IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 344 OF 2022

MBARALA A. MAHARAGANDE ..... 1ST APPLICANT
MADARAKA A. MAHARAGANDE ..... 2ND APPLICANT
IBARIKI A. MAHARAGANDE ..... 3RD APPLICANT
MTEGAME A. MAHARAGANDE ..... 4TH APPLICANT
SALEHE A. MAHARAGANDE ..... 5TH APPLICANT

VERSUS

MAHIKU A. MAHARAGANGE ..... RESPONDENT
(Arising from the decision of this Court in PC Civil Appeal No. 7 of 2009)

RULING

12th December, 2022 & 17th February, 2023

KISANYA, J.:

The applicants, Mbarala A. Maharagande, Madaraka A. Maharagande, Ibariki A. Maharagande, Mtegame A. Maharagande and Saleh A. Maharagande have moved the Court under section 11(1) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002 (now R.E. 2019), seeking the following orders:

i) That, the Hon. Court may be pleased to grant leave for extension of time in order to certify that there is a point of law to be determined by the Court of Appeal

against the Judgement and Decree of the High Court of Tanzania, Dar es Salaam District Registry (Hon. Wambura S.A.N.J.) in PC Civil Appeal No. 7 of 2009 delivered on 28th June, 2012.

ii) *Costs be in due course.*

iii) *Any other ORDER as the Honourable Court may deem fit and just to grant.*

Supporting the application is the applicants' joint affidavit which set forth the historical background of the matter and the reasons for extension of time. Contesting the application, the respondent filed a counter-affidavit to such effect.

In view of the facts deposed in the joint affidavit and counter-affidavit, it is clear that parties have been in the court's corridors since 1995. It all started with Probate Administration Cause No. 114 of 1995 of the Morogoro Urban Primary Court (henceforth "the trial court"), in which the above respondent was appointed to administer the estate of his late father, Abdallah Maharagande. The deceased left behind a house on Plot No. 81/214 Block 'B' (92B) Uhuru Street in Morogoro Municipality (henceforth the house).

In the course of executing his duties, the respondent opined for sale of the house. Some beneficiaries were against the respondent's

opinion or proposal for selling the house. The respondent went to the trial court and asked it to give direction on the matter. After hearing the respondent and all beneficiaries, the trial court held the view that the respondent's proposal was the proper recourse. It went on making an order for sale of the house.

Aggrieved by that decision, Nyamuhika A. Maharagande and other persons whose names were not disclosed in the memorandum of appeal appealed to the District Court of Morogoro in Civil Appeal No. 7 of 2009. The District Court upheld the decision of the Primary Court and thus, dismissed the appeal.

Still aggrieved, Nyamuhika A. Maharagande and other beneficiaries whose names were also not stated in the petition of appeal filed an appeal to this Court (PC Civil Appeal No. 7 of 2009). Having heard the parties, this Court (Wambura, J., as she then was) dismissed the appeal for want of merit. It is however, worth noting here that, only Nyamuhika A. Maharagande was named in the judgment and decree of this Court in PC Civil Appeal No. 7 of 2009. Feeling that justice was not rendered, Nyamuhika A. Maharagande lodged a notice of appeal to the Court of Appeal to challenge that decision.

On 28th August, 2016, this Court (Feleshi J as he then was) through Misc. Civil Application No. 484 of 2015) certified the points of law to be determined by the Court of Appeal. It is on record that the application was granted in favour of Nyamuhika A. Maharagande and the above named applicants against the respondent herein.

Thereafter, Nyamuhika A. Maharagande and the applicants filed Misc. Land Application No. 781 of 2016. In that application, this Court was, among others, invited to correct the judgment and decree in PC Civil Appeal No. 7 of 2009 by rectifying the applicants list to read Nyamuhika A. Maharagande and Others. In its ruling dated 30th November, 2017, this Court (Arufani, J.) found it not proper to rectify the judgment and decree of the Court by listing all the names of the applicants. However, the Court corrected the judgment and decree by naming the appellants as "Nyamuhika A. Maharagande and Others".

About three years later, on 9th November, 2020, the Court of Appeal, vide Civil Application No. 571 /01 of 2019 struck out the notice of appeal. That was after being satisfied that Nyamuhika A. Maharagande had failed to institute the appeal within the prescribed time and that no essential steps were taken taken in filling the appeal.

Subsequent to that decision, the above named applicants moved this Court in Misc. Civil Application No. 582 of 2020 seeking extension of time within which to file the notice of appeal against judgment in PC Civil Appeal No. 7 of 2019. Their application was granted on 28th September, 2021. The applicants were further directed to file the notice of appeal within thirty days from 28th September, 2021.

In view of that decision, the applicants lodged the notice of appeal on 1st October, 2021. Three weeks later, on 20th October, 2021, the applicants lodged an application for extension of time to file an application for a certificate on point of law. At the instance of the applicants, that application was marked withdrawn when the parties appeared before my brother Hon. Kakolaki, J., on 23rd March, 2022. However, leave was granted for the applicant to file a fresh and proper application. It was ordered that the fresh application be lodged within 14 days.

Following the foresaid order, the applicant filed Misc. Civil Application No. 168 of 2022 which was struck out by this Court (Mruma, J) on 27th July, 2022, for being time barred, hence, the present application. The applicants' joint affidavit suggests that they misunderstood the withdrawal order and that a copy of the said order

was not supplied to them within 14 days stated by this Court. It is their further averment that there are points of law in the impugned judgment.

The respondent filed a notice of preliminary objection on the points of law that the applicants have no *locus standi* and that, the application is *res-judicata*. Upon considering that evidence was required to dispose of the preliminary objections raised by the respondent, this Court declined to determine the same for being premature. It is also worth noting that, having considered the notice of preliminary objection filed by the applicants against the respondent's counter-affidavit, this Court expunged paragraphs 2, 4, 6 and second part of paragraph 11 of the counter affidavit for contravening the law.

When this matter was called on for hearing, the applicants appeared in person, legally unrepresented. On the other side, the respondent was represented by Mr. Richard Kinawari, learned advocate. Given that the issue of *locus standi* was not resolved on merit, I invited the parties to address the Court on whether the applicants have *locus standi* to file the present application.

Having considered the submissions by the applicants and the respondent's counsel, I will go straight to determine the issues pertaining to this application.

At the outset, I find it appropriate to determine whether the applicants have *locus standi* to file the present application. In his submission in chief, the 1st applicant argued that all applicants have *locus standi* to file this application. He expounded that this Court had through Misc. Civil Application No. 582 of 2020, held the view that the applicants were not strangers to the impugned decision. He further argued that the respondent did not appeal against that decision. It was also his contention all applicants were a party to the matter filed before the trial court. Other applicants adopted the submission made by the 1st applicant.

Responding, Mr. Kinawari referred the Court to paragraph 4 of the supporting affidavit in which the applicants made reference to the judgment of this Court in Misc. Land Application No. 781 of 2016. It was his argument that in that decision, this Court refused to add the applicants' names in the judgment subject to the intended appeal to the Court of Appeal. Contending that the applicant did not appeal against that

decision, the learned counsel argued that the applicants have no *locus standi.*

In their brief rejoinder, the applicants were at one with the 1st applicants that the judgment subject to this application was rectified by this Court (Arufani, J) in Misc. Land Application No. 781 of 2016.

The trite law in this jurisdiction is to the effect that, in order to maintain proceedings, the applicant is required to demonstrate that he or she is entitled to bring the suit. This stance is derived from the decision of this Court in the cases of **Lujuna Shubi Balonzi vs Registered Trustees of Chama Cha Mapinduzi** [1996] TLR 208, where it was held that:

> *"In this country locus standi is governed by Common law. According to that law in order to maintain proceedings successfully, a plaintiff or* ***applicant must show*** *not only that the court has the power to determine the issue but also* ***that he is entitled to bring the matter before the court****."*

As indicated earlier, the applicants are seeking for extension of time within which to file an application for certificate on point of law against the judgment and decree of this Court in PC Civil Appeal No. 7 of 2009.

On that account, the applicants must establish they have *locus standi* to file the intended appeal.

I am mindful of the position that the right to appeal is available to the person aggrieved by the impugned decision of the court. In that regard, I am of the considered view that, the party to the impugned decision has the *locus standi* to appeal and thus, file an application for extension of time within which to apply for certificate on a point of law.

In this application, the applicants deposed in paragraph 4 of their joint affidavit that they were a party to the appeal against the decisions of the trial court, District Court and this Court. It is on record that, save for the 5th applicant, the applicants appeared before the trial court and contested the sale of the house. Further to this, although their names do not feature in the memoranda of appeal and judgments of the District Court and this Court, it is on record that, vide Misc. Civil Application No. Misc. Civil Application No. 582 of 2020, this Court decided that the applicants are not strangers to impugned decision and that "the names error was from the Court and not their fault." In the circumstances, since determination of the applicant's *locus standi* is based on contention that the applicants are strangers to the decision subject to the intended

appeal, I am of the view that this Court is *fanctus officio* to determine the same.

Second for consideration is Mr. Kinawari's argument that the application is *res-judicata*. His argument was based on the fact that this Court had certified the points of law involved in the intended appeal to the Court of Appeal. The applicants conceded that the Court certified the point law worth of determination by the Court of Appeal. However, they contended that the appeal was not filed due to defect in the notice of appeal. The applicants further submitted that they were directed to file a fresh notice of appeal and thus, the present application.

The principle of *res-judicata* bars the court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by the court.

It is further settled position that, for the principle of *res-judicata* to apply, the following conditions must be established. *One*, that the

matter directly and substantially in issue in the subsequent suit was directly and substantially in issue in the former suit. *Two,* that, the former suit was between the same parties or parties under whom all of them claim. *Three*, that, the parties in the subsequent suit have litigated under the same title in the former suit. *Fourth,* that, the court which decided the former suit was competent to try the subsequent suit. *Fifth,* that, the matter directly and substantially in issue in the subsequent suit was heard and finally decided in the former suit. [See for instance, **Sarkar on Civil Procedure,** 10th Edition (2005 reprint) at page 91].

Reverting to this case, the respondent has not demonstrated how the above conditions have been met. Furthermore, nothing to suggest that the matter on extension of time to apply for certificate on point of law has been determined by the court of competent jurisdiction. It is common ground that what was determined by this Court in Misc. Civil Application No. 484 of 2015 is an application for certificate on point of law in the intended appeal to the Court and not application for enlargement of time to file such application. I have considered further that, the notice of appeal which led to points of law which were certified by this Court was struck out by the Court of Appeal on 1st November, 2020 in Civil Application No. 571/01 of 2019. That being the case, the

applicants were inclined to start the process of appeal afresh. Thus, the respondent's argument that this matter is *res-judicata* lacks merit.

Third for consideration is whether the application is meritorious. The applicants urged the Court to grant extension of time basing on the reasons stated in paragraphs 7 and 8 of their joint affidavit.

Countering the application, Mr. Kinawari submitted that the applicants have not advanced good cause. He substantiated his submission by pointing out that, the withdrawal order had no confusion on the fact that it was read in Kiswahili and that the prayer to withdraw the application was made by the applicants themselves. As for the ground that there was delay in obtaining the copy of order, Mr. Kinawari submitted that the applicants have not produced evidence to prove their request for copies of order. It was his further submission that the applicants did not file the affidavit of the court clerk referred to their joint affidavit. Citing the case of Paul **Melchoir Mmasi and Another vs Evarist Peter Soka**, Misc Civil Appeal No. 14 of 2019, HCT at DSM, he submitted that such affidavit cannot be relied upon. Mr. Kinawari further submitted that the applicants have not accounted for the delay as required by the law. To support his argument, he cited the case of **Finca**

(T) Limited and Another vs Boniface Mwalukisa, Misc. Civil Application No. 589/12 of 2018 (unreported). Therefore, the learned counsel urged me to dismiss the application with costs.

Rejoining, the applicants submitted that they were confused with the term withdraw and amendment on the contention that the copy of order was not availed to them on time. It was further stated that the clerk referred to in their affidavit is assigned to Hon. Kakolaki, J, and that each day of delay had been accounted for.

It is a common ground that the impugned decision was made by this Court in PC Appeal No. 7 of 2009. In terms of section 11 of the AJA cited in the chamber summons, this Court has discretionary power to enlarge the time to apply for a certificate that the case is a fit case for appeal. The said provision does not provide for the factors to be considered in determining whether to enlarge the time or otherwise. The law is settled that, applications of this nature are determined by considering whether or not sufficient cause for delay has been exhibited. It is upon the applicant showing sufficient cause for the delay that the Court may exercise its discretionary power to extend the time.

The law is further settled law that sufficient cause is determined by considering the various factors and basing on the circumstances of each case. The established factors include, whether the applicant was diligent, reasons for the delay, the length of the delay, the degree of prejudice to the respondent if time is extended, whether there is a point of law or the illegality of the impugned decision. [See for instance, the case of **Lyamuya Construction Co. Ltd vs. Board of Trustees of the Young Women Christian Association**, Civil Application No. 2 of 2010 6 (unreported)].

I also agree with the respondent's counsel that, each and every day of delay must be accounted for by the applicant. This position has been held in a number of cases, including the cases of Said **Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another,** Civil Application No. 278/15 of 2016, CAT and **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, CAT (both unreported). In the latter case, it was held that:

> *"… delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."*

In our case, the applicants were granted with leave for extension of time to lodge a notice of appeal. That was on **30th September, 2021.** Therefore, the period of up to **30th September, 2021** was duly accounted for in Misc. Civil Application No. 452 of 2020. However, reading from paragraph 5 of the joint affidavit, it is clear that the applicants have not accounted for the delay of about **19 days** from **1st October, 2021** when they lodged the notice of appeal and served the copy thereof to the respondent, to **20th October, 2021,** when they filed the application which was withdrawn before Hon. Kakolaki, J.

As for the period between **23rd March 2022** when the applicants' application was withdrawn to **14th April, 2022** when they filed an application which was struck out for being lodged out of time, the applicants state in paragraphs 6 and 7 of the joint affidavit that, they misunderstood the court's order and that the copy of the said order was not supplied to them within 14 days.

As rightly submitted by Mr. Kinawari, the record bears it out that, it is the applicants who prayed to withdraw the application with leave to file a fresh application. The contention that the applicants prayed to amend the said application is not supported by the record. It is also on

record that the Court granted the prayer for withdrawal of the application. On that account, I am of the view that, the allegation on confusion of the Court's order lacks merit.

As regards the delay in obtaining the copy of withdrawal order, the applicants did not prove to have requested for the copy of the said order or ruling. As if that was not enough, it is not a legal requirement for the applicants to append the copy of the said order or ruling in the application for extension of time.

In view of the foregoing, I find no sufficient reason for the delay from **23rd March, 2022** to **14th April, 2022**.

Last for consideration is the ground deposed in paragraph 8 of the applicants' joint affidavit which suggest that the impugned decision is tainted with illegality. I have noted that Mr. Kinawari did not respond to this ground. It is trite law that, the Court has duty of extending the time if there is a point alleging illegality of the impugned decision. I am fortified, among others, by the decision of the Court of Appeal in **VIP Engineering and Marketing limited and Three Others vs Citibank Tanzania limited**, Consolidated Civil Reference No. 6,7 and 8 of 2006 (unreported) where it was held that:

"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"

In view of the above position of law, the ground on illegality of the impugned decision constitutes a sufficient cause for extension of time. It does not matter whether or not reasonable explanation has been advanced by the applicant to account for the delay as held in the case of **Jubilee Insurance Company (T) Limited vs Mohamed Sameer Khan,** Civil Application No. 439/01 OF 2020, CAT (unreported).

That notwithstanding, I am alive to the position of law stated in the case of **Lyamuya Construction Company Ltd** (supra) that the illegality in question must be that which raises a point of law of sufficient importance and that it must be apparent on the face of record not one that would be discovered by a long-drawn argument or process.

I have gone through the points of law listed in Exhibit E appended to paragraph 8 of the joint affidavit. It is my considered view that the said points of law does not suggest illegality of the decision of this Court. Furthermore, whether or not the points of law set forth in Exhibit E raise

illegality of the impugned decision will need a long-drawn arguments in their respective determination. Being guided by the above stated position, I am of the view that the said points of law do not constitute a sufficient cause for the delay.

Ultimately, the application is hereby dismissed as the applicants have failed to account for the delay or exhibit illegality in the impugned decision. As the matter originates from probate cause, I order each party to bear its costs.

DATED at DAR ES SALAAM this 17th day of February, 2023.

S.E. KISANYA
JUDGE
17/02/2023