

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J.A., WAMBALI, J.A., And LEVIRA, J.A.)

CIVIL REFERENCE NO. 11 OF 2018

EXIM BANK (TANZANIA) LIMITED APPLICANT

VERSUS

1. JOHAN HARALD CHRISTER ABRAHMSSON 2. DASCAR LIMITED 3. MAS & ASSOCIATES COMPANY LTD & COURT BROKER 4. YUSUPH SHABAN MATIMBWA	} RESPONDENTS
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**(Reference from the Ruling of a Single Justice of
the Court of Appeal of Tanzania at Dar es Salaam)**

(Mziray, J.A.)

dated the 6th day of September, 2018

in

Civil Application No. 224/16 of 2018

RULING OF THE COURT

6th November, 2019 & 15 January, 2020

LEVIRA, J.A.:

The applicant, Exim Bank (Tanzania) Limited has brought this application for reference under Rule 62 (1) (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) with the intention to challenge the decision of single Justice of the Court (Mziray, J.A.) dated 6th September, 2018 in Civil Application No. 224/16 of 2018. In the said application, the single Justice of the Court granted Johan Harald Christer Abrahamsson, the first respondent herein leave and extended the period

of instituting revision proceedings in this Court. The applicant herein was not satisfied with that decision and hence, the current application for reference.

It is on record that, sometimes in 2008 the applicant unsuccessfully sued the first and second respondents for the recovery of loan facility availed to the second respondent and guaranteed by the first respondent in Commercial Case No. 51 of 2008. Aggrieved, the applicant successfully appealed against that decision to the Court vide Civil Appeal No. 92 of 2009. Thereafter, the applicant applied for execution of a decree by way of attachment and sale of the first respondent's immovable property, that is, plot No. 16 at Jangwani Beach, Dar es salaam, Title No. 43835. Later, the first respondent's spouse initiated objection proceedings (Commercial Cause No. 69 of 2017) in vein. As a result, the executing court issued a proclamation for sale of the said first respondent's property by way of public auction. The public auction was conducted by the third respondent whereas, the fourth respondent became the successful bidder. The first respondent was dissatisfied with the public auction and he lodged Civil Application No. 19/16 of 2018 for revision of the execution proceedings. However, the said application was struck out for being incompetent. Following the

striking out of the said application, the first respondent successfully applied for extension of time within which to lodge another application for revision through Civil Application No. 224/16 of 2018 which is subject to this reference.

At the hearing of this application, the applicant was represented by Mr. Dilip Kesaria, learned counsel, whereas Mr. Kephass Mayenje, Mr. Makame Segulo, and Mr. Philemon Mutakyamirwa all learned counsel, represented the first, third and fourth respondents, respectively. The second respondent did not enter appearance despite being duly served through publication in the Mwananchi and the Daily News papers of 23rd October, 2019. Therefore, hearing of this application had to proceed *ex-parte*, against the said second respondent.

At the outset, Mr. Kesaria adopted the applicant's written submissions which he said, makes cross reference to the applicant's submission before the single Justice of the Court. Thereafter, he submitted to the effect that the single Justice of the Court (Mziray, J.A) erred as he did not consider all the material facts in order to exercise his judicial discretion. As a result, he said, the single Justice failed to appreciate the applicable facts and laws in his ruling which granted extension of time to the then applicant (the first respondent herein).

Mr. Kesaria added that during hearing of the application before single Justice, several principles were argued relating to the end of litigation while emphasising that, this matter has been in court (both in lower and this Court) for almost twelve (12) years now therefore it has to come to an end, a fact which the single Justice did not consider. In support of his argument, Mr. Kesaria cited the case of **Jaluma General Suppliers Limited v. Stanbic Bank**, Civil Application No. 48 of 2014 (unreported) where the Court held that there should be an end to litigation.

Another thing complained of by Mr. Kesaria was that, the affidavit in support of the application before the single Justice contained false statements, as he referred to paragraphs 11, 12 and 16 of the affidavit in reply by Edmund Aaron Mwasaga and paragraphs 8,9,10 and 11 of the applicant's written submission in the said application. It was Mr. Kesaria's argument that the aforesaid false statements were brought to the attention of the single Justice; but, he did not take them into account in arriving at his decision.

He added that, the affidavit was deposed by the advocate and not the applicant so it was supposed to be confined to matter's within the advocate's personal knowledge. Mr. Kesaria also argued further that the

single Justice failed to take into account that negligence of the counsel, inadvertence, ignorance of the law and procedure or blunder by counsel do not constitute sufficient cause or reason for extending time.

It was Mr. Kesaria's further submission that the single Justice failed to take into account that, the applicant had failed to exhaust all available remedies applicable to the lower court, as a result, the application was misconceived. According to him, the issue in regard to the other available remedies was stated under paragraph 15 of the affidavit in reply and para 14 of the written submission of the applicant which was presented before the single Justice.

It was Mr. Kesaria's contention that the applicant had failed to account for each day of the delay, out of 14 days which he delayed from the time his previous application for revision was struck out to the time of lodging an application for extension of time; but, the single Justice failed to take this into account. As a result, he ended up granting extension of time.

Lastly, Mr. Kesaria submitted that the single Justice refused counsel for the parties to submit on the point of illegality which the applicant had raised in his affidavit in support of the application for

extension of time. Yet, under the said sole ground the single Justice granted the application and extended time as prayed. Mr. Kesaria argued that, it was wrong for the single Justice to stop counsel for the parties to submit on the point of illegality which was raised in the applicant's affidavit on account that, a single Justice has no jurisdiction to consider it. He however stated that, in the said affidavit it was only stated that there was illegality without more. According to him, it is not every allegation of illegality that constitutes good cause. To support his position, he referred us to the decision of the Court in **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] TLR 76.

To recap, Mr. Kesaria argued that it was wrong for the single Justice to grant extension of time by relying on the point of illegality without hearing the parties on the same. It was also his argument that, the decision of the single Justice was unsafe and it sets a wrong precedent. He thus prayed that the said decision as well as the order of extension of time be reversed and this application be allowed with costs.

In reply, Mr. Mayenje adopted the first respondent's written submissions and he strongly objected this application.

Regarding the issue of illegality, the learned counsel submitted that the Single Justice was right in his decision because he had no jurisdiction to determine the issue of illegality which was raised. According to him, mere presence of issues of illegality in the first respondent's affidavit (paragraphs 10, 11, 12(a), (b), (c), (d) & (e)) and the written submission was enough for the single Justice to consider and grant extension of time. To support his averment, he cited the case of **Eliakim Swai & Another v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 (unreported) where the single Justice of the Court granted extension of time without discussing issues of illegality.

In regard to the applicant's argument that the first respondent did not account for the 14 days of delay in his application for extension of time before the single Justice, Mr. Mayenje argued that, in **Eliakim Swai & Another's** case (supra) the applicant delayed for 14 days yet it was considered that he acted promptly and the extension of time was granted. According to him, it was right for the single Justice to grant extension of time to the first respondent who was the applicant.

On the issue of false statement, Mr. Mayenje submitted that the deponent in that affidavit was referring to the applicant not himself and

therefore, there was no false statement made. He therefore argued that the submission of Mr. Kesaria on this matter is unfounded.

Regarding the issue of public policy, Mr. Mayenje submitted that this is not among the factors to be taken into consideration when the Court deals with extension of time. According to him, the Court considers good cause under Rule 10 of the Rules. He insisted that in that application, the single Justice considered special circumstances of the claim of illegality in the challenged execution proceedings; he found them to be 'good cause' and thus, he granted extension of time.

Submitting in regard to the issue of exhausting available remedies, Mr. Mayenje stated that this was among the relevant factors to be considered, as correctly considered in his views by the single Justice. As such, he said, there were only two applications for revision so the issue raised was misconceived. Mr. Mayenje argued that all the available remedies were fully exhausted and thus, he argued, this application has no merit. He therefore urged us to dismiss it with costs.

On their part, both Mr. Sengulo and Mr. Mutakyamirwa supported this application and they concurred with Mr. Kesaria's submission. They

as well prayed for the application to be allowed and the decision of the single Justice to be reversed.

In rejoinder, Mr. Kesaria mostly reiterated what he submitted earlier. He also distinguished the case of **Eliakim Swai & Another** (supra) cited by the counsel for the first respondent from the current matter. He said, in that case at page 14 the single Justice expounded on the issue of illegality and he set out the facts to be examined by the full Court. He added that, when the issue of illegality is raised, the single Justice narrates the circumstances of the illegality so raised and then grants extension of time, but this was not the case in the impugned decision.

Mr. Kesaria argued that, the counsel for the first respondent has failed to counter his arguments and therefore, he prayed for the application to be allowed with costs.

We have carefully considered the record of this application and the parties' submissions. We note that the third and fourth respondents support this application and therefore, our determination will be confined on the rival arguments of the applicant's counsel and the counsel for the first respondent. However, after close scrutiny of the

said parties' arguments we are satisfied that the main argument is in relation to the order of the single Justice granting extension of time on the point of illegality. While Mr. Kesaria and the counsel for the third and fourth respondents claimed that the Single Justice did not give the parties an opportunity to submit on the point of illegality raised by the applicant in his application, Mr. Mayenje was firm that parties were given that opportunity and the single Justice could not do more than what he did to grant the extension of time sought.

We find it important at this juncture to emphasise that, powers to grant extension of time or otherwise are under court's discretion. The single Justice who entertains an application for extension of time is normally guided by 'good cause' in reaching his/her decision whether to grant or refuse extension of time (see Rule 10 of the Rules). The term 'good cause' as said in a number of decisions cannot be defined by any fast and hard rule, it all depends on the circumstances of each case. (See for instance, **Convergence Wireless Networks (Mauritius) Limited and 3 Others v. Wia Group Limited and 2 Others**, Civil Application No. 263 "B" of 2015 (unreported))

Having made the above observation, we proceed to consider the issue of illegality which also formed the basis of extension of time in the

impugned decision. The issue before us is whether it was proper for the single Justice to rely on the point of illegality to grant extension of time; and whether parties were accorded an opportunity to be heard on the said point by the single Justice.

It is settled in a number of Court's decisions that, an allegation of illegality is among the factors which may be considered as a 'good cause' in granting extension of time (see for instance **Motor Vessel Sepideh and Pemba Island Tours & Safaris v. Yusuf Moh'd Yussuf and Ahmad Abdullah**, Civil Application No. 91 of 2013 (unreported) and **Convergence Wireless Networks (Mauritius) Limited and 3 Others** (supra). In the current matter, as pointed out earlier, there is no dispute that among the grounds presented before the single Justice was that the execution proceedings sought be to reversed contain illegalities. We therefore find that the single Justice was justified in relying on illegality as one of the grounds in granting extension of time.

Regarding whether parties were accorded an opportunity to be heard on the point of illegality in the said application for extension of time, we have gone through the record of the application and we are satisfied that in view of the record of the application before us, it is

difficult to confirm or deny the fact that parties were not given the right to present their oral arguments on the issue of illegality. However, we are fully satisfied that parties had ample opportunity to address the issue of illegality in their respective written submissions which were lodged by their respective counsel.

The record is silent as to whether the parties were refused by the single Justice to submit orally on the points of illegality raised as claimed by Mr. Kesaria. The record shows that the single Justice took cognisance of the existence of the raised points of illegality; as a result, in his ruling he granted the extension of time basing on that point as well. Even if we have to agree with Mr. Kesaria that the parties did not make oral submission on the points of illegality, still we find that it is unsafe to conclude that parties were not given the right to be heard or they were prejudiced. Our finding is based on the fact that parties had the opportunity of filing written submissions which basically represent parties' arguments, that is why when a party files written submissions and does not appear and /or make oral submissions on the hearing date, it is considered that he/she has argued his/her case and the Court may proceed to pronounce the judgment (see Rule 106(12) of the Rules).

In the circumstances, we are of the considered opinion that to resolve this issue we better revert to what is in the record of application with regard to the issue of illegality and the counsel arguments on the same before this Court. The record is clear that when the application for extension of time was before the single Justice of the Court, the applicant therein (first respondent) filed a Notice of Motion which among other grounds, contained a ground of illegality. We wish to quote it hereunder:

"That the execution proceedings sought to be revised contain illegalities which are apparent on the face of the record."

In the supporting affidavit, the said illegality was elaborated under paragraph 12 as follows:

"(12) That following sale of the applicant's property situated at plot No.16, Jangwani Beach with certificate of Title No.43835; the Applicant immediately preferred an application for revision before this court against the Execution proceedings for being carried illegally and also been tainted with fraud/ or material irregularity as hereunder:

- a) That there was no legally issued prohibitory order in respect of the attached property before issuance of proclamation of sale.*
- b) That the sale was done whilst there existed a valid court order which restrained the 1st and 3rd Respondents from auctioning or otherwise selling of the said property.*
- c) That the said sale was done prematurely following the proclamation of sale which was issued on the 29th day of November, 2017 without there being any application for an order of sale from the Decree Holder as required under the law and or there was no written consent of the Judgment debtor.*
- d) That the proclamation of sale was not fixed on a conspicuous part of the property and as such the proclamation of sale did not contain any order to that effect and / or fixing the proclamation of sale at conspicuous part of the court house.*
- e) That the House being residential house occupied by me, my wife and dependent children for residential purposes was not liable for attachment.”*

Those points were also explained in the applicant's written submissions where he had also supported his arguments with authorities.

We also note that, the respondents made their respective reply through affidavits in reply and written submissions. For the purpose of arguments raised by Mr. Kesaria in this application, we find it important to reproduce the applicant's reply in the said application for extension of time. While responding to the points of illegality raised, the applicant stated under paragraph 16 of the affidavit in reply as follows:

"16. The several allegations of fraud and irregularity made at paragraph 12(a)-(d) of the Applicant's Affidavit are false. Paragraph 12(e) of the Applicant's Affidavit is false statement under oath. The house on plot No. 16 Jangwani Beach, Dar es salaam Titled No. 43835 sold by Public Auction in execution of the Decree of the trial court is not and never has been a residential house occupied by the deponent, his wife and dependent children for residential purposes as deposed or at all."

Yet, in the reply submission, the applicant was very brief in addressing the issue of illegality raised as reproduced hereunder:

"13. One of the grounds put forward in the application is alleged illegality in the execution proceedings in the lower court which the applicant seeks to revise in his intended Application for Revision. The first respondent acknowledges that this

*Court has said in a number of its decisions that time would be extended if there is an illegality to be rectified. However, this Court has not said that time must be extended in every situation. Each situation has to be looked at on its own merits. See Authority No. 6 from the first respondent's list of Authorities, the reported case of **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] TLR 76." [Emphasis added].*

In this regard, we are of the considered opinion that even though the single Justice did not make direct reference to the written submissions of the parties, he must have considered the same before he stated as follows in his Ruling at pages 8-9:

"Also, in application for extension of time among the factors to be considered by the Court are the special circumstances showing why the applicant should be allowed to argue the case out of time. One of such special circumstances this Court has consistently held, is a claim of illegality or otherwise of the challenged decision or order or the proceedings to that decision... In the case at hand, the applicant complains that the execution process by selling plot No. 16 Jangwani Beach with Title No. 43835, the plot in dispute, was with material irregularities, tainted with fraud and contained illegalities which were apparent on the face

of the record. It should be noted that once there is a claim of illegality, a single Justice of Appeal lacks the jurisdiction to determine the matter to ascertain the illegality. The same must be ascertained by the Full Court...I will therefore refrain from discussing this issue of illegality for want of jurisdiction.” [Emphasis added].

Our close reading of the pleadings and the decision made by the single Justice of the Court drives us to a finding that, both parties had an opportunity to address the Court on the issue of illegality raised by the then applicant. We note that, Mr. Kesaria raised the issue of false statements contained in the applicant's affidavit, in particular, he challenged the deponent's statement regarding the ownership and status of the house in dispute. This issue in our opinion, was supposed to be raised as a point of preliminary objection but the counsel for the applicant did not do that. It is so unfortunate that, he only challenged it in his affidavit in reply but said nothing in reply to the applicant's written submissions. We further note that, except the said single point of illegality challenged by the applicant, the rest remained intact as the applicant opted not to reply on each point.

In this regard, we hold that the parties were not denied their right to be heard, particularly so, because while the counsel for the applicant stresses that both parties were denied the right to be heard, the counsel for the first respondent stated which we agree that, the said right was not infringed by the single Justice. With respect, we are unable to agree with Mr. Kesaria that the single Justice denied the parties an opportunity to address the Court on the point of illegality due to lack of jurisdiction because the record of application before us does not support his arguments. In **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527 it was held that:

- (i) "A Court record is a serious document; it should not be lightly impeached.*
- (ii) There is always a presumption that a Court record accurately represents what happened."*

We subscribe to the above holdings of the Court and we are firm that the above quoted part of the decision of the single Justice in the current application bears evidence that, having acknowledged the points of illegality raised, he proceeded to show the position of the law in regard to the powers of the single Justice and thereafter, precisely in our opinion, stated that he was not in a position to determine those points. We observe that the single Justice did not close the door for the

parties, instead he opened it up by granting extension of time as a way of giving both parties an opportunity to address the Court not only on the alleged illegalities, but also other points raised by Mr. Kesaria through the intended revision application.

We further observe that, at pages 6, 7 and 8 of the impugned ruling of the single Justice, it is vividly clear that almost all the complaints which Mr. Kesaria has raised in this application were considered. It is important to note that, the decision of the single Justice did not base solely on the point of illegality which was raised by the applicant. Our reading of the record of application and the impugned ruling in particular, shows that the single Justice having gone through the entire record of application and in exercise of his discretion was satisfied that the applicant was able to account for each day of the delay.

Since the application before the single Justice was for extension of time to file revision application, we entertain no doubt that he was not in a position to resolve those other issues as some of the matters can be argued in the application for revision. We are settled that in the circumstances of the application for extension of time placed before the single Justice, it was proper for him in exercise of his discretionary

powers to find that, the applicant was able to show 'good cause' justifying the relief sought.

For the foregoing reasons, we find and hold that this application is unmerited and therefore, we decline to reverse the decision of the single Justice of the Court.

In fine, we dismiss this application. Having considered circumstances of this application, we make no order as to costs.

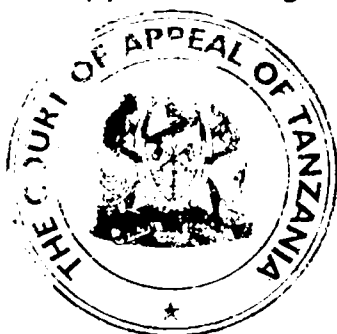
DATED at DAR ES SALAAM this 27th day of December, 2019.

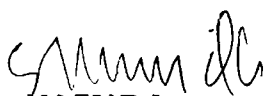
K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 15th day of January, 2020 in the presence of Mr. Zachary Daudi, learned Counsel for the Applicant and Mr. Ereneus Swai, Mr. Ramadhani Sukari and Mr. Phillemon Mutakyamirwa, learned Counsel for the 1st, 3rd, and 4th Respondents respectively and in the absence of the 2nd Respondent dully served, is hereby certified as a true copy of the Original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL