

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

CIVIL APPLICATION NO. 468/16 OF 2022

JOHN HARALD CHRISTER ABRAHAMSSON.....APPLICANT

VERSUS

EXIM BANK (T) LIMITED..... 1ST RESPONDENT

DASCAR LIMITED..... 2ND RESPONDENT

MAS & ASSOCIATES COMPANY LIMITED &

COURT BROKER..... 3RD RESPONDENT

YUSUPH SHABAN MATIMBWA..... 4TH RESPONDENT

**(Application for extension of time to file an application for revision of the
proceedings in execution of the decree in respect of Commercial
Case No. 51 of 2008)**

RULING

19th & 27th February, 2024

MGONYA, J.A.:

By notice of motion the applicant, JOHN HARALD CHRISTER ABRAHSSON is seeking for an extension of time to file an application for revision against the execution proceedings in the execution of the decree of the High Court in Commercial Case No. 51 of 2008. The application is founded on rules 10 and 48 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by an affidavit sworn by Mr. Michael Yudas Mwambeta. On the other hand, the 1st and 4th respondents strenuously resisted the application vide their affidavit in reply which was deponed by

Edmund Aaron Mwasaga the employee of the 1st respondent and Yusuph Shaban Matimbwa, the 4th respondent himself.

When the application was called for hearing on 19th February, 2024, Mr. Michael Mwambeta, learned advocate appeared for the applicant whereas, Mr. Zacharia Daudi and Mr. Sylvanus Mayenga, learned advocates appeared for the 1st and 4th respondents respectively. The 2nd and 3rd respondents did not appear despite of being duly served. Therefore, the applicant prayed under rule 63(1) of the Rules, the Court to proceed with the hearing of the application in their absence, the prayer which was not objected by the other respondents. Henceforth, the same was granted.

When invited to argue in support of the application, Mr. Mwambeta adopted the averments in the Notice of Motion, affidavit as well as their written submission. Thereafter, he implored the Court to grant the application.

In his reply, Mr. Daudi also adopted the affidavit in reply filed by the 1st respondent and their written submission. He then proceeded to resist the application by arguing that, the applicant failed not only to demonstrate the purported allegations of illegality but also has failed to

account for the delay. He went on to state that, the previous application No. 446/16 of 2018 was struck out by the Court on 16/6/2022 and the current application was filed on 10/8/2022. Nothing has been accounted for by the applicant that prevented him to file the present application timely.

Also, by referring the Court to paragraph 1-12 of the 1st respondent affidavit in reply, Mr. Daudi is contended that for more than 10 years the applicant and the respondents were tied up in Court on the same allegations. It was Mr. Daudi's further submission that it is the public policy that, there should be an end for litigation. Therefore, allowing this application it will not only defeat the public policy but the abuse of the Court process.

Further by referring to paragraph 15 of the 1st respondent affidavit in reply, Mr. Daudi stated that while the applicant is pursuing this application, the applicant's wife is also pursuing the same in another courts.

Responding to the alleged illegality, Mr. Zakaria contended that the applicant has never invoked Section 38 and Order XXI Rule 89 of the Civil Procedure Code, Cap. 33 [R. E. 2002] (the CPC) which gives power the

trial court to deal with all the questions arising from execution proceedings and determine the allegations of illegality, fraud and material irregularities.

On the premise of what he submitted Mr. Zacharia implored the Court to dismiss the application for want of merit.

On his part Mr. Mayenga having adopted the affidavit in reply deposed by the fourth respondent, at the outset he concurred with what was submitted by Mr. Zacharia. He emphasized that, the application should not be granted for non-disclosure of sufficient reasons.

Mr. Mayenga contended that, before this application, the applicant filed an application for revision No. 19/16 of 2018 which was struckout by this Court. That the applicant later filed an application for extension of time to file revision which was granted. After being granted the time the applicant lodged an application for revision which was application No. 446/16 of 2018. However, when the same was scheduled for hearing again it was struck out for being time barred. With those facts Mr. Mayenga went on to state that the present application was due to negligence of the applicant in handling his case.

On the alleged illegality of the decision, joining hands with Mr. Zakaria Mr. Mayenga contended that, what has been termed as illegality was supposed to be tackled by the executing court. Like Mr. Zakaria he also prayed the application be dismissed.

Having heard the rival submission from the parties' counsel, the nagging issue in application as this one is whether good cause has been shown for the Court to exercise its discretion under rule 10 of the Rules.

It is trite law that, extension of time is a matter of the discretion of the Court which must be exercised judiciously according to the facts of each case. See; **Mwita s/o Mhere v. Republic** [2005] T.L.R. 107 and **Ngao Godwin Losero V. Julius Mwarabu, Civil Application No. 10 Of 2015** (unreported).

It is also common that, in applications for extension of time, the Court is required to consider whether or not sufficient cause for delay has been shown to warrant the exercise its discretion to grant the extension of time. There is, however, no definition of what amounts to "sufficient cause" but in determining whether in a particular case, sufficient cause has been established or not, a number of factors have to be taken into consideration depending on the circumstances of that particular case.

Those factors include; whether the applicant was diligent, reasons for the delay, the length of the delay, the degree of prejudice to the respondent if time is extended, whether there is a point of law or the illegality or otherwise of the impugned decision. See: **Laurent Simon Assenga v. Joseph Magoso & Others**, Civil Application No. 50 of 2016, **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987, **Tanga Cement Co. v. Jumanne Masangwa and Another**, Civil Application No. 6 of 2001, **Tanzania Revenue Authority v. Tango Transport Co. Ltd**, Consolidated Civil Applications Nos. 4 of 2009 and 9 of 2008 and **Jubilee Insurance Company (T) Limited v. Mohamed Sameer Khan**, Civil Application No. 439/01 OF 2020 (all unreported).

Likewise, it is also the position of the law that in an application for extension of time, every day of delay must be accounted for. See: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 and **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011 (both unreported). In **Bushiri Hassan** (supra), the Court stated that:

"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"

Flowing from the above demonstrated position of the law, I now move to examine whether the applicant has accounted for each delayed day. It was the 1st and 4th respondents' contention that, the applicant did not account for the delayed time from when the previous application No.446/16 of 2018 was struck out to when the instant application was filed. It was their contention that there has been a delay for 8 weeks which was not accounted for.

I entirely agree with the learned advocates for the respondents that, the applicant did not account for the time between 15th June, 2022 to 10th August, 2022. In the affidavit in support of the application, it is deponed under Paragraph 15 that, application for revision No. 446 /16 of 2018 was struck out for being incompetent but no good reasons have been advanced by the applicant to justify the inordinate delay of more than 55 days from 15/06/2022 (Annexure MMA-14) when previous Revision application was struck out to 10/08/2022 when the instant application was filed. This period of more than 55 days has not been accounted for. The applicant ought to have acted promptly and diligently soon after the previous application being struck out.

It is settled law which should also be emphasized that the negligence or ignorance of the procedure, is not an excuse and does not constitute a sufficient cause for extension of time. See, the decision of this Court in **Exim Bank (Tz) Ltd v. Jacquilene A. Kweka**, Civil Application No. 348 of 2020 and **Omar Ibrahim v. Ndege Commercial Services Ltd**, Civil Application No. 83 of 2020 (all unreported), where the Court held that lack of diligence on the part of the counsel is not sufficient ground for extension of time.

On the claimed illegalities, it is settled in our jurisprudence that, regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay, once there is a claim of illegality of the impugned decision the same constitutes a sufficient cause for extension of time under rule 10 of the Rules. See; **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] T.L.R. 185 and **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007.

It is also trite law that, where illegality is raised as one of the grounds for extension of time, it must be satisfied that the claimed illegality really exists. In **Lyamuya Construction Company Ltd V.**

Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 Of 2010 (unreported), the Court went further to state that, the illegality in question must be that which raises a point of law of sufficient importance and the same must be apparent on the face of record not one that would be discovered by a long-drawn argument or process.

In the instant application, as I have indicated above the applicant moved this Court to enlarge time so as file an application for revision of the execution proceedings emanated from commercial case No. 51 of 2008. Going by the affidavit in support of the application especially paragraph 16 it is deponed that, the execution proceedings was carried out illegally and it was tainted with fraud and material irregularities on the following; **One** the Decree used in execution proceedings was a non-existed Decree and the same was not in favour of the 1st respondent; **Two**, the suit property being a residential house and occupied by the judgment debtor and a sole matrimonial home was not liable for attachment: **Three**, there was no legally issued prohibitory orders in respect of the attached property before issuance of proclamation of sale of the suit property and that the sale was carried out whilst there existed a valid court order which restrained the 1st and 3rd respondents from

auctioning the said property. In the opposite, the 1st and 3rd respondents vide their affidavit in reply, they contested the alleged illegalities and insisting that if there was any, the applicant could raise it before the executing court for the same to be determined.

Having considered the arguments by the parties, I join hands with counsels for the 1st and 4th respondents that since the applicant intends to move the Court to revise the execution proceedings and not the impugned decision, I find the granting of the application would be futile because the applicant has a right under section 38 (1) of the CPCF to refer all questions arising from the execution proceedings to the executing court for the same to be determined. Section 38 (1) of the CPC is couched in mandatory term which means that, matters which arose during execution proceedings should be determined by the execution court only.

It is common ground that, where there is already an alternative remedy provided by law, like in the matter at hand, the applicant cannot properly move the Court to use its revisional jurisdiction. See; **Naima Suleiman (Suing as a next friend of Zakaria Omary Salumu Shighela (Minor) v. Idu Busanya Mugeta (Administrator of the**

Late Lazaro Busanya), Civil Application No. 538/8 of 2019 (unreported).

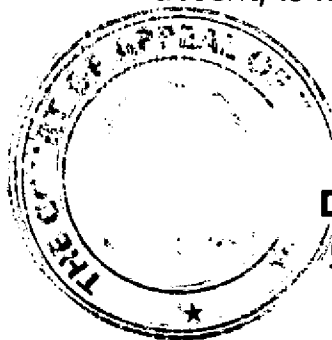
For the above given reasons, I find that no sufficient cause has been shown to warrant extension of time as sought by the applicant. The application is therefore dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 27th day of February, 2024

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 27th day of February, 2024 in the presence of Mr. Michael Mwambeta, learned counsel the Applicant and Mr. Zakaria Zaudi learned counsel for the 1st Respondent and holding brief for Mr. Silvanus Mayenga, leaned advocate for the 4th Respondent, 2nd and 3rd Respondent are absent, is hereby certified as a true copy of the original.



A. S. Chugulu
A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL