

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 80 OF 2022

GASPER EZRON TESHA.....APPLICANT

VERSUS

LINDERMAN ALFRED LEKEYRESPONDENT

RULING

07/11/2022 & 27/01/2023

GWAE, J

The applicant, Gasper Erzon Tesha filed a civil suit against the respondent; Linderman Alfred Lekey in 2020 via Civil Case No. 10 of 2020. The matter was assigned to Hon. Mzuna, J. After completion of the parties' pleadings and holding of first pre-trial conference, the suit was assigned to me for the statutory mediation. On 28th July 2021 when Mr. Joseph Msuya and Mr. Elvaison Maro, both the learned counsel who appeared in court representing the applicant and respondent respectively, duly notified the court that, the matter had already been settled by the parties out of the court.

Now, the applicant herein is exhibiting to have been aggrieved by the court's order marking the suit as settled out of the court and he is

after having the same reviewed. However, he found himself to be out of the period set by the law. Hence, this application for extension of time to file an application for review brought under section 14 (1) of the Law of Limitation Act, Cap 89, R, 2019 and section 93 of the Civil Procedure Code, Cap 33, R.E, 2019.

The applicant, through his sworn affidavit supporting his application stated that, he was absent when the order was made nor was the deed of settlement prepared and signed by him adding that, on 3rd May 2022 he reported the matter to the Prevention and Combating of Corruption Bureau at Arusha (PCCB) whereof advocate Julius Karata was probed. He went on stating that, on 20th day of June 2022, the Bureau informed him that, his complaints are not corruption related matter. He further stated that from when he received the information from PCCB's office till 28th day of June 2022, he was looking for an advocate for legal opinion and representation. He finally stated that, the intended review has very important issue for judicial consideration.

Through his sworn counter affidavit, the respondent resisted this application by stating that the parties' settlement was reached before the date set for mediation and that, the parties agreed at Maro's office that the respondent would be paying the claimed amount (Tshs. 400,000, 000/

=) depending on how he would be earning the monies. He further stated that, he started paying the debts and as of the date of filing this counter affidavit the amount of money remains unpaid is Tshs. 40,000,000/= in favour of the applicant.

The respondent also stated that, the parties oral agreement is legally binding between the parties and that, there has no violation of the law. He appended some annexures establishing that he paid the applicant after they had entered into the mutual agreement. He pondered this application by stating that, the applicant has failed to explain what prevented him from taking necessary actions for the period of ten months. The respondent finally called for an order of the court dismissing this application with costs for being devoid of merit.

The applicant through his reply to the respondent's counter affidavit admitted to have already received a total of Tshs. 360,000,000/= from the respondent being part of the agreed amount (Tshs. 600,000,000/=) however he maintained denying to have rescinded the former agreement dated 26th February 2019.

On 28th day of September 2022 when his application was called for hearing, the parties' advocates sought and obtained leave to dispose this matter by way of written submission.

Supporting this application for extension of time, the applicant's counsel argued that there is an illegality in the settlement order since Order VIII (B) Rule 18 (3) of the Civil Procedure Code, Cap 33, Revised Edition, 2019 was not complied with by the court. He bolstered his argument by the case law namely; **Meryy Rwabizi T/A Amuga Enterprises vs. National Microfinance PLC**, Civil Application No. 378 of 2019 (unreported) where the Court of Appeal held;

"I think the question of existence of real or perceived illegality in judicial proceedings of the final court, like this case, is not one of the issue to be taken lightly. Thus, since the intention of the application is to place before the court on review the argument that the error apparent on the face of the record has mad the decision of the court to be illegal, there is, in my view, no need of going further at the application to demand the applicant to divulge further and better particular of the alleged illegality"

Further strengthening his argument, the counsel for the applicant also cited the case of **Ministry of Defence and National Service vs. Devram Valambia** (1992) T.L.R, 182 and **VIP Engineering Limited and three others vs. City Bank Tanzania Limited**, Consolidated Civil Reference Applications No. 6, 7 and 8 of 2006 (unreported). Both judicial decisions emphasize the requirement to grant an application for extension

of time whenever there is an issue of illegality on the decision to be appealed or set aside or review out of time, an application for extension of time should be granted in order to have the issue considered or determined.

In his response, the respondent submitted that, there is no illegality in respect of the proceedings in the applicant's suit (Civil Case No. 10 of 2020 adding that, the alleged fact that, the court did not give written consent judgment and decree are not error apparent in the face of the records. The respondent's counsel further argued that, failure to file deed of settlement is not fatal since the parties to a case may orally settle their dispute.

The respondent also argued that, since Mr. Josephat Msuya, the learned advocate represented the applicant and he was the one who duly notified the court of the out of the court settlement; Therefore, he (Applicant) cannot be heard lamenting that, he was not present and therefore not aware of the alleged settlement out of the court. He thus invited this court to refer to the case of **Lim Han Yung vs. Lucy Treseas Kreistensen**, Civil Application No. 219 of 2019 (unreported) where the Court of Appeal of Tanzania stated;

"A party who dump his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and he not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside ex-parte judgment passed against him"

Having considered the parties' affidavits and their respective written submission for and against the application. I am of the view that, the applicant has totally failed to account each day of delay that is a delay of more than ten months from the date of the court order marking the case as settled out of the court. I am holding so, simply because mere reporting the matter to PCCB's office does not constitute good cause in law since the case was formally filed in court and the same court is the one which issued the order. In this regard, in my considered view, the applicant ought to have timely lodged his complaints to the court if he felt aggrieved by the order.

More so, his failure to do so timely ought to have pertained with sufficient reason including accounting each day of delay though not like mathematical calculations. (See the case of **Benedict Mumello vs. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (Unreported), **Yusuf Same**

and Hawa Dada vs. Hadija Yusuf, Civil Application No. 1 of 2002 (unreported).

On the issue of illegality as raised and argued by the parties, though the parties' advocates when appeared before me when playing the role of a mediator for the first time, they just informed me that, the matter had been settled out of the court. However, as complained no decree or consent judgment that was recorded neither the parties filed deed of settlement.

Similarly, I have carefully gone through the parties' affidavits and their appended documents and submissions and observed that, initially, both parties entered into an agreement for the sale of the shares dated 26th February 2019. But, nothing that was recorded in the same way as was case in the former agreement freely entered by the parties in respect of the alleged settlement out of the court. The Court of Appeal of Tanzania when faced the similar situation lucidly explained that position in the case of **TanESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016 (unreported), where it *was stated that:-*

"Notwithstanding the fact that the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that there is a complaint of illegality in the decision intended to be

impugned, suffices to move the Court to grant extension of time so that, the alleged illegality can be addressed by the Court."

In our instant application, though it is clear that, the applicant has failed to account each day of delay however, in the circumstances of the complained settlement out of the court. It follows that, the alleged illegality, cannot easily be ignored or cannot be taken lightly by the court taking into account of the absence of reciprocal record in the manner the former agreement was entered.

Basing on the foregoing reasons, the applicant's application is hereby granted based on the alleged illegality. The applicant is given **ten (10)** days within which to file his application for the intended review. Costs of this application shall be in the course.

DATED at **ARUSHA** this 27th day of January, 2023


M. R. GWAE
JUDGE

Court: Ruling delivered in the presence of the parties and that their counsel namely **Mr. Kimaro** and **Mr. Sambo** representing the applicant and respondent respectively


M. R. GWAE
JUDGE
27/01/2023

