IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 495/16 OF 2022

THE ATTORNEY GENERAL ..... APPLICANT

VERSUS

MICCO'S INTERNATIONAL (T) LTD ..... 1ST RESPONDENT

TANZANIA RAILWAY CORPORATION

(Successor of the RELI ASSETS HOLDING COMPANY) ..... 2ND RESPONDENT

(Application for extension of time to file an application for revision against the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Nchimbi, J.)

Dated 10th day of October, 2014

in

Commercial Case No. 53 of 2009

RULING

1st & 21st November, 2023

ISMAIL J.A.:

In this application, I am called upon to exercise the Court's powers vested under rule 10 of the Tanzania Court of Appeal Rules, 2009, to allow an extension of time within which to commence revision proceedings. The intended proceedings arise from the decision of the High Court (Commercial Division) delivered on 10th October, 2014. The parties to that suit were the 1st respondent, who featured as the plaintiff and Reli Assets Holding Company, the 2nd respondent's predecessor, who was impleaded as the

defendant. The subject matter of the claim was TZS. 232,786,768/- that allegedly accrued out of a contract for fumigation works that covered an area measuring 1,724,316 square metres. The contention by the 1st respondent is that the 2nd respondent had reneged on its undertaking under the contract and, as a result, the said sum remained due and unsatisfied. The trial court acceded to the 1st respondent's prayer for payment of the claimed sum plus interest thereon and costs of the matter.

The application is supported by affidavit of Mr. Mark Mulwambo, Principal State Attorney in the Office of the Solicitor General. Several grounds on which the application is based are enumerated. Key among the applicant's depositions is the fact that the applicant was not a party to the original proceedings and that his only entry route into the proceedings is through revision. It is also the applicant's averment that the decision sought to be challenged is tainted with illegality. Instances of illegalities are spelt out in paragraph 11 of the supporting affidavit.

The application has encountered an opposition from the 1st respondent. The affidavit in reply, sworn by Dennis Michael Msafiri, learned counsel for the 1st respondent has taken the view that the action taken by that the applicant ought to have been taken many years ago because he was

aware of the existence of the decision. He played down the contention of illegality in the decision.

When the application came for hearing, the applicant was represented by Ms. Dorothea Method, learned Senior State Attorney, assisted by Mr. Stanley Kalokola, learned State Attorney. He was pitted against Mr. Dennis Msafiri for the 1st respondent and Mr. Ramadhani Mbahe, learned State Attorney, for the 2nd respondent.

Ms. Method submitted that the application stems from proceedings to which the applicant was not a party, and the latter's entry into the matter was on account of the role that the applicant plays as the custodian of the interests of the Government. She argued that this role was underscored in the case of **Attorney General v. Swiss Singapore Overseas Interprises PTE Limited**, Civil Application No. 110/01 of 2019 (unreported). Learned Attorney further submitted that powers of intervention are also spelt out in sections 6 (a) and 17 (1) (a), 2 (a) and (b) of the Office of the Attorney General (Discharge of Duties) Act.

On conditions for granting an extension of time, Ms. Method contended that the same were restated in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's**

Association of Tanzania, Civil Application No. 2 of 2010 (unreported). She argued that, while the Court enjoys the discretion to grant or refuse an application, it is a legal certainty that illegality of the decision to be impugned constitutes sufficient cause.

Expounding further on illegality, Ms. Method argued that grounds of illegality in the instant application are listed in the notice of motion, adding that these grounds are important and should constitute the basis for granting the application.

The learned Attorney was emphatic that the only remedy available to the applicant, a non-party in the trial proceedings, is an intervention by way of revision, as was stated in the case of **Mussa A. Msangi & Another v. Anna Peter Mkomea**, Civil Application No. 188/17 of 2019; and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 (both unreported). She urged the Court to grant the application.

For his part, Mr. Msafiri stated at the outset that he was opposing the application. He held the view that the applicant has not been diligent in pursuing what he perceives to be the right of intervention. He argued that the applicant was aware of the impugned judgment since way back in 2015 but he chose to take action after commencement of the execution

proceedings. Mr. Msafiri urged the Court to make reference to Annexure 4 attached to the Affidavit in reply. In the said letter, he contended, the Solicitor General expressed is knowledge of the presence of the decree and advised on ways to satisfy the respondent's rights.

Amplifying the contention that the applicant has acted in bad faith, learned counsel argued that the applicant was in a position to even direct the 1st respondent to appeal against the decision of the High.

On revision, the contention by Mr. Msafiri is that the grounds intended to be relied on are matters of evidence which can be challenged by way of appeal.

While acknowledging the fact that the Attorney General was not a party to the original proceedings, the view held by Mr. Msafiri is that nothing justifies seven years of inaction. He referred me to the case of **Wambele Mtumwa Shahame v. Mohamed Hamisi**, Civil Application No. 138 of 2016 (unreported).

Submitting on illegality, Mr. Msafiri argued that the same is, as far as this case is concerned, far-fetched and not apparent on the face of the record. It requires going through the entire record and, even then, there would be nothing that would infer any sense of lack of jurisdiction or denial

of the right to be heard both of which are the real instances of illegality. He argued that the decision could be erroneous but free from illegality. Mr. Msafiri implored me to be guided by the Court's decision in **Tauka Theodory Ferdinand v. Eva Zakayo Mwita (As Aministratrix of the Estate of the late Albanus Mwita & 3 Others**, Civil Application No. 300/17 of 2016 (unreported).

He wound up his submission by citing the case of **Robert Kadaso Mageni v. Republic**, Criminal Appeal No. 476 of 2023 (unreported), in which it was held that no court is allowed to grant an extension of time for an appeal barred by statute. He was firm that revision cannot tackle matters of evidence.

When Mr. Mbahe's turn came, he prayed that it be recorded that the 2nd respondent was supporting the application.

In rejoinder, Mr. Kalokola argued that the Court has a duty where illegality is raised, and the purpose is to put the record right. Regarding the intervention, Mr. Kalokola submitted that one of the interventions is through revision, and that the applicant became aware of the decision after the lapse of 60 days. He argued that matters touching on illegality are a subject to be covered in the impending appeal.

From these contending submissions, the question for my determination is whether this application has what it takes to succeed.

As I stated earlier on, powers of the Court to extend time are derived from the provisions of rule 10 of the Rules. The rule sets good cause as a condition precedent for grant of extension time, meaning that a party seeking to invoke the Court's discretionary powers must conform to this requirement. Demonstration of good cause must not only apply to the delay but also to the reasons for extending time. This position was enunciated by this Court in **Republic. v. Yona Kaponda and 9 Others** [1985] T.L.R. 84. It was reasoned as follows:

> *"In deciding whether or not to extend time I have to consider whether or not there is 'sufficient reasons'. As I understand it, 'Sufficient reasons' here does not refer only, and is not confined, to the delay. Rather, it is 'sufficient reason' for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved".*

Crucially, as the applicant demonstrates sufficient cause, he is also under obligation to demonstrate diligence and not negligence, apathy or any form of procrastination that is synonymous with lack of diligence. This Court underscored this requirement in the case of **Luswaki Village Council and Paresui Ole Shuaka v. Shibesh Abebe,** Civil Application No. 23 of 1997 (unreported), in which it was held:

> "*.... those who seek the aid of the law by instituting proceedings in court of law must file such proceedings within the period prescribed by law...Those who seek the protection of the law in the court of justice must demonstrate diligence".*

The contention by Ms. Method and Mr. Kalokola is that the applicant was not impleaded in the trial proceedings that bred the impugned decision. In such a case, the recourse available to him is to come to this Court by way of revision. In the counsel's view, this is a right that must be availed to the applicant without being fettered. Mr. Msafiri's view is that realization of such right must first involve surmounting the present hurdle, adding that the grounds for the intended revision are, by and large, matters of evidence and not of law.

I wish to state at the outset that, while the question as to whether revision is the right course of action is valid and significant, its conversation is a subject for another day. This is essentially because what the Court needs to pronounce itself on, in the instant application, is the sufficiency or otherwise of the grounds for extension of time. With respect to sufficient cause, the applicant's trump card is illegality whose particulars are enumerated in paragraph 11 of the applicant's affidavit. For ease of reference, it behooves me to reproduce them, as hereunder:

(i) *That, there was no invitation of tender which was approved by the Tender Board of the 2nd Respondent as required by the law;*

(ii) *There is no proof as the tender which the 1st Respondent won was out of single sourcing or competitive procurement as required by the law;*

(iii) *That, there is no proof that tender was not sanctioned by the Chief Executive Officer or Accounting officer of the 2nd Respondent as required by law;*

(iv) *That, there is no procurement contract signed by the 1st Respondent and 2nd Respondent to exhibit their relationship as required by the law for which the breach was established; and*

(v) *That, there is no evidence to show that the said procurement agreement or contract claimed to have been breached was*

sanctioned or vetted by the Attorney General or any competent State Attorney as required by the law.

These are the grounds that Mr. Msafiri has taken a swipe at, contending that the alleged illegality in them is far-fetched and requires going through the entire record to be able to discover it.

It is trite law that illegality, once pleaded and proved, constitutes a ground for extension of time. This Court has held in numerous decisions that successful proof of illegality spares an applicant of the requirement of accounting for days of delay. Some of the decisions include those that have been cited by learned counsel for the parties, such as **Valambhia's** case (supra); **Lyamuya Construction Company Limited** (supra); and **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported). The emphasis in all of the decisions is that the illegality sought to be relied upon must be of sufficient importance such as lack of jurisdiction, denial of the right to be heard, or failure to observe time prescription in taking action.

While illegality is often times applied as a ground, not many people are able to tell what it is and, as a result, a confusion has occurred, leading to

reliance on consternations which do not have the quality of what an illegality is. It is in view thereof that in **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported), the Court was constrained to define illegality. In that case, the definition of illegality was extracted from the Black's Law Dictionary, 11th Edition, to mean: *"an act that is not authorized by law" or "the state of not being legally authorized"*. Further to that, the Court felt the persuasive need of adopting the broad view held by the Supreme Court of India in **Keshardeo Chamria v. Radha Kissen Chamria & Others** AIR 1953 SC 23, 1953 SCR 136, wherein illegality was defined as follows:

> "... ***the words "illegally" and "material irregularity" do not cover either errors of fact or law***. *They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after formalities which the law prescribes have been complied with".*
> [Emphasis is added]

See also: **Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another**, Civil Appeal No. 174 of 2020 (unreported).

What I gather from the foregoing is that mere decisional errors, however plausible and obvious they may be, or matters touching on improper evaluation of evidence would not fall in the realm of illegality.

I have dispassionately gone through the grounds enumerated by the applicant. All of them appear to cast some serious doubts on the2nd respondent's compliance with the legal and procedural aspects that led to the award of the tender from which the claim of damages arose. In my considered view, the alleged grounds exhibit one thing. That it is not evident that the 2nd respondent conformed to the law relating to procurement when it decided that the award should go to the 1st respondent. My fortified position is that these are not points of illegality as the applicant would want us to believe. If committed by the trial court, they would, at best, be considered to be some decisional errors and faults in the evaluation of evidence. As correctly submitted by Mr. Msafiri, they are matters that touch on correctness of the decision of the High Court. As such, they cannot be counted as instances of illegality.

Worth of the note, as well, is the fact that, though blemishes for the non-compliance are thrown at the trial court, these are shortfalls (if indeed they are) which were committed by the 2nd respondent at the award stage.

They have nothing to do with adjudication process at the trial stage. I am unable to comprehend how these 'improprieties' would be blamed on the trial court.

It brings me to the position held by this Court, as was accentuated in **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (unreported) that illegalities to be challenged in an impending appeal or revision must be those of the decision sought to be challenged. This is because extension of time is intended to give a lifeline that will enable the applicant to rectify the illegality in the decision sought to be challenged. Nothing suggests to that the illegality in the pre-trial stages of the tender will be corrected through the impending revision.

The net effect of the foregoing is that the applicant has not been able to convince the Court that illegality exists in the decision sought to be impugned. With illegality as a ground out of our way, the fact of the matter is that the delay in filing the application, lasting a whopping seven years has not explained out, in the midst of an unchallenged contention by Mr. Msafiri that the applicant was aware of the impugned decision not so long after it was delivered.

I consequence of all this, I find that this application has not met the threshold requisite for exercising the Court's discretion and granting it. Accordingly, the same fails and it is hereby dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 20th day of November, 2023.

M. K. ISMAIL
JUSTICE OF APPEAL

The ruling delivered this 21st day of November, 2023 in the presence of Ms. Mariam Matobolwa, learned State Attorney for the Applicant, Othman Ramadhani Kipeta, learned counsel for the 1st Respondent and Ms. Mariam Matobolwa, learned State Attorney for 2nd respondent, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL