

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF Mtwara
AT Mtwara**

MISC. CIVIL APPLICATION NO. 2 OF 2023

(Arising from Civil Case No. 4 of 2011)

EXECUTIVE DIRECTOR

KILWA DISTRICT COUNCIL.....APPLICANT

VERSUS

BOGETA ENGINEERING LIMITED.....RESPONDENT

RULING

Date of last Order: 25.04.2023

Date of Ruling: 04.07.2023

Ebrahim, J.

The applicant has lodged the instant application under the provisions of **section 14(1) of the Law of Limitation, Cap 89 RE 2019, section 11(1) of the Law of Appellate Jurisdiction Act, Cap 141 RE 2019 and section 95 of the Civil Procedure Code CAP 33 RE 2019** praying mainly for the following order:

THAT, this honorable court be pleased to extend time within which the Applicant can lodge notice of appeal to the Court of Appeal

of Tanzania against the decision of this court in Civil Case No. 4 of 2011 dated 10th February, 2016.

The application was supported by an affidavit sworn by Mary James Kavula, State Attorney working at the office of the Kilwa District Council.

The brief background of the matter goes to the Contract entered between the Applicant in the year 2008 for construction of an abattoir at Kilwa Masoko for consideration of TZS. 122,522,000/- in which it was revised to TZS 192,650,000/-. The Respondent was paid all her entitlement but their dispute arose on the interest and or penalties accrued from the delayed payments which occurred following another dispute on variations in certain additional works which were not agreed by the Applicant. The said dispute prompted the Respondent to successfully file a suit in this Court claiming for the above mentioned interest and penalties arising out of the delayed payments. In filing their Written Statement of Defence, the Applicant raised a point of preliminary objection which they claim that the same was not determined first before the trial court could proceed to hear and determine the main suit. They also claim that the trial court proceeded to pronounce

judgement and decree against the improper party which is the Executive Director Kilwa District Council who is a mere employee of the Applicant. Their effort to appeal against the impugned decision was not successful as the appeal was struck out by the Court of Appeal for being filed out of time. Hence, the instant application.

This application was disposed of by way of written submission as per the schedule set by the court. Mr Masunga, learned Senior State Attorney appeared for the Applicant.

Counsel for the Applicant insisted that they still wish to challenge the serious procedural irregularity occasioned at the trial court which has the effect of vitiating the proceedings. He explained that the two preliminary objections raised in the amended written statement of defence on 28th May 2012 were not determined before the court could proceed with the main trial. To cement his argument, he cited the case of **Khaji Abubakari Athumani Vs Daudi Lyakugile T.A.D.C Aluminium and Mwanza City Council**, Civil Appeal No. 86 of 2018 (CAT – Mwanza – unreported) where the Court of Appeal speaking of a similar situation held as follows:

"the trial court ought to have heard the Preliminary Objections raised by the second respondent in its written statement of defence before proceeding to the full trial of the suit and issues its findings either before or its judgement depending on the circumstances of each case... under the circumstances we are settled in our mind that there was a procedural irregularity committed by the judge that vitiated the entire proceedings starting from 26th May, 2016".

He also cited the case of **Deonesia Onesmo Muyoga and Others Vs Emmanuel Jumanne Lahaula**, Civil Appeal No. 219 of 2020, Court of Appeal Tanzania at Tabora, pg. 9 where it was held that:

"Given that the Preliminary Point of objection raised by the first appellant attached the competence of the suit which was before the trial court, on account of the misjoinder of parties which is so basic, it was fundamental for the trial magistrate to determine the preliminary objection first before proceeding with the trial of the suit in order to conclusively ascertain as to who was a proper and or necessary party to be sued in the matter. The omission was a serious procedural irregularity which vitiated the subsequent proceedings and judgement of both the trial and the first appellate courts".

He insisted that since the preliminary objection questions the jurisdiction of the trial court, it was illegal for the trial court to proceed with the matter before determining it first – **Shahida Abdul Hassanali Kasam Vs Mahed Mohamed Gulamali Kanji**, Civil

Application No. 42 of 1999 cited with approval in the cited case of **Khaji Abubakar Athumani (supra)** that:

"the whole purpose of a preliminary objection is to make the court consider the first stage much earlier before going into the merits of an application, so in a preliminary objection a party tells the court the existing circumstance do not give you jurisdiction. It cannot be gain said that the issue of jurisdiction has always to be determined first".

He argued further that the trial court acted on the wrong party where as the parties to the contract were Bogeta Engineering Limited (The Respondent) and Kilwa District Council (The Applicant) but not the Respondent and Executive Director Kilwa District Council. To buttress his position, he cited the case of **M/S Mkurugenzi Nowu Eng Vs Godfrey M. Mpezya**, Civil Appeal No. 188 of 2018 (CAT –DSM) in addressing the issue of parties to a suit held that:

"since the issue of parties to the case is fundamental and central in al proceedings, the CMA, was expected to note that, DWI who was mentioned by the respondent as his employer was not a party to the suit. It was therefore improper for the CMA to proceed with the labour dispute which had indicated a wrong party to the dispute...as indicated above, the issue of parties to the case is a legal and central matter in all proceedings. Therefore, the act of

the respondent suing a wrong party had affected the entire trial as it goes to the root of the matter".

Mr. Masunga concluded by citing the case of **The Attorney General Vs Emmanuel Marangakis (as Attorney of Anastonsiou Anagnostou) and Others**, Civil Application No. 138 of 2019 (CAT – DSM) where it was held that illegality is a good cause to extend time even if the applicant failed to account for each day of delay. He prayed for the application to be granted.

Advocate Reinery Songea represented the Respondent.

Responding to the submission made by the Applicant's counsel, counsel for the Respondent while agreeing that extension of time is granted at the discretion of the court – **Mbogo and Another Vs Shah** [1968] EALR 93, he was firm that time is extended upon a party showing good cause for the delay. He cited a persuasive case of **Kombo Mkabara Vs Maria Louise Frisch**, Misc. Civil Application No. 331 of 2021, HCT where it was held that a party seeking extension of time has a burden of laying basis to the satisfaction of the court and the consideration is to be made on case to case basis. He emphasized on the inordinate delay by the applicant to apply for the extension of time from when challenged decision was delivered on 10th day of February 2016,

to when the appeal was finalized on 25th Day of February, 2019 to the filing of this application on 16th day of March 2023. He contended therefore that the applicant has failed to account for the delay of four years and the acknowledgment that the respondent seeks to execute the decree clearly shows that it is an after-thought. He invited this court to be guided by the principle set by the Court of Appeal in the case of **Ibrahim Twahili Kudundwa & Another Vs Epimaki S. Makoi & Another**, Civil Application No. 437/17 of 2022 which held that the applicants were expected to account for the days of delay.

As to the raised issue of illegality that there was preliminary objection, counsel for the respondent responded that the same should have been a ground of appeal. He was inspired by the holding of the Court of Appeal in the case of **The Board of Trustees of the Free Pentecostal Church of Tanzania Vs Asha Selemani Chambanda & Another**, Civil Application No. 63/07/2023 (CAT – Mtwara – Unreported) where it was held that the Applicant did not only fail to account for each day of delay but also no ground of illegality was disclosed.

Discussing the issue of illegality further he said the raised issue by the Applicant is an afterthought and the issue was extensively discussed by the Court of Appeal in the case of **Charles Richard Kombe Vs Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 where the excerpt from the book **Mulla's Code of Civil Procedure at page 1381** was quoted with approval that:

"It is settled law that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity merely because it has come to an erroneous decision on a question of fact or even law".

From the above quote, the Court held further that:

*"From the above definition, it is our conclusion that for decision to be attacked on ground of illegality one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred. In **Chanila Dahyabhai Vs Dharanishi Nanji and Others, AIR 1969 Guj 213(1969)GLR 734** which we find persuasive, the following paragraph was quoted from the decision of the Supreme Court of India in AIR 1953 SC 23:-*

"..the word illegality and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law prescribes have been complied with"

It is clear from these observations that a mere error of law in the exercise of jurisdiction is not enough".

Counsel for the Respondent concluded therefore that the delay of four years by the Applicant calls for accounting of each day of delay in considering that the application has been preferred after the Respondent has filed an application for execution. He prayed for the application to be granted with costs.

In rejoinder, Counsel for the Applicant reiterated what he submitted in chief and referred to the cited case of **Khaji Abubakari Athumani** (supra) that the Respondent does not dispute that the preliminary objections were not determined first by the trial court and that the same cannot be defeated by the fact that the Applicant had legal representative. He added further that the instant application cannot bar an application for execution and that the raised issue of illegality is apparent on the face of the record and not an arguable ground of appeal which may determine the merits of the case. However, it falls squarely in the meaning of what is an illegality.

He observed that the issue of the consequential damages awarded against the Executive Director who was not a party to the contract but wrongly sued was not replied by the Respondent. He reiterated their prayers.

I have carefully considered the rival arguments presented by both parties' counsels.

Coming to the merits of the application, it is settled principle in our jurisdiction that extension of time is discretionary power of the court to be exercised judiciously upon the applicant establishing sufficient reason for the delay. The main issue for consideration is whether the applicant has advanced good cause for the delay to warrant grant of this application. The phrase "good cause" has been expounded by the Court of Appeal in the case of **Kalunga and Company Advocates vs NBC Limited** [2006] TLR 235 which illustrated factors for consideration like, the length of delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the court exercise its discretion; the conduct of the parties and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal. Further, the Court of Appeal has in the case of **Lyamuya Construction Company Limited Vs The Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 expounded further on the

criteria to be considered by the court to warrant extension of time. Of interest before I address other issues is the issue of illegality. Undoubtedly, as submitted by both counsel for the parties, the Court of Appeal of Tanzania has underscored that where a point at issue is illegality, the same constitutes sufficient reason for extending time so that the said illegality can be cured. In the same vein, the Court of Appeal has also laid a principle that not every allegation of illegality will constitute a sufficient reason for extending time. I associate myself with the holding of the Court of Appeal in the cited case of **Charles Richard Kombe (supra)** that the issue of illegality would not arise in a case where the court acted within its jurisdiction but came to an erroneous decision on a question of fact or law.

The point here being that for an allegation of illegality to constitute a sufficient reason it must be apparent on the face of the record that the court acted without jurisdiction or there was a material irregularity causing injustice.

Indisputably, is the fact that the issue as to whether the preliminary points of objection were raised and never determined whilst there was no any record of abandonment of the same is not disputed.

There goes the question as to whether failure by the trial court to proceed with the trial without first determining the preliminary point of objection is a material irregularity which has the effect of vitiating the proceedings of the entire case.

The jurisprudential position of our apex Court illustrated in the cited cases of **Khaji Abubakar Athumani Vs Daudi Lyakugile (supra)** and the case of **Deonesia Onesmo Muyoga and Others Vs Emmanuel Jumanne Lahaula (supra)** that it is fundamental for the trial court to either determine first the points of preliminary objection before proceeding to the full trial or make its findings in its judgement in order to conclusively ascertain either the procedural irregularity committed or the legal issue raised. The omission is fatal procedural irregularity which vitiates the proceedings from when the objection was raised.

Counsel for the Respondent has extensively and vigorously challenged the application on the basis that where the court has jurisdiction to adjudicate the matter, the erroneous decision of fact or law does not amount to illegality but rather an arguable ground of appeal. I fully subscribe to such observation as per the position set in the cited case of **Charles Richard Kombe Vs**

Kinondoni Municipal Council (supra). Nevertheless, the set principle is distinguishable in the circumstances of this case because in the instant matter, the Applicant seeks for extension of time not because the decision was erroneous either in fact or in law but because there was material irregularity in proceeding with the trial without first determining the raise legal points of preliminary objection. As intimated earlier, the irregularity has the effect of vitiating the proceedings.

Counsel for the Respondent has mounted the blame to the counsel for the Applicant for continuing with the 1st PTC knowing that the preliminary points of objection have not been heard and determined. While I also agree that the trial court had a duty to oversee that the procedure is followed and the same with the counsel for the applicant; this application would have been highly averted if counsel for the Respondent would have also played his role as an officer of the court to remind the court on the lapse. This would be for the benefit of both, interest of justice and their clients. All said and done, much as the period of four years has passed, it would not be proper to have the decision which emanated from

the proceedings which are claimed to be a nullity. Surely, there has to be afforded room for ascertainment of such position.

I would have ended here and issued my final order. However, the issue of whether the decree issued to the Executive Director is viable also taxed my mind and I am of the firm stance that the same need to be addressed to avoid the dilemma of having a decree which cannot be executed.

Having said that, I find no reason to embark on the issue of accounting for the each of delay as I agree that the raised issue of illegality suffice on its own to warrant this court to exercise its judicial discretion to extend time. Accordingly, I allow the application and the Applicant is availed 30 days from the date of this ruling to lodge notice of appeal to the Court of Appeal of Tanzania against the decision of this court.

At the end result, I accordingly allow the application and avail the Applicant with thirty days (30) from the date of being availed a copy of this ruling to file Notice of Intention to Appeal to the Court of Appeal of Tanzania against the judgement and decree of this court in Land Case No 4 of 2011. Costs shall follow the main event.

Ordered accordingly.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written above the printed name.

**R.A. Ebrahim
JUDGE**

Mtwara

04.07.2023