

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

CRIMINAL APPLICATION NO. 41194 OF 2023

(C/F Criminal Case No. 230 of 2017 in the District Court of Moshi at Moshi)

DOMISIAN GERALD S/O RWEZAURA..... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 06.05.2024

Date of Ruling : 20.05.2024

MONGELLA, J.

The applicant herein has preferred this application under **Section 361(2) of the Criminal Procedure Act** [Cap 20 R.E 2022] seeking for enlargement of time to file an appeal. His chamber application was supported by his own sworn affidavit and an affidavit of one, Mr. Elisante Kimaro, an advocate he sought legal advice from. The respondent contested the application vide sworn counter affidavit of one, Mr. Henry Kasiano Daudi, learned state attorney.

The brief facts of the application are that: the applicant was arraigned before the district court of Moshi at Moshi (hereinafter, the trial court) vide Criminal Case No. 230 of 2017 for the offence of obtaining money by false pretence. In a Judgement delivered on 23.11.2018, he was found guilty, convicted and sentenced. The

applicant thus seeks to challenge the said decision on the ground that it contains illegality.

The application was resolved orally whereby the applicant was represented by Mr. Emmanuel Anthony, learned advocate, while the respondent was represented by Ms. Imelda Mushi, learned state attorney.

Submitting in chief while also adopting the applicant's affidavit and affidavit in reply to the counter affidavit; Mr. Anthony averred that the main reason for seeking enlargement of time was illegality. He started by referring the case of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII, which explains the point of illegality as one of the factors to be considered by the court in extension of time. Explaining the alleged illegality, he advanced two points being, one, that the trial court lacked jurisdiction to entertain the matter before it; and two, that the trial court failed to evaluate the evidence before it.

Expounding on the point of jurisdiction, Mr. Anthony contended that while the applicant was charged for obtaining money under false pretense, the evidence on record showed that he had a contractual relationship with the complainant. He made reference to the typed proceedings of the trial court annexed on the applicant's affidavit. He contended that the matter before the trial court was civil in nature, thus the court erred in determining the

matter as one of criminal nature. That, the trial court, in the circumstances, lacked criminal jurisdiction. He fortified his arguments with the case of **James Duru @ Nade vs. Republic** (Criminal Appeal No. 100 of 2020) [2023] TZCA 17642 (22 September 2023) TANZLII, which he believed to be slightly similar to this matter and prayed for the court to allow the application so that the matter could be resolved.

On evaluation of evidence, he advanced arguments somehow in continuation of the point of jurisdiction. He submitted that the trial court never considered part of the evidence, such as the presence of a contract between the parties that was reduced into writing. In that regard, he challenged that the judgement was not composed per the requirement of **Section 312(1) of the Criminal Procedure Act**. He cemented his arguments on this point with the case of **Matongo Mathayo @ Mgori & Another vs. Republic** (Criminal Appeal No.271 of 2021) [2023] TZCA 17441 (20 July 2023) TANZLII.

The application was vehemently opposed by the respondent's counsel. In her reply submission on the alleged lack of jurisdiction, Ms. Mushi disputed existence of any contractual relationship between the complainant and the applicant. She averred that the complainant stated at trial that he entered into an agreement with a company named "Haraka Company" which was owned by the applicant. Referring to the testimony of PW2, she contended that PW2 proved that the agreement between the applicant and the complainant was void because after following up, he found that

the company had been banned prior to entering to the alleged contract. In her view, that meant that the applicant was not in capacity to enter into a contract with the complainant. That, in the premises, filing a criminal case against the applicant was the only available option for the complainant.

Addressing the point on failure to evaluate the evidence on record, Ms. Mushi argued that the offence the applicant was charged with was obtaining money under false pretense. She contended that the prosecution proved the offence and the trial court composed the judgement by relying on evidence on record. She argued further that all the evidence on record was considered and the judgement was properly composed.

As to the application of the point of illegality as a reason for extension of time, Ms. Mushi enumerated the factors to be considered thereof. She contended that the pleaded illegality has to be apparent on the face of record, that is, should be visible and not one that can only be found after long drawn arguments. She supported her arguments with the case of **Registered Trustees of Calvary Assemblies of God (CAG) vs. Tanzania Steel Pipes Limited & Others** (Misc. Civil Application No. 730/17 of 2022) [2023] TZCA 17832 (14 November 2023) TANZLII and **Lyamuya Construction Ltd** (supra). She finalized her submission by challenging the applicant for failure to demonstrate sufficient reasons thereby failing to convince this court on the point of illegality. She prayed for the application to be dismissed.

Rejoining, Mr. Anthony found Ms. Mushi to have conceded to the fact that the contract was void as testified by PW2. He thus prayed for such statement to be associated with paragraph 14 of the applicant's affidavit in which the applicant deponed that the complainant could have referred the dispute to a civil court for breach of contract or misrepresentation.

While Mr. Anthony conceded to the argument that parties are not to embark to long drawn process to find the illegality, he maintained that it was apparent that there was an agreement between the parties rendering the matter to be tried in a civil court.

I have observed the submissions of the learned counsels for both parties, their affidavits and annexures therein. It is well settled that enlargement of time is within the discretion of the court, but the same ought to be judiciously exercised. See; **Tropical Air (T) Tanzania Limited vs. Godson Eliona Moshi** (Civil Application 9 of 2017) [2018] TZCA 384 (3 April 2018); **Lyamuya Construction Ltd.** (supra) and; **Melau Mauna & Others vs. The Registered Trustees of the Evangelical Lutheran Church in Tanzania (ELCT) North Central Diocese** (Civil Application No. 22 of 2023) [2024] TZCA 132 (23 February 2024). For the court to exercise its discretion judiciously, the applicant is obliged to show sufficient cause as to why the court should grant the enlargement. There is a list of factors that are taken into consideration in determining the sufficient cause. In **Melau Mauna & Others vs. The Registered Trustees of the Evangelical**

Lutheran Church in Tanzania (ELCT) North Central Diocese (supra), the Apex Court listed some of such factors. It stated:

“In a string of decisions, the Court has propounded certain factors that would guide it although they are not exhaustive as every case has to be looked at depending on its facts. The factors are length of the delay, whether or not the applicant acted diligently, that is whether he was prompt in lodging the application, reasons for delay, the degree of prejudice to the respondent if time is extended and existence or not of an illegality in the decision sought to be challenged upon grant of extension of time and each day of delay should be accounted for.”

In this application, the applicant is alleging presence of illegality in the judgment reached by the trial court. It is well settled that while illegality is sufficient cause for granting extension of time, the same must be apparent on the face of record and not one that can be seen after long drawn argument or process. The Court in **Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambhia** [1992] T. L. R. 185 stated:

“However, as observed by the learned single Justice, it is not sufficient to allege that the decision sought to be challenged is tainted with illegality. The illegality must be apparent on the face of the record.”

In **Lyamuya Construction Co. Ltd** (supra) the Court of Appeal further explained:

“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 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 the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.”

See also; **Power & Network Backup Ltd vs. Olafsson Sequeira** (Civil Application No. 307 of 2021) [2023] TZCA 80; **Mashaka Juma Shabani & Others vs. The Attorney General** (Civil Reference No. 30 of 2019) [2023] TZCA 17615.

Mr. Anthony has raised two points of illegalities that ought to be addressed in appeal. One, is jurisdiction, in which he alleged that the matter ought to have been dealt with by a civil court and not a criminal court. I have observed the proceedings of the trial court annexed to the applicant's affidavit. At page 13 one, Grace Tadeus Meela, PW1 and complainant in the matter, claimed to have paid “Haraka Clearing and Forwarding” allegedly owned by the applicant who is the director, for clearing and forwarding her goods. At page 14 to 15 it seems that the payment was made to the applicant directly. It appears, as provided under page 16, that there was subsequent agreement between the applicant and the complainant made on 07.09.2016 on payment of 30,000,000/= and

incidental costs in instalments. Such contract was prepared by PW4, an advocate the parties contracted to do the same and it was admitted as Exhibit P4.

In the premises, as depicted on records presented before me, I find the question of jurisdiction of the trial court in determining the matter being apparent on face of the record. The respondent's counsel argued disputing existence of the alleged contract by showing that the contract was void. In my view, whether the contract was void or not, or whether the trial court had jurisdiction or not in entertaining the matter before it, is not in the mandate of this court to determine in this application. Doing that, would be stepping into the shoes of an appellate court, which shall be a fatal irregularity.

It is trite that where there is a claim of illegality in the decision intended to be challenged, this court is obliged, for interest of justice, to grant extension of time so that the illegality is addressed. In **Salehe Omary Ititi vs. Nina Hassan Kimaro** (Civil Application 583 of 2021) [2023] TZCA 232 TANZLII the Apex Court stated:

“Again, it is a settled principle of law in our jurisdiction that where an illegality in the decision being challenged is raised, the Court is supposed to grant the application for extension of time so that the matter can be considered.”

In the foregoing, having found the pleaded illegality on jurisdiction apparent on the face of record of Criminal Case No. 230 of 2017 which the applicant seeks to challenge, I find the application with

merit and proceed to grant it. The applicant is hereby given fourteen (14) days from the date of this Ruling, to file his intended appeal. Being a criminal matter, I make no orders as to costs.

Dated and delivered at Moshi on this 20th day of May, 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA