THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISC.CIVIL APPLICATION NO. 378 OF 2022

(Arising from Judgment and Decree of the High Court of Tanzania at Dar es Salaam Sub-Registry in Civil case No.50 of 2017 as per Hon.Y.J.Mlyambina, J., dated 12th day of December 2018)

Between

INDEPENDENT POWER TANZANIA LIMITED.....1ST APPLICANT

PAP AFRICA POWER SOLUTIONS (T) LIMITED....2ND APPLICANT

VERSUS

PROMAN CONSULT LIMITED.....RESPONDENT

RULING

Date of last Order: 22/11/2023

Date of Ruling: 30/11/ 2023

GONZI,J.;

In Civil Case No.50 of 2017, the Respondent, who was the Plaintiff in the trial, sued the Applicants in the High Court as the 1st and 2nd Defendants. The Respondent claimed against the Applicants for the total sum of USD 102,537 (equivalent to TZS. 225,581,400/=) being payment for procurement of professional consulting fees for services rendered to the Applicants that arose from a contract entered between them on 2nd June 2014. This sum was claimed with interest at the commercial rate of 25% per annum from the date of contract to the date of Judgment. Also, a 12% rate of interest was claimed on the decretal sum from the date of judgment and decree to the date of full satisfaction thereof. The matter proceeded exparte due to default of the Applicants to fike Written Statement of Defence despite being

served. On 12th December 2018, the Court granted the Respondent's prayers as stated above with costs.

An exparte judgment was passed against the applicants and subsequently execution proceedings thereof were initiated. The applicants filed the present application seeking for orders that this Honourable Court be pleased to enlarge the time within which the Applicants can file an application to set aside the ex-parte judgment and decree of the High Court of Tanzania at Dar es Salaam dated 12th day of December 2018 in Civil Case No.50 of 2017. They also prayed for costs of the application and any other reliefs.

In the affidavit in support of the application which was deponed by Dora Simeon Mallaba, Advocate for the Applicants, it was deposed that on 18th August 2022 the Principal Officer of the 1st and 2nd Applicants one Harbinder Singh Sethi received a summons through his house help which was affixed nearby his residence at Sapphire Apartments, along Haille Sellassie Road, Oysterbay area Kinondoni District, Dar es Salaam. Through that summons the said Harbinder Singh Sethi came to know of existence of an Execution Application pending in Court and that he was supposed to appear in court on 24th August 2022. That the application for execution was seeking for orders for arrest and detention of Harbinder Singh Sethi, the Principal Officer of the 1st and 2nd Applicants.

The grounds for extension of time which were deposed in the affidavit include the fact that the applicants were not properly served with summons for civil case No.50/2017 until on the 18th August 2022. That their offices had been closed after closure of their operations when EWURA refused to renew their power generating licence since 2017.

Further grounds for extension of time to set aside the exparte judgment were deposed to include the fact that the respondent did not attach any document to exhibit any procurement concluded by the Respondent and that there was no document attached to the plaint to denote acknowledgement of receipt of the procurement report. Further that there was no board resolution of the applicants to engage the Respondent to render procurement services to the applicants.

The Applicants' affidavit concluded by deposing that there are triable issues surrounding the claims raised by the respondents against the Applicants and that there was an illegality in that there was no evidence that the Respondent rendered provable services hence there was misrepresentation.

In the counter affidavit deponed by Mr.Reginald Martin, learned Advocate for the Respondent, it was deposed that the Principal Officer of the Applicant companies was aware of the existence of Civil Case No.50 of 2017 since 14th August 2017 when he was served with the first summons to file WSD and appear in court and which he received and stamped with the 1st Applicant's seal. That the Applicants were represented in Court by an advocate they engaged before they defaulted to file a Written Statement of Defence. The Respondent deposed that the substituted service by affixing on the wall at the residence of the Applicants' Principal Officer was only for notice of date of exparte judgment in December 2018. That on 6th December 2018 the Applicants were still in operation and had their offices open but they just refused to accept service of summons. The Respondent concluded that all efforts to invite the Applicants to defend their case were taken but the Applicant failed to file the Written Statement of Defence in time.

The Applicants filed a reply to counter affidavit where it was deposed by Dora Simeon Mallaba that the Principal Officer of the Applicants was not aware of the Civil Case No.50/2017 since he was incarcerated at Ukonga Prison since 17th June 2017 to 16th June 2021 when he was released and that he had not instructed any advocate to appear in Civil Case No.50/2017. The Applicants deposed further that there are apparent errors on the face of record in the exparte judgment where, for example, a letter Exhibit P3 dated 31st July 2014 is signed by Shushuu J.Maguya as IPTL Team Leader while in the Board resolution the same officer is titled as Managing Partner and Director.

The Application was heard by way of written submissions. The applicant enjoyed the services of learned Advocate Dora Mallaba while the Respondent enjoyed the services of Reginald Martin, learned Advocate. Counsel Dora Mallaba submitted that in law an application to set aside an exparte order

should have been filed within 30 days. That the Applicants are late but there exist sufficient reasons for the delay and fore extension of time. The first reason is that by the time the Applicants received the summons affixed to the wall on 18th August 2022, the time to set aside exparte order had already expired. She submitted that in law time can be extended where there is a sufficient cause for delay. She referred the Court to section 14(1) of the Law of Limitation Act, Cap 89 and the case of **Michael Lessani Kweka vs John Eliafye** (1997) TLR 152 decided by the Court of Appeal. The learned Advocate submitted that, in the case at hand, the length of delay is not inordinate or excessive. That the applicants became aware of the case on 18th August 2022 and filed this application on 1st September 2022. She argued that there is a good reason for delay in that by the time the Applicants received the summons, the time to lodge an application to set aside the exparte judgment had elapsed. The learned counsel for the Applicants also submitted that no summons was served upon the Applicants as the Principal Officer of the Applicants was in Ukonga prison at that time. Counsel argued further that there is an illegality tainting the exparte judgment in the following areas: (a)there was no document attached to show any procurement concluded by the Respondent; (b) there was no procurement report attached to the Plaint; (c) there was no acknowledgement receipt to the procurement report;(d) there was no provable services to the Applicant;(e) there was misrepresentation of facts made; (f) a fake signature of Principal Officer of the Applicants was used; (g) there was no written evidence that the Applicants ever engaged an advocate to represent them in Civil Case No.50/2017. (h) there was no evidence of delivery of 500 metric tones to the Applicants; (i) there was no evidence that the Applicants ever procured the delivery; (j) there was no board resolution supporting the contract; (k) the Respondent failed to follow the law on proper service of summons.

The learned counsel relied on **VIP Engineering and Marketing Limited and 2 Others versus Citibank Tanzania Limited**, Civil References No.6,7 and 8 of 2006 where the Court of Appeal of Tanzania held that **"where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reason" for extension of time".**

The applicants' counsel submitted that, if this application is granted, the Respondent will not be prejudiced. Hence, in the interest of justice, the Applicant prayed for the application to be granted with costs.

The Respondent's Counsel argued in opposition that in order for extension of time to be granted, the delay must be with sufficient cause. He went on to submit that the Applicants were served with summons to appear in Civil Case No.50 of 2017 on 14th August 2017 and since then it is now 5 years. He argued that the Civil Case No.50/2017 has since then been determined and that execution of the exparte decree is in the process. He added that the Applicants stamped the court summons dated 14th August 2017 requiring them to appear before Hon.Arufani,J. The Respondent relied on the case of **William Mpalange versus Lilian Bavu**, Misc.Civil Application No.501/2020 to the effect that mistakes, faults, lapses or dilatory conduct of a party should not be visited on the other party.

The learned counsel for the Respondent submitted that the incarceration of the Principal Officer of the Applicant Companies in remand prison could not prevent the other officers in the companies from receiving the summons and defending the suit. He submitted that, in fact, the Applicants engaged Advocate Charles Chipande to handle the matter in court. That means the Principal Officer was also aware of the case.

The learned advocate for the Respondent argued that the allegations of illegality are points of fact which should have been pleaded in the WSD of the Applicants. At any rate, argued the Respondent's counsel, those points are not apparent on the face of record in terms of the principle established in the case of Lyamuya. The Respondent submitted further that in **William Mpalange versus Lilian Bavu in Misc.Civil Application No.501/2020** the court stated that:

"While I agree with the principle that where illegality is set as a ground seeking extension of time, court will always grant the application, but a party asserting illegality must sufficiently substantiate his/her assertions. Court will not grant an extension of time simply because illegality is mentioned. The applicant must

go a step further and demonstrate what has been done which is forbidden by the law. The applicant is required to prove illegality of the proceedings."

The Respondent's counsel submitted that in the case at hand the Applicants have nit substantiated or proved the illegality of the proceedings. He went on to argue that during the exparte hearing there were documents tendered in court by the Respondent to prove the claims. The Respondent finished by praying for dismissal of the present application with costs.

By way of rejoinder the Applicant's counsel reiterated the arguments in submissions in chief and submitted further that the names of the officer who purportedly received the alleged summons is not mentioned by the Respondent. Further, that the applicants never instructed any advocate to appear for them in court. That the exhibits tendered during the trial did not prove that the Applicants had delivered 500 metric tonnes to the Respondents.

After hearing the arguments by both sides and going through the records of the court I am now in a position to determine the present application. The application is brought under section 14(1) of the Law of Limitation Act, Cap 89 of the Laws of Tanzania (RE 2019). The section provides that:

14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

In the case at hand the exparte Judgment sought to be set aside if extension of time is granted, was delivered by the Court on 12th December 2018 by Hon.Mlyambina,J. Under item No.5 in Part III of the Schedule to the Law of Limitation Act, Cap 89 of the Laws of Tanzania, the Applicants had 30 days within which to apply to the trial court to set aside its exparte Judgment and decree. The Applicants did not do so within the prescribed time of 30 days. On 1st September 2022, the Applicants lodged in Court this application for

extension of time. By the time the Applicants lodged the present application for extension of time. From the date of the exparte decree to the date of filing this application on 1st September 2022, the Applicants were over 3 years and 9 months late. Obviously, no application to set aside an exparte decree could have been validly instituted without obtaining a prior extension of time. Hence this application.

The position of the law in cases of extension of time in Tanzania is well settled. In the case of **Lyamuya Construction Ltd versus Board of Trustees of Young Christians Women of Tanzania**, Civil Application No.2 of 2010 decided by the Court of Appeal, it was held that the court can extend time where sufficient reasons are given. The sufficient reasons include the applicant being able to account for all period of delay; the delay should not be inordinate; and that the Applicant should not have shown apathy, negligence or sloppiness.

Clearly, in the present case, the Applicant has not accounted for every single day of the delay in not taking the prescribed steps to prosecute the intended application for setting aside the exparte Decree. No such attempt was made in the affidavit of the Applicants. Rather, the applicants have pegged their application on the ground of illegality of the exparte Judgment sought to be set aside.

Is illegality a good cause for extension of time? That question is always answered in the affirmative, if it is proved that there is an illegality on the face of the record of the court. An illegal decision cannot be left to stand. Where illegality is successfully raised and proved, the court has a duty to extend the time even where the applicant fails to account for every single day of the delay.

The relevant question is whether or not there is an illegality on the face of record in the exparte Judgment and Decree delivered by the Court on 12th December 2018 by Hon.Mlambina,J? the Applicants in their affidavit have produced a long list of events constituting illegalities in their view. These are: (a) no document was attached to show any procurement concluded by the Respondent;(b) No procurement report was attached to the Plaint; (c) absence of acknowledgement receipt to the procurement report;(d) there

was no provable services to the Applicants;(e) there was misrepresentation of facts made; (f)there was tendered a fake signature of Principal Officer of the Applicants; (g) there was no written evidence that the Applicants ever engaged an advocate to represent them in Civil Case No.50/2017. (h) there was no evidence of delivery of 500 metric tonnes to the Applicants; (i) there was no evidence that the Applicants ever procured the delivery; (j) there was no board resolution supporting the contract; (k) Respondent failed to follow the law on proper service of summons.

Before making effort to ascertain whether each of the above alleged illegalities existed in the case at hand, I had firstly to consider whether or not, if established, the above listed complaints would constitute an illegality in law to justify the extension of time? So, this leads us to the question of what constitutes an illegality on the face of the record for the purposes of extension of time? That question has been answered in numerous decided cases by the Court of appeal and the High Court of Tanzania. In a recent decision by the Court of Appeal of Tanzania in **Attorney General versus Micco's International (T) Limited and another, Civil Application No.495/16 of 2022,** delivered on 21st November 2023, the Court held that:

"the words illegally or 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 formalities which the law prescribes have been complied with…. Mere decisional errors, however plausible and obvious they may be, or matters touching on improper evaluation of evidence would not fall in the realm of illegality."

I have asked myself whether the complaints advanced by the Applicant as itemized in (a) to (k) above, would constitute an illegality in law for the purpose of extension of time. My answer is in the negative. All the above itemized complaints are far-fetched and require this court going deep into the proceedings to discover and ascertain them. Hence they are not apparent errors on the face of record. Also, those complaints, even if proved, would at best constitute decisional rather than procedural errors. The errors which qualify under the ground of illegality have been repeatedly held to be

fundamental procedural errors which fall under aspects like lack of jurisdiction on the part of the court; lapse of the prescribed period of limitation; and denial of natural justice right to be heard.

I am, therefore, of the view that the present case does not unearth illegalities apparent on the face of the record as to constitute a sufficient cause for extension of time. With regard to an error apparent on the face of the record, Mulla**, Indian Civil Procedure Code,** 14th Edition Pages 2335 – 36, states that –

"***An error apparent on the face of record must be such as can be seen by one who writes and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions."***

I could not find any such errors in the exparte decision of this court made by Hon.Mlyambina,J., in Civil Case No.50 of 2017. The Applicants have not exposed any. In that regard, there is no need to go deeper into the records trying to ascertain the alleged illegalities which, even if proved to exist, would simply constitute decisional errors rather than an illegality on the face of record. If proved, all the complaints raised by the applicants herein, except for the allegation of improper service of summons, could only make the impugned decision merely erroneous but not illegal. It is the procedural illegality of the decision, and not its substantive erronity, which matters when determining an application for extension of time to challenge that decision on the ground of illegality. As for lack of service of summons,if proved, in my view could indicte denial of the right to be heard. But the record is clear that the Applicants received and stamped the court summons dated 14th August 2017 requiring them to appear before Hon.Arufani,J., who was handling the case before Hon.Mlyambina,J. The Applicants dully engaged Advocate Charles Chipande to handle the matter for them in court. They cannot now by their mere words, simply disown their advocate and what he did in court for and on their behalf.

In the case of **Attorney General versus Micco's International (T) Limited and another, Civil Application No.495/16 of 2022,** the need

for the Applicant to be diligent was also stressed. **"It is a principle that those who seek the aid of the law by instituting proceedings in court of law must file such proceedings within the period prescribed by law… those who seek protection of the law in the court of justice must demonstrate diligence".** (Luswaki Village Council and Paresui Ole Shuaka versus Shibesh Abebe, Civil Application No.23 of 1997).

In the case at hand, I fail to see any diligence by the applicants in pursuit of their perceived legal rights. When the Civil Case No.50/2017 was instituted, the Applicants as the Defendants in it were duly served with notice of mention of the case before Hon.Arufani,J. The Notice which was attached to the counter affidavit as annexture PML-1 shows that it was duly received by the Applicants who affixed the 1st Applicant's corporate seal or stamp on behalf of both Applicants on 14th August 2017. The Applicants went a step further to engage an Advocate who appeared in court for them only that the Applicants defaulted to file the Written Statement of Defence on time and thereby excluded themselves from the trial. Upon conclusion of the trial the trial Court complied with the legal requirement of notifying the Applicants to attend the date of Exparte Judgment as it is evidenced in annexture PML-2. The exparte Judgment was delivered and an application for execution of the exparte Judgment was instituted against the Applicants. In those circumstances, the Applicants cannot be said to be diligent when they opted not to participate in the proceedings of the main case as well as in not instituting an application to set aside the exparte judgment and decree on time. It is now after over 3 years and 9 months that the Applicants wish to unfairly wind back the hands of the clock. That cannot be allowed by a court of justice. I do not accept the applicants' argument that the respondent will not be prejudiced in the circumstances.

Before I finish, I need to stress on the critical need for timely action in the administration of justice. The slogan by the Judiciary of Tanzania of "timely justice for all" is not just a decoration. It should always be remembered that time and justice are inseparably intertwined such that any attempt to separate the two would make justice lose any practical relevance. Justice makes sense only when it is done within the appropriate time. Rendering

justice out of time is like scoring goals in a football pitch outside the scheduled game time; even a few minutes before or after the game time. It is not exciting; it doesn't bring satisfaction or pleasure. It is not victory. It is simply out of time context and thus doesn't count. I wish to borrow the words of an author known as Chhatrapati, S., in his work titled **"The Concept of time in Law : Basis of Laws of Limitation and Prescription,"** (Journal of the Indian Law Institute , July-September 1990, Vol. 32, No. 3 , page 339) that time is a moral concept and it has something to do with the establishment of truth concerning rights, claims and evidence. There is the law of limitation that restricts claims and civil suits - within how much time, for example, can an insurance be claimed or a suit be filed for the loss or damages. On the other hand there is the law of prescription that prescribes the time that must elapse before an entitlement or a right can be claimed. (For example the law of prescription requires that a person shall not file for divorce until after expiry of at least 2 years from the date of marriage; or that no suit shall be filed against the government before the lapse of at least 90 days from the date of serving the Notice of intention to sue.)

The Laws concerning time limitation and prescription are not superficial or abstract, rather they are fully substantive laws. They belong to the very heart of the notion of justice. The law of limitation facilitates social order by not disturbing the settled. Time is intertwined with acquisition and loss of rights and is the tool by which proof or otherwise of those acquired or lost rights can be made. The common phrase that: 'only time can tell the truth' is not taken lightly in law. In law time and truth are not independent of each other. Time is the truth, it does not tell it, it is the basis or the criterion for what can be called the truth. A person enters the land of another and uses it without any complaints by the owner thereof, after passage of some time he acquires rights over it in the eyes of the law and the former owner loses his rights over it. A person is sued, he is given some period of time to file his Defence. If he does not file the defence, after the lapse of the prescribed time, he loses his rights to defend himself in the suit and what is alleged against him may be declared as the truth in court. Judgment and decree, whether interpartes or exparte, are passed against a person, he is given some time to challenge the same. If the prescribed time passes and he does

not initiate any challenge thereto, the rights in the Judgment and decree crystalize and vest upon the decree holder. The judgment debtor thereby loses his rights and in addition he is deprived of the right to challenge the settled judgment and decree in question. Even where the decree holder does not execute hisel decree within a certain time, he loses his right to enforce it afterwards. Time helps to establish and settle the social order. Not only is justice temporal, the very existence of human beings in this world is also temporal. All human affairs are also temporal. Not respecting the dictates of time to human life, would keep human affairs in constant state of suspense. This would be undesirable for a progressive society as human nature craves for certainty and repose. Public interest requires that there must be an end to litigations. The periods of limitation were put in the laws, inter alia, to appreciate the critical role of time in the administration of justice.

With passage of time, legal rights are lost by some people and are acquired by others and they crystalize over time. The Court will only intervene to disrupt the settled social order and extend the time which has elapsed only where a real cogent sufficient cause is established rather than just to enable a late applicant to catch a train he has missed by his own lateness. To do so would defeat the very purpose of the law as 'justice' would be rendered outside its context and thus the courts would become irrelevant. Here is the respondent who instituted a case in court five years back in 2017; he duly served the court processes upon the Applicants who sent their advovate in court but chose not to take part in the case by not filing the written statement of defence; the respondent went ahead to bring witnesses and tender exhibits in court during the exparte hearing in order to prove his claims; the court notified the Applicants of the date of exparte judgment; and then proceeded to deliver its judgment; no challenge to the exparte judgment ensued from the Applicants until the time for doing so lapsed; the respondent initiated execution process by filing in court the relevant application; then suddenly the Applicants turn up after 5 years and want to wind back the hands of the clock to ground zero and thereby reset the social order as it was 5 years ago and have the entire legal process start all over again. Surely, in my view, this would prejudice the respondent. The train the applicants missed in Dar es Salaam is now in Kigoma! It is impossible to return it to Dar es Salaam with all the passengers and cargo in it as it had

departed, just for the applicants to "catch it" and then start the long journey afresh all over again.

The Applicants must accept the impact of passage of time to their cause. In the upshot, I find the application at hand devoid of any merit. I therefore dismiss the application with costs. Right of appeal explained.

A.H.Gonzi

JUDGE

30/11/2023