IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

CORRUPTION AND ECONOMIC CRIMES DIVISION

AT DAR ES SALAAM REGISTRY

ECONOMIC APPLICATION NO. 02 OF 2022

(Arising from Economic Case No. 4 of 2019)

1. HARRY MSAMIRE KITILYA..... 1ST APPLICANT
2. SHOSE MORI SINARE..... 2ND APPLICANT
3. SIOI GRAHAM SOLOMON..... 3RD APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

20th July and 19th August, 2022

BANZI, J.:

The Applicants in this matter, namely, Harry Msamire Kitilya, Shose Mori Sinare and Sioi Graham Solomon, are seeking an order of this Court to grant them extension of time to file an application to set aside the Conviction, Sentence and Orders that were made on 25th August, 2020 in the Economic Case No. 4 of 2019. It would be remembered that, the said Conviction, Sentence and Orders were arrived at following a plea agreement entered into between the Director of Public Prosecutions ("DPP") and the Applicants, together with two other persons, namely, Bedason Anthony Shallanda and Paul Alfred Misana, who are now not party to this Application. The said plea

agreement was negotiated by the parties to it, signed as such and filed for registration into this Court on 25th August, 2020.

The Application is made under Section 14 (1) of the Law of Limitation Act [Cap. 89 R.E. 2019] ("the Law of Limitation Act") and supported by the affidavits affirmed by Mr. Sinare Zaharan, the learned counsel for the Applicants. The Respondent opposed the Application by the counter affidavit deposed by Mr. Christopher John Msigwa, learned Senior State Attorney.

A brief factual background of the proceedings of this matter is as follows: The Applicants and the other two persons were initially arraigned before this Court in the Economic Case No. 4 of 2019 jointly and severally charged with 58 counts of leading organised crime, forgery, uttering false documents, use of documents intended to mislead principal, obtaining money by false pretence, money laundering and occasioning loss to a specified Authority.

In the course of the hearing of that Economic Case, to be exact, before PW13 completed to testify, the Counsel for the Republic through a letter informed the Court that the Applicants and the other two on the one hand and the DPP on the other hand, were actually intending to negotiate a plea agreement. Ultimately, on 25th August, 2020 the Plea Agreement was filed

and the parties appeared before the Court. After being examined under oaths over their **voluntariness** and **competence** to enter into such agreement, and upon being satisfied as such, the Court accepted and registered their Plea Agreement. Notably, the Plea Agreement in question appears to be counter-signed on each page by the parties and witnessed by several advocates. After registration and as per the Plea Agreement, the Prosecution substituted the Information by dropping 57 counts and remained with just one count of occasioning loss to a specified Authority, to which the Applicants and the other two were called upon to plead, and each one of them pleaded guilty accordingly. Following that plea of guilty, the facts constituting the offence were read over to them and they all admitted to the same. Consequently, they were all convicted on their own plea of guilty as charged and each one was sentenced to pay a fine of Tshs.1,000,000/= (one million only) or imprisonment for six months in default. In addition, they were together ordered to pay Tshs.1,500,000,000/= (one billion, five hundred million only) to the Government of the United Republic of Tanzania as compensation for the loss so occasioned according to clause 3, Part B of the Plea Agreement.

Now, after complying with the sentence and order, the Applicants have returned to this Court seeking extension of time within which they can file an application to set aside their conviction, sentence and order.

At the hearing of this Application, Mr. Sinare Zaharan, learned Advocate appeared for the Applicants, while the Respondent was represented by Messrs. Christopher John Msigwa, learned Senior State Attorney and Timotheo Mmary, learned State Attorney.

Mr. Zaharan began his submission with a prayer to adopt his affidavit and the affidavit in reply to form part of his submission. He submitted that, the main reason why the Applicants delayed to file the application to set aside the conviction, sentence and order is that, they (the Applicants) were waiting to be supplied with copies of record of proceedings which they had requested since 5th October, 2020. He clarified that, under the provisions of Section 194G (2) of the Criminal Procedure Act [Cap. 20 R.E. 2019] ("the CPA"), an accused person may apply to the court which passed the sentence to have the conviction and sentence procured **involuntarily** or by **misrepresentation** pursuant to a plea agreement to be set aside. According to him, in order to determine misrepresentation, it is necessary for an accused person to have copy of the entire proceedings and not just

the proceedings arising from a plea agreement as suggested by the Prosecution in their counter affidavit.

He further submitted that, as the concept of plea bargaining is new in our jurisdiction, at the time when the Applicants wanted to apply to set aside their respective convictions, sentences and orders, as the case may be, the underlying Rules to govern the process were not in place. He cited an unreported decisions of the High Court in the cases of **Vietel Tanzania PLC v. Republic**, Criminal Appeal No. 55 of 2021 and **Devotha Amandus Ngonyani and Another v. Republic**, Misc. Criminal Application No. 6 of 2022 to support his argument about the novelty of plea bargaining concept. Thus, he prayed for the application to be granted.

In reply, for the Republic, Mr. Msigwa on the outset stated that, they are contesting the Application. Apart from adopting his counter affidavit to be part of their submission, he further stated that, plea bargaining process is separate proceedings from the main trial and thus, in order to file an application to set aside conviction and sentence, the Applicants only needed copy of the plea bargaining proceedings, which in this matter were the proceedings recorded on 25th August, 2020. He added that, copy of the said proceedings was ready for collection since 20th October, 2021 but there is no proof that the Applicants made any effort of following up on its

availability. Besides, some of the requested documents such as copy of Plea Agreement and the statement of facts were in their custody since 25th August, 2020. He cited the decision of the Court of Appeal of Tanzania, at Dar es salaam in the case of **Rehema Idd Msabaha v. Salehbhai Jafferjee Sheikh and Another**, Civil Application No. 527/17 of 2019 (unreported) which emphasised on the need for an applicant to account for his efforts to follow up copy of the proceedings.

Furthermore, he submitted that, the laws governing time frames in litigation are in place and as such important in order to make end of litigations and avoid abuse of court process. Thus, it was necessary for the Applicants to assign a **good cause** for the delay for court to grant extension of time. To support his argument about the necessity of assigning good cause, he cited the case of **Bonface Alistedes v. Republic**, Criminal Application No. 06/08 of 2019 CAT (unreported). In addition, he insisted that, the grounds of involuntariness or misrepresentation which are provided under Section 194G (2) of the CPA can be seen and determined through plea bargaining proceedings and not the entire proceedings. Otherwise, if the Applicants were in need of testing the weight of the case, they could have done so through copies of witnesses' statements and exhibits which were

made available to them during the committal proceedings. In that regard, it was their view that, this Application warrants no good cause to be granted.

In his rejoinder, Mr. Zaharan was of the view that, it is not correct that, the proceedings of plea bargaining and the main trial are separate as there is no law which provides for that. Apart from that, the Applicants requested the documents which were not in their possession. Also, in annexure ZS4, the Applicants confirmed to have received copies of agreement and statement of facts and it was on 22nd March, 2022 when they were informed about availability of the proceedings for collection. He added that, since the grounds for setting aside the conviction are factual, it was extremely important for the accused persons to have copy of proceedings to review witnesses' testimonies and documentary exhibits which in this case, 11 witnesses had already testified and more than 100 exhibits were admitted. Moreover, he submitted that, the cited case of **Bonface Alistedes** emphasised on the need to assign a good cause for the delay and in the matter at hand, the Applicants have assigned good cause for the delay as it was necessary to have the record of proceedings. Furthermore, he distinguished the cited case of **Rehema Idd Msabaha** with the case at hand as in the former, the court dealt with rule 90 (5) of the Court of Appeal Rules which imposes a duty to the Appellant to follow up with the Registrar

after expiration of time given to the Registrar to supply the Appellant with relevant documents, but in the latter, there is no such similar provision in the Rules governing this Court. He concluded his submission by praying for the Application to be granted by giving the Applicants 60 days to file their intended application.

Having carefully considered the chamber summons, the affidavits of both parties as well as their submissions, the only issue for determination is whether in the particular circumstances of this case, the Applicants have established sufficient cause to warrant this Court to grant the extension of time sought.

It is prudent noting here that, according to Section 14 (1) of the Law of Limitation Act, the court is vested with the discretion to extend the period of limitation for the institution of application for any reasonable or sufficient cause. See the case of **Benedict Mumello v. Bank of Tanzania** [2006] 1 EA 227 which emphasised that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause.

What amounts to sufficient cause has not been defined in the law. However, there are plenty of legal authorities which guide as to the factors to be taken into account in establishing sufficient cause, including the length of delay, the reason(s) for the delay, the degree of prejudice that the

respondent may suffer if the application is granted, whether or not the application has been brought promptly and lack of diligence on the part of the applicant. On this, see the cases of **Tanzania Revenue Authority v. Tango Transport Co. Ltd**, Consolidated Civil Applications No. 4 of 2009 and 8 of 2008 CAT (unreported), **The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe and Others** (Civil Application No. 191 of 2019) [2019] TZCA 516 at www.tanzlii.org, **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 CAT (unreported) and **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority**, Civil Application No. 146 of 2016 CAT (unreported), just to mention a few.

In the present matter, looking closely at the affidavit of the learned counsel for the Applicants, it is apparent that the alleged delay was caused by inaction of the Court to supply them with copy of the proceedings. In his submission, Mr. Zaharan expounded that, it was necessary for the Applicants to have record of the entire proceedings of the case in order to determine misrepresentation as a ground for setting aside conviction arising out of plea agreement. I am very much aware that, delay in supplying the applicant with relevant documents is among the factors upon which courts are enjoined to take into account in considering application for extension of time. See the

case of **Asha Juma Mansoor and Others v. John Ashery Mbogomi** (Civil Application No. 192 of 2020 [2021] TZCA 379 at www.tanzlii.org. However, I do not think that this factor is absolute. It would normally depend on the prevailing circumstances of each particular case.

In this case, as I have just stated above, the Applicants were convicted with the offence of occasioning loss to specified Authority following a Plea Agreement entered into between the DPP on behalf of the Republic and them together with the other two persons. They negotiated and ultimately entered into that agreement before PW13 completed to testify, out of 54 witnesses intended to be called by the DPP. Reading closely at the import of Sections 194A to 194H of the CPA, it is apparent that apart from receiving notification from the parties on their intention to negotiate and enter into a plea agreement, the involvement of the Court in the process begins after a signed plea agreement is presented before the Court for registration. To be precise, under Section 194A (3) it is expressly stated that, the court shall not participate in the plea negotiations between the DPP and the accused persons. The fact that how, where and when such negotiations and agreement were conducted and ultimately signed, as the case may be, are not part of the trial court's proceedings.

According to the records of this Court, after the DPP notified the Court by a letter on 24th August, 2020 of their intention to negotiate a plea agreement, on 25th August, 2020, the Applicants, the other two persons and the Respondent through the DPP appeared before the Court with a signed Plea Agreement for registration. In line with the prescriptions of Section 194D of the CPA, after examining the Applicants under oaths over their voluntariness and competence to enter into such agreement, this Court accepted and registered their Plea Agreement upon being satisfied on such conditions. Under the circumstances obtaining in this matter, whatever transpired in the entire process of their negotiations leading up to the signing of the agreement upon which involuntariness or misrepresentation may be challenged or established cannot be found in the Court's proceedings as suggested by learned counsel for the Applicants. Nonetheless, if that suggestion by any chance was to be correct, then I would agree more with the submission of Mr. Msigwa for the Respondent that, the only proceedings which would assist the Applicants to determine those grounds (*i.e.* involuntariness or misrepresentation) are the proceedings of the final day which contain facts upon which their conviction was based – thus, on the basis of their own agreement *inter partes*, they were examined under oaths, the Information was varied, the charge against them was read over to them

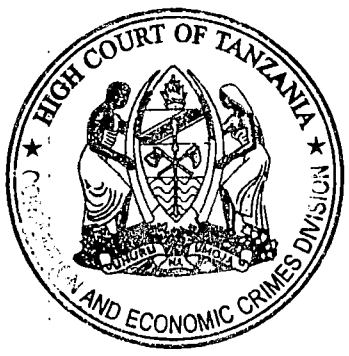
to plead, they pleaded accordingly, the statement of the facts was read over to them, to which they admitted to be correct. I must hasten to point out here that, although in the Affidavit in Reply of Mr. Zaharan, for the Applicants, particularly at paragraph 4, Mr. Zaharan introduces new facts, which the Respondents could not counter, it is the considered view of this Court that, whether the negotiations and signing of the Plea Agreement were conducted around the court premises, when the Court was not in session, yet still that does not mean that the Court was involved in that process; and, thus, whatever transpired between the parties which may constitute involuntariness or misrepresentation are facts known to the parties themselves and cannot be found in the testimonies of twelve and a half witnesses. In that regard, it is the position of this Court that, the Applicants did not need the proceedings of the entire case with testimonies of witnesses thus far (13PWs out of 54 intended witnesses) in order to establish misrepresentation as submitted by Mr. Zaharan. Thus, under the particular circumstances of this case, delay in supplying the Applicants with copy of proceedings does not constitute sufficient cause to warrant this Court to grant extension of time.

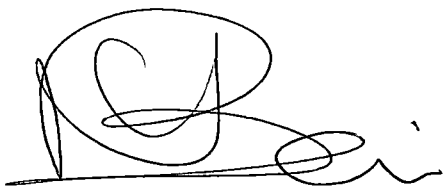
Before I pen off, I would like to comment on the argument made by Mr. Zaharan about the novelty of plea bargaining process in our jurisdiction.

In his submission, he argued that, at the time when the Applicants wanted to set aside their convictions, the Rules to govern the process were not in place. I am aware that, the underlying Rules (*i.e.* the Criminal Procedure (Plea Bargaining Agreement) Rules, 2021) were made in 2021 vide the Government Notice No. 180 of 5th February, 2021. However, that does not mean that, before then, it was not possible to make such an application, as there was no vacuum in the law. Such applications to set aside purported vitiated convictions were already guided under Section 194G of the CPA. Being an application under the CPA, as to how it should be made, is provided under Section 392A of the same Act (as was added by Act No. 3 of 2011) that, it can either be orally or in written form. Subsection (2) of the said Section 392A directs that, written applications should be made by way of chamber summons supported by affidavit. Much as I agree with counsel for the Applicants on the novelty of plea bargaining concept in our jurisdiction, but, I must point out, his argument is misplaced, because under Sections 194G (2) and 392A of the CPA nothing prevented the Applicants to bring their application to set aside their conviction and sentence either orally or in writing timely. Besides, Sections 194G (2) and 392A do not require an application to be necessarily accompanied by copy of proceedings.

Having said so and for the reasons explained above, it is the finding of this Court that, in the particular circumstances of this case, the Applicants have failed to assign sufficient cause to warrant this Court to grant extension of time. Consequently, this Application is hereby dismissed.

It is so ordered.





I. K. BANZI
JUDGE
19/08/2022

Date: 19/08/2022

Coram: Hon. B. T. Maziku, DR

For 1st Applicant:
For 2nd Accused: — Mr. Sinare Zaharan and Nora Maraha, Advocates
For 3rd Accused: — via VC

For Respondent: Edith Mauya, State Attorney via VC

B/C: Saida

Court: Hon trial judge is attending other official duties.

Ms. Edith Mauya, State Attorney states:

Ready for ruling.

Mr. Sinare Zaharan and Nora Maraha Advocates for accused persons states:

Ready for ruling.

Court: Ruling delivered today on 19/08/2022 in chamber via video conference in presence of Mr. Sinare and Nora counsel for the applicants and Edith Mauya State Attorney for respondent.

Court: Right of appeal explained.

I certify that this is a true and correct copy of the Original Order/Judgement/Ruling.

Deputy Registrar
High Court of Tanzania
Corruption and Economic Crimes Division
Dated: 19/08/2022 at DSM

B. T. Maziku
Sgd: Deputy Registrar
19/08/2022