

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

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 47 OF 2023

(Arising from Commercial Case No. 34 of 2020)

BETWEEN

DAVID SIMON MZENAAPPLICANT

VERSUS

BANK OF INDIA (T) LIMITED1ST RESPONDENT

BEST GROUP OF (T).....2ND RESPONDENT

RULING

Date of last order: 14/06/2023

Date of ruling: 14/07/2023

AGATHO, J.:

The ruling is in respect of application for extension of time to file notice of appeal. The application as by way of chamber summons supported by the affidavit deposed by applicant himself. The respondent protested the application by filing a counter affidavit of Rahim Lema.

Both parties were represented by learned counsel. Whereas Mr Mohamend Manyanga represented the applicant, Mr Shukrani Mzikila appeared for the respondent. The hearing of the application was conducted orally on 14/06/2023.

The background of the application is that, before this a Commercial case No. 34 of 2020 ended in compromise judgment and decree. The applicant is aggrieved by that decision and wished to appeal to the Court of Appeal of Tanzania (CAT). However, he delayed filing the notice of

appeal. Hence, the present application for extension of time to file the said notice of appeal. But whether consent judgment and decree are appealable is not a concern of the present application. Here the court is asked to determine the applicant's application for extension of time to file notice of appeal to the CAT.

In submission in chief Mr Manyanga, Advocate for the applicant submitted that the application is for extension of time to file notice of appeal to appeal to the Court of Appeal of Tanzania against the decision of this court in Commercial Case No. 34 of 2020 dated 10/12/2021. The learned applicant's counsel submitted that the applicant in paragraphs 4 and 3 of his affidavit averred that the deed of settlement has some irregularities because at the time of filing the settlement deed he was seriously sick (suffering from stroke) and hee was incapable of talking or being a aware of what was going on. He attached annexures D-3 (medical certificate) substantiating that he was hospitalized for treatment. He also averred that in paragraph 6 of the affidavit there was no witness on his side when the deed was signed. Therefore, according to him, he was unaware of what was going on. He added that the deed of settlement has his thumb signature while has his signature but he was quick to point that he is a literate person. According to him. the use of his thumb signature implies that he was unaware of what was going. Mr Manyanga for applicant submitted that in such circumstances the deed of settlement has those illegalities . Since the applicant is the first respondent's customer there was no rush in signing of deed of settlement.

The applicant's counsel submitted further that the respondent under paragraph 5 of the first respondent's counter affidavit admitted that the applicant was sick at the time of signing of the deed of settlement. That

is why he appended his thumb signature. Mr Manyanga went on submitting that in the foregoing paragraph, the respondent has attached the affidavit of the applicant legalizing that he consented to signing of deed of settlement. The learned counsel wondered why the medical doctor was not involved to verify that the applicant was of sound mind or conscious to what he was doing. The applicant's counsel referred this court to Section 12 of the Law of Contract Act [Cap 345 R.E. 2019] dealing with soundness of mind at the time of concluding the contract.

He reasoned that since the 1st respondent has admitted that applicant was sick, we pray that illegality be taken into consideration in extending time. To cement his submission he referred this court to the case of **Principal Secretary Ministry of Defence and National Service v Devran Valambia [1992] TLR 387**.in which the court discussed that, if there is allegation of illegality the court should take into account that this a pure and major point of granting extension of time regardless of other grounds.

Mr Manyanga concluded his submission by voicing his view that there is a sufficient cause to grant the prayer contained in the chamber summons. He added that the matter may be settled because the applicant does not dispute that he is indebted to the 1st respondent. However, the challenge is the legality of the settlement.

Mr Mzikila, Advocate for respondent in his reply objected the application and referred the counter affidavit of the 1st respondent's officer Rahim Lema. He thereafter turned to the illegality at hand and submitted that on the issue of illegality there are several decisions where it has been held that the illegality has to be apparent on the face of record such as issue of jurisdiction and it should not be the one that will have a long-

drawn processes as it was stated in **Valambia's case** (supra). Mr Mzikila also submitted on the issue of the applicant's sickness as has been opposed in paragraphs 6,7, 8 and 10 of the counter affidavit. He was of the view that the applicant was aware of what was going on. Expounding on sickness the respondent's counsel attacked the medical report (annexture D-3) that the applicant was admitted on 29/08/2021 and he was discharged 31/08/2021, in that perspective the hospital considered him to be ok and discharged him. The learned counsel submitted that in that report there is nowhere where it is stated he was unconscious or unaware of what was happening.

The counsel for the respondent submitted further that the deed of settlement was as per court decree executed on 08/12/2021, that the date the applicant signed the deed of settlement. The consent judgment was delivered 15/12/2021. But again, the applicant was represented by advocate Faraji Kajuni, which has not been disputed so far, and the second defendant in the original case was Godfrey Simon Mzena, the biological brother of the applicant. They both assisted the court in reaching the settlement. Mr Mzikila continued to submit that , from the time the applicant was discharged to the time he signed the deed of settlement, and taking into account that there was no any information that the 1st respondent was re-admitted to the hospital or it was a requirement set by the trial judge that, there should be an affidavit to show that the applicant has consented to signing the deed of settlement by thumb. According to Mr. Mzikila learned counsel for respondent , the allegation in paragraph 5 of the affidavit that applicant was unaware when he was signing the deed of settlement is an afterthought after realizing that he was incapable of performing his obligations under the

deed of settlement. The counsel cited paragraph 6 of the applicant's affidavit, where it has been averred that the applicant was unconscious, but there is no evidence that when he was at home, he was unconscious. Mr Mzikila opined that the allegation of the applicant that there was illegality in executing the deed of settlement is untrue.

The respondent counsel's second point was on the delay and failure to account for each day of the delay from the time the consent judgment was delivered. He submitted that the judgement was dated 15/12/2021 and the application was filed on 31/03/2023. There is inordinate delay. There is no explanation of that delay. Mr Mzikila attacked paragraph 8 of the applicant's affidavit that he became aware of execution on 23/03/2023. That averment is unsubstantiated. Again from 23/03/2023 to 31/03/2023 he has not accounted for the delayed days.

Mr Mzikila concluded by submitting that there is not any sufficient cause to warrant the extension of time. He prayed that the application be dismissed with costs.

In rejoinder Mr Manyanga submitted that the respondent's counsel has mentioned about the brother of the applicant. But there is no affidavit of Godfrey Mzena was there during the signing of the deed of settlement. Equally, there is no affidavit of the applicant's counsel (Faraja Kajuni) to confirm all these allegations. The applicant's rejoined further that there is no evidence that Godfrey Mzena played a role in insisting the settlement. He also reacted to attacks directed to paragraph 6 of the applicant's affidavit that the applicant was aware of what he was doing. He submitted that the respondent has failed to bring any evidence from the medical doctor showing that the applicant was fit and aware of what was going on. He added that the applicant is not disputing the outstanding loan.

Rather, he is claiming that there was illegality at the time of signing of the deed of settlement. He was quick to submit that whether there was delay of time that does not prevail where illegality is raised as a ground for extension of time.

Mr Manyanga closed his rejoinder by submitting that the respondent has admitted in paragraph five of the counter affidavit that the applicant was sick then. And he suggested that should be taken into account in extending time. Hence, the application be granted with costs.

While determining this application the court observed that paragraph 4 of the applicant's affidavit avers that the deed of settlement has some irregularities. The same paragraph 3 avers that at the time of filing the deed of settlement the applicant was seriously sick as he was suffering from the stroke. That rendered him incapable of talking and he was not aware of what was going on. This was supported by the annextures D-3 (medical certificate), which confirmed that he was hospitalized for treatment. That was also averred in paragraph 6 of the affidavit. Therefore, he was unaware of what was going on. There was further argument that the deed of settlement contains the applicant's thumb signature. But he is a literate person with his own handwritten signature. The applicant counsel submitted that there was no witness on his side when the deed was signed. But this court noted that the annexure D-3 did not say the applicant was of unsound mind. Therefore, Section 12 of the Law of Contract Act [Cap 345 R.E. 2019] cannot apply without evidence to support allegation of unsoundness of mind to vitiate capacity and consent of the applicant in the deed of settlement.

Moreover, the applicant has not denied that the thumb signature is not his. He has neither alleged forgery of his signature nor coercion or

duress in signing the deed of settlement. That means the parameters of illegality set in the case law especially **Lyamuya Construction Company Limited v The Board of Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010, Court of Appeal** does not apply in the case at hand where the alleged illegality in the deed of settlement is difficult to comprehend and justify.

Since illegality is unfounded in the present application, and because the alleged illegality was the justification for not accounting for each day of the delay then that reason also crumbles. The applicant ought to have accounted for each day of the delay.

In the end the application for extension of time to file notice of appeal is rejected as there was no illegality. Even by stretch of imagination one can hardly confirm the allegation that the applicant was of unsound mind when the deed of settlement was executed. Consequently, that ground is unmeritorious. The fact the applicant was sick (suffering from stroke, unconscious or unaware) has no connection with illegality. But he also alleged that there was no witness on his side when the deed of settlement was executed. The advocate who witnessed the deed of settlement was also the witness of the applicant. The applicant does not dispute signing of the deed of settlement. Nor does he allege coercion, duress, undue influence, or forgery. This court has failed to find any illegality apparent on the face of record. The application must thus fail. Consequently, it is dismissed for want of merit.

Each party to bear its costs.

Order accordingly.

DATED at DAR ES SALAAM this 14th Day of July 2023.



U. J. AGATHO

JUDGE

14/07/2023

Court: Ruling delivered today, this 14th July 2023 by Hon. Minde, Deputy Registrar in the presence of the parties.



U. J. AGATHO

JUDGE

14/07/2023