

TANZANIA / JUDGMENT

NANDHRA ENG AND CONST CO LTD NEW

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MAIN REGISTRY) AT DODOMA
MISC. CIVIL CAUSE NO. 15701 OF 2024 IN THE MATTER OF AN APPLICATION FOR LEAVE
PREROGATIVE ORDERS OF CERTIORARI AND PROHIBITION BY NANDHRA ENGINEERING AND
CONSTRUCTION COMPANY LTD AND IN THE MATTER OF LAW REFORM (FATAL ACCIDENTS
AND MISCELLANEOUS PROVISIONS) ACT, [CAP 310 R.E 2019] AND IN THE MATTER OF LAW
REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS), JUDICIAL REVIEW
PROCEDURE AND FEES) RULES G.N. NO.324 OF 2014 AND IN THE MATTER OF THE LAW
LIMITATION ACT,[CAP 89 R.E. 2019] AND IN THE MATTER APPLICATION TO CHALLENGE THE
DECISIONS OF THE MINISTER OF CONSTITUTIONAL AND LEGAL AFFAIRS REJECTING TO
GRANT EXTENSION OF TIME TO FILE FRESH SUIT BY THE APPLICANT BETWEEN NANDHRA
ENGINEERING AND CONSTRUCTION COMPANY LTD APPLICANT VERSUS THE MINISTER
OF CONSTITUTIONAL AND LEGAL AFFAIR..... ,1st RESPONDENT THE ATTORNEY
GENERAL..... 2nd RESPONDENT

RULING

5TH & 30TH SEPTEMBER 2024 RUMISHA, J.: The Applicant entered into a contract with Ambiere Real Estates Ltd for the construction of a storey building in Mtwara. However, despite the Applicant fulfilling her obligations under the contract, Ambiere Real Estates Ltd failed to pay the agreed amount of money. Consequently, in 2018, the Applicant filed a case in this Court to recover the balance. The suit was struck out for lack of a Board of Directors' ResolutionV. When the suit was struck out, the Applicant was already time-barred and could not file a fresh suit. As a result, under Section 44(1) and (2) of the Law of Limitation Act, Cap 89 [R.E. 2019], the Applicant applied to the 1st Respondent for an extension of time. However, the 1st Respondent refused to grant the extension on the grounds that the case had already been determined by the Court, thereby rendering the 1st Respondent without the necessary powers to grant the extension. The decision of the 1st Respondent did not satisfy the Applicant. Determined to challenge this decision, she applied for leave to seek the prerogative orders of Certiorari and Mandamus, which was granted on the 24th day of June 2024. Having successfully obtained leave, the Applicant filed this instant application, supported by an affidavit from Nimesh Rashmi Barmeda, a Principal Officer of the Applicant, seeking the following orders:

1. This Honourable Court be Pleased to issue an Order for Certiorari to call for, quash and set aside the Decision of the Minister for the Constitutional and Legal Affairs dated 1st December 2023, which did not grant the extension of time to the Applicant to file fresh Suit.
2. That this Honourable Court be Please to issue Order for Mandamus, to compel the Minister for Constitutional and Legal Affairs (1st Respondent) to issue the Extension of time to the Applicant so that can file fresh suit.
3. Costs of Application, anc 2
4. Any other Orders as this Honourable Court may deem fit and just to grant. The Applicant was represented by Mr. Laurent Ntaga, a learned Advocate. The Respondents, on the other hand, opted for the service of being heard through written submissions. Mr. Elias Athanas, Principal State Attorney, was assisted by Ms. Jenipher Kaaya, Senior State Attorney. This application was heard by written submissions. I should indicate that the submissions by the learned Counsel for both sides greatly assisted me in preparing this ruling. In support of the application, Mr. Ntaga submitted that it was incorrect for the 1st Respondent to decline the Applicant's request for an extension of time on the grounds that the suit had been determined by the Court. Since the suit was struck out for want of the Board of Directors' Resolution, the determination was not based on the merits of the case. In Mr. Ntaga's opinion, striking out the suit means the matter was incompetent, and the Court lacked jurisdiction to determine it. He submitted that striking out the matter does not resolve the dispute between the parties, unlike when a matter is dismissed, where the aggrieved party has no room to return to the same court that dismissed it to have the matter determined on its merits. In such circumstances, he submits, any interested party may refile the same suit. In support of his argument, he cited the case of Bank of Tanzania versus Zuhura H. Mbulu, Civil Appeal No. 207 of 2021 [2024] TZCA 545 (11 July 2024), where it was stated that an incompetent matter cannot be dismissed. Mr. Ntaga, therefore, submitted that since Civil Case No. 70 of 2018 was not determined on its merits by the Court, the 1st Respondent had the power to grant the request for an extension of time under Section 44(3)(a) of the Law of Limitation Act [CAP 89, R.E, 2019]. He thus prays that the application be granted, and Prerogative Orders for Certiorari and Mandamus be issued so that the 1st Respondent can grant an extension of time to the Applicant to file the suit to claim the balance originating from the contract. Mr. Athanas, the Principal State Attorney, on the other hand, resists the application. In his submissions, he narrates the grounds upon which prerogative orders might be issued as provided in John Mwombeki Byombalirwa versus Regional Commissioner and another [1986] TLR. While he admits that the Applicant has been able to prove that they met the conditions of demand and refusal of performance by the 1st Respondent, he submits that the Applicant has not been able to prove that the 1st Respondent has a public duty imposed by law and that the application was made within time. In his submission, Mr. Athanas argues that the use of the word "may" in Section 44(1) of the Law of Limitation Act [CAP 89 R.E. 2019] gives the Minister discretion, which may be exercised at liberty. Therefore, Mr. Athanas contends that the Minister was correct in not

using her discretion to grant the extension, as the Applicant did not provide a board resolution signifying authority to bring the application to the 1st Respondent. In such circumstances, it is submitted that if the Minister were to issue an order for an extension of time to file a suit in response to the Applicant's application, which was brought to her without to a board resolution, it would conflict with the decision of the High Court in Civil Case No. 70 of 4 2018, which struck out the suit for the Applicant not attaching the board resolution, thereby violating Article 107(A)(1) of the Constitution. As such, he prays that the application be dismissed with costs. In his rejoinder, Mr Ntaga submitted that there was no dispute that the application for an extension of time was declined without justifiable reasons. This alone, he argues, gives this Court the power to intervene. He added that the Applicant has no other remedy available to her, making it imperative for the Minister to extend the time for her to file the suit that the Court struck out. I should perhaps indicate that the law on prerogative orders has been well settled in Tanzania. As rightly submitted by Mr Athanas, several reasons may warrant this Court's intervention to check the abuse or misuse of public powers. Indeed, this Court in *John Mwombeki Byombalirwa vs. Regional Commissioner & Another* [1986] TLR 71 established the tests which, I should say, have stood the test of time. Thus, I shall assess the application to determine if it merits this Court's intervention. One of the grounds upon which this Court might intervene, as rightly and ably submitted by Mr Athanas, is for the Applicant to prove that the Respondent, as a public officer, has a public duty to perform imposed on him by statute or any other law. This duty should not be owed solely to the state but should also be owed to the individual citizen. Counsel for both Applicant and Respondents maintained that, under Section 44(1) of the Law of Limitation Act, [Cap 89 R.E. 2019], the Minister has the discretion to extend the time for a litigant to file a suit in a court of law. These provisions, which have been part of the legal framework since the Law of Limitation Act was first enacted over 50 years ago, have played a significant role in the administration of justice in Tanzania. Indeed, the authority vested in the Minister by this section has been exercised in various instances over the years, opening gates for the courts to the litigants whose cause of actions had expired and becoming time barred. However, it is important to acknowledge that the legal landscape has evolved considerably since these provisions were introduced. When the Law of Limitation Act was enacted, for instance, the socio-political context was vastly different from the present day landscape. The passage of time has brought about changes in both legal interpretations and constitutional mandates, which require a re-examination of certain longstanding statutory provisions. Significant developments, I must say, include the promulgation of the new Constitution in 1977 and the reintroduction of the multiparty system of democracy in the country in 1992. Undoubtedly, when the Law of Limitation Act came into effect, the current Constitution had yet to be promulgated, and the socio-political landscape was considerably different from what is prevailing today. Notably, in *Joran Lwehabura Bashange vs. Minister for Constitutional & Legal Affairs & Another* (Misc. Civil Cause No. 12 of

2023) [2024] TZHC 774, the Constitutional Court was invited to determine whether the powers of the Minister under Section 44 of the Law of Limitation Act were in compliance with the constitution. In a landmark ruling, the Court found the powers of the Minister to be in contravention of the Constitution. Equally important, it is worth noting that the Court went ahead and declared the provisions of section 44(1) of the Law of Limitation Act to be void. The Court's decision was based on the premise that the discretion granted to the Minister under this section is inconsistent with the principles enshrined in the Constitution, the supreme law of the land. I am on my mind that while the Constitutional Court provided a directive for necessary legislative amendments to be made within 12 months, this grace period does not negate the fact that the identified constitutional contraventions have been in existence since the Constitution came into force. In my firm view, the violations of the Constitution did not commence with the Court's ruling but have persisted from the moment the Constitution was enacted. Therefore, the unconstitutional nature of the Minister's powers under Section 44(1) is not contingent upon the expiration of the 12 months but has been present since the inception of the Constitution itself. It is without doubt that the impugned decision by the Minister, which was made on December 1, 2023, and communicated through a letter referenced J/C. 150/01/1004/02 of the same date, predates the recent developments concerning the Minister's powers under Section 44(1) of the Law of Limitation Act. However, this does not change the fact that, by the time the present application was filed, the Minister no longer possessed the authority to grant an extension of time. In light of the Constitutional Court's ruling, it would be absurd for this Court to compel the Minister to exercise powers that have been declared unconstitutional. Such a decision would create a legal paradox, where this Court, in one case, orders the Minister to act in violation of the Constitution, while another directs compliance with the Constitution. This contradictory state of affairs is, in my opinion, uncalled for in a democratic and constitutional state. As a result, I am of the firm opinion that the Minister for Constitutional and Legal Affairs no longer has the power to extend the time for the Applicant to file a suit, which is out of time. Upholding the Constitution is not just a legal obligation but a civic duty for every law-abiding citizen, especially in a nation that prides itself on its democratic values and constitutional integrity. The Constitution is the bedrock of our legal system, and it must be respected and preserved to ensure our society's continued stability and cohesion. Given that this condition has yet to be established, it would be futile to proceed with the remaining grounds of the application. Without a valid legal basis for the Minister's power to extend time, any further consideration of the merits of the case would be an exercise in futility. Therefore, the application stands dismissed. However, given the nature and reasons of the outcome, I make no order for costs. DATED at DODOMA this 30th day of September 2024 A.K. kuMISHA JUDGE

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