

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 206 OF 2018

(Arising from Commercial Case No. 150 of. 2017)

BINANI CEMENT TANZANIA LIMITED.....APPLICANT

VERSUS

CHANG JING INVESTMENT LIMITED.....RESPONDENT

10/12/2018&23/01/2019

RULING

MWANDAMBO, J

The applicant in this application has moved the Court under section 14 (1) of the Law of Limitation Act, Cap 89 [R.E 2002] for extension of time to file a review from this Court's ruling delivered on 31st May 2018 in Miscellaneous Commercial Application No. 369 of 2017. The application is supported by the affidavit of Albert Lema learned Advocate for the applicant strongly resisted by counter – affidavit of Robert Kayenze Dadaye learned Advocate representing the respondent.

The factual background giving rise to the application presents little dispute. What divides the parties is none other than the reasons justifying the order sought in the chamber summons. Briefly, the applicant is a defendant in Commercial Case No. 150 of 2017 in which this Court (Mruma, J) made an order for ex parte proof on 24th October 2017 following the applicant's default to appear and answer the claim in the suit. Consequently, the applicant sought to challenge the ex parte order through Miscellaneous Commercial Application No. 369 of 2017. That application was met by preliminary objections challenging its competence and upon the Court hearing arguments for and against the said preliminary objections it delivered its ruling on 31st May 2018 dismissing the application. Aggrieved, the Applicant filed an application for

review on 2nd July 2018 in Miscellaneous Commercial Application No.152 of 2018 but again, that application was struck out on 28th August 2018 for being incompetent. Since the time for filing a fresh application had already lapsed, the applicant filed the instant application for extension of time the subject of this ruling. Apart from stating facts tending to explain away the delay between the date on which this Court struck out the application for review and the date on which the instant application was filed, the Applicant avers in the affidavit that there is an issue of illegality in the ruling delivered on 31st May 2018 in that the Court made a determination of the substantive application without hearing parties instead of disposing the preliminary objections on which the Court had received arguments from the parties Advocates.

As seen, earlier the respondent finds no sufficient cause being shown to warrant the order sought and brands the applicant for being negligent praying for the dismissal of the application.

Pursuant to rule 64 of the High Court (Commercial Division) Procedure Rules 2012 (the Rules) the Court received skeleton arguments from the learned Advocates who opted to dispense with oral hearing inviting me to compose a ruling without further arguments. Mr. Albert Lema learned Advocate for the applicant has invited the Court to grant the applicant premising his arguments on three aspects. Firstly, the learned Advocate advances the issue of illegality arising from the Court's ruling delivered on 31st May 2018 which is said to have denied the applicant her right to be heard. The learned Advocate argues citing several decided cases that where an issue of illegality is involved, the Court should readily grant extension of time in line with **Mary Mchome Mbwambo and Another (As Joint Administrator of the Estate of the late Gilliad Mbwambo) vs. Mbeya Cement Company Limited**, Civil Application No. 271/01 of 2016 [2017] TLS (R 277, **Principal Secretary, Ministry of Defence and National Service Versus Devram Vallambia** [1992] TLR 185. Secondly, the learned Advocate argues that the application was filed without an undue delay and the applicant has sufficiently accounted for each day of delay warranting the Court's exercise of its discretion citing **Tanga Cement Company Limited vs. Jumanne D.**

Masangwa and Another, CAT Civil Application No.6 of 2001 cited in **Samweli Sichone vs. Bulebe**, Civil Application No. 8 of 2015 (unreported). Lastly, the learned Advocate argued that the delay in this applications was merely a technical one and so the Court should readily extend the time on the authority of **Fortunatus Masha Versus William Shija and Another** [1997] TLR 154. Winding up his arguments, the learned Advocate urged the Court to find that the application is meritorious and so the Court should exercise its discretion extending the time for filing an application for review.

Mr. Robert Dadaye learned Advocate invites the Court to determine the application on the basis of three issues he himself formulated that is to say (1) whether is sufficient reason warranting extension (2) whether there was negligence on the part of the applicant and its Advocate and (3) whether negligence or humanitarian grounds can warrant extension of time.

Regarding the first and second issues, the learned Advocate argues that filing an incompetent application for review constituted negligence which cannot warrant the Court's exercise of its discretion to extend the time. Proceeding from that premise, the learned Advocate argue that the Court cannot extend time based on humanitarian grounds citing this Court's decision in **C.D Muganyizi and 4 Others vs. The Attorney General and Others**, Miscellaneous Civil Case No. 62 of 2003 (unreported), **Yusufu Same and Hawa Dada vs. Hadija Yusufu**, CAT Civil Appeal No.1 of 2002 (unreported). On the other hand, the learned Advocate argued that the applicant has failed to account for "massive number of delay above and beyond 90 days" contrary to the established principles reflected in **Aluminium Africa Limited vs. Adil Abdallah Dhiyebi**, CAT Civil Appeal No.6 of 1990 (unreported) cited in **John Geza Versus Abedi Letema**, HC Miscellaneous Land Application No. 386 of 2016 (Maige, J - unreported). Finally, the learned Advocate urged the Court to dismiss the application with costs because the applicant has not exhibited sufficient cause for the delay.

I have examined the arguments for and against the application and I propose to begin my discussion with the issue of illegality canvassed as the first ground by the learned Advocate for the applicant. The crux of the arguments by the learned Advocate for the applicant is that the Court (Mruma, J) dismissed the application in Miscellaneous Commercial Application No. 369 of 2017 without affording an opportunity to be heard which constituted an illegality and a sufficient cause by itself to extend the time. I think there is merit in the learned Advocate's arguments weighed against the principle expressed by the Court of Appeal in the Principal Secretary, **Ministry of Defence and National Service V. Devram Vallambia** (supra) in which the said Court held that 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 the record right. Later in **VIP Engineering And Marketing Limited and Others vs. Citibank Tanzania Limited**, CAT consolidated Civil Reference Nos 6, 7 and 8 of 2006 (unreported) the Court of Appeal stated:

"..... It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule of regardless whether or not a reasonable explanation has been given by the Applicant under the rule to account for the delay..." emphasis added at P.18).

See also: **Etienes Hotel vs. National Housing Corporation**, CAT Civil Reference No. 32 of 2005 (unreported) and **Mary Mchome Mbwambo and Another (As Joint Administrator of the Estate of the late Gilliad Mbwambo) Versus Mbeya Cement Company Limited** (supra).


The above decisions were made in the light of a rule in the Court of Appeal Rules in relation to applications for extension of time. The principle stated in the said decisions applies squarely to section 14 (1) of Cap 89 for extension of time as it were in this application. It is clear in the said decisions that the Court of Appeal was quite

unequivocal when it said that claim for illegality is sufficient reason for extending time which is what the applicant has done in this application. It seems to be logical that once the claim for illegality is made, it is not open for the Court considering the application for extension of time to delve into the merits of that claim but to be satisfied that claim has been sufficiently made in the affidavit for the merits and demerits of that claim can only be considered after an application has been granted. In my view, doing otherwise will be pre-emptive of the determination of the matter for which the order for extension is sought. In the upshot, having examined the affidavit in the light of the argument based on the claim for illegality, I am constrained to endorse the submission by Mr. Lema on that ground. That means in effect that the applicant has satisfied the Court on the claim for illegality which is sufficient to extend the time regardless whether the applicant has explained away the delay. Having so said I need not detain myself any more discussing other arguments canvassed by the learned Advocates because my determination will not change the outcome.

In the event and for the foregoing reasons the application succeeds. The applicant is ordered to file her application for review within fourteen (14) days from the date of this ruling. Costs shall be in the cause. Order accordingly.

Dated at Dar es Salaam this 23rd day of January 2019




L.J.S Mwandambo
JUDGE