IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 146 OF 2023

(Arising from the Consent Judgment and Decree of the District Land and Housing Tribunal for Kibaha in Application No. 56 of 2020 dated 11 October 2022)

BERNARD BOUGAULT.....1ST APPLICANT

NEW BAGAMOYO BEACH RESORT LTD.....2ND APPLICANT

VERSUS

MOEIZ HARARI.....1ST RESPONDENT

M/S GOGO HOTELS LTD.....2ND RESPONDENT

THE FUNKY SQUID BEACH BAR AND GRILL.....3RD RESPONDENT

R U L I N G

Date of last Order: 25 August 2023
Date of Ruling: 29 September 2023

K. D. MHINA, J.

The Applicants, Bernard Bougault and New Bagamoyo Beach Resort Limited, lodged this application by way of chamber summons, made under Section 14 (1) and (2) of the Law of Limitation Act [Cap. 89 R. E. 2019] ("the LLA")

The applicants are in pursuit of an extension of time to file revision against the Decree of the District Land and Housing Tribunal ("DLHT") for Kibaha in Application No. 56 of 2020, dated 11 October 2022.

The chamber summons is supported by the joint affidavit affirmed by Bernard Bougault, the 1st applicant, which expounds the grounds for the application. As per the affidavit, the only reason for seeking an extension is the illegality discovered in the impugned consent decree that the DLHT had no jurisdiction to determine the dispute had been referred to it for the following reasons;

i. The lease agreement provided that any dispute shall be referred for arbitration.

ii. The claims on breach of lease agreement and payment of compensation fall within civil matters.

But before going to the substance of the application, a brief background is significant to understand what prompted the filing of this application, as can be gleaned from the pleadings.

In order to appreciate the sequence of events leading to this matter, it is instructive at this stage to set out the facts briefly.

From the affidavit and affidavit in reply and the record, the facts may briefly be stated as follows: The applicants instituted in the DLHT for Kibaha,

Application No. 56 of 2020, against the respondents for the following declaratory orders;

i. A declaration that the respondents breached the lease agreement.

ii. Indemnification of the applicants an amount of TZS. 80,874, 500/= for an act by the 1st respondent to sub-lease the Hotel to another tenant while the tenancy agreement was still subsisting.

iii. Payment of TZS. 184,000,000/= as a value of properties removed from the hotel.

iv. General damages of TZS. 70,000,000/= for financial loss, inconvenience and damages to the applicants.

v. Interest on (ii) and (iii) at a commercial rate of 32% per annum from the date of filing the suit till judgment.

vi. Interest on (ii) and (iii) at a rate of 12% per annum from the date of judgment till final payment.

vii. Costs and any orders the Tribunal deemed fit to grant.

On 8 September 2022, the parties signed the settlement deed, which they filed the same at the DLTH on 15 September 2020. On 11 October 2022,

the DLHT recorded the settlement deed and formed the Consent Judgment and Decree of the Tribunal. That marked the end of the matter between the parties.

This application proceeded by way of written submissions. On behalf of the applicants Ms. Stella Simkoko, learned advocate, drew and filed the submission in chief and a rejoinder, while for the 1st and 2nd respondents, Ms. Agness Uiso, also a learned advocate, drew and filed the reply to the submission in chief. The 3rd respondent submissions were drawn and filed by Sylvan Fonained, who, according to his counter-affidavit, is the principal officer of FON-TEN LTD, which before 2019, was the owner of the 3rd respondent.

Briefly, Ms. Simkoko, on the first aspect of illegality, submitted that in view of paragraph 11 of the Lease Agreement between the parties, the Tribunal had no jurisdiction on the ground that the agreement provided that any dispute between the parties should be referred to arbitration. Therefore, the parties were bound by their choice and were not allowed to abandon their agreement and use a different mode. She bolsters her argument by citing **Amani Nuru Mtimawauzima (formerly known as Ndele Mwandoje Mbafu and also Amani Uweza Nuru) vs. CRDB Bank PLC**

and two others, Land Case No. 7 of 2020, Tanzlii (HC-Mbeya) where it was held that;

> *"As a matter of general principle, where the parties have agreed to refer their dispute to a forum of their choice, the court would direct the parties should go before the agreed forum.....parties cannot depart from what they agreed upon in their contracts".*

On the second aspect, Ms. Simkoko submitted that the DLHT had no jurisdiction because the claims for the lease agreement and payment of compensation fall within civil matters. She supported her argument by citing the decision of this Court in **Charles Rick Mulaki vs. William Jackson Magero,** Civil Appeal No. 69 of 2017 (HC- Mwanza), where it was held that a dispute relating to compensation of breach of the lease agreement is not a land dispute within the meaning of section 167 (1) of the Land Act.

In reply, Ms. Uiso submitted that in the decision of **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Young Women's Association of Tanzania**, Civil Application No. 147 of 2006 (Unreported), the Court of Appeal held that for illegality to be a good ground in the extension of time, such point of law must be of sufficient importance.

It must be on the face of the record and not the one which would be discovered by a long-drawn argument or process.

She argued that in the instant application, the applicants had not established any material reason amounting to sufficient cause. Also, the pleaded illegality is not in the face of the record. She stated that it was a mere afterthought of fear of execution to be carried against the applicants for failing to honour the settlement, which they entered with free consent.

Further, she submitted that the applicants had failed to account for 170 days, thus rendering this application fruitless.

She concluded by citing the decision of the Court of Appeal in **Mtengeti Mohamed vs. Blandina Macha**, Civil Application No. 344/17 of 2022 (Tanzlii), where it was held that illegality could not be used as a shield to hide against inaction part of the applicants.

On his side, the 3rd respondent briefly submitted that the applicants failed to account for each day of delay from 11 October 2022 to 20 March 2023; therefore, as per the cited case of **Lyamuya Construction (Supra),** the delay is inordinate.

Further, the cases mentioned by the applicants supporting the ground of illegality were distinguishable because the applicants had failed to account for the delay. Therefore, the application is an afterthought and increases further delay.

The applicants filed a rejoinder, reiterating that the DLHT had no jurisdiction to entertain the matter and does not need a long-drawn argument.

She also submitted that as per the decision of the Court of Appeal in **Hassan Abdulhamid vs. Erasto Eliphase**, Civil Application No. 402 of 2019, illegality constitutes a sufficient cause for an extension of time regardless of whether or not reasonable explanations have been given in accounting for the delay.

Having considered the chamber summons and its supporting affidavit, the affidavits in reply, and the written submission made by both parties, the issue that has to be resolved is whether the applicants have shown a good cause for this Court to exercise its discretion in granting an extension of time to file revision.

As to what may constitute a good case, the Court of Appeal in the cited case of **Hamis Babu Ally vs. The Judicial Officers Ethics Committee and three others, Civil Application No 130/01 of 2020 (TanZlii),** pointed out the following factors: -

(a) To account for all period of delay

(b) The delay should not be inordinate;

(c) The applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take and

(d) The existence of a point of law of sufficient importance, such as the illegality of the decision sought to be appealed against.

Further, it is trite that illegality is sufficient ground to grant an extension of time. See **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambia [1999] TLR 182,** but that point of illegality must be a point of law of sufficient importance and apparent on the face of the record.

In the cited case of **Lyamuya Construction (Supra),** it was held that;

"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 drawn argument or process."

What is complained about by the applicants in this application is very peculiar. The peculiarity of this matter resonates from the fact it was the applicants themselves who filed the case at the DLHT. Later on, 8 September 2022, the parties to that suit at the DLHT, including the applicants both herein and at the DLHT, decided to settle the matter by signing the deed of settlement, which resulted in the consent decree of the Tribunal dated 11 October 2022.

In the instant application, as I alluded to earlier, the ground for seeking an extension is based only on illegality but in two aspects.

I will start with the first aspect, that the DLHT had no jurisdiction because the lease agreement had an arbitration clause. It should be noted that the point of jurisdiction raised in this matter is very distinct because the allegations that the DLHT had no jurisdiction are only because the case was supposed to go through arbitration first. Therefore, from that angle, I have the following;

One, section 13(1) of the Arbitration Act No. 2 of 2020 provides that:

"A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, ***upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*** *[Emphasis added]*

That means the remedy available to the party aggrieved by a reference of the dispute to an ordinary court is not to terminate the suit. The remedy available to a party to move the court before which the case is instituted for an order of stay of the case pending reference to arbitration.

In this matter, that was not done by the parties at the Tribunal; therefore, by a mere look at the DLHT records that the matter was already concluded its finality, it means the ground has been overtaken by events, especially in a situation where the applicants themselves were the ones who filed the matter at the DLHT. In my opinion, they cannot come now and say that they were wrong and want an extension of time to challenge what themselves had filed at the DLHT. They have to blame themselves for not referring the matter to the arbitrator first.

Two, the parties after signing the deed of settlement, which resulted into the consent decree between the parties, there remained no arbitrable dispute between them. In the circumstances of this matter where parties themselves skipped to refer the matter to arbitration and chose to settle the matter amicably at the DLHT where their dispute was filed, they cannot go behind the deed of settlement and the consent decree and invoke arbitration proceedings.

The Supreme Court of India in **United India Insurance Co. Ltd vs. Antique Art Exports Pvt Ltd,** Civil Appeal No. 3484 of 2019, held that;

> *"It must follow that the claim had been settled with accord and satisfaction, leaving no arbitral dispute subsisting under the agreement to be referred to the Arbitrator for adjudication".*

From the above discussion, the first aspect of illegality that the DLHT had no jurisdiction is misconceived.

In addition to the above, *Mary Charman, in her book bearing the title* ***Contract Law, 4th Edition****, Willan Publishing, UK, 2007, wrote* that valid agreement may be declared void when there are the following vitiating factors: **one**, duress and undue influence; **two**, misrepresentation; **three**, mistake and **four**, illegality on the subject matter of the agreement.

Having gone through the applicants' affidavit, neither of the vitiating factors had been pleaded by the applicants.

The Court of Appeal in **Ibrahim Twahil Kusundwa and another vs. Epimaki Makoi and another,** Civil Appeal No. 437/17 of 2022 (TanZlii), it was held that;

> *"This is so, because, under normal circumstances, the Court extends time on that account for purposes of rectifying the noted illegality in the intended application, appeal and or revision.*
>
> .....
>
> *It is only one in a situation where, if the extension sought is granted, that illegality will be addressed".*

Therefore, it is meaningless to grant the application while the vitiating factors which may affect an agreement were not pleaded in the affidavit.

The second aspect is that the claims before the Tribunal fall under a civil suit; this should not detain me long.

Having revisited the application filed at the DLHT, the subject matter of the application was the lease agreement, termination of lease and sub-lease of the hotel to the new tenants. As I indicated earlier, the first relief sought was a declaration that the respondent breached the lease contract.

By a mere look at **Part IX of the Land Act**, Cap 113, titled **LEASES,** the argument by the counsel for the applicant is misconceived.

Further, the argument of the counsel for the applicants based on the cited case of **Charles Rick (Supra)** is another misconception. In the cited case, the subject matter was concerning compensation for breach of the lease agreement, while at the DLTH, the subject matter was the breach of lease contract, termination of lease and sub-leasing.

Flowing from the above findings, I hold that the applicants failed to advance any good cause for the delay to warrant this Court to exercise its discretion to enlarge the time sought.

Therefore, this application is unmeritorious, and I proceed to dismiss it with costs awarded to both respondents.

It is so ordered.

K.D. MHINA
JUDGE
29/09/2023.