IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 77/17 OF 2022

DR. MEDARD MUTALEMWA MUTUNGI by the appointed Attorney JOYCE REHEMA MUTUNGI ..... APPLICANT

VERSUS

PETER NSHEKANABO MUTUNGI ..... RESPONDENT

(Application for extension of time to file a Notice of Appeal against the ruling and order of the High Court of Tanzania at Dar es Salaam)

(Maige, J.)

dated the 23rd day of October, 2020
in
Land Case No. 74 of 2018

RULING

9th & 21st November, 2023

ISMAIL J.A.:

This application represents the applicant's second attempt in his bid to challenge the decision of the High Court, Land Division, which struck out the suit and the counter-claim. The ground for the court's action was that the loan agreement on which the applicant was allegedly suing had not been registered. The first of such attempts was through institution of Misc. Land Application No. 363 of 2021. It fell through on the ground that the applicant had not accounted for the days of delay.

The instant application, coming by way of a second bite, is supported by affidavits sworn by Joyce Rehema Mutungi and Joseph Ishengoma Rutabingwa. Together with the notice of motion, the affidavits lay grounds on which the application should be granted. The grounds are as follows:

(i) Following the judgment of the High Court, the applicant opted to go with the first alternative by seeking to register the loan agreement in readiness for filing a fresh suit;

(ii) Despite fulfilment of necessary requirements, the registration was refused by the Registrar of Titles on the ground that the loan agreement had expired;

(iii) That the refusal by the Registrar of Titles narrowed the applicant's options to an appeal against the decision of the High Court;

(iv) Since time for lodging a notice of appeal had been exhausted in pursuit of the registration, filing of the notice of appeal had to be preceded by an extension of time;

(v) The ruling of the High Court on extension of time was delivered on 21st February, 2022.

Brief history of the matter, as gathered from the trial court record is to the effect that the applicant, the plaintiff in the suit, is the respondent's

paternal uncle. He sued for vacant possession of a property situate on Plots No. 1012 to 1014 Block A, Makongo Juu area, Kinondoni District in Dar es Salaam, and demolition of structures allegedly built by the respondent without the former's approval. In 2006, the parties entered into a loan agreement pursuant to which the respondent lent out TZS. 6,000,000/-. The sum was to be repaid in a period of 10 years. The contention by the applicant is that during the period of repayment of the sum the respondent would take possession of the suit land and only allowed to only clear the bush and it livable. It is alleged that the respondent surveyed and developed the land by putting permanent structures. The loan amount was repaid on 26th September, 2016, a day before the deadline day.

The respondent did not deny that he developed the suit land. His only contention is that development of the suit land was consistent with what the loan agreement provided. In a counter-claim filed in reply to the statement of claim, he pressed a demand for payment TZS. 400,000,000/- being compensation for the unexhausted improvements he made on the suit land.

Proceedings in the High Court terminated in a stalemate as the Court held that the loan agreement on which the suit was based had not been

registered, and that the claim was prematurely preferred. In the end the plaint and counter-claim were struck out.

In both of the affidavits sworn by the applicant and learned counsel, the delay in taking action has been attributed to the registration process which was initiated by the applicant, and that initiation of the appeal process against the decision of the High Court came as an alternative to the applicant's earlier intention to institute a fresh suit. The reason for refusal to register the loan agreement is its expiration. It is averred further that failure to register the agreement prevented the applicant from filing a fresh suit as ordered by the High Court, and that resort to appeal came as an option which was scuppered by time prescription. This necessitated an application for extension of time filed in the first time of asking.

The respondent has fervently opposed the application. The affidavit in reply, sworn by the respondent, has taken a serious exception to the averments by the respondent. His contention is that, like in the High Court, the applicant has, yet again, failed to account for days of delay, yet the days of delay are in ordinate.

When the matter came up for hearing, only Mr. Joseph Rutabingwa, learned advocate for the applicant, along with his client appeared in court

while the respondent was a no show. Consistent with rules 106 (12) and 112 (4) of the Rules, the respondent was deemed to be absent and hearing proceeded based on the submission he filed. He submitted that after delivery of the decision of the High Court, the applicant opted to have the loan agreement registered and that efforts to do so hit a snag when the Registrar of Titles adjudged the agreement unregistrable because its life had ended. The refusal by the Registrar, he contended, slammed the door on the applicant's intended resurrection of the suit. This is what triggered the application for extension of time which was dismissed before the applicant resorted to the instant effort.

On accounting for days of delay, the contention is that 13 days which were said to be unaccounted for have been fully accounted for as they include days on which correspondences were exchanged and non-working days in respect of which no action could be pursued. Mr. Rutabingwa contended that the applicant did not sit idle from the time the judgment of the High Court was delivered to the time the applicant instituted the application for extension of time in the High Court.

When probed on the applicant's reaction to the decision of the High Court, Mr. Rutabingwa submitted that the applicant was quite pleased with

the decision as he believes that the same was quite in order. He added, however, that the responsibility of registering the agreement rested on the shoulders of the respondent.

The respondent's submission was filed by Mr. Kelvin Kidifu, learned counsel who took a swipe at the steps taken by the applicant. He termed them as an afterthought as the right cause of action was to challenge the decision of the Registrar of Titles to refuse to register the loan agreement. Regarding extension of time, the learned advocate's view is that it is entirely in the discretion of the Court to grant or refuse extension of time and that factors to be considered are as spelt out in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). They entail accounting for days of delay; ensuring that the delay is not inordinate; demonstration of diligence and not apathy, negligence or sloppiness in the actions taken; and demonstration of any other reason, including illegality.

Mr. Kidifu was of the view that the applicant has not accounted for the days of delay in different spells of actions. The unaccounted-for days are 13. This failure, he contended, was in defiance of the principle set by the Court

in **Dar es Salaam City Council v. Group Security Co. Ltd**, Civil Application No. 234 of 2015 (unreported).

With respect to diligence, Mr. Kidifu contended that the applicant's conduct was characterized by lack of diligence. He considered that the decision to take steps that would lead to filing of afresh suit only to change course was an afterthought as the applicant is not aggrieved by the decision of the High Court. His only disgruntlement is with the decision of the Registrar of Titles to refuse to register the loan agreement. He argued that no sufficient reasons were adduced to warrant granting of the extension of time.

The rival arguments by learned counsel distil the question as to whether the application is meritorious.

It is common knowledge that grant of extension of time for doing an act is a discretion vested in the Court and regulated by the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009. Such grant is predicated on a condition that a party asking for it must demonstrate good cause. It entails doing what was held by the Court in **Republic. v. Yona Kaponda and 9 Others** [1985] T.L.R. 84. It was held:

"In deciding whether or not to extend time I have to consider whether or not there is 'sufficient reasons'. As I understand it, 'Sufficient reasons' here does not refer only, and is not confined, to the delay. Rather, it is 'sufficient reason' for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved."

What should be gathered from the quoted excerpt is that, it is not enough for the party to give reasons for his inability to take action within time prescription set by law. He should also satisfy the Court that extension of time is, in the circumstances of a particular case, fitting. It involves giving reasons as to why he thinks time should be extended. Review of the goodness or otherwise of the reasons is also gauged by looking at the principles restated in the **Lyamuya Construction Company Limited's** case (supra), cited by counsel for the respondent.

Looking at the affidavits that support the application and the submission by Mr. Rutabingwa, the sole reason for the delay is the decision to comply with the decision of the High Court that directed that the loan agreement be registered before it can be relied on to found a claim. With

this factual reality the narrow question for determination is whether this reason constitutes good cause for extension of time.

As stated by Mr. Rutabingwa, the choice to comply with the decision of the High Court was one of the alternatives. The other was to challenge the correctness of the decision to this Court. When the applicant, guided by his counsel, chose to take the route he took, he believed that to be the right track and I have nothing against the exercise of the right to a choice. But choosing the route he chose while knowing that the agreement's validity had to come to an end, and a refusal was looming was a sloppy decision. It is a decision which is not consistent with diligence expected of a party that enjoys services of an astute and seasoned counsel in the stature of Mr. Rutabingwa. It was a stillborn action which cannot serve as a reason, let alone good enough to fit into the good cause contemplated in rule 10 of the Rules. It is a delay that arises from the applicant's wrong choice of the course of action and it can hardly enjoy the condonation sought by the applicant.

Turning on to the reason for the applicant's quest for extension of time, Mr. Rutabingwa has been less economical with the fact or rather generous, by disclosing that the applicant is content with the decision of the High Court to strike out the suit and the counter-claim because the agreement was not

registered. He has no qualms, either, with the decision by the Registrar of Titles to refuse their application for registration of an agreement whose lifespan has expired.

The clear message that the learned advocate sends out is that, in none of the decisions has the applicant found any decisional error or fault that can be corrected through a challenge, in the form of appeal to this Court. It is equally clear, in my view, that the applicant would not contemplate a challenge of the decision of the High Court to this Court had the Registrar of Titles acceded to his request for registration of the loan agreement. It is obvious that the impending appeal by the applicant is a step that is contemplated without there being anything bemusing. In simple terms, the applicant intends to appeal against the decision that has no qualms on. This, in law, is not only novel but also an unallowable practice.

While it is generally acknowledged that the person who wants to appeal must be the party who lost in the trial court, in law, that person must be aggrieved by the decision for him to enjoy this right. That is an implicit requirement under rule 93 (1) of the Rules which provides:

> *"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively,*

> *without argument or narrative,* ***the grounds of objection to the decision appealed against specifying,*** *in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law,* ***which are alleged to have been wrongly decided.*** [Emphasis added]

In **Lombard v. City of Providence**, No. 2012-86-Appeal, the Rhode Island Supreme Court reminded litigants that a party who is not **aggrieved** by a judgment cannot be qualified as an appellant on appeal. Giving a description of who an aggrieved person is, the Supreme Court held as follows:

> *"…. the rights set forth in R.I. Gen. Laws § 9-24-1 must be read in light of our long-established rule that* ***a person is aggrieved by a judgment when it adversely affects, in a substantial manner, his [or her] personal or property rights****…* [Emphasis added]

This implies that appeals are the domain of the aggrieved and a 'no-go zone' for those who see no wrong in the decision from which an appeal is intended. Taking a hue from the cited excerpts, my conviction is that the notice of appeal for which extension is prayed is in respect of a decision

against which the applicant has no issues. Grant of extension in such circumstances will be injudicious exercise of discretion and I resist the temptation to do so. In view thereof, I am not persuaded, one bit, that reasons cited for extension of time to file a notice of appeal are anywhere close to being good cause.

In the upshot of the all of the foregoing, I hold that the application is devoid of any merit and the same is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 20th day of November, 2023.

M. K. ISMAIL
JUSTICE OF APPEAL

This Ruling delivered this 21st day of November, 2023, in the presence of Mr. Evodius Rutabingwa, learned counsel for the Applicant and in the absence of the counsel for the Respondent is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL