IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 267 OF 2023

(Original from the Judgment in Civil Case No. 362 of 1999, Hon. Mmbando, SRM dated 1st December, 2014)

MOHAMED ENTERPRISES (T) LIMITED.....APPLICANT

VERSUS

SOUZA MOTORS LTD.....RESPONDENT

RULING

Date of Last Order: 14/09/2023.

Date of Ruling: 05/10/2023.

E.E. KAKOLAKI, J.

This is an application by the applicant inviting this Court to grant her the following prayers amongst others. **One**, extension of time within to allow the applicant file application for revision. **Secondly**, call for records, proceedings, judgment and decree of the trial Court RM's Court of Dar es salaam at Kisutu in Civil Case No. 362 of 1999, to ascertain as to the legality, correctness, propriety and or otherwise of the said proceedings, judgment and decree. In the second prayer the Court is invited further to declare and hold the proceedings, judgment and decree of the RM's Court sitting at

Kisutu Dar es Salaam are illegal, unlawful and improper in law on the reasons stated and particularized in the applicant's affidavit, hence be set aside. The applicant is also praying for costs to abide the results herein and any other relief as this court deem fit to grant. The application is preferred by way of chamber summons under section 14 (1) of the Law of Limitation Act [Cap. 89 R.E 2019] (the LLA), section 44(1) and (2) of the Magistrates Court Act, [Cap. 11 R.E 2019] (the MCA) and sections 79(1)(a),(c) and (3) of the Civil Procedure Act, [Cap. 33 R.E 2019] (the CPC), supported with an affidavit duly sworn by **Elisa Abel Msuya,** applicant's advocate, stating the grounds in support of the prayers in the application.

Competence of the application was unsuccessfully challenged by the respondent as all the preliminary points of objection raised by her were overruled by this Court in its ruling dated 06/06/2023. As to the merits of the application the same were strenuously resisted by the respondent when filed her counter affidavit through advocate **Wilson Edward Ogunde**, inviting this Court to dismiss it. In response the applicant filed a reply to the counter affidavit.

The brief factual background of the matter as discerned from the affidavit and its annexure is simple to tell. The applicant herein vide Civil Case No.

362 of 1999 sued the respondent together with two others, Mr. Riyaz Gulamali and Ms. Geo process Tanzania Limited not parties to this application. It appears in response to the claim by the applicant in her Written Statement of Defence, the respondent raised a counter claim against the applicant claiming for return of her motor vehicle allegedly in unlawful possession of the applicant. According to the fact in the judgment sought to be impugned (annexure TMA2) the respondent had executed chattel mortgage (exhibit P1) with Gio process (T) Ltd in respect of the motor vehicle make Land cruiser Reg. No. TZN 5855 before the respondent was asked to sell it on hire purchase in which sale price was to be paid in instalments as the motor vehicle registration card (green card) bore both of parties' names. One of the condition under chattel agreement it appears was that, the said motor vehicle would not be sold by the said Geo process (T) Ltd before clearance of the pending debt and government custom duties as at the time of agreement it was on exemption of duties and tax. It was alleged that, the said Gio process (T) Ltd violated the above agreed terms and sold the motor vehicle to the applicant hence the counter claim against her (applicant) by the respondent.

In her counter claim the respondent prayed for the following orders from the trial Court:

(a) That Mohamed Enterprises or his agents or servants or any other person whosoever described purporting to act on their behalf to return the motor vehicle Toyota Land cruiser nearing Reg. No. TZN 5855 to the 3rd defendant (respondent).

(b) That Mohamed Enterprises and or his agents or servant or any other person whosoever described purporting to act on their behalf to be permanently restrained from interfering with possession or control of the vehicle.

In the alternative and without prejudice to the above prayers the respondent prayed;

(c) That Mohamed Enterprises be ordered to pay them USD 48,000.00 or equivalent in Tanzania shilling as purchase price for the said motor vehicle.

(d) That Mohamed Enterprises be ordered to pay them (Souza Motors) interest at 25% banking rates from the date when he took unlawful possession of the vehicle, subject matter of this suit till judgment.

(e) Mohamed enterprises be ordered to pay Souza Motors interest 11% Courts rates from the date of judgment till settlement of the deceased (sic) in full.

(f) Costs of the suit.

(g) Any other relief the Court deem fit.

Facts are silent as what happened to the applicant's suit but it appears the counter claim proceeded ex-parte against the applicant and two other defendants and the ex-parte judgment and decree issued in favour of the respondent as exhibited in annexure TMA-1 and TMA-2 to the affidavit, the decision which is subject of this application. And that was after one Gulam Ismail Managing Director of the respondent had testified and produced documentary exhibits. In its decision the trial court ordered the applicant to pay the respondent USD 48,000 or its equivalent as purchase price of the said motor vehicle, interest of 12% from the date of coming into possession of the said motor vehicle to the date of fulfillment of the judgment, interest at court's rate of 11% of the decreed amount from the date of judgment to date of settlement of decree and costs of the suit. It is the said decision which disgruntled the applicant that resulted into filing of this application after the respondent had put in motion execution process.

As alluded to above, this application basically contains two major prayers, **one**, extension of time to file revision and **second**, determination of the said revision if the first prayer is granted. As grant of first prayer precedes determination of the application for revision this Court is enjoined to consider and determine it first, the task which I am venturing into.

It is settled law that grant of extension of time within which to perform a certain act in which its time limitation is provided by the law shall be done upon the party seeking extension advancing good cause warranting this Court exercise it discretion to grant the same. As what amounts to good cause there is no fast and hard rule as that depends on the materials presented before the court justifying the delayed period or assigning sufficient grounds as to why the Court should grant extension of time. See the cases of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (both CAT-unreported) and **Jumanne Hussein Bilingi Vs. Republic** (Criminal Application No. 20 of 2014 [2015]TZCA 342 (21 July 2015); www.tanzlii.org.tz. In the case of **Jumanne Hussein Bilingi** (supra) on what amounts to good cause, the Court of Appeal stated:

> *"…what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically* ***various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time****."* (Emphasis added).

It is also a principle of law that, in demonstrating good cause the party has to account for each and every day of delay. See the cases of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 and **Sebastian Ndaula Vs. Grace Rwamafa,** Civil Application No 4 of 2014 (both CAT-unreported). In **Sebastian Ndaula** (supra) the Court of Appeal had the following to say:

> *"…****even a single day delay has to be accounted for*** *otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken*."

The law also provides that, good cause or sufficient reason should not be confined to delay only, but should also take into account the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved. See the case of **Republic Vs. Yona Kaponda and 9 Others** (1985) T.L.R 84 and **Regional Manager, Tanroads Kagera Vs. Ruaha concrete Company**

Ltd, Civil Application No. 96 of 2007 (CAT-unreported). In **Yona Kaponda and 9 Others** (supra) the Court observed that:

> *"In deciding whether or not to extend time I have to consider whether or not there are "sufficient reasons." As I understand it, "sufficient reasons" here does not refer only, and is not confined, to the delay. Rather it is "sufficient reason" for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implications of the issue or issues involved."*

In taking into account the decision intended to be appealed against or revised, illegality of the said decision if successfully argued, the trite law is that it is sufficient to warrant good cause for extension of time regardless of whether or not delayed days have been accounted for. There is litany of authorities behind that legal stance some of which are **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambhia** (1992) TLR 387 (CAT), **VIP Engineering and Marketing Limited and Two Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6,7 and 8 of 2006 and **Andrew Athumani Ntandu and Another Vs. Dustan Peter Rima** (As Legal Administrator of the Estates of the Late Peter Joseph Rima), Civil Application No. 551/01 of 2019 (both CAT-

unreported). In the case of **Andrew Athumani Ntandu and Another** (supra) on point of illegality as sufficient cause for grant of extension of time, the Court of Appeal stated thus:

> *"The right to be heard is one of the fundamental rights of litigants in a trial and therefore, failure by the trial court to give the parties the right to be heard is an illegality. Moreover, it is* ***settled law that a claim of illegality of the impugned decision constitutes good cause for extension of time regardless of whether or not reasonable explanation has been given by the applicant to account for delay****."* *(Emphasis supplied)*

Similarly in the case of **VIP Engineering and Marketing Limited and Two Others** (supra) on point of illegality, the Court of Appeal stressed that:

> *"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****."* *(Emphasis supplied)*

With the above understanding on the principles applicable when considering an application for extension of time, the issue for determination in the first

prayer is whether the applicant has demonstrated good or sufficient cause warranting this Court exercise its discretion to grant the application.

It is Mr. Msuya's submission that, the decision sought to be impugned if extension of time is granted is tainted with illegalities. He highlighted the alleged illegalities to be **one**, on improper admission of certified copy of chattel mortgage agreement of 12/03/1999 (Exh. P1), which is a private document and not public document as defined in section 84 of Evidence Act [Cap. 06 R.E 2019]. He said, being a private document and not tendered in terms of the provisions of section 67 and 68 of Evidence Act, allowing proof of document by secondary evidence, its admission was illegal as mere certification of the same was not sufficient to qualify it for admission. **Second**ly, he argued, the trial court wrongly based its decision on chattel mortgage agreement Exh. P1, without specific proof of the motor vehicle values as the settled principle is that, specific claim must be strictly proved. Reliance was made on the case of **M/S Universal Electronics and Hardware (T) Limited Vs. Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 112 of 2017 (CAT-unreported) at pages 10 -11 on proof of specific claims/damages. **Thirdly**, he contended is the award of interest of 11% at court rate to the respondent in contravention of Order XX

Rule 21 of the CPC which specifies that, award of over 7% of interest at court's rate must be on agreement of parties. **Fourth**, it the exorbitant award of 12% interest on the decretal amount to the respondent without justifiable reasons. In his view the assigned reason of unlawful possession of vehicle by the applicant does not support such exorbitant rate more particularly when issued on forex (USD). Inviting the Court to be guided by the principle in **Dervan P. Valambhia** (supra) he concluded by submitting that, illegality of the decision when proved constitute good ground for extension of time, hence the applicant has successfully established ground of illegality in support of this application.

In rebuttal having adopted his counter claim to form part of his submission Mr. Ogunde, argued that this application is bound to fail and should be dismissed for want of merit. He said, the judgment sought to be impugned was delivered on 01/12/2014 and this application was filed on 09/06/2021, but in her entire affidavit and reply to counter affidavit the applicant has failed to tell the Court as to when did she become aware of the said judgment and the steps taken thereafter before filing this application. He insisted at least the applicant became aware of existence of the said judgment on 17/12/2014 when applied for supply of copies of judgment and decree but

took no efforts to challenge it until 09/06/2021 when this application was filed. Mr. Ogunde took the view that, the applicant cannot be allowed to rely on blank cheque of illegality as a ground for extension of time without accounting first for the delayed days as illegality cannot be used as a shield to hide against inaction on the part of the applicant is part. To fortify his argument the learned counsel relied on the cases of **Mtengeti Mohamed Vs. Blandina Macha**, Civil Application No. 344/17 of 2022 (CAT-unreported) and **William Kasian Nchimbi and Three Others Vs. Abas Mafaume Sekapaia and Two Others**, Civil Reference No. 2 of 2015 as cited in **Mtengeti Mohamed** (supra), where the applicant relied solely on the ground of illegality for extension of time and the Court after considering its decision in **Dervan P. Valambhia** (supra) held that, as general rule, the law favours those who exercise vigilance in pursuing their legal rights by failing to act within reasonable period of time to protect their rights.

He went on submitting that, irrespective of the ground of illegality the applicant must show diligence, not apathy or negligence, in which in the present matter there is no single paragraph by the applicant explaining the delay hence should not be allowed to hide on ground of illegality of the decision. On the illegality of the decision constituting ground of extension in

itself as claimed in paragraph 4.1 of the applicant's affidavit he retorted that, the same does not constitute illegality of the decision as counsel for the applicant admitted in his submission not to have accessed the trial court proceedings, so there is no way he could have established how exhibit P1 was admitted. He said, as the law under section 67 of the Evidence Act, permits admission of secondary evidence, certified copy of the document being one of them. Thus to him the argument by Mr. Msuya that, only certified public document are admissible is misplaced.

Regarding the contention that respondent's claim was not proved through evidence of PW1 who relied on exhibit P1, his response was that, since the learned counsel did not seize an opportunity to peruse trial court proceedings, that assertion could not be justified and further that, at any rate that point cannot constitute illegality of the decision, hence the case of **M/S Universal Electronics and Hardware (T) Limited** (supra) is distinguishable under the circumstances. As regard to the complaint of interest rate of 12% per annum on decretal amount awarded to the applicant being exorbitant he countered, the applicant failed to establish what was reasonable and which law was violated. And on the argument that, no reasons were assigned on awarding the said 12% interest rate he said,

reasons were given as per the impugned decision and finally the Court was satisfied that the same was proved out of 25% rate prayed by the respondent.

Lastly was on the award of 11% interest as court's rate out of the rates ranging from 7% to 12 %, he contended the award was in the court's discretion which according to him was exercised judiciously. He thus prayed the court to find there is insufficient grounds demonstrated by the applicant to warrant grant of this application, hence proceed to dismiss the same.

In rejoinder Mr. Msuya distinguished the position in the decision in **Mtengeti Mohamed** (supra) relied on by the respondent arguing that, it never changed the position of the Court of Appeal in numerous decision in that, illegality of the decision sought to be impugned when successfully raised in itself constitute good ground for extension of time regardless whether or not the period of delay has been accounted for. He contended, in **Mtengeti's case** (supra) unlike the applicant herein who has been vigilant in prosecuting this matter, the applicant therein was negligent and inactive in pursuit of his rights. He elaborated that, as rightly acknowledged by the respondent in paragraph 5 (b) and (d) of her counter affidavit, the applicant filed an application for setting aside the dismissal order of the plaintiff's suit in Civil

Case No. 362 of 1999 which was dismissed on 22/07/2007. And that, subsequent to that, an application for extension of time to file review vide Misc. Civil Application No. 107 of 2014 was preferred before it was also dismissed, thus a justification that, applicant had not sat at her back in pursuing her rights. He added that, the as averred in paragraph 2 of the affidavit, the applicant instructed Trustmark Attorney to peruse the record before this application was preferred, so the applicant has been acting diligently in pursuing her rights.

As regard to the submission that, illegality must be apparent on face of record he reiterated his submission in chief basically on wrongly awarded specific damages for want of specific proof of the same, admission of chattel mortgage (exhibit P1) as a private document and certified copy document which is not admissible under section 67(1) of Evidence Act, award of exorbitant interest rate of 12% per annual without assigning reasons and that, it is not applicant's duty to state the reasonable rate but rather for the court to state the reasons for reaching such rate and lastly, the illegal award of 11% interest at court rate in violation of the provisions of Order XX Rule 21 of the CPC, as parties had not agreed to such rate. He thus pressed the

court to find the points of illegalities demonstrated by the applicant constitute good cause for extension of time.

I have taken considerable time to consider the fighting submissions by both parties and travelled through the affidavit, counter affidavit and reply thereto with view of establishing whether the applicant has demonstrated good cause for extension of time as per the requirement of the law. While Mr. Ogunde relying on the case of **Mtengeti Mohamed** (supra) is of the submission that, applicant should be allowed to use unestablished illegality as a shield to hide against her inaction to take any step against the impugned decision from the date of delivery on 01/12/2014 up to the date of filing this application on 09/06/2021 and for failure to account for such delayed period, Mr. Msuya is of the contrary view that, illegality constitutes ground of extension of time even when the delayed period is not accounted for as the position of the Court of Appeal has not changed and that, the applicant did not sleep on his rights since she took steps to challenge the decision of the trial court as conceded by the respondent and demonstrated in her counter affidavit. It is true and I agree with Mr. Msuya that, the position of the Court of Appeal on consideration of the illegality as a sole and independent ground for extension of time when established regardless whether or not the delayed

period has been accounted for, is settled and has never changed. Meaning that accounting for the delayed days is one of the ground constituting good cause for extension of time but not necessary that, the same should be proved conjunctively with the ground of illegality of the decision intended to be challenged as what constitutes good cause depends on the relevant material or factors for consideration presented by the applicant in order to move the court to exercise its discretion. There is litany of authorities on that settled legal stance some of which are **Regional Manager, Tanroads Kagera Vs. Ruaha concrete Company Ltd,** Civil Application No. 96 of 2007, **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Yong Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 and **Julius Francis Kessy and 2 Others Vs. Tanzania Commissioner for Science and Technology**, Civil Application No. 59/17 of 2018 (all CAT-unreported). On what constitutes good cause the Court of Appeal in the case of **Ruaha concrete Company Ltd** (supra) had this to say:

> *"The test for determining an application for extension of time, is whether the applicant has established some materials*

amounting sufficient cause or good cause as to why the sought application is to be granted."

Though not exhaustively in the case of **Julius Francis Kessy and 2 Others** (supra) the Court of Appeal when deliberating on the factors to be considered by the Court when exercising its discretion to either or not extend time enumerated them as:

1) *The length of delay,*
2) *The reason for delay,*
3) *The applicant must account for the delay of each day;*
4) *Degree of prejudice that the respondent may suffer if the application is granted.*
5) *The delay is not inordinate.*
6) *The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
7) *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.*

What is deduced from the above cited authorities is the unchallengeable position of the law that, apart from other factors mentioned when the court feels that there are other sufficient reasons such as point of law of sufficient importance like illegality of the decision sought to be challenged then might

consider it independently of other factors and proceed to grant extension. It is however worth note that, since grant or denial of extension is discretional and solely rested on the Court, no doubt other factors such as principle of equity proving that, *equity aids the vigilant and not the indolent*, comes into play as it was held the case of **Mtengeti Mohamed** (supra) and rightly relied on by Mr. Ogunde. Further consideration in my humble view has to be paid in preventing the applicant from exercising inaction and use illegality as a shield to hide his act of sleeping at his rights, negligence and sloppiness, as rightly considered by the Court of Appeal in **Mtengeti Mohamed** (supra) when referring to the case of **William Kasian Nchimbia and Three Others** (supra).

All the above legal positions taken into consideration in this case as rightly submitted by Mr. Ogunde and silently conceded by Mr. Msuya, the applicant herein in her affidavit never disclosed any fact accounting for the delayed period. But as also correctly put by Mr. Msuya there is evidence in paragraphs 5(b) and (d) of the respondents counter affidavit demonstrating to the Court that, soon after delivery of the judgment sought to be impugned the applicant did not sleep on her rights rather was busy in court pursuing her rights before she instructed Trustmark Attorney to handle his case as stated

in paragraph 2, before the case file was perused and this application filed. It is from that evidence I find apart from the fact that, illegality when successfully raised can constitute good cause for extension of time regardless of whether or not delayed period has been accounted for, in this matter unlike in **Mtengeti Mohamed** (supra) where the applicant had totally failed to disclose to the court steps taken after delivery of the decision sought to be impugned, there is evidence to show that, the applicant herein took action soon after delivery of the judgment, hence the facts in **Mtengeti Mohamed** (supra) are distinguishable from the facts of this case.

In now move on to consider whether there is illegality in the decision sought to be challenged. It is trite law that illegality when alleged must be visible or apparent on the face of record not the one that will take a long drawn process to decipher from the impugned decision. See the cases of **Lyamuya Construction Company Ltd** (supra), **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 and **Moto Matiko Mabanga Vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017 (CAT-unreported). On visibility of the alleged illegality the Court of Appeal in the case of **Ngao Godwin Losero** (supra) stressed that:

"…the illegality of the impugned decision should be visible on the face of record."

In this matter glancing at the alleged points of illegality I find the complaint that, certified copy of chattel mortgage exhibit P1 was not admitted under section 67(1) of Evidence Act and court's failure to seek specific proof of specific claim/damages of USD 48,000.00 before awarding the same though seem to raise points of law, are neither constituting illegality of the decision for calling for long arguments to discover it nor are they of sufficient importance to justify extension of time. It is trite law that, not every point of law may be of sufficient importance to justify extension of time. I find solace in the Court of Appeal decision when confronted with akin situation in the case of **Devram Valambhia** (supra) at page 188, whereby before considering the illegality disclosed before it for extension of time, had this to say at page 188:

> *"In other words the Court refused to extend time because the point of law at issue was not of sufficient importance to justify the extension.* ***The corollary of that is that in some cases a point of law may be of sufficient importance to warrant extension of time while in others it may not****."* *(Emphasis added)*

Similarly the assailed trial court's decision in awarding the respondent 12% interest rate annually on the decretal sum, I opine does not constitute illegality of the decision for inviting long processed argument on what should be considered as exorbitant amount or not, when exercising court's discretion. I only find existence of illegality is successfully demonstrated on the award of 11% of interest at court's rate. I so do as the award raises a point of law and of sufficient importance inviting this Court to consider whether under the provisions of Order XX Rule 21 of the CPC, a party can be awarded interest rate more than 7% at court's rate without both parties' agreement. It is the law that, where an illegality is raised successful the Court has a duty of extending time to allow the Court to put the matter and record proper as it was held in the case of **Dervan P. Valambhia** (supra) where the Court of Appeal had this to say:

> *"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 record straight."*

In light of the above deliberation and the law, since the undisputed fact that illegality has been demonstrated by the applicant, and given the position of

the law that, once raised successfully illegality of the decision is sufficient ground for extension of time, I find the application is meritorious and hereby proceed to grant the applicant with extension of time within which to file an application for revision. Having so done I now proceed to consider the merits of the second application for revision.

In the second application which has two limbs, the applicant is inviting this Court on the first limb to exercise its supervisory powers under section 44(1)(b) of MCA, regardless of the manner in which it is moved to know the nature of the errors in record. It was Ms. Msuya's submission that under paragraphs 2 and 7 of the affidavit the applicant contends that, after perusal of the case file there was no attached pleadings in record to form and justify the decision which is sought to be impugned. According to him, save for certified copies there is no the original judgment and decree, no typed and or any hand written proceedings in which the evidence of PW1 that formed the basis of decision could be referred to. And further that even exhibits P1 and P2 are also missing. As to what should be done under the circumstances where crucial documents are missing, Mr. Msuya opined that, the guiding decision is that of **Charles Ramadhan Vs. R**, Criminal Appeal No. 429 of 2015 (CAT-unreported) which basically provide for two alternatives or

solutions. One, to reconstruct the record/file and second, to order for trial of the matter de novo. In his submission, Mr. Msuya convincingly urged the Court to find the second option more viable as one, this case is an old matter of 1999 and second, it will be convenient for the parties to reconstruct their pleadings and be able to prove their case since most of the original document are missing. He insisted that, the relied on case though founded on criminal matter the principles therein are relevant to civil matters.

On the second limb Mr. Msuya invited the Court to invoke its revisional powers under section 44(1)(b) of the MCA to revise the decision of the trial court basing on the illegalities highlighted when submitting on extension of time. As the confusion was caused by the trial court he impressed upon the Court to let each party bear its own cost.

In response to the submission by Mr. Msuya, Mr. Ogunde retorted that, it is not true that the decision of the trial court was arrived at in absence of original pleadings and court records as submitted by the applicant, as there is evidence in paragraph 5(d) and annexure 'C' of the counter affidavit to the effect that, the late Dr. Lamwai who formerly represented the applicant once perused the trial court file and filed the application thereafter but he never complained of any missing original documents. According to him if there is

some missing documents that is an issue which ought to be resolved administratively by the applicant requesting the Resident Magistrate incharge for Kisutu to swear an affidavit explaining on the missing document as it happened in the case of **Charles Ramadhan** (supra) which he argued is distinguishable to this case for want of proof of affidavit by the RM's incharge.

In this matter Mr. Ogunde argued there is a duplicate use in the execution proceedings after the original file went missing. He resisted the proposition by Mr. Msuya for an order of trial de novo as the last option since that is the last alternative to the first option which is to order for reconstruction of case records in which the applicant has not stated to have attempted to pursue and failed.

On the second limb of the application where the Court is invited by the applicant to consider the illegalities enumerated in the submission in chief of the application for extension of time, it was Mr. Ogunde's strong submission that, no any illegality was demonstrated by the applicant to warrant this Court invoke its powers under section 44(1)(b) of the MCA. He therefore impressed upon the Court that, the entire application is wanting in merit thus bound to fail and prayed the Court to dismiss it with costs.

In brief rejoinder as to what should the Court do when the original documents are missing Mr. Msuya maintained that, there is no general rule as that depends on the circumstances prevailing at the time and nature of the case. In other words he contended there is no requisite condition in **Charles Mohamed** (supra) that, the second option must follow or come after the first one since in that case both options were even not taken up by the Court instead it ordered for acquittal of the appellant who had served large part of his sentence. He thus in this case pressed the Court to go for the second option. He added that, since Mr. Ogunde is conceding that, the original case file went missing as exhibited in the pending execution proceedings then the proposition of reconstruction of case file misses support.

With regard to the contention by Mr. Ogunde that, the late Dr. Lamwai perused the file without raising complaint of the missing original record, he countered that, the argument comes from the bar as it is not reflected anywhere in Dr. Lamwai's affidavit and further that, the alleged affidavit of the late Dr. Lamwai was sworn on 15/05/2014 in respect of an application for leave to file review while the impugned decision was delivered later on 01/12/2014. On the powers of this Court under section 44(1)(a) of MCA, he

reiterated his submission in chief and implored the Court to find merit in this application and finally order for trial de novo of the matter by directing both parties to submit their pleadings for rehearing.

Having considered the fighting submission from the parties and unhurriedly perused the duplicate file in record and before scheduling the matter for ruling this Court on 31/08/2023 deemed it fit and in the interest of justice to order the Resident Magistrates Court of Dar es salaam at Kisutu to forward to this Court the original record in Civil Case No. 362 of 1999 if any, so as to enable it compose the ruling in respect of this matter. In response the acting RM's incharge swore an affidavit dated 12/09/2023 stating in paragraphs 3.0 that, all diligent efforts employed to trace the record in respect of the said suit proved futile and confirmed that the requested documents are missing from the court records and cannot be easily traced. In view of that response then I decided to proceed composing this ruling by setting the delivery date.

It is learnt from both parties' submission and an affidavit by the acting RM's incharge for RM's Court of Dar es salaam at Kisutu one Abraham Huruma Shaidi and therefore undisputed fact that, the original record which includes pleadings filed by the parties in respect of Civil Case No. 362 of 1999, original and typed proceedings and original or photocopies of tendered exhibits P1

and 2 are missing. It is also uncontroverted fact some of applicant's grievances against the judgment and decree of the trial court, such as admissibility of the chattel mortgage exhibit P1 and whether or not special damages were proved through the tendered exhibit are to be determined upon reviewing the evidence on record. As there is no any proceedings be it typed or original and tendered exhibits to assist the court arrive to an objective, fair and informed decision on such controversy issues, it is obvious that, resort must be made to the options viable under such circumstances. Now that being the case, the issue pending for determination before the Court is what option this Court should take after the confirmation from the trial court that the original record cannot be easily trace. Mr. Msuya says the option of trial de novo is viable while Mr. Ogunde holds the contrary view that it is not as it is the second option to the first one.

It is true as correctly stated by Mr. Msuya that, there is no general rule on the way forward to be followed by the Court when confronted with the scenario of missing of record or important documents for determination of either appeal or revision, as that depends on the circumstances surrounding each case. I so agree with him as in **Charles Ramadhan** (supra) the Court of Appeal chose none of the two suggested options by the parties herein

instead proceeded to quash the proceedings and appellant's conviction and then set aside the sentence meted on him the consequences of which was to release him from prison, after compliance of its order for reconstruction of record had unearthed only warrant of commitment and the notice of appeal which were of no assistance in making the appeal proceed with hearing. Similar stance was taken by the Court of Appeal in its recent decision of **Yusuph Mbululo Vs. R**, (Criminal Appeal No. 405 of 2018)[2023] TZCA 17511 (21 August 2023) by quashing the proceedings and conviction of the appellant and set aside his sentence before ordering for his immediate release from prison. In arriving to such conclusion the Court had considered the evidence from the affidavit that efforts to trace the record were unsuccessful, after it had ordered first the Deputy Registrar to reconstruct record of the High Court and the fact that the appellant who was convicted and sentenced to death by hanging had spent more than 23 years in pursuit of his appeal.

Reasoning by analogy it is evident to this Court that, though there is no general rule as to which option between **reconstruction of record** and **trial de novo** should come first of the other as rightly submitted by Mr. Msuya, the principle is that where there is alternative remedy the same must

be exhausted first. No doubt the principle was also applied by the Court of Appeal in the cases of **Charles Ramadhan** (supra) and **Yusuph Mbululo** (supra) when ordered for reconstruction of record first before going for other options. It is from that principle and the prevailing circumstances in this matter I find the proposition by Mr. Ogunde sounding in that, the second option of trial de novo must come after the first one is exhausted. In this matter since the affidavit by the acting RM's incharge for RM's Court of Dar es salaam at Kisutu does not disclose whether efforts to reconstruct the record were employed unsuccessfully, I refrain from considering applicant's proposed option (second option) as I find it prudent and just to exhaust the first option first.

In the premises I order the Resident Magistrate Incharge in the Resident Magistrates Court of Dar es salaam at Kisutu to summon parties, reconstruct the record and forward it to this Court within 30 days from the date of this ruling, to enable it determine this revision on merit. The record should include the pleadings, typed proceedings, original copies or certified chattel mortgage exhibit P1 if any, registration card of motor vehicle Reg. No. TZN 5855 exhibit P2 and GNR receipt No. 999643 dated 14/09/1999 issued at central registry of motor vehicles Dar es salaam exhibit P3.

Costs in cause.

It is so ordered.

DATED at Dar es Salaam this 05th day of October, 2023.

E. E. KAKOLAKI

JUDGE

05/10/2022.

The Ruling has been delivered at Dar es Salaam today on 05th day of October, 2023 in the presence of Ms. Ndehorio Ndesamburo, advocate for the Appellant, Mr. Wilson Ogunde, advocate for the Respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

05/10/2023.