IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 585 OF 2020

(Arising from the Judgment of the High Court in the Consolidated Civil Appeals No. 302 of 2001 and No. 291 of 2001, Luanda, J, dated 25/07/2003)

GRACIOUS MWANGUYA..... APPLICANT

VERSUS

TREASURY REGISTRAR (Official receiver of TANZANIA
TRACTORS MANUFACTURING COMPANY LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

CRDB BANK LIMITED.....3RD PARTY

RULING

Date of last Order: 15/12/2021.

Date of Ruling: 18/02/2022.

E.E. KAKOLAKI, J

In this application preferred under sections 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] referred to as LLA and supported by affidavits of the applicant himself, his son one George Mwanguya and Dr. Lemeri l. Mchome, the court is moved by the applicant to extend him time within which to file

an application to this court for Review of its own Judgment in the consolidated Civil Appeals No. 302 of 2001 and No. 291 of 2001, dated 25/07/2003. The application is vigorously resisted by the 1st and 2nd respondents and the 3rd party who filed their respective counter affidavits to that effect duly sworn by their counsels. During hearing the applicant appeared unrepresented as the 1st and 2nd Respondents were represented by Ms. Debora Mcharo, learned State Attorney while the 3rd party enjoying the services of Mr. Samwel Mathiya, learned advocate and the matter proceeded by way of written submission.

The brief background story that gave rise to this application is traced from the decision of this court in consolidated Civil Appeals No. 302 of 2001 and No. 291 of 2001, whose judgment was handed down by this court on 25/07/2003 in which both appellant, respondents and 3rd party were parties to. The said consolidated appeals were arising from Civil Case No. 186 of 1992, filed and adjudicated by the Resident Magistrates Court for Dar es salaam Region at Kisutu. In its decision in the said appeals, this court found the proceedings before the trial court were nullity for want of jurisdiction to entertain the suit and proceeded to quash them and set aside the judgment and its decree. As the decision was in disfavour of the applicant he preferred

an appeal to the court of Appeal vide Civil Appeal No. 59 of 2005 which was struck out. Undaunted, he successfully filed an application for extension of time to file the application for leave to appeal to the Court of Appeal before this court whereby fourteen days were extended to him but could not make it within 14 days as directed. However, he managed to file another application for extension of time which was struck out by this court before he preferred a fresh application to the Court of Appeal vide Misc. Civil Application No. 117 of 2013, which application ended up being struck out too on 28/09/2017 for want of competence. As the Notice of Appeal was still pending in the Court of Appeal the applicant filed a Notice of withdrawal of the Appeal which resulted into withdrawal of the said appeal by the Court on undisclosed date to this court. It is from that stance the applicant has preferred the present application.

Before going into merits or otherwise of this application, I wish to make a quick recap of the position of the law surrounding grant or non-grant of the application for extension of time. It is the law under section 14(1) of the LLA that, for the court to exercise it unfettered discretion whether to grant the application or not, the applicant has to assign good cause. As what amounts to good cause there are several factors to be considered. Though not

exhaustive, the said factors include the reasons for the delay, length of the delay, whether the applicant acted diligently and not with apathy or sloppiness, the degree of prejudice to the respondent if time is extended, illegality of the decision sought to be impugned regardless of whether or not reasonable explanation has been given by the applicant to account for delay and any reasonable cause which prevented the applicant from pursuing his action within the prescribed time. See the cases of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001, **Region Manager Tanroads Kagera Vs. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, , **Julius Francis Kessy and 2 Others Vs. Tanzania Commissioner for Science and Technology**, Civil Application No. 59/17 of 2018, **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Yong Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 and **Andrew Athumani Ntandu and Another Vs. Dustan Peter Rima** *(As Legal Administrator of the Estates of the Late Peter Joseph Rima)*, Civil Application No. 551/01 of 2019 (All CAT-unreported).

In assigning reasons for the delayed period of action the applicant has to account for each and every day of delay as even a single day has to be accounted for. See the cases of **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported) and **Alman Investment Ltd Vs Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported).

In this application, the applicant vide his affidavit and the other two supporting affidavits has raised two sets of reasons that delayed him to file the present application, as well as the ground of illegality of the decision sought to be impugned. Accounting for the delayed period he contended that the from the date when the impugned decision was delivered on 25/07/2003, he was busy in court pursuing his rights until when his application in Misc. Civil Application No. 117 of 2013, was struck out by the Court of Appeal on 28/09/2017, which according to him, amounted to technical delay. He said, when his application was struck out by the Court of Appeal on 28/09/2017, he was seriously sick suffering from the neurological condition and hypertension which at time deprived him of his mental judgment ability until late October, 2020 when he recovered and made a follow up of his matter before the Court of Appeal, only to note that it was

withdrawn. The applicant relied on the medical history dated 30/10/2020 from Muhimbili National Hospital annexure **GM-01** to his affidavit issued by Dr. Lemeri L. Mchome who also swore affidavit to support it. Basing on those two reasons of technical delay and sickness he submitted the delayed period of time was accounted for hence his applica,tion was filed in time on 09/11/2020. That aside, he argued upon consultation with his lawyer was advised that the impugned decision in consolidated Civil Appeals No. 302 of 2001 and No. 291 of 2001 is tainted with illegality as the finding that the trial court had no jurisdiction to try the case was arrived at upon this court raising the jurisdiction issue suo motu and determined it without affording parties with their right to address the court on the competence of the trial court or otherwise. Relying on Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 guaranteeing the right to be heard and the cases of **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambhia** (1992) TLR 387 and **Kalunga and Company Advocate Vs. National Bank of Commerce Limited**, (2006) TLR 235, where the Court of Appeal held, making of a decision without the parties concerned being heard upon it is an illegality amounting to sufficient reason

for extension of time. He thus prayed the court to find the applicant has advanced sufficient reasons and proceed to grant the application.

As for the 1st and 2nd respondents Ms. Mcharo resisted the applicant's submission stating that the grounds raised by him for extension of time are without merit. On the reason for the delay particularly before the sickness of the applicant she contended, his advocate's act of advising him to file the appeal to the Court of Appeal against the decision sought to be impugned followed by unsuccessful application which culminated into his application in Misc. Application No. 117 of 2013 being struck out and the Notice of Appeal withdrawn from the Court of Appeal at his instance amounted to nothing but ignorance of law and negligence on the part of his advocate, which in law does not amount to good cause. It was her submission that inaction, laxity and or negligence of the advocate and ignorance of the legal procedure would not constitute sufficient reason for extension of time and thus the delayed days from 25/07/2003 to the time when the applicant allege to have fallen sick in 2017 were not accounted for. To reinforce her stance attention was drawn to the court on the cases of **Selemani Kasembe Tambala Vs. The Commissioner General of Prisons and 2 Others**, Civil Application No. 383/01 of 2020 and **A.H. Muhimbara and 2 Others Vs. John K.**

Mwanguku, Civil Application No. MBY 13 of 2015 (Both CAT-unreported). As to the ground of illegality of the decision sought to be challenged she argued, the applicant's complaint on denial of the right to be heard was not illegality in the real sense as he ought to have raised his concerned as to why the two consolidated appeal should not have been heard before the hearing could take off but he failed to so do. Placing reliance of the case of **Lyamuya Construction Co. Ltd** (supra) she submitted, the alleged illegality in the present matter is not apparent on the face of record as per the dictates of that case, hence this application should be dismissed with costs.

Mr. Mathiya for the 3rd party, on the grounds advanced for grant of extension of time to file review application he submitted, apart from the health reason which accounted for part of the delayed period, there is no justifiable reasons to justify the delayed time before his sickness that started 2017. He said according to Part III item 3 of the schedule to LLA, the time limitation for application for review of the judgment or decree is 30 days which when reckoned from 25/07/2003, the date in which the judgment sought to be challenged was handed down till when the applicant fell sick 2017 that period was not accounted for. He reasoned, at all that time the applicant was

pursuing hopeless and incompetent Appeal and applications before he resorted to application for review which according to him such course is an abuse of court process as review is not an appeal in disguise whereby an erroneous decision can be reheard and corrected. He supported his position with the case of **Afriq Engineering & Construction Co. Ltd Vs. Registered Trustees of the Diocese of Central Tanganyika**, Commercial Review No. 03 of 2020 [2020[TZHC ComD 49. He added, as per Order XLII Rule 1(i)(a) of the Civil Procedure Code, [Cap. 33 R.E 2019] application for review would be preferred where there is discovery of new evidence and an error on the face of record in the decision sought to be impugned, the elements which are missing in the present application. On the strength of the said submission, Mr. Mathiya invited this court to dismiss the application with costs for want of merit. The applicant on his part had nothing new to add in his rejoinder submission that stressing on what he had submitted in his submission in chief.

I have dispassionately considered the fighting arguments from both parties and spared enough time to peruse the entire pleadings. As alluded to above, in application of this nature, the applicant has to assign good reasons. It is not in dispute that under Part III Item 3 of the schedule to the LLA, the time

allocated for filing the application for review is 30 days from the date of the decision sought to be challenged which in this case is from 25/07/2003 to 09/11/2020 when this application was filed. In accounting for such delayed time this court is satisfied that the applicant has sufficiently accounted for the period from 28/09/2017, when Misc. Application No. 117 of 2013 was struck out by the Court of Appeal and the period when he was under serious sickness as per annexure **GM-01** up to late October 2020 when alleged he recovered. The only remaining period in contest is the time from 25/07/2003 to October, 2020, approximately seven (7) years and 3 months in which Ms. Mcharo and Mr. Mathiya contend was wasted by the applicant pursuing hopeless and incompetent appeal banking on his advocate's advice, something which does not constitute good cause on account of laxity, sloppiness and negligence of the advocate as well as his ignorance of the procedure to be followed to challenge the decision. It is true and I agree with both counsels for the 1st and 2nd respondent and 3rd party that, the appellant's act of filing incompetent appeal to the Court of Appeal which he later on prayed to withdraw, coupled with incompetent applications one of which was resulted from his failure to file timely the application for leave to appeal after being granted extension of time by this court before he opted

for the present application amounted to nothing but lack of diligence, laxity, apathy and sloppiness coupled with ignorance of law of his advocate which in total do not constitute sufficient reason for extension of time. It was held in the case of **Selemani Kasembe Tambala** (supra) that, ignorance of the applicant or his advocate does not constitute good cause warranting extension of time. As to laxity, inaction or negligence on the part of the advocate as insufficient reason for grant of extension of time the Court of Appeal in the case of **A.H. Muhimbira and 2 Others** (supra) had this to say:

> *"In the instant case* ***it seems to me that the delay was caused by inadvertence or laxity on the part of counsel for the applicants****. As* ***inaction, laxity and or negligence on the part of the counsel does not constitute sufficient reason for extending time****, I am not persuaded to grant the application sought… the applicants themselves did not know the correct legal position to follow,* ***it is trite principle that ignorance of legal procedure would also not constitute sufficient reason for extending time****." (Emphasis supplied)*

Similar stance to **A.H. Muhimbira and 2 Others** (supra) was held by the Court of Appeal in the case of **Mussa Msangi and Another Vs. Anna Peter Mkomea**, Civil Application No. 188/17 of 2019 (CAT-unreported) where the court had this to say:

> *"It is also a considered view of the Court that the attempt by the applicants to throw the blame on their former advocate cannot be accepted and it does not relieve them from being held responsible for whatever snag their wish to challenge the High Court decision in encountering.* ***Ignorance by an advocate of what procedure needed to be followed*** *and the changing of hands of a case between advocates* ***does not constitute a good cause for extension of time****."*
> *(Emphasis supplied)*

In light of the above position of the law, and given the fact that in this matter the applicant relying on the advice of his advocate he wasted more than seven (7) good years in court pursuing hopeless and incompetent appeal and applications which manifestly resulted from ignorance of the law and laxity, sloppiness and lack of diligence on the part of the applicant and his advocate I find that, the applicant has failed to account for the time delayed before he fell sick.

Next for determination is the ground of illegality in which the applicant alleges parties were denied of their right to be heard before this court could enter its decision on the issue of jurisdiction which it had raised suo motu. Ms. Mcharo and Mr. Mathiya submitted that the applicant has failed to establish the ground of illegality as the same is not apparent on the face of record as per the dictates of **Lyamuya Construction Co. Ltd** (supra). The issue here is whether the applicant has managed to establish the ground of illegality. It is the trite law that, failure by the trial court to accord parties of their right to be heard constitutes illegality. The Court of Appeal in the case of **Andrew Athumani Ntandu and Another** (supra) on the denial of the right to be heard as the ground illegality sufficient to constitute good cause for extension of time despite of failure of the applicant to account for the delayed period had the following observation:

> *"**The right to be heard is one of the fundamental rights of litigants in a trial and therefore, failure by the trial court to give the parties the right to be heard is an illegality**. Moreover, it is settled law that a claim of illegality of the impugned decision constitutes good cause for extension of time regardless of whether or not reasonable explanation has been given by the applicant to account for delay." (Emphasis added).*

Guided by the above cited authority, and having a glance of an eye to the decision sought to be challenged, I am persuaded that, the applicant has managed to convince this court that there existing illegality in the said decision. I so find as it is apparent on record at page 8 of the judgment sought to be challenged that, there are facts suggesting that this court raised suo motu the issue of jurisdiction of the trial court without any evidence indicating that parties were invited to address it before that point could be decided on. Now the issue as to whether parties were denied their right to be heard on that point or not is left for this court to consider and decide on during the review application if any is preferred.

In the upshot and for the fore stated reasons, I am inclined to hold that, this application has merit as the applicant has demonstrated good cause warranting this court grant him extension of time. The application is therefore granted, and time is extended to the applicant for fourteen (14) days from today for him to file the application for review.

As regard to the costs, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of February, 2022.

E. E. KAKOLAKI

JUDGE

18/02/2022.

The Ruling has been delivered at Dar es Salaam today on 18th day of February, 2022 in the presence of the applicant in person, Mr. Daniel Nyakiha, learned State Attorney for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
18/02/2022