IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. LAND APPLICATION NO. 13 OF 2022

(C/F Land Appeal No. 41 of 2017 of the High Court of Tanzania at Moshi; Land Application No. 173 of 2012 District Land and Housing Tribunal for Moshi)

SYLVESTER PETER MUSHI .....APPLICANT

Versus

KHADIJA RAMADHANI (Administratrix of the estate of Ramadhani Mohamed Mitta) ..... 1ST RESPONDENT

RAJABU MOHAMED (Administrator of the estate of Ramadhani Mohamed Mitta) ..... 2ND RESPONDENT

ALLY HUSSEIN MOHAMED MITTA (Legal Representative of Hussein Mohamed Mitta .....3RD RESPONDENT

RULING

30/8/2022 & 7/10/2022

SIMFUKWE, J.

The applicant Sylvester Peter Mushi has filed an application for extension of time within which to file objection proceedings out of time against the decision in Land Appeal No. 41 of 2017 of the High Court Moshi District registry delivered on 19/11/2019 by Hon. Mkapa, J. The application has been brought under **section 14(1) and section 21(2) of the Law of Limitation Act, Cap 89 R.E 2019** and **section 95 of the Civil**

Procedure Code, Cap 33 R.E 2019. It is supported by applicant's affidavit and amended affidavit which was contested by a counter affidavit deponed by Mr. Elvaison Erasmo Maro, the learned counsel of the 1st and 2nd respondents and the counter affidavit of the 3rd respondent.

The gist of this application in a nutshell is that, the impugned appeal emanated from the District Land and Housing Tribunal where the late Ramadhan Mohamed Mitta and Ally Hussein Mitta (legal representative of Hussein Mohamed Mitta) were parties. The matter concerned dispute over Plot No. 40, Block E, Zone III. The case was decided in favour of Ally Hussein Mohamed Mitta. The said Ramadhan was aggrieved and preferred the appeal to this court (the impugned appeal).

Sometimes in 2020, the applicant herein believing that he could challenge the said appeal as he alleged to be the legal owner of the disputed landed property, he filed application for revision before the Court of Appeal which was withdrawn on 17/3/2022. He then filed the instant application for extension of time to file objection proceedings out of time against the said appeal.

During the hearing of this application, the applicant was represented by Mr. Phillip Njau, learned counsel, the 1st and 2nd respondents were represented by Mr. Elvaison Maro learned counsel while the 3rd respondent was unrepresented. The matter was argued by way of written submissions.

In support of the application, Mr. Njau adopted the affidavit deponed by the applicant to form part of the submission. He narrated the history of this application and implored the court to grant leave to the applicant to file objection proceedings. He said that through the objection

proceedings, the applicant intends to challenge the decision of this court which allowed the appeal in favour of the respondents over the landed property which was sold to the applicant before the said appeal had been filed in court. It was argued that if the decision of this court stands as it is, it will cause irreparable loss to the applicant as he will be deprived of his property and he was denied opportunity to be heard.

Mr. Njau continued to submit that granting extension of time is in the discretion of the court upon the applicant showing reasonable and sufficient cause. He cited the case of **Royal Insurance Tanzania Limited vs Kiwengwa Strand Hotel Ltd, Civil Application No. 111 of 2009** in which the Court quoted with approval the case of **Attorney General vs Twiga Paper Products Ltd, Civil Application No. 128 of 2008** which laid down the following factors to be considered before granting extension of time: length of delay, reasons of the delay, the degree of prejudice to the respondent if application is granted and chances of the appeal succeeding if the application is granted.

Explaining the reasons for the delay, it was submitted that the applicant was not made aware of Land Appeal No. 41/2017 as he was not a party. However, he came to learn the same in November 2019 and he immediately took necessary steps. That, the application before the Court of Appeal remained pending until 17/3/2022 when it was withdrawn. He argued that the court has always treated time spent in court to be sufficient reason to grant extension of time. He referred to the case of **Benedict Shayo vs Consolidated Holdings Corporation as Official Receivers of Tanzania Film Company Limited, Civil Application No.366 of 2017** in which the court treated the time a party spent in court pursuing his case as excusable technical delay. He thus prayed the

court to dispense with the time the applicant spent in Court from December 2019 up to March 2022 as it was technical delay which constitutes sufficient reason to grant extension of time.

Mr. Njau continued to say that it only took 7 days for the applicant to file this application of which he believed was reasonable time which cannot be termed as delay. He cemented the argument with the case of **Juma Posanyi Madati vs Hambasia N'kella Maeda, Civil Application No. 230 of 2016** (CA) in which the Court held that 14 days of delay were reasonable.

It was also stated that though the plaintiff is at liberty to sue whoever he thinks proper in his case, but the court has a duty to ensure its decision and decree is executable and where it appears that the decree cannot be executed, the Court has its avenue of ensuring that the proper or necessary party is joined in order to settle all the questions involved. That, **Order 1 Rule 10(2) of Civil Procedure Code** (supra) provides powers to the court to join or remove a party to a suit for the purpose of ensuring proper adjudication of a suit.

The learned advocate faulted the court for hearing the appeal while the appellant was in clear knowledge that a necessary party was not joined in the suit hence, denying him right to be heard. He substantiated this point with the case of **Claude Roman Shikonyi vs Estomy A. Baraka and 4 Others, Civil Revision No. 4 of 2012 [2019] 1 T.L.R 192** (CA).

It was also contended that the applicant has interest in the disputed property but was not party in the original matter. Mr. Njau was of the view that there is an illegality in Land Appeal No. 41/2017. That, the applicant was supplied with copy of submission that was filed by the

advocate of the 1st and 2nd respondents on 8/7/2019 when the said land appeal was to be heard. That, page 5 and 6 of judgment show that the advocate for the respondent in the appeal urged the court to take note that the suit property was no longer in his client's ownership, the information which was shut off by the advocate for the appellant as seen at page 8 of the judgment.

On that basis, it was submitted that the appellant was aware that the disputed property had changed hands and that his appeal had been over taken by events. However, he made sure that the applicant was not included in the appeal. Thus, there was deliberate move to deny the applicant herein right to be heard.

Mr. Njau also submitted that where there is illegality the court never hesitates to grant extension of time so as to accord the right to be heard on the matter. He supported the argument by citing the case of **Harrison Mandali and Others vs The Registered Trustees of the Archdiocese of Dar es Salaam, Civil Application No. 482 of 2017 [2019] TCA 298**.

Responding to paragraph 9(b) of the counter affidavit of the 1st and 2nd respondents that the applicant was aware of the said land appeal, it was stated that exhibit 'I' which was attached therein was an official search conducted by the appellant on 25/8/2017 which shows that the 1st and 2nd respondents were aware that the disputed property was in the name of the applicant. However, he instituted land appeal four months later in absence of the applicant and the decision was made on 19/11/2019 without the knowledge of the applicant. Also exhibit K shows that when Land Appeal No. 41 of 2017 was lodged in court the appellant was aware

that the suit property was no longer registered in the name of Ally Hussein Mohamed Mitta but was registered in the name of the applicant herein. Thus, the appellant opted purposely not to include the applicant in land appeal hence, denying him right to be heard.

The advocate for the applicant disputed the caveat on the following reasons: first, at page 5 of the counter affidavit which was sworn by the advocate of the 1st and 2nd respondents which compliments paragraph 9 of the affidavit it was stated that the caveat was filed on 16/1/2018. However, the copy supplied shows that it was attested on 17/1/2018. Thus, it cannot have been filed a day before it was attested. The second reason of disputing the caveat was that there was no proof whether the same was filed as there is no official stamp from the registry office acknowledging the date it was received. Third, there is no proof that the said caveat was served to the applicant or not.

Basing on the arguments advanced, the learned advocate for the applicant prayed the court to make a finding that this application is meritious and proceed to grant the extension of time as prayed.

In his reply, the learned advocate for the 1st and 2nd respondent on the outset reproduced paragraph 14 of the counter affidavit of the 1st and 2nd respondents which reads:

> *"...the intended cause to be pursued if extension is granted i.e., filing objection proceedings is totally misconceived and stands no chance of success."*

From the above quotation the learned counsel was of the opinion that having seen the above paragraph the applicant would have reflected and withdrawn this application.

Before submitting on the merit of the application, Mr. Maro stated that this application is nothing but a *fait accompli* and waste of court's time. He was guided by the case of **Safari Mwazembe vs Juma Fundisha, Civil Application No. 503/06/2021**.

Mr. Maro challenged this application, he asked whether the applicant can file objection proceedings in the circumstances and facts of this case. He was of the view that the applicant cannot. He said that objection proceedings are guided by **Order XXI, rule 57 to rule 60 of the Civil Procedure Code**.

He argued that the court also has prescribed the condition before objection proceedings can be filed, that a property in dispute must have been attached in execution of a decree. In the case of **Abdallah Salum Lukemo and 18 Others vs Sifuni A. Mbwambwo and 208 Others** it held that:

> *"In the case at hand no execution proceedings have been instituted. To shorten the story, there can be no objection proceedings in absence of execution of the decree. I therefore unhesitatingly agree with Dr. Kamanija that this application is indeed misconceived and premature, therefore bad in law.*

Mr. Maro also referred to the cases of **Sosthenes Bruno and Another vs Flora Sahuri, Civil Appeal No. 249/2020** (CAT); and Ugandan case of **Chotabhai M. Patel vs Chatubhai M. Patel and Another [1953] EA 743** to that effect.

On the strength of those authorities, it was argued by Mr. Maro that objection proceedings can only be commenced/filed where execution is in progress and attachment has been made.

He averred that in the instant matter execution proceedings have not commenced and indeed no attachment has been made. The respondents' advocate wondered why the court's time is being wasted to entertain an application for extension of time to file objections which will never take off. Mr. Maro stated that since this point was raised in the counter affidavit, he prayed the court to make decision on the same.

Another preliminary observation raised by Mr. Maro was that the objection cannot be maintained since the High Court is *functus officio.* He made reference to the affidavit, submissions by the applicant as well as the impugned appeal and alleged that the property in dispute was decreed to be the property of the late Ramadhan Mohamed Mitta and so this court cannot sit and undo its previous decision. He stated further that, when it comes to the issue of ownership, the court is *functus officio*. Elaborating more on the issue of *functus officio*, the learned advocate referred to the case of **Mohamed Enterprises (T) Ltd vs Masoud Mohamed Nasser, Civil Application No. 33 of 2012**.

The learned advocate continued to state that at the time of transfer of the suit property there were incumbrances by way of Caveat lodged by the late Ramadhan Mohamed Mitta and the caveat was filed 14 days before the sale between the applicant and the 3rd respondent.

On the allegations that the applicant was not aware of the pendency of the impugned appeal, Mr. Maro disputed the same on the following reasons; first; that the applicant ought to have conducted search on the

said title and he would find the said caveat. He emphasized the need of making inquiry on the title before purchasing land by referring the case of **Hamis Bushiri Pazi and 4 Others vs Sal Henry Amon, Civil Appeal No. 166/2019, section 34 of the Land Registration Act, Cap 334** and the book of **Conveyancing and Disposition of Land in Tanzania Law and Practice by Dr. Tenga R.W and Mramba S. J.**

In addition, it was stated that a caveat which was filed on 16/1/2018 by the late Ramadhan Mohamed Mitta was served to the applicant through postal address. Thus, the applicant must have received the said Notice and thus learnt the pendency of the said appeal.

Concerning the allegation that the late Ramadhan Mohamed Mitta avoided joining the applicant in the said appeal, Mr. Maro stated that the late Ramadhan had no duty to join the applicant in the appeal, as there was no suit before the High Court since an appeal is based on evidence taken at the trial. Thus, at the time of trial there was no any evidence touching the applicant.

Turning to the instant application of extension of time, Mr. Maro submitted that the guiding principles in applications of extension of time are the following: first the applicant must account for each day of delay as stated in the cases of **Wambele Mtumwa Shahame vs Mohamed Hamis, Civil Reference No. 8/2016** (CA) (unreported) and **Jumah omari vs Kabwere Mambo, Civil Application No. 330/2017.**

Mr. Maro also referred to the case of **Attorney General** (supra) **and the case of Lyamuya Construction Company Ltd vs Board of Trustees of Young Women's Christian Association of Tanzania, Civil**

Application No. 2/2000 (unreported) in which the Court set out the following criteria to be observed in applications for extension of time:

i. *The applicant must account for all the period of delay*
ii. *Delay should not be inordinate*
iii. *Length of delay*
iv. *Reasons for delay*
v. *The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
vi. *The degree of prejudice to the respondent*
vii. *Chances of success.*

On the criterion of accounting for days of delay, it was stated that the applicant knew of the pending appeal but took no step whatsoever to protect his interest if any.

Mr. Maro stated that the applicant filed revision before the Court of Appeal and the same was withdrawn on 17/3/2022. Two years and three months had been spent in the Court of Appeal and he wanted to benefit with the provision of **section 21(2) of the Law of Limitation Act**, while under such provision for a party to benefit from the exception he must demonstrate inter alia that the previous proceedings failed because of lack of jurisdiction or the like cause.

He continued to state that a remedy of the person who has been affected by a court judgment but was not a party in the proceedings is by way of revision. Reference was made to the cases of **Ally Ahmed Bauda (Administrator of the deceased Amina Hussein Senyange) vs Raza Hussein Ladha Damji and 2others, Civil Application No. 215 of 2016** which held that:

"I am also well aware of this court's decisions that the only way a third party, as it is the case herein can access the Court is by way of revision. One of such cases is that rightly cited by Mr. Daimu of Amani Mashaka (applying as the administrator of the estate of Mwamvua Ahmed deceased) vs Mazoea Amani Mashaka and Two Others, Civil Application No. 124 of 2015."

Mr. Maro also referred to the case of **The Attorney General vs Tanzania Ports Authority and Another, Civil Application No. 87 of 2016** and the case of **Grand Regency Hotel Ltd vs Pazi Ally & 5 Others, Civil Application No. 588/1 of 2017** both of the Court of Appeal which insisted that the remedy for the third party who was not party to the proceedings can challenge the same through revision.

On the strength of above authorities, it was the opinion of Mr. Maro that the applicant correctly applied for revision to the Court of Appeal since the same had jurisdiction to entertain his application. Thus, he cannot invoke the provision of **section 21(2) of the Law of Limitation Act** (supra) since the application he made before the Court of Appeal never failed for want of jurisdiction or of a like cause. He supported his argument with the case of **Salim Lakhani and Two Others vs Ishfaque Shabir Yusufali (As Administrator of the Estate of the late Shabir Yusufuali), Civil Appeal No. 237/2019**(CA) and the book titled; **The Law of Limitation Act 1963, 12th Edition Eastern Law House, 1998 at page 268**.

The learned advocate insisted that Civil Revision before the Court was correctly filed and thus the two years and three months have not been accounted for. He referred to the case of **Joseph Paul Kyauka Njau**

and Another vs Emanuel Paul Kyauka Njau, Civil Application No. 7/05 of 2016 in which the Court of Appeal held that failure to account for 20 days of delay was inordinate.

Regarding the case of **Benedict Shayo** (supra) which was cited by Mr. Njau, the learned advocate for the 1st and 2nd respondents stated that the same is distinguishable to the present case since the previous application was struck out for being incompetent, while in this case the application for revision was properly before the Court of Appeal and was not struck out. secondly; the cited case of **Benedict** was found incompetent for want of jurisdiction.

On the issue of illegality and right to be heard, Mr. Maro was of the view that the applicant was aware of the impugned appeal since 2016 but he took no steps to protect his interest. Therefore, all the cited cases to support the issue of illegality are distinguishable. He gave an example of the case of **Claude Roman Shikonyi** (supra). He argued that, in this case the High Court decision cannot be challenged, quashed or set aside.

On the allegations that the impugned Appeal had been over taken by events, it was argued that the same cannot be determined in this application for extension of time since it is evidential. However, the learned advocate reiterated his reply on the same trying to challenge the allegations that the applicant is a bona fide purchaser.

The learned advocate kept on insisting that the applicant was aware of the appeal proceedings but took no action until judgment. Thus, he opted not to be heard. He referred to the case of **Abdallah Makongoro and 4 Others vs The Hon. Attorney General, Civil Appeal No. 8/1986** to support his arguments.

In conclusion it was submitted that considering that two years and three months have not been accounted for, this application should be dismissed as the applicant has exhibited inordinate delay, apathy, sloppiness and negligence in prosecuting his right. He prayed the application to be dismissed with costs.

The 3rd respondent did not oppose the application. He was of the view that reasons/grounds advanced by the applicant are reasonable and sufficient cause to warrant granting him extension of time as listed at page 9 in the case of **Elius Mwakalinga vs Domina Kagaruki and 5 Others, Civil Application No. 120/17 of 2018**. (unreported)

In rejoinder, the applicant's advocate reiterated his submission in chief. As far as **Order XX1 Rule 57(1)** is concerned, he formed an opinion that the same provides two aspects: the first aspect was stated by Mr. Maro. The second aspect is found in the case of **Sosthenes Bruno and Another vs Flora Shauri** (supra), in which the alternative rule for an objector/3rd party to access the court that passed the decree to hear such objector as if he was a party to the suit. He said that the law does not provide for an objector who intends to file objection proceedings to wait for a decree holder to file execution. He said that the aim of objection proceedings is to investigate as to the correctness of attachment or declaration made with regard to the property by the decree holder.

On the issue of *functus officio*, it was replied that in the case of **Sosthenes Bruno** (supra) the law vests jurisdiction in the court that passed a decree to hear the objector as if he was a party to the suit.

The learned advocate challenged the cited case of **Abdallah Salum Lukemo and 18 Others** (supra) by arguing that such decision is

persuasive. Second, that the said case is distinguishable to the present case. Third, it did not interpret the law in particular on the phrase attachment. Fourth, the same was based on the preliminary objection on point of law while this application is for extension of time.

On the issue of accounting for reasons for the delay, the learned advocate for the applicant stated that the court which is conferred with jurisdiction to determine the intended objection proceedings is this court which determined the impugned appeal and not the Court of Appeal.

Responding to the opinions of Mr. Maro that the Land Revision which was before the Court of Appeal was proper; Mr. Njau submitted that the law demands that a party to a suit must exhaust all the remedies available in the lower court and thus the remedy is to file objection proceedings.

It was concluded by Mr. Njau that all the principles for determining an application for extension of time were properly met in this application.

Having considered the submissions of both parties as well as their affidavits, the issue is *whether this application has merit.*

It is trite law that granting an application for extension of time is in the court's discretion. The applicant is required to avail the court with sufficient materials for the court to exercise its discretion. There is a number of decisions to this effect among them were cited by the learned advocates. In the case of **Attorney General vs Consolidated Holding Corporation and Another, Civil Application No. 26 of 2014** (unreported) the Court of Appeal stated that:

> *"...is principally a question of fact in each case and would definitely vary from case to case but it has generally been*

accepted that in each case the court must be satisfied; by the reason(s) of the delay, the length of delay, the degree of the prejudice to the respondent if the application is granted; and the point of contention in the intended action."

In the instant case, the applicant was not party to the impugned Land Appeal No. 41 of 2017. However, he is eagerly wishing to challenge the same through objection proceedings but he found himself being out of time. It has been argued by the learned counsel for the 1st and 2nd respondents that this application is misconceived since the remedy available to the party who was not party to the original case is revision. The learned advocate for the applicant to the contrary argued that objection proceedings are the remedy.

Since this allegation was brought into my attention and the parties had ample time to submit on the same, I will first deal with the issue as to *whether this application is properly before this court.*

The applicant has moved this court to extend time so that he can file objection proceedings against an appeal in which he was not a party. The question is whether there are chances of success in the intended application for objection proceedings.

Order XXI rule 57(1) of the Civil Procedure Act (supra) provides that:

"57. (1) Where any claim is preferred to, or any objection is made ***to the attachment of any property attached in execution of a decree,*** *on the ground that such property is not liable to such attachment, the court shall*

proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was a party to the suit:

Provided that, no such investigation shall be made where the court considers that the claim or objection was designedly or unnecessarily delayed." [Emphasis added]

From the above provision of the law, it goes without saying that objection proceedings are filed where there is attachment of the property in execution of the decree.

In the instant matter, the impugned appeal was not an execution, thus even if this court grants extension of time sought by the applicant still the applicant cannot file objection proceedings against the said appeal basically on the reason that the said appeal has been finalised and this court is *functus officio*. Therefore, the intended objection proceedings have no chances of succeeding.

It has not been stated if there is any pending application of execution of the decree of the said Land Appeal of which I am of considered opinion that, the applicant could file his objection proceedings against.

Therefore, as rightly submitted by Mr. Maro, the intended cause to be pursued if extension is granted is misconceived and stand no chances of success.

Be as it may, even if it is assumed that filing objection proceedings is the remedy available, still the applicant has failed to account for each day of delay. That, from January 2020 when he became aware of the said appeal

to 24/3/2022 when he filed the present application, it is two years and three months. In accounting for these days, the applicant stated that he was prosecuting application for revision before the Court of Appeal which he withdrew and no reason was assigned to such withdrawal.

I am aware that time spent in prosecuting an incompetent application is a good ground to extend time. However, in this matter the land revision which was before the Court of Appeal was competent and the Court of Appeal did not find the same to be incompetent. It is the applicant who withdrew the application without assigning any reason.

Also, the advocate for the applicant tried to tell this court that there was illegality in the impugned decision as the applicant was not heard in the said Land Appeal. It is trite law that whenever there is illegality, the court must extend time. However, in this case the curtailment of right to be heard appears in the air since in the said Land Appeal the applicant was not a party. So, he cannot complain that he was not accorded right to be heard. Also, as established above, since the impugned appeal has been finalised, this court cannot make the applicant party to it or accord him right to be heard. *What is the way forward?*

Order 1 Rule 10 (2) of the CPC (supra) provides that:

> *"The court may,* ***at any stage of the proceedings, either upon or without the application of either party*** *and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that* ***the name of any person who ought to have been joined, whether as plaintiff or defendant,*** *or whose presence before the court may be necessary in order to enable the court*

effectually and completely to adjudicate upon and settle all questions involved in the suit, ***be added****." [Emphasis mine]*

On the basis of the above quoted provision the learned counsel for the applicant contended that the court has its avenue of ensuring that proper or necessary party is joined in order to settle all questions involved in the matter. He faulted this court for failure to order that the applicant be joined in the impugned appeal.

I totally subscribe to the provision cited by the learned counsel for the applicant though in a different perspective. In accordance to **Order 1 Rule 10 (2) of the CPC, (supra)** the applicant should have preferred an application seeking leave to be joined as a party in the impugned appeal before it had been finalised. The case of **Attorney General versus National Housing Corporation and Others, Civil Appeal No 432 of 2017,** (CAT) is relevant.

In case the applicant became aware of the said appeal while it had already been finalised, alternatively he could have filed a fresh suit claiming ownership of the disputed landed property as prescribed under **Order XXI Rule 62 of the CPC**. The same was underscored by the Court of Appeal in the case of **Bank of Tanzania v. Devram P. Valambia, Civil Reference No. 4 of 2003** which was cited with approval in the case of **Sosthenes Bruno** at page 14 (supra).

Short of that, in the absence of execution proceedings, granting the instant application will be futile and ultra vires.

I therefore concur with the learned counsel for the 1st and 2nd respondents that this court is *functus officio*.

In the circumstances, I am of considered opinion that this application has no merit. As a result, I hereby dismiss it with costs.

It is so ordered.

Dated and delivered at Moshi this 7th day of October, 2022.

S. H. SIMFUKWE

JUDGE