

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 145 OF 2022

(Arising from Civil Case No. 47 of 1998.)

DAL FORWARDING (T) LIMITED APPLICANT

VERSUS

SAKAS INTERNATIONAL (T) LIMITED RESPONDENT

RULING

2nd, & 24th November, 2022

ISMAIL, J.

This Court is called upon to grant an extension of time within which to file a Notice of Appeal against the Judgment and Decree of the Court in Civil Case No. 47 of 1998. The said decision, which was delivered on 20th August, 2014, saw the respondent, the decree holder, emerge victorious in a claim of breach of contract. Consequently, special and general damages, to the tune of USD 370,661.71 and TZS. 20,000,000/-, respectively, were awarded. Interest on these sums was also imposed on the applicant, the judgment debtor.

Grounds supporting the application are found in the affidavit sworn by Rosan Mbwambo, learned counsel for the applicant. Allegation of illegalities and irregularities in the decision sought to be executed have been cited,

alongside a technical delay. In respect of technical delay, the averment is that delays in preferring the instant application were caused by the applicant's pursuit of an appeal which was adjudged time barred, and struck out. Regarding illegalities, the contention is that the award of special damages was not specifically proved, while general damages awarded were far higher than the value of the consignment.

The application has been opposed to by the respondent. The contention, as contained in the affidavit sworn by Ms. Dora Mallaba, is that the applicant's efforts are a delaying tactic aimed at avoiding the satisfaction of the decree. The respondent singled out for criticism, the applicant's undertaking that they were going to settle the matter, only to find out that the applicant had instituted an application for extension of time to file a notice. On the delay to supply records of the trial proceedings, the respondent averred that, in the absence of evidence of any action taken by the applicant, it is illogical and injudicious to accept the argument that the said records were not supplied timely.

Disposal of the application took the form of written submissions, preferred consistent with the filing schedule, passed by the Court on 2nd November, 2022. The applicant enjoyed the usual privilege of submitting ahead of the respondent.

Besides listing key events in the run up to the filing of this application, Ms. Nsangizyo Zilahulula, learned counsel for the applicant, began by acknowledging that this Court enjoys discretionary powers of extending time within which to file the notice of appeal to the Court of Appeal of Tanzania. This power, she contended, is derived from the provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019. Learned counsel argued that exercise of such discretion must be judicious and within rules of reasons and justice, as was stated in the cases of ***Ngao Godwin Losero v. Julius Mwarabu***, CAT-Civil Application No. 10 of 2015; ***Mbogo v. Shah*** [1968] EA 93; and ***Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (all unreported). In the latter guidelines for the grant of extension of time were accentuated.

Ms. Zilahulula further argued that technical delay is also recognized as a ground for allowing extension of time, as was held in ***Salvand K.A. Rwegasira v. China Henan International Group Ltd***, CAT-Civil Reference No. 18 of 2016, and applied by the Court in ***Paschal Sato v. Mariam Edward Mrakala***, HC-Misc. Land Application No. 24 of 2020 (both unreported). She argued that delay may be technical or actual.

On the conditions to be fulfilled before extension is granted, the applicant's advocate argued that the applicant had accounted for the period of delay and that paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the supporting affidavit. On the condition that delay should not be inordinate, Ms. Zilahulula's argument is that the applicant was actively pursuing its rights and that, at no point in time, did it sleep on its rights.

On demonstration of diligence and not apathy, negligence or sloppiness, the contention by the applicant is that the depositions in the affidavit clearly show that the applicant was diligent, all along, and that the level of diligence demonstrated mirrored what is stated in the case of ***Convergence Wireless Networks (Maurities) Limited & 3 Others v. Wia Group Limited & 2 Others***, CAT-Civil Application No. 263 "B" of 2015 (unreported).

Submitting with regards to illegality, the view held by Ms. Zilahulula was that the settled position is that illegality of the decision sought to be appealed against constitutes a ground for extension of time. She based her argument on the decisions in ***Mohamed Salum Nahdi v. Elizabeth Jeremiah***, CAT-Civil Reference No. 14 of 2017; ***Principal Secretary, Ministry of Defence and National Services v. Devram Valambhia***

[1992] TLR 185; ***FINCA (T) Limited & Another v. Boniface Mwalukisa***, Civil Application No. 589/12 of 2018 (all unreported).

Learned counsel contended that instances of illegalities have been covered in paragraphs 17 through to 19, and that they are premised on the fact that, whereas the proved value of the lost consignment was TZS. 6,325,162.17, the Court went ahead and awarded damages to the tune of USD. 378,985.71. She argued that this is an illegality that needed no long-drawn argument to exhibit. She also contended that these damages were not strictly proved.

Regarding technical delay, the contention by the applicant is that failure to file a notice of appeal within time was in the nature of a technical delay which justifies condonation of time, consistent with the decisions in ***Salvand K.A. Rwegasira v. China Henan International Group Ltd*** (supra) and ***Paschal Sato v. Mariam Edward Mrakala*** (supra).

The applicant prayed that the application be granted.

The respondent's submission was preferred by Ms. Dora Mallaba, learned counsel. Reacting to the allegation of illegality, learned counsel argued that the settled position is that grant of extension of time is in the discretion of the Court, as was accentuated in the case of ***Michael Lessani Kweka v. John Eliafye*** [1997] TLR 152 (CA). She also joined hands with

her counterpart in holding that illegality constitutes the basis for extension of time. She argued, however, that such illegality must be of sufficient importance to justify the extension. Ms. Mallaba contended that she found that no illegalities or irregularities exist in the judgment, as exhibits P1 and P2 were duly recognized by DW1, and that the same were tendered in court without any objection. She imputed negligence and lack of due diligence in the prosecution of its case, and that this was evidenced by frequent defaults in appearance and defence to its case. This, she said, militated against the decision in ***Elias Masija Nyang'oro & 2 Others v. Mwananchi Insurance Company Ltd***, CAT-Civil Appeal No. 278 of 2019 (unreported). In the said case, the applicant's lethargic handling of the matter, characterized by persistent absence was considered to constitute lack of diligence and was abhorred. Ms. Mallaba took the view that unexplained absences for three consecutive occasions cannot be justified by the claim of illegality. She urged the Court to resist the temptation of letting the applicant use illegality as a shield for its negligent conduct.

Moving on to the grounds for extension time, Ms. Mallaba contended that, having failed to account for each day of delay, the applicant was resorting to illegality and technical delay. She argued that, usual requirements for extension of time, set out in ***Tanzania Revenue***

Authority v. Tango Transport Co. Ltd & Tango Transport Co. Ltd v. Tanzania Revenue Authority, CAT-Consolidated Civil Application Nos. 4 of 2009 & 9 of 2008 (unreported), must be conformed to.

On the length of delay, the contention by the respondent is that the applicant had failed to account for a delay of four days, contrary to the requirement for so doing, as underscored in numerous decisions, including the decision in ***Hassan Bushiri v. Latifa Lukio Mashayo***, CAT-Civil Application No. 3 of 2007 (unreported), in which it was held that a delay, of even a single day has to be accounted for. Regarding the justification for the delay on filing the application on 4th April, 2022, the view taken by learned counsel is that this is a new revelation which was not pleaded in the affidavit that supported the application. He considered this to be a departure from the trite position that parties are bound by their pleadings as restated in ***Fatma Idha Salum v. Khalifa Khamis Said***, CAT-Civil Appeal No. 28 of 2002 (unreported).

Regarding the reason for the delay, the respondent argued that no genuine reason had been advanced by the applicant for the delay in lodging the notice of appeal, as was set out in ***Xerox Sila v. Tanzania Harbours Authority***, CAT-Civil Reference No. 14 of 1998 (unreported).

On whether there is an arguable case, Ms. Mallaba's take is that there is no arguable case as there is evidence that the applicant was negligent and breached its duty to deliver the goods to the final destination. She went ahead and gave a detailed account that she considers to constitute the basis for her view. I will not delve into such details at this stage.

With regards to degree of prejudice, the contention by the respondent is that the respondent will be hugely prejudiced if the application is granted, because it is evidently clear that the respondent has been in court for more than 24 years of pursuit for its rights. Ms. Mallaba relied on the case of ***Elias Masija Nyang'oro & 2 Others v. Mwananchi Insurance Company Ltd*** (supra).

The respondent prayed for dismissal of the application with costs.

From the parties' rival submissions, one key question for determination is whether the instant application has what it takes to succeed.

As counsel tussle on whether the application should be granted, they hit a convergence point and subscribe to the settled position of the law. This is to the effect that sufficient cause must be demonstrated by a party seeking to move the Court to extend time. A multitude of cases, a few of which have been cited by counsel, insist on the need of adducing sufficient reasons, not only for the delay, but also for extending time. This was accentuated in the

case of ***Republic. v. Yona Kaponda and 9 others*** (1985) TLR 84, wherein, the Court of Appeal of Tanzania held as follows:

"In deciding whether or not to allow an application to appeal out of time, the court has to consider whether or not there are sufficient reasons" not only for the delay but also "sufficient reasons" for extending the time during which to entertain the appeal."

Needless to say, the applicant must be able to demonstrate diligence and not negligence, apathy or any form of procrastination that would be said to exhibit indilligence. The reason for imposition of such stringent condition is not hard to find, and the upper Bench's reasoning in ***Luswaki Village Council and Paresui Ole Shuaka v. Shibesh Abebe***, CAT-Civil Application No. 23 of 1997 (unreported), constitutes the basis for it. It was held:

".... those who seek the aid of the law by instituting proceedings in court of law must file such proceedings within the period prescribed by law...Those who seek the protection of the law in the court of justice must demonstrate diligence."

Sufficient reasons or grounds are varied in nature and depend on the circumstances of a particular case. They range from illness to any other

reason which is not of the applicant's own making, and they include illegality and technical delays that the applicant has premised its prayer on. In law, delays that arise from the party's unsuccessful pursuit of proceedings that are subsequently ruled out, on account of any defect of form or substance, constitute a sufficient cause for extension of time. It is as potent a reason as is illegality.

In the case of illegality, successful demonstration of the existence of the allegation of illegality qualifies as a ground good enough to allow extension of time (See: ***The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia*** (supra) ***Serengeti Breweries Limited v. Hector Sequeiraa***, CAT-Civil Application No. 373 of 2018; and ***Hector Sequeiraa v. Serengeti Breweries Limited***, CAT-Civil Reference No. 12 of 2019 (both unreported)). It should be noted that, invocation of illegality as a ground is not without any condition precedent. The settled position is that the alleged illegality must be one that is in mould of sufficient importance and on the face of record. If illegality is so blurred and would not be discovered without a long drawn argument or process, the same fails the test or the threshold requisite for having it as a ground. Thus, in ***Lyamuya Construction Company Ltd v. Board of Trustee of Young***

Women's Christian Association of Tanzania (supra), the Court of Appeal of Tanzania held as follows:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in **Valambia's case**, the Court meant to draw a general rule that every applicant who demonstrates 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 record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.**"*

[Emphasis supplied]

The argument by the applicant is that illegality that constitutes the basis for the application resides in the averments made in paragraphs 17 through to 19. In her view, grant of damages to the tune of USD. 378,985.71, instead of the actual value of the lost consignment, thought to be in the region of TZS. 6,325,162.17, was an instance of illegality, more so since the same were not strictly proved, yet they are special damages.

While the established position is that specific damages must be specifically proved and that no specific damages should be granted without any specific proof, the question is whether, in the impugned decision that was the case. An answer to that question will involve leafing through the evidence and come up with an answer. That, however, is not the task of this Court, at this stage. It is a matter that is in the ambit of the appellate Court when the matter gets to that level. The duty of the Court is to state if that is an illegality and, if so, whether such illegality is of any sufficient importance as stated in ***Lyamuya Construction Company Ltd v. Board of Trustee of Young Women's Christian Association of Tanzania*** (supra).

In my unflustered view, the illegality alleged to exist is of sufficient importance, apparent and would not require any long-drawn argument to discover. It is my conviction that the same has passed the requisite threshold for its reliance in matters of extension of time.

The respondent has taken a serious exception to what is considered to be a procrastinating behavior exhibited by the applicant in taking necessary steps to challenge the decision. The respondent's view is that time has not been accounted for. Whilst the respondent's contention may be plausible, the settled position is that, where illegality is successfully advanced as a ground, all other factors such as accounting for days of delay, at best, play

second fiddle. They become less significant and cannot hold the usual sway that they would, had they been left to stand on their own. This explains why, in the case of ***Peter Mabimbi v. The Minister for Labour and Youths Development & 2 Others***, CAT-Civil Application No. 88/08 of 2017 (unreported), the Court of Appeal of Tanzania condoned time and allowed that proceedings be instituted after the lapse of 13 years and 8 months from the date on which the cause of action arose.

I the upshot of all this and, on the ground of illegality alone, I grant the application. I order that the applicant should file the notice of appeal within fourteen (14) days from the date hereof. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this **24th** day of **November, 2022**.



M.K. ISMAIL

JUDGE

24/11/2022

