

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

CIVIL APPLICATION NO. 266/16 OF 2019

ATTORNEY GENERAL.....APPLICANT

VERSUS

1. MKONGO BUILDING AND CIVIL WORKS

CONTRACTORS LTD.....1st RESPONDENT

2. NAMTUMBO DISTRICT COUNCIL.....2nd RESPONDENT

**(An Application for extension of time to apply for revision against
the ruling and orders of the High Court of Tanzania,
Commercial Division) at Dar es Salaam**

(Mruma, J.)

**Dated 12th day of March, 2017
in**

Miscellaneous Commercial Case No. 409 of 2017

.....

RULING

4th Oct., 2019 & 16th March, 2020

SEHEL, J.A:

In this application, the Attorney General, is seeking an extension of time within which to apply for revision against the final arbitral award that was registered by the High Court of Tanzania, Commercial Division and a decree dated 12th day of March, 2018 was issued there from. The applicant was not a party in the arbitral proceeding nor in the High Court. The application is preferred under Rules 10, 4 (2) (b), and 48 (1) of the Court of Appeal Rules, 2009 as amended (hereinafter referred to as "the Rules") and sections 6 (a), 8 (1) (f), 17 (1) (a), (2) (b) and 192A of the Local

Government (District) Authorities Act No. 7 of 1982 (hereinafter referred to as "the Act") as amended by section 31 of the Office of the Attorney General (Discharge of Duties) Act No. 4 of 2005 (hereinafter referred to "the AG Act"). The application is supported by an affidavit of George Nathaniel Mandepo, Principal State Attorney.

The 1st respondent has filed the affidavit in reply to oppose while the 2nd respondent has not filed one. The applicant and the 1st respondent have also filed their written submissions.

The supporting affidavit, read together with the affidavit in reply, provide the historical and undisputed background to this matter, which is as follows: the 1st respondent was contracted by the 2nd respondent to execute construction works for the completion of, construction and provision of schools building facilities at Luna Secondary School in Namtumbo District Council at a contractual price of TZS. 212, 734,480.00. The contracted works were to be completed within a period of four months. In the course of execution of works, the 2nd respondent terminated the contract. Dissatisfied with the termination, the 1st respondent referred the matter to the Adjudicator pursuant to the provisions of the contract and on 30th day of December, 2014 the said

Adjudicator issued his ruling. The 1st respondent was still not satisfied with the findings of the Adjudicator hence it referred the Adjudicator's decision to Arbitration. Eng. Ronald Aitalia Lyatuu was appointed by the National Construction Council as the sole arbitrator. Unfortunately, the arbitrator passed away on 15th day of August, 2016.

On 1st day of December, 2016 the National Construction Council appointed Eng. Sudhir J. Chavda to proceed with the arbitral proceedings in place of the late Eng. Lyatuu. On 21st day of March, 2017 the Final Award was issued and on 12th day of March, 2018 was registered at the High Court (Commercial Division), Miscellaneous Commercial Case No. 409 of 2017 and a Decree was issued therefrom.

The applicant who was not a party before the arbitral proceedings and the High Court wants to challenge the Decree by revision. Since it is late, it has come for an extension of time.

When the application was called for hearing before me, Mr. Benson Hoseah and Ms. Grace Lupondo, learned State Attorneys appeared for the applicant whereas Mr. Leonard Kipengele, learned advocate appeared to

represent the 1st respondent. The 2nd respondent was absent despite being duly served as per the affidavit of service of Mbayi Kwika.

Mr. Hosea prayed under Rule 63 (2) of the Rules to proceed with the hearing of the application in absence of the 2nd respondent which prayer was not objected by the Mr. Kipengele. The prayer was granted thus in terms of rule 63 (2) of the Rules, the hearing proceeded in absence of the 2nd respondent who was duly served on 23rd day of September, 2019 but defaulted appearance.

Ms. Lupongo began her submission by fully adopting the contents of the notice of motion, affidavit in support of the application and written submissions. Expounding further as to why this Court should allow the application, she submitted that there is illegality on the Final Award as stated in the affidavit and the grounds of illegalities have been established in the written submissions; that the Final Award is the subject of the Decree which the applicant intends to challenge; and that the applicant became aware of the existence of the Decree on 15th day of February, 2019 as deposed under Paragraph 31 of the affidavit where each and every day of delay have been accounted for under Paragraphs 31 to 38 of the supporting affidavit.

It was her submission that a party who was not a party to the previous proceedings as the applicant herein, has a remedy and that remedy is to bring revisional proceedings and not appeal.

She faulted the 1st respondent who required the applicant to issue notice. She said, the applicant is not seeking to join in the proceedings but rather to revise the determined proceedings. She added that since there is a public interest then the applicant has a right to seek revision.

In reply, Mr. Kipengele also prayed to adopt affidavit in reply and written submissions which were filed to oppose the application for extension of time. He then argued that the applicant has failed to demonstrate the claimed illegality for the Court to grant the requested extension of time. He added that the Court cannot grant an extension of time on a blanket allegation of illegality that is an abuse of court process. Similarly, he said that the applicant failed to account for each of delay. He also argued that the applicant has an alternative of remedy of challenging the Decree by way of objection proceedings since there are pending execution proceedings at the High Court. He therefore prayed for the application to be dismissed.

Ms. Lupongo briefly rejoined that the issue of illegality cannot be raised at the execution proceedings at the High Court. As to the establishment of illegality, she contended that the applicant has shown the illegalities and this is not a right forum to argue *in extenso* the alleged illegalities. On the argument that the 2nd respondent was aware of the proceedings and attended the proceedings, Ms. Lupongo conceded that there was a lawyer representing the 2nd respondent but she maintained that the Attorney General was not aware of such proceedings.

In view of rival contentions of the parties, it is imperative to begin from the legal premise where the Court derived its power in extending time. Rule 10 of the Rules, invoked by the applicant in this application, 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 expiration of that time and whether before or after the doing of the act; any reference in these Rules to any such time shall be construed as a reference to that time so extended". [Emphasis added]*

From the above Rule, the power of the Court to extend time is discretionary and that it can only be exercised where the applicant has shown good cause. This was clearly stated in the case of **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** [2006] TLR 235 where the Court was moved under Rule 8 (now Rule 10) of the Rules for extension of time. It said as follows:

"The Court has discretion to extend time but such extension in the words of Rule 8 can only be done if "sufficient reason has been shown".

It follows then that the applicant has to advance good cause for the Court to exercise its discretionary power. What amounts to good cause has not been defined by the Rules. The reason behind this is explained in the case of **Alliance Insurance Corporation v. Arusha Art Limited**, Civil Application No. 512/2 of 2016 (Unreported- CAT at Arusha) by Mwambegele, JA when he said:

"....extension of time being a matter within the Court's discretion cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case."

Further in **Oswald Masatu Mwizarubi Vs Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (Unreported) it was stated that sufficient cause is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion. Although sufficient cause is relative but there are some guiding factors for the Court to consider in exercising its discretionary power. In the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported) it was stated:

"On authorities however, the following guidelines may be formulated:

- (a) The applicant must account for all the period of 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; and*
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient*

importance; such as the illegality of the decision sought to be challenged."

(See Also- **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Regional Manager TANROADS, Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; and **Benedict Shayo v. Consolidated Holdings Corporation as Official Receivers of Tanzania Film Company Limited**, Civil Application No. 366/01/2017 (all unreported).

In the instant application, the applicant has advanced two main reasons. First, the passage of time without the applicant's knowledge as it was not a party to the proceedings before the Arbitral Tribunal and the High Court, Commercial Division. Secondly, the Award, subject of the intended impugned Decree, is marred with irregularities.

Starting with the passage of time without the knowledge of the applicant, the applicant has explained that it became aware of the existence of Misc. Commercial Case No. 409 of 2017 on 15th February, 2018 as per Paragraph 31 of the affidavit. I am alive that Mr. Kipengele advanced an argument that the applicant became aware on 12th March

2018 and not 15th February 2019 as alleged by the applicant. With respect to that submission, though I agree that the proceedings of the High Court shows that Ms. Salome Gasabile appeared before the High Court on 12th March 2018 and prayed for an adjournment so that she can inform the Attorney General but there is no further proof that the Attorney General was actually informed on that date or any other date earlier than that of the 15th February 2019. I thus take that the applicant as deposed under Paragraph 31 of the affidavit became aware on 15th February, 2019 and it took a month to file the application for extension of time which was struck out on 11th day of July 2019 for failure to serve the 1st respondent. Thirty days taken by the applicant in preparing and filing the application for extension of time was not an ordinate delay.

After the earlier application having been struck out, the applicant had to file another application seeking for an extension of time. On 16th day of July 2019 the applicant filed the present application. it is noteworthy to note that the applicant took six days to file this application.

In the case of **Royal Insurance Tanzania Limited Vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 166 of 2008 (Unreported) it was stated:

"It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in good faith."

From the facts deposed, it is clear that immediately after becoming aware the applicant filed an application which was struck out for being incompetent since the 1st respondent was not served. It is also evident that it took the applicant six days to file another application. In other words, the applicant was diligent all along in pursuing its rights of revision. At no point in time the applicant was negligent or sloppy in the process of seeking extension of time to file for an application for revision. Accordingly, I am satisfied that the applicant has accounted for each delay.

The applicant is also alleging that there is serious illegality in the whole arbitral proceedings together with the published Final Award which was registered by the High Court in Misc. Commercial Case No. 409 of 2017. The alleged illegalities have been listed in the notice of motion and in the affidavit in support of the application. Mr. Kipengele in his submission tried to discount each and every itemized alleged illegality by impressing upon me to find that there was no illegality hence I should not grant the requested application for extension of time. I take that Mr. Kipengele was

not trying to mislead the Court because it is now settled that where there is an allegation of illegality, it is important for the Court to grant the applicant the extension of time so that the alleged illegality can be considered by the Court. This was so held in the case of **The Principal Secretary, Ministry of Defence and National Service Vs Devram Valambhia** (1992) T.L.R 182 that:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

Further, my mandate, in this application, as Single Justice is, in terms of Rule 60 (1) read together with Rules 10 and 3 of the Rules, to determine an application for extension of time and not to consider substantive issues that are to be dealt with the Court. Issues like, illegalities and whether the applicant has a right to file an application for revision or not as argued by Mr. Kipengele are substantive matters. In other words, the standing of the applicant in the present application as to whether there are matters of public interest entitling the applicant to file the intended application for

revision or not and whether they alleged illegalities are real or not are matters within the mandate of the Court thus I decline to deal with them.

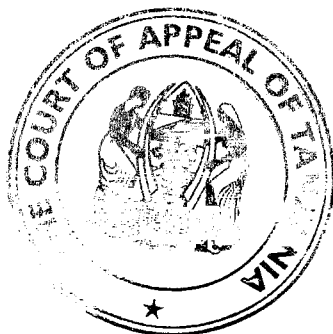
All said, I find merit in the application for extension of time. The applicant is hereby granted sixty days extension of time to apply for revision. That sixty days period shall be reckoned from the date of the delivering of this ruling. Costs of this application shall abide by the outcome of the revision.

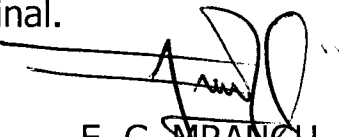
It is so ordered.

DATED at DAR ES SALAAM this 11th day of March, 2020.

B. M. A. Sehel
JUSTICE OF APPEAL

The ruling delivered this 16th day of March, 2020 in the presence of Ms. Rehema Mtulya, learned Senior State Attorney for the Applicant and in Absence of the Respondents despite being dully served, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL