

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. 212 OF 2022

AJAY HANSRAJ ASHER APPLICANT

VERSUS

TRIUMP IMPEX LIMITED RESPONDENT

(Arising from the decision of the Resident Magistrate's Court of Dar es Salaam in Civil Case No. 25 of 2017)

RULING

6th March & 31st May, 2023

KISANYA, J.:

The applicant is seeking leave for extension of time to lodge an appeal out of time. The application is brought under section 14(1) of the Law of Limitation Act [Cap 89, R.E. 2019], Order XLIII, Rule 2 and section 95 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC) and is founded on the affidavit deposed by the applicant, Ajay Hansraj Asher.

The application traces its genesis from the summary judgment of the Resident Magistrate's Court of Dar es Salaam, dated 14th December, 2015 in Civil Case No. 25 of 2017. In that suit, the applicant was ordered to pay the respondent, principal sum of TZS. 50,000,000 being the amount due because of dishonoured cheques; general damages of TZS 50,000,000 for loss of

business and embarrassment; interest on the decretal sum at commercial rate of 26% per annum; and costs of the suit.

Subsequent to that decision, the applicant lodged several applications in which he moved the trial court to be pleased to extend time within which to file an application for leave to appear and defend the summary suit. The said application included, Misc. Civil Application No. 25 of 2017, Misc. Civil Application No. 20 of 2018, Misc. Civil Application No. 21 of 2018, Misc. Civil Application No. 142 of 2019, Misc. Civil Application No. 45 of 2020. It is not disputed that save for Misc. Application No. 142 of 2019, the said applications were struck out for being incompetent.

At the end of the day, the applicant lodged Misc. Civil Application No. 174 of 2020. As it was in the preceding application, the applicant sought for leave to appear and defend the summary suit out of time. On 6th January, 2022, the trial court dismissed it for want of merit. Upon being supplied with the copy of ruling and drawn order, the applicant lodged the present application on 23rd May, 2022. He claims that he could not timely file the appeal because he was prosecuting the said applications in good faith. He further alleges that the impugned decision is tainted with illegalities.

The application is being resisted by the respondent vide a counter affidavit deposed by her advocate one, Ms. Maryam Saleh Msean. Although the respondent does not dispute that the applicant lodged the applications named

in the supporting affidavit, she asserts that there is no sufficient cause for extension of time. It is deposed, among others, that the ground of illegalities was raised in the application for extension of time to defend summary suit which was dismissed for want of merit. She further argues that the applicant has not accounted for a period of three months from 2nd January 2022 when the decision in Misc. Civil Application No. 174 of 2020 was delivered to 24th March, 2022 when this application was instituted in this Court. All in all, the respondent states that the applicant was negligent to challenge the impugned judgment.

During the hearing of this application, the applicant was represented by Mr. Jerome Msemwa, learned advocate, while the respondent was represented by Ms. Maryam Saleh Msean, also learned advocate. The hearing proceeded by way of written submissions. I will consider the parties' arguments in the course of resolving the issues pertaining to this application.

The main issue for determination is whether the applicant has advanced sufficient cause for extension of time sought. The issue is premised on the provision of section 14(1) of the Law of Limitation Act which was referred to in the chamber summons.

It is a settled position of law that, what constitutes sufficient cause is not defined by the law. It is determined basing on the circumstances of each case and by considering several factors which has been developed by case law. The developed factors include; reason for the delay, length of the delay, explanation

accounting for such delay and in some cases, existence of a point of law or illegality of sufficient public importance in the impugned decision. See the case of **Shelina Jahangir and 4 Others vs Nyakutonya N.P.F Company Limited**, Civil Application No. 47/08 of 2020 (unreported), in which the Court of Appeal observed that:

*"Various factors are taken into account when determining what constitutes good cause. Among the factors were stated in **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). These are; to account for all period of delay which should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. See: **Tanga Cement Company Limited vs. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 and **Ludger Bernard Nyari vs. National Housing Corporation**, Civil Application No. 372/01 of 2018 (both unreported)."*

It is not disputed that the impugned summary judgment was delivered on 14th May, 2017. The CPC does not prescribe the time within which to lodge an appeal. Hence, in view of item 1, Part II of the Schedule to the LLA, the appeal ought to have been lodged within ninety (90) days. However, it was on 23rd May, 2022, when the applicant filed the present application for extension

of time to challenge the said decision. Has the applicant accounted for the delay?

Mr. Msemwa urged the Court to consider that the applicant was prosecuting the applications seeking for his right to be heard. It was his further submission that the said applications were filed in good faith and that the applicant was not guilty of lashes, negligence, mistakes, inaction and lack of due diligence. Relying on the case of **Rutagatina C.L. vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (unreported), he submitted that the applicant is entitled to extension of time.

On her part, Ms. Msean did not dispute that the applications stated in the supporting affidavit were filed in the court. However, she was of the firm view that the applicant was negligent and that he is guilty of instituting about five applications, whereby one of them, Misc. Civil Application No. 174 of 2020 was dismissed for being devoid of merit.

In view of the foregoing submission, it is not disputed that the applicant has fronted the ground of technical delay. The law is settled that, technical delay denotes time lost when the party was pursuing matter in court and that, it constitutes a sufficient cause for extension of time. Apart from the case of **Rutagatina C.L** (supra), this stance was stated in the case of **Fortunatus Masha vs William Shija and Another** [1997] 154, where it was held that:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which

clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

As stated earlier, it is a common ground that the applicant filed a number of applications to challenge the impugned summary judgment and decree. Both parties are at one that, the last application was Misc. Civil Application No. 7 of 2020 which was decided on 6th January, 2022. The applicant admitted in paragraph 6 of the supporting affidavit that the said application was for extension of time within which to apply for leave to appear and defend the suit and that it was dismissed for want of merit. Since the end result of the application filed was dismissal for want of merit, the ground of technical delay does not fit in the case at hand. Consequently, I find no merit in the ground of technical delay relied upon by the applicant because the application subject to the said ground was not held to be incompetent. If the said application was improper before the trial court as argued by the applicant's counsel, the proper recourse was to lodge an appeal or revision as the case may be.

It follows therefore, that the applicant has not accounted for each day of delay as mandatorily required by the trite law. See the cases of **Bushiri Hassan**

vs Latifa Lukio Mashayo, Civil Application No. 3 of 2007 and **Airtel Tanzania Limited vs Masterlight Electric Installation Co. Limited and Another**, Civil Application No. 27/01 of 2020 (both unreported) cited by the respondent's counsel. This is also when it is considered that, as rightly submitted by Ms. Msean, the applicant admits to have applied for a copy of judgment on 24th March, 2023. Given that the ruling was delivered on 6th January, 2022, it is clear that the copies were requested at the time when the time within which to appeal had expired.

Next for determination is the ground of illegality which was deposed in paragraphs 13 to 18 of the supporting affidavit. According to Mr. Msemwa, the illegalities of the impugned judgment are of two fold. *One*, the trial court awarded general damages, loss of business, customers and embarrassment, and interest which are not matter reserved under the summary suits predicated under Order XXXV, Rules 1 and 2 of the CPC. *Two*, the applicant was not served with a notice of the date of summary judgment and notice of outcome of the judgment. He was of the view that the said illegalities are of importance to constitute sufficient reason for this Court to grant extension of time.

The learned counsel added that, the ground of illegality is by itself a sufficient cause for extension of time and that the extent of delay is no longer a determining factor. To cement his assertion, he cited the cases of **Etiennes Hotel and National Housing Corporation**, Civil Reference No. 32 of 2005

(unreported), **Principal Secretary, Ministry of Defence and National Service vs Devram Valambia** [1992] TLR 185 and **Livingstone Silayo Sharu and Collins Temuar**, Civil Application No. 3 of 1995 (unreported).

Making reference to the case of **Mobrama Gold Corporation Ltd vs Minister for Energy and Minerals and 2 Others** [1998] TLR 425, he went on contending that the respondent would not be prejudiced by an order granting the extension of time.

In rebuttal, Ms. Msean argued that the alleged illegalities are not worth of extension of time. She relied on the case of **Jubilee Insurance Company Ltd vs Mohammed Sameer Khan**, Civil Application No, 439/01 of 2020 (unreported), where it held, inter alia, that, where illegality is raised as one of the ground for extension of time, the illegality must be that which raises a point of sufficient importance and that the same must be apparent on face of record.

Responding to the first ground of illegality pointed out by the applicant, Ms. Msean submitted that the suit was correctly brought under XXXV of the CPC because it was based on the bills of exchange. She further submitted that general damages were awarded at the discretion of the Court as per settled position held in the case of **P.M Jonathan vs Athuman Khlafan** [1980] TLR 174. It was therefore her contention that the alleged illegality amounts to a ground for dissatisfaction with the decision and not illegality that renders the impugned summary judgment a nullity. She relied on cases of **Olam Tanzania**

vs Kalpesh Yasyinh Asher, Civil case No. 165 of 2016 and **Magreth Andulile Bukuku vs Nathaniel Mwakipiti Kigwila**, Land Case No. 40 of 2018 (both unreported) in which this Court granted general damages in the summary suits.

On the second ground of illegality, that, the applicant was not served with the date of judgment Ms. Msean submitted that the case of **Cosmos Construction Co. Ltd** (supra) does not suggest the omission rendered the judgment a nullity. It was her further contention that, the applicant did not prove that he was not notified of the date of judgment. The learned counsel urged me to consider the case of **Sahara Media Group Limited vs The Board of Trustees of the National Social Security Fund, Misc. Civil Application No. 27 of 2020**, where this Court held that this ground is not an illegality. She further argued that the case of **Etiennes Hotel and National Housing Corporation** (supra) and **Principal Secretary Ministry of Defence** (supra) are distinguishable from the case at hand because the illegalities herein have not been established.

The learned counsel went on submitting that the ground of illegality is not a panacea for all applications for extension of time. She supported her argument by referring this Court to the case of **Magnet Construction Limited vs Bruce Jones**, Civil Appeal No. 459 of 2020 (unreported). In conclusion, she prayed for this Court to find that the applicant has failed to demonstrate

sufficient cause for delay.

Rejoining, Mr. Msemwa reiterated his argument that illegality is itself a good cause for extension of time even if each day of delay has not been accounted for. To bolster his argument, he cited the case of **Attorney General vs Emmanuel Malangakis (As Attorney of Anastansious Anagnostou) and 3 Others**, Civil Appeal No. 138 of 2018, CAT at DSM (unreported).

At the outset, I agree with Mr. Msemwa that, in terms of the settled position of law, an illegality of the impugned decision is a sufficient ground for extension of time. This stance is found, among others, in the cases of **The Principal Secretary Ministry of Defence and National Service** (supra) and **Attorney General vs Emmanuel Marangakisi** (supra). For instance, in the latter case, the Court of Appeal underscored that:

"Pursuant to the cited decisions, allegation of an illegality is good cause for extension of time even if the applicant has failed to account for each day of delay."

However, I also agree with Ms. Msean that, time will not be extended in every case where illegality is alleged as an issue as held in **Magnet Construction** (supra). It must be proved that the alleged illegality is on the face of record without attracting a long argument.

In the instant case, the first ground of illegality is to the effect that the trial court erred by awarding general damages, loss of business, customers and embarrassment, and interest in a summary suit. I am at one with Ms. Msean

that the alleged illegality suggests that the applicant is dissatisfied with the summary judgment. Considering the trite law that the trial court is enjoined to grant general damages and interest, I hold the view that the alleged illegality is not on the face of record and that it attracts a long argument. Being guided by the position of law stated afore, this ground does not amount to illegality of the impugned decision to warrant extension of time.

I now move to the second ground of illegality, that the applicant was not served with notice of the date of summary judgment. In the case of **Integrated Property Investment (T) Ltd and Another vs the Company for Habitat and Housing in Africa**, Civil Appeal No. 187 of 2015 (unreported), the Court of Appeal held that, a summary suit entered as a result of the defendant's failure to appear is akin to an ex-parte decision. Further to this, under Order XX rule 1 of the CPC, the court is mandatorily required to notify the parties or their advocate, of the date of judgment.

It is trite law in our jurisdiction that the judgment delivered without giving notice to the parties to the case is a nullity. See the case of **Awadhi Idd Kajass v. Mayfair Investment**, Civil application No. 281/17 of 2017 (unreported) in which the Court of Appeal held as follows, after noticing that the party was not served to appear on the date of judgment:

"... we are inclined to agree with the learned advocates for both parties that the purported delivery of the judgment

was inoperative with the net effect that no valid judgment and decree came into existence."

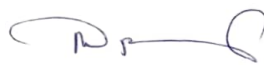
Now that the applicant alleges that he was not served to appear on the date of judgment, I am satisfied that there is an illegality of the challenged decision. According to the cited authorities, the alleged illegality constitutes sufficient cause for extension of time even if the applicant has not accounted for the delay.

Ultimately, I find this application meritorious basing on the ground of illegality. Consequently, the application is hereby granted, and the applicant is ordered to file the intended appeal within thirty days from the date of this ruling. Costs of the application shall follow event in the intended appeal.

It is so ordered.

DATED at DAR ES SALAAM this 31st day of May, 2023.




S.E. KISANYA
JUDGE