IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 19 OF 2015

In the matter of application for leave to apply for orders of Certiorari and Mandamus

AND

In the matter of the decision of Tanzania Electric Supply Company Limited in Tender Board dated 25th July 2014, in terms of the Public Procurement Act, 2014

BETWEEN

E-FULUSI AFRICA (T) LIMITED
MOBISTOCK COMPANY LIMITED ..... **APPLICANTS**

AND

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED ..... **RESPONDENT**

10th & 13th February, 2015

RULING

MWAMBEGELE, J.:

The applicants E-Fulusi Africa (T) Limited and Mobistock Company Limited, under a certificate of urgency, have filed this application seeking leave of this court to file an application for prerogative orders of

Certiorari and Mandamus. The application has been taken under Order XXXVII Rules 2 (1) & 4, Sections 68 (c) & (e) and 95 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002, section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 of the Revised Edition, 2002, section 85 of the Public Procurement Act, 2004, section 19 (2) (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 of the Revised Edition, 2002, Rule 5 (1), (2) and (6) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 - GN 324 of 2014 and any other enabling provisions of law. It is supported by a joint affidavit of Paul Boman and John Mbaga; directors of the applicant companies. It is made *ex parte* seeking for the following orders:

1. That this Honourable Court be pleased to restrain the Respondent from processing and or executing the award in Tender No. PA/OO1/13/HQ/N/029 pending the hearing and determination of the application prerogative orders to move the court for orders of certiorari and mandamus;
2. This Honourable Court be pleased to grant leave to the applicants to apply for orders of certiorari and mandamus to bring to the High Court and quash the proceedings and decision of the Tender Board of the Tanzania Electric Supply Company Limited communicated to the applicants on 05.08.2014; and
3. The costs of this application be provided for.

The application was argued *ex parte* before me on 09.02.2015 by Mr. Dennis Msafiri, learned counsel who represented the applicants. That was quite apposite as the law; sub-rule (2) of Rule 5 the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review and Fees) Rules, 2014 – GN No. 324 OF 2014, dictates that an application for leave to apply for judicial review shall be made *ex parte* to a judge in chambers. Mr. Msafiri was very brief in his submissions, but to the point. He told the court that the applicants were, by way of judicial review, seeking to challenge the decision of the applicant which was made on 25.07.2014 and communicated to them on 05.08.2014. He adopted and relied on the contents of the affidavit in support of the application whose contents are, *inter alia*, to the effect that the applicants sought remedies available to them under the Public Procurement Act, 2004 and on 27.11.2014 the Public Procurement Appeals Authority communicated to them that their appeal could not be entertained as the tenure of office of members had since expired and advised them to seek recourse in alternative avenues hence the present application for leave to file an application for judicial review. Mr. Msafiri prayed that the application be allowed as stated in the chamber summons and in the meantime, he prayed, execution of the decision of the respondent of awarding a contract in Tender No. PA/001/13/HQ/N/029 be stayed pending the hearing and determination of the application for orders of certiorari and mandamus whose leave was being sought in the present application.

I reserved the ruling to 13.02.2015. However, in the course of composing the ruling, I realized that the decision of the respondent complained of was made on 25.07.2014 and communicated to the applicants on 05.08.2014. The application for leave to apply for judicial review was filed in this court on 06.02.2015. Having been aware of the limitation period which requires that such an application must not be granted unless it is made within six months after the decision complained of was made, I caused the learned counsel for the applicants to appear and address me on the point before composing the ruling.

The learned counsel, exemplifying the role of a true officer of the court, made a positive response to the call and addressed me on the point on 10.02.2015. This time, he had the assistance of Mr. Makaki Masatu, learned advocate. This was done on the understanding that if this court finds that the application was not filed within the prescribed time, that would be the end of the matter. However, if it would be found otherwise, the court would proceed to deliver the substantive ruling slated for 13.05.2015.

In his address on the point, Mr. Msafiri started with the premise that under the provisions of Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees), Rules – GN No. 324 of 2014 an application for leave to apply for judicial review must be made within six months from the date of proceedings, act or

omission intended to be challenged occurred. However, he told the court that the present application was filed well within time in that the decision complained of, despite the fact that it was made on 25.07.2014, it was communicated to the applicants on 05.08.2014 after which they started to exhaust the remedies available to them under the Public Procurement Act before filing the present application. Their endeavours were commenced by filing a complaint to the Public Procurement Regulatory Authority (PPRA) whose decision did not make them happy and thus preferred an appeal to the Public Procurement Appeals Authority. However, the Public Procurement Appeals Authority could not entertain their appeal under the pretext that the tenure of office of members had expired and the appointment of new ones was not expected in the remaining nine days during which the appeal, by prescription of the law, ought to have been decided. The applicants were thus advised by the Appeals Authority to seek recourse on other avenues. They, heeding to the advice, sought recourse in this court by filing the present application. Mr. Msafiri submitted that the six months limitation should, in the premises, be reckoned from 27.11.2014 when the Public Procurement Appeals Authority notified the applicants that they were unable to entertain the appeal for want of quorum. The present application, he charged, was therefore well within the six months limitation period.

Mr. Msafiri had yet another arsenal to unleash which he argued in the alternative but in effect it was in line with, and an amplification of the

first argument. He submitted that the time used by the applicants to seek remedies as provided for by the provisions of sections 79, 80, 82 and 83 of the Public Procurement Act, 2004 should be excluded from the computation of the period of limitation. He reinforced his argument by citing the provisions of section 21 (2) of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 which, according to him, requires that such time should be excluded in computation of the limitation period. He thus concluded that the application was filed in this court well within the prescribed time and urged the court to proceed allowing the same as prayed for on 09.02.2015 when arguing the substantive application.

Before going into the nitty gritty of the arguments brought to the fore by Mr. Msafiri, I feel pressed to thank him and his colleague for the industry exhibited in representing their clients both when arguing the substantive application and when called upon to address the court on the question of limitation. His arguments were quite convincing and to the point. He did his homework quite appositely and I am very grateful for that.

As alluded to above, counsel for the applicant was subpoenaed to address the court on the question whether or not the court had jurisdiction to entertain and hear the application which, it seemed, was not filed within time. This was done notwithstanding the fact that the substantive application had already been argued and the ruling thereof

slated for pronouncement on 13.02.2015. The court took that course having been alive to the notorious position of the law that the question of jurisdiction is fundamental; it goes to the root of any matter. It therefore can be raised at any time. That this is the law has been held in a string of cases in this jurisdiction. These include ***Fanuel Mantriri Ng'unda Vs Herman Mantiri Ng'unda and two Others*** [1995] TLR 155; ***Richard Julius Rukambura Vs Isaac Ntwa Mwakajila and Another***, Civil Application No 3 of 2004 Court of Appeal of Tanzania at Mwanza (unreported); ***Tanzania Revenue Authority Vs Kotra Company Limited***, Civil Appeal No. 12 of 2009, Court of Appeal of Tanzania at Dar es Salaam (Unreported); ***Nicomedes Kajungu & 1374 Others Vs Bulyankulu Gold Mine (T) LTD*** Civil Appeal No. 110 of 2008 (CAT unreported) and ***Tanzania Revenue Authority Vs New Musoma Textile Limited***, Civil Appeal No. 93 of 2009 (Unreported), Court of Appeal of Tanzania at Dar es Salaam, to mention but a few. In ***Tanzania Revenue Authority*** (supra), for instance, the court held:

> "The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... [T]he question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.... It

> is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case"

And in almost similar tone, in ***Nicomedes Kajungu*** (supra), the same court, speaking through Othman, J.A (now Chief Justice of Tanzania), had this to say:

> "... it is the duty of the Court to satisfy itself that it is properly seized or vested with the requisite jurisdiction to hear and determine a matter. **It is a well settled principle that a question of jurisdiction ... goes to the root of determination** – see **Michael Leseni Kweka V. John Eiliafe**, Civil Appeal No. 51 of 1997 (CA) (unreported)".
> [Save for the case citation, bold is supplied].

And His Lordship went on:

> "A challenge of jurisdiction is also a question of competence".

Now let me go back to the arguments by Mr. Msafiri. The learned counsel for the applicants argues that this application was filed well in time as the limitation period of six months should be reckoned from 27.11.2014; the date when the Public Procurement Appeals Authority communicated to the applicants of its inability to entertain and hear the appeal for want of quorum. It is his view that the applicants ought to have exhausted the available remedies before coming to this court. I agree with Mr. Msafiri that the applicants were at liberty to exhaust the remedies available to them as provided for by the Public Procurement Act, 2004 (and or any other law) before preferring the present application. However, I do not agree that the process must be exhausted first before filing an application for leave to apply for review. It is the practice of courts in this jurisdiction founded upon prudence that an application for leave to file an application for judicial review will not necessarily be rejected if the remedies available to the applicant were not exhausted before determining such an application – see ***Alfred Lakaru Vs Town Director Arusha*** [1980] TLR 326; the decision of the Court of Appeal and ***The Republic Ex-Parte Peter Shirima Vs Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General*** [1983] TLR 375 and ***Hans Wolfgang Golcher Vs General Manager of Morogoro Canvas Mill Limited*** [1987] TLR 78; the decisions of this court.

However, depending the circumstance of each case, there are instances when the courts have refused to grant leave for the reason that the

applicant did not exhaust available remedies – see ***Abadiah Selehe Vs Dodoma Wine Company Limited*** 1990 TLR 113 and ***Moris Onyango Vs the Senior Investigating Officer Customs Department Mbeya*** Criminal Application No. 25 of 1981 discussed by Buxton David Chipeta in his book titled **Administrative Law in Tanzania, a Digest of Cases** at pp 121 123.

The position was summarized by Lukangira, J. (as he then was) in the ***Peter Shirima*** case (supra) having traversed a good number of authorities as follows:

> "... from the totality of these authorities, that the existence of the right of appeal and even the existence of an appeal itself, is not necessarily a bar to the issue of prerogative orders. The matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case. Where an appeal has proved ineffective, and the requisite grounds exist, the aggrieved party may seek and the court would be entitled to grant, relief by way of prerogative orders. "

In view of the foregoing, it may be summarized that much as it may be desirable that an applicant exhausts remedies available to him before

making a resort to this court, the law does not bar courts from entertaining and hearing an application for leave to file an application for prerogative remedies just because alternative remedies available were not exhausted. Should an applicant wish to exhaust the remedies available to him before filing an application for leave, that course will be of his own choose and to his detriment in terms of limitation as time will start clicking against him right from the moment the decision intended to be complained of was made and not from the moment such remedies available to him were exhausted.

Section 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 of the Revised Edition, 2002 and Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 – GN No. 324 of 2014, state in no uncertain terms that the application for leave to file application for judicial review must be filed within six months after the proceedings, act or omission intended to be impugned was given. For easy reference let me reproduce these provisions of the law. Subsection (3) to section 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act reads:

> "In the case of an application for an order to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, leave shall not be

granted unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed under any Act, and where the proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

And Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 – GN No. 324 of 2014, which rules have been made under the Act, reads:

"The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates".

These provisions peg the limitation of time to the proceedings, act or omission to which the application for leave of judicial review relates. My reading of the rule finds no reference, neither directly nor by implication, to the time spent in the endeavour to exhaust the remedies available to the applicant. From the way I perceive, the makers of the

law intended that time should be reckoned from the moment the proceedings, act or omission complained of is made. That was, in my view, the intention of the legislature. If the legislature intended that limitation of time should be reckoned from the moment the remedies available to the applicant are exhausted before filing the application, it would not have failed to state so in clear and certain terms.

This being the case, to reiterate by way of emphasis, despite the fact that I agree that an applicant is free to exhaust available remedies before filing an application for leave to apply for prerogative orders, still, the way I interpret the law, the same must be filed within six months after the proceedings, act or omission complained of occurred. I do not agree with the learned counsel for the applicants that limitation time should be reckoned from the moment they were communicated of the decision. Neither do I agree with him that the same should be reckoned from the moment they were done with seeking recourse regarding available remedies under the public procurement legislation and or any other legislation. A prudent businessman is expected to be vigilant. A prudent businessman would not, in my view, sit back and relax waiting to be notified of the progress and, or outcome of his bid without making any proactive steps to follow the matter up, for, not doing so might be to his detriment as happened in present case.

I now turn to the seemingly alternative argument brought to the fore by Mr. Msafiri to the effect that time spent in seeking recourse to the PPRA

and PPAA should be excluded in computation of the limitation period. To appreciate his argument, let me reproduce section 21 (2) of the Law of Limitation Act which Mr. Msafiri relies to cement his proposition. The marginal note to the section reads:

> "Exclusion of time of proceeding bona fide in court without jurisdiction".

And subsection (2) thereof reads:

> "In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

With due respect to Mr. Msafiri, my reading of the provision tells me that the time which the subsection intends to be excluded in computation of the limitation time is that which an applicant spends in

"prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief". This was not the case in the present instance. The applicants were not prosecuting the matter in the court of first instance. Neither were they prosecuting it in the court of appeal. In the premises, the provisions of subsection (2) to section 21 of the Law of Limitation Act do not come to the rescue of Mr. Msafiri. I, therefore, respectfully, find myself unable to swim his current.

In England the position is explained by Nigel Giffin in his paper titled Introduction to Judicial Review, Preliminary Procedural Issues (a paper written for Administrative Law Bar Association continuing education course, autumn 2010 - dated 06.10.2010 (available at http://www.adminlaw.org.uk/docs/JR%202010%20by%20Giffin.pdf). The learned author states at Page 11:

> "The general rule is that permission should not be granted to apply for judicial review where an alternative remedy exists: see R v Chief Constable of Merseyside Police ex p. Calveley [1986] QB 424."

And at page 10, quoting the dictum in ***R Vs Secretary of State for Transport ex p. Presvac Engineering Ltd.*** (1991) 4 Ad LR 121, the

author states as to when the limitation period should be reckoned in the following terms:

> "... time starts running from the date when grounds for making the application first arose, not from when the claimant first knew of those grounds: see R v Secretary of State for Transport ex p. Presvac Engineering Ltd. (1991) 4 Ad LR 121. However, the point at which the claimant acquired the requisite knowledge may be material to any application for an extension of time".

The same was the position in Kenya until 1960 when the Law Reform [Miscellaneous Provisions (Amendment) Ordinance, 1960] was enacted. The book by Peter Kaluma; **Judicial Review: Law, Practice and Procedure** at p 221 elucidates this point as follows:

> "... a court seized with an application for judicial review at present does not have to look behind it back or peruse through statutes or other laws to ascertain the existence or the otherwise of an alternative remedy before issuing appropriate orders."

Thus in the Kenyan case of ***Shah Vershi Devshi & Co Ltd Vs the Transport Licensing Board*** [1971] 1 EA 289, the court held that the existence of a right of appeal is only a factor to be taken into account, not a bar to issue a prerogative order.

The time limit on which applications of this nature should be reckoned has been the subject of discussion in several cases in this court. My pick on such cases go to two of them: ***Raphael Morandi Vs Dar es Salaam Police Commander & Two Others***, Misc. Civ. Cause No. 69 of 2001 and ***TOICO Ltd Vs Tanzania Revenue Authority***, Misc. Civ. Cause No. 108 of 2031 (both are unreported decisions of this court at Dar es Salaam). In the ***Morandi*** case (supra), this court [Oriyo, J. (as she then was),] was faced with an identical situation. Like in the present instance, the applicant had filed an application for leave to apply for prerogative orders of certiorari and mandamus. He sought to challenge the decision of the Inspector General of Police (IGP) which was made on 17.12.1997. The applicant had issued a ninety days notice to sue as required by the law. The Respondents challenged the application by way of preliminary objection stating that the application which was filed on 12.09.2001 was time barred in that the applicant's right of action accrued from 17.12.1997. On the other hand, the applicant contended that his right of action accrued from 21.03.2001 when the IGP responded to his ninety days notice of intention to sue. The court held that the right of action accrued on 17.12.1997 on which the decision he intended to challenge was made. Underlining the

importance of limitation of time to institute proceedings in court, the court had this to say:

> "The object of the legislature to prescribe limitation periods to institute proceedings was for a purpose. One of the objects was to attain certainty and provide for limitation to litigation. If each litigant is allowed the freedom to seek assistance or intervention from all the administrative institutions in the country before institution of proceedings in court; then the object of the legislature in prescribing limitation periods of limitation would be defeated. Such time taken would not affect the limitation period. ..."

The court sustained the preliminary objection and in consequence whereof dismissed the application on account that it was time barred as it ought to have been filed within six months counted from 27.12.1997; the date on which the decision intended to be impugned was made.

In yet another occasion; in the ***TOICO*** case (supra), this court was seized with an akin situation. The applicant filed an application for leave to apply for prerogative orders of certiorari, mandamus and prohibition seeking to challenge the decisions of the respondent which were made

on 27.01.2003 and 28.01.22003 and communicated to the applicant on 30.01.2003. The applicant had appealed against those decisions to the Tax Revenue Appeals Board which appeal was dismissed on 15.09.2003. The applicant thus argued that time started to run against him on 15.09.2003 when the Tax Revenue Appeals Board dismissed the appeal and advised it to come to this court for redress through prerogative orders. On the other hand, the respondent argued that time should be reckoned from 27.01.2003 and 28.01.2003; the dates on which the decisions intended to be challenged were made and not from 15.09.2003; the date on which the Tax Revenue Appeals Board dismissed the applicant's appeal. The court (Shangwa, J.) agreed with the respondent that the six months limitation period should be counted from 27.01.2003 and 28.01.2003; the dates on which the decisions intended to be challenged were made. His Lordship elucidated:

> "... time within which the applicant had to file his application cannot start to run from 15/9/2003 when the Tax Revenue Appeals Board made its decision. This is because the decision which the applicant wants to challenge by applying for the prerogative orders of Certiorari, Mandamus and Prohibition is not the decision of the said Board's Chairman but the decisions of the commissioner for Customs and Excise which

were made on 27/1/2003 and 28/1/2003 respectively."

In both the foregoing decisions; the ***Morandi*** and ***TOICO*** cases, whose facts fall in all fours with the facts of the present case, this court did not mince words; it reckoned the dates on which the decisions intended to be challenged were made to be the dates on which the right of action accrued and the limitation periods thereof were held to be counted right from those dates.

Reverting to the matter at hand, the application for leave to apply for prerogative orders of certiorari and mandamus was filed on 06.02.2015 and the decision of the respondent intended to be challenged by way of judicial review was given on 25.07.2014. The application therefore, in terms of section 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act and Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 – GN No. 324 of 2014, ought to have been filed by 24.01.2015; that is, within six months after the decision intended to be challenged was made. By filing the application on 06.02.2015, as happened in the present instance, the applicants were about a fortnight out of time. It is elementary law that an application filed out of time is incompetent before the court. It deserves the wrath of being dismissed in terms of the provisions of section 3 of the Law of Limitation Act.

The sum total of the foregoing is a finding that an application for leave to apply for judicial review must be filed within six months after the date of the proceedings, order or omission to which the application for leave relates was made. The time spent by an applicant in exhausting remedies available to him before the application for leave to apply for judicial review is not excluded in the computation of limitation period. Time starts to run against an applicant from the very date the proceedings, act or omission complained of was made.

All said and done, I find myself not clothed with the requisite jurisdiction to entertain the application. I, therefore, am unable to proceed giving the ruling of the substantive application for leave to file an application for judicial review which was argued on 09.02.2015 and scheduled to be pronounced today 13.02.2015. As the application is incompetent, it being filed out of the prescribed time and no prior leave was sought and obtained to have it so filed out of time, and in terms of section 3 of the Law of Limitation Act, I hereby proceed to, as I hereby do, dismiss it. For the avoidance of doubt, no order is made as to costs. .

DATED at DAR ES SALAAM this 13th day of February, 2015.

J. C. M. MWAMBEGELE
JUDGE