

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 769/16 OF 2022

SINYOMA COMPANY LIMITED APPLICANT

VERSUS

BULYANHULU GOLD MINE LIMITED RESPONDENT

(Application for Extension of Time to file an Application for Review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Mwarija, J.A., Kerefu, J.A And Kente, J.A.)

dated the 29th day of June, 2022

in

Civil Appeal No. 172 of 2017

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RULING

15th & 19th March, 2024

MLACHA, J.A.:

By notice of motion made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), supported by three affidavits, the applicant lodged an application for extension of time to file an application for review of the decision of this Court made in Civil Appeal No. 172 of 2017, dated 29th June, 2022 on the ground that there is an apparent error on the face of the judgment which needs to be corrected in the interest of justice. The notice of motion pointed three areas; one, that, the judgment of this Court quashed the judgment, decree and order of

the High Court in Commercial Case No. 102 of 2014 but at the same time allowed the appeal with costs; two, that, the judgment found that the contract between the parties still subsists but did not provide for the rights of the applicant and the liabilities of the respondent leaving the applicant with a decree which cannot be executed; and three, that, the decision has irregularities and or illegalities to the extent that it has caused an injustice to the applicant.

The respondent is resisting the application and has filed three affidavits in reply.

Briefly stated, the affidavits reveal the following facts: That, the applicant was the plaintiff in the High Court in Commercial Case No. 102 of 2014. It was alleged that there was an agreement for the purchase, transportation and disposal of scrap materials between the parties. While the contract was in progress, the respondent issued a notice of termination of contract and subsequently terminated the contract with the applicant. The applicant accused the respondent of breach of contract and sued for special damages, payment of outstanding balance, general damages and interests. The High Court (Songoro, J. retired) dismissed the claim for special damages for want of proof, awarded some costs incurred, some general damages and interests. The applicant was

aggrieved by the finding of the High Court that the respondent was justified to terminate the contract and that there was no proof for special damages. Consequent to that, Civil Appeal No. 172 of 2017 was lodged to challenge the decision. The appeal was heard and a judgment was pronounced on 29th June, 2022. The Court had this to say at pages 15 and 16 of the typed judgment:

"... it is our considered view that the respondent was duty bound to comply with clause 19(c) of the contract by issuing to the appellant, 14 days' notice before terminating the contract. Failure to do so entails that the contract had not been terminated. Since the finding on the first ground of appeal suffices to dispose of the appeal, we find no need to converse on the other grounds.

In the event, we reverse the finding of the trial court that the respondent has rightly terminated the contract. In that aspect, we quash that decision and the subsequent orders arising therefrom. The appeal is consequently allowed to the extent that the contract subsists. The appellant shall have the costs."

The present application was filed out of this background. The applicant is not happy with this decision and wants to challenge it by way of review.

Mr. Kung'e Wabeya, learned advocate appeared for the applicant, while the respondent had the services of Mr. Faustine Malongo, also learned advocate. Both counsel adopted the contents of their affidavits and written submission to be part of their oral submissions in the course of making their presentations.

When Mr. Wabeya was called to amplify what is stated in the affidavit and written submissions, he had a focus on one area only. Making reference to the decision of the Court in **Zuberi Athumani Mbuguni v. NBC**, Civil Application No. 311/12 of 2020 he intimated that there is an illegality in the decision of this Court calling for invocation of its powers of review. When I engaged him to give the details, he referred me two areas; one, that the decision of this Court was based on one ground of appeal despite the existence of 4 grounds of appeal. He argued that the applicant was denied a right to be heard on the other grounds which were left unattended; two, that, the judgment allowed the appeal and nullified the decision of the High Court leaving positions which are contradictory.

In reply, it was submitted that, the applicant has failed to show good cause as required by rule 10 of the Rules making his application baseless. Counsel for the respondent submitted further that, the grounds

upon which extension is sought were supposed be seen at the notice of motion but there is nothing of the sort in the notice of motion. He intimated that failure to show the grounds in the notice of motion amounts to failing to show good cause. Counsel for the respondent proceeded to submit that the case of **Subira Athumani Mbuguni** (supra) is distinguishable because it was referring to illegality of the decision of the High Court as opposed to this application which is pointing at illegality of the decision of this very Court.

On failure to address all the grounds of appeal counsel for the respondent had the view that reasons for doing so were given. He submitted that the applicant was fully heard on all grounds of appeal but the decision was based on just one ground because there was no need to discuss other grounds which could be a mere academic exercise. He went on to submit that the decision of this Court did not create two contradicting positions as alleged. It only said that if the contract between the parties is still subsisting, no remedy could be given to the applicant. He argued that if the appeal was allowed by nullifying the decision of the High Court that is not an illegality justifying extension of time to file review.

In rejoinder, counsel for the applicant submitted that, rule 48(1) has no requirement to state the grounds in the notice of motion. He added that failure to show the grounds in the notice of motion is not fatal so long as the same are in the affidavits supporting the application. He went on to submit that illegality of the decision of this Court is pleaded in item (c) in the notice of motion, paragraph 17 of the affidavit of Timothy Kalumile and paragraph 6 of the affidavit of Kung'e Wabeya. It is also in ground 3 in the grounds of the intended review. He reiterated his earlier position and argued the Court to grant the application.

I will start with the complaint by the respondent that the applicant did not point out the grounds upon which extension is sought in the notice of motion. I agree with counsel for the respondent that the grounds must be pointed out in the notice of motion. But, with respect, I don't share the view that they are not existing. Looking through one can see three points at the notice of motion as hinted all complaining about short comings in the decision of this Court. I think that these points were meant to be the grounds. All appear to revolve at the element of illegality which is the focal point of the submission of the counsel for the applicant. With respect I find no merit in the complaint which is rejected.

Next is whether there is good cause upon which extension can be granted. There is no doubt that the Court has discretionary powers to extend time under rule 10 of the Rules upon good cause being shown. Ordinarily we look at two things: (i) an account for each day of delay and or (ii) illegality of the impugned decision. The applicant in this case did not opt to base its application on an account for each day of delay for, as it appeared to the counsel for the respondent, he had no good cause on that side. The application is based on illegality of the decision. Illegality of the decision, if proved to exist, can be used as a base for extension of time despite the absence of an account for each day of delay. See **The Principal Secretary Ministry of Defence and National Service v. Divram P. Valambhia** [1992] T.L.R. 185, **V.I.P Engineering and Marketing Limited and 2 Others v. CITIBANK Tanzania Limited**, Consolidated Civil Reference Nos. 6,7 and 8 of 2006, **Iron and Steel Limited v. Martin Kumalija and 117 Others**, Civil Application No.292/18 of 2020 and **Sabena technics Dar Limited v. Michael J. Luzunzu**, Civil Application No. 451/18 of 2020, to mention a few. The issue is whether the applicant has managed to establish illegality of the decision of this Court.

In his endeavor to point out the illegality, counsel for the applicant has pointed out two areas; **One**, that the Court based its decision on one ground of appeal only, leaving 3 grounds of appeal unattended thereby denying the applicant a right to be heard on these grounds. **Two**, the judgment allowed the appeal and vacated the decision of the High Court without specifying the rights of the parties leaving a confusion in the matter.

On the first point, I will agree with the counsel for the respondent that, it is a practice of this court to base its decision in one or two grounds and leave other grounds aside where it is seen that the ground or grounds discussed have the effect of disposing the appeal. That is what was done by the Court in the decision sought to be challenged by way of review. With that in mind, I find the first point as having no merit which is dismissed.

On the second point, my attention is drawn to the last part of the decision of this Court as shown above. Looking at the decision, as can be seen in the above excerpt, it is obvious that the contract between the parties was found to be valid but no specific direction was made on what to do. In other words, the Court allowed the appeal and set aside the decision of the High Court without making specific orders on the rights

of the applicant and liability of the respondent. The applicant cannot easily go to the High Court to execute the decision though he has won the appeal. There is an element of a confusion in the matter.

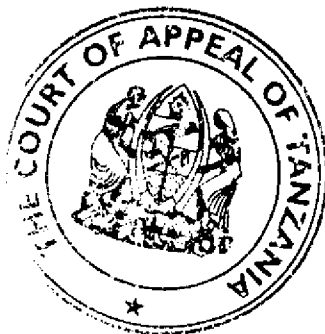
With this observation, I agree with counsel for the applicant that, there is an element of illegality on the face of the judgment of this Court which can be used as a base for extension of time.

That said, the applicant is given 30 days within which to lodge the application for review. The application is granted, no order as to costs.

DATED at **DAR ES SALAAM** this 18th day of March, 2024.

L. M. MLACHA
JUSTICE OF APPEAL

The Ruling delivered this 19th day of March, 2024 in the presence of Mr. Wabeya Kung'e, learned counsel for the Applicant and Ms. Caroline Kivuyo, learned counsel for the Respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL