

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**CIVIL APPLICATION NO. 733/15 OF 2023**

**AZIM CONTRACTORS ..... APPLICANT  
VERSUS**

**BHASH VALAMBIA ..... RESPONDENT**

**(Application for Extension of Time to Apply for Revision of the proceedings  
Judgment and Decree of the High Court of Zanzibar at Tunguu)**

**(Issa, J.)**

**dated the 4<sup>th</sup> day of October, 2021**

**in**

**Civil Case No. 2 of 2018**

**R U L I N G**

22<sup>nd</sup> April & 8<sup>th</sup> May, 2024

**MLACHA, J.A.:**

By way of notice of motion lodged on 27<sup>th</sup> June, 2023, the applicant, Azim Contractors, has filed this application under a certificate of urgency seeking for extension of time to apply for revision of the proceedings, judgment and decree of the High Court of Zanzibar (the High Court) in Civil Case No. 02 of 2018 (Issa J., as he then was) dated 4<sup>th</sup> October 2021. The application is brought under rule 10 of the Tanzania Court of Appeal Rules,

2009 (the Rules) and supported by an affidavit sworn by Salim Hassan Bakari Mnkonje, counsel of the applicant. The respondent filed affidavit in reply sworn by Nassor Khamis Mohammed, counsel for the respondent.

The grounds upon which this application is based, as could be grasped from the notice of motion and its supporting affidavit, can be presented as follows:

1. That, the applicant was delayed in the cause of prosecuting Application No. 612/01 of 2021 which was filed in time but withdrawn on defects of its supporting affidavit and the record.
2. That, the arbitration was conducted without supervision of the High Court as required by section 66 and the third schedule of the Civil Procedure Decree, Cap 8 Laws of Zanzibar:
  - i. The arbitrator extended time without leave of the High Court.
  - ii. The arbitrator amended the decree without leave of the High Court.

To get a good understanding of issues around the matter, the background is reproduced, albeit briefly, as follows: The applicant, a construction company, entered into an agreement with the respondent for

renovation of his building described as house No. 174, Gizenga Street, Shangani, stone town area, Zanzibar. The renovation was to be carried out at a consideration of USD 165,764. The respondent advanced a total of USD 110,554 to the applicant for the work. Differences emerged between them leading to termination of the contract. The applicant certified to the respondents that work done was equal to USD 129,634.20 meaning that she needed more money. The respondent engaged a quantity surveyor consultant who examined the work and certified that what was done worth USD 45,813 only. The parties were engaged in a wrangle leading to the filing of Civil Case No. 02 of 2018 at the High Court. As the contract between them had a provision requiring their disputes to be resolved through arbitration by the National Construction Council of Tanzania (the NCC), they asked the High Court of Zanzibar to make a referral order to the NCC which was dully made. The matter thus moved to the NCC for arbitration.

Mr. Kisamo Elias Fredrick, a Registered Quantity Surveyor and advocate, was appointed by the NCC to act as a sole arbitrator. He conducted the arbitration and released an award which was sent back to the High Court for registration. The award was registered as a judgment of the High Court

released on 4/10/2021. A decree was drawn declaring the contract between the parties as a lump sum contract based on drawings and specifications. The value of work done, at the date of termination of contract, was declared to be USD 49,808. The applicant was adjudged to pay loss and damages to the respondent amounting to USD 454,117.30, costs USD 28,314.59 and refund of fees and expenses of the arbitration UDS 29,081.25.

The applicant was aggrieved and filed an application for revision on 2/12/2021; Civil Application No.612/15 of 2021. This application was withdrawn on 6/12/2021 on two defects; i) the affidavit supporting the application was incompetent as the power of attorney of the deponent had expired since 31/12/2014; ii) the record had no copies of judgment and decree. As the applicant was still aggrieved by the decision of the High Court, which he wanted to challenge by way of revision to this Court, for which he was already late, he lodged the present application seeking extension of time on the grounds alluded to above.

At the hearing of this application the applicant was represented by Mr. Salim Hassan Bakari Mnkonje, learned advocate, whereas the respondent enjoyed the services of Mr. Suleiman Salum Abdallah, also learned advocate.

The advocates adopted the contents of their affidavits in the course of making oral submissions.

The submissions of the learned counsel were based on technical delay and the illegalities of the decision of the High Court and the award. Mr. Mkonje spent more time on the alleged illegalities of award and the Judgment of the High Court. Submitting on illegality, Mr. Mkonje contended that section 66 of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar (the CPD) deal with arbitration of parties other than the Government and is applicable in the situation at hand. It has to be read with the third schedule. Amplifying, he submitted that, arbitration starts by a court order which is made based on the third schedule of the CPD referring the dispute to the arbitrator. He contended further that, the High Court of Zanzibar referred the dispute to the National Construction Council of Tanzania (the NCC) which received and attended the dispute. In the course of attending the matter, the arbitrator did two things which had no jurisdiction to do namely; he extended time and made an amendment to the award without seeking the leave of the High Court. He challenged what was done by the arbitrator saying it was against the spirit of section 66 and the third schedule of the

CPD. He maintained that, the power to extend time or altering the award are vested in the High Court and for which the arbitrator was supposed to send the matter back to the High Court to make directives. He lamented that, despite this shortcoming, the High Court proceeded to adopt and register the award as its judgment and issue the decree.

The submission of the applicant on technical delay was short and focused. He said that the time spent in the conduct of the application which was withdrawn should be excused because the applicant was in Court fighting for his right. Based on the two aspects, counsel urged the Court to grant the application.

In reply, Mr. Abdalla submitted that, by agreeing to refer their dispute to the NCC, the parties made the rules of the NCC applicable to their dispute making justification to what was done by the arbitrator. He contended that, rule 7(3)(c) of NCC Rules gives the arbitrator power to extend time whereas rule 7(3)(t) gives him power to alter the award. He argued that, what was done by the arbitrator is legal because he is controlled by the NCC Rules not the CPD as alleged by counsel for the applicant. Amplifying, he submitted that, arbitration once completed, calls for filing of the award at the High

Court for other processes to continue. These include the registration of the award as a judgment of the High Court and the issue of a decree. It is also a venue for an aggrieved party to object. He contended that, the award in this case was attended without an objection from the applicant.

Counsel for the respondent submitted further that, if there is any error in the award, the remedy is not to challenge it before this Court but to do so before the High Court. He added that, in whatever case, for the applicant to benefit from an illegality of the decision, the same must be apparent on the face of the impugned decision, which is not the case here. He stressed that the applicant did not point any illegality of the decision of the High Court but the arbitration proceedings and the award. He urged me to disregard the submission of the applicant. To bolster his stance, he referred me to our decision in **HYASINTHA MALISA V. JOHN MALISA**, Civil Application No.1677/01 of 2021 [2023] TZCA 239; (10 May, 2023, TANZLII).

Counsel for the respondent went further and submitted that, the application for revision was found to be defective on mistakes of the applicant's counsel who did not exercise due diligence in handling the application leading it being withdrawn. He should not be allowed to benefit

from his own wrongs, he contended. In this regard, he relied on our decision in **HYASINTHA MALISA V. JOHN MALISA** (supra) and **UMOJA GARAGE V. NBC**, Civil Application No.27 of 1997 [1997]TZCA 73; (27, October, 1997, TANZLII).

In rejoinder, it was contended by Mr. Mkonje that, a reference of the dispute to the NCC did not excuse the parties from following the procedure under section 66 and the third schedule to the CPD. He stressed that, the NCC Rules cannot supersede Zanzibar Laws in a dispute which originated from Zanzibar. He went on to submit that he cannot challenge the award in the High Court of Zanzibar because there is no room for appeal but revision. He maintained that there was no negligence on the part of the applicant in the conduct of the application which was withdrawn in the normal course of judicial proceedings before the High Court. He reiterated his earlier stance and urged me to grant the application.

I had ample time to revisit the record and consider the submissions of leaned counsel. I will start with expounding the legal position. The Court's power to extend time is provided under rule 10 of the Rules which reads as under:



***"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."*** (Emphasis added)

Rule 10 is plain that, the Court, in its discretion, can extend the time limited by these Rules or by any decision of the High Court or tribunal upon good cause being shown. The discretion must be exercised judiciously, meaning, taking into account the relevant law and the facts carefully, before making the decision. The measure in this case is good cause; the Court will have to see if there is good cause before making an order granting or refusing extension of time. What amounts to good cause is not defined in the rules but case law has established factors to be considered in examining whether there is good cause or not. Such factors may include: the lengthy of delay and the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer in case the Court opts to exercise its discretion; and the conduct of parties and the need to balance the interests of a party who has a decision in his favour against the interest of the other party who

has a constitutional right of appeal. See **DAR ES SALAAM CITY COUNCIL V. JAYANTLAL P. RAJANI**, Civil Application No. 27 of 1987 (unreported), **KALUNGA AND COMPANY ADVOCATES LTD V. NBC LTD** [2006] TLR 235, **ELIAS UNDERSON V. THE REPUBLIC**, Criminal Appeal No. 2 of 2013(unreported) and **AG V. TANZANIA PORTS AUTHORITY AND ANOTHER**, Civil Application No. 87 of 2016 [2016] TZCA 897; (12 October, 2016, TANZLII).

The position of the law was stated in clear terms in **LYAMUYA CONSTRUCTION COMPANY LIMITED V. BOARD OF TRUSTEES OF YOUNG CHRISTIAN WOMEN ASSOCIATION OF TANZANIA**, Civil Application No. 2 of 2010 [2011] TZCA 4; (3 October, 2011, TANZLII) where it was stated:

- 1. That the applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant must show diligence and not apathy or sloppiness in the prosecution of the action that he intends to take.*

4. *If the court feels that there are other reasons such as the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged.*"

See also **BUSHIR HASSAN V. LATIFA LUKIO MASHAYO**, Civil application No.3 of 2007 (unreported), **JAMES PETRO NDAKI V. NYAMALWA WANGARUKE**, Civil Application No. 956/08 of 2023 [2024] TZCA 127; (23, February, 2024, TANZLII) and **FORTUNATUS MASHA V. WILLIAM SHIJA AND ANOTHER** [1997] TLR 154.

In **FORTUNATUS MASHA** (supra) it was stated thus:

*"... a distinction should be made between cases **involving real or actual delays** and those like the present one which only involve **what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted**. In the circumstances, the negligence, if any, really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to***

*determine the timeousness of applying for filing the fresh appeal. In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."***[Emphasis supplied].**

That is to say, a delay caused to a party while perusing a matter in court earnestly, is excusable even where the matter which he had been pursuing was ultimately decided against him on some mistakes done by him. We should not be moved by mistakes of the applicant in the previous case, for he has already been punished, but, in my view, whether there is evidence of obvious negligence or ill will. Where there is no obvious negligence or ill will, a delay caused by the conduct of a previous matter involving the applicant is excusable and is what is called *technical delay*. See also the decision of the Court in **YARA TANZANIA LIMITED V. DB SHAPRIYA & CO. LIMITED**, Civil Application No. 498/16 of 2016 (unreported).

A claim of illegality of the impugned decision, where established, constitutes sufficient reason for extension of time under rule 10 regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay. This is the import of our decision in **V I P ENGINEERING AND MARKETING LIMITED AND TWO OTHERS V.**

**CITIBANK TANZANIA LIMITED**, Consolidated Civil References No. 6, 7 and 8 of 2006 [2007] TZCA 165; (26, September, 2007, TANZLII), **PRINCIPAL SECRETARY, MINISTRY OF DEFENCE & NATIONAL SERVICE V, DEVRAM VALAMBHIA** [1992] T.L.R 185 and **HB WORLDWIDE LIMITED V. GODREJ CONSUMER PRODUCTS LIMITED**, Civil Application No. 2/16 of 2021 [2023] TZCA 100; (13 March, 2023, TANZLII).

Next is an examination of the application to see if the applicant is protected by the laid down principles. I will start with technical delay.

Parties are in agreement that Civil Application No. No. 612/01 of 2021 was lodged in time. They also agree that the applicant was held in Court in the application which was withdrawn on 6/6/2023. There is no doubt that the applicant filed this application soon after the withdrawal of the former application. Their dispute is on the reason for the withdrawal. The respondent contend that the applicant's counsel was negligence in not seeing that the deponent's mandate under the power of attorney had expired. He also questions the failure to attach the necessary documents. I think that if the application for revision was filed in time, conducted diligently,

and if this application was filed soon thereafter, the applicant is protected by the principle of technical delay unless there is evidence of negligence or an ill motive on his side. Human beings can forget, can error, can make mistakes, for we are not angels. Where there is no evidence of outright negligence or ill motive, the principle of technical delay must come in to protect such people. Looking through, I could not see any negligence or ill motive on the part of the applicant. Further, as alluded to above, the applicant has already been penalized for having his application withdrawn for which he had to incur expenses to start the process afresh. I think that he has protection under the principle of technical delay.

Illegality is premised on two limbs. The first limb is on the defects of the arbitration proceeding and the award. That, the arbitrator extended time and amended the award without the sanction of the High Court. With respect to Mr. Mkonje, I will not go to examine illegality on the face of the award because the decision here means the judgment of the High Court not the award. Further, I share the view that, the defects in the award were supposed to be challenged in the High Court.

The second limb is illegality of the decision of the High Court. That, it converted an illegal award to its judgment and issued an illegal decree. Mr. Mkonje contended that there is an illegality in the decision of the High Court for failure to abide to section 66 and the third schedule to the CPD which gave it power to control arbitration proceedings. That, the arbitrator misdirected himself for using the law applicable in Tanzania Mainland instead of the Laws of Zanzibar which give the High Court a controlling hand. He added that, the NCC Arbitration Rules cannot supersede the Law of Zanzibar in a matter originating from Zanzibar. To this, Mr. Abdalla contended that, having submitted themselves to the jurisdiction of the NCC, the parties had agreed to be governed by the Rules of the NCC. That, rules 7(3)(c) and 7(3)(t) of the NCC allowed the arbitrator to extend the time and amend the award.

I agree with Mr. Abdalla that the NCC rules allowed the arbitrator to do what he did but I think, in view of what is contained under section 66 and the third schedule of the CPD, the learned Judge was supposed call the parties and require them to air their views on these contending positions, before registering the award as the judgment of the High Court and issuing

the decree. I find this as an illegality on the face of the decision of the High Court justifying the issue of orders for extension of time.

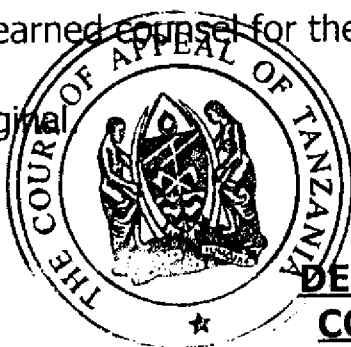
That said, it is obvious that, the applicant has managed to establish good cause upon which to extend the time. The application is granted. The applicant is given 60 days from today within which to file the application for revision before the Court.

Order accordingly.

**DATED** at **ZANZIBAR** this 8<sup>th</sup> day of May, 2024.

L. M. MLACHA  
**JUSTICE OF APPEAL**

The Ruling delivered this 8<sup>th</sup> day of May, 2024 in the presence of Ms. Saada Malota Soma, learned counsel for the Applicant and Mr. Mustafa Nassor Khamis, learned counsel for the Respondent is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**