

TANZANIA / JUDGMENT

reuben lubanga vs moza gilbert mushi and others 2023 tzca 246 12 may 2023

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CIVIL APPLICATION NO 533/01 OF 2021 REUBEN LUBANGA..... APPLICANT VERSUS MOZA GILBERT MUSHI..... 1st RESPONDENT BACH JOHN MKEU..... 2nd RESPONDENT LOYCE JOHN MKEU (Suing through power Of Attorney by Billionaire Jonh Mkeu..... 3rd RESPONDENT (Application for extension of time to apply for revision of the decision of the High Court of Tanzania at Dar es Salaam (Hon. Rwizile J. ^ Dated 26th August ,2021 in Civil Appeal No.227 of 2021

RULING

9 h & 12th May, 2023 MAIGE. J.A: This an application is for extension of time to apply for revision against the decision of the High Court of Tanzania. It originates from the decision of the District Court of Temeke ("the probate court") between the third respondent and the first two respondents. In the said decision, the letters of administration of the estate of the late Esther John Mkeu granted to the first two respondents was revoked and the third respondent constituted an administrator for the reason of failure to exhibit an inventor/. Having been so constituted, the third respondent, filed, on 8th September, 2020 an inventory and account of the estate of the deceased. On appeal to the High Court, the decision of the probate court was reversed and the status quo restored. The first two respondents were further directed to complete the exercise within six months from the date thereof or else the probate court would proceed in terms of section 107(3) of the Probate and Administration of Estates Act. In the inventory filed by the third respondent, which was declared invalid by the High Court, it would appear, the land described as Plots No. 3378-3394, Block WA" Mbutu - Amani Gomvu Area, Kigamboni Municipality ("the suit property") was listed as part of the deceased estate. The applicant claims that, he had a marital relation with the deceased having cohabitated with her for a period of more than 19 years. He claims further that, although the suit property is in the name of the deceased, he has interests thereon in that; they jointly acquired the same with the deceased during her life time. The applicant believes that, as the co-owner of the suit property, he had a right to be heard 2 in both the proceedings at the probate court and the High Court. He could not timely pursue his right of revision as it was not until on 25th October, 2021 when he became aware of the existence of the

decision. That is the factual justification of the application. He has pleaded illegality as a justification as well. Denial of a right to be heard and inclusion of the suit property in the inventory are the elements of illegalities the applicant is relying upon. At the hearing, the applicant did not appear despite being duly served. He had however filed written submissions in terms of rule 106 of the Rules. The first two respondents enjoyed the service of Mr. Roman Lamwai and Ms. Mary Lamwai, learned advocates while the third respondent enjoyed the service of Mr. Samweli Shadrack, also learned advocate. Both Mr. Roman and Shadrack were of the view that, despite the absence of the applicant, the application should, in terms of rule 106

- (12) (b) of the Rules, be treated argued. The respondents should however be afforded an opportunity to present oral argument, they further submitted. That being the correct position of the law, I agreed with them and proceeded accordingly. In his written submission, the applicant justifies his delay to pursue the intended revision on account that he was not aware of the existence of the decisions in question, He became aware on 25th October, 2021 and on 29th October, 2021, he did file the instant application. In his view, therefore, he has accounted for every day of delay. On illegality, he submitted, the determination of the proceedings at the probate court and the High Court which affected his interest was a curtailment of his right to be heard. Relying on the case of Yahaya Seleman Marya v. Stephano Sijia & 2 Others, Civil Appeal No. 316 of 2017 (unreported), he submitted correctly in my view, that denial of a right to be heard amounts to illegality which according to the case of the Principal Secretary, Ministry of Defence and National Service Versus Devram Valambia, (1992) TLR 185 is a sufficient cause for extension of time. Submitting in rebuttal, Mr. Roman adopted the facts in the joint affidavit in reply of the first two respondents and submitted that, the applicant has not shown good cause for extension of time. The factual justification, he submitted, is without merit as the grant of letters of administration to the first two respondents from which the decision of the High Court traces its origin, was preceded by a general citation. In addition, he submitted, the applicant, initiated the Land Application No. 209 of 2017 while aware of the existence of the proceedings and the grant. The counsel further drew the attention of the Court to annexure "AR.6" to the affidavit in reply suggesting that, the applicant defaulted to appear in the proceedings at the High Court. He submitted further that; the applicant cannot be heard saying that he was denied a right of hearing while it is evident that he filed Civil Revision No. 50 of 2020 against the same decision which he subsequently abandoned. After all, he submitted, the complaint by the applicant cannot be addressed by revision. In his conclusion, therefore, the application should be dismissed with costs. Mr. Shadrack did not have much to say than supporting the submissions by his learned friend and prayed that, the application be dismissed with costs. With the above exposition of the nature of the contention, it is high time to consider the application. Under rule 10 of the Rules, the Court enjoys discretion to grant an extension of time on good cause. Conversely, the definition of the phrase "good cause" is neither in the Rules nor in the Act. It is not defined by any statute either. That, it would appear, was not accidental. The respective power being purely discretionary and equitable, it cannot apply identically in all circumstances and as such the

categories of good cause are never closed. Therefore, in *Masatu Mwizarabi v. Tanzania Fish Processing Ltd*, Civil 5 Application No. 13 of 2010(unreported), we observed that, "goodcause is a relative one and is dependent upon the p arty seeking extension o f tim e to provide the relevant m aterial in order to m ove the court to exercise its discretion " Admittedly, case law has established some principles to be taken into account in determining existence or non-existence of good cause. For instance, in *Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda*, Civil Application No. 6 of 2001(unreported), it was observed: " W hat am ounts to su fficien t cause has n ot been defined. From decided cases a num ber o f factors have to be taken into account including w hether o r n ot the application has been brought prom ptly; the absence o f any explanation fo r delay, lack o f diligence on the p art o f the applicant" It is also the law that illegality by itself can, if it is apparent on the face of the record and of sufficient importance, be a good cause for extension of time. This position was stated in among others, *Valambia's Case* {supra) and *Lyamuya Construction's Case* (supra). It is equally the law that, in deciding whether or not to grant an extension of time, the Court should not limit itself to the delay. Instead, 6 it has to consider as well the weight and implications of the issues involved in the intended action and whether the same is prim a facie maintainable. This is because, the order being equitable, it cannot be granted where it will serve no purpose or where it is a mere abuse of the court process. On this, I am guided by the principle in *R. v. Yona Kaponda & Others* [1985] T.L.R, 84 where it was observed: "... as I understand it, "su fficien t reasons " here does not refer only, and is not confined to delay. Rather, it is su fficien t reasons fo r extending tim e, and fo r th is I have to take into account also the decision intended to be appealed against\ the surrounding circumstances, and the w eight and im plications o f the issue o r issues involved." In here, the extension is sought for the purpose of Revision against the decision of the High Court. What is at stake is the suit property which the applicant complains that it was included in the deceased estate of his late wife without him being afforded a right of hearing. Quite surprisingly, in the judgment that he seeks to fault, ownership of the suit property was not adjudicated upon. Equally so, in the judgment of the probate court, which was the subject of the appeal to the High Court. The applicant's complaint is that, the property was wrongly listed in the inventory. Nonetheless, errors in an inventory or 7 account of an state unless adjudicated upon by the probate court, cannot be a subject of an appeal or revision at a higher court. In my view, therefore, an order for extension of time will serve no purpose. On that account, I find this application devoid of any merit and it is accordingly dismissed with costs. It is so ordered. DATED at DAR ES SALAAM this 11th day of May, 2023. I. J. MAIGE JUSTICE OF APPEAL Ruling delivered this 12th day of May, 2023 while the applicant is absent, and in presenee of Mr. Roman Selasin Lamwai, learned counsel for the 1st and 2nd respondent and Mr. Roman Selasin Lamwai, holding brief for Mr. Samwel Shedrack learned counsel for the 3rd respondent, is hereby certified as a true copy of the original. 8

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