

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 224/16 OF 2018

JOHAN HARALD CHRISTER ABRAHSSON.....APPLICANT

VERSUS

- 1. EXIM BANK (T) LIMITED.....1ST RESPONDENT**
- 2. DASCAR LIMITED.....2ND RESPONDENT**
- 3. MAS & ASSOCIATES COMPANY LIMITED.....3RD RESPONDENT**
- 4. YUSUPH SHABAN MATIMBWA.....4TH RESPONDENT**

(Application for extension of time to file Application for Revision against the execution proceedings and the sale of the Applicant's property from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Werema, J.)

dated the 11th day of August, 2009

in

Commercial Case No. 8 of 2008

RULING

29th August & 10th September, 2018

MZIRAY, J.A.:

The applicant, Johan Harald Christer Abrahamsson, through the services of Mr. Peter Joseph Swai, learned advocate, brought the present motion under Rule 4(2)(b),10 and 48(1) of the Court of Appeal Rules, 2009 (the Rules), seeking extension of time to file Revision out of time on the grounds that:

- i. The execution process by selling plot No 16, Jangwani Beach with Title No. 43835 was with material irregularities and tainted with fraud*
- ii. The application for revision filed in time was struck out for the reason that the court was moved under wrong provision of the law*
- iii. That the execution proceedings sought to be revised contain illegalities which are apparent on the face of the record.*

The application is supported by the affidavit deponed by Peter Joseph Swai, the applicant's counsel. The respondents on the other hand, filed affidavits in reply to controvert the contents of the affidavit. Counsel for the respective parties however filed written submissions in support of and against the application as required by the law.

At the hearing of the application, the applicant was represented by Mr. Kephas Mayenje, learned counsel, whereas, the first and third respondents had the services of Mr. Dilip Kesaria learned counsel. Mr. Philemon Mutakyamirwa, learned counsel, appeared for the fourth

respondent. The 2nd respondent who was duly served did not enter appearance in which then, the hearing proceeded in his absence in terms of Rule 63 (2) of the Rules.

In support of the application, Mr. Mayenje submitted that the grounds for seeking extension of time are contained in the affidavit of Mr. Peter Joseph Swai. The said affidavit was adopted as part of the submission in support of the application. The learned counsel also referred to the case of **Eliakim Swai & Another V. Thobias Karawa Shoo**, Civil Application No. 2 of 2012 (unreported), which he said, the facts and the circumstance of the cited case were almost similar to the established facts to the case at hand. The learned counsel maintained that since the application for revision was filed on time but the same was struck out on a technical point for being filed under the wrong provision of the law, that by itself constitutes good cause to grant the application sought. Principally that is the gist of his submission.

On his part, Mr. Kesaria, vehemently opposed the application for extension of time for the following reasons; **Firstly**, no good cause

has been established by the applicant for the delay. He submitted that, Rule 10 of the Rules gives discretion to the Court to grant an extension of time after the applicant has shown sufficient reasons for the delay. He further submitted that, those reasons are to be stated in the affidavit in support of the application. However, Mr. Kesaria said, the applicant's affidavit has totally failed to state reasons for such a delay. While agreeing with the principle expounded in the case of **Eliakim Swai**, he stated that an excusable inadvertence for delay in making an application does not include ignorance of procedure and blunder by a counsel. He submitted further that the errors committed by an advocate firm, lack of diligence and negligence at any rate, the same do not constitute good and sufficient cause to warrant the extension of time. In support of his argument he cited several cases including the cases of **Omari Shamba and Others v. National Housing Corporation** , Civil application No. 46 of 2006, **Abdallah Ndope and Others V. National Housing Corporation** , Civil application No. 21 of 2006, **Umoja garage V. National Bank of Commerce**[1997] TLR 109 and **William Shija V. Fortunatus Masha**[1997] TLR 213

Secondly, in an application for extension of time each day of the delay must be accounted for. The counsel argued that the application for revision was struck out on 31/5/2018 and this present application was filed on 13/6/2018 after 14 days. He submitted that taking into account that the matter has been dragging in court for almost ten years, the 14 days ought to have been accounted for. To strengthen his argument, the learned counsel made reference to the case of **MPS Oil Tanzania Limited and two others V. Citibank Tanzania Limited**, Civil Application No 4 of 2016.

Thirdly, the affidavit in support of the application is incompetent because it contained false statements taken on oath. He made reference to paragraphs 5, 6 and 12(e) of the supporting affidavit. He stated that the contents of those paragraphs are nothing but naked lies. Citing the unreported case of **Jaluma General Supplies Limited V. Stanbic Bank**, Civil Application No. 167 of 2013 as authority, he urged the Court to strike out the application.

Fourth, the application is misconceived in the sense that the applicant did not exhaust all the available remedies in the lower court.

He stated that the complaint that the execution proceedings and the sale of the applicant's property was with illegalities and material irregularities would have been resolved by the executing court and not by this Court.

Basing on the submission and the authorities he has just cited, the learned counsel urged this Court to dismiss the application for lack of merit with costs.

On his part, Mr. Mutakyamirwa was in full support of what was argued and submitted by Mr. Kesaria. He also prayed that the application be dismissed with costs.

In brief rejoinder submission, Mr. Mayenje submitted that the established principle on counting each day of the delay in extension of time is only applicable when the case was not filed in time at the first instance. He submitted that the principle does not apply in the circumstances of this case because the case at hand was filed within time. On that basis he maintained that there is justification in the delay as it was not actuated by inaction, negligence or any wrongful act or omission on the part of the applicant.

After careful consideration of the facts deposed in the affidavit filed in support of the application coupled with the detailed arguments made by the learned counsel for the applicant together with the picture which comes out I find that the only issue for determination is whether there are sufficient grounds laid for extending the period of applying for revision against the execution proceedings and the sale of the applicant's property in Commercial Case No. 8 of 2008.

It is evident from Rule 10 that whether or not to grant an extension of time is a matter for the discretion of the Court. To that end the applicant must put material before the Court which will persuade it to exercise its discretion in favour of an extension of time. The reasons for the purported delay in this case are as shown in the affidavit in support of the application, the applicant's written submission and the arguments advanced by the applicant's learned counsel coupled with the authority cited in support thereto. These reasons have been vehemently criticized by Mr. Kesaria who is of the view that they do not constitute good cause.

I have with greatest care gone through the record of the case and the submissions made by the two learned counsel. There is no doubt that prior to this application, the applicant was in this Court pursuing Civil Revision No. 49/16 of 2016 which was struck out for reason that the Court was moved under wrong provision and that upon being struck out on that technical delay the applicant acted promptly within two weeks in bringing this present application. Since the applicant was not idle but all along have been in this Court pursuing an incompetent application, that by itself constitutes good cause. See **Robert Schelten V. Balden Norataran Varma and 2 Others**, Civil Application No.112 of 2016 (unreported).

Also, in an application for extension of time among the factors to be considered by the Court are the special circumstances showing why the applicant should be allowed to argue the case out of time. One of such special circumstance this Court has consistently held, is a claim of illegality or otherwise of the challenged decision or order or the proceedings leading to that decision (see the case of **Veronica Fubile VS National Insurance Corporation and 3 Others**, Civil

Application No. 168 of 2008, **Etienne's Hotel v National Housing Corporation**, Civil Reference No. 32 of 2005 (both unreported) and that of **Principal Secretary, Ministry of Defence and National Service V Devram Valambhia** [1992] TLR 185.

In the latter case this Court held *inter alia*, I quote:-

"We think that where, as here, the point of law at issue is illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of rule 8 of the Rules for extending time. To hold otherwise would amount to permitting a decision which in law might not exist to stand..."

In the case at hand, the applicant complains that the execution process by selling plot No. 16 Jangwani Breach with Title No. 43835, the plot in dispute, was with material irregularities, tainted with fraud and contained illegalities which were apparent on the face of the record.

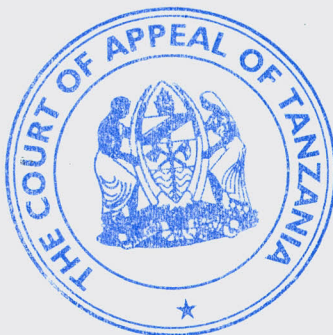
It should be noted that once there is a claim of illegality, a single Justice of Appeal lacks the jurisdiction to determine the matter to ascertain the illegality. The same must be ascertained by the Full Court. See **Eliakim Swai and Another V. Thobias Karawa Shoo** (*supra*). I will therefore refrain from discussing this issue of illegality for want of jurisdiction.

On the foregoing, I am satisfied that the applicant has given valid explanation for the purported delay. I accordingly grant leave and extend the period of instituting revision proceedings in this Court out of time. The intended Revision should be instituted within twenty one (21) days from the date of delivery of this Ruling. In the circumstance of the case I will make no order as to costs.

DATED at **DAR ES SALAAM** this 6th day of September, 2018.

R. E. S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL