

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 86 OF 2022**

**REIME (T) LIMITED.....APPLICANT**

**VERSUS**

**MASKI & SONS CONSTRUCTION**

**CO. LTD.....RESPONDENT**

**RULING.**

Date of last Order: 24<sup>th</sup> August 2022.

Date of Ruling: 20<sup>th</sup> September 2022.

**MARUMA, J.**

This is a ruling in respect of an application brought under section 11(1) of the Appellate Jurisdiction Act [Cap 141 R.E 2019] and Order XLIII Rule 2 of the Civil Procedure Code [Cap 33 R.E 2019]. The Applicant before this Court is seeking for an extension of time to give a notice of intention to appeal from the Judgment and Decree of Commercial Case No. 101 of 2017 delivered on 2<sup>nd</sup> August 2018. The application is supported by affidavit of Ramesha Raju.

The parties in this matter were represented by Mr. Gerald Nangi, advocate for the Applicant and Mr. Castor Rweikiza, Advocate for the Respondent.

This application was heard ex parte after the failure of the respondent to file a counter affidavit for sufficient reasons. This is on the fact that on the date this application was set for hearing, Mr. Castor for the Respondent informed the Court that he had not been able to trace his client since he was served with the application on 18<sup>th</sup> July 2022 so he had no instruction. However, the counsel admitted that he was aware that the matter was set for hearing on 13<sup>th</sup> July 2022 tried to call the counsel for the applicant, who told him that the matter was heard, so why did he appear in Court for ruling. Besides, he submitted to get instructions some days back and, being aware of the status of the matter, he requested an adjournment so he could call for his client within three days and prepare and file a counter affidavit. This prayer was strongly objected by the counsel for the Applicant who argued that there were no sufficient reasons adduced by the counsel for the Court to

vacate its previous order to proceed with the hearing. He argued that this matter was coming for the third time since it was adjourned on 13<sup>th</sup> July 2022 and the counsel had ample time to have instructions, which he did not say when he was given instructions. He said since the counsel had been served a month ago, the Court should not grant his prayer but instead proceed with the hearing of the application. The argument was accepted by the Court and the application was proceeded to hear and determine as there were no sufficient grounds to make the court vacate its order of 2<sup>nd</sup> August 2022 as it transpired that no such effort had been made by the counsel for the respondent.

Coming back to the main application, Mr. Nangi the Applicant's counsel, adopted the contents of the affidavit to form part of his submission. He submitted that the grant of application of this nature is solely dependent on the discretion of this Court upon the ground. He requested the Court to assess facts subjectively to establish whether there is a good cause or not, as the affidavit of Ramesh Raju is sufficient and good cause to warrant the Court to grant the

application. He clarified that the reasons for the delay were, first, the time which the applicant spent in the court of appeal in prosecuting an appeal which was struck out for having an invalid certificate of delay. However, immediately upon the insurance of the decision of the Court of Appeal on Friday 30<sup>th</sup> of May 2022 this application was filed on Monday 3<sup>rd</sup> of June 2022.

He also submitted that there was a question of illegality in the decision sought to be appealed as the High Court to entertain a claim which was time barred. He argued that this is a triable legal issue that will suffice for the court to grant the time extension, citing two cases of **Lyamuya Construction Limited vs The Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 where 4 criteria were set which have been upheld in various decisions. These criteria have been met by the applicant. Also, the case of **Juto Ally vs Lucas Komba & Another**, the Civil Application 484/17 of 2019 and **Vodacom Tanzania Public Limited Company vs Commissioner General Tanzania Revenue Authority**, Civil

Application No.101/20 of 2021. Both of these decisions were considering the four conditions the court exercise discretion in granting application for extension of time.

As submitted by the counsel for the applicant, the granting of an extension of time is a court's discretion as guided in various decisions. However, such discretion must be guided by the principles or tests as guided in the **Lyamuya's** case (Supra) at page 7-8 of the decision. Besides , there is also a settled position that the ground of illegality will also suffice for the grant of extension of time in the absence of other tests as guided by the Court of Appeal in the case of **TanESCO vs Mafungo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016 (Unreported) and the case of **VIP Engineering and Marketing and Two Others vs Citibank Tanzania Limited**, Consolidated Civil Reference No.6,7 and 8 of 2006 (Unreported) which insist that the illegality can sufficiently constitute a reason for extension of time but such illegality should be on the face of the record.

Having the guidance above and after the perusal of the affidavit in support of the application and attached documents. The affidavit of Ramesh Raju under paragraph 11 established the legal issue that the High Court entertained a claim which was time barred as per annexure REIME-4 on the Memorandum of Appeal. Reading ground no.1 of the said Memorandum of Appeal where the Applicant relied on, I quote,

1. *".... The learned trial Judge erred in law and facts by holding that the matter was not time barred. There is no evidence on record to the effect that Appellant had ever promised to pay the Respondent in 2014..."*

Relating the above ground with the test of illegality, I hesitate to consider this ground to warrant the prayer requested for the following reasons: first, though the issue of time barred can be a point of law to touch on the issue of illegality; still, the said illegality must be seen on the face of record, the test which is missing in the present application, as insisted in the case of **The Principal**

**Secretary, Ministry of Defence and National Service vs Devram Valambia**, (1992) TLR 387. Secondly, having perused the decision subject to be appealed, I have failed to see anywhere in the said decision that the applicant contested the alleged fact that he did not promise to pay the Respondent in 2014 or where the Court ruled out that the matter was not time barred. Based on the stand that illegality must be on the face of record and on the absence of sufficient explanation of such an error to suffice illegality, the applicant cannot be benefited by this principle of illegality or apply the case of **Juto Ally** (Supra) which also insisted that.

*"... It is not sufficient for the applicant to simply alleged in passing without explaining briefly the alleged illegality..."*

Also, in the **Lyamuya's case** (Supra) at page 9 where the Court insisted on the point of illegality that,

*"... such point of law, must be that " of sufficient importance" and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process..."*

Considering the foregoing observations, and despite the fact that the other grounds for granting an extension are not at issue in this current application, I believe that the ground of illegality, which the Applicant relied on to justify the grant of this application, does not constitute a sufficient reason to invoke this Court to grant the requested extension of time. As a result, this application is without merit, and is accordingly dismissed with no order as to costs.

**Dated at Dar es Salaam this 20<sup>th</sup> day of September 2022.**



**Z.A.Maruma.**

**JUDGE**