

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 479/16 OF 2022**

**THE ATTORNEY GENERAL .....APPLICANT**

**VERSUS**

**ELECTRICS INTERNATIONAL COMPANY LIMITED .....1<sup>ST</sup> RESPONDENT**

**BOARD OF TRUSTEES OF THE**

**PUBLIC SERVICE SOCIAL SECURITY FUND (PSSSF).....2<sup>ND</sup> RESPONDENT**

**(Application for extension of time to file application for Revision of the  
decision of the High Court of Tanzania (Commercial Division)  
at Dar es Salaam)**

**(Philip, J.)**

**Dated 1<sup>st</sup> day of October, 2018**

**In**

**Miscellaneous Commercial Cause No. 15 OF 2018**

**.....**

**RULING**

7<sup>th</sup> & 17<sup>th</sup> February, 2023

**KIHWILO, J.A.:**

In this application the applicant, by way of notice of motion filed on 17<sup>th</sup> August, 2022 under Rules 10, 4(2) (b), and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) is seeking extension of time within which to lodge an application for revision of the decision of the High Court of Tanzania (Commercial Division) dated 1<sup>st</sup> October, 2018 in Miscellaneous Commercial Cause No. 15 of 2018.

The application has been supported by an affidavit, duly sworn by George N. Mandepo, the Principal State Attorney working with the Office of the Solicitor General. In addition, the applicant filed written submissions to fortify its quest. For its part, on the adversary side, the first respondent, filed a counter affidavit as well as written submissions gallantly contesting the application. It is, perhaps noteworthy that, the second respondent adopted a passive gesture and did not, at all, counter any of the documents.

Before determining the merits or otherwise of the instant application, it is, in my view, essential to provide abbreviated facts of the matter. These can be gleaned from the supporting affidavit and counter affidavit in reply. The applicant is a principal legal adviser to the Government with mandate to protect and safeguard public interest while the second respondent is a public institution established under the laws of Tanzania with the main responsibility of administration and management of pension funds. The law establishing the second respondent was repealed and replaced by the Public Service Social Security Fund Act, No. 2 of 2018 where the duties and functions of the defunct fund were transferred to the current fund.

On 6<sup>th</sup> November, 2008 the first and second respondents entered into two construction contracts for the sum of Tanzanian Shillings Two Billion Nine Hundred and Sixty-Six Million Eighty-Five Thousand Seven Hundred and Seventy-Four and Thirty Cents (TZS. 2,966,085,774.30) only and Tanzanian Shillings Three Billion One Hundred Seventy Eight Million Six Hundred Thousand Four Hundred Ten (TZS. 3,178,600,410.00) only respectively.

In the course of implementation of the two contracts a dispute ensued which could not be resolved amicably as a result an arbitrator was appointed who delivered an award in favour of the first respondent to the tune of Tanzanian Shillings Two Billion Four Hundred Sixty-Six Million Nine Hundred Twenty-Five and Seventy-One (TZS.2,466, 925,071.00) only. Subsequently, the first respondent filed an arbitral award at the High Court of Tanzania (Commercial Division) requesting the same to be enforced as a decree of the court and shortly thereafter the second respondent filed a petition seeking to set aside an Arbitral Award but unfortunately the same was struck out with costs on account that the Arbitral Award attached to the Petition was not certified. Thereafter, the Presiding Judge proceeded to register the award as a decree of the court without affording the right to be heard to the second respondent and to show cause as to why an award should not be registered as a court

decree. Since then, the applicant has on different occasions made several attempts to intervene through legal process but in vain. It is on that account that, the applicant has desired to challenge the proceedings of the High Court (Commercial Division) through revision. However, since the applicant could not initiate revisional proceedings within the time prescribed by law, the applicant has come before this Court seeking an extension of time.

At the hearing of the application before me, the applicant was represented by Mr. David Kakwaya, learned Principal State Attorney who teamed up with Mr. Galus Lupogo, learned State Attorney whereas the first respondent was represented by Mr. Samson Mbamba, learned counsel and the second respondent was represented by Mr. Nicada Kileo, learned Principal State Attorney assisted by Ms. Anna Shayo, learned State Attorney. Upon the applicant being asked to take the floor and expound the application, Mr. Kakwaya prayed to adopt the affidavit by the applicant along with the written submissions which were prior lodged in Court on 3<sup>rd</sup> October, 2022 in support of the application. He very briefly, and meticulously referred to paragraph 20 of the affidavit which according to him clearly indicates illegalities which warrants this Court to grant the extension of time and went ahead to cite a number of case law to wit **Chawe Transport Import & Export Co. Ltd v. Pan Construction**

**and Others**, Civil Application No. 146 of 2005 (unreported) in which the Court cited denial to the right to be heard as sufficient cause for extending time to file an application for revision, **John Tilito Kisoka v. Aloyce Abdul Minja**, Civil Application No. 3 of 2008 (unreported) in which the Court discussed at considerable length that where a point at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute sufficient reason for extension of time. The learned Senior Principal State Attorney also went on to cite the case of **Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 Others**, Civil Application No. 225 of 2014 (unreported) to drive home his line of argument and rounded off by praying that the Court should be pleased to grant the prayers sought.

When it was his turn, Mr. Mbamba, learned counsel for the first respondent prayed to adopt the affidavit in reply and written submissions which were prior lodged in Court on 31<sup>st</sup> October, 2022 and highlighted some key issues, urging us to dismiss the application on account that, it was not enough for the applicant to allege illegality as the basis for quest for extension of time without examining and determining whether the said illegalities were of sufficient importance to warrant a grant of extension of time. He paid homage to the case of **CRDB Bank Limited v. George M. Kilindu & Another**, Civil Application No. 87 of 2009; **MZA RTC**

**Trading Company Limited v. Export Trading Company Limited**, Civil Application No. 12 of 2015, **Khadija Kuziwa v. Tanzania Portland Cement Company Ltd**, Civil Reference No. 4 of 2018 and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported) and stressed that there is a clear distinction between illegality and an error of law which seems to be the case in the instant application in which change of name from Parastatal Pension Fund (PPF) to Public Service Social Security Fund (PSSSF) was by operation of the law hence the appropriate approach was to substitute the name. Mr. Mbamba therefore, contended that, the applicant did not demonstrate sufficiently the point of illegalities to warrant extension of time. He insistently prayed for dismissal of the application with costs.

On his part, Mr. Kileo, fully supported the application, while in a brief rejoinder Mr. Kakwaya, reiterated his earlier submission and argued that the applicant being the guardian of public property took this recourse which was not the first time citing the case of **Attorney General v. Oyster Bay Villas Limited and Another**, Civil Application No. 299/16 of 2016 and **Attorney General v. The Board of Trustees of the Cashewnut Industry Development Fund and Another**, Civil

Application No. 73 of 2015 (unreported). He finally rounded off by submitting that the applicant was condemned unheard but at this juncture, the Court cannot dwell much on substantive issues which is within the purview of the Full Court citing the case of **Kalunga and Company, Advocates v. National Bank of Commerce Limited** [2006] T.L.R. 235 and contended that the applicant has sufficiently demonstrated that it deserves extension of time.

I have painstakingly examined the record and considered the arguments by the parties and in order to appreciate the essence of the application, I reproduce in *extenso* paragraph 20 of the applicant's affidavit.

*"20. That the Office of the Solicitor General upon becoming aware of the matter and through scrutiny of the copies of the proceedings and Decree in respect of Miscellaneous Commercial Application No. 15 of 2018, it was discovered that the proceedings are tainted with illegality to wit;*

- i. That, the High Court Judge registered the Arbitral Award as Decree of the High Court without affording the second respondent an opportunity to show cause why award should not be registered.*
- ii. That, the High Court Judge extracted the Court's Decree against non-existence party (the second respondent), in the sense that the decree*

*was entered against the defunct Fund while PSSSF was already in existence and*

- iii. That, the High Court ordered high interest, at the rate of 12% per annum on the sum of Tshs. 2,466,925,071 contrary to the contract and laws.*

I have reproduced the above paragraph deliberately in order to facilitate an easy determination on whether the application by the applicant is founded on sound basis.

It bears reaffirming that, the power of this Court to grant extension of time to an applicant is obtained in the provision of rule 10 of the Rules which reads inter alia that:

*"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 doing of that act: and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."*

At the outset, I wish to point out that, the law is very settled and clear in this jurisdiction that, in order for the applicant to succeed to



prompt the court to exercise its discretion under rule 10 of the Rules to order an enlargement of time in applications of this nature, the applicant must bring to the fore good cause for the delay. There is, in this regard, a considerable body of case law in this area but to mention a few **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported) and **Kalunga and Company Advocates** (supra).

Although rule 10 does not go further to define as to what amounts to good cause. However, case law has it that extension of time being a matter within the court's discretion, cannot be laid by any hard and fast rules but will be determined by reference to all the circumstances of each particular case. There is, in this regard a long line of authority to that effect, if I may just cite the case of **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 in which this Court stated that:

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is 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."*

However, it is significant to emphasize that the court's discretion in deciding whether or not to extend time must be exercised judicially and

not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice – **See Shah v. Mbogo and another** [1967] E.A. 116.

I am mindful of the fact that there are certain decisions of this Court suggesting that a single Justice should not deal with the substance of the matter for which an extension of time is sought because that is the province of the full Court. I am therefore not prepared to stretch my muscles beyond what is expected of a single Justice in the instant application.

As already indicated above, the gist of the applicant's complaint hinges on the illegality of the registration of the Arbitral Award as a decree of the court in Miscellaneous Commercial Cause No. 15 of 2018 and without affording the second respondent the right to show cause as to why the award should not be registered as a court's decree. This is coupled with the complaint on the legality of the decree itself. I am very

aware that, this Court held in **Principal Secretary, Ministry of Defence v. Devram Valambhia** [1992] T.L.R. 182 at page 189 that:

*"where 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 purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."*

Corresponding observations were made in the case of **Attorney General v. Oyster Bay Villas Limited and Another** (supra) and **VIP Engineering and Marketing Limited and Two Others v. Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported). Without attempting to dig deep into the substance of the claim of illegality of the High Court's decision, is it, in my view, that, this contentious matter is worthy legal point for the consideration by the Court.

Thus, in view of the fact that there is an alleged illegality, I find it appropriate under the circumstances to allow the application on the basis of this point so that the issue may be considered. In the result, the application is hereby granted. The application for revision to be filed within

twenty-one (21) days from the date of this ruling. I make no order as to costs.

**DATED at DAR ES SALAAM this 13<sup>th</sup> day of February, 2023.**

**P. F. KIHWELO**  
**JUSTICE OF APPEAL**

The ruling delivered this 17<sup>th</sup> day of February, 2023 in the presence of Ms. Rehema Mtulya, learned State Attorney for the Applicant, Mr. Sebastian Mgimbwa, Principal officer of the first Respondent, Mr. Erick Haule, learned Senior State Attorney for the second Respondent and in the absence of Mr. Samson Mbamba, counsel for the first Respondent, who is reported sick, is hereby certified as a true copy of the original.



  
**A. L. KALEGEYA**  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**