

TANZANIA / JUDGMENT

RULING OF MOGREEN VS CHUNYA DC FINAL

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28 November 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA APPLICATION NO. 5236 OF 2024 CASE REFERENCE NO.
202403121000005236 (Originating from Civil Case No. 1 of 2022 in the district court of Chunya)
between MO GREEN INTERNATIONAL CO. LTD APPLICANT VERSUS
CHUNYA DISTRICT COUNCIL RESPONDENT

RULING

10th October & 28th November 2024. NONGWA, J. In this application, the applicant seeks extension of time within which to file appeal in Civil Case No. 1 of 2022 of the district court of Chunya. It is made under section 14(1) of the Law of Limitation Act, [Cap 89 R: E 2019] and supported by the affidavit of Doris Peter Mponda, the principal officer of the applicant. The respondent filed counter affidavit to oppose the application. Briefly, the applicant, a private company dully incorporated under the Laws of Tanzania was involved in purchase of tobacco from various AMCOS within Chunya district which was subject to payment of crops cess levy to the respondent. In the year of 2020/2021 the applicant purchased tobacco crops of 693,906.22 Kgs valued USD 1,117,017.91 which was to be charged TZS 77,744,446.54/= as crops cess levy. That the applicant did not pay such amount which necessitated the respondent to institute the suit for claim of the mentioned amount. At the inception of the suit, the applicant was appearing in the trial court through the service of various advocates and were involved in hearing one plaintiff witness. Then defaulted appearance for continuation of hearing and the court proceeded under Order VIII Rule 14(1) of the CPC. At the end on 15th September 2023, the court delivered ex-parte judgment against the applicant. It is against this background the applicant has brought this application for extension of time. It is alleged that before November, 2023 the applicant was under control and management of Patrick Kessy as a director and is the one who was communicating with the instructed advocate in the conduct of the case. The said director fell into serious illness and in November 2023 his life expired. That the instructed advocate missed communication with the previous director and choose to withdraw instruction from the case. It was on 19th February 2024 when the applicant was served with notice of execution and became aware of the ex-parte judgment in Civil Case No. 1 of 2022. Thus, instructed ABRASEN & Co. Advocates to take necessary action. The applicant alleges that the decision of the district court is

pregnant of illegalities as it lacked jurisdiction over the matter, the Attorney General was not joined to the 2 suit, it was determined as normal civil suit while it was commercial in nature and that the applicant was not served with notice of ex-parte

judgment.

The respondent resists the application, in the counter affidavit sworn by Florian Mangasin, principal officer of the respondent disputed each and every allegation save for ex-parte judgment and execution in Civil Case No. 1 of 2020. Present at the hearing were Mr. Peter Kiranga, learned counsel for the applicant and Mr. Julius Lukumay, State Attorney for the respondent. Parties prayed and were granted leave to file written submissions. In his submission Mr. Kiranga attributed the delay with miscommunication with Partick Kessy a former director after he fell sick. He referred to paragraphs 4, 5, 6, 7, 8 and 9 of the affidavit. Another reason was lack of notification of the date of ex-parte judgment, referring to paragraph 15 of the affidavit, counsel submitted that failure to serve the applicant with notice deprived an opportunity to timely take legal action. He stated the applicant became aware of existence of ex-parte judgement on 19th February 2024. He supported the argument with the case of Kaiza Katamba Mwalugaja vs Obby Sikuanguka Mwampaja & Another, Civil Appeal No. 7 of 2022 [2022] TZHC 13554 (6 September 2022; TanzLII) on the holding that the court 3 is required to issue notice of intention to proceed ex-parte against a party to a case. Existence of illegality and irregularity in the decision is another reason advanced by the applicant, citing paragraph 17 of the affidavit which enumerates the alleged illegality, counsel submitted that it is now settled that wherever there are allegations of illegality, the court has to extend time so that the alleged illegality can be corrected. He referred to various judicial pronouncements on this area including Principal Secretary, Ministry of Defence and National Service vs Devram Valambia [1992] TLR 185, Attorney General vs Consolidated Holding Corporation & Another, Civil Application No. 26 of 2014 and Registered Trustees of Kanisa La Pentekoste Mbeya vs Lamsom Sikazwe & Others. Civil Application No. 191 of 2019 [2019] TZCA 516 (6 December 2019; TanzLII). Elaborating Mr. Kiranga submitted the Attorney General was not joined and referred to section 10 of the Government Proceedings Act [Cap 5 R: E 2019] which requires all civil proceeding by or against the government to be instituted by or against the Attorney General. On proceeding under wrong provision of the law, counsel for the applicant submitted that to proceed ex-parte the court acted under Order VIII rule 14(1) of the Civil Procedure Code, cap 33 which applies when 4 the defendant fails to file written statement of defence which was not the case on his part as she filed the same and partly participated in hearing. From the above, Mr. Kiranga on behalf of the applicant prayed the application be granted with costs. In reply submission, the state attorney informed the court that the application was overtaken by events as the execution proceedings had gone to the stage of attaching the applicant's motor vehicle which is awaiting to be sold after the finalization of this application. He supported the argument with the case of Felix Emmanuel Mkongwa vs Andrew Kimwaga, Civil Application No. 249 of 2016 [2020] TZCA 333 (9 June 2020; TanzLII). Starting with the last part of the state attorney reply submission, he stated that in application of this nature the applicant must account each day of delay. He fortified the argument with the case of Bariki Israel

vs Republic, Criminal Appeal No. 444 of 2007 [2011] TZCA 33 (18 February 2011; TanzLII) and CRDB Bank Limited vs George Mathew Kilindu, Civil Application No. 81 of 2005 [2006] TZCA 76 (10 July 2006; TanzLII). State attorney submitted that the applicant has not accounted for 178 days from when the decision was rendered. Further that applicant and her advocate were negligent in defending the case because written statement of defence was signed by Mr. Peter Kiranga who was also 5 instructed to defence the case. Counsel referred the court to the case of Dr Ally Shabbhay vs Tanga Bohora Jamaat [1997] TLR 305. On argument that delay was caused by illness and death of the director, it was submitted that the applicant being a legal entity could not be managed by one person but a board resolution. He referred the court to the case of Ursino Palms Estate Ltd vs Kyela Valley Foods Ltd & Others, Civil Application No. 28 of 2014 [2018] TZCA 48 (20 June 2018; TanzLII) and Pita Kempap Limited vs Mohamed I. A. Abdulhussein, Civil Application No. 140 of 2004 (Unreported). Referring to section 147(1) of the Companies Act, Cap 212, state attorney concluded it was not possible for the case being known only by one director. On argument that the trial court had no jurisdiction, the state attorney acknowledged that jurisdiction of the court is a bedrock to any decision-making authority. He referred to the provisions of the Tax Administration Act Cap, 438 and Local Government Financial Act Cap, 290 to see if charging cess levy fall under commercial business. He argued collection of cess levy did not fall under the categories of commercial transaction. On failure to serve notice of ex-parte judgement, state attorney cited order IX rule 8 of the Civil Procedure Code and submitted that it did not require any notice to be served to the defaulting party to appear on 6 the date of judgment. He supported the stance with the case of Mendrad Okota vs Cosmas Chuwa, Civil Appeal No. 31 of 2022, HCT at Morogoro. He said the case of Kaiza Katamba Mwalugaja (supra) was inapplicable. Replying to argument that Attorney General was not joined, state attorney referred to section 11 of the Government Proceedings Act in that the government can file a suit against private person or organization. He added all cases by or against the government under attorney general prosecuted by the office of solicitor general. Further that the applicant did not state if was prejudiced. On submission that wrong provision of law was used in proceeding ex-parte, the respondent submitted that it did not prejudice the applicant. Having considered rival submission, the only issue is whether the application has merits. I will start with the point raised by the respondent that the application is taken by events. This will not detain me much, process to appeal cannot not be taken by event even when execution is completed. Plea of the matter being taken by events is only available to stay of execution and temporary injunction orders which serves purpose of maintaining status quo between the parties. I thus reject the prayed by the respondent to rule that this application is taken by events. 7 This being the application for extension of time to do certain act, it is trite law that an application for extension of time is entirely in the court's discretion to grant or refuse it. However, those discretionary powers must be judiciously exercised according to the rules of reason and justice, not personal whims. Although there is no universal definition of what constitutes good cause, in exercising such powers, the Court is required to consider the prevailing circumstances of the particular case guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the

decision sought to be challenged. See *Abdulrahman Mohamed Ally vs Tata Africa Holdings T. Limited*, Civil Application No. 166 of 2021 [2023] TZCA 60 (24 February 2023; TanzLII) and *Lyamuya Construction Co. Ltd* (supra). There were some rival arguments on what led to non-appearance of the applicant in the matter which to me was premised on wrong arena, these arguments are fit in application to set aside ex-parte judgment and not extension of time to appeal. Parties agree that ex-parte judgment was passed against the applicant, the question now becomes when the applicant became aware of the ex-parte judgment and not why she did not appear to defend the case. 8 The applicant pleaded that it was on 19th February 2024 when was served with notice of execution, the applicant did not dispute this fact in his counter affidavit, this application was filed on 8th March 2024. Neither in the affidavit in support of the application nor submission by Mr. Kiranga did attempt to disclose and discuss this pertinent issue. Under paragraph 12 of the affidavit it is averred ABRSEN & Co. Advocates was instructed to take legal action but is silence when that was done. In absence of what was going on between 19th February 2024 when the applicant became aware of existence of ex-parte judgment and 8th March 2024 when this application was filed, the applicant has failed to account each day of delay. Another reason is existence of illegality in the impugned judgment, according to Mr. Kiranga when illegality is raised is good and sufficient reason for the court to extend time. The state attorney went inside the alleged illegality and discussed them in detail. Regarding illegality in the decision as a ground for extension of time, it is a settled position in our jurisdiction that an alleged illegality if established, is sufficient to move the Court to extend time. The Court clearly stated this in the case of *Principal Secretary, Ministry of Defence and National Services v. Durvam Valambhia* [1992] TLR 387 held that; 'In our view, when the point at issue is one alleging the 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 9 and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right' A more elaborative decision on the alleged illegality for the court to extend time was given in the case of *Lyamuya Construction Co. Ltd* (supra) when the court held; 'Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized 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.' Emphasize supplied.' I have read paragraph 17 of the affidavit in support of the application, and convinced on face of the record the alleged point of illegality in (a)(b)(c) and (d) is established. It is noteworthy that at this juncture, the court is not supposed to dig much and demand the applicant to divulge further on the pointed-out illegalities. Whether the applicant will succeed or not it cannot be ruled in application for extension of time. That is the duty of the appellate court sitting in its appeal powers in which the applicant and all parties involved will be adequately heard on the 10 alleged illegalities in the impugned decision and the court have chance to rule in favour of either party. In the

premises, I find merit in the application and grant it accordingly. The applicant is given 30 days within which to lodge the appeal. Costs to follow the outcome of the intended appeal. V.M. NONGWA JUDGE 28/11/2024 Dated and Delivered at Mbeya this 28th November in presence of Mr. Peter Kilanga for the applicant. V.M. NONGWA JUDGE 11

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Prepared on 14 October 2026 · Esheria