

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 218 OF 2015

DIMENSION DATA SOLUTIONS LIMITEDAPPLICANT

VERSUS

1. WIA GROUP LIMITED.....1ST RESPONDENT

2. ABDULRAHMAN OMAR KINANA.....2ND RESPONDENT

3. ERIC MWENDA3RD RESPONDENT

(Application from the Judgment and Decree of the High Court of Tanzania
(Commercial Division) at Dar es Salaam)

(Nyangarika, J.)

dated the 1st day of October, 2013

in

Commercial Case No. 13 of 2012

RULING

30th May & 12th June, 2018

MUGASHA, J.A.:

This is an application for extension of time to file revision by notice of motion brought under rule 10 of the Court of Appeal, Rules, 2009. The grounds canvassed by the applicant in the notice of motion are as follows:-

1. There has been occasioned a long and inordinate delay in obtaining certified copies of Court record which constitute an integral part of the record of revision. The applicant applied for

the said record on the 19th day of January, 2015 and a reminder request on 30th day of July 2015 but has not been supplied with the said record to date.

2. There is good and sufficient cause for the grant of extension of time within which to lodge the application for revision because:

- a. The cited proceedings of the High Court are tainted with illegality, irregularity and impropriety which have prejudiced the applicant and other persons who were not parties to the suit contrary to the principles of natural justice;
- b. It is in the interest of justice that the correctness, propriety and legality of the cited proceedings and the decision of the High Court of Tanzania be examined by this honourable Court.

The application is supported by the affidavit sworn by **JOSEPH KAIRIGO** the Director of the applicant. The application has been challenged by the respondents through the affidavit in reply of **PATRICK MUTABAZI NYINDO**, the principal officer of the 1st respondent.

The background of the application as gathered from the affidavital evidence and other documentation accompanying the application is briefly as follows: Pursuant to a dispute which arose from agreements to render Telecom services and related services, the respondents [**WIA GROUP LIMITED; ABDULRAHMAN KINANA AND ERIC MWENDA**] filed Commercial case No. 13 of 2012 in the High Court (Commercial Division) against seven defendants [**CONVERGENCE WIRELESS NETWORK (PROPRIETARY) LIMITED; CONVERGENCE WIRELESS NETWORK (MAURITIUS) LIMITED ; CONVERGENCE PARTNERS INVESTMENT (PROPRIETARY) LIMITED; COMMUNICATION SOLUTION PROPRIETARY LIMITED t/a COMSOL WIRELESS LIMITED SOLUTION; DIMENSIONS DATA SOLUTIONS LIMITED ; ANDILE NGCABA and BRANDON DOYLE**]. The applicant was the 5th defendant. The claims included payment of compensation for loss and liquidated and unliquidated damages and the declaratory order in the form of perpetual injunction against the applicant or any other convergence affiliates to cease conducting business or trade which directly or indirectly competes with the business of WIA Company Limited within Tanzania.

Following unsuccessful defendants' bid to have the dispute arbitrated by the International Chamber of Commerce (ICC) the respondents having

invoked rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 on 1st October, 2013, they prayed and obtained a default judgment jointly and severally against the five defendants including the applicant herein. On 22nd of October, 2013, the applicant applied to set aside the default judgment and leave to defend the suit. However, the application was on account of incompetency, struck out on 29th May, 2014.

Subsequently, the applicant unsuccessfully sought enlargement of time to apply to set aside the default judgment vide Misc. Commercial Application No. 152 of 2014 which was struck out on 4th of September, 2014 on account of not having demonstrated good cause for the delay to file the application within twenty one (21) days. Ultimately, the applicant filed an application for review vide Misc Commercial Review No. 245 of 2014 which was partly allowed on 18th December, 2014 without changing the initial verdict. A month later, that is on 19th January, 2015 the applicant's advocates who indicated to be desirous of seeking a revision, wrote to the Registrar requesting to be supplied with the proceedings of the main suit together with the related interlocutory proceedings. A reminder was made six months thereafter but the proceedings in question were not supplied. Since the time within which to apply the revision had

expired, on 28th October, 2015, the applicant brought the present application seeking extension of time to apply for the revision.

At the hearing, the applicant was represented by Mr. Joseph Ndazi, learned counsel and Mr. Deusdedit Mayomba Duncan, learned counsel represented the respondents.

Mr. Joseph Ndazi, adopted the affidavit in support of the Notice of Motion to constitute an integral part of his submission. The learned counsel submitted that, the application could not be timely lodged because of the inordinate delay to obtain the requisite documents which have not been supplied by the Registrar of the Commercial Court irrespective of the follow ups made by the applicant. Reiterating what the applicant deposed in paragraphs 7 and 8 of the affidavit, the counsel submitted that the proceedings intended to be revised have issues of illegality ranging from breach of the principles of natural justice; bias and the default judgment containing orders prohibiting the applicant's affiliates who were not parties to the proceedings from doing business in Tanzania which is tantamount to unheard condemnation and contrary to the law relating to Fair Competition; the award of huge sums of money to WIA company who was neither a party nor required to prove contractual claims. The learned

counsel as well submitted on the complaint relating to the pending application for execution by the respondents seeking to attach the Bank accounts of the applicant while he was not a party in the main suit and is not so in the application for execution.

The applicant's counsel further argued that, the intended revision is the only remedy available to the applicant as she has no right of appeal against the review handed down in a Ruling dated 18th December, 2014. He urged the Court to find the application merited and proceed to grant it with costs.

On the status of the proceedings requested by the applicant from the Registrar, Mr. Ndazi confirmed that to date, the applicant has not obtained the impugned proceedings sought to be revised but all the same she seeks extension of time to apply for the revision.

On the other hand, Mr. Duncan adopted the affidavit in reply. He pointed out that, save for the delay to obtain the records of the Commercial Case in question, the applicant has not demonstrated good cause warranting the grant of the application. He argued that, the applicant was not prompt and diligent in seeking the present application.

having not explained the delay of two years he wasted in order to write a letter seeking to be supplied with the proceedings. To support his proposition Mr. Duncan relied on the case of **VODACOM FOUNDATION VS COMMISSIONER GENERAL**, Civil Application No. 107/20 of 2010 (unreported) whereby the applicant was found not diligent for failure to account for the delay of nine days to lodge an application following withdrawal. As such he submitted, the application was dismissed.

On the question of illegality, he argued that before the High Court the defendants including the applicant were given opportunity of a hearing but filed no defence and as such, there was no bias as alleged. He further pointed out that, the respondents were justified to seek and obtain the default judgment under Rule 22 (1) of the Commercial Court Rules. He concluded that, the complaints on the illegality are mere allegations which are not supported by the applicant's affidavit. He urged the Court to dismiss the application on account of applicant's failure to demonstrate good cause for the delay.

Mr. Ndazi briefly rejoined by submitting that, the letter seeking to be supplied with the proceedings was written before the expiry of the period within which the applicant could apply for revision. He added the record has been inordinately delayed as to-date the applicant is yet to be supplied with the entire proceedings in question.

From the respective submissions, both counsel are in agreement that the pertinent issue for determination is whether the applicant has demonstrated good cause to warrant the Court to exercise its judicial discretion under rule 10 which states:-

"The court may, upon good cause shown, extend time limited by these rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time so extended."

In the case **HENRY MUYAGA Vs. TTCL** Application No. 8 of 2011 (unreported) the Court interpreted judicial discretion to extend time as unfettered, but several factors must be considered including the length of

delay, the reason for the delay, and the degree of prejudice that the respondent may suffer if the application is not granted.

Moreover, a claim of illegality of the challenged decision constitutes good reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay. However, the threshold is that, a point of law on illegality must be apparent on the face of record in order to constitute good cause to grant the extension of time sought. (See **MINISTRY OF DEFENCE, NATIONAL SERVICE VS DEVRAM VALLAMBHIA [1992] TLR 387** and **LYAMUYA CONSTRUCTION COMPANY LIMITED VS BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA**, Civil Application No.2 of 2010 (unreported)).

This application for extension of time to apply for revision basically hinges on two limbs namely: an account of delay to obtain the impugned proceedings which are yet to be obtained and the complaint of illegality. The aforesaid notwithstanding, the gist of the applicant's complaint is on the proceedings in respect of what transpired at the High Court in the main suit and subsequent

applications. However, the applicant is yet to be supplied with the impugned proceedings as reflected in what she deposed in paragraph 9 (c) of the affidavit having stated:

"despite such lapse of time, the applicant is unable to lodge a proper application for revision because is yet to obtain certified copy of the Court record to which the revision relates".

Notwithstanding the aforesaid position, at the hearing the applicant's counsel expressed his desire to file the intended revision after obtaining extension of time.

The said status of the applicant not having obtained the impugned proceedings, really taxed my mind as to how can the present application be disposed for the sake of facilitating the intended revision. In my considered view, since the applicant has not obtained the impugned proceedings, the present application for extension of time to apply for the revision is premature. Moreover, in the absence of the impugned proceedings, it is impossible for the Court to conclude if the impugned proceedings on the face of record are tainted with illegality. I say so

because it is settled law that, for an illegality to constitute good cause warranting extension of time, it must be apparent on the face of record. Therefore, before lodging this application, the applicant ought to have initially obtained the impugned proceedings and not otherwise.

Thus, on account of the application being premature, it is hereby struck out with costs. Furthermore, I hereby direct the Registrar of the Commercial Court who has not responded to the applicant's correspondences for almost three years to attend to the same and supply the applicant with the impugned proceedings as soon as possible to enable her embark on steps to pursue the intended revision.

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

S.E.A. MUGASHA
JUSTICE OF APPEAL

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


B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL