



**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT BUKOBA**

MISC. CIVIL APPLICATION NO. 40A OF 2018

(Arising from Misc. Civil Application No. 13 of 2016, and originating from Bukoba RM's Court in Civil Case No. 34 of 2012)

OLAM TZ LIMITED.....APPLICANT

VRS

JOSEPHAT JONATHAN.....1ST RESPONDENT

IGNATUS N. BASHEMALA T/A BASHEMELA

AUCTION MART AND COURT BROKER.....2ND RESPONDENT

RULING.

3/3/2021 & 2/6/2021

Kairo, L

The Applicant in this matter is praying for orders: -

- (i) An extension of time within which to apply for revision in respect of Civil application No. 13 of 2016 from Bukoba RM's Court.*
- (ii) That this court may be pleased to call, examine and revise the execution process and proceedings of Misc. Civil application No. 13*

of 2016 and subsequent orders of the trial court as there are apparent errors material to the merit of the Application which involve injustice.

- (iii) That this court be pleased to order the Respondent to return the decretal amount of Tshs. 91,689,426/= to the Applicant which was paid to the 1st Respondent to satisfy the exparte decree.*
- (iv) Cost of this application follow the event.*
- (v) Any other relief this court may deem just and fit to grant.*

The Application was brought under Section 14(1) of the Law of Limitation Act Cap. 89 RE 2002 and Section 44 (1)(b) of the Magistrates Courts Act Cap. 11 RE 2002. As usual the chamber summons has been supported by two affidavits sworn by Joseph Isondo and Innocent Kisigiro respectively.

Basically, the Respondent resisted the application and together with his counter affidavit, he raised a notice of Preliminary of Objection which was overruled and the court ordered the application to proceed on merit.

The Applicant was represented by Advocate Innocent Bernard, the 2nd Respondent was absent while the 1st Respondent was paddling his own canoe.

When invited to orally amplify the affidavit and counter affidavit respectively, Advocate Bernard prayed to submit on both prayers.

However, on reflection, the court was of the view that, despite encouraging omnibus applications to deter multiplicity of applications, but the nature of the omnibus applications at hand cannot be lumped together in one application and thus the second prayer has to wait for the outcome of the first prayer.

The law is now settled that, an extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause as per



the case of **Benedict Mumello versus Bank of Tanzania**, Civil Appeal No. 12 of 2002 CAT DSM (unreported). In his affidavits together with the oral submission, the Applicant stated that his delay was caused by what he called *technical delay*. He clarified that all the time since the decision subject to impunity was delivered, he was in court corridors prosecuting the matter by filing various applications, but in vain due to incompetency of the same. As a result, they were being struck out, as demonstrated in paragraphs 3,5 and 6 of the affidavit of Joseph Isondo. He argued that a technical delay is among sufficient causes for the court to exclude such a period when it comes to counting for the purpose of limitation. He referred this court to the case of **Fortunatus Masha vrs William Shija & Another (1977) TLR 154** to bolster his argument.

Another reason advanced by Advocate Bernard was illegality in the court proceedings. The Applicant through the affidavit of advocate Innocent Kisigiro at paragraph 5-9 deposed that various illegalities including non serving of the summons to the Applicant when the *ex parte* judgment was delivered, neither was he served with a notice to show cause before execution. Besides, the execution at issue was dismissed on 6/4/2016 for non-appearance of the Respondent. The Applicant went on that the said order was neither vacated nor restored, yet other proceedings proceeded. He further deposed through Advocate Kisigiro that there was no order appointing the court broker and further that there was no order whatsoever to date in court record which shows how did the court broker implemented the execution order. He cited the case of **Mohamed Salum Nahdi vrs Elizabeth Jeremiah; Civil Reference No. 14 of 2017 CAT DSM** (unreported) Pg. 7 to support his argument wherein it was stated that, illegality is a good cause to extend time so as to afford the court with time to correct/rectify an illegality on appeal. He thus prayed the court to grant his prayer for an extension of time.



In his reply, the Respondent started by lamenting that the Applicant is disturbing him with his endless applications. He also refuted the reason that the Applicant was all along in court corridors pursuing the matter asserting that he was not attending to court and prayed the court to go through the court record for verification of his contention. He added that when the judgment was delivered, the Applicant was present and he is surprised why he didn't take prompt action while he had advocates representing him throughout.

The Respondent also refuted the pointed-out illegalities clarifying that the matter was not dismissed. Further the alleged non appointment of the court broker is also not true otherwise the execution order could not have been implemented. The Respondent also submitted that a court broker is an officer of the court, as such it is the 2nd Respondent who could clarify on this. He prayed the court to dismiss the application.

In rejoinder, Advocate Bernard prayed the court to disregard oral submission which is not in the 1st Respondent's counter affidavit. He also argued that the invitation by the Respondent for the court to go through the court record is an implied conceding to the Applicant's prayer for an extension of time whereby after the grant, the court will be mandated to go through the whole record so as to verify what has been stated by both parties. He reiterated the prayer for the grant of an extension of time arguing that he has demonstrated sufficient causes.

The issue for determination before the court is whether the Applicant has advanced good/sufficient cause to enable the court exercise its discretion to grant the extension of time sought. As earlier stated, god cause is the criterion for the court to extend time. In the case of **Barenga Mungozi vrs Mary Ntunzwe (2002) TLR 141** and **Samson Kishosha Goba vrs Charles**



Kinyoyo Goba (1990) TLR 133, the court observed that: *when considering whether or not an extension of time should be granted, the court has to consider reasons for delay, chances of the intended appeal succeed **and conspicuous error*** (emphasis mine).

What constitute sufficient cause has not been defined. However, from decided cases, a number of factors could be taken into consideration in determining as to whether or not the Applicant has demonstrated good/sufficient cause. Among the factors to be considered has been succinctly stated which among others include point of law of sufficient importance such as illegality of the decision sought to be challenged. [Refer Civil Reference No. 9 of 9991; **Principal Secretary Ministry of Defence and National Service vrs D. Valambhia CAT DSM** wherein it was stated as follows:

“In some cases, a point of law may be of sufficient importance to warrant extension of time, while in others it may not. ...We think that where, as here, the point of law at issue is the core or otherwise of the decision being challenged, that is sufficient importance to constitute “sufficient reason” within the meaning of Rule 8 of the rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. - In our view 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 the purposes, to ascertain the point, and if the alleged illegality be established, to take appropriate measures to put the matter and the record right”.

In the instant application, the Applicant has pleaded two reasons: -

Technical delay, and illegalities: I will start with technical delay. Going through the affidavits when he explained the chronological events (paras 5-9 of the affidavit) after the ex parte decision delivered against him, I am convinced that the stated delay was technical which legally is excusable [Refer the case of **Fortunatus Masha (supra)**].

The Applicant has also alleged illegality to be another reason for delay. The law is now settled that, illegality as a reason for seeking an extension of time amounts to sufficient/good cause. I found fortification in this stance in the case of the **Principal Secretary of the Ministry of Defence and National Service (supra)**].

Further, the case of **VIP Engineering & Marketing Ltd & three Others vrs Citibank TZ Ltd; Consolidated Civil Reference No. 6,7,8/2006 CAT DSM** (unreported) clearly stated: -

"It is, therefore settled law that a claim of illegality of the challenged decision constitutes sufficient reason to extension of time Under rule 8, regardless of whether or not a reasonable explanation has been given by the Applicant under the rule to account for the delay."


It goes therefore, the allegation of illegality by itself suffices for the grant of an extension of time. Thus, without going into the merits of the alleged illegality, I am with candid views that, the same as alleged by the Applicant warrants the grant of an extension of time sought.

In the forgoing, the Applicant's prayer for the grant of an extension of time is hereby granted as prayed, with no order to cost.

It is further ordered that the application for revision be lodged within 30 days from the date of this decision. For avoidance of doubt, the second prayer for revision is considered to have been withdrawn and thus the Applicant has to file a fresh application for revision within the time prescribed.

It is so ordered.




L.G. Karro
Judge

2/6/2021

Date: 02/06/2021

Coram: Hon. J. M. Minde – DR

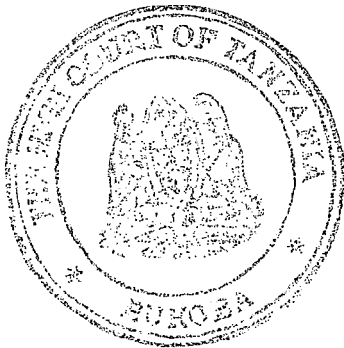
Appellant: Mr. Mzee (P/O)

Respondent: Present

B/C: Lilian Paul

Court:

This matter is scheduled for ruling on 31/05/2021, however by the date I was not yet read instructed to deliver the said ruling by then trial judge, who was appointed Justice of Appeal. As today she instructed the ruling to be delivered, I deliver the ruling in the presence of parties, this 2/6/2021.



Sgd: J. M. Minde – DR

02/06/2021