

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 461 OF 2022**

*(Originating from the Civil Appeal No.251 of 2017)*

**BRITUM INSUARANCE TANZANIA LTD.....APPLICANT**

**VERSUS**

**EZEKIEL KINGONGOGO .....1<sup>ST</sup> RESPONDENT**

**SIMON OSIAH MWAMBIGIJA.....2<sup>ND</sup> RESPONDENT**

**RULING**

*7<sup>th</sup> & 24<sup>th</sup> March, 2023.*

**MWANGA, J.**

The applicant has lodged an application under Section 11 (1) of the Appellate Jurisdiction Act, Cap.141 R.E 2019. The order sought is for this Honourable court to extend time within which to file Notice of Appeal.

The application is supported by an affidavit deposed by **Mudhihir Maghee** and the same was opposed by the respondent who filed a counter affidavit sworn in by **Anna Amon Mlimakifi**. Parties agreed to dispose the application by way of written submission which were duly filed as agreed.

In his submission, Mr. Maghee adopted the affidavit to form part of his submission. The counsel submitted that, the applicant was not satisfied with the decision in Civil Appeal No. 251 of 2017 which was entered against the applicant on 19<sup>th</sup> September, 2019 by Hon. Kulita J. where it was decided that the matter was not time bared since the cause of action in respect of accident count from the date the defendant denied to compensate the victim and not the date of accident. It was his submission that, the applicant appealed to the Court of Appeal where on 4<sup>th</sup> October 2021 Civil Appeal No. 2021 was struck out due to failure to effect service to the 2<sup>nd</sup> Respondent, hence this application.

In an effort to pursue the application successfully, the applicant relied on the grounds of illegality of the decision the subject to the then appeal, technical delay, exclusion of time provided under Section 21(1) of the Law of Limitation Act and on ground of interest of justice.

On the first ground of illegality, the counsel submitted that the matter in Civil Appeal No. 251 of 2017 is coupled with illegality on the basis that the matter proceeded on merit while it was time barred. The counsel submitted that, the accident occurred on 7<sup>th</sup> October, 2012 while the suit was instituted on 7<sup>th</sup> April 2016, almost a period of four years. In support of his point, he

cited the case of **Principal Secretary Ministry of Defence and National Service Versus Devram Valambia**, [1992] TLR 182 where it was held at page 189 that: -

***"in our view when the point at issue is one of illegality of the decision being challenged the court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right"***

It was the counsel contention that for this suit being founded on tort, the period of limitation to institute proceedings is three (3) years. Therefore, the matter was time barred. Hence, upon finding that the matter was out of time the respondent ought to resort to the provisions of the law under order VII, Rule 6 of the Civil Procedure Code, Cap. 33. To strengthen his point, he cited the Case of **Alfonse Mohamed Chilumba Vs Dar es salaam Small Industries Cooperatives Society** [1986] TLR where it was stated that:-

***"in my view the learned magistrate cannot be faulted. Order VII rule 6 of CPC Provides that where the suit is instituted after the expiration of the period prescribed by law of limitation, the plaintiff shall show ground upon which exemption from such law is claimed. In other words, where but for some good ground of exemption from the law of limitation, a suit would prima facie be***

***barred by limitation, it is necessary for the plaintiff to show in his  
plaint such ground of exemption."***

It was the learned counsel submission that the plaintiff never pleaded the exemption from the limitation. Hence, the suit was time barred and that is illegality which need to be corrected by the Court of Appeal.

On ground of technical delay, the learned counsel demonstrated that, he filed a notice of appeal on time on 3<sup>rd</sup> October 2019. Thereafter, an appeal was filed on 16<sup>th</sup> April, 2021. Then, the appeal was struck out for the reason that the applicant failed to effect service and the failure was due to the fact that even in the previous appeal No.251 of 2017 and the Application for leave No. 569 of 2019 proceeded exparte for the 2<sup>nd</sup> respondent as he was nowhere to be found. Therefore, the applicant's learned counsel called all the process as a technical delay. In that respect, the counsel cited the High court decision in case of **Damari Watson Bijija vs Innocent Sangano**, Miscellaneous Civil Application No.30 of 2021 HC where it was stated that;

***"In this matter, it has been conceded that the applicant filed  
her appeal in time, only which it was struck out on legal technical  
grounds; as explained above, I must say right at the outset that  
this ground is sufficient reason to warrant the application to be  
granted"***

It was the counsel further contention that, the time lapsed while the applicant was pursuing the matter before the Court of Appeal of Tanzania in Civil Appeal No.251 of 2021. The counsel supported his argument with the high court decision in the case of **Zaid Baraka & Others Vs Exim Bank (T) Limited**, Misc. Commercial cause 300 of 2015 where it was stated that:

***"The fact that, the requisite time of issuing a notice of appeal expired while pursuing their appeal, that alone in my view is reasonable and sufficient cause for extending their time of giving notice of appeal."***

Further to that, it was submitted that the applicant has managed to account for delay due to the fact that after the appeal had been stuck out, immediately they wrote a letter to the court of appeal requesting copies of the ruling and drawn order whereby they made physical follow up until 13<sup>th</sup> October 2022 where they have been supplied with the same. Soon after, on 17<sup>th</sup> October, 2022 they posted the same online because on 14<sup>th</sup> October was a holiday 'Nyerere Day' and the following day was a weekend.

Conclusively, the applicant counsel submitted that it is in the interest of justice the extension be granted due to the reason that the intended appeal is going to be determined on merits and it does not have any prejudice or sufferance on the side of the respondent. The counsel cited the

case of **Fredrick Selenga & Another Vs Agnes Masele [1983] TLR 99** and **Mwanza Director; and Mis New Refrigeration Co. Ltd Vs Mwanza Regional Manager of Tanesco Ltd & Another [2006] TLR335.**

In response, the respondent's learned counsel in his submission adopted the counter affidavit to form part of his submission. He contended that, the Appeal No.252 of 2017 was not time bared. Though he agreed that the case was instituted in the Resident Magistrate Court as the court of first instance after the lapse of three years and six months.

The counsel was of the view that, item 6 of paragraph 1 of the Law of Limitation is just a general rule and the same has an exception under the provision of Section 27(3) of the Law of Limitation Act, in which the time limit commences on and not before the date of acknowledgement or part payment. It was his submission that, the issue was resolved by the High Court in Appeal No.252 of 2017.

With regard to the second ground, it was the submission of the counsel that there was no technical delay because the applicant's counsel did not account for the delay. The counsel proceeded that the applicant at the first instance delayed to file an Appel for 540 days being more than one year and a half and the delay certificate was issued to the applicant exempting only

22 days from 19<sup>th</sup> March 2020 to 9<sup>th</sup> April 2020. Therefore, it is the counsel strong submission that the delay by the applicant is the normal delay, thus the court should not consider the same otherwise it will set ill precedent to the counsels with ill intention of misleading the courts. The counsel cited the case of **Barclay Bank Tanzania Limited Vs Phyilisisn Hussein Mcheni**, Civil Appeal No.176 of 2015(Unreported); Sebastian **Ndaula Vs Grace Rwamafa**, Civil Application No.4 of 2014, **Samwel Kobelo Muhulo Vs National Housing Corporation**, Civil Application No.302 of 2017 which provides that the extension of the time shall be granted upon showing sufficient cause.

Having said so, it was the counsel view that the applicant was supposed to account for each day of delay for one year and a half where there was no proceeding pending in court. The counsel reiterated that, on the basis of the above arguments, the question of exclusion of time under section 21(1) of the Law of Limitation Act cannot stand.

Replying on the ground of interest of justice, the respondent disputed as well that there is no strong fact for the court to grant the prayers sought by the applicant on that ground, the application is baseless and has no merits and the same should be dismissed with costs.

I have carefully considered affidavit in support of the application, counter affidavit, the rival submission together with the supportive documents attached thereto. It is clear that grant of an application for extension of time to the applicant is a judicial discretion exercised only depending on the sufficient grounds in order to dispense justice between parties. I certainly agree with both counsels on authorities cited regarding the good grounds for extension of time. The issue now is whether the applicant has demonstrated sufficient cause warranting extension of time.

It is my considered view that, there has been raised fundamental issue of importance regarding illegality of the decision in Civil Appeal No. 251 of 2010. See the case of **Principal Secretary Ministry of Defence and National Service Versus Devram Valambhia** (supra) and **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women Christian Association Tanzania**, Civil Application No. 20 of 2010 (Supra). In the cited cases, illegality of the decision being challenged was considered good grounds for extension of time in order to put the matter and the records straight. However, it is the settled principle of law that, the claimed illegality should be apparent on the face of record to satisfy the court in exercise of its discretion.



In the present application, the issue raised by applicant is that of jurisdiction of the court. It was alleged that, the suit was instituted while it was time barred, the facts which was conceded by the respondent counsel to the extent that the matter was resolved by the High Court in Civil Appeal No.251 of 2017. Therefore, it is my considered view that, the law under order VII, Rule 6 of the Civil Procedure Code [Cap. 33 R.E 2019] stipulate clearly what ought to be done before institution of the suit beforehand. The provision reads: -

***"Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed."***

From the above provision of the law, I am inclined to hold the decision was tainted with illegality. The question of jurisdiction is so fundamental, the same ought to be cured before the institution of the case and not at appellate stage.

The grounds of technical delay put forward by the applicant have no substance. This is because the appeal was struck out due to negligence on part of the applicant failure to effect service to the 2<sup>nd</sup> Respondent. In that regard, the applicant does not have sufficient reasons for delay and that he failed to account for each day of delay. Therefore, it is my view that, much

as technical delay is a good cause or sufficient ground for a court to grant the extension of time, the same shall not be attached to negligence in adopting correct procedure of the law. As a matter of law, the applicant ought to fulfil her role on the issue of service. In the **case Charles Salungi Vs the Republic**, Criminal Application No. 3 of 2011 (Unreported), the court stated that lack of diligence on the part of the counsel is not sufficient ground for extension of time. Having said that, the third ground that the applicant is entitled to benefit under section 21(1) of the Law of Limitation Act [89 R.E 2019] also lacks merit as there was negligence on the part of the applicant. As for the ground of interest of justice, the applicant cited the case of **Fredrick Selenga & Another Vs Agnes Masele** [1983] TLR 99 that it is in the interest of justice that, unless there are special reasons to the contrary suits are determined on merits.

It is the finding of this court that since the issue of illegality of the decision sought to be impugned have succeeded in this application, it is also in the interest of justice to grant extension of time is inevitable as it overrides other unexplained delays.

In the light of the above, the prayer for extension of time within which to file notice of appeal out of time is granted. The same shall be filed within 14 days. Costs shall be in the main cause.

Order accordingly.



**H. R. MWANGA**

**JUDGE**

**24/03/2023**

**ORDER:** Ruling delivered in Chambers this 24<sup>th</sup> day of March, 2023 in the presence of advocate Godfrey Kitawala for Maghee for the applicant and advocate Kabula Elinihaki for the respondents.



**H. R. MWANGA**

**JUDGE**

**24/03/2023**