

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IRINGA DISTRICT REGISTRY
AT IRINGA
MISC. CIVIL APPLICATION NO. 17 OF 2021
(Arising from Civil Appeal No. 14 of 2019, in the High Court
of Tanzania, at Iringa).
UNILIVER TEA TANZANIA LIMITED.....APPLICANT
VERSUS
FESTO ANTONY MBILINYI.....RESPONDENT**

RULING

18/7 & 21/7/2022.

UTAMWA, J.

The applicant in this matter, UNILIVER TEA TANZANIA LTD, moved this court for the following reliefs:

- (i) An order granting extension of time for the applicant to file a notice of appeal to the Court of Appeal of Tanzania (The CAT), against the judgment and decree of this court (Matogolo, J.) in Civil Appeal No. 14 of 2019.
- (ii) For costs to be provided for; and
- (iii) For any other relief(s) this Honourable court may deem fit and just to grant.

The application was made under Sections 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (The AJA), by way of chamber

summons. It was supported by an affidavit of Mr. Jackson Bidya, the applicant's counsel.

The grounds for the application as set out in the affidavit supporting the application are summarized as follows: that, the respondent had filed in the District Court of Mufindi District, at Mafinga (The trial court) a claim against the applicant's act of prohibiting the respondent's motor vehicle from accessing the applicant's private road. The trial court decided the case in favour of the respondent. The applicant was aggrieved by the decision of the trial court and appealed to this court. In turn, this court decided the appeal partly in her favour. It did so by setting aside the award of Tanzanian Shillings (Tshs.) 5,000,000 as special damages since the respondent had failed to prove the amount claimed. The applicant also alleged that, there are illegalities and irregularities in the trial court's decision. These included the act of the trial court in entertaining the case after the expiry of the speed track. The trial court also wrongly received unqualified documentary evidence and acted upon it.

Now, the applicant intends to appeal against the decision of this court to the CAT. However, she failed to file her leave to appeal within the prescribed time, hence this application.

The respondent objected the application through the counter affidavit sworn by himself. In essence, he did not object the back ground of the matter as narrated in the affidavit supporting the application. He however, refuted the existence of the illegalities complained of by the applicant and the fact that he will not be prejudiced if this court grants the application.

He further disputed the fact that there are good grounds for granting the application.

The application was disposed of by way of written submissions. The applicant was represented by Mr. Jackson Bidya, learned advocate. On the other hand, the respondent enjoyed the services of Mr. Hafidhi Mbinjika, learned counsel.

In his submissions in-chief supporting the application, the applicant's counsel adopted the affidavit supporting the application. He added that, both parties agree that the appellant is out of time to lodge her notice of appeal to the CAT. This has been demonstrated in the applicant's affidavit and the respondent's counter affidavit. However, there are irregularities and illegalities in the proceedings before the trial court that warrant this court to grant the application.

The learned applicant's counsel also contended that, the illegalities and irregularities are contained in paragraph 8 of the affidavit. They include the following: that, the trial court erred in law by determining and entertaining the case after the expiration of its Speed Track, it delivered the judgment in favour of the respondent basing on irrelevant facts which had not been adduced by either party, it also accepted documentary evidence which was unqualified to be tendered as exhibit since they contradict the rules of evidence. It further based its findings on the unqualified documentary evidence. The other illegalities are that, the trial court decided the case without analysing and considering the evidence on record.

Moreover, the applicant's counsel cited the cases of the **Principal Secretary, Ministry of Defence v. Devram Valambia [1992] TLR 185**, **Kastan Mining PLC v. Colom Investment (T) Ltd, Civil Application No. 95/01 of 2019** (unreported) and **Kalunga and Company Advocates v. National Bank of Commerce Ltd [2006] TLR 235** to support his above contentions. He contended that, these precedents essentially held that, when the point at issue is one of illegality, the court has a duty to extend the time.

It was a further argument by the applicant's counsel that, the proceedings of the trial court are defective for the failure by the magistrate to administer oaths of the witnesses. It is mandatory for a witness to be sworn when testifying in court. This legal position was underscored in the cases of **Uniliver Tea Tanzania Limited v. Davis Paulo Chaula, Civil Appeal No. 290 of 2019** (unreported), **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020** (unreported) and **Iringa International School v. Elizabeth Post, Civil Appeal No. 155 of 2019** (unreported).

Moreover, the applicant's advocate submitted that, the proceedings before the trial court lacked the Magistrate's signature after recording the testimony of each witness. This is contrary to the law as it was held in **Uniliver case** (supra). He added that, there is also no proper counter affidavit before this court. This is because, the counter affidavit sworn by the respondent is defective as it contravenes section 10 of the Oaths and Statutory Declarations Notaries Act, Cap. 34 R.E 2019. These provisions require the attesting officer to indicate in the *jurat* of attestation whether

the deponent is known to him/her personally or introduced to him/her by someone. The respondent's counter affidavit has not indicated the same. To cement this position, he cited the cases of **Thomas John Paizon v. Khalid Nongwa, Misc. Land Appl. No. 954 of 2017** (unreported) and **Ramadhani Pazi & Wambura Malima v. Tanzania Civil Aviation Authority, Revision No. 325 of 2013** (unreported).

The applicant's counsel thus, urged this court to grant this application so that the said defect can be addressed by the CAT.

In his replying submissions, the respondent's counsel also adopted the counter affidavit. He however, added that, section 11(1) of the AJA gives discretion to this court to extend time to the parties upon demonstrating good cause for the delay. This application was filed on 27th July, 2021 after the respondent had filed the application for executing the decision of this court. The same was registered as Execution No. 10 of 2021. He argued further that, 100 days had lapsed from the last date the applicant was required to file her notice of intention to appeal.

The respondent's counsel further submitted that, it is trite law that a delay even of a single day has to be accounted for. This position was underlined in the case of **Ramadhan J. Kikwani v. Tazara, Civil Application No. 401/18 of 2018** (unreported). The applicant has failed to account for the 100 days delay. Moreover, the applicant's counsel did not briefly explain on the illegalities as relied upon, but he only mentioned the alleged illegalities. The applicant's counsel in his submissions in chief has also submitted that, the delay in filing this application was due to illegality and irregularities tainted in the proceedings of the trial court. He

cited the cases of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 02 of 2010** (unreported) referred to in the case of **Efrasia Mfugale v. Andrew J. Ndimbo and Another, Civil Application No. 38/10 of 2017**. These precedents, he contended, outlined the factors for granting extension of time.

It was also the contentions by the learned counsel for the respondent that, the applicant ought to have filed her notice within 30 days from the date of the decision of this court (that is on 19th March 2021). He did not act diligently in challenging that decision since her application was filed after the respondent had filed the application for execution. Parties are supposed to act diligently in pursuing their cases in court as it was guided in the case of **Dr. Ally Shabhay v. Tanga Bohora Jamaat (1997) TLR 305**.

Furthermore, the respondent's counsel contended that, the issue of illegality by itself suffices for an extension of time. However, such illegality must be apparent on the face of record. The illegalities mentioned by the applicant's counsel are not apparent on the face of record. Other legal issues have already been determined by the High Court. The applicant has thus, failed to advance good and sufficient reasons for the prayed extension of time. To cement these contentions, he referred the court to the case of **Uniliver Tea Tanzania Limited v. Conrad Msekwa, Misc Application No. 03 of 2021**.

The respondent's advocate also distinguished the **Principle Secretary case** (supra), the **Kalunga case** (cited above) and the **Kastan**

Mining case (supra) all cited by the applicant's counsel. He distinguished them from the present case because, in the cited cases the alleged illegalities were on the face of record unlike in the present application. He added that, the alleged illegalities related to failure by the witnesses to take oath before the trial court were not pleaded in the applicant's affidavit. It is a principle that parties are bound by their pleadings, this was the position in the case of **Barclays Bank (T) Ltd v. Jacob Muro, Civil Appeal No. 357 of 2019** (unreported).

On the challenge against the counter affidavit, the learned counsel for the respondent submitted that, the argument is baseless since the *jurat* has options. It follows thus, that, if none has been selected, that means that the deponent is known personally to the commissioner for oaths. He supported this contention by citing the case of **Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby, Civil Application No. 475/01 of 2020** (unreported).

In conclusion, the respondent's counsel charged that, the applicant has not shown that he will suffer loss if the application will be denied. However, the respondent will suffer a great loss once this application is granted since he is waiting for the payment of his general damages. He thus, prayed for this court to dismiss the entire application with costs because, it is intended to delay the respondent from getting his awarded general damages.

By way of rejoinder, the applicant's counsel reiterated his submissions in-chief. He also added that, the respondent's replying submissions are misconceived and misleading. The cases he cited are all

distinguishable from the present application. On the argument by the respondent's counsel that the applicant had not prayed to adopt her affidavit, this is misconceived as the applicant's advocate had done so at paragraph 1.2 of his submissions in-chief. The respondent's counsel has in fact adopted his supplementary affidavit indicating that, the same has been made by the respondent which is not the case. He elaborated that, in the **Kastan Mining case** the court granted extension of time even after the lapse of five years since there were points of law that needed to be addressed by the CAT.

I have considered the applicant's affidavit, submissions by both parties, the record and the law. One of the vital and trite principle of the law on extension of time is that, the applicant must adduce sufficient reasons for the court to exercise its discretion and grant the prayed extension of time. Certainly, that discretion, like any other court's discretion, has to be exercised judiciously. The major issue for consideration at this juncture is therefore, *whether the applicant has adduced sufficient reasons for this court to grant the prayed extension of to file the Notice of Appeal.*

The provisions of Section 11(1) of the AJA under which this application is brought provide thus, and I quote them for a readymade reference:

"11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a

certificate that the case is a fit case for appeal, notwithstanding that the time for giving notice or making the application has already expired.”

Furthermore, the law sets time limitation for an aggrieved party to file a notice appeal to the CAT. Rule 83 (2) of the Tanzania Court of Appeal Rules, 2009 (the CAT Rules) as amended by GN. No. 344 of 2019 provides thus;

“83.-(2) Every notice shall, subject to the provision of Rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal.”

What constitutes a sufficient cause or reason (mentioned above) can be determined upon considering various factors as deliberated in various cases. Amongst the factors to be considered were stated in the **Lyamuya Construction** (supra). They include the following: to account for all the period of delay, the delay should not be inordinate, the applicant must show diligence, and not apathy, negligence or sloppiness in prosecution of the action that he intend to take, and the existence of a point of law of sufficient importance such as the illegality of the decision sought to be appealed against. See also the decisions by the CAT in **Yusuph Same and Hawa Dada v. Hadija Yusuf, Civil Appeal No. 1 of 2002 CAT at Dar es Salaam** (unreported) and **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002 CAT at Dar es Salaam** (unreported).

In the matter at hand, the judgment of this court that the applicant seeks to challenge before the CAT was delivered on 19th March, 2021, but the present application was filed in court on 27th July, 2021. By simple arithmetic that was a period of 130 days computed from when the

judgment of this court was delivered. The applicant however, did not account for any day of delay, but solely based her application on the point of illegalities in the decision of the trial court.

The sub-issue at this stage is therefore, *whether under the circumstances of the case at hand the point of illegalities raised by the applicant alone, constitutes a sufficient reason for granting the application.* Apart from the precedents cited by the parties above, there are other various decisions of the CAT which considered the issue of illegality as one of the grounds for extending time. In the case of **TANESCO v. Mufungo Leornard Majura and 15 Others, Civil Application No. 94 of 2016, CAT at Dar es Salaam** (unreported) for example, the court held, and I reproduce the holding for purposes of an expedited reference;

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court."

Furthermore, in the **Lyamuya Construction Case** (supra) the court observed thus, and I quote it for the sake of a quick reference;

"Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The court there emphasized that such point of law, must be "of sufficient importance" and I would add that it must also be apparent on the face of record, such as a question of jurisdiction; not one that would be discovered by a long drawn argument or process".

From the above cited precedents, one can deduce the following important principles on illegalities as a sufficient reason for extending time;

- i.** That, under some circumstances prevailing in an application for extension of time, demonstrating illegalities in the decision to be challenged, may constitute a sufficient ground for the court to grant the prayed extension of time.
- ii.** That, the illegality to be demonstrated under this rule should have been committed in the decision to be challenged by the applicant or in procuring it.
- iii.** That, the point of illegality must be of sufficient importance.
- iv.** That, the point of illegality must also be apparent on the face of record (not one that would be discovered by a long drawn argument or process).
- v.** That, the significance of the rule that a point of illegality constitutes a sufficient cause for extending time is rooted on the purpose for correcting the illegality by the competent court to do so.
- vi.** That, not every demonstration of the point of illegality constitutes a sufficient reason for granting the prayed extension of time.

In the present application, the applicant alleges that, there are various illegalities and irregularities in the proceedings before the trial court which call for the determination by the CAT. Nevertheless, upon applying my mind to the principles listed above, I am of the view that, the

circumstances of the matter at hand do not speak for the applicant. They do not also attract answering the sub-issue posed above affirmatively. This is because, in the first place, it is obvious that the applicant intends to appeal to the CAT against the decision of this court. However, according to the affidavit supporting the application and the submissions by the counsel for the applicant, the illegalities' complained of are only those committed in relation to the trial court. The applicant did not demonstrate as to how this court committed the illegalities which he intends to be corrected by the CAT. She did not also demonstrate as to what was the reaction of this court to the alleged illegalities committed in relation to judgement of the trial court so as to justify her to approach the CAT for correcting this court's illegalities. Indeed, the applicant put her complaints on the illegalities as if she intends to appeal to the CAT against the decision of the trial court, which is not the case.

Now, for the above reasons, I am of the view that, the illegalities complained of in the matter at hand do not fit under the principle listed as No. **ii)** herein above. This is because, the illegalities under discussion were not committed in the decision of this court which the applicant intends to challenge before the CAT. They were allegedly committed by the trial court as observed earlier. The illegalities under discussion do not also fit under the principle mentioned as No. **iii)** above. This view is based on the reason that, they lack the sufficient importance for being related to the decision of the trial court and not to the decision of this court which is intended to be challenged before the CAT. Likewise, the illegalities under discussion do not

fit under the principle termed as No. **iv)**. This is so because, the applicant did not demonstrate any illegality committed in the decision of this court, but those committed in the decision of the trial court, which is not directly challengeable before the CAT. She did not thus, demonstrate that the illegalities committed by this court (if any) are apparent on the face of record.

Further, such illegalities complained of in this matter cannot fit in the principle named as No. **v)** earlier. It is because, according to the law, the decision that would be corrected by the CAT (if it had illegalities) would be the one made by this court. However, the applicant did not demonstrate as to how this court's decision committed the alleged illegalities as observed earlier. Actually, she did not even explain as to how this court failed to make good the illegalities committed by the trial court.

Owing to the reasons shown above, the circumstances of the application at hand does not also fall under the principle mentioned as No. **i)** above, i. e under circumstances that would attract any court to consider the illegalities as sufficient reasons for extending time. They rather fall under the circumstances of the principle numbered **vi)** i.e. circumstances which do not attract considering the illegalities as sufficient reasons for granting the extension of time.

Due to the above reasons, I answer the sub-issue posed above negatively that, under the circumstances of the case at hand the point of illegalities alone, does not constitute a sufficient reason for granting the application. I accordingly answer the major issue posed above negatively

that, the applicant has not adduced sufficient reasons for this court to grant the prayed extension of time to file the Notice of Appeal.

Regarding the challenge posed by the applicant's counsel against the *jurat* of attestation for the counter affidavit, I agree with the respondent's counsel that the alleged irregularity was not fatal to it. The applicant's counsel did not also show as to how that anomaly prejudiced his client. Besides, even if it is taken that the counter affidavit was defective incurably, that course will not add any value to the applicant's case since it will not constitute any good reason for granting the prayed extension of time. The doctrine of overriding objective will not therefore, be in favour the challenge. This principle has been underscored in our written laws. It essentially requires courts to deal with cases justly, speedily and have regard to substantive justice as opposed to procedural technicalities. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported) and many other decisions by the same court.

Having observed as above, I dismiss the application for want of merits. The applicant shall pay costs to the respondent since costs follow event. It is so ordered.



JHK UTAMWA
JUDGE
21/07/2022

21/07/2022

CORAM; JHK. Utamwa, J.

For Appellant; Mr. Emmanuel Kyashana, advocate.

Respondent; present in person.

BC; Gloria, M.

Court; Ruling delivered in the presence of Mr. Emmanuel Kyashana, advocate for the applicant and the respondent in person, in court this 21st July, 2022.



JHK UTAMWA
JUDGE
21/07/2022.