

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 191/17 OF 2023

DHAHARANI RAJABU KYAZE APPLICANT

VERSUS

ZIHIJA SELEMANI MUHEMA 1ST RESPONDENT

MKOMBOZI COMMERCIAL BANK PLC 2ND RESPONDENT

HOPE AUCTIONEERS AND COURT BROKERS 3RD RESPONDENT

**(Application for extension of time to lodge an application for revision out of
time against the judgment of the High Court (Land Division)
at Dar es Salaam)**

(Ndika, J.)

dated the 23rd day of September, 2016

in

Land Case No. 246 of 2015

RULING

22nd & 29th April, 2024

MGEYEKWA, J.A.:

The applicant herein has brought this application for extension of time to lodge an application for revision under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The grounds canvassed in the notice of motion are as follows:

(a) This Honourable Court be pleased to extend time within which the applicant may lodge an application for revision in this Honourable Court.

(b) This Honourable Court be pleased to make any other order for the good ends of justice.

The application is supported by an affidavit of Mr. Benedicto Maziku, the applicant's employee. The application has, however, been resisted by the 2nd respondent in an affidavit in reply as well as written submissions in opposition. The first and third respondents did not file affidavit in reply.

For a better appreciation of the issues of contention, it is necessary to explore the factual setting giving rise to the application which may briefly be recapitulated as follows: In unknown date and month 2014, the applicant mortgaged his property comprising of C.T. No .186282/82, Plot No.746, Block D located at Sinza area within Kinondoni District in Dar es Salaam to secure a loan to the tune of TZS 650,000,000 advanced to the 1st respondent by the 2nd respondent.

The 1st respondent failed to pay the loan hence the applicant was served with a notice to give vacant possession from his landed property. Astonishingly, the applicant realized that the landed property had already been sold to Gibore Gweso Magessa who had purchased the same under

public auction conducted on 15th January, 2021 under the instruction of the 2nd Respondent. Following the notice of eviction, the applicant lodged a Land Application No.142 of 2021 in the District Land and Housing Tribunal for Kinondoni (DLHT) challenging the auction which was conducted on 15th January, 2021. Before hearing of the same on merit, the 2nd respondent filed a preliminary objection to the effect that the Tribunal had no jurisdiction to determine the matter. The DLHT sustained the objection and struck out the application.

Discontented, the applicant successfully appealed to the High Court of Tanzania (Land Division) at Dar es Salaam through Land Appeal No. 229 of 2021. On 20th January 2023, the applicant became aware that in 2015, the 1st respondent had filed Land Case No. 246 of 2015 in High Court (Land Division) against the 2nd and 3rd respondents. Upon making further inquiry, he was informed by the 1st respondent that the parties to the land case had settled the matter out of court by signing a deed settlement on 23rd September 2016. Unfortunately, the applicant was not a party to the said case. Following the said discovery, on 1st March, 2023, the applicant had to withdraw the Land Application No. 142 of 2021.

Having accomplished the foregoing, the applicant then lingered along and, in the result, he failed to file an application for revision to challenge the said deed of settlement within time. To remedy the situation, he preferred the instant application for extension of time to file a revision out of time.

At the hearing of the application, the applicant was represented by Mr. Hamis Katundu, learned advocate while the 1st respondent had the legal service of Mr. Mluge Karoli Fabian, learned advocate and the 2nd respondent was represented by Mr. Leonard Masatu, learned advocate. The 3rd respondent was duly served but he did not enter appearance. Therefore, the matter proceeded *ex parte* against him. The 2nd respondent did not oppose the instant application.

In his written submission, Mr. Katundu fully adopted the contents of his written submission filed before the Court on 22nd May, 2023. He contended that the applicant was not aware of the proceedings of Land Case No. 246 of 2015, which authorized the 2nd respondent to sell his landed property because he was not a party of the proceedings before the High Court. He argued that the applicant became aware of the existence of the said case after lodging the Land Application No. 142 of 2021 at the DLHT. He further contended that from 20th January, 2023, he was in court corridors

prosecuting Land Application No. 142 of 2021 and on 1st March, 2023, when he prayed to withdraw the application. He went on to argue that on 9th March 2023, he prepared the instant application, and the same was lodged in court on 22nd March 2023. The learned counsel concluded by stating that the applicant has explained the whole period of delay.

Apart from accounting the days of delay, Mr. Katundu contended that the applicant's intended revision to this Court raises substantial points of law and facts to be determined. To reinforce his submission, he referred me to paragraph 21 of the applicant's supporting affidavit. He elaborated that the applicant was not afforded the right to be heard since he was not a party to the Land Case No. 246 of 2015, whereas the respondents included the suit landed property in their settlement. To buttress his submission, he cited the cases of **VIP Engineering and Marketing Ltd v. Citibank Tanzania Ltd**, Consolidated Civil Reference No2. 6, 7 and 8 of 2006 (unreported), **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** (1992) TLR 182 and **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein and 3 Others**, Civil Application No.6 of 2016 (unreported).

In conclusion, the learned counsel for the applicant urged me to grant the application with costs.

In his reply, Mr. Masatu attacked the averments that the applicant has adduced sufficient cause to warrant me to grant his application. He contended that the applicant became aware of the existence of the Land Case No. 246 of 2015 on 28th April, 2015 when he was served with a 60 days' notice following the default on the loan repayments. Therefore, in his view, the applicant had ample time to remedy the situation. He further contended the applicant has failed to account for the delay from 28th April, 2015 when the applicant was served with a statutory sixty (60) days' notice to 4th June, 2021 when he received a notice of transfer. He added that the days from 20th January, 2023 when he claimed that he became aware of the existence of the deed of settlement to 22nd March, 2023 the day the present application was filed were not accounted for.

Apart from the delay blamed on accounting for days of delay from 28th April, 2015, Mr. Katundu submitted further that the applicant has failed to explain the delay from 20th January, 2023 when he became aware of the existence of the settlement deed to 22nd March, 2023 the day the present application was filed. He valiantly stressed that the applicant was required to

account for each day of delay. To buttress his position, Mr. Masatu cited the cases of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women Association of Tanzania**, Civil Application No.2 of 2010 (unreported) and **Dar es Salaam City Council v. S. Group Security Co. Ltd**, Civil Application No. 234 of 2015 (unreported).

On the alleged illegality of the decision desired to be impugned, Mr. Masatu contended that the termed illegality cannot be granted since it is only in a situation where if the extension sought is granted, that illegality will be addressed. To reinforce his submission, he cited the cases of **Ibrahim Twahil Kusundwa and Another v. Epimaki S. Makoi & Another**, Civil Application No. 437/17 of 2022 (unreported), **Iron and Steel Ltd v. Martin Kumaliya & 117 Others**, Civil Application No. 292/18 of 2020 (unreported) and **Mega Builders Ltd v. D.P. Simba Ltd**, Civil Application No. 319/16 of 2020 (unreported). Conversely, the learned counsel for the 2nd respondent prayed for the dismissal of the application with costs for being devoid of merit.

Having heard the counsel for the parties, I wish to state at the outset that, it is settled position that the discretionary powers of the Court to extend time for an applicant to do an act authorized by the Rules after the expiry of

the prescribed time, are exercised upon good cause being shown as provided for under Rule 10 of the Rules. Rule 10 provides that:

"10. 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 act authorized or required by these Rules, whether before or after the expiration of that time and 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 that time as so extended."

Another factor to be considered is whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. Among the decisions on this point include, **Lyamuya Construction v. Board of Registered Trustees**, (supra) and **Chiku Harid Chonda v. Getrude Nguge Mtinga as Administratrix of the late Yohane Claude Dugu**, Civil Application No. 509/01 of 2018 (unreported) to mention but a few.

Starting with the first issue whether the applicant has accounted for the days of delay. In the instant application, the confronting issue on which the parties locked horns, as evidenced by their submissions and affidavits is

the date when the applicant became aware of the existence of deed of settlement ought to be challenged. The 2nd respondent's counsel in his submission had implored me to believe that the applicant's became aware of the existence of the case on 28th April 2015 when he was served with a 60 days' statutory notice. However, I have perused the record and could not find any supporting document, therefore, Mr. Masatu submission is a mere assertion. I am in one with Mr. Katundu that the applicant was not a party in the case which ended with the deed of settlement sought to be challenged. Therefore, in my view there is no way the applicant could be blamed to have known the existence of the Land Case No. 246 of 2015. For that reason, I believe that the applicant became aware of the existence of deed of settlement on 20th January, 2023 and not otherwise.

According to paragraphs 3, 4 and 9 of the applicant's affidavit, he has explained the delay from 20th January, 2023 when he became aware of the deed of settlement to 1st March, 2023 when the Application No. 142 of 2021 was withdrawn. But also, there is explanation for the delay from 1st March, 2023 when the said application was withdrawn to 8th March, 2023 when he started to prepare his application and the day the present application was filed. Therefore, it is my considered view that the applicant has accounted for all period of delay.

Next for consideration is whether the impugned order of the High Court was tainted with illegalities. It has been held many times without number that where illegality exists and is pleaded as a ground, the same constitute a good cause for an extension of time. However, the alleged illegality must be on the face of the record. In **Lyamuya Construction** (supra). In the instant application, the applicant complained that he was not a party to Land Case No. 246 of 2015. Looking closely at the raised point, I am persuaded that the applicant intends to challenge the settlement deed, which affected his interest. In the case of **Attorney General v. Emmanuel Marangakisi (as Attorney of Anastansious Anagnostou) & 3 Others** (Civil Application No. 138 of 2019) [2023] TZCA 63 (24 February 2023) TanzLII the Court held that: -

"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 the time so that the matter can be looked into..."

Thus, seeking inspiration from the above referred authorities of the Court on the issue of illegality and applying it in the circumstances of this application, I agree with the applicant's counsel that the allegation of an illegality of the decision sought to be challenged amount to good cause,

hence the discretion of the Court in terms of Rule 10 of Rules can be properly exercised to grant the application.

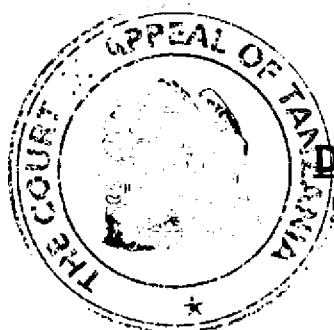
In the upshot, the applicant is granted extension of time to file an application for revision. It is ordered that the requisite application should be lodged within sixty (60) days from the date of the delivery of the ruling. In the circumstances of this application, I order that parties shall bear their respective costs.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of April, 2024.

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 29th day of April, 2024 in the presence of Mr. Hamisi Katundu, learned counsel for the applicant who took brief of Mr. Karoli Mluge Fabian, for the 1st respondent, Mr. Malick Hamza, learned counsel for the 2nd respondent and in the absence of the 3rd respondent though duly notified is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL