

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**MISC. CIVIL CAUSE NO. 8 OF 2004**

**J. P. INTERNATIONAL LIMITED ..... APPLICANT**

**VERSUS**

**CONSOLIDATED HOLDING CORPORATION .....RESPONDENT**

**RULING**

**MWARIJA, J.**

The applicant, J. P. International who is advocated for by Mr. Nyange, learned counsel has brought this combined application for extension of time to institute a notice of appeal and for leave to appeal to the Court of Appeal against this court's decision dated 26/1/2006 in Miscellaneous Civil Cause No. 8 of 2004. The application which was brought under s.11 (1) of the Appellate Jurisdiction Act , Cap. 141 [R.E. 2002] is supported by an affidavit sworn by Jamanest Petropa Mboya. The respondent, Consolidated Holding Corporation opposed the application through the services of its learned counsel, Mr. Mwandambo. With leave of the court, the application was argued by way of written submissions.

Submitting in support of the first limb of the application in which the applicant seeks for extension of time to file a notice of appeal, Mr. Nyange attributed the delay to the defect in the record of appeal supplied to him by the Registrar of the High Court. The learned counsel argued that although the applicant had previously obtained leave to appeal and filed Civil Appeal No. 54 of 2005, that appeal was struck out on 22/5/2009 for the reason that the supplied record of appeal which was filed by the applicant was defective in that the record was incomplete.

On the second limb of the application concerning leave to appeal, Mr. Nyange submitted to the effect that there exist sufficient grounds for grant of leave to appeal. He argued that the decision intended to be appealed against is tainted with improprieties, irregularities and illegalities. Citing the case of **Transport Equipment Ltd v. Devram P. Valambhia** (1993) TLR 91, the learned counsel argued that where the point at issue in the intended appeal involves illegality of the impugned decision the court has a duty to cause such a point to be ascertained even if that can be done through extension of the time for filing an appeal.

Relying further on the case of **CRDB Bank Ltd v. George M. Kilindu & Another**, Civil Application No. 87 of 2009 (CA) (unreported), Mr. Nyange submitted that even if a delay occurs as a result of the applicant's negligence, when an illegality or impropriety of a decision is at issue, negligence cannot outweigh the said factors. The learned counsel went on to point out in his submission the factors which he contended that they render the impugned decision being tainted with illegalities, improprieties and irregularities.

He mentioned the factors stating that the petition from which the impugned decision was made was erroneously grounded on a wrong provision, that the petition was a disguised appeal and that the court erroneously omitted to deal with the cross- petition. The other factors stated by the learned counsel were that the court wrongly determined the petition in the absence of core documents and that it proceeded to determine the petition without properly considering it. He made a detailed submission in support of these factors and prayed that the application be granted.

Responding to the arguments made by the learned counsel for the applicant, Mr. Mwadambo submitted that the applicant has not established a sufficient cause for the delay such as to satisfy the court to grant extension of time under s. 11 (1) of the Appellate Jurisdiction Act. He argued that the striking out of the appeal which had been filed by the applicant was due to negligence, the factor which does not constitute a sufficient cause for delay. Mr. Mwadambo argued further that the learned counsel for the applicant had the duty of checking correctness of the record and that therefore, even if the record issued by the Registrar was incomplete, the learned counsel should have ensured its completeness. To support his argument that negligence is not a sufficient cause for grant of extension of time, he cited the cases of **Loswaki Village v. Shibesh Abebe**, Civil Application No. 23 of 1997 (CA-AR) (unreported), **Dr. Ally Shabhay v. Tanga Bohora Jammaat** (1997) TLR 305 and **Inspector Sadik & Others v. Gerald Nkya** (1997) TLR 290.

Citing further the cases of **Samos Ltd Karafuu Hotel v. Mirko Tomassia & Another**, Civil App. No. 69 of 2001 (CA-ZNZ) (unreported) and **Millan Zinzuwadis v. Abdul Hakim & Mbaraka Paraj Amen**, Civil Appeal No. 30 of 1998, Mr. Mwandambo stressed the point that negligence does not constitute a sufficient cause for extension of time and that the degree of diligence is higher when an advocate is involved.

On the authorities cited by Mr. Nyange, the cases of **CRDB Bank v. George M. Kilindu** and **Transport Equipment Ltd. v. Devram P. Valambhia** (supra), though agreeing on the applicability of the principles laid down in those decisions, Mr. Mwandambo argued that the learned counsel for the applicant has neither established the illegalities in the decision which is intended to be appealed against nor some fundamental questions which merit consideration by the Court of Appeal. He argued however that the question whether the decision which is intended to be challenged is erroneous, illegal or was improperly made, is a matter which is to be decided not by this court, but the Court of Appeal.

In his rejoinder submission, Mr. Nyange made it clear that the matter does not involve an application for leave to appeal, but rather it is for extension of time to file both a notice of appeal and application for leave to appeal.

Having considered the submissions made by the learned counsel for the parties, I must state at the outset that indeed, without a grant of extension of time in this application, a notice of appeal and an application for leave to appeal cannot competently be before the court. It is a correct

position therefore as stated by Mr. Nyange that although he had made a detailed submission in an endeavour to show that the impugned decision is tainted with illegalities, improprieties and errors hence warranting grant of leave to appeal, the present combined application as stated earlier is for extension of time to file an application for leave to appeal and notice of appeal.

The crucial issue in determining the application is thus whether the applicant has established a sufficient cause for grant of extension of time as prayed. The main ground upon which Mr. Nyange has based the application is existence of illegalities in the impugned decision. This ground, constitutes a sufficient cause for grant of extension of time to file both a notice of appeal and an application for leave to appeal. Although Mr. Mwandambo has argued firstly, that the applicant has not proved existence of the alleged illegalities, and secondly, that whether such illegalities exist or not, the same ought to be ascertained by the Court of Appeal, in my considered view, as argued by Mr. Nyange, in order for this court to exercise its discretion in extending time on the ground of an allegation of illegalities, such illegalities need not be proved beyond reasonable doubt. In the case of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR 185 the Court of Appeal held as follows on that point:

- “(i) *Where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged that is of sufficient importance to constitute*

*sufficient reason within the meaning of rule 8 of the Rules for extending time.*

- (ii) *When the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for that purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

The above holding by the Court of Appeal lays down the principle that where there is an allegation of illegality of a decision sought to be challenged, the court has a duty to ascertain the illegality and to enable this to be done, should extend the time so that such an illegality can be addressed. The words used in the above cited decision are "*where ... the point of law **at issue...** is the illegality*" and "*when the point at issue is one **alleging** illegality...*". It is not meant therefore that the illegalities must be proved. In my considered view, when such an allegation appears to be probable, the application for extension of time has to be granted.

From the submission made by the learned counsel for the applicant and on the basis of the binding authority cited above, I am satisfied that the applicant has established a sufficient cause for grant of extension of time. I thus accordingly grant the application as prayed. A notice of appeal and an

application for leave to appeal h to be instituted within 21 days for the date of this ruling.

  
**A. G. Mwarija**

**JUDGE**

**27/6/2013**

**27/6/2013**

Coram : A. G. Mwarija, J.

For the applicant : Mr. Nyange, Advocate

For the respondent : Ms. Chavawa, Advocate

CC: Banza

Ruling delivered.

  
**A. G. Mwarija**

**JUDGE**

**27/6/2013**