

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA SUB-REGISTRY)
AT ARUSHA**

MISC. CIVIL APPLICATION NO. 30 OF 2022

(Originating from the High Court of Tanzania, Civil Case No. 21 of 2022)

KYIMBILA TEA PACKING COMPANY LIMITED APPLICANT

Versus

THE BOARD OF TRUSTEES OF PUBLIC SERVICE

SOCIAL SECURITY FUND RESPONDENT

RULING

5th October & 16th December 2022

Masara, J.

The Applicant herein preferred this Application under Section 14 of the Law of Limitation Act, Cap. 89 [R.E 2019] and Section 95 of the Civil Procedure Code, Cap. 33 [R.E 2019] seeking an extension of time to file an application for leave to defend in Civil Case No. 21 of 2022. The Application is supported by the affidavit deposed by one Eunice Mgore, Principal Officer of the Applicant. The Respondent opposed the Application through a counter affidavit deposed by one Paulina H Msanga, Senior Legal Officer of the Respondent.

At the hearing, the Applicant was represented by Ms Happiness Kessy and Mr Idris Muhidin Msemu, learned advocates, while the Respondent was

represented by Mr Nicander Kileo, learned advocate. It was resolved that hearing of the Application be conducted through filing of written submissions.

Before delving into what was argued in the submissions, it is imperative that I recount facts leading to this Application, albeit briefly. On 30/11/2021, the Respondent filed a suit against the Applicant in this Court, vide Civil Case No. 21 of 2021. The case was filed under Summary Procedure pursuant to Order XXXV of the CPC. In that case, the Respondent was claiming payment of TZS 574,012,465.18 from the Applicant, being membership contributions and accrued penalty.

Since the suit was instituted under summary procedure, the Applicant had no automatic right to file a defence thereof unless leave to defend from the Court was sought and granted. On 16/02/2022, the Applicant was served with a copy of the Plaint with respect of Civil Case No. 12 of 2021. The Respondent was supposed to apply for leave to appear and defend within 21 days from the day of service. Noting that she was late to file the application for leave to defend, on 09/3/2022, the Applicant preferred this Application, seeking to be extended time to file application for leave to defend.

Submitting on the substance of the Application, Mr Msemu contended that upon receiving the Complaint, the Applicant had to make follow up on the status of the Respondent's claims so as to ascertain the actual amount owed to her. He added that the Applicant also had to trace their lawyer who was in Nairobi leading transition procedures and negotiations on acquisitions between the two companies, Wakulima Tea Company (the old owner) and the Applicant (new owner). It was Counsel's submission that the delay was not attributed by the advocate after engagement. He further submitted that the Applicant was late for only a single day terming it as ordinate delay which can be excusable. According to Mr Msemu, it is upon Court's unfettered discretion to extend time upon showing good reasons referring the case of **Tanzania Revenue Authority vs Yusuph Juma Yusuph, Civil Application No.2 of 2004** (unreported) to support his argument.

Mr Msemu was of the view that the reason stated amounts to good cause for the one-day delay. He added that the Applicant has been diligent in pursuit of her rights, which also amounts to sufficient cause. To cement his contention, he referred this Court to the case of **Mchome Mbambo and Another vs Mbeya Cement Company Limited, Civil Application No.**

271 of 2006 (unreported). On that basis, he urged the Court to allow the Application so as to pave way for settlement of the claims.

Contesting the Application, Mr Kileo contended that the Applicant is employing delaying tactics as the reasons for delay are confusing and contradictory. He referred to the Applicant's submission and affidavit, stating that at one point the Applicant averred that they were looking for their lawyer who resides in Nairobi having negotiations on acquisitions deals between the two companies and on the other hand he accounted that they were pursuing to know the status of the debt. The Respondent's Counsel prayed that the Applicant's affidavit be disregarded for being tainted with lies. To bolster that argument, he relied on the case of **Damas Assesy & Another vs Raymond Mgonda Paula & 7 others Civil Application No. 32/17 of 2018** (unreported). According to Mr Msemu, the Applicant failed to show good cause for the delay and that it abysmally failed to account for every day of the delay. He insisted that delay for each day has to be accounted for, referring to the decision in the case of **Tanzania Cigarette Company (TCC) vs Hassan Marua, Civil Application No. 49/1 of 2018** (unreported). In his view, the negotiations between the former and

successor company do not amount to sufficient cause. Mr Msemu implored the Court to dismiss the Application with costs.

In a rejoinder submission, the Applicant's Counsel submitted that the contradictions raised by the Respondent's Counsel in the submission were never raised in the counter affidavit, therefore the same should be disregarded. He maintained that the Applicant delayed for only one day which is 9th March 2022 and that day was accounted in the sense that the Applicant was busy in ascertaining the actual amount owed and in so doing she confirmed that the principal amount had been remitted to the Respondent on 30/11/2021. He insisted that the Applicant has shown sufficient cause for the delay warranting the extension of time sought.

After a thorough consideration of the affidavits of both parties and the rival written submissions of Counsel for both parties, it is pertinent that I consider whether the delay in filing the Application for leave to defend was necessitated by good cause.

At the outset, I need to state that sufficient cause for the delay is a *conditio sine qua non* for the extension of time to be granted. It is trite law that extension of time is in the discretion of the Court whether to grant or not,

however it has been said times and again that such discretion has to be exercised judiciously. There is a litany of this Court as well as the Court of Appeal decisions to that effect. The cited case of **Lyamuya Construction Company Limited** (supra) is instructive in this respect. That decision laid down yardsticks for a determination of application akin to the one under consideration. It was *inter alia* stated:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities, however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

The question is whether the Applicant herein is covered by sufficient cause above explained. According to the Applicant's Counsel, the delay was for a single day. The reason for the delay, as advanced by the Applicant, is that

upon being served with the Plaint, the Applicant had to pursue the claim with the former owner of the company, to ascertain the actual amount owed by the Respondent. He portrayed that upon follow ups, the Applicant realized that the principal amount of TZS 93,564,368.35 was remitted to the Respondent on 30/11/2021.

The learned advocate for the Applicant urged the Court to note that in the impugned suit, the Respondent claims both the principal amount and penalties. That, if time is not extended, judgment will be rendered in respect of both the principal amount, which has already been paid, and the penalties displaying injustice on the part of the Applicant. In his view, there are prospects of success in the suit in case time is extended. Another reason put forth by the Applicant's advocate is that the Applicant had to make consultations with her advocate in Nairobi Kenya who is leading transitional activities and negotiations between the two companies.

I have given sufficient consideration to the grounds advanced by the Applicant. It is uncontested that the delay of a single day, although unsanctioned by law, cannot be held to be inordinate. That corresponds to the parameters set out in the **Lyamuya Construction Company Limited** case that the *delay should not be inordinate*. Also, taking into account the

lengthy of the delay, which is a single day, I agree with Mr Msemu that the Applicant acted promptly and diligently, which also amounts to sufficient cause for extending time. In this respect, I subscribe to the authoritative decision of the Court of Appeal in the case of **Sebastian Ndaula vs Grace Rwamafa (Legal Representative of Joshwa Rwamafa) Civil Application No. 4 of 2014** (unreported), in which the Court cited with authority its previous decision in **Royal Insurance Tanzania Limited vs Kiwengwa Strand Hotel Limited, Civil Application No. 116 of 2008** (unreported), where it was held:

*"It is trite law that an applicant before the Court must satisfy the Court that **since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in good faith.**"* (Emphasis added)

I agree with the Applicant Counsel's submission that the Applicant acted promptly and expeditiously, demonstrating sufficient cause for the delay. The argument by Counsel for the Respondent that the Applicant's affidavit was tainted with lies and contradictions, is unsubstantiated. The Respondent did not account the true position against the alleged lies in the Applicant's affidavit. Particularly, the allegations were not raised in the counter affidavit.

the law is trite that affidavit depositions can only be contested by corresponding affidavit depositions.

Guided by the above reasons and authorities, the Applicant has furnished sufficient cause for the delay to warrant grant of the extension of time sought. The Application is therefore allowed. The Applicant to file the intended application for leave to defend Civil Case No. 21 of 2022 within 14 days from the day of this Ruling. Costs shall be in the course.

Order accordingly.



A handwritten signature in black ink, appearing to read "Y. B. Masara".

Y. B. Masara

JUDGE

December 16, 2022