

IN THE HIGH COURT OF TANZANIA

(IN THE MWANZA SUB-REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 126 OF 2022

(Arising from the Judgment and Decree of Resident Magistrate's Court of Mwanza at Mwanza in RM Civil Case No. 28 of 2020 dated 21st September 2020)

UAP INSURANCE TANZANIA LIMITED..... APPELLANT

VERSUS

NYAMASWA INVESTMENT LIMITED.....1st RESPONDENT

NYABARA INSURANCE AGENCY.....2nd RESPONDENT

RULING

Date of Last Order: 02/06/2023

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Kamana, J:

Aggrieved by the ex parte judgment in Civil Case No. 28 of 2020 delivered by the Resident Magistrate's Court of Mwanza at Mwanza, the applicant UAP Insurance Tanzania Limited moved this Court under section 14(1) of the Law of Limitation Act, Cap. 289 [RE.2019] seeking an extension of time to appeal against such a decision which was entered in favour of Nyamaswa Investment Limited, the first respondent. The application is supported by an affidavit deposed by Aurelia Kimaryo, the Chief Operations Officer of the applicant.

When the appeal was called on for a hearing, the applicant was represented by Mr. Kiariga N. Kiariga, learned counsel whilst the first respondent had the services of Mr. Erick Kahangwa, learned advocate. The application was argued viva voce.

Submitting in support of the application, Mr. Kiariga prefaced by adopting the affidavit. He further contended that the application is predicated on the ground that the impugned judgment is tainted with illegality. He reasoned that illegality is a sufficient ground for an extension of time. To buttress his argument, the learned counsel referred this Court to the decision of the Court of Appeal in the case of **Mohamed Salum Nahdi v. Elizabeth Jeremiah**, Civil Reference No. 14 of 2017.

In expounding the illegality as a ground for extension of time, Mr. Kiariga contended that the suit that was decided ex parte was based on tort whereby the cause of action accrued on 14th March, 2017 and the suit was filed sometimes in April, 2020. He argued that as per item 6 of Part 1 of the Schedule to the Law of Limitation Act, Cap. 289, the suit was filed beyond the prescribed period of limitation of three years.

He further contended that the parties were not notified as to the date of judgment by the trial court. To him, this anomaly amounted to illegality.

Mr. Kiariga went on to submit that the judgment of the trial court is not supported by pleadings and evidence. He averred that specific damages were not specifically pleaded and proved. He insisted that the trial court did not show how the amount that was awarded was arrived at.

The learned counsel attacked the counter affidavit as containing general denial. He contended that general denial amounts to an admission of what was pleaded by the other party. He summed up by urging this court to grant the application.

Responding, Mr. Kahangwa submitted that there is no illegality so far as the ex parte judgment is concerned. He contended that the claim in the trial court was based on contractual relations between the parties which originated from the insurance cover issued by the applicant to the first respondent.

He further submitted that the issue as to the variance between the pleadings and the judgment is new as the same was not reflected in the

affidavit supporting the application. He contended that the pleadings and the evidence adduced in the trial proceedings proved the case.

Concerning the argument that the counter affidavit amounts to a general denial, Mr. Kahangwa dismissed the argument as his client was not supposed to adduce evidence at this stage as the same is on the court's records. He concluded his arguments by inviting this Court to dismiss the application.

In his brief rejoinder, Mr. Kiariga reiterated his position that the suit was founded on tort and not on the insurance contract. He further contended that the issue of illegality can be raised at any stage even by the court itself. He reasoned that the Court must ensure that the records of the subordinate court are in accordance with the law.

Having heard the competing arguments, I hasten to state that in determining this application, I will not consider any arguments advanced from the bar as the same do not form part of the evidence. This position was elucidated in the case of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 where the Court of Appeal had this to state:

' . . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.' **See: Rosemary Stella Chambejairo v. David Kitundu Jairo, Civil Reference No. 6 of 2018; and Bish International B.V. & Rudolf Teurnis Van Winkelhof v. Charles Yaw Sarkodie & Bish Tanzania Limited, Land Case No. 9 of 2006.**

Fortified by that position, I will not consider the arguments advanced by Mr. Kiariga which were not pleaded in the affidavit supporting the application.

Having said so, the issue for my determination is whether the application is meritorious. First and foremost, I concur with the arguments of Mr. Kiariga that illegality is a sufficient ground for extending time to appeal. This position was accentuated in several decisions including the decision of the Court of Appeal in the case of

Mohamed Salum Nahdi v. Elizabeth Jeremiah (Supra) where it was stated:

'We say so because the law is fairly settled that in applications of this nature, once an issue of illegality in the decision sought to be challenged is raised, that amounts to good cause and the Court, even if every day of delay is not accounted for, would grant an extension sought so as to clarify the illegality on appeal.' **See: Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015, **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia**, [1991] TLR 387, **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No.6,7 and 8 of 2006 and **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil 4 Application N0.451/18 of 2021.

In seeking the extension of time, the learned counsel for the applicant has raised illegality as a ground for the extension of time citing that the suit was time-barred as was founded on tort and not on contract as argued by the learned counsel for the first respondent.

Further, Mr. Kiariga contended that the trial court did not notify the parties as to the date of the judgment which he took as illegality. When prompted by this Court if that is reflected in the impugned judgment, the learned counsel cited Order XX R. 1 of the Civil Procedure Code, Cap. 33 [RE.2019] as putting it mandatory for the parties to be notified. Though Mr. Kiariga did not argue on the lack of jurisdiction on the part of the trial court to entertain the suit, the same was contained in the affidavit as part of the illegality he claimed to taint the impugned judgment.

It is trite law that for the ground of illegality to warrant an extension of time, the illegality in question must be on the face of the record. When it is necessary for the parties to argue with a view to establishing the illegality, such illegality is insufficient to convince the Court to grant an extension of time. In the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, the Court of Appeal stated the following:

'Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant

to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he 10 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 the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.'

I have gone through the impugned judgment. One of the issues that was framed was whether the applicant breached the insurance agreement. That being the case, I concur with Mr. Kahangwa that the suit in question hinged on contract and not on tort as Mr. Kiariga wanted this Court to believe. To prove otherwise, it needs long arguments which defeat the purpose of illegality as a ground for extending the time to appeal.

Further, regarding the issue of jurisdiction, though not argued by Mr. Kiariga, I am of the considered opinion that the same is not within the illegality for the purpose of extending the time to appeal. It needs

arguments and reasoning to establish whether the trial court had jurisdiction or otherwise.

Concerning the arguments that the parties were not informed as to the date of the impugned judgment, I do not see that is sufficient illegality to warrant an extension of time. The applicant was aware of the judgment and she at one time attempted to set aside the impugned judgment.

In the final analysis, I find the application devoid of merits and I consequently dismiss the same. I refrain from awarding costs as the same was not prayed by the first respondent. Order accordingly.

DATED at MWANZA this 2nd day of June, 2023.



KS KAMANA

JUDGE