IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 278/15 OF 2016

1. **SAID NASSOR ZAHOR ..... FIRST APPLICANT**
2. **MUNTASIR NASSOR ZAHOR ..... SECOND APPLICANT**
3. **SABRA NASSOR ZAHOR ..... THIRD APPLICANT**
4. **INTISAR NASSOR ZAHOR ..... FOURTH APPLICANT**

VERSUS

1. **NASSOR ZAHOR ABDALLAH EL NABAHANY..... FIRST RESPONDENT**
2. **MRAJIS WA NYARAKA – ZANZIBAR ..... SECOND RESPONDENT**

(Application for Extension of Time to apply for Revision of the Judgment and Decree of the High Court of Zanzibar at Vuga)

(Rabia H. Mohamed, J.)

dated the 21st day of June, 2012
in
Civil Case No. 13 of 2012 (O.S)

R U L I N G

9th February & 8th March 2017

NDIKA, J.A.:

This is an application by a notice of motion brought under Rules 10, 48 (1) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") by the Applicants named above for extension of time within which to apply for revision of the judgment and decree of the High Court of Zanzibar in Civil Case No. 13 of 2012 (O.S.) dated 21st June 2012. The

application is supported by two affidavits, one deposed by the First Applicant and the other one affirmed by the Third Applicant. For his part, the First Respondent filed two separate affidavits in reply to the supporting affidavits.

When the matter came up for hearing the Applicants entered appearance through Mr. Salim H.B. Mnkonje, learned Advocate, while Mr. Rajab Abdallah Rajab, learned Counsel, appeared for the First Respondent. As it were, the Second Respondent entered no appearance despite having been served with the notice of hearing. Accordingly, the matter proceeded in the absence of the Second Respondent in terms of the provisions of Rule 63 (2) of the Rules.

At this point, I wish to state that before the hearing Mr. Rajab had filed a notice of preliminary objection on behalf of the First Respondent in which he raised five points. At the hearing, Mr. Rajab abandoned four of the five points and pursued the first point of preliminary objection, contending that "the notice of motion is incurably defective for contravening Rule 48 (2) of the Rules."

For the sake of accelerating disposal of this matter the Court ordered, upon the agreement of both Counsel, that the preliminary objection be argued conjointly with the substantive application. As ordered by the Court, both advocates addressed the Court on the preliminary objection and then on the substance of the application.

Arguing in support of the preliminary objection, Mr. Rajab contended that the notice of motion was incurably defective for contravening Rule 48 (2) of the Rules in that while it seeks extension of time for revision of the judgment and decree of the High Court of Zanzibar dated 21st June 2012, the actual judgment annexed to the Third Applicant's affidavit is dated 2nd July 2012. It was therefore his view that the so called judgment of 21st June 2012 sought to be revised was non-existent and that even if the Court granted the requested extension of time, it would not have jurisdiction to revise the judgment and decree dated 2nd July 2012 but the non-existent judgment and decree of 21st June 2012.

In addition, Mr. Rajab expressed his misgivings that the notice of motion indicated that the judgment and decree sought to be revised

were simply stated as the judgment and decree of "the High Court" without specifying whether it is the High Court of Zanzibar or the High Court of Tanzania. It was his view that the said omission to specify the name of the court in full was fatal.

By way of analogy, Mr. Rajab cited the decision of the Court in **Nichontinze s/o Rojeli v Republic,** Criminal Appeal No. 177 of 2011 (unreported), which was followed in the case of **Dennis Kasege v Republic**, Criminal Appeal No. 359 of 2013 (unreported), that underlined the indispensability of stating correctly the particulars required on a notice of appeal. He noted that in the above two decisions, the Court struck out the appeals due to the incorrectness in the mandatory details on the notice of appeal.

Replying, Mr. Mnkonje argued that the date of the impugned judgment as indicated on the notice of motion was based upon a copy of the decree extracted from the judgment which is shown as being dated 21st June 2012. As regards the failure to state the name of the High Court in full, Counsel argued that the said omission was not fatal because the judgment and decree annexed to the Third Applicant's affidavit

indicate clearly that the matter originated from the High Court of Zanzibar sitting at Vuga.

Mr. Mnkonje sought to distinguish the decision in **Nichontinze s/o Rojeli v Republic** (supra) on the ground that it dealt with a notice of appeal in a criminal matter that legally instituted the appeal. Unlike the notice of motion in this matter, he contended, any notice of appeal instituting a criminal appeal must state all the mandatory details correctly.

Mr. Mnkonje submitted further that the notice of motion in this matter was substantially compliant with the requirements of Rule 48 (2) of the Rules despite the defects pointed out by Mr. Rajab. In this regard, he made reference to this Court's decisions in **The Wakf Trust Property Commission Zanzibar v Damien Florence Grancian Fernandes**, Civil Application No. 197 of 2015 (unreported) and **Zanzibar Shipping Corporation v Mkunazini General Traders**, Znz Civil Application No. 6 of 2005 (unreported) in which the Court waived certain non-compliances that were deemed trifling and that the said waiver caused no prejudice to the opposite party. While in the former

case, the Court waived the applicant's misstatement of date of the judgment and decree on the notice of motion, in the latter decision the Court ignored an insignificant non-compliance with Rule 45 (1) and (2) of the Court of Appeal Rules, 1979.

Rejoining, Mr. Rajab was concerned that the date on the extracted decree annexed to the Third Applicant's affidavit varied from that of the judgment attached to the same affidavit. Nonetheless, it was his view that the correct date, in the circumstances, must be that of the judgment intended to be challenged and that the said date ought to have been stated on the notice of motion correctly.

From the contending submissions, it is evident that the parties acknowledge that any notice of motion instituting an application before this Court must conform to the requirement stipulated by Rule 48 (2) of the Rules. The said provisions state as follows:

> *"A notice of motion shall* ***be substantially in the Form A in the First Schedule to these Rules*** *and shall be signed by or on behalf of the applicant."* [Emphasis added].

As held in **The Wakf Trust Property Commission Zanzibar v Damien Florence Grancian Fernandes** (supra), Rule 48 (2) above does not provide that a notice of motion must strictly conform to Form A in the First Schedule. It is sufficient if the notice is compliant in most details, even if not completely.

Looking at the notice of motion in this matter, it is manifest that it suffers from the two ailments pointed out by Mr. Rajab. Nonetheless, while I would agree that the name of the High Court of Zanzibar from which this matter arose as well as the date of the judgment and decree desired to be challenged were matters that the Applicants did not state fully or correctly on the notice of motion, I am disposed to find the said omission and misstatement rather trifling. These are matters that could be corrected through an appropriate order of this Court. As rightly contended by Mr. Mnkonje, the aforesaid oversight has not prejudiced the Respondents because they must obviously have to deciphered from the annexed copies of the judgment and decree of the High Court of Zanzibar, the correct date of the impugned judgment and decree as well as the full name of the court from which this application originates. I am fortified that in **The Wakf Trust Property Commission Zanzibar v**

Damien Florence Grancian Fernandes (supra) the Court found a similar misstatement of the date of judgment and decree on the notice of motion as inconsequential. I would accordingly overrule the preliminary objection.

Having disposed of the preliminary objection, I now proceed to consider the substantive application for extension of time.

It is convenient at this stage that I summarise the facts of this matter as can be gleaned from the supporting affidavits and the affidavits in reply.

This is certainly an unusual dispute pitting four siblings (i.e., the Applicants) against their father (i.e., the First Respondent). Central to the dispute is ownership of a piece of land, described as Plot No. 559, located at Kiembesamaki, Zanzibar as well as another portion of landed property located at Kikwajuni, Zanzibar. It is undisputed that in 2002 the First Respondent, by a Deed of Gift, conveyed to the First and Second Applicants aforesaid Plot No. 559. In the same year, he transferred, by a second Deed of Gift, the landed property at Kikwajuni to his three other children including the Third and Fourth Respondents. The Second

Respondent, by virtue of his office as the Registrar of Documents of Zanzibar, subsequently registered the two Deeds.

In 2012, the First Respondent successfully sued the Second Respondent in Civil Case No. 13 of 2012 (O.S.) before the High Court of Zanzibar for revocation of the two gifts. In its judgment dated 2nd July 2012, the Court (Mohamed, J.) was of the opinion that the First Respondent herein presented sufficient grounds for revocation of the gifts, which, as already indicated, had then been registered as Nos. 28 and 29 of 2002. None of the Applicants herein, against whose interest was the revocation sought and granted, was impleaded as a party to that suit.

The differences between the Applicants and their father led to the institution of two separate suits before the same High Court of Zanzibar against the First Respondent: first, the First and Second Applicants lodged Civil Case No. 52 of 2014 over ownership of Plot No. 559; and secondly, the Third and Fourth Applicants sued in Civil Case No. 56 of 2014 contesting ownership of the Kikwajuni property. It is the contention by the First and Second Applicants that they learnt from the First

Respondent's Written Statement of Defence filed in Civil Case No. 52 of 2014 in reply to their Plaint that he had obtained an order from the High Court in Civil Case No. 13 of 2012 for revocation of registration of the Deeds of Gifts that he had made in 2002. Subsequently, the High Court (Mwampashi, J.) on 16th August 2016 terminated Civil Case No. 56 of 2014 lodged by the Third and Fourth Applicants after taking cognizance of that court's decision in Civil Case No. 13 of 2012 and then holding that it had no jurisdiction to question, impeach or set aside the decision in the previous case revoking the Deeds of Gifts (i.e., the decision in Civil Case No. 13 of 2012 dated 2nd July 2012). Desirous of seeking revision of the aforesaid decision in Civil Case No. 13 of 2012 at the time when the limitation period for applying for revision had elapsed, the Applicants were compelled to lodge this application for extension of time.

In his brief address on this application, Mr. Mnkonje adopted contents of the notice of motion, the supporting affidavits and the written submissions. While acknowledging in the written submissions that the intended application for revision ought to have been lodged within sixty days of the delivery of the impugned decision, Mr. Mnkonje argued that the delay to lodge it was due to the following facts: first, the

Applicants, not being the parties to Civil Case No. 13 of 2012, were unaware of the existence of said proceedings and the decision therein. Secondly, the High Court delayed supplying certified copies of the proceedings, admitted exhibits, judgment and decree that the Applicants requested on 13th March 2015 after becoming aware of the impugned decision. The requested certified copies were supplied on 18th April 2016 but without any certified copy of the decree.

In addition, Mr. Mnkonje urged the Court to grant the application on the ground that Civil Case No. 13 of 2012 was heard and determined by the High Court by denying the Applicants their right to be heard. He bitterly attacked the legality of the judgment and decree in that case, saying that apart from having been obtained without hearing the Applicants whose interest it affected adversely by revoking the two gifts, it was now being executed against them even though they were not parties to that action. In this regard, he cited the decision in **Alpitour World Hotels and Resorts S.p.A. & Others v Kiwengwa Limited**, Znz Civil Application No. 3 of 2012 (unreported) where, at page 7 of the typed ruling, the Court referred to the case of **Abbas Sherally &**

Another v Abdul Sultan H.M. Fazalbay, Civil Application No. 23 of 2002 (unreported) in which it was held that:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. The right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice."*

Mr. Mnkonje further contended that the Applicants have no right of appeal against that decision as they were not parties to the proceedings in which it was made and that they can only challenge the said decision if they are allowed to apply for its revision. It was also his submission that the Applicants' pursuit for recovery of the gifted properties through the two suits (i.e., Civil Cases Nos. 52 and 56 of 2014) that they lodged separately was frustrated as the latter of the said cases was dismissed by the High Court (Mwampashi, J.) on the technical ground that the learned Judge had no jurisdiction to question, impeach or set aside the decision

in that case revoking the Deeds of Gifts (i.e., the decision in Civil Case No. 13 of 2012 dated 2nd July 2012) made by a Judge of the same court. The learned Counsel appears to suggest that Civil Case No. 52 of 2014 that is still pending may suffer the same fate.

Replying, Mr. Rajab contended that the Applicants had themselves to blame for wasting their time in filing and prosecuting the two suits against the First Respondent (i.e., Civil Cases Nos. 52 and 56 of 2014) instead of applying for the intended revision timely. It was his view that the Applicants were slothful. In addition, he expressed that his concern that the Applicants were seeking to apply for revision while at the same they time were pursuing Civil Case No. 52, now pending in court, and that they had already lodged notice of appeal against the decision in Civil Cases Nos. 56. He thus urged this Court to preclude the Applicants from riding three horses at the same time. In this regard, he cited the decision in **Harish Ambaram Jina (By His Attorney Ajar Patel) v Abdulrazak Jussa Suleiman** [2004] TLR 343 in which this Court held that an applicant's resort to two legal avenues in two different courts at the same time in respect of the same matter was an abuse of the process of the court.

Before dealing with the substance of this application in light of the rival submissions, I find it pertinent to restate that although the Court's power for enlarging time under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. While it may not be possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion in this regard, the Court must consider the merits or otherwise of the excuse cited by the applicant for failing to meet the limitation period prescribed for taking the required step or action. Apart from valid explanation for the delay, good cause would also depend on whether the application for extension of time has been brought promptly and whether there was diligence on the part of the applicant (see, e.g., this Court's decisions in **Dar Es Salaam City Council v Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported); and **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported)).

The question now before the Court is determining whether the Applicants have, in accordance with Rule 10 of the Rules, shown good cause for granting their solicitation for extension of time.

It is evident that the decision of the High Court intended to be challenged by way of revision was handed down on 2nd July 2012. In terms of Rule 65 (4) of the Rules, the intended revision ought to have been lodged within sixty days of the delivery of the aforesaid decision. It is unchallenged that the Applicants were unable to lodge their application within time because they were unaware of the said decision for they were not parties to Civil Case No. 13 of 2012 in which that decision was made. I also find it unassailable that even after they became aware of the aforesaid decision on 13th March 2015 after the First and Second Applicants learnt of it from the First Respondent's defence, they could not lodge the application for revision because the High Court delayed supplying certified copies of the proceedings, admitted exhibits, judgment and decree. The requested certified copies were supplied on 18th April 2016 but without any certified copy of the decree.

Nonetheless, what I find rather troubling is that the Applicants did not state anywhere in the supporting affidavits as to when exactly they obtained the copy of the impugned decree, which was not supplied on 18th April 2016 along with other certified documents. Without mentioning the specific date on which they obtained a copy of the decree, the

Applicants, in my view, failed to account for the delay between 18th April 2016 and 16th September 2016 when they lodged this application. That is a period of five months.

I am mindful that it is the firmly entrenched position of this Court that any applicant seeking extension of time is required to account for each day of delay. Indeed, the Court has reiterated that position in numerous cases including **Bushiri Hassan v Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) where it held as follows:

> *"...Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

Of course, I am conscious that the Applicants were certainly at the material time in the pursuit of the two suits (i.e., Civil Cases Nos. 52 and 56 of 2014) they lodged against the First Respondent. I also recall that they claimed that they had to wait up to 6th September 2016 for the supply of the relevant certified documents in respect of Civil Case No. 56 of 2014 that had been dismissed on 16th August 2016. But, it has never been suggested that their pursuit of the two suits prevented them in any

way from taking action promptly to pursue the intended revision. Furthermore, I do not see why they had to wait for the certified documents in respect of Civil Case No. 56 of 2014, which were certainly irrelevant to their present quest for revision. In the circumstances, I am of the considered view that the application has not disclosed good cause for the delay.

There is, however, another aspect to the present motion. As rightly submitted by Mr. Mnkonje, this application sufficiently demonstrated that it is arguable that there is a manifest illegality in the manner Civil Case No. 13 of 2012 was heard and determined by the High Court without the Applicants being impleaded and accorded an opportunity of being heard before the gifts made to them in 2002 were revoked. The Applicants' situation is further compounded by the fact that apart from not having any right of appeal against the decision in Civil Case No. 13 of 2012, they are now being subjected to the execution of the aforesaid judgment and decree against them even though they were not parties to that suit. It should be noted that since they were not parties to the aforesaid suit, they can only challenge the decision therein by way of revision (see, e.g., **Halais Pro-Chemie v Wella A.G.** [1996] TLR 269; **Chief Abdallah**

Said Fundikira v Hillal A. Hillal, Civil Application No. 72 of 2002, CAT at Dar Es Salaam (unreported) and **Mgeni Seif v Mohamed Yahaya Khalfani**, Civil Application No. 104 of 2008 (unreported)).

The above allegation by the Applicants imputes a serious illegality. It is an accusation of a grave abrogation of the right to be heard protected by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 within the broad context of the right to a fair hearing. As held by this Court in **Abbas Sherally & Another v Abdul Sultan H.M. Fazalbay** (supra) such a violation would result in the nullification of the proceedings concerned and the decision therein.

I am aware that this Court held in **Principal Secretary, Ministry of Defence v Devram Valambhia** [1992] TLR 182 at 189 that:

> *"when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."*

The above position has been restated by the Court in a number of its decisions including **VIP Engineering and Marketing Limited and Two Others v Citibank Tanzania Limited**, Consolidated Civil References Nos. 6, 7 and 8 of 2006 (unreported).

On the basis of the foregoing analysis, it is my finding that even though good cause for delaying the intended revision was not shown it is imperative that the Applicants be granted an enlargement of time so that the alleged illegality can be investigated and determined. Accordingly, I order that the envisioned application for revision be filed within thirty days from today. Costs of this matter shall follow the event in the cause.

DATED at DAR ES SALAAM this 6th day of March 2017.

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL