IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 299/16 OF 2016

ATTORNEY GENERAL ..... APPLICANT

VERSUS

1. OYSTERBAY VILLAS LIMITED ..... FIRST RESPONDENT

2. KINONDONI MUNICIPAL COUNCIL ..... SECOND RESPONDENT

(Application for Extension of Time to apply for Revision of the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar Es Salaam)

(Nchimbi, J.)

dated the 11th day of March, 2014
in
Commercial Case No. 88 of 2011

R U L I N G

15th February & 8th March 2017

NDIKA, J.A.:

This is an application by a notice of motion brought under Rules 4 (2) (b), 10, 48 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") as well as sections 6 (a) and (f), 17 (1) (a) and (2) (b) of the Office of the Attorney General (Discharge of Duties) Act, 2005 ("the Act No. 4 of 2005") by the Attorney General ("the Applicant") for extension of time within which to apply for revision of the judgment and decree of

the High Court of Tanzania, Commercial Division in Commercial Case No. 88 of 2011 dated 11th March 2011. The application is supported by an affidavit deposed by Ms. Angela Kokuhumbya Lushagara, Principal State Attorney, employed in the Office of the Applicant.

For its part, the First Respondent filed an affidavit in reply deposed by its Managing Director, namely Mr. Bakir Samardzic. The Second Respondent lodged no affidavit in reply.

At the hearing the Applicant entered appearance through Mr. Vincent Tangoh, learned Principal State Attorney, while Mr. January R. Kambwamwene, learned Counsel, represented the First Respondent. Mr. Hussein Ugulum, learned Solicitor, appeared for the Second Respondent.

It is convenient at this stage that I summarise the facts of this matter as can be gleaned from the supporting affidavit and the affidavit in reply.

While the First Respondent is a foreign-owned limited liability company registered under the laws of Tanzania for carrying on the business of real property development, financing and management, the

Second Respondent is an urban authority established under the Local Authorities (Urban Authorities) Act, Cap. 288 RE 2002 with powers to buy, develop and maintain assets in its own name for the benefit of the Government of the United Republic of Tanzania. Sometime in 2007, the Second Respondent invited tenders for the development of its specified landed properties within Kinondoni Municipality. On 13th December 2007, both Respondents entered into a contract for joint ownership and development of two properties known as Plot No. 277, Mawenzi Road, and Plot No. 322, Ruvu Road, in Oysterbay, Kinondoni, Dar Es Salaam City. Both properties are registered in the name of the First Respondent as owner.

There is no doubt that the contractual relationship between the Respondents was not a smooth and happy one; certain differences ensued in the course of development of the aforesaid properties into prime apartments. For the sake of seeking legal redress, the First Respondent sued the Second Respondent before the High Court, Commercial Division in Commercial Case No. 88 of 2011, which was finally decided on 11th March 2015. Aggrieved by the decision of the High

Court, the First Respondent lodged a notice of intention to appeal to the Court of Appeal of Tanzania on 1st April 2015.

On 14th July 2016, the Applicant became aware of the legal dispute between the Respondents after it received a letter referenced as number CB.98/235/02/44 of 8th July 2016 from the Permanent Secretary, President's Office, Regional Administration and Local Governments. In that letter, the Applicant was informed of the pending appeal initiated by the First Respondent before this Court and then requested to intervene so that the decision of the High Court, Commercial Division decreeing that the First Respondent be registered the owner of the suit properties could be challenged on the ground that the said respondent, being a non-citizen, could not legally own land in Tanzania in its own name.

It is deposed on behalf of the Applicant in Paragraph 14 of the supporting affidavit that, since the Applicant was not a party to the proceedings before the High Court, Commercial Division, its only recourse to challenge the High Court's decision was by applying to this Court for revision of the said decision. As the sixty days limitation period prescribed by Rule 65 (4) of the Rules for applying for revision after the

decision intended for review was rendered had expired, the Applicant lodged this matter on 29th September 2016 for extension of time to apply for revision.

In his brief address on this matter, Mr. Tangoh adopted the contents of the notice of motion, the supporting affidavit and the written submissions. He submitted that the Applicant was seeking to intervene in the dispute between the respondents by virtue of its position as the Chief Legal Advisor to the Government and the representative of the Government in all courts of law and tribunals for safeguarding the interest of the public at large.

While acknowledging in the written submissions that the intended application for revision ought to have been lodged within sixty days of the delivery of the impugned decision, Mr. Tangoh argued that the effluxion of the limitation period occurred without the Applicant's knowledge because it was not a party to the proceedings before the High Court, Commercial Division. It is further argued that after the Applicant became aware of the impugned decision of the High Court it followed up with the High Court's Registry and established the existence of the

proceedings and the decision therein and then lodged the present matter straightway for enlargement of time to seek revision. Citing this Court's decision in **Chief Abdallah Said Fundikira v Hillal A. Hillal**, Civil Application No. 72 of 2002, CAT at Dar Es Salaam (unreported), Counsel argued that it is settled law that the only recourse to a person who was not a party to the suit that has affected his interest is challenging that decision by way of revision.

In addition, it was submitted on behalf of the Applicant that in the intended revision, the Applicant would seek to challenge the legality and soundness of the decision of the High Court on the following grounds: first, that the said decision failed to hold that the contract between the two respondents was illegal for contravention of the laws, national policy and public interest; secondly, that the said decision failed to find that the contract between the respondents was made fraudulently with the First Respondent's concealment of the fact that its shareholders were non-citizen and, therefore, it was legally prohibited from owning land or entering into any contract involving transfer of ownership of land in the country; and thirdly, that the decree of the High Court was non-executable for requiring specific performance of an illegal contract

contrary to the provisions of section 20 (1) of the Land Act, Cap. 113 RE 2002, which state that a non-citizen cannot be granted land for any purpose other than investment. Based on the alleged illegality of the aforesaid decision, Mr. Tangoh urged that the requested extension of time be granted as was the case in **Principal Secretary, Ministry of Defence v Devram Valambhia** [1992] TLR 182; **Kashinde Machibya v Hafidhi Said**, Civil Application No. 48 of 2009 (unreported); **Kalunga and Company, Advocates v National Bank of Commerce Limited** [2006] TLR 235; and **Attorney General v Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2004, CAT at Dar Es Salaam (unreported).

Replying for the First Respondent, Mr. Kambamwene adopted the affidavit in reply as well as his written submissions. He then submitted so strongly that there was no sufficient cause to extend the limitation time to revise the decision of the High Court that he termed perfectly legal. He elaborated that the First Respondent entered into the now impugned contract after the Second Respondent had advertised the tender for the development of its landed properties. It was his view that there was no law that barred a foreigner from taking an interest in land subject to the

requirement to be approved by the Tanzania Investment Centre (TIC). It was perfectly legal, again in his view, for the First Respondent entering into the contract upon fulfillment of the applicable conditions and that it was absurd that the Applicant now claimed that the contract was illegal.

Mr. Kambamwene submitted further that the fact that the First Respondent entered into the contract before the TIC certification and approval were granted does not render the contract illegal. It was a contingent contract that would have only become void if and when the requisite TIC approval was withheld.

On his part, Mr. Ugulum, learned Solicitor for the Second Respondent, submitted that he did not object to the application being granted as presented.

Let me state at the this point that none of the respondents disputed the Applicant's claim that as the Chief Legal Advisor to the Government, it had standing to intervene in any matter of public interest in accordance with the provisions of sections 6 (a) and (f) and 17 (1) (a) and (2) (b) of Act No. 4 of 2005 (*supra*). Acting on this fact, I find that

the Applicant is entitled to intervene at this stage in the dispute between the respondents.

Before dealing with the substance of this application in light of the rival submissions, I find it pertinent to restate that although the Court's power to extend time under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. While it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion in this regard, the Court must consider the merits or otherwise of the excuse cited by the applicant for failing to meet the limitation period prescribed for taking the required step or action. Apart from valid explanation for the delay, good cause would also depend on whether the application for extension of time has been brought promptly and whether there was diligence on the part of the application (see, e.g., this Court's decisions in **Dar Es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported); and **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported)).

It is evident that the decision of the High Court intended to be revised was handed down on 11th March 2015. In terms of Rule 65 (4) of the Rules, the intended revision ought to have been lodged within sixty days of the delivery of the aforesaid decision. It is unchallenged that the Applicant was unable to lodge its application within time because it was unaware of the said decision for it was not a party to suit before the High Court. I also find it unassailable that the Applicant became aware of the decision of the High Court on 14th July 2016 after being informed of it by the Permanent Secretary, President's Office, Regional Administration and Local Governments vide a letter of 8th July 2016, a copy of which was annexed to the supporting affidavit. It was further unchallenged that after the Applicant became aware of the impugned decision of the High Court it followed up with the High Court's Registry and established the existence of the proceedings and the decision therein and then lodged the present matter straightway for enlargement of time to seek revision. I am mindful that this matter was lodged on 29th September 2016, which was about forty-five days after it learnt of the dispute between the respondents. It has not been suggested by any of the respondents that the said duration constituted inordinate delay. Given these

circumstances, I am disposed to find that the effluxion of the limitation period for applying for revision occurred without the Applicant's knowledge of the High Court's decision intended to be revised and that after it learnt of the existence of the said decision, it acted promptly to investigate the matter and then move this Court for extension of time through this application.

As already indicated, a further aspect to the present motion is the Applicant's intention to challenge the High Court's decision on the grounds that it failed to find the invalidity and illegality of the contract between the respondents and that it was non-executable due to seeking specific performance of the contract that is alleged to be illegal. Mr. Kambamwene argued for the First Respondent so strongly that the contract between the respondents for development and ownership of the suit properties was legal and that it could not be vitiated in any way simply because it was entered before the necessary approval and certification had been sought and obtained.

I am aware that this Court held in **Principal Secretary, Ministry of Defence v Devram Valambhia** (*supra*) at page 189 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, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."

The above position has been restated by the Court in a number of its decisions including **VIP Engineering and Marketing Limited and Two Others v Citibank Tanzania Limited**, Consolidated Civil References Nos. 6, 7 and 8 of 2006 (unreported). That is apart from four other decisions mentioned by Mr. Tangoh in his submissions.

Without attempting to delve into the substance of the claim of the illegality of the High Court's decision as well as the non-executability of its decree for specific performance of contract on the ground that the said contract is illegal, it is my view that these contentions present worthy legal points for the consideration of the Court.

In sum, I find that the Applicant has not only shown good cause for the delay but also established that the intended revision will be a forum

for challenging the legality of the High Court's decision as well as the executability of that court's decree seeking specific performance of an illegal contract. Accordingly, I order that the intended application for revision be filed within thirty days from today. Costs of this matter shall follow the event in the cause.

DATED at DAR ES SALAAM this 6th day of March, 2017.

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL