IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL REFERENCE NO. 11 OF 2019

AHMED MABROUK.....1ST APPLICANT

BI NAJMA HASSANALI KANJI.....2ND APPLICANT

VERSUS

MRS. RAFIKIHAWA MOHAMED SADIK.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Application arising from a decision of a single Justice of the Court of Appeal of Tanzania, at Dar es Salaam)

(Kitusi, J.A.)

dated the 9th day of May, 2019

in

Civil Application No. 179/01 of 2018

.....

RULING OF THE COURT

21st February & 31st May, 2023

MKUYE, J.A.:

This is an application for reference made under Rule 62 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It arises from a decision of a single Justice of the Court (Hon. Kitusi J.A.) who granted the 1st respondent extension of time to lodge an application for revision through Misc. Civil Application No. 179/01 of 2018. The 1st respondent sought to challenge the decision of the High Court of Tanzania at Dar es Salaam (Mzuna, J.) in Civil Case No. 95 of 1994.

The brief background of the events leading to this application is as follows:

The matter has a chequered history. It has been lingering in court premises since 1994. It started when the 1st respondent alleged to have purchased a property identified as Plot No. 3 Block 19, Kariakoo Area within Dar es Salaam Region in 1990 from two individuals, namely; Amina Amri and Abbas Amri. It appears that later, it transpired that there was a pending dispute before the High Court between Amina Amri and Ahmed Mabrouk, the 1st applicant, over the suit property. In a bid to protect her newly acquired interest on the suit property, the 1st respondent lodged objection proceedings against an application for injunction that had been sought in the pending matter in the High Court, however, the said objection proceedings did not sail through as it was rejected by Hon. Msumi J. (Rtd.). This prompted the 1st respondent to institute a suit against the applicants.

It is on record that, while the suit was going on, the Commissioner for Lands was in the process to revoke the 1st respondent's title over the suit property which again prompted her to drag the 1st applicant, (subsequent buyer of the suit property), the Registrar of Titles, Commissioner for Lands and Hon. Attorney General into the suit.

In the said suit, the 1st respondent sought for a declaration that she was the lawful owner of the suit property and for an order for injunction restraining the Registrar of Titles and Commissioner for Lands from revoking her right over the property. The matter, however, was greeted with a preliminary objection (the PO) raised by the 1st and 2nd applicants herein that the 1st respondent had no cause of action against them which PO was sustained by Hon. Mackanja J. (Rtd.) leading to the dismissal of the suit against all the respondents.

Aggrieved, the 1st respondent appealed to this Court vide Civil Appeal No. 80 of 1998 in which the Court made a finding that the 1st respondent had a cause of action and allowed the appeal with an order that the suit should be remitted to the High Court for its trial.

As was ordered by the Court, the matter was placed before the High Court vide Civil Case No. 95 of 1994 for trial but once again was welcomed with a PO that in terms of sections 99 (1) and 102 of the Land Registration Act, Cap 334 R.E. 2002, the suit was not legally maintainable. The High Court, through Hon. Mzuna J. was convinced with the PO and upheld it leading to the striking out the suit with costs.

The 1st respondent, intending to appeal to this Court against the said Ruling by Hon. Mzuna J., found that time had run against her. She

then approached this Court with an application for extension of time to lodge an application for revision to the Court. The single Justice, as alluded to earlier on, granted the 1st respondent extension of time and ordered her to lodge the said application for revision within sixty (60) days with costs.

The applicants were not amused with that outcome. Hence, they have come to this Court with an application for reference to have the decision of the single Justice reversed. The grounds for the applicants' dissatisfaction with the grant of extension of time are that:

1) *There was no ground of illegality apparent in the decision of the High Court warranting the respondent (then applicant) to obtain extension of time to apply for revision.*

2) *The discretion to award costs to the respondent (then applicant) was improperly exercised as the applicants (then respondents) were in no way to blame to shoulder the costs.*

When the application was called on for hearing, Mr. Samson Edward Mbamba, learned counsel appeared representing the applicants whereas the 1st respondent was represented by Mr. Edward Peter Chuwa teaming up with Ms. Anna Lugendo, both learned counsel and the 2nd respondent enjoyed the services of Messrs. Lukelo Samwel and

Aloyce Sekule, learned Principal State Attorneys, Mr. Gerald Njoka learned Senior State Attorney and Ms. Getrude Songoi, learned State Attorney.

Mr. Mbamba, after having adopted the notice of motion, affidavit and written submission in support of the application, amplified his written submission that it was wrong for the single Justice to grant extension of time to the 1st respondent to challenge the decision of Hon. Mzuna J. which struck out the suit on the basis of illegality. Essentially, in the written submission, it is the applicants' argument that there is no illegality in the decision of Hon. Mzuna J and that the respondent failed to demonstrate sufficient prima facie case. It is contended that, at most what the advocate for the respondent did was to establish that the decision was erroneous which is not equal to illegal decision. The counsel for the applicant submitted further that in that decision Hon. Mzuna J. agreed that a person aggrieved by the decision of the Registrar of Title has to appeal to the High Court within three months and not to institute a suit as the respondent did.

With regard to the 2nd ground of reference relating to the costs awarded, it was submitted that it was wrong for the single Justice to award costs to the respondent while the applicants were not to blame as it was the 1st respondent who delayed herself.

In response, the 1st respondent contended in her written submission in reply that, the 1st respondent sufficiently established that there was a point of illegality as Hon. Mzuna, J. determined the matter as he did, while the Registrar of Title had not yet decided the matter before him. In his oral submission, Mr. Chuwa stressed that at the time when Hon. Mzuna, J. made that decision there was no decision by the Registrar of Title but there was only a threat of cancellation of the 1st respondents' title. He argued, therefore, that the single Justice was right to find that there was an issue of illegality and held that there was an arguable point of law to be addressed by the Court.

At any rate, Mr. Chuwa argued further that, the single Justice granted extension of time basing on two grounds: **one**, existence of arguable point of law on illegality; and **two**, that the 1st respondent had accounted for the delay which was sufficient to be relied upon even without the issue of illegality.

With regard to the issue of awarding costs to the 1st respondent, it was argued that the same was properly awarded in the discretion of the Court and that there is no requirement for the judge to assign reasons. In fortifying the point, Mr. Chuwa referred us to the case of **DB Shaprya & Co. Ltd v. Regional Manager, TANROADS Lindi,** Civil Reference No.1 of 2018 pg 7 (unreported), where the Court stated that

costs of, and incidental to all civil actions are awarded in the discretion of the court and that in exercising its discretion to award costs, the court is generally enjoined to award costs to the successful party on the basis of the principle that costs follow the event. As such, Mr. Chuwa was of a view that, the single Justice did not error in awarding costs. He concluded by urging the Court to find that the application is unmerited and dismiss it with costs.

On behalf of the 2nd respondent, Mr. Samwel, at the outset sought to abandon written submission they had filed earlier on and then briefly and to the point declared their stance by submitting that they supported the decision by the single Justice to be the correct position.

In rejoinder, Mr. Mbamba stressed that, under section 102 of the Land Registration Act, any act is challenged by an appeal. On the issue of illegality, he contended that it must be on the face of the record. As regards the issue of costs he conceded that it follows the event, however, in the matter at hand it was the 1st respondent who was at fault in filing the revision late.

We have considered the grounds of reference and the submissions made by the parties in support and against them and, we think, the issue for this Court's determination is whether this application has merit.

We wish to take off by pointing out that in an application of this nature, the Court is required to be guided by the principles as follows:

1) *That, on reference the full Court looks at the facts and submissions the basis of which the single Justice, made the decision;*
2) *No new facts or evidence can be given by any party without prior leave of the Court; and*
3) *The single Justice's discretion is wide, unfettered and flexible; it can only be interfered with if there is a misinterpretation of the law.*

See, **Yazidi Kassim Mbakileki v. CRDB (1996) Ltd and Another**, Civil Reference No. 14/04 of 2018, **Amada Batenga v. Francis Kataya**, Civil Reference No. 01 of 2006 and **VIP Engineering and Marketing Limited and Two Others v. Citibank Tanzania Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006 (all unreported).

In the case at hand, the matter that was before the single Justice was seeking extension of time within which to file an application for revision against the Ruling and Order of the High Court in Civil Case No. 95 of 1994. The said application was made under Rules 10, 4 (2) (b) and 48 (1) of the Rules which requires a party who seeks for an order for extension of time to do a certain act or thing to show a good cause for his/her failure to do such thing within the time prescribed for doing

so. The provisions of the law have been amplified in times without number such as in the case of **Abdallah Salunga and 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 and **Praygod Mbaga v. The Government of Kenya Criminal Investigation Department and Another**, Civil Reference No. 04 of 2019 (both unreported).

Also, it is noteworthy that as to what constitutes good cause is not defined but according to the case law, a number of factors such as whether or not the application has been brought promptly, the absence of any valid explanation for the delay and whether the applicant has accounted for each day of delay and the lack of diligence on the part of the applicant are to be considered – See, **Tanga Cement Company Limited v. Jumanne D. Masangwa & Amos A. Mwalwanda**, Civil Application No. 06 of 2001, **Wambele Mtumwa Shaban v. Mohamed Hamis**, Civil Reference No. 08 of 2016 (both unreported).

Again, it is well settled that any grounds alleging illegality may constitute a good cause to warrant the Court to extend time – See, **Principal Secretary Ministry of Defence and National Service v. Divram P. Vilambhia** [1992] T.L.R. 387 and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). It should be emphasized at this juncture that in case of an illegality, it

must be apparent on the face of the record of the decision sought to be challenged as was clearly stated in the case of **Lyamuya Construction Company Limited v. Board of Trustees of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In the matter at hand, the applicant (now the 1st respondent) had raised two grounds in her application which are **one**, illegality in the decision of Mzuna, J. in that he wrongly considered the points of objections which related to the decision of the Registrar of Titles whose notice was given on 15/8/1994 while Civil Case No. 95 of 1994 (subject to this application) was filed on 19/5/1994; and **two**, that the Hon. Judge misdirected his mind on extraneous matters as the suit before him was never tried on its merit.

On top of that, the 1st respondent narrated in paragraphs 11, 12, 13 and 14 of the supporting affidavit on the reasons for delay in filing the application for revision stating the steps she took to impugned the decision of the Registrar of Title whereby she instructed Dr. Lamwai to file Misc. Civil Application No. 455 of 2015 for extension of time to file appeal against decision of Registrar of Title dated 15/8/1994 and how the same was struck out on 6/4/2018 by Hon. Dyansobera, J. for being brought under a wrong provision of the law. Also, she averred on how

on April 2018 upon getting a second opinion that she was prosecuting wrong applications instead of challenging the decision of Hon. Mzuna J, dated 14/7/2015, she filed an application for extension of time which was granted.

The learned single Justice granted the 1st respondent extension of time to file revision on two grounds that she had accounted for the delay; and that there was an arguable point of law as hinted earlier on. On the first limb, the single Justice found that following the striking out of the suit, the 1st respondent filed two Miscellaneous Applications (para 11 and 12 of affidavit) through practicing advocates which could not be treated as having not been diligent for taking wrong steps. While relying on the case of **Ngao Godwin Losero's** case, the single Justice was convinced that the 1st respondent was diligent and thus entitled to an order of extension of time. Incidentally, the applicants herein have no qualms with the issue of accounting for the delay and hence we need not dwell much on it.

The basis of the application at hand is on the second limb of illegality in which the applicants are arguing that there was no illegality in the High Court's decision warranting the grant of extension of time for the 1st respondent to file revision which was among the reasons relied upon by the single Justice in granting extension of time after having

been satisfied that the 1st respondent had sufficiently discharged the duty of establishing that there was an arguable point of illegality arising out from the misdirection on the part of the High Court.

On the rival side, they are of the view that there was an illegality since the High Court Judge struck out the suit which did not intend to challenge the decision of the Registrar of Title as the 1st respondent in the suit sought to be declared the rightful owner of the suit land, in a suit that was filed long before the application to the Registrar of Titles was filed.

Having closely examined the issue and the arguments of both sides and the nature of the application which was before the single Justice, we gather from paragraph (a) of the notice of motion that the 1st respondent had deponed as follows:

> *"(a) The decision of the court is illegal as Hon. Trial Judge wrongly held that the suit was not maintainable in terms of section 99 (1) and 102 of the Land Registration Act [Cap. 113 R.E. 2002] while the applicant (the 1st respondent herein) in the suit was not challenging the decision of the Registrar of Titles who was not even a party to the suit."*

Apart from that, in paragraphs 9 and 10 of the supporting affidavit, the applicant (1st respondent) raised the issue of illegality in the said decision as follows:

> *"9. That, I have been advised by my advocate, Edward Chuwa that the said Ruling and Drawn order was wrong and illegal in the sense that the Honourable Judge Mzuna wrongly considered the points of objections which related to the decision of the Registrar of Titles whose notice was given on 15th August 1994 while Civil Case No. 95 of 1994 was filed on 19th May 1994. The decision of the Registrar of Titles was made after filing of the suit and therefore it was not a matter before the judge in Civil Case No. 95 of 1994.*
>
> *10. That, further to the foregoing, the Honourable Judge misdirected his mind on extraneous matters and the suit before him was never tried on its merits as the purported preliminary objection was based on points which were not before the court for determination on the day they were lodged".*

According to the affidavital information and submissions made before the Court, it is discernible that what was before Hon. Mzuna J. was Civil Case No. 95 of 1994 in which the 1st respondent's among other claims was to be declared a rightful owner of the suit land. It is also

undisputed fact that the said suit was filed in the High Court on 19th May 1994. However, it would appear that on 19th August 1994 there was matter filed to the Registrar of Titles seeking to revoke the registration of the title in question then a notice was sent to the 1st respondent to show cause why it should not be carried out. The 1st respondent's grievance was that it was wrong for the High Court Judge to strike out the suit under section 99 (1) of the Land Registration Act and it was among the basis for the Single Justice's decision to extend the time within which to lodge an application for revision.

We think, striking the suit under that section 99 (1) of the Land Registration Act under the circumstances of the case was an arguable point of law and not a mere extraneous matter, requiring to be addressed by the Court on revision. We are also settled in our mind that in making such a determination, the single Justice exercised his discretion judiciously in view of the material facts presented before him and found that the 1st respondent had been able to show the illegality.

In any case, we also take note of Mr. Chuwa's argument that, assuming the issue of illegality was not shown, since the single Justice had been satisfied that the 1st respondent had successfully accounted for the delay, it was also sufficient on its own to warrant the grant of the extension of time sought.

We, therefore, agree with the learned single Justice's decision that there was an issue of illegality warranting to be addressed by the Court.

Next is the ground relating to awarding of costs to the 1st respondent.

On our part, having considered the rival arguments, we agree with the principles regarding awarding costs as was rightly stated by Mr. Chuwa and conceded to by Mr. Mbamba. It is a settled principle of law that costs of and incidental to all civil matters are awardable by the Court in its discretion as per Rule 121 of the Rules, and are awarded to a successful party on the principle that costs are to follow the event. (See, **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, Civil Application No.6 of 2013, **Itex Sani v. The Chief Executive Tanzania Roads Agency (TANROADS) and Another**, Civil Application No. 14 of 2015, **Ramani Consultants Ltd v. The Board of Trustees of the National Social Security Fund and Another**, Civil Application No.184 of 2014 (all unreported).

However, the Court may on discretion, upon justifiable reasons, withhold costs to the successful party. (See, **Twaha Michael Gujwile v. Kagera Farmers Cooperative Bank Ltd,** Civil Application No. 156/04 of 2020 (unreported).

In the matter at hand, it is true that the single Justice awarded costs to the 1st respondent. As was rightly contended by Mr. Mbamba, costs were awarded to the 1st respondent while the applicants had nothing to blame as the 1st respondent had delayed herself to file revision to which extension of time was sought and granted. Apart from that, much as we are aware of the settled principle that costs normally follow the event, we are also mindful that awarding of costs is discretional but it has to be judicially exercised. Assigning reasons for the grant of costs would lead to an assurance that the discretion was exercised judicially. Looking at the circumstances of this matter, the single Justice awarded it without assigning any reason much as the respondent was to be blamed for her failure to take action within the prescribed time. For this reason, we are of the view that, it was not proper for the single Justice to award costs. We, therefore, allow the 2nd ground of revision.

With the foregoing we find no cogent reason to fault the single Justice's finding that the 1st respondent ably established that there was an arguable point of illegality.

In the event, except for the ground relating to costs which is allowed, we find that the application is devoid of merit and, we

accordingly, dismiss it. In the circumstance, we make an order that each party shall bear its own costs.

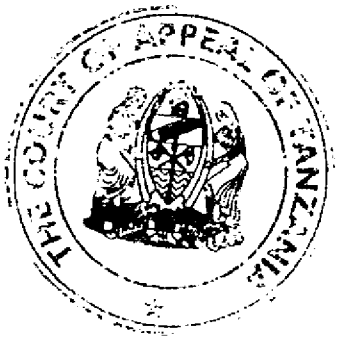
DATED at **DAR ES SALAAM** this 25th day of May, 2023.

R.K. MKUYE
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

P.S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 31st day of May, 2023 in the presence of Mr. Charles Leonard Yotam holding brief for Mr. Samson Edward Mbamba, learned advocate for the Applicants, Mr. Edward Peter Chuwa, learned counsel for the 1st Respondent and Ms. Frida Mollel, learned State Attorney for the 2nd Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL