my view is as good as ignoring the defence evidence. It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by the court. There are various decision of the court of appeal which has insisted the need for considering the evidence of both parties and failure to do is bad in law. This was underscored in ***Hussein Iddi and Another Versus Republic [1986] TLR 166,*** where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge* ***to deal with the prosecution evidence on its own*** *and arrive at the conclusion that it was true and credible* ***without considering the defence evidence****".*

I have gone through the records from the District Court and observed that the proceedings and the Judgment were tainted by irregularities that in my view jeopardized justice to the appellant seems to be more jeopardized. My perusal from the records of the show that the Magistrate seems to be biased by mainly basing on the submission of the respondent ignoring the grounds and issues raised by the applicants. This in my considered dined the applicants' right to be heard. This court can also borrow a leaf from the relevant persuasive decisions

from other common law jurisdictions such as England. For instance, in one of a persuasive decision in ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162. **Lord Denning L.J** observed and pointed out that:

> *"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him.* ***He must know what evidence has been given and what statements have been made affecting him****; and then he must be given a fair opportunity to correct or contradict them". (emphasis supplied with).*

In my firm view, this implies that the right to be heard was not fully availed to the appellant. Reference can also be made to the decision made Appeal by the Court of Appeal in ***MBEYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where it was held that:

> *"In this country, natural justice is not merely principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part"*
>
> *"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na* ***haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

The Court of Appeal in ***ABBAS SHERALLY & ANOTHER VS. ABDUL (supra)*** reiterated that:

> *"....**That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard,** because the violation is concerned to be a breach of natural justice."*

Looking at the application before this court, the applicants in their affidavit and submission had clearly indicated that he had sufficient reasons for their application since there was the legal point of illegality. It is clear from the affidavit that the applicants had clearly stated the sufficient reasons for his application at the District Court.

Similarly, the court in ***BARCLAYS BANK TANZANIA LTD VERSUS PHYLICIAN HUSSEIN MCHENI;*** Civil Application No 176 of 2015:Court of Appeal of Tanzania at Dar es Salaam (Unreported) underscored that;

> *"Among factors to be considered in an application for extension of time under Rule 10 of the Court of Appeal Rules, 2009 are:-*
>
> *(a) The length of the delay*
>
> *(b) The reason of the delay – whether the delay was caused or contributed by the dilatory conduct of the applicant?*
>
> *(c) Whether case such as **whether there is a point of law or** the **illegality** or otherwise of the decision sought to be challenged."*

In my view, the point of illegality that arose the Trial Primary Court was a good cause and sufficient reasons for the applicants to be granted their application and I hold so. Reference can also be made to the decision of Court of Appeal in ***MOBRAMA GOLD CORPORATION LTD Versus MINISTER FOR ENERGY AND MINERALS, AND THE ATTORNEY GENERAL, AND EAST AFRICAN GOLDMINES LTD AS INTERVENOR, TLR, 1998 in*** which the court at ***Page 425*** held that

> *"It is generally inappropriate to deny a party an extension of time where such denial will* ***stifle his case;*** *as the respondents' delay does not constitute a case of procedural abuse or contemptuous default and because the applicant" will not suffer any prejudice, an extension should be granted.*

Indeed, the question as to what it amounts to "sufficient cause" was underscored in ***REGIONAL MANAGER TANROADS KAGERA VS RUAHA CONCRETE CO LTD CIVIL APPLICATION NO 96 of 2007,*** where the court observed the following:-

> *"What constitutes sufficient reasons cannot be laid down by any hard or fast rules. This must be determined by reference to all the circumstances of each particular case. This means* ***the applicant must place before the court material which will move the court to exercise judicial discretion in order to extend time limited by rules****"(emphasis supplied).*

Similarly, The Court in ***TANGA CEMENT AND ANOTHER CIVIL APPLICATION NO 6 OF 2001*** clearly held that:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors has to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for delay; lack of diligence on the part of the applicant".*

I thus agree with the applicants that the point illegality was required to be considered as the ground for enlargement of the time so that the matter can be determined on merit.

The applicants have also prayed this court to revise the decision of the Primary Court. However, since the applicants at the District Court filed their application for extension time to file an appeal against the decision of the Primary Court, I find it proper to just set aside the decision of the District curt so that the applicants can file their appeal out of time against the decision of the primary Court if they wishes to do so. For the interest of justice this court rules that the applicants be granted an extension of time to file their appeal at the District court and I hold so.

I am of the considered view that this application has merit and this court finds proper the applicant to be granted an extension of time to appeal to the District court out of time. In the premises and from the foregoing reasons, I quash the

decisions of the District and set aside any order made thereof and allow the application.

The applicant shall file his appeal within 21 days from the date of this ruling.

DR. A.J. MAMBI
JUDGE
14.5.2020

Ruling delivered in Chambers this 14th day of May, 2020 in presence of both parties.

DR. A. J. MAMBI
JUDGE
14.5.2020

Right of appeal explained.

DR. A. J. MAMBI
JUDGE
14.05.2020

Date: 14/05/2020

Coram: N. Mwakatobe, DR.

1st applicant: Absent

2nd applicant: Present

Respondent: Present

B/C: Gaudensia

Court: Ruling is delivered this 14th day of May, 2020 in the presence of 2nd appellant and the respondent.

N. W. Mwakatobe
Deputy Registrar
14/05/2020

Court: Right to appeal is hereby explained.

N. W. Mwakatobe
Deputy Registrar
14/05/2020