

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 133 OF 2021

*(From the decision of the Resident Magistrate Court of Mwanza
at Mwanza in Civil Application No. 66 of 2020)*

JASSIE AND COMPANY LTD APPLICANT

VERSUS

CEMENT DISTRIBUTORS (EA) LTD RESPONDENT

RULING

Sept. 21st & 30th, 2022

Morris, J

I have before me, a chamber summons preferred by Jassie and Co. Ltd. (applicant), under sections 14(1), (2) and 95 of the Law of Limitation Act, Cap. 89 R.E. 2019 and the Civil Procedure Code, Cap. 33 R.E. 2019 respectively. The main prayer in this application is for the court order granting extension of time for the applicant to file application for revision out of time. According to the subject chamber summons, the envisaged revision is in connection with Miscellaneous Application No. 66 of 2020 filed at and determined by the Resident Magistrates Court of Mwanza (RM Court) on 29th

April 2021. The application is supported by the affidavit of Susan N. Gisabu which is countered by George Mwaisondola's affidavit.

In summary, the depositions from the foregoing affidavits relate to the decision of RM Court which denied the applicant's remedies in his application for review. Apparently, the applicant sought to review the decree of RM Court emanating from Civil Case No.39 of 2017. Of relevance to the current matter from the subject civil case, is the fact that the impugned decree resulted from settlement deed between parties herein. Determined to challenge the outcome of the subordinate court's review proceedings, the vanquished-applicant is determined to engage the revisionary gear of this court only to find himself time-barred.

Paragraph 4 of the affidavit evidences that the ruling which is sought to be revised, if extension of time is granted hereof, was delivered on 29th April 2021. The present application was filed on September, 30th 2021. The time in between is, therefore, about five (5) months. Precisely, 153 days. The time-line for the envisioned application for revision is sixty (60) days. Hence, this application.

During the hearing of this application, parties' respective counsel- Mr. Kulwa S. Ndulila and Mr. Renatus L. Shiduki, successfully obtained the court's

leave to argue and pursue the application by way of written submissions. I thank them to have complied with the court-set filing schedule, however short the time-lines were. Apart from both sides making constant reference to their respective affidavit as they submit, the court notes something unusual in their concurrent approach. Both have introduced and argued, at a fair length, a point which is not contained in the current chamber summons, parties' affidavits or court proceedings for this matter. That is, misdirected as they seem to be, both counsel spent a considerable time submitting on the issue of incongruities of dates apparent on the RM Court's ruling of the application for review from the bar. It is not supported by evidence vide affidavit or otherwise. As I have indicated, the applicant neither did he depose on discrepancies of these dates on the ruling nor did the counterpart controvert the same. With respect, this ruling will ignore the parties' wasted efforts in such regard.

In his erudite submissions, Mr. Ndulila, learned advocate for the applicant, submitted on only one reason in support of the prayer to enlarge time within which to file the application for revision: illegality marring the RM Court's decisions. This is notwithstanding the fact that the affidavit attached to the application reveals two grounds; illegality and tardiness in being

supplied with certified copies of the ruling and drawn order (paragraphs 8, 9 and 10; and 6 and 7 respectively). In favour of the spared ground, the applicant's counsel ably submitted that the court retains discretionary powers to grant extension of time. However, he asserted that the court should be guided by principles of justice, reason and rules pursuant to **African Airlines Intl. Ltd v Eastern and Southern Africa Trade and Development Bank** [2003] 1 EA 1.

He argued further that one of the guiding pillars to grant extension of time is if allowing the application will cure illegality in the to-be challenged decision. To buttress his submissions in this regard, he referred the court to various cases including **Lyamuya Construction Co.Ltd.v Board of Trustees of Young Women's Christian Association of Tanzania**, Civ.Applic.No.2 of 2010,CAT-Arusha (unreported); **Lycopodium (T) Ltd v Power Board (T) Ltd and Others**, Comm. Applic.No.47 of 2020, High Court-Dar es Salaam(unreported); **Chandrakant Joshubhai Patel v R.** [2004] TLR 218; **PS Ministry of Defence & National Service v Devram Valambia** [1993] TLR 185; and **Keres and Others v Tasur and Others** [2003]2EA 531.

Relating the foregoing judicial pronouncements to the present matter, the applicant's counsel made reference to depositions in the affidavit. Emphasis was cast on the variation between the sum of money claimed in the plaint in RM Court Civil Case 39 of 2017 and the settlement deed filed to mark the suit as 'amicably settled'. In his analysis, the variation was so fundamental and touched on the court's pecuniary jurisdiction. Thus, through the envisaged revision, this court would cure the apparent illegality as vindicated in the subordinate court's proceedings. So, he prayed for the court to allow this application.

On the part of the respondent, Mr. Shiduki, learned advocate strongly attacked the submissions of the applicant. His perception of the present application is that the same has been filed as an afterthought. He is also at issue with the applicant on the basis that the alleged illegality is not expressly deposed in the applicant's affidavit. His submissions insist that, in the absence of underlying depositions in the affidavit, the relief is not sustainable. Omitted evidence in the affidavit cannot be sneaked in the court records from the bar, so he emphasized. He cited the case of **Bruno Wincelaus Nyalifa v PS Ministry of Home Affairs and Another**, Civ. Appeal No. 82/2017, CAT-Arusha (unreported) to support his argument.

Consequently, he submitted further that for the application to succeed, the applicant must not only account for each day of delay but also details of the alleged illegality must be shown in the affidavit. He prayed for dismissal of the application with costs.

Having heard the two opposing parties, this court is of the view that the issue to be determined is whether or not the applicant has disclosed the requisite reasons to warrant the court to grant the application. As rightly put by the applicant's counsel, the court has wide discretion to extend time even where the time for a given procedure has already expired. The law simply requires the applicant to demonstrate sufficient reason(s) as to why he did not take the necessary step(s) in time. The essence of setting the time limits in law is, among others, to promote the expeditious dispatch of litigation, (**Costellow v. Somerset County Council** (1993) IWLR 256; and to provide certainty of time tables for the conduct of litigation (**Ratman v. Cumara Samy** (1965) IWLR 8).

I am also in agreement with the applicant's counsel that illegality apparent in the to-be impugned court's proceedings and/or outcomes therefrom presents a sufficient cause for the grant of an application for extension of time. A plethora of authorities, in addition to the ones cited by

the applicant's advocate, includes: **Khalid Hussein Muccadam v Ngulo Mtiga** (*As A Legal Personal Representative of the Estate of Abubakar Omar Said Mtiga*) and **Another** CAT-Dar Es Salaam, Civ. Application No. 234/17 of 2019 (unreported); **Shabir Tayabali Essaji v Farida Seifuddin Tayabali Essaji**, CAT-Dar Es Salaam, Civ. Application No. 206/06 of 2020 (unreported); **Hassan Ramadhani v R.**, CAT- Tabora, Crim. Appeal No. 160 of 2018 (unreported); **Eqbal Ebrahim v Alexander K. Wahyungi**, CAT -Dar Es Salaam, Civ. Application No. 235/17 of 2020 (unreported); and **Ngolo S/O Mgagaja v R.**, CAT- Tabora, Crim. Appeal No. 331 of 2017 (unreported).

As pointed out above, in the instant matter, the affidavit of Susan N. Gisabu advances two major grounds to support the application. One, that the applicant was late to obtain copies of the ruling and drawn order (paras 6 & 7). Two, that revision is envisaged in connection with a decision marred with serious irregularity (paras 8, 9 & 10). I undertake to elucidate each of these grounds separately, though the counsel's submissions are heavily lopsided against the former.

I will start with the lateness in being supplied with copies of the subordinate court's documents. It is hereby reiterated, right from the outset,

that the applicant abandoned this ground, by conduct. He did not submit on its support. But because affidavit is evidence, the court is not prevented to analyze them on the reason that no submissions were given thereon. [**Atuwonekye Mwenda v Hezron Mangula**, Misc. Land Appli. No. 05 of 2020 (unreported)]. Under paragraph 5 of the affidavit, which is one of the relevant paragraphs in respect of this ground, the deponent avers that "the Applicant was informed that the intended Application has to be properly lodged in the High Court of which there must be copies of the Ruling, Drawn Order and Proceedings of the case which are the essential documents to be attached".

Three aspects need to be addressed here. Firstly, the deponent thereof does not disclose when such information was given to the applicant for the court to mark the beginning of the countdown for the delay. Secondly, the source of such information is concealed in both the particular paragraph and the verification clause. Thirdly, there is not attached to the application, an affidavit of the person who informed the applicant. In law, unless the person who is alleged to have volunteered the information to another produces his affidavit to confirm the purported facts, the allegation remains to be intrinsically hearsay evidence thus inadmissible. **Narcis Nestory v Geita**

Gold Mining Ltd, Misc. Lab. Appli. No. 13 of 2020 (unreported); **NBC Ltd v Superdoll Trailer Manufacture Co. Ltd.**, Civ. Appli. No. 13 of 2002 (unreported); and (Original From Land Case No. 27of2018) **Awadh Abood (As Legalpersonalrepresentative Ofthe Estate Ofthe Late Sklehe Abood Salehe)** v Tanroads and AG, Misc. Land Appli. No. 53 of 2020(unreported) followed.

Furthermore, the law requires the applicant to account for each day of the delay for him to deserve a favourable discretionary advantage. [**Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others**, CAT-Dar Es Salaam, Civ. Application No. 130/01 of 2020 (unreported)]. In the present application, the applicant states that the ruling in the RM court's proceedings was delivered on 29th April 2021. The application was filed on 30th September 2021. Though the affidavit indicates that the applicant had not obtained the copy of the ruling at the time of filing this application, it is not clearly stated as to when exactly the copy of the ruling attached to the application was obtained by the applicant. It is also worth-noting that the letter of the applicant's advocate requesting for copies of the court documents was lodged with the subordinate court in July 2021. At that time, the statutory time within which to file the present matter had already

expired. More so, there is no deposition whatsoever to explain the state of event in such period-gap. Hence, this ground is, with respect, very feeble.

I now turn to the ground of illegality. The applicant's advocate has submitted in details about this point. His arguments are supported with requisite authorities. I will address this point sparingly so that this court does not delve into the merits of the envisaged application for revision. The court gathers from the affidavit and counsel's submissions that the illegality in the RM Court proceedings relates to the discrepancies found in the deed of settlement and the pleadings of the suit. It is argued that the amount in the former document, which was later on adopted as Judgement (sic) of the Court, was for Tshs. 216,134,000/- which was beyond the pecuniary jurisdiction of the Resident Magistrate's Court' (para.10 of the affidavit and para.2 of page 2 of the applicant's submissions). In essence, the illegality is jurisdictional. If it were not for the reasons I am about to give, this squarely falls in the categories of matters for which the court will not loosely let pass without settling conclusively. That is, courts should at all times make sure that the decisions of the judicial bodies (formal and quasi-judicial) have been handed down with prerequisite jurisdiction.

Mindful of the above, with respect, I am inclined to being loath to apply such ground in this application sightlessly. The outcome of this application, if it were to succeed, will enable the applicant to file an application for revision of the subordinate court's decision. I will quote the relevant part of the chamber summons to make my point:

*"1. That this Honourable Court be pleased to grant an extension of time to file the Application for revision out of time in the High Court of Tanzania against the decision of the Resident Magistrate's Court of Mwanza in **Miscellaneous Application No. 66 of 2020** which was delivered on **29th April 2021** by **Hon. Sumaye, RM.**"*

From the above excerpt two aspects are very critical. One, the number of the application at the subordinate court (**66/2020**). Two, the **date(s)** on which the decision was made. I will take one aspect at a time. It is not disputed that the chamber summons (as quoted), which is moving the court to adjudicate this matter; and its attached affidavit (para 3) and Leonard & Co. Advocates' letter dated 30th April 2021 (forming part of the affidavit pursuant to para 6) are categorical that the matter envisaged to be revised is **Miscellaneous Application No.66 of 2020**. Even the heading of the chamber summons is evident that the present application is emanating from the subject application at the RM Court.

However, very conspicuously, the ruling attached to the application is for **Miscellaneous Civil Application Case (*sic*) No. 130 of 2020**. To make it even worse, the submissions filed for and against the present application bear the latter nomenclature as the title of the would-be impugned RM Court's proceedings. Consequently, the court is left without certainty as to what exact subordinate court's decision is subject to revision (assuming this application succeeds) hereafter. Further, the litigants themselves are not even sure of what proceedings to take up from the subordinate court to this court. In addition, this court is somewhat being moved to adjudicate on non-existent court proceedings. Accordingly, the exercise which this court will be embarking on, if it were to allow the present application in its current state, is going to be a mockery to justice; let alone subjecting the judicial minds and/or legal professionals to blatant public ridicule.

Regarding differences in dates on the ruling, assuming the attached copy is the correct one; the whole matter before this court becomes excessively vague. I noted earlier that this ruling does not consider rivalry submissions of the parties in this connection. Yes! As they did not raise such issue in their paperwork, it will not be just to pick their arguments from the

submissions. However, the court, in my view, is mandated to go through all the records before it and arrive at a just decision in the circumstances.

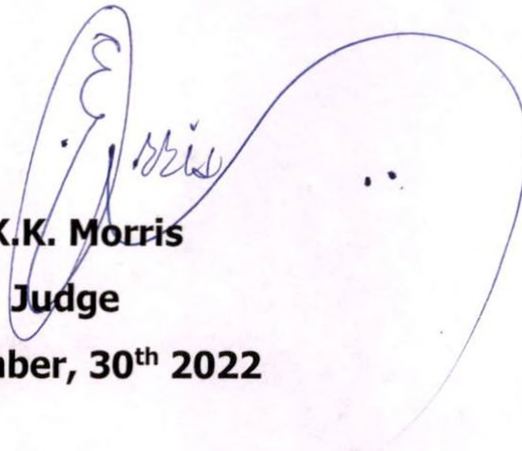
Hence, I have taken keen interest in the attached ruling. There are about three different dates thereon. At page 1, the date is 30/03/2021. At page 9, the last sentence of the ruling states that the same was delivered on 30/04/2021. Further, the date affixed in the court seal is 30/09/2021. Lastly, below the magistrate's signature the date is 30/3/2021. One fails to appreciate the exact date of the ruling. This anomaly is not without a significant impact on the present application and the intended application for revision. First, it distorts the counting of date for the purposes of determining the magnitude of applicant's delay. That is, it is not easy to fix the starting point of the counting between March 2021, April 2021 and September 2021. Second, the discrepancy vitiates the genuineness and sanctity of the court document. As elaborated in respect of uncertainty of the case number, it is impossible to be particular as to the date to be taken as being the true and correct date of the ruling. Parties should have worked on sanity of documents and whole process before setting off towards this court.

In view of the conclusions and reasons I have reached at and given above, there is no way this application will justly stand the test of law. It is

accordingly dismissed. Because the application has been determined on the basis of somewhat exclusive efforts of the court, each party will bear own costs.

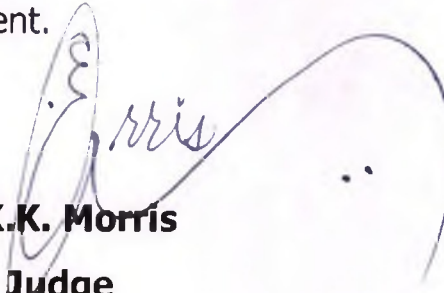
It is accordingly ordered.




C.K.K. Morris
Judge

September, 30th 2022

Judgement delivered in the presence of Mr. Kulwa Samson, learned advocate for the applicant and Mr. Kulwa Samson holding brief of Mr. Lubago Shiduki, learned advocate for the respondent.


C.K.K. Morris
Judge

September, 30th 2022