

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 150 OF 2022

(Arising from Civil Application No. 136 of 2001)

ERIC AUCTION MART & COURT BROKERS.....APPLICANT

VERSUS

CONSOLIDATED HOLDING CORPORATION.....1ST RESPONDENT

TANTRACK AGENCIES LTD.....2ND RESPONDENT

AFRICAN TERMINALS LTD.....3RD RESPONDENT

RULING

Date of last Order: 5th April, 2023

Date of Ruling: 5th May, 2023

E. E. KAKOLAKI, J.

Pursuant to section 14 (1) of the Law of limitation Act,[Cap. 89 R.E 2029], applicant has brought this application for extension of time to file revision against deed of settlement executed between 1st respondent and 3rd respondent herein on 15th November, 2019 and settled in court on 18th November, 2019 and any other orders that this court may deem fit to grant. The application is supported by an affidavit deposed by Ally Moshi Omary, senior operations officer to the applicant, disclosing illegality of the decision

sought to be impugned in this Court as the sole ground for extension of time. According to the applicant, the said executed and registered deed of settlement in court is illegal and untenable in law as the Treasury Registrar has no legal interest/ consideration as the suit property was legally owned by third respondent after the court had issued her with the certificate of sale and sale became absolute. And averred further that, registration of the deed of settlement in itself constitute illegality as it infringed applicant's rights for being condemned and the same did not involve other vital parties in Misc. Civil Application No.136 of 2001. It is due to the alleged illegality in the registration of deed of settlement in court, the applicant is seeking extension of time for making it good as it is apparent on record.

The application is opposed by the 1st respondent through the counter affidavit sworn by Robinson Farles Kidede, Principle Financial Manager officer working at the office of Treasury Registrar on the ground that, the said deed of settlement involves legal rights between the 1st and the 3rd respondents only, and for that matter there is no any applicant's infringed rights by the two parties who entered into settlement, hence no illegality in the deed of settlement.

Disposal of the application took the form of oral submissions in which, Mr. Thadeus Hyera, learned advocate appeared for the applicant, while Ms. Hossana Mgeni, learned State Attorney, represented the 1st respondent and for the 2nd and 3rd respondents were Mr. Masinde Kisumo and Mr. Ngasa Ganja assisted by Ms. Mborancia John, respectively, all learned advocates. I should state from the outset that, the 2nd and 3rd respondents were not contesting the application.

Having adopted the affidavit in support of the application Mr. Hyera, began his submission by arguing that the settlement entered and registered in Court between the 1st and 3rd respondent in Misc. Civil Application No. 136 of 2001, is tainted with illegality as the Treasury Registrar had no legal interest in the suit property, taking into consideration the fact that the same was already owned by the 3rd respondent who had a certificate of sale as the sale had already been declared absolute by the RMS Court of Kisumu. That aside he submitted, the applicant being a party in Misc. Civil Application No. 136 of 2001 for auctioning of the property in dispute, was not accorded with the right to be heard on the executed and registered deed of settlement, thus condemned unheard which illegality is apparent on face of record. As to the involvement of the applicant in auctioning the property, Mr. Hyera

countered 1st respondent's allegations in the counter affidavit that, there was no auction conducted over the suit property, the fact which he stated goes against the contents of the deed of settlement attached to the applicants affidavit as annexure AMO1, indicting the applicant as the party who conducted the auction. In conclusion he noted and prayed that, since the applicant was not heard, the ground which constitute illegality of the deed of settlement sought to be challenged, then the prayer sought be granted.

In response, Ms. Mgeni while adopting 1st respondent's counter affidavit to form part of her submission, acknowledged that, this Court enjoys discretionary powers to extend time upon good cause shown, which she contended entails accounting for delayed period or the materials constituting illegality of the decision sought to be challenged. On the applicant's sole ground of illegality for extension of time to file revision application, Ms. Mgeni admitted that, illegality is one of the grounds upon which the court can grant the extension of time. She however contended, the same must be apparent on the face of record. To buttress her position, the Court was referred to the case of **Omary Ally Nyamalege (As administrator of the estate of the late Seleman Ally Nyamalege) and 2 others vs Mwanza Engineering Works**, Civil Application No. 94 /08 of 2017 (CAT) at page 10 & 13.

Then Ms. Mgeni went on arguing that, in this matter the applicant is alleging been denied of her right to be heard but instead referring the Court or showing as to how the alleged illegality is constituted the applicant concentrated on countering the content of the counter affidavit where the 1st respondent is disputing that, there was no any auction conducted. And that she is stressing further that, the treasury registrar has no any legal interest in the property. According to her all these arguments do not constitute illegality of the deed of settlement which must be apparent on the face of record as those are mere arguments which entail tendering of evidence to exhibit existence of that illegality. She was of the view that, the only ground which the applicant could have successful relied on was to account for the delayed period in which she failed to do. It was her submission that since the ground of illegality of the settlement deed is not apparent on the face of record, then the application be dismissed with cost and she so prayed.

Mr. Kisumo for the 2nd respondent had nothing to submit apart from indicating to the court that, they were not contesting the application.

As for the 3rd respondent, Mr. Ganja who was supposed to argue on issues of law alone for not filling the counter affidavit, argued in supported the

application. He submitted that, since Misc. Civil Application No. 136 of 2001 involved five (5) parties but the deed of settlement included only two parties, the applicant exclusive then, that amounted to illegality for not according her with the right to be heard.

In a short rejoinder, Mr. Hyera stressed that since the applicant was heard before registration of the deed of settlement by the trial court, then illegality is apparent on face of record, and since there is illegality no need to account for delayed days. He also noted that, it is to the applicant's understanding that, as a party to the said decision has a right to appeal but unfortunately she was not aware of the said decision only to note later on that time had lapsed, hence resorted to revision as the alternative to challenge the decision by the trial court. Otherwise he reiterated his submission in chief and implored the court to grant the application.

I have carefully considered the rivalry submission by the learned counsel for the parties here and evidence adduced in the affidavit and counter affidavit by the 1st respondent in support and against the application. The issue which calls for the court's determination is whether the applicant has demonstrated sufficient cause to warrant this court to extend time within which to file revision.

Undoubtedly, grant of an application for extension of time is a judicial discretion, exercised depending on surrounding circumstances, with the aim of achieving real and substantial justice between parties. However, the same is exercised upon the applicant advancing good or sufficient cause for delay, as in accounting for delay each day of delay must be accounted for. See the cases of **Lyamuya Construction Company Ltd vs. Board of registered trustees of young women's Christian association of Tanzania**, Civil Application No. 2 of 2010 (CAT Unreported), **Benedict Mumelo vs Bank of Tanzania**, Civil Appeal No. 12 of 2002 CAT at Dar es Salaam (Unreported) **The International Airline of the United Arab Emirates vs. Nassorror**, Civil Application No 263 of 2016, CAT at Dar es Salaam (Unreported) to mention few. It is also trite law that, illegality if successfully advanced as a ground constituting good cause for extension of time in performing certain action, then all other factors such as accounting for days of delay are not measured. See the cases of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; **VIP Engineering and Marketing Limited and Three Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported) and **Serengeti Breweries Limited Vs. Hector**

Sequeiraa, CAT-Civil Application No.373 of 2018 (both CAT-unreported) in **VIP Engineering and Marketing Limited and Three Others** (supra)

Court of Appeal patently stated:

*"It is, therefore, **settled law that a claim of illegality of the challenged decision constitutes sufficient reason for 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.**"*
(Emphasis supplied)

It is however worthy noting that, it is not enough for the applicant to allege illegality of the decision sought to be impugned as the law requires the same to be apparent on the face of record and not one to be discovered through long drawn argument or process. This was the position of the Court of Appeal in the case of **Lyamuya Construction Company Ltd Vs. Board of Trustee of Young Women's Christian Association of Tanzania** CAT-Civil Application No. 2 of 2010 (unreported), where the Court had the following to say:

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates 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 that of sufficient importance and, **I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.**" [Emphasis supplied]*

In this application as alluded to above the applicant relies on the ground of illegality, to obtain extension of time within which to file application for revision so as to challenge the registration of deed of settlement by the trial court without affording her with right to be heard, the illegality which Mr. Hyera is submitting is apparent on the face of record while Ms. Mgeni is of the contrary view that the same requires evidence to be established. Before I venture on determination of the merit or otherwise of this application I find it apposite to first address the point admitted by Mr. Hyera that, it is in the applicant's knowledge that as party to Misc. Civil Application No. 136 of 2001, had a right to appeal but dispensed with it and preferred to go for revision as alternative hence the present application. It is true as submitted by Mr. Hyera that, the order for registration of deed of settlement in which the applicant is seeking extension of time to challenge through revision is appealable. The law under Order XL Rule 1(m) of the Civil Procedure Code,

[Cap. 33 R.E 2019], provides that appeal shall lie from an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction.

It is also trite law that, where appeal is provided by the law as a mandatory remedy the same must be exhausted before revision is preferred as revision is not an alternative to appeal and there are plethora of authorities on the subject some of which are such as **Transport Equipment Ltd Vs. Dervam P. Valambhia** (1995) T.L.R 161, **Augustino Lyatonga Mrema Vs. R**, Criminal Appeal No. 91 of 1999 (CAT-unreported) and **Felix Lendita Vs. Michael Long'utu**, Civil Application No. 312/17 of 2017 (both CAT unreported). In **Augustino Lyatonga Mrema** (supra) the Court of Appeal on the above subject matter held among other things that:

"To invoke the Court of Appeal's power of revision there should be no right of appeal in the matter, the purpose of this condition is to prevent the power of revision being used as an alternative to appeal."

The above position of the law was cemented in the case of **Felix Lendita** (supra) where the Court of Appeal remarked thus:

"According to the law therefore, where there is a right of appeal the power of revision of this Court cannot be invoked."

What is deciphered from the above case laws is the principle that unless appeal as of right is prohibited by the law or the applicant is not in a position to appeal for not being a party to the case in which he seeks to challenge its decision, no party can exercise the right to apply for revision as an alternative to appeal. In this matter Mr. Hyera submitted that, the applicant failed to exercise his right of appeal against the decision sought to be impugned if extension is granted because he was not aware of the decision and found herself out of time. With due respect to the learned counsel I don't find merit in that proposition for two reasons. One, as per the order annexed to the affidavit marked AMO 2 the applicant was represented by her advocate Mr. Dickson Sanga on 28/05/2020, when the complained of registration of deed of settlement was done, hence her assertion that was not aware of the decision is an afterthought. Second, even if this Court is to believe that he was not aware of the decision, still this Court could hold that does not entitle her to resort to revision as an alternative to appeal as she could as well seek extension of time within which to file the appeal basing on the ground of illegality of the decision sought to be impugned but failed to do so.

As revision is not an alternative to appeal and since in the present matter the applicant is seeking to have time extended to him to prefer the same, I

find it to superfluous to delve into determination of the merit or otherwise of the application, which even if granted will not take the applicant to intended destination of challenging the recorded deed of settlement deed in Misc. Civil Application No. 136 of 2001, on the reason that revision is not an alternative to appeal which is still open and available remedy to her.

In the event I find the application is incompetent and proceed to strike it out. The applicant is advised if still interested to apply for extension of time within which to appeal against the complained of decision.

Given the nature of the matter and parties involved, I order each party to bear its own costs.

It is so ordered.

DATED at Dar es salaam this 05th May, 2023.



E. E. KAKOLAKI

JUDGE

05/05/2023.

The Ruling has been delivered at Dar es Salaam today 05th day of May, 2023 in the presence of Mr. Masinde Chisamo, advocate for the 2nd respondent who is also holding brief for advocate Thadei Hyera, for the applicant, Mr. Lilian Machange, State Attorney for the 1st respondent, Mr.

Ganja Ngassa, advocate for the 3rd respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

05/05/2023.

