

**IN THE UNITED REPUBLIC OF TANZANIA  
THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM SUB-REGISTRY)  
AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 373 OF 2022**

(Originating from the exparte judgment of the district court of Ilala at Samora in Civil  
Case No. 98 of 2014 before Hon. Msafiri J. C )

**THE BOARD OF TRUSTEES**

**EXECUTIVE OF CHAWATA .....APPLICANT**

**VERSUS**

**BANANA CONTRACTOR LTD.....RESPONDENT**

7<sup>th</sup> & 23<sup>rd</sup> May, 2024

**DYANSOBERA, J.**

This is an application for extension of time in which to file revision of against exparte judgment of the District Court of Ilala at Samora in Civil Case No. 98 of 2014. It has been filed under Section 14(1) of the Law of Limitation Act [Cap. 89 R.E.2019] and Section 95 of the Civil Procedure Code [Cap. 89 R.E.2019]

Brief facts for purposes of determining this application as gleaned from the applicant's affidavit are that Banana Contractor Limited signed an agreement on 8.8.2011 with Chama cha Walemavu Tanzania (CHAWATA) for maintenance and repairing of the building of CHAWATA. in 2014 Banana Contractor Limited instituted Civil Case No. 98 of 2014 in the District Court of Ilala at Samora against the applicant for breach of contract and an ex- parte judgment was delivered.

The respondent then filed an application for execution of the decree. However, before the execution order was issued parties settled the matter

out of court on 12.12.2022 and agreed on the amount and mode of payment. The applicant issued a cheque for payment but the cheque bounced because the respondent's name and bank account were not in existence. This prompted the applicant who, on 3<sup>rd</sup> February, 2023 wrote a letter to the Chief Executive officer of the Business Registration and Licensing Agency (BRELA) seeking registration verification of the respondent who purported to be a company. The Agency replied that the respondent had never been registered at it.

During the hearing of this application, the applicant was represented by the learned Counsel Mr. Paul Kisabo while the respondent enjoyed the legal services of Andrew, Miraa, learned Advocate.

Arguing in support of the application, Mr. Paulo Kisabo, after adopting both the chamber summons and affidavit. He contended that the court is vested with discretionary powers to extend time for filing an application for revision upon existence of reasonable or sufficient cause as stated under section 14(1) of the Law of Limitation Act [Cap. 89 R.E.2019].

It is the argument by counsel for the applicant that the agreement signed on 8<sup>th</sup> August, 2011 which is the basis of Civil case No. 98 of 2014 which gave rise to the deed of settlement whose legality is being questioned were all tainted with illegality and specifically fraud contrary to section 17 (1) (a) and (b) of the Law of Contract Act [Cap 345 R.E 2019].

Counsel for the applicant argues that since, under the law, there are two categories of persons; a natural person and legal person, then the respondent was neither of the two. He is confident that at the time of signing the agreement on 8<sup>th</sup> August 2011 and at the time of instituting the

case before the court, the respondent was not legally in existence and, therefore, incapable of entering into a contract.

Mr. Paulo Kisabo was of the view that illegality is a good ground for the court to grant extension of time and placed reliance on the cases of the **Principal Secretary, Ministry of Defence and National Service V. Devram Vallambhia** [1992] TLR 185 and **Ramadhan Myolele Vs. Hamad Ally Islam**, Miscellaneous Civil Application No. 40 of 2022

On the improper verification of the respondent's counter affidavit, counsel for the applicant directed his arsenals on paragraphs 8,9 and 10 of the said counter affidavits and argued that they were in contravention of Order VI rule 15(2) of the Civil Procedure Code. It was prayed for the applicant that those paragraphs be expunged from the record.

The applicant's attack was also directed on the jurat of attestation of the counter affidavit. It was the argument of counsel for the applicant that the jurat is defective for failure to clearly state whether the attesting officer personally knew the deponent or that the deponent was introduced to him by a person known to him. An omission which goes contrary to S.10 of the Oath's and Statutory Declarations Act [Cap 34 R.E. 2019], an omission that renders the whole affidavit to be fatally defective.

Counsel for the applicant reiterated his prayers for the grant of extension of time so that the applicant to files an application for revision in order for this court to address itself on the illegality of the impugned decision of the lower court and correct it.

Replying to the submission by the learned Counsel, Mr. Andrew Miraa, learned Advocate for the respondent, adopting the counter affidavit as par

of his submission, invited the court to dismiss the application on account that it is devoid of any merit.

Counsel for the respondent submitted that normally in applications for extension of time the court has to be satisfied that the applicant has advanced sufficient reason for the delay to act in time.

Making reference to the case of Benedict Mumelo Vs. Bank of Tanzania, [2006] E.A 257, counsel for the respondent told this court that there are three conditions to be considered by the court when exercising its discretionary powers to grant extension of time. One, whether the application has been brought promptly. Two, the absence of any or valid explanation for delay and three, lack of diligence on part of the applicant.

Counsel for the respondent explained that the applicant is intending to challenge the decision delivered on 29<sup>th</sup> January, 2015. The applicant's first application for extension of time which he had filed in the year 2019 which is almost for years from the date the matter was decided was struck out on 22<sup>nd</sup>. July, 2020. Then in the same year, the applicant filed application for extension of time to set aside *ex parte* judgement but the same was dismissed on 25<sup>th</sup> of February, 2021. The applicant's appeal against that decision was dismissed on 17<sup>th</sup> September, 2021.

Undaunted, the applicant, on 21<sup>st</sup> of July, 2023 filed this application. According to Mr. Andrew Miraa, from 17<sup>th</sup> September, 2021 to 21<sup>st</sup> July, 2023, it is over a period of twenty-two months.

With regard to the applicant's argument at paragraph 15 of the affidavit that he became aware of the defect which he is now calling an "illegality" on 14<sup>th</sup> of February, 2023. It is the counsel's argument that from

15<sup>th</sup> of February, 2023 to 21<sup>st</sup> of July 2023 when this application was filed a period of almost five months had elapsed and that from the date when an *ex parte* judgment was delivered it is about 8- or 9-years past.

Counsel argued that it is a settled principle of law that the applicant must account for each day of delay, a fact which, the applicant has failed. Further that the period of which the time five months the time the applicant alleges to be aware of the illegality has not been accounted for and in buttressing his argument, he cited the case of **Kehongo Mosei and another v. Muluga Peter Mahorya**, Miscellaneous Land Application No. 64 of 2021. Reliance was also placed to the case of the **Board of Trustees of the Free Pentecostal Church of Tanzania Vs. Asha Selemani Chambanda.....**, in which at p. 9 the Court emphasized on the requirement of accounting each day of the delay.

Counsel for the respondent urged the court to dismiss this application for the applicant's failure to not only accounting for each day of delay but also providing any valid explanation.

On the existence of illegality as per paras 14 and 15 of his affidavit, Counsel for the respondent was of the view that there is no illegality as alleged by the applicant because the applicant at all stages of the case has been acknowledging the respondent as the one with whom he entered into a contract and even settled the matter and the applicant was also in the process of issuing payment to the respondent. In counsel's view, this application is geared at evading the contractual liability on the applicant.

On the alleged illegality, counsel urges this court to dismiss this argument in that the court is subjected to a long-drawn argument and

explanation, it being not apparent on the face of the record. This court was referred to the case of Asha Selemani Chambanda (supra) at p.9.

On account that the applicant has failed to account for each day of delay, has failed to establish any illegality and has not been diligent in pursuing the matter, counsel for the respondent urged the court to find that no sufficient reasons to warrant the grant of extension has been adduced.

On the attack on the counter affidavit, counsel for the respondent prayed the Court to invoke the provisions of section 3A(1) and 3B (1) of the Civil Procedure Code by employing the overriding principle objective to consider the identified paragraphs.

With respect to the jurat of attestation, counsel for the respondent drew this court's attention to the record which shows that the respondent was introduced to the attesting officer by Didas Kamjambo; therefore, the jurat of attestation is in order.

In a brief rejoinder, Mr. Paul Kisabo urged the court to reject the respondent's argument on failure to account for each day of delay submitting the ground for seeking extension of time is illegality and in support of his argument, he relied on the case of **Ramadhan** (supra) and contended that according to that case, where there is allegations of illegality, the requirement of accounting each day of delay does not arise. On this aspect, he relied on the case of **Peter Mabimbi Vs. A.G.** where there was a delay of more than twelve years. He further reiterated what was decided in the cases of the **Board of Trustees of Fre-Pentecostal Church of Tanzania** (supra) at p. 9 and **Kehongo Moseti** (supra) at P.5. on the illegality being a ground sufficient to warrant the court to grant extension of time.

It is the further argument of the applicant's counsel that he has not raised a technical delay and that the apparent illegality has been shown at p. 4 of the supporting affidavit in that Banana Contractor and Banana contractor Ltd are two different persons.

On the argument that the applicant acknowledged the existence of the respondent by signing the agreement, counsel for the applicant argued that correct position is that the applicant signed the agreement with Banana Contractor and not Banana Contractor Ltd which does not exist.

Counsel for the applicant insisted that there is no any contractual liability between the parties and that it has not been disputed by Counsel for the respondent that the respondent does not even exist.

On the principle of overriding objective under the cited law, it was submitted for the applicant that there was no identification of which sub paragraph was being relied upon. Counsel for the applicant enjoined the court to take into account Article 107 B of the Constitution of the United Republic of Tanzania, 1977 as amended on its duty to comply with the Constitution and the law. Making reference paragraphs 8, 9 and 10 of counter affidavit not having been verified in accordance with the law, he insisted that an affidavit must be verified as required under Order VI rule 15(2) of the Civil Procedure Code and further that the jurat of attestation is silent on whether the deponent was known or introduced to the attesting officer, the fact which contravenes the law.

I have dispassionately weighed the rival arguments from both parties. To start with, it is imperative to reiterate as a matter of general principle that whether to grant or refuse an application of extension of time is entirely in the discretion of this court. I am, however, not oblivious that the discretion is judicial and must be exercised judiciously and according to the rules of fair trial and administration of justice.

For this court to be able to exercise its discretionary powers in granting an extension time to an applicant to have set criteria which have to be considered when dealing therewith the matter of such nature. For instance, the defunct Court of Appeal for Eastern Africa in the case of **Mbogo v. Shah** [1968] EA held that: -

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Besides, the recent decision of the Court of Appeal of Tanzania took the same view as stated in the referred above case which is reflected in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil



Application No. 2 of 2010. In that case, the Court reiterated the following guidelines for the grant of extension of time: -

- “(a) The applicant must account for all the period of delay.
- (b) The delay should not be inordinate.
- (c) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intends to take.
- (d) If the court feels that there other sufficient reasons, such as the existence of a point of law of sufficient importance; such s the illegality of the decision sought to be challenged.”

Now, being aware with the guidelines for granting or not an extension of time, my duty is to weigh the grounds advanced in the applicant’s affirmed affidavit vis a vis the guidelines established by the Court. The main reason advanced by the applicant is centred in the illegality of the impugned decision and the basis is the non-existence in law of the respondent which fact has hindered the respondent enjoy her fruits decreed by the court.

The law is settled that where illegality is raised as a ground for seeking an extension of time, such ground amounts to sufficient cause.

Indeed, the Court of Appeal in the case of **Mary Rwabizi t/a Amufa Enterprises Vs. National Microfinance Bank PLC**, Civil Appeal No. 378/01 of 2019 was clear that: -

'I am of the opinion that an allegation by the applicant that the error in the judgment of the Court has made the decision to be illegal, is a serious matter which deserves the attention of the Court on review. I think the question of the existence of real or perceived illegality in judicial proceedings of the final court, like in this case, is not one of the issues to take lightly.....Certainly, if given opportunity, the applicant will expound further the allegation contained in the above reproduced paragraphs of the affidavit in support of the application.... Therefore, to demand further explanation at this stage, will in my view, be prejudicial to what the Court will have to deal with if an application for extension of time is granted. It is equally inappropriate at this stage, I think, for me to go further and determine the substance of the claim of illegality.

It has also been the position of the courts in this country that the word reasonable cause or good cause a relative one dependent upon party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. [see. **Oswald Masatu Mwizarubi Vs. Tanzania Processing Ltd**, Civil Application No. 13 of 2010, Court of Appeal of Tanzania, (Unreported).

In this case, the court will have to determine whether or not the respondent is a legal entity and what the status of the contract and the subsequent deed of settlement by the parties was.

As clearly stated by the Court of Appeal in the above case, it is inappropriate at this stage, for the court to go further and determine the substance of the claim of illegality as further explanation is still required. It is my humble but considered view that the resolution of this quagmire can only be canvassed and determined in a substantive action and in this matter, the revisional proceedings.

With that state of affairs, I am satisfied that the applicant has demonstrated an illegality as a cause sufficient to warrant this court grant extension of time. Besides, I am of the view that the revision will assist parties to avert protracting the litigation process.

Now on the two case laws cited to me by learned counsel for the respondent and one case law referred to me by the applicant's counsel. I think they are distinguishable and inapplicable in the circumstances of this case.

For instance, while in the case of **Ramadhan Myolele Vs. Hamad Ally Islam** (supra), that case was revisional proceeding made under sections 43 and 43 (1) and (b) of the MCA, Section 79 (1) (b)(c) of the CPC whereby the applicant was asking the court to call and examine records of

the lower court for the purpose of revising illegalities, irregularities and injustices, thereof, quash and set aside the same, in this case the applicant is seeking extension of time under section 14 (1) of the Law of Limitation Act and section 95 of the Civil Procedure Code and the ground being advanced is illegality.

With regard to the case of **Kihongo Moseti** (supra), the issue was on technical delay which, as the counsel for the applicant asserts, is not the issue on this application.

In relation to the case of the **Board of Trustees of Fre-Pentecostal Church of Tanzania**, the matter in that case was on dispute of ownership of a farm and the illegality was for failure to join necessary parties to the case as mandated by O.1 rule 10 of the CPC. This is not the case under the application in question.

Before penning down, I must state that I align myself to the position taken by counsel for the plaintiff that the respondent's counter affidavit sworn by Simon Mwavipa is fatally defective in the verification clause. According to the respondent's counter affidavit, paragraphs 8, 9 and 10 were not verified. This, counsel for the for the respondent has admitted.

The importance of a verification clause in an affidavit was elaborated in the case of **A.K.K Nambiar Vs. Union of India** (1970) CR 121 cited

with approval by the Court of Appeal in the case of **Lisa E. Peter Vs. Al-Hushoom Investment**, Civil Application No. 147 of 2016 thus: -

"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records.

The importance of verification is to test the genuineness and authenticity of allegations and 7 allegations. In essence verification is required to and certainly I am not re-inventing the wheel. In **A. K. K. Nambiar** case also to make the deponent responsible for enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavit cannot be admitted in evidence."

Counsel for the respondent has sought the court to employ the principle of overriding objective. With respect, the court cannot take that proposed cause because, the overriding objective principle cannot be employed where one blatantly violates the provisions of the law.

Apart from the fact that this court is satisfied that sufficient cause has been shown by the applicant to warrant this court grant the extension of time, the contents in the affidavit have not been seriously contested by the respondent as the counter affidavit is incurably defective.

For the foregoing reasons, I find this application meritorious and grant it. Time for the applicant to apply for revision is granted and the application to be filed within thirty days of the date of this ruling.

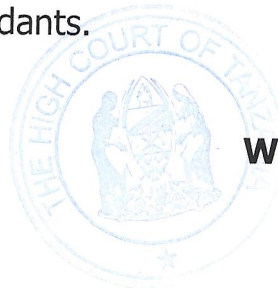
Costs shall be in the intended revision.

Order accordingly.



  
**W. P. Dyansobera**  
**JUDGE**  
**23.5.2024**

This ruling has been delivered this 23<sup>rd</sup> day of May, 2024 in the presence of Mr. Wilhelm Joseph Mushi holding brief for Mr. Paul Kisabo, learned Counsel for the applicant and in the presence of Mr. Andrew Miraa, learned counsel for both defendants.



  
**W. P. Dyansobera**  
**JUDGE**