

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 207 OF 2018

THE PERMANENT SECRETARY OF WATER &

IRRIGATION.....APPLICANT

Versus

MEGA BUILDERS LTD.....RESPONDENT

Last Order: 12th Nov, 2019

Date of Ruling: 25th Feb, 2020

RULING

FIKIRINI, J.

The applicant by way of chamber summons and under section 5 (1) (c) and 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA); Rule 47 of the Tanzania Court of Appeal Rules, 2009 (the CAT Rules) and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC) was praying for the grant of the following reliefs:

1. This Honourable Court be pleased to grant the applicant an order for extending time within which to file a Notice of Appeal against the whole decision of the High Court (Commercial Division) in Miscellaneous Commercial Application No. 84 of 2015, dated 07th October, 2015.

2. This Honourable Court be pleased to grant the applicant an order extending time within which to apply for leave to appeal to the Court of Appeal of Tanzania and take all other procedural steps incidental to the intended appeal.
3. Subject to granting the extension of time this Honourable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal against the ruling and order of this Court in Miscellaneous Commercial Application No. 84 of 2015, dated 07th October, 2015.
4. Costs of this application be provided for; and
5. Any other order (s) that the Honourable Court may be deem fit to grant.

The affidavit of Mr. Daniel Nyakiha, State Attorney supported the application and that counter affidavit of Mr. George Mathew Kilindu advocate opposed the application. Due to time constraint the Court ordered parties to file written submissions which were preceded by skeleton arguments filed pursuant to Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules) which were essentially not that different from each other.

Admitting that grant of an extension of time is entirely in the discretion of the Court and citing the following cases in support: **Yusuph Same & Ano v Hadija Yusufu, Civil Appeal No. 1 of 2002, CAT, DSM, Chawe Transport Import &**

Export Co. Ltd v Pan Construction Co. Ltd & Others, Civil Application No. 146 of 2005, CAT, DSM and Tanga Cement Company Ltd v Jumanne D. Masangwa & Another, Civil Application No. 6 of 2001 (all unreported), Mr. Nyakiha on behalf of the applicant laid out what needs to be fulfilled in order to allow the Court to exercise its discretion.

One of the requirement pointed out was accounting for every day of the delay beyond the period prescribed. On this point he relied on the decisions in the cases of **Daudi Haga v Jenitha Ab Don Machafu, Civil Reference No. 1 of 2000 (unreported)** and **Lyamuya Construction Co. Ltd v Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT-Arusha, (unreported),** where the principle was echoed.

Adding to the above is negligence, laxity, financial constraint and ignorance of the legal procedure that they do not constitute sufficient reason to warrant Court's exercise of its discretion. Buttressing this point the applicant directed this Court to the cases of **Ally Vuai Ali & Ano v Suedi Mzee Suedi, Civil Application No. 1 of 2006, CAT-Zanzibar, (unreported) p.7; Paulo Martin v Bertha Anderson, Civil Application No. 7 of 2005, CAT-Arusha, (unreported), pgs.6-7; A.H. Muhimbira & 2 Others v John K. Mwanguku, Civil Application No. 13 of**

2005, CAT-Mbeya, (unreported) p. 8 and Zabitis Kawuka v Abdul Karim (EACA) Civil Appeal No. 18 of 1937.

As for the present application, it was the applicant's submission that there are illegalities on the face of the record which require Court of Appeal intervention. The claimed illegalities have been depicted from paragraphs 16, 18, 20, 21, 22 and 24 of the affidavit of Mr. Daniel Nyakiha. The alleged illegalities pointed out were:

- I. Civil Proceedings was instituted against the Permanent Secretary Ministry of Water instead of the Attorney General as the law requires.
- II. That the parties did not agree to submit to arbitration on matter of termination of contract.

Supporting his position he referred this Court to the case of **M/S E.A Construction v Permanent Secretary Ministry of Planning Economy and Empowerment & Attorney General, Commercial Application No. 13 of 2007**, where at page 6 the Court held:

“Arbitration is based on consent of party. Indeed there was an agreement to arbitrate. But the 1st Respondent was not appropriately represented in law; he had no advocate

representing him. The award is in conflict with public policy and article 13 of the Constitution.”

The decision rendered the whole award incompetent and that was why the applicant intends to challenge the decision of the Court for failing to consider the existed illegalities and hence the award was registered.

Furthering his submission on the issue of illegality as reason for extension of time Mr. Nyakiha cited for this Court the cases of **CRDB Bank Ltd & Serengeti Road Service, Civil Application No. 12 of 2009, DSM Registry (unreported)**, where the CAT applied with approval the case of **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia [1992] T. L.R 182, p. 189**, where the Court of Appeal extensively deliberated on the issue of illegality as a good cause to warrant granting extension of time. Another case cited along the same line was **Kashinde Machibya v Hafidhi Said, Civil Application No. 48 of 2009 (unreported)**.

Based on the above submissions, Mr. Nyakiha prayed for the orders sought in chamber summons be granted and the applicant be allowed to file a notice of appeal and leave be granted forthwith to appeal to the Court of Appeal.

The respondent hotly contested the application, through the written submissions filed by Mr. Roman Masumbuko. His first concern was that this was an omnibus application which cannot be entertained by this court and that the applicant should follow the legal procedures in place, first by obtaining for an extension of time to file notice of appeal under Rule 46 (1) of the CAT Rules before seeking other reliefs. His second concern was that all that intended to be appealed had already been determined by this Court in Miscellaneous Commercial Application No. 84 of 2015. Third, Mr. Masumbuko observed on the fact that the applicant only submitted in relation to the extension of time while the application had various prayers. Also the applicant had submitted on illegality which they interpreted as an admission that the delay was inordinate and cannot be explained in the present application. He thus considered the application as failed.

Submitting on each of the prayers starting with the one for extension of time to file notice of appeal, he submitted that reasons for delay have not been assigned which is almost three (3) years from 07th October, 2015 when the decision was made to 03rd September, 2018 when this application was filed. Citing the case of **Badru Issa Badru v Omari Kilendu & Ano, Civil Application No. 164 of 2016, CAT at DSM (unreported)**, when the CAT itemized four (4) things for consideration in granting or not granting extension of time namely: (i) length of delay; (ii) reason

for the delay; (iii) degree of prejudice to the respondent; and (iv) chances of appeal succeeding. In the present situation the notice of appeal was timely filed but struck out for the applicant's failure to take essential steps by applying for leave after almost a year. The Court of Appeal decision came out on 23rd December, 2016 whereas this application was filed on 03rd September, 2018 which is almost two (2) years without being accounted for. According to Mr. Masumbuko this was inordinate delay attributed to the counsel's negligence.

The present application is predicated under section 11 (1) of AJA, which allows extension of time upon sufficient cause or reasons advanced. Although what amounts to sufficient cause varies from one case to another and there has been a debate on various Court of Appeal decisions, negligence and ignorance of law have been ruled out not to be sufficient cause for grant of an extension of time, submitted Mr. Masumbuko. Fortifying his submission he referred this Court to the case of **Calico Textile Industries Ltd v Pyraliesmail Premji (1983) T.L.R. 28**. The same stance was taken in the cases of **Wankira Bethel Mbise v Kauka Foya, Civil Application No. 63 of 1999, CAT at DSM; Umoja Garage v NBA (1997) T.L.R. 109; Bank of Tanzania v Said A. Marinda & 30 Others, Civil Application No. 150 of 2011, CAT at DSM; and Hadija Adamu v Godless**

Tumba, Civil Application No. 14 of 2013, CAT at Arusha (all the unreported cases had copies attached).

Taking up illegality submissions, Mr. Masumbuko argued that the present application is on extension of time and not illegality. After all several issues raised in the affidavit supporting the application had already been determined in Miscellaneous Commercial Application No. 84 of 2015, they cannot therefore be discussed by this Court as they are *res judicata* and the Court is *functus officio*.

Supporting the submission the case of **Charles Marwa Wambura v Consolidated Holdings Corporation, Civil Reference No. 26 of 2005, CAT at DSM** (unreported but copy supplied).

Furthering his submission on illegality, he submitted that for illegality to prevail as a sufficient cause, the illegality should not draw argument or long process. And to enhance his position he cited the case of **Praygod Mmbaga v The Government of Kenya, Criminal Investigation Department & Ano, Civil Reference No. 04 of 2019, CAT-DSM (unreported)**, p. 10 when the Court of Appeal stressed that, illegality claimed must be apparent on the face of the record. No illegalities were visible in the present situation as portrayed by the applicant. And that the case of **M/S E & A Construction** (supra), was distinguished. In that case the Court found that the Attorney General was never consulted nor involved in the case which is

different in the present case as it was ruled out that the Attorney General fully participated in the arbitration proceedings, and therefore this Court is *functus officio*.

Disputing the chances of success, it was his submission that the contested award has already been declared a Court decree and therefore there was no longer an award to be set aside and also there can never be such proceedings after the award has been registered as a decree of the Court. The cases of **Ardhi University v Kiundo Enterprises (T) Limited, Miscellaneous Commercial Cause No. 272 of 2015** and **The Government of the United Republic of Tanzania v Hermanus Phillippus Stern & Others, Case No. 28994/2019, High Court of South Africa at Gauteng** (unreported), p. 11, were cited in support of the averment. Bringing the position from the two cases to the present case, the award has already been registered as decree of the Court. Any attempt to challenge the award has been overtaken by events including the issue of illegality which, Mr. Masumbuko considered misplaced.

Submitting on prejudice, it was Mr. Masumbuko's submission that the respondent has been prejudiced for a long time. The applicant has all along dragging the process either by not taking essential steps or letting the respondent act as exhibited in annexure GMK-2 to the counter affidavit. The applicant's failure to

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act or take steps which led to striking out of Civil Application No. 71 of 2016 led the arbitral award to be registered and allow it to enforceable as decree as exhibited by GMK-3 and GMK-4. There is therefore no longer issue of setting aside the arbitral award and any move in that direction will prejudice the respondent and it will be taking the proceeding back four (4) years when there was no decree of this Court, which will be prejudicial to the respondent's right and moreover, the application is overtaken by events, he stated.

The second prayer on extension of time to file an application for leave to appeal has actually been covered that there was no reason advanced for the delay, on one hand. On the other hand, he submitted that the application has been brought prematurely. This application was to be preceded by the one of notice of appeal under Rule 46 (1) of the CAT Rules. The third prayer for leave was as well premature.

On the strength of his submission he prayed for the application to be dismissed with costs.

Briefly rejoining, Mr. Nyakiha contested the concern raised that the application was omnibus which was not raised in the counter affidavit. Also he submitted on the illegality as not to have been contested and that the law was clear that the issue can be used as a ground for extension of time. Dismissing the respondent's

submission as unnecessary arguments which should not be used to thwart justice, and reiterated the decision on the case of **CRDB Bank and Serengeti** (supra) which cited with approval the **Valambhia** case (supra), Mr. Nyakiha submitted that when the question of illegality has been raised, the Court was duty bound even if it meant extending time for that purpose only. The position was stated in the case of **Machibya** (supra) as well.

Discussing the cited cases of **Wakira** (supra) he contended the case as distinguished but in the context of this application was misleading as it refers to ignorance of law while that has never been raised by the applicant nor the respondent in their counter affidavit as counter argument in not extending time. Maintaining on his submission on illegality, Mr. Nyakiha stated that the issue has been identified both in pleadings and through the submissions which have not been opposed by the respondent. The Court in extending time has to consider number of factors, illegality being one of them, he stressed. He also submitted that granting of an extension of time will not jeopardize the respondent's claim or award.

Responding to the issue of the Court being *functus officio*, he argued that the Court cannot be *functus officio* as the prayers in the present application were different from those in Miscellaneous Commercial Application No. 84 of 2015. The present

application was for allowing the applicant to go to the higher Court so its concerns can be examined. He prayed for the application to be granted and time extended.

Prior to determining the application before it, the Court has to make sure it has been properly moved and has been vested with powers to grant the reliefs sought.

In the present application the chamber summons has enlisted three different prayers which ordinarily ought to have been considered in three separate applications, since they seek for reliefs at various stages of the process. Those prayers are:

- (i) extension of time within which to file a Notice of Appeal;
- (ii) extension of time within which to apply for leave to appeal to the Court of Appeal and take all other procedural steps incidental to the intended appeal; and
- (iii) leave for the applicant to appeal to the Court of Appeal against the ruling and order of this Court in Miscellaneous Commercial Application No. 84 of 2015, dated 07th October, 2015.

This point was only raised during the filing of written submission and not in the counter affidavit, therefore should perhaps not be considered as submitted by Mr. Nyakiha. While in agreement to Mr. Nyakiha's submission and that Mr. Masumbuko was supposed raise the issue by way of a preliminary point of

objection which should have been dealt with at the earliest stage of this application. Having said that it however, does not mean the same should go unattended. It is uncontested fact that such omnibus applications have an impact to the application before the Court. The Court cannot therefore pretend as if the application is properly before it, while it is not.

The application for leave to appeal to the Court of Appeal is always preceded by a notice of appeal. Although Rule 46 (1) of the CAT Rules are for use in the Court of Appeal, but the logic is not farfetched. To consider an application for leave in the absence of a properly filed notice will defeat the purpose of having such rule which has been couched in mandatory term by using the term “shall” even though the term “shall’ is not necessarily mandatory in every situation.

The notice of appeal should therefore have been applied first, and after it has been granted then to be followed by an application for extension of time to apply for leave. The application for leave to appeal to the Court of Appeal would have come last. For all the three reliefs sought to be lumped in one application, translate to me that the Court is being tricked and obligated to grant all the applications, the move discouraged. In the case of **Mohamed Salmin v Jumanne Mapesa, Civil Application No. 103 of 2014, CAT -Dodoma (unreported)**, the Court faced with the scenario like the one in this case had this to say:

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“.....the application is omnibus for combining two or more unrelated applications. As Court has held times without number that an omnibus application renders the application incompetent and liable to be struck out.”

The position was echoed in the Court of Appeal decision in the case of **Ali Chamani v Karagwe District Council & Another, Civil Application No. 411/4 of 2017** (unreported), where the application being omnibus was one of the reasons the Court struck out the application.

In the present application likewise, since the application before the Court is omnibus by seeking three different reliefs in one application, the fact which renders the application incompetent and with that anomaly the Court cannot be said to have been properly moved.

In light of the above, I proceed to strike out the application as the Court has not been properly moved and also for the application being incompetent. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. Fikirini".

P. S. FIKIRINI

JUDGE

25th FEBERUARY, 2020