IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 319/16 OF 2020

MEGA BUILDERS LIMITED ..... APPLICANT

VERSUS

D.P. I. SIMBA LIMITED ..... RESPONDENT

(Application for extension of time to apply for revision out of time against the Order of the High Court (Commercial Division) at Dar es Salaam)

(Mruma, J.)

dated the 30th day of November, 2017
in
Commercial Case No. 109 of 2015

RULING

15th & 26th February, 2021

LEVIRA, J.A.:

By notice of motion made under Rules 10, 48(1) & (2) and 49(1) of the Tanzania Court of Appeal Rules (the Rules), MEGA BUILDERS LIMITED, the applicant herein is moving the Court for an order that extension of time within which to apply for revision out of time be granted. The notice of motion is supported by an affidavit affirmed by BALBIR MALIK SINGH, the Managing Director of the Applicant Company. In opposition to this application, the respondent filed an affidavit in reply

deposed by DEUSDEDITH LURANGA a Principal officer of the Respondent Company.

It is on record of application that via Commercial Case No. 109 of 2015 the respondents instituted a suit against the applicant in the High Court of Tanzania, Commercial Division (Mruma, J.) seeking among other orders for an order for the payment of the total sum of USD 51,512.16 being the outstanding debt for the items supplied to the applicant. However, trial could not take place as the parties settled their dispute through mediation on 2nd March, 2016. Following that settlement, the High Court entered consent judgment and decree. Later, the respondent initiated execution proceedings against the applicant by applying for arrest and detention of Mr. BALBI MALIK SINGH as a civil prisoner.

On 14th November, 2019, the High Court issued the applicant a notice to show cause why execution should not proceed against the Managing Director of the applicant. However, the applicant's Managing Director contended that the said notice was not served upon him and there is no proof of service to that effect. On 30th November, 2017 the High Court ordered arrest warrant to be issued against BAILBI MALIK

SINGH as a way of compelling his appearance before the court and hence the current application.

In this application, the sole ground raised by the applicant is that the order of the High Court was issued illegally and irregularly contrary to the law relating to application for executions.

At the hearing of the application, the applicant was represented by Mr. Ashiru Lugwisa, learned advocate, whereas the respondent enjoyed the services of Mr. Said Adam Nyawambura, learned advocate.

Having adopted the notice of motion and the supporting affidavit, Mr. Lugwisa elaborated the applicant's contention as stated under paragraph 8 of the supporting affidavit that, the execution proceedings are tainted with illegalities and impropriety. According to him, the summons to show cause was never issued to the applicant and there is no proof that the same was indeed served upon him. Also he contended that, it was wrong for the court to issue an arrest warrant before the respondent could deposit sufficient amount as subsistence allowance for the judgment debtor.

He went further submitting that, this application is made under Rule 10 which confers discretionary powers to the Court to extend time to do any act required by the Rules provided that good cause is shown. According to him, "good cause" depends on the peculiar facts of each case including illegality as stated in a number of decisions of the Court. To support his argument, he cited the case of **Citibank Tanzania Limited v. Tanzania Telecomunications Co. Ltd & 4 others**, Civil Application No. 97 of 2003 (unreported) at page 12 where the Court held that the possibility of a breach of natural justice in the court below which had been shown, amounted to sufficient cause for extension of time.

The learned counsel argued that in the current application, the deponent of the supporting affidavit has stated that he was denied the right to show cause because he was not served with a notice to appear. This fact, he said, was not seriously challenged by the respondent in affidavit in reply as there was no affidavit of the process server attached to prove service. He cited the case **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) which cited with approval the case of **The Principal Secretary Ministry of**

Defence and National Services vs. Devram Valambia [1991] TLR 387 where the Court stated that, the illegality of the impugned decision has to be clearly visible on the face of record.

It was Mr. Lugwisa's contention that in the application at hand, it is apparent on record that the applicant was not served with a notice to show cause and therefore he prayed for the application to be allowed.

In reply, Mr. Nyawambura adopted the respondent's affidavit in reply as part of his submission. Having done so, he argued that the case of **Ngao Godwin** (supra) cited by the counsel for the applicant reiterated the principles for grant of extension of time set in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appeal No. 2 of 2010 (unreported); which includes:

> *"(a) The applicant must account for all the period of delay.*
>
> *(b) The delay should not be inordinate*
>
> *(a) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

(b) If the court feels that their other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

Basing on the above principles, Mr. Nyawambura argued that the impugned order of the High Court was delivered on 30th December, 2017 and the current application was lodged on 5th August 2020 but the applicant has never accounted for the delay.

Regarding the alleged illegality, he said, the illegality complained of by the applicant must be apparent on the face of record but this is not the case in this application. He referred the Court at page 8 of the High Court proceedings and paragraph 4 of the affidavit in reply where it is clearly stated that, the respondent applied for the arrest and detention of Mr. BALBI MALIK SINGH following the disobedience of court order to appear for execution and refusal to accept service of summons. However, he admitted that initially the respondent was represented by another advocate (Mr. Mussa Mfinanga) who initiated the execution process and therefore, he had no other documents including the summons to show cause which was issued to the applicant but rejected during service.

Mr. Nyawambura concluded his submission by stating that, the applicant has failed to account for the delay and the claim of illegality was not established. He thus prayed for this application to be dismissed with costs.

In his brief rejoinder, Mr. Lugwisa stated that each case has to be decided on its own circumstances. He insisted that the alleged illegality in this case is apparent on the face of record. According to him, pages 8 – 9 of the High Court proceedings referred to by the counsel for the respondent cannot change anything unless proof of service and refusal of summons is made available. He added that the affidavit of the process server is not attached to the respondent's affidavit in reply to prove service.

The learned counsel reiterated his submission in chief and maintained that there was no proof of service to the applicant. Finally, he prayed for the application to be granted with costs.

I have carefully conserved the notice of motion, affidavits in support of the application and in reply, parties submissions and cited authorities. In determining whether or not the applicant has shown

good cause in terms of Rule 10 of the Rules under which this application is preferred, a number of factors beyond the sole ground of illegality raised by the applicant herein has to be considered. In **Ngao Godwini Losero** (supra) the Court quoted with approval the decision of the defunct Court of Appeal of Eastern Africa in **Mbogo v. Shah** [1968] EA where it was held that:

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice."*

In the light of the above decision, I must state that despite the development of jurisprudence and wide interpretation of what amounts to "good cause" the above factors cannot be ignored casually as in the current application where the applicant has decided to rely solely on the ground of illegality. The applicant did not even attempt to state the reasons for delay while the delay in this matter is of more than two years, from 30th November, 2017 when the impugned decision was delivered to 5th August, 2020 when this application was lodged. It is settled position that in applications for extension of time, the applicants

must account for every day of delay. (See **Yazid Kassim Mbakileki v. CRDB (1996) LTD Bukoba Branch,** Civil Application No. 412/04 of 2018 (unreported)).

It is my considered observation in the current application that, the applicant's unexplained delay of more than two years is inordinate.

As intimated earlier on, the applicant has decided to raised illegality as a sole ground constituting good cause for extension of time. Much as it can be appreciated that illegality is one of factors to be considered as good cause, the same is not an automatic right. For illegality to be considered as a good cause for extension of time, it must be apparent on the face of record. (See **The Principal Secretary Ministry of Defence and National Service** and **Lyamuya Contraction Company Ltd** (supra); **Chiku Harid Chonda v. Getrude Nguge Mtinga as Administratria of the late Yohane Claude Dugu**, Civil Application No. 509/01 of 2018 (unreported)).

In the current application, the High Court ordered arrest warrant to be issues against the applicant on 30th November, 2017. However,

the applicant alleged that the execution proceedings are tainted with illegality and impropriety, to wit:

> *(a) The summons to show cause was never issued to the applicant/Judgment Debtor, and there is no proof that the same was indeed served upon him.*
>
> *(b) It was wrong for the court to issue an arrest warrant before the respondent/decree holder could deposit sufficient amount as subsistence allowance for the judgment debtor.*

Looking closely at the above points of the illegality alleged by the applicant I am not persuaded that they really deserve to be termed so. I will explain. The first point requires a proof of two things, whether the summons to show cause was issued and if the answer is in affirmative the question that follows is whether the said summons was served on the applicant.

It is on record that on 14/11/2017 the High Court order summons to show cause to be issued to the applicant (See page 8 of the proceedings of that date). Now whether it was issued or not, is something which requires proof. Nothing on record suggesting that the

court had no jurisdiction while making that order. If it was issued, whether the applicant was served, is also a matter of fact requiring proof.

Regarding the second ground, the focus is on whether or not the respondent deposited sufficient amount as subsistence allowance. Just like in the first ground, this ground also requires proof through long process. Although the respondent's newly engaged advocate admitted that he had no record right away to prove the service, still, in my considered view, the analysed grounds do not qualify to be termed 'illegality'. The record of trial proceedings shows that the order of the High Court directed for issuance of arrest warrant to compel the appellant's attendance for him to be heard as to why execution should not take place against him. What followed next after the issuing of the arrest warrant is unclear. At any rate, it cannot be said with certainty that the applicant was denied the right to be heard as alleged by his counsel.

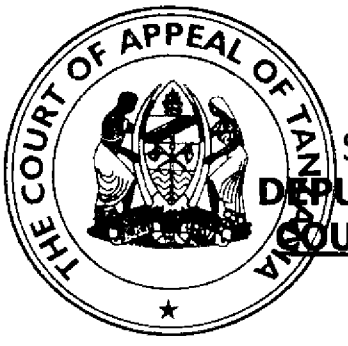
Having so stated, I find and hold that, the applicant has failed to account for the delay and establish the alleged illegality as a good cause

for extending time for him to file the intended revision. As a result, I hereby dismiss this application with costs.

DATED at **DAR ES SALAAM** this 24th day of February, 2021

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 26th day of February, 2021 in the presence of Mr. Ashini Lugwisa, learned Counsel for the Applicant and Mr. Said Adam Nyawambura, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL