

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 192/17 OF 2021

ROVITHA KEMILEMBE APPLICANT

VERSUS

MIC TANZANIA LIMITED..... RESPONDENT

**(Originating from the decision of the High Court of Tanzania
(Dar es Salaam Land Division)**

(Hon. Mango, J)

Dated 29th Day of May, 2020

in

Land Mic Land Application No. 657 of 2018

.....

RULING

2nd & 10th May, 2023

MAIGE, J.A.:

This application is for an extension of time to apply for revision against the order of the High Court in Miscellaneous Civil Application No. 657/2018 refusing to review its own judgment in Land Case No. 312 of 2018. The application has been brought under rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The grounds in support of the application have been demonstrated in the notice of motion and supporting affidavit of Ms. Crescencia Rwechungura, learned advocate.

The facts of the case briefly stated are as follows. The parties herein entered into an agreement in 2009 wherein the respondent leased a space at the applicant's Plot No. 605 Mikocheni Phase 11 Area in Dar Es Salaam measured 9 mx 6 square meter (the leased property) for installation of telecommunication tower, generator and a room for her telecommunication business. The applicant's claims against the respondent were as follows. **First**, for payment of arrears of rent for the period commencing from June 2017 to 2018. **Two**, for payment of USD 500 per month from 2013 to the date of judgment being mesne profit for the use of the telecommunication tower built at the applicant's plot in 2008 by her previous tenant one Devotel (T) Limited. **Three**, for vacant possession of the leased property and removal of the respondent's equipment therefrom. **Four**, for general damages at the tune of Tanzania Shillings 50,000,000/=.

In its *ex parte* judgment, the trial Judge, while in agreement with the applicant that; the respondent unlawfully used the tower on the applicant's plot without consideration, refused to award the amount of mesne profit claimed for the reason that, the respondent was not privy to the lease agreement between the applicant and Devotel (T) Limited. That aside, it ordered the respondent to remove its telecommunication

materials from the applicant's plot. The trial court further dismissed the applicant's claim as to rent arrears in respect of her lease agreement with the respondent for the reason that, there was no evidence to the effect that it was renewed to 2017-2018. For the same reason, it dismissed the claim for general damages.

The applicant, it would appear, believes that the decision to withhold the relief for payment of mesne profit despite the finding that there was a proof of the respondent's use of the telecommunication tower unlawfully and without consideration, was an apparent error which could be cured by the same court by way of review. Equally so, for the order directing the respondent to remove the telecommunication materials from the leased property without first giving an order for payment of rent arrears. She, therefore, moved the trial court to review its decision, the application which was dismissed for the reason that the alleged errors if at all they were as such, were not apparent on the face of the record as the law requires. The applicant is still aggrieved. She would have applied for revision to the Court but for being out of time and henceforth the instant application.

In the conduct of this matter, Ms. Crescencia Rwechungura, learned advocate and Mr. Zaharan Sinare, also learned advocate, represented the applicant and the respondent, respectively.

In her brief oral submissions, Ms. Rwechungura adopted the notice of motion and affidavit and urged the Court to grant the application on the sole ground of illegality. She submitted that, the judgment which the trial court refused to review was tinted with illegalities as follows. **One**, despite the two lease agreements being reflected in the judgment as exhibit P3, the trial Judge dismissed the applicant's claim for rent arrears for the reason that no lease agreement to establish existence of the same was adduced. **Two**, the trial court ordered the respondent to remove her telecommunication materials without giving an order for payment of rent arrears. **Three**, the trial judge refused to award mesne profit despite her finding that, the respondent unlawfully and without paying rent, occupied the applicant's telecommunication tower. In review, she submitted, though the illegalities pointed were apparent on the face of the record, the High Court Judge sitting on review said it was not. Relying on the famous case of **the Principal Secretary, Ministry of Defence and National Service v. Devran Valambia** [1992] TLR 185, she urged me to extend time for revision so that the said apparent illegalities in the

decision of the trial court which were not corrected on review, can be corrected.

In rebuttal, Mr. Sinare adopted the affidavit in reply as part of his submission and argued that, the errors pinpointed by the applicant are not apparent on the face of the record as the law requires. They are, in his contention, mere errors of law and facts which could be addressed by way of appeal. He prayed, therefore, that the application be dismissed with costs.

In her brief rejoinder, Ms Rwechungura though admitting as a matter of principle that, the illegality has to be apparent on the face of the record, she was of the humble contention that, a quick glance over the judgment under discussion, would, without a long-drawn process, reveal the said illegalities.

I have given the rival submissions due consideration and it is time that I determine the application. In so doing, I am obliged to decide whether good cause has been demonstrated. I agree with Ms. Rwechungura that, illegality can by itself suffice as a good cause for extension of time. This is in line with the authority in the case of **Valambia** (*supra*) where it was held:

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law"

I also agree with the counsel's concurrent submission that; for illegality to constitute good cause, it must be apparent with sufficient importance. See for instance, **Lyamuya Construction Company Limited v. the Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where it was observed:

" Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that

such point of law, must be that "of sufficient importance" and I would add that, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."

I have, therefore, to decide whether there is any illegality apparent on the face of the record involved in the intended revision. As I understand the principle in the case of **Lyamuya Construction Limited** (*supra*), a decision does not become illegal merely because it is incorrect in law however apparent the incorrectness may be. It only becomes illegal if it is reached without jurisdiction or against the provisions of the law or its principles. In addition to the principle in the authority just referred, the following statement of the High Court of Uganda in **Nilefos Minerals Ltd vs. Attorney General & Anor** (Msc. Cause No. 0184 of 2014) quoted by the Supreme Court of Uganda in **Uganda Taxi Operators & (UTODA) v. Uganda Revenue Authority (URA)**, Civil Application No. 52 of 2021 (unreported) may be pertinent:

*"Illegality is when the decision making authority commits an error of law in the process of taking or making the act subject of the complaint. **Acting without jurisdiction or ultra-vires or contrary to the provisions of law or its principles are instances of illegality."***

The complaint by the applicant in the first place is that it was illegal for the trial court to hold that, there was not lease agreement for a period between 2017 to 2018 despite the lease agreement in exhibit P3 being reflected in the judgment. In the judgment in question however it is clear that, the trial Judge justified her refusal to award rent arrears for the reason that, no evidence was tendered to the effect that the lease agreement was renewed for a further period of 2017 to 2018. Ms. Rwechungura thinks that the finding does not correctly reflect what is in exhibit P3. Come what may, the error if any, is that of incorrect assessment of evidence which cannot by itself render the judgment illegal. Equally so, for the complaint that the trial judge ordered for vacant possession without awarding a decree for rent arrears.

This now takes me to the complaint as to the refusal of the trial court to award mesne profit despite its factual finding that the respondent illegally and without payment of rent, used the applicant's telecommunication tower. My quick perusal of the judgment reveals that, the trial court made such a finding but refused to award the claim for mesne profit for the reason that, the respondent was not privy to the lease agreement between the applicant and her previous tenant. Apparently, my view, whether what was decided is correct in law or not

raises, a clear issue of illegality because if everything remains constant, there is no wrong without redress.

In view of the foregoing discussion, therefore, this application has merit and it is accordingly granted. The applicant has to file her intended application for revision within 30 days from the date hereof. I shall not give an order as to costs in the circumstances.

DATED at DAR ES SALAAM this 8th day of May, 2023.

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 10th day of May, 2023 in the presence of Ms. Crecensia Rwechungura, learned counsel for the applicant while the respondent was absent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL