IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

CIVIL APPLICATION NO. 33 OF 2021

ADROFU FULGENSI MFUNYA ..... APPLICANT

VERSUS

1. **JUMA HEREYE**
2. **SOSPITA MPOMA**
3. **MBEZI AUCTION MART & CO. LTD**

..... RESPONDENTS

(Application for Extension of time to file application for Revision against the Order of the High Court of Tanzania at Kigoma)

(Matuma, J.)

Dated the 18th day of October, 2019
in
Misc. Land Application No. 9A of 2019

.....

RULING

14th & 16th June, 2022

KENTE, J.A.:

This application in which the applicant Adrofu Fulgensi Mfunya is seeking an extension of time within which to lodge an application for revision has its genesis three years ago in Miscellaneous Land Application No. 9A of 2019 before the High Court (sitting at Kigoma) which was settled amicably between the parties. Unexpectly however, sometimes thereafter, the present applicant was dissatisfied with the said settlement order and in expression of his

dissatisfaction, he appealed to this Court (vide Civil Appeal No. 40 of 2020).

After hearing the parties, the Court went on striking out the appeal for being incompetent the same having been preferred without the requisite leave contrary to section 47(2) of the Land Disputes Act Cap 216 R.E 2019 (the LDC Act). Still aggrieved with the settlement order, the applicant went back to the High Court and lodged another application (No. 26 of 2021) this time seeking for enlargement of time within which he could file a notice of appeal against the settlement order out of time. Having heard the parties, the High Court (Matuma, J.) dismissed the application because of the applicants' failure to furnish sufficient cause to account for the delay. Apparently, unresolved on what to do so as to have the settlement order quashed and set aside, the applicant moved the High Court to review its decision in Miscellaneous Land Application No. 26 of 2021 in which he was seeking extension of time to file the notice of appeal but for the reason best known to himself he ended up withdrawing the said application. That was on 13th December, 2021. Relentlessly however, three days thereafter, the applicant preferred the present application which as per the Notice of Motion,

is predicated on rules 10 and 48(1) of the Tanzania Court of Appeal Rules, 2019 ("the Rules"). The application is supported by the affidavit deponed by Ms. Edna Aloyce learned counsel for the applicant.

The main plank of Ms. Aloyce's argument is that the applicant has neither been indolent nor dilatory in pursuing his rights. The learned counsel had a strenous and herculean moment trying to explain away the delay by justifying the applicant's two years forum shopping spree. Foreseeing that Mr. Kelvin Kayaga learned counsel representing the respondent would definitely argue that the applicant should not be heard to say that he was not indolent and addicted to filing incompetent and vexatious matters both in the High Court and this Court, Ms. Alloyce submitted that the applicant should not be punished for the professional errors committed by his advocates. Confronted with another argument by Mr. Kayaga that the order of the High Court sought to be revised was appellable, Ms. Aloyce sought to split hairs by arguing that the matter was not a land dispute as the applicant was specifically aggrieved by the terms of the settlement order and the mode of excution and not the overall outcome of the land case.

In the event that the first-string breaks, Ms. Aloyce had another string to her bow. She contended that the order sought to be revised emanated from the proceedings which were fraught with irregularities and illegalities. Probed to disclose the nature of the alleged illegalities and irregularities, the learned counsel contended from the bar that the High Court had used coercion to force the applicant to negotiate and reach a settlement and that at one time, the learned trial judge had made an order for the application to be heard ex-parte but only to vacate that order two hours thereafter with no apparent reason. She thus urged the application to be allowed so that the applicant could go on to challenge the settlement order.

As expected, Mr. Kayaga was diametrically opposed to the application. He submitted in the first place that the applicant had not accounted for each day of the delay and in the second place, he argued that, opening and reopening incompetent appeals and applications cannot be equated with promptness and diligence as to form the basis for extension of time. The learned counsel referred the Court to paragraphs 3 and 7 of Ms. Aloyce's affidavit to underscore the argument that the applicant had spent much time

filing incompetent and vexatious applications. As to the allegations of illegality and irregularity in the decision sought to be revised, Mr. Kayaga submitted, correctly so in my view that, apart from the general allegation that the said decision was tainted with errors and irregularities, Ms. Aloyce did not go further to identify the nature of the alleged errors and illegalities The learned counsel referred to the case of **Ngao Godwin Losero v. Julius Mwarambu**, Civil Application No. 10 of 2015 in support of the position that for illegality to form the grounds for revision, it must be clearly apparent on the face of the impugned decision.

I have considered the contending argument by both counsel from a dispassionate viewpoint. It should be common ground that as a general principle, the decision whether to grant or refuse an application for extension of time lies entirely in the discretion of the court. But as held in **Ngao Godwin Losero** (supra), that discretion is judicial and so it must be exercised according to the rules of reason and justice. Giving the guidance on what the court ought to take into account in an application for extension of time, the erstwhile Court of Appeal for Eastern Africa had the following to say, thus:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

(See **Mbogo v. Shah** [1968] EA as cited in Ngao Godwin Losero (supra).

Starting with the length of the delay and the argument that the applicant had not acted in a thorough display of sloppiness, I would agree with Mr. Kayaga that indeed the applicant has failed to account for each day of the delay. For I am not in the least persuaded that going into forum shopping and filing several incompetent matters as the applicant did after he felt aggrieved with the settlement order amounted to being diligent and prudent in the pursuit of his rights. In saying so, I am alive to the decision by this Court in **Zuberi Musa v. Shinyanga Town Council. TBR** Civil Application No. 3 of 2007 (unreported) where the applicant was granted an extension of time after it was demonstrated on a balance of probabilities that, he had been bona fide litigating in Court at all the material time and the application for review which he had

intended to lodge had high chances of success. Moreover, I am mindful of the sentiment expressed by my brother Massati, JA in the above cited case when he said with regard to the allegations of lack of diligence on the part of the advocate who was said to have caused the delay that, to err is human and advocates being humans are bound to make mistakes sometimes in the course of their duties.

I start from the settled position of the law that, in any application of the instant nature, delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken. (see **Hassan Bushir v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported). On this point, I entirely agree with Mr. Kayaga that the applicant could not specifically account for each day of the time he spent in the court corridors and outside without applying for revision.

Moreover, I note here that the decision of the High Court which is sought to be revised was a result of an amicable settlement between the parties. It was necessary therefore for Ms. Alyoce to put forward the evidence through her affidavit clearly pointing out the alleged illegalities and irregularities on the impugned decision of

the High Court. Only then would I be in a position to determine whether or not there was prima facie errors or illegalities on the said decision as to require the intervention of this Court by way of revision.

In other words, it was not enough and rather bordering unprofessionalism for Ms. Aloyce to suspect the High Court judge for allegedly causing the applicant to yield to amicable settlement by applying both legal and arm-twisting tactics. One would expect that in future the learned counsel will exercise much more caution before accusing a judicial office with such grave accusations which may turn out to be quite difficult to substantiate.

Bearing in mind what was decided by this court in the case of **The Permanent Secretary Ministry of Defence and National Services v. Devram P. Valambhia** [1992] TLR 387 where it was held that, where the point of law at issue is the illegality or otherwise of the decision being challenged that is a point of law of sufficient importance to constitute a sufficient reason to enlarge the time but, without losing sight that it was further held in **Lyamuya Construction Company Ltd v. The Board of trustees of Young Women's Christian Association of Tanzania,** Civil Application

No. 2 of 2010 (unreported) that such an illegality must be apparent on the face of the record, such as the question of jurisdiction, I am highly convinced that in the case under scrutiny, the allegation by Mr. Aloyce that the applicant was arm-twisted as to unwillingly enter into a settlement agreement, cannot be an apparent illegality on the face of the record. That is an allegation which can be established by engaging in a long-drawn process of arguments. I thus dismiss that ground for lack of merit.

Finally, is the question as to whether or not the impugned order of the High Court is appealable. Going by the record, it is apparent and indeed undisputed that Misc. Land Application No. 9A of 2019 which gave rise to the impugned order of the High Court was in respect of a land dispute in which the first respondent herein was aggrieved with the mode of execution of the decree of the District Land and Housing Tribunal. It follows in my respectful view that the impugned order emanated from a land dispute and it was subject to appeal to this Court after obtaining leave of the High Court in terms of section 47(2) of the LDC Act. For these reasons, I am constrained to agree with Mr. Kayaga that the applicant was wrong to rely on the provisions of section 5 of the Appellant

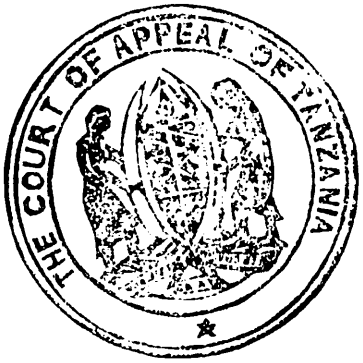
Jurisdiction Act, Cap 141 R.E 2019 ("the AJA") instead of section 47(2) of the LDA Act which is the applicable law.

For all the above reasons, I find the application to have no merit. I accordingly dismiss it with costs.

DATED at **KIGOMA** this 15th day of June, 2022.

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 16th day of June, 2022 in the presence Ms. Edna Aloyce, learned Counsel of the Applicant and Mr. Kevin Kayaga, learned Counsel for the 1st Respondent, in Absence of the 2nd Respondent and 3rd Respondent Present in Person, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL