

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 95/01 OF 2019

KASTAN MINING PLC APPLICANT

VERSUS

COLOM INVESTMENT (T) LTD RESPONDENT

**(Application for extension of time to file an application for revision
from the Decree and Proceedings of the High Court of Tanzania
at Dar es Salaam)**

(Utamwa, J.)

**Dated the 30th day of April, 2013
in
Misc. Civil Application No. 162 of 2011**

RULING

18th June & 25th July, 2019

KOROSSO, J.A.:

The application before the Court is by way of notice of motion pursuant to Rule 10 and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), with a supporting affidavit sworn by John Allen Tate, a Principal Officer for the applicant and the sought relief is for an order for extension of time within which to file an application for revision out of time regarding the proceedings in Civil Case No. 162 of 2011 at the High Court of Tanzania, Dar es Salaam Registry. The respondent filed an affidavit in reply sworn by Peter Kibatata, an

advocate duly instructed to represent the respondent denying most of the assertions averred by the applicant on reasons for delay to file the application for revision within time.

The grounds supporting the application are outlined in the notice of motion and the supporting affidavit, stating that the proceedings in Civil Case No. 162 of 2011 are tainted with irregularities and illegalities and other circumstances. First, that the Hon. Trial Judge misled himself and erred in law in entertaining and determining a suit which was not properly before the trial court for non-citation of the enabling provisions of the law. Second, that the court misdirected itself by entertaining the suit despite the fact that it lacked jurisdiction in view of the fact that the parties in the suit had contractually agreed to settle all disputes in arbitration, and arbitration had never been initiated. Third, that the trial court erred by hearing and determining the suit and granting orders prayed therein without granting the applicant, a chance to present his case and in effect denying the applicant the right to be heard, and fourth that the trial court misdirected itself by believing the respondent case while the respondent had concealed material evidence and fraudulently and illegally prosecuted Civil Case No. 162 of 2011 and

thus in the process prejudiced the rights of the applicant. The argument thus being that taking in consideration all the circumstances pertaining to the matter as presented, the applicant's delay in seeking revision was an excusable technical delay.

It is important at this juncture to present albeit briefly, the background to the application before the Court. Court records reveal that the applicant is the owner of property, Plot Number 1050, Block S, Ras Karanjo Gezaulole, Kigamboni with Title Number 107479 measuring 967 square meters, a subject matter in Civil Case No. 162 of 2011. On or about March 2008, the applicant and Tanzania Mortgage Company Limited (TMCL) entered into an agreement, a mortgage loan facility, where it was agreed that TMCL provide a loan to the respondent (plaintiff in Civil Case No. 61 of 2015) to purchase a residential unit, Plot No. 1050 Gezaulole Kigamboni. Under the agreement, TMCL were to prepare a mortgage deed but this was not done and then later they decided that a promissory note issued by the respondent will suffice and thus prepared and signed on 20th June 2008 as security for the loan. It is alleged that despite the agreement TMCL did not provide the loan funds but borrowed money from the respondent to fund the loan. TMCL assigned the loan and

promissory note to the respondent on or about 14th July 2008 under a Master Deed of Assignment. Subsequently, subject to terms and conditions in the Mortgage Loan Facility letter and the Master Deed of Assignment TMCL prepared a supplementary credit facility letter which was executed by TMCL and the respondent on or about 26th May 2009. The promissory note represented a lien by deposit of documents as security for the loan.

The respondent is the one who filed Civil Case No. 162 of 2011 under Order XXXV of Civil Procedure Code, Cap 33 RE 2002 (CPC) against Tanzania Mortgage Company, claiming not to have received any payments under the loan transaction with TMCL including payments for the loan, and prayed to be granted a decree to sell Plot No. 1050 Block 5C RAS Koronjo Gezaulole, Temeke District, owned by the applicant.

When this application came for hearing, Mr. John Tate, Principal Officer of the applicant entered appearance for the applicant and for the respondent, Mr. Peter Kibatala, learned Advocate represented him.

Mr. Tate, with the leave of the Court abandoned the second prayer in the notice of motion, and thereafter prayed for the contents

of the notice of motion and written submissions filed to be adopted and form part of his overall submissions. Contending that the notice of motion and the supporting affidavit reveal the relief sought and the reasons and grounds for the application being mainly to be granted extension of time to file an application for revision alleging that the Ruling in Civil Cause No. 162 of 2011 is tainted with irregularities and illegalities. The applicant's representative amplified the grounds for delay in filing the application for delay, stating that the suit was heard in their absence and that when they became aware of the relevant proceedings and the decision which they found to affect the interests of the applicant, a thorough research was conducted to enable them to strategise on candidate action to take, this included perusal of the court file on 26th September 2011 and then proceeded to file a summary procedure suit which was struck out on the 17th of March 2015. A fresh summary procedure suit vide Order XXXV of the CPC was filed that is, Civil Case No. 61 of 2015 which is still pending and it addresses a collateral matter relating to the suit that was struck out on 23rd April 2013.

That in October 2013, the applicant's filed misconduct proceeding in the Advocates Committee against Mr. Peter Kibatala,

learned Advocate for the respondent which is also still pending. They also filed a caveat with the Ministry of the Ministry of Land, Housing and Settlement and thereafter, realized that the recourse they have undertaken was not in anyway beneficial, that the fundamental issue was with regard to the original matter, and they proceeded to conduct further research so as to arrive at the most appropriate action to take, and thereafter decided to proceed with a revision of the proceedings and decision they were aggrieved against. But by this time the applicant was out of time and because the applicant felt the trial court proceedings and decision was enfolded with various illegalities and irregularities such as, allegations of serious fraud, and believing that the applicant was condemned unheard the applicant filed the current application.

The applicant argued that the irregularities and illegalities presented in the affidavit supporting the notice of motion are matters which need to be addressed by this Court. That the delay is an excusable technical delay and the Court need to so find and also be inspired by the decision of this Court in **Bank M (Tanzania) Limited vs Enock Mwakyusa**, Civil Application No. 520/18/2019 and that the irregularities and illegalities revealed give rise to

exceptional circumstances and find they represent good cause for the delay and exercise discretion under Rule 10 of the Rules to grant the prayers sought by the applicant.

The respondent counsel replying to the submissions and contentions from the applicant started by praying that the respondent's written submissions and affidavit in reply be adopted as part of their submissions, arguing that the Court should dismiss the application because no sufficient cause has been established to warrant consideration and grant of the prayers sought in this Court. Mr. Peter Kibatala, submitted that, reading from the submissions and all the documents before the Court supporting the application, they reveal that the applicant after the delivery of Ruling concentrated on ancillary proceedings which did not lead to anything and that the applicant started with Civil Application No. 502 of 2014 which was struck out for being incompetent; then there was another application filed which is still pending, that is, Civil Case No. 61 of 2015; and that looking at the plaint and the written statement of defence by the respondent challenging the efficacy of the said case, the applicant decided to venture into seeking revision proceedings. Arguing further that there is also Civil Case No. 165 of 2014, between applicant and

TMCL dealing with matters relating to the other cases filed. That all these cases filed by the applicant show a process of forum shopping and the applicant being not clear what recourse to undertake.

With regard to allegations of fraud, that counsel for the respondent argued that the allegations are outside the domain of the application before the Court. That from the undertakings seen, it is clear that there has been no competent legal advice which has been sought to assist or guide the applicant properly. That the application before the Court has failed to present reasons for the delay. As for alleged illegalities, the respondent's counsel argued that there are none that are salient on face of it. Regarding claims that the applicant was denied an opportunity to be heard, the counsel submitted that since the civil case which is being questioned was a summary procedure suit, the defendant then sought leave to defend through Hallmark Attorneys but leave to defend was denied for being out of time. That the original defendant in that case, TMCL never sought to appeal or revise the Ruling and that assuming the alleged illegality extend to present application why the delay of five years? That all the cases cited by the applicant's representative related to

inordinate delay of not more than two years and are thus distinguishable, also there is no excuse for delay for five years

The respondent counsel further submitted that when one seeks recourse through prayers on a Constitutionally granted right, it should be remembered that the Constitution has parameters, one cannot lie for five years and rely on the Constitution only and he thus urged the Court to consider well established principles that extension of time applies to those who are prudent and respond quickly on becoming aware of anomalies and it is not a sentimental remedy and therefore the application should be dismissed with costs.

The rejoinder by the applicant's representative was brief, a reiteration of his submissions in chief. On the issue of the delay of five years, he contended that during the period the applicant has been diligently pursuing remedies and that issues for consideration are as presented and discussed in the cited cases which addressed delay to file application, and that the Court exercised discretion and granted extension of time where it was satisfied that there are irregularities and illegalities in proceedings and decisions.

Regarding the assertion that the allegations of fraud cannot be dealt with in the current hearing, the applicant representative

submitted that this is the last Court and it is important that the fraudulent issues as averred should be addressed because leaving them will encourage fraudulent activities and TMCL has neither initiated a revision process nor appealed, the main reason being that the property attached does not belong to TMCL but is owned by the applicant. He also submitted that the applicant has not been forum shopping as alleged, but he has been seeking various remedies so as to get justice. He further contended that, the pending case, Civil Case No. 165 of 2014, is not in any way related to the current application, asserting that what the applicant is seeking is a declaratory order that security supporting the loan should be as in the promissory note.

I have carefully considered the rival submissions by the counsels for the applicant and the respondent and it is pertinent to start by putting matters into context, presenting the guiding provision on matters relating to application of the nature like the present one that is Rule 10 of the Rules which provides:

"The Court may, upon good cause shown, extend the 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 the

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 as so extended."

Rule 10 of the Rules gives a wide discretion to the Court to determine when good cause is shown, but this discretion is expected to be exercised judiciously, and that's why, there are established principles to guide the Court when determining whether there is good cause shown and the underlying principle being that, the set boundaries are dependent on facts of each individual case. Therefore, the applicant must always demonstrate good cause in the supporting affidavit, expounding reasons for the delay and the actions taken and accounting for each day of delay. The decision of this Court in the case of **Lyamuya Construction Company Limited vs. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) is relevant formulated guidelines to consider on what amounts to good cause:

"(a) The applicant must account for all days of the delay.

(b) The delay should not be inordinate.

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

(d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

In a nutshell, when the Court is exercising its discretion to grant extension of time, it should consider such factors as the length of delay; the reason for the delay; and that the applicant must account for the delay of each day and degree of prejudice that the respondent may suffer if the application is granted.

In the present hearing, the applicant when addressing the issue of delay to file the application, has averred in the affidavit supporting the notice of motion expounded in written and oral submissions, that the delay was caused by the undertakings to seek justice after becoming aware of the High Court decision which the applicant now seeks to apply for revision in Civil Case No. 162 of 2011, between Colom Investments (T) Ltd (the respondents) and TMCL. Contending that the applicant was not a party to this suit, and became aware of this decision (delivered on 30th April 2013) which affected their

interest, since the attached property that is plot 1050, Block 8 Ras Karanjo, Gezaulole, Kigamboni is the property of the applicant (a fact which has not been disputed by the respondent in the reply affidavit in July 2014 after a discussion he had with the principal officer of the respondent. The fact that the applicant was not a party to Civil Case No. 162 of 2011, has not been disputed by the respondent, in fact, the respondent counsel submitted, that the suit was filed under summary procedure order XXXV of CPC, and the defendant then Tanzania Mortgage Company limited, had sought to defend but the application was dismissed being filed out of time.

The applicant representative expounded on actions taken after becoming aware of the decision sought to undergo revision if the application is granted, as averred in paragraphs 12, 13, 14 and 16(i), (ii), (iii),(iv), (v), where in effect it shows that, the applicant spent time to follow-up on the file and conceptualize the situation, including discussion with respondent, and also filed various cases seeking recourse amongst the filed cases in the High Court some were struck out and one is pending. But stated that the pending case does not interfere with the present application. That the applicant also filed disciplinary proceedings against the counsel for the respondents in

the Advocate's Committee which is still pending. The respondent on the other hand wants this Court to find that the delay is too long, that is about five years, since the decision under scrutiny and sought to be revised was in April 2013 and that all this time the applicant has been doing nothing constructive against the challenged decision but only forum shopping leading to the long delay in filing for a revision.

There is no doubt that 2013 to 2019 is a long time, but in view of the fact that the applicant was not a party to the suit of the case sought to be revised if granted extension of time, the test should be how he has explained the delay from the time he became aware of the existence of the decision, which was in July 2014 as averred in the affidavit supporting the notice of motion, and not challenged by the respondent. Paragraphs 12, 13 and 16 explain clearly the actions taken by the applicant in pursuit of rights.

It is relevant to point out that this is not the forum to consider whether or not the applicant's alleged rights were affected or not with the decision sought to be revised, because venturing into that will be addressing the merits of the envisaged revision, where the current application to be granted. Whilst it is true that most of the

cases cited by the applicant related to delay of less than two years, the Court duty is to determine whether or not good cause has been shown for the delay, and in doing this also consider the promptness of taking commensurate action to seek recourse.

The applicant raised the issue of not being accorded an opportunity to be heard in the suit at the High Court. Recognizing the importance of the principle of the right to be heard as expounded in **Mbeya Rukwa Autoparts and Transport Ltd. vs Jestina George Mwakyoma** (2003) TLR 251, the importance of parties to be accorded the right to be heard, I find in the current application, this issue need not take much of our time, because, as also submitted by the respondent counsel, the suit was under Order XXXV of CPC, and the applicant was not a party to that suit, and so cannot at this juncture claim that he was denied the right to be heard where the applicant was not a party. Therefore, I find this ground has no standing since no evidence to show this and consideration has been made to the circumstance of the case.

The same for the allegations of fraudulent actions. These are serious allegations that require proof of evidence, while in the affidavit there are only narrations of suspicions which this Court cannot presently

venture into examination, not being the appropriate forum for such claims. I am of similar view as the one expressed by the learned counsel for the respondent, that the allegations not being on the face of the application, needing proof, this is not the right forum for such so the ground falls.

On the allegations of illegalities and irregularities in the proceedings of the case envisaged for revision, the law is settled that claims of illegality or irregularities can also be considered as a good cause for extension of time, as discerned from various decisions of this Court such as; **Kalunga and Company Advocates Ltd vs National Bank of Commerce Ltd** (2006) TLR 235 and the **Principal Secretary, Ministry of Defence and National Service vs Divram P. Valambhia** (1992) TLR 387.

It is contrite to say that determination of existence of illegality is not as apparent as believed and various decisions of this Court expound this fact. Whereas in **Young Women's Christian Association of Tanzania**, (supra) it was held that a claim of illegality is not necessarily sufficient to extend time, such illegality must be apparent on the face of the record not entailing long drawn process of arguments, and that the Court need only be satisfied that

there exists an issue involving illegality apparent on the face of the record.

For the applicant in this case, Paragraphs 12, 14, 15 and 18 of the affidavit supporting the notice of motion attempts to expound some of the alleged illegalities. The counsel for the respondent has implored the Court to find the claims of illegality as mere suppositions and not substantiated by the applicant to warrant the Court to consider the allegations.

Without doubt, it is outside the purview of this Court to consider the merits of the allegations of illegality in the present matter, but it is important having observed that the alleged illegalities have been disclosed in the affidavit, in the circumstances, I find myself unable to discard the observation as stated in **Young Women's Christian Association of Tanzania**, (supra), that the Court need only be satisfied that there exists an issue involving illegality apparent on the face of the record and at the same time, I am also inclined to lean towards the holdings in **VIP Engineering and Marketing Limited and Two Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006, where it was held:-

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay."

The issue was also considered in the case of **TanESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Application No 94 of 2016, Court of Appeal at Dar es Salaam (Unreported), where it was stated:-

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court."

Thus overall, I find that while it is true that five years is too long to delay filing for revision when this situation is considered together with the narrated alleged irregularities and illegalities in proceedings

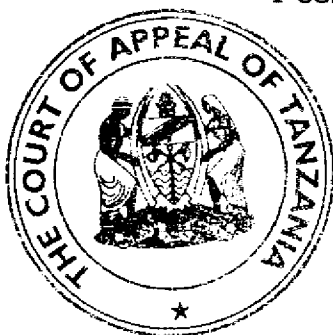
and decision, leads to an assertion that there has to be an opportunity to consider the alleged matters further by this Court, and this will be an opportunity to discuss further on the merits of the expected revision. The assertion by the applicant that denial of the application will lead to an irreparable loss on his side has also been considered relying on averment that the attached property belongs to applicant, an assertion not disputed by respondent.

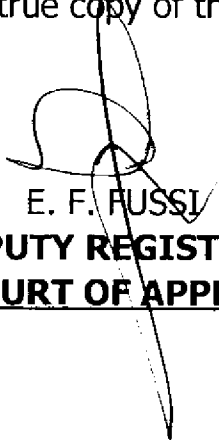
In the premises, for reasons stated above and taking all the matters and obtaining circumstances into perspective, I find that the applicant has good cause for the delay in filing the application for revision. In the premises, the prayers are granted, and the application sought must be filed within thirty (30) days from the date of this Order. Costs to abide by the results. Ordered.

DATED at DAR ES SALAAM this 19th day of July, 2019.

W. B. KOROSSO
JUSTICE OF APPEAL

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




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL