

TANZANIA / JUDGMENT

rosemary katunzi vs oscar mhagama another 2023 tzca 17556 29 august 2023

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 43/17 OF 2022 ROSEMARY KATUNZI.....APPLICANT VERSUS OSCAR MHAGAMA 1st RESPONDENT SEKUNDA MHAGAMA..... 2nd RESPONDENT (Application for Extension of time to file Notice of Appeal against the decision of the High Court of Tanzania, Land Division at Dar es Salaam) fMaohimbi, J. dated the 19th day of September, 2019 in Land Appeal No. 78 of 2017

RULING

14th July & 29th August, 2023 KAIRO. J.A.: This is an application for enlargement of time within which to lodge a notice of appeal to challenge the decision of the High Court dated 19th September, 2019 in Land Appeal No. 78 of 2017. The application is by way of notice of motion taken out under the provisions of Rule 10 and 45 A (1) (a) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit, duly sworn by the applicant. In addition, the applicant has filed written submissions to expound her prayers. The application has, however, been resisted by the respondents in their joint affidavit in reply as well as written submissions in opposition. The brief factual background resulted to this dispute can be recapitulated as follows:- The respondents instituted a suit at the District Land and Housing Tribunal (the Tribunal) for Temeke against the applicant, one Johas Kashura (now deceased) claiming ownership of a house situate at Block No. 1/92 Tandika, Temeke District within Dar es Salaam Region (suit property) vide Land Application No. 145 of 2011. The said suit property was allegedly to have been purchased from Wilfred Edward Katunzi, the applicant's husband who is now deceased. Together with the written statement of defence, the applicant and the late Johas Kashura filed a counter claim and raised a preliminary point of objection (P.O). The P.O was said to be overruled suo-m ottu by the Tribunal and the suit proceeded on merit. Eventually, the decision was in favour of the respondents. Discontented, the applicant and the late Johas Kashura unsuccessfully appealed to the High Court vide Land Appeal No. 78 of

2017. The High Court upheld the Tribunal's decision. The applicant was further aggrieved by the said outcome and decided to apply for review in Civil Application No. 635 of 2019 which was however, dismissed on 22nd December, 2020. Still determined to contest the judgment and decree of the High Court in Land appeal No. 78 of 2017, the applicant decided to lodge an appeal. However, the time within which to do so had expired. The applicant then decided to apply for an extension of time to lodge Notice of Appeal vide Misc. Land Application No. 230 of 2021 which was also rejected on 10th December, 2021 for being unwarranted. Consequently, the applicant applied for the copies of the ruling of the rejected application on 14th December, 2021 and it was ready for collection on 26th January, 2022. The certificate of delay was accordingly issued. Hence, the matter at hand which was lodged on 7th February, 2022 as a second bite. At the hearing of the application before me, the applicant was represented by Ms. Stephen Mosha, learned counsel while Mr. Tarimo Methodius Melkior and Ms. Sekunda Mhagama, both learned counsel appeared for the respondents whereby the 2nd respondent was also present in Court. Mr. Mosha commenced his submissions by fully adopting the contents of the notice of motion, the supporting affidavits sworn by the applicant and another by Nafikile Elly Mwambona, the advocate who agreed to extend legal assistance to the applicant, as well as the applicant's written submission. In his submission, Mr. Mosha stated that, he is very much aware of the legal stance that, the grant of an application for extension of time is in the discretion of the Court upon showing good cause, citing the case of Benedict Mumelo vs Bank of Tanzania, (2006), EA 227, to back up his submission. He went on to submit that, in determining good cause, the Court will consider all material factors brought by the applicant to move it to exercise its discretionary powers to grant the sought extension of time or not. He illustrated the said factors to include the length of delay, the reason for the delay and the decree of prejudice that the respondent may suffer if the application is granted and fortified his assertion with the case of Henry Leonard Maeda and Another vs Ms. John Anael Mongi, Civil Application No. 31 of 2013 (unreported). Mr. Mosha went on to submit that, the applicant's reason for delay which according to him constitute good cause is premised on three folds A as follows: One, technical delay which caters for the period spent in prosecuting Misc. Land Application No. 635 of 2019 for review; two, real or actual delay; and three, that the impugned decision of the High Court is riddled with material irregularities on the face of the record resulting to serious illegalities. Expounding on the first fold, the learned counsel submitted that it is a well-established principle that time spent in pursuing a certain matter in court constitute good cause. To substantiate his assertion he cited the cases of Fortunatus Masha vs William Shija [1997] T.L.R. 154 and Elly Peter Sanya vs Ester Nelson, Civil Appeal No. 151 of 2018 (unreported). He elaborated that, the technical delay in this case covers the period between 19th September, 2019 when the decision intended to be challenged was delivered up to 22nd December, 2020 when the ruling dismissing the application for review was pronounced. He went on that, another period which also constituted technical delay covered the time when the applicant filed an unsuccessful application for extension of time as first bite on 19th May, 2021 and 10th December, 2021. He prayed the Court to exempt the two periods from counting for purpose

of limitation, contending that the applicant was diligent in pursuing the matter and thus the periods be taken to have been accounted for. Regarding the second fold on the actual or real delay, the learned counsel contended that the same is expounded in the affidavits of the applicant and the supplementary affidavit of advocate Mwambona. It was the contention of Mr. Mosha that the period covers the time between 22nd December, 2020 and 7th February, 2022 which is the time spent in following-up for legal assistance. He further insisted that though he was aware of the legal stance that the time spent looking for legal assistance does not constitute good cause for delay but there is an exception to the said general rule where the applicant provides an affidavit from the person who offered him/her the said assistance with particulars of the date on which such assistance was sought and obtained. He cited the case of Azizi Mohamed vs Republic, Criminal Application No. 87/07 of 2019 (unreported), to support his contention. According to Mr. Mosha, the applicant in this application had fully discharged the said obligation in paragraphs 9 - 12 of her affidavit 6 wherein she mentioned the advocate who assisted her in advising and preparing her documents. On top of that, she provided the aforesaid affidavit containing the particulars of the date on which the legal assistance was sought and obtained. He further asserted that from 10th May, 2021 up to 19th May, 2021 which is about 10 days, was the period spent for reading the documents, preparing, drafting and filing the present application which according to him exhibits good cause for extension of time. He cited the case of Vodacom Tanzania Public Limited Company (formerly Vodacom Tanzania Limited) vs Commissioner General, TRA, Civil Application No. 101/20 of 2021 to back up his argument. He insisted that the applicant has also managed to account for the actual delay as above explained. Regarding the third fold, Mr. Mosha submitted that there are incurable irregularities in the decision intended to be challenged on appeal which he submitted to be good cause in granting the extension of time. He asserted that there is a plethora of decisions to that effect. He bolstered his contention with the case of Tanzania Breweries Limited vs Herman Bildad Minja, Civil Application No. 11/18 of 2019 (unreported). He went on to submit that, even where the applicant fails to account for each day of delay, once illegality is pleaded, the Court has a duty to extend time so as to look into and determine the alleged illegality on appeal. He cited the case of Mary Rwabizi t/a Amuga Enterprises vs National Microfinance PLC, Civil Application No. 378/01 of 2019 (unreported). Mr. Mosha also submitted that he is alive to the settled legal position that the stated illegality has to be apparent on the face of record. He contended that the said illegalities were raised and listed in the notice of motion and in the applicant's affidavit and according to him the requirement has been fulfilled. He added that the divulgence of the nitty-gritty of the stated particulars are at this stage, inappropriate but the same is to be ascertained by the Court during the intended substantive appeal. To back up his arguments, he cited the cases of Mary Rwabizi t/a Amuga Enterprises (Supra), Exim Bank (Tanzania) Limited vs John Harld Christr Abrahamsso And 3 Other, Civil Reference No. 11 of 2018 (unreported). In conclusion, he pleaded with the Court to grant the enlargement of time sought. 8 In response, Mr. Tarimo prayed to adopt the respondents' joint written submission in opposition without more. According to their written submission, the respondents concurred with the submissions by Mr. Mosha on the

relevant legal principles. They however contended that, the same do not support the situation which led to the applicant's delay. According to the respondents, the delay was inordinate and the applicant advanced no good cause for delay. In elaboration, the respondents submitted that, though it is a settled principle that time spent in prosecuting a matter constitutes a good cause for delay as the delay is considered to be technical, but the principle cannot apply in this application. It was the respondents' assertion that the applicant's delay was not caused by prosecuting the unsuccessful review, rather the very decision of opting to prosecute the review to impugn the judgment intended to be challenged while the said decision was appealable. They added that the current decision to appeal after being unsuccessful in the application for review is an afterthought and illegal. As such, cannot fall under technical delay as contended by Mr. Mosha. It is their contention that the delay was negligently caused and thus distinguishable from the cited case of Fortunatus Masha, (Supra). The respondents went on to submit that only the period when the applicant was prosecuting an application for extension of time at the High Court up to the time of filing of the current application could be termed as technical delay. It is their further contention that the applicant is therefore required to account for a period from 19th September, 2019 when the decision intended to be appealed against was pronounced to 19th May, 2021, the date when she sought for an extension time to file the notice of appeal at the High Court, that is about 1 year and eight months. Refuting to what was submitted by the applicant to be actual delay, the respondents contended that the same was just a continuation of the delay from the application for review to the time of the alleged time sought for legal assistance. It was their contention that further delay was caused by the decision by Mr. Mwambona to travel to Tanga and stayed for about two months after accepting to offer legal assistance to the applicant instead of advising the applicant otherwise or assign the matter to another advocate. The respondents therefore distinguished 10 the cited case of Azizi Mohamed (supra) contending that the presence of Mr. Mwambona's affidavit is not an automatic rescue, rather it must be scrutinized to verify whether the facts asserted therein contain reasonable cause for the delay or not. Answering the question regarding the status of the time spent by the applicant when preparing the application till the filing of the same, the respondents submitted that, such a period could have constituted good cause if only the applicant was diligent and there was no previous delay. But they contended not to be the case, thus cannot be entertained nor assisting the applicant in her prayer for enlargement of time. As regards the issue of illegalities, the respondents submitted that the same do not constitute good cause as well in this matter to sustain the prayer sought by the applicant. Elaborating, the respondents contended that the allegation of illegality in the judgment is not an automatic good cause, rather the same should be apparent on the face of the record of the impugned decision and not the one that would take along drawn process to find them out. The respondents cited the cases of Ngao Godwin Losero vs Julius Mwarabu, Civil Application No. 10 of 2015 (unreported) and Chandrakant Joshubhai Patel vs 11 Republic, [2004] T.L.R. 218. They further contended that the mentioned illegalities in paragraph 13 of the applicant's affidavit are not apparent on the face of the record and further that the same were all dealt with by

the High Court in the review and decided on them. According to them, the applicant's intention to appeal against the said illegalities is an afterthought and an abuse of the Court process. The respondents also added that the word "record" as far as illegality as a ground for extension of time is concerned refers to the record of the lower court and not the drawn pleadings filed for the application. They thus prayed the Court to dismiss the application for failure to exhibit sufficient cause to warrant the grant of the extension sought. I have dispassionately considered and weighed the rival arguments from both parties. To begin with, I wish to state from the outset that generally I agree with all the legal principles explained in the cases cited by the applicant. However, the question is whether the stated principles fit or are applicable in the circumstance of this application. Or put it differently, whether this application has merit. 12 The applicant has pleaded technical delay to be partly the cause of her delay to file the notice of appeal. Essentially, technical delay is a sufficient cause to warrant the grant of extension of time. In the case at hand, the technical delay pleaded is twofold; first, it covers the period between 19th September, 2019 when the decision intended to be appealed against was delivered up to 22nd December, 2020 when the ruling dismissing the application for review was pronounced, that is an aggregate of 460 days. Secondly, it covers the period between 19th May, 2021 when the application for extension of time for the first bite was lodged at the High Court up to 10th December, 2021 when the ruling refusing the grant of the application was delivered, that is 190 days. It is the contention of the applicant that throughout the stated periods she was in court corridors prosecuting the applications in a move to pursue her rights. The respondents however contended that the said periods are not fit to be termed technical since the delay was intentional and was caused by the applicant's option to lodge a review instead of appeal which she now wants to pursue. 13 It is not in dispute that the applicant was pursuing the stated applications in Court during the referred periods. The law is now settled that the delay in taking action within the time specified by law caused by the time spent in prosecuting a matter is a technical delay and it constitutes good cause for the purpose of extension of time. As such, I agree with the applicant that the period used to prosecute the applications in courts constituted technical delay. However, I wish to hasten to add that, according to paragraph 9 of the affidavit, the applicant started to make a follow up of the ruling of the review delivered on 22nd December, 2022 and the same was supplied to her on 9th February, 2021. Simple arithmetic denotes that there was a lapse of 70 days in between. Yet, there is neither explanation nor any letter attached requesting for the said ruling. In their absence, the Court can not know whether the applicant promptly requested for the ruling and thus, the lapse makes her diligence questionable. That apart, the assertion that she was supplied with the ruling on 9th February, 2021 is not in tandem with annexure RK 3 to the affidavit. The annexure concerns a drawn order which shows the same to have 14 been issued on 29th January, 2021. It means, the applicant collected the ruling after 11 days since issued. Again, the lapse was not explained. It is the finding of this Court that neither the lapses of 70 days nor 11 days were accounted for by the applicant. The law is long settled that even the lapse of a single day has to be accounted for and failure to do so would result into the dismissal of the application. [See the case of Hassan Bushiri vs Latifa Lukio

Mashayo, Civil Application No. 39 of 2007 and Wambura N J, Waryoba vs The PS Ministry of Finance & Another, Civil Application No. 320/01/2020 (both unreported)]. Her failure to account for the pointed-out lapses shows that the applicant was negligent and sloppy in pursuing her right despite the said technical delay, and thus she cannot be rescued by it. The applicant has also pleaded illegality and listed down the followings to verify her contention :-

- (a) That the Judge declined to determine and consider the Applicant's ground of appeal on the issue of spousal consent, stating that it was a new matter raised on appeal for the first time. The Judge failed to appreciate that the issue of spousal consent is a matter of law and therefore, she was enjoined to determine and consider it even if it was raised on appeal for the first time. 15
- (b) That both the Trial Tribunal and the Appellate Judge did not decide on the counter claim filed by the Respondents in the Trial Tribunal. In other words, the said counter claim remains unresolved.
- (c) That by holding that the issue of the value of the subject matter, which tend to determine the jurisdiction, was not raised during the Trial and therefore, it could not be used as a ground for nullification of proceedings at the stage of appeal, the Judge slipped into error for her failure to direct herself that jurisdictional issue can be raised at any stage even at the appellate stage.
- (d) That the Appellate Judge continued to hear an appeal in the absence of the 1st Appellant, JOHASIKASHURA who died since 2016, the fact which was well known to the Judge but the name of the said deceased continued to appear in the Court record.
- (e) That being the first appellate court, the Judge failed to re-evaluate the entire evidence adduced during the trial so as to come with sound decision. Both parties are well aware of the principle that the alleged illegality has to be apparent on the face of the record. However, it should be understood that the record referred to is that of the decision intended to be challenged as rightly submitted by the respondents and not the pleadings in the notice of motion or affidavit as submitted by Mr. Mosha in his written submission. 16 Nevertheless, I have gone through the decision being challenged and observed that the alleged illegalities are matters of law mixed with evidence, as such their determination would entail a long process of reasoning and probably distinct opinion may be reached. This defeats the principle requiring the illegalities to be the apparent on the face of record. In Chandrakant Joshubhai Patel vs Republic (supra) the Court observed the following regarding the phrase "apparent on the face of record": "An error apparent on the face of record must be such that can be seen by one who writes and reading that is an obvious and patent mistake, and not something which can be established by long drawn process of reason on points on which there may conceivably be two opinions..." That apart, points (b) and (d) above challenges the proceedings of the High Court while there is no copy of the said proceedings before the Court for reference on the alleged illegalities. But all the same, even if the copy of

the proceedings would have been there, still in my view the long-drawn process of reasoning could not have been avoided, thus contrary to the principles explained in Chandrakant Joshubhai Patel vs Republic (supra) above explained. All said and done, I am with settled view that the applicant has failed to advance good or sufficient cause upon which the Court can exercise its discretion to grant the extension of time sought. The application is therefore devoid of merit and accordingly it is dismissed with costs. It is so ordered. DATED at DAR ES SALAAM this 23rd day of August, 2023. L. G. KAIRO JUSTICE OF APPEAL The Ruling delivered this 29th August, 2023 in the presence of Mr. Stephen Mosha learned counsel for the Applicant hold brief for Mr. Melkiori Tarimo, learned counsel for the Respondent is hereby certified as true copy of original. 18

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