IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 466/01 OF 2021

EURASIA HOLDINGS LIMITED ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF ENERGY ..... 2ND RESPONDENT

INDEPENDENT POWER TANZANIA LIMITED (IPTL) ..... 3RD RESPONDENT

(Application for extension of time within which to file for a revision against the judgment and decree of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Banzi, J)

Dated the 19th March, 2021
in
Civil Case No. 90 of 2018

RULING

14th & 21st November, 2023

MGEYEKWA, J.A;

Before me is an application for extension of time made under rules 10, and 65(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking the indulgence of the Court to exercise its discretion to extend time within which to assail by way of revision the decision of the High Court in Civil Case No. 90 of 2018. The notice of motion is supported by an affidavit sworn by

James Basil Yarah, the Director of the applicant who also filed a written submission. The third respondent did not file any affidavit in reply. The application is strongly contested by the 1st and 2nd respondents who filed a joint affidavit in reply.

In order to appreciate the sequence of events leading to this matter, it is instructive at this stage to set out the facts briefly. From the affidavit sworn by Mr. Yarah, and the original record, the facts may briefly be stated as follows: The 1st and 2nd respondents, The Attorney General and Permanent Secretary Ministry of Energy, instituted in the High Court Civil Case No. 90 of 2018 against the 3rd respondent, Independent Power Tanzania Limited (IPTL). The reliefs sought involved payment of the principal sum of USD 198,878,972.70, TZS. 33,282,880,402.37, Swiss Francs (CHF) 1,077.00 interest out of USD 185,449,440 at the rate of LIBOR plus 2% from 1st September, 2018 until the date of full and final payment, interest at the rate of 20% per annum from 30th March, 2018 to the date of judgment, interest on the decretal amount at the court rate of 12% per annum from the date of judgment to the date of final payment and satisfaction in full, general damages, costs of the suit and any other reliefs as the court may

deem fit and just to grant. On 25th March, 2021, respondents entered a deed of settlement.

It appears that the said Deed of Settlement was signed by the single shareholder of the 3rd respondent while in effect it extend to the applicant herein who is also a shareholder of the 3rd respondent. Following the signing of the Deed of Settlement, on 8th July, 2021, the applicant's attempts to file a revision proved infertile. Henceforth, the applicant has approached the Court through the present application seeking extension of time within which to lodge an application for revision.

When the application was placed before me for hearing, the applicant was duly represented by Mr. Mpaya Kamara, learned counsel. On the other hand, Mr. Gerlad Njoka, Principal State Attorney assisted by Ms. Celina Kapanga and Erigh Rumisha both learned State Attorneys, represented the first and second respondents. The third respondent had the legal service of Mr. Leonard Manyama assisted by Ms. Dora Mallaba both learned counsel.

Submitting in support of the application, the learned counsel for the applicant commenced his submission by fully adopting the contents of the notice of motion, the supporting affidavit, the supplementary affidavit and

his written submissions. In short, he submitted that the applicant is seeking for extension of time to lodge a revision of the decree of the High Court in Civil Case No.90 of 2019 dated 10th March, 2021. He went on to submit that the applicant became aware of the existence of the consent decree when time to file the same had long passed. He went on to submit that the applicant attempted to have the decree reviewed, however, it took a long time after being informed that his request was not granted.

On the ground of illegality, it is Mr. Kamara's assertion that, the impugned decision is tainted with illegality. He stressed that there are points of law worthy of the attention of the Court. Reinforcing his submission, Mr. Kamara referred to paragraphs 4.2 and 4.3 of their written submission.

Regarding the ground of miscarriage of justice, the learned counsel for the applicant contended that there was a serious failure of natural justice. To bolster his proposition, he referred to paragraph 4.4 of the applicant's written submission. Referring to paragraphs 4.1.4 which read together with paragraphs 2.1 and 2.2, he argued that, the applicant was made to bear the consequence of the decree while he was not a party to the case.

To this end, Mr. Kamara submitted that the reasons advanced by the applicant constitute good cause for extension of time even in the absence of on account for the days of delay.

In response, Mr. Rumisha strenuously opposed the application by arguing that the applicant has failed to account for each day of delay. Relying on the affidavit in reply, Mr. Rumisha contended that the applicant was aware about the Deed of Settlement which was concluded by IPTL and the Attorney General on 4th July, 2021. Mr. Rumisha faulted the applicant for failure to take prompt action to file the instant application. He argued that the applicant has failed to account for each day of delay from 4th to 8th July, 2021.

Regarding the alleged illegality, he said, the illegality complained by the applicant must be apparent on the face of record but this is not the case in this application. Mr. Rumisha clarified that at the trial court, there was no any dispute between the Directors, the issue was between IPTL and the Ministry of Energy. He contended that it was the Company, not the Directors, who concluded the matter on 18th May, 2021. He continued to clarify that, the parties to the dispute and the terms agreed upon by the parties are well shown in annexures EH1 and EH2. He stressed that IPTL had all powers and

authority to conclude the dispute. He submitted that Director and Shareholder were afforded the right to be heard.

The learned State Attorney averred that the applicant in his affidavit specifically in paragraphs 8 to 10 mentioned one Mlingi but in the absence of Mlingi's affidavit, the period from 26th July, 2021 to 22nd September, 2021 was not accounted for. In the circumstances, Mr. Rumisha stated that the applicant has not accounted for every day of delay as emphasized by the Court in **Heritage Insurance Co. Ltd v Sabina Mchau and 2 Others**, Civil Application No. 284/09/2019 (unreported).

Mr. Rumisha continued to argue that the raised illegality is not apparent on the face of the record as it requires long drawn argument. He went on to submit that under the Company law, the Directors are the brain and mind of the Company and there is a line between the Director and the Company. To reinforce his argument, he cited the cases of **Omary Ally Ibrahim v Ndge Commercial Service Ltd, Civil Application** No.83/01 of 2020, and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015.

He referred to the case of **The Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 and distinguished it from the case at hand by stating that in **Valambhia's** case, the Government was condemned unheard while in the case at hand the Director or Shareholder are the ones who complained that they were unheard. He contended that the Deed of Settlement was addressed to the Company and the execution would involve the property of the Company, not the Director's property. To bolster his proposition, he cited the case of **Mackriman Trust Fund v NBC and 2 Others**, Civil Appeal No.330 of 2022 (unreported), the Court cited the cases of **Salim Kabora v TANESCO Ltd and 2 Others**, Civil Appeal No. 55 of 2014 and **Marsh v Moores** [1949] KB 2008.

In his conclusion, Mr. Rumisha submitted that the applicant has failed to advance good cause for the Court to grant the application. He therefore prayed for the application to be dismissed with costs.

On his part, Mr. Manyama adopted his affidavit in reply, outrightly supported the application, and submitted that the Deed of Settlement and consent decree are tainted with illegalities which are apparent on the face of the record. He submitted that IPTL did not sign the Deed of Settlement,

therefore, it was unaware of the same, and the one who signed it was forced to do so. He added that Harbinder Singh Sethi was not a shareholder of IPTL because it is a joint venture Company comprising three shareholders who are purely Companies. He argued that the IPTL Director's signature is not appended in the Deed of Settlement and neither was it sanctified by Body Resolution of the Company. Mr. Manyama stressed that a blessing meeting from the Directors was necessary to execute the Deed of Settlement. He relied on the case of **Carte General Enterprises Ltd v Equity Bank Tanzania Ltd & Another**, Civil Case No.22 of 2018 and **Makoa Farm Ltd & 2 Others v Uduru Makoa Agricultural and Marketing Cooperative Society Limited (UDURU MAKOA AMCOS)**, Civil Case No. 4 of 2022 (unreported).

Regarding the right to be heard, based on his earlier submission, Mr. Manyama contended that the shareholders of IPTL and 3 Directors were condemned unheard contrary to Article 13 (6) (a) of the United Republic of Tanzania Constitution. To bolster his proposition, he referred to Clause 9 of the consent decree and the case of **Attorney General v N.I.N Munuo Ng'uni**, Civil Appeal No.45 of 1998 (unreported). It was his view that the alleged illegality suffices to move the Court to grant the application, even if

the applicant has failed to account for each day of delay. To support his contention he referred me to the decisions of the Court in **Attorney General v Emmanuel Malangasiki & 3 Others**, Civil Application No. 138/2019 and **Ally Salum Said v Iddy Athumani Ndaki**, Civil Application No.450/17 of 2021. Based on his submissions, he urged me to grant the application.

Mr. Kamara made a brief rejoinder reiterating his submission in chief and insisted that the raised illegality does not require a long drawn process, it is apparent on the face of the record. He stressed that the applicant is not a party to the decree but he stands to suffer. He forcefully argued that the Company is an independent entity, enjoying independent jurisdiction of IPTL, therefore, the applicant was condemned unheard because he was not a party to the consent decree. He stressed that the applicant has accounted for every day of delay, in case, the Court finds that the applicant was required to account for each day of delay to the last dot then, he urged the Court to consider the ground of illegality. He argued that litigation will end when justice is done not otherwise. Finally, Mr. Kamara urged me to disregard Mr. Rumisha's assertion and grant the application.

Having carefully considered the notice of motion, parties affidavits' written and oral submissions by the counsel, the main issue for consideration is whether the applicant has demonstrated good cause to warrant the grant of extension of time to file an revision out of time. Rule 10 of the Rules under which this application is brought requires good cause to be shown for the Court to grant extension of time. For ease of reference, it reads:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended." It is noteworthy that there is no universal definition of the term "good cause'.*

In the light of the above rule, good cause among other things means, satisfactory reasons of delay or other important factors that need the attention of the Court, once advanced, may be considered to extend time within which a certain act may be done. The applicant is required to account for the days of delay from 19th May, 2021 when the days to apply for revision ended to 4th October, 2021 when he lodged the instant application. In the current application, as rightly pointed out by the learned counsel for the 1st

and 2nd respondents, the applicant did not account for the days of delay from 5th July 2021 when he became aware of the existence of the decree to 8th July, 2021 when the applicant wrote the first letter to the Honourable Chief Justice praying for the Court intervention in initiating the revision on its own accord. It is settled law that a party applying for extension of time has to account for every day of delay. (See **Finca (T) Limited and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 [2019] TZCA 561 (15 May 2019) TanzLII, **Joseph Paul Kyanka Njau & Another v Emmanuel Paul Kyanka Njau & Another**, Civil Application No. 7/05 of 2016 (unreported) and **Sebastian Ndaula v Grace Rwamafa**, Civil Application No.4 of 2014, (unreported) where it was stated that, delay of even a single day needs to be explained out.

Again, the applicant did not account for each day of delay from 26th July, 2021 when the applicant wrote a reminder letter to the Honourable Chief Justice praying for the Court intervention in initiating the revision on its own accord to 22nd September, 2021 when the applicant received a call from Mlingi requiring the applicant to collect his letter. In the absence of Mlingi's affidavit, there is no evidence that Mlingi communicated with the applicant. It is settled position of law that, the affidavit of a person whose

evidence is material to the issue has to be lodged in support of the application in order to assist the Court to satisfy itself that, the particular period of delay has been fully accounted for by the applicant. I therefore agree with Mr. Rumisha that failure renders the assertion to be unsupported as stated in **John Chuwa v Anthony Ciza** [1992] TLR 233 and **Workers Development Corp. v Vocal Networks Ltd**, Civil Application No. 28 of 2008, (unreported). Therefore, I am satisfied that the applicant has failed to account for each day of delay.

The next ground for consideration in support of the extension of time is the issue of the alleged illegality in the consent decree of the High Court. The applicant in his affidavit specifically paragraphs 21, 22, 23, 24 and 26 complained that he was condemned unheard. In my considered opinion, the allegation by the applicant that the error in the consent decree of the High Court has made the decree illegal and that the applicant was condemned unheard, are serious matters that deserve the attention of the Court on revision. Thus, there is, in my view, no need at this juncture to demand the applicant to divulge further. Certainly, if given the opportunity, the applicant will expound further on the allegation contained in the above-reproduced paragraphs of the affidavit in support of the application. (See **Mary Rwabizi**

T/A Amuga Enterprises v National Microfinance PLC, Civil Application NO. 378/01 of 2019 [2020] TZCA 355 (15 July 2020) TanzLII). It follows that although the applicant has not sufficiently explained each day of delay in lodging an application for revision, he deserves consideration of the Court on the allegation of illegality. In **Attorney General v Tanzania Ports Authority & Another** (Civil Application 87 of 2016) [2016] TZCA 897 (12 October 2016) TanzLII, the Court stated that: -

> *"Moreover, it is settled law that a claim of the illegality of the challenged decision constitutes sufficient reason for the extension of time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay. (See VIP Engineering & Marketing Ltd & 2 Others vs. Citibank Tanzania Ltd, Consolidated Civil Reference No. 6, 7 & 8 of 2006 (unreported)".*

Therefore, seeking inspiration from the above-referred decisions of the Court on the issue of illegality and applying it in the circumstances of this application, I am satisfied that the discretion of the Court in terms of rule 10 of the Rules, can be properly exercised to grant the application.

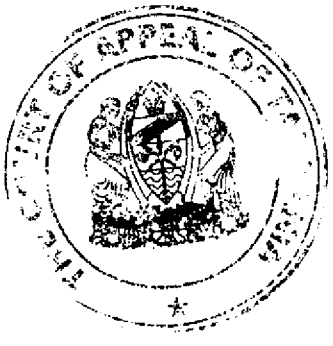
In the upshot, the applicant is granted extension of time to lodge an application for revision. It is ordered that the requisite application should be lodged within sixty (60) days from the date of the delivery of the ruling. However, considering the circumstances of this application, parties shall bear their own costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 21st day of November, 2023.

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Mr. Leonard Manyama who took brief for Mr. Mpaya Kamara, learned counsel for the applicant, Ms. Happiness Nyabunya, Principal State Attorney for the 1st and 2nd Respondents and Mr. Leonard Manyama and Ms. Dora Mallaba, learned counsel for the 3rd respondent is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL