

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 305 OF 2023

**1. MAULID NGOWENGO.....1ST APPLICANT
2. HASSAN KINJENGE.....2ND APPLICANT
3. SHABANI BAKARI.....3RD APPLICANT
4. SEVERIN HERMAN4TH APPLICANT**

VERSUS

THE GENERAL MANAGER, SONIA INDUSTRIES LTD.....RESPONDENT

RULING

POMO, J

In this Application, the Applicants, MAULID NGOWENGO; HASSANI KINJENGE, SHABABNI BAKARI and SEVERIN HERMAN, under section 14(1) of the Law of Limitation Act, [Cap.89 R.E. 2022] (the LLA) read together with section 95 Of the Civil Proceudre Code, [Cap. 33 R.E.2022] (the CPC) have moved this court praying for: -

- 1. That, this Honourable Court be pleased to grant extension of time to file Revision out of time*
- 2. Costs of this Application*

3. Any other relief(s) this Honourable court may deem fit and just to grant

The Application is supported by the affidavit deposed by Ibrahim Mbiu Bendera, who has introduced himself in it as the advocate for all the Respondents. In all intent, in my view, this was a slip of hand because from the facts obtaining in the affidavit, he is an advocate for the Applicants. Further, an application cannot be supported by the Respondents' advocate who cannot presume its existence until it is filed in court and brought to the Respondent(s) attention

It is a seven (7) paragraphs affidavit. In them, what is stated can easily be condensed as follows. Previously, the Applicants filed Civil Revision No. 19 of 2022 in this Court. It was struck out on 16th December, 2022. This was so because it was declared incompetent for containing omnibus prayers. The Applicants filed the instant application seeking to be allowed to file revision out of time as they are aggrieved by the conduct of the subordinate courts. They intend to ask this court invoke its revision and supervisory powers over the conduct of subordinate courts in order to determine propriety and legality of various proceedings, decisions and orders thereto in respect of Misc. Civil Application No. 35 of 2019 dated 22/12/2021. In addition, copies of the following decisions are annexed, to wit, decision of the court orders of Hon. Riwa RM in Civil Application No.

49 of 2007; Judgment of High Court by Judge Mkasimongwa in Civil Appeal No. 1 of 2014, Ruling by Kihawa RM in Misc. Civil Application No. 35 of 2019, Judgment by Hon. Mlyambina, J in Civil Appeal No. 158 of 2019 dated 20th July, 2020 and Court order of Hon. Kataraiya, SRM in Misc. Civil Application No. 35 of 2019 dated 22nd December, 2021. These decisions form annexure MN -3 of the affidavit under paragraph 4.

Following the above facts, counsel for the applicants stated, under paragraph 4, that he is confident with this court that it will have an opportunity to hear and determine this application by looking at the entire circumstance of the affairs, fairness, law and good administration of justice hence allowing the application.

Resisting the Application, on 26th July, 2023 the respondent filed a counter affidavit deponed jointly by SONIA TANIL SOMAIYA and AMAL SIBIR SOMAIYA. In essence, the resistance is to the effect that the Applicants ought to highlight what the court should revise as there is nothing stated for the court to invoke its revisionary powers (see paragraph 4 of the counter affidavit). Again, under paragraph 5 the respondent asserts that the Applicants have failed to substantiate the grounds on which this court can grant the Application. Each day of delay is not accounted for; ground of illegality ought to be shown for the court

to find out if the same exist; no sufficient cause is shown for the delay in filing out revision out of time and that the Applicants ought to have shown no negligence, sloppiness or apathy on their side. These are stated under paragraph 5(a)-(d)) of the counter affidavit.

In disposal of the Application, I order the hearing be by way of written submissions. Both sides of the application have complied the orders therefore I am grateful to the parties' counsel for their well-researched submissions.

Arguing the Application, Capt. Ibrahim Mbiu Bendera, learned counsel for the Applicants is of the submission that Civil Revision No. 19 of 2022 timeously was filed before this court but ended up being struck out on technical ground as it contained omnibus prayers. Such findings was delivered by this court on 16th December, 2022 but orders thereto came to be supplied to them on 14th April, 2023.

In his further submission, Capt. Bendera argues that this Application was filed on 23rd June, 2023 which was eight (8) weeks lapse of time from 14th April, 2023 when they were supplied with ruling and order of this court in Revision No. 19 of 2022 hence not actuated by inaction, negligence or any wrongful act or omission on the Applicants' part. That, under this application, the Applicants encountered technical delay

therefore are entitled for extension of time sought. In support, he cited two cases, **Johan Harald Christer Abrahsson versus Exim Bank (T) Limited and 3 Others**, Civil Application No. 224/16 of 2018 CAT at Dar es Salaam and **Bank M (Tanzania) Limited versus Enock Mwakyusa**, Civil Application No. 520/18 of 2017 CAT at Dar es Salaam (Both Unreported). He therefore argued this court to grant the application

In reply, Ms. Winjaneth Lema, learned advocate for the Respondent counted the submission by arguing that, from the dictate of section 14(1) of the Law of Limitation Act, [Cap. 89 R.E. 2022], the Applicants have failed to give reasonable or sufficient cause for the court to extend time. On the requirement, she has cited the case of **Tima Haji versus Amiri Mohamed Mtoto and Another**, Civil Revision No. 61 of 2003 HC (unreported)

Carrying further the submission, Ms. Wenjaneth is of the argument that factors to be considered by the court in application for extension were listed in **Ngao Godwin Losero versus Julius Mwarabu**, Civil Application No. 10 of 2015 CAT at Arusha (unreported). That courts are enjoined to considered the following factors: **one**, length of delay, **two**, reason for the delay, **thirdly**, the Applicant must account for all the period of delay, **fourthly**, the Applicant must show diligence and not apathy

negligence or sloppiness in the prosecution of the action that he intends to take, and **lastly**, illegality of the decision sought to be challenged.

Applying the above guidance, Ms. Wenjaneth is of the contention that from 14th April, 2023 when the Applicants were supplied the ruling and drawn order of this court in Revision No. 19 of 2022 up to 23rd June, 2023 on which they came to file this application is a lapse of sixty-nine (69) days, which is an indication of no promptness on their side. It depicts inaction and lack of promptness.

As to the duty of accounting each day of delay. Her argument is, although the Applicants were on 14th April, 2023 supplied with the ruling and drawn order of this court in Civil Revision No. 19 Of 2022, filed the instant Application on 23rd June, 2023 being 69 days later and no account for the days is given. To bolster her argument, she has cited to this court the case of **Wambele Mtumwa Shamte versus Mohamed Hamis**, Civil Reference No. 8 of 2016 CAT wherein the Court of Appeal insisted that delay of even a single day has to be accounted for. Thus, prayed the Application be dismissed on account of failure to account 69 days of delay

Regarding illegality complained of, Ms. Wenjaneth's submission is that the same is not pleaded in the affidavit thus no such illegality. In the end, she prayed the application be dismissed with costs.

In rejoinder, Capt. Bendera while maintaining his submission in chief, briefly argued that illegality of the decision complained of stand stated under paragraph 4 of the affidavit supporting the application.

Distinguishing the decisions cited by the Respondent, which impose a duty of accounting each day delayed, Capt. Bendera is of the argument that the same do not apply in the circumstance of this application which is filed under the instance where the former revision was timeously filed. He then prayed the application be granted

I have given due consideration both sides' rivalry written submissions so is the application, the affidavit and the counter affidavit. It is common ground that Civil Revision No. 19 of 2022 which was timely filed by the Applicant, the time it was struck out for whatever reason, led the Applicants be barred from refiling it until such time the court grant leave of refiling. Aware of the requirement, this is the Applicants' application seeking extension of time.

The Application is based on twofold grounds. **One**, technical delay, and **two**, existence of illegality of the decision complained of

It is on record that Civil Revision No. 29 of 2022 filed by the Applicants was on 16th December, 2022 struck out by this court. Ruling and Drawn Order are acknowledged by the Applicants to be supplied to

them on 14th April, 2023. On 23rd June, 2023 is when they filed the instant extension of time application. As a whole, reading the affidavit supporting the Application, nothing is stated as to why it took such long, 69 days, in filing this Application on 23rd June, 2023. The explanation is found in rejoinder submission, wherein Capt. Bendera, in respect of these 69 days under complaint that no explanations on the same, argued that, even copies of Ruling and Drawn Order which the Applicants were supplied with on 14th April, 2023 had errors and therefore wrote the court for their correction and came to be supplied the corrected one on 3rd August, 2023. Surprisingly, these facts do not feature anywhere in the affidavit Capt. Bendera deposed in support of the Application rather the same are submission from the bar. In **Farida F. Mbarak and Another versus Domina Kagaruki and 4 Others**, Civil Reference No. 14 of 2019 CAT at Dar es Salaam (unreported), at page 19, the court stated thus: -

*"Further we find that **the explanations of the delay given by the applicants in their written submissions** before the single Justice **and also the explanations by Messrs. Mbwambo and Nyika in their respective submissions before us that the 5 days were spent in preparing and filing the application, to be statements from the bar which cannot be acted upon.** As correctly held by the single Justice, **the explanations needed to be given in the notice of motion or the supporting affidavit**".*

[Also see: **Karibu Textile Mills Limited versus Commissioner General Tanzania Revenue Authority**, Civil Reference No. 21 of 2021; **Rosemary Stella Chambejairo versus David Kitundu Jairo**, Civil Reference No. 6 of 2018 CAT at Dar es Salaam; **Gem and Rock Ventures Co Ltd versus Yona Hamis Mvutah**, Civil Reference No. 1 of 2010 CAT at Arusha and **The Government of Vietnam versus Mohamed Enterprise (T) Ltd**, Civil Appeal No. 122 of 2005, CAT at Dar es Salaam (All unreported)

Since these averments by the Applicants' counsel does not feature in the affidavit supporting the application and instead are submissions from the bar, therefore, applying the guidance from the settled position obtaining in the long list of the decisions of the court of appeal, I am inclined to decline from acting on such submission from the bar. Under the circumstance, as correctly submitted by the counsel for the Respondent, in my view, the Applicants have failed to account each day of delay from 14th April, 2023 when they were supplied with the ruling and drawn order in Revision No. 19 of 2022 to 23rd June, 2023 which is the date on which this Application was filed, a total of 69 days.

In **Wambele Mtumwa Shahame versus Mohamed Hamis**, Civil Reference No. 8 of 2016, CAT at Dar es Salaam (unreported), the Court of Appeal, at page 9, had this to state: -

"It is already a well settled rule since more than ten years ago in unbroken chain of this court's decisions to the effect that in the application of this nature the applicant is obliged to account for the delay for everyday within the prescribed time".

The Court of Appeal in **Wambele Mtumwa's** case (**supra**) went ahead, at the same page 9, to refer the case of **Bushfire Hassan versus Latina Lucia Masanya**, Civil Application No. 3 of 2007, in which it was held thus: -

"Delay even of a single day has to be accounted for, otherwise, there would be no point of having prescribing periods within which certain steps have to be taken".

It is also a well settled law of this land that, technical delay is a good ground for the Applicants seeking extension of time. It enjoins courts of law to regard as accounted, days the Applicants spent in courts conducting their cases but ended up being struck out for one reason or the other. This is a cardinal principle tracing its origin from the case of **Fortunatus Masha versus William Shija and Another** [1997] TLR 154 where at page 156 held thus:

*"... I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present on which only involve what can be called technical delays in the sense that the original the original appeal was lodged in time but the present situation arose because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. in the circumstances, the negligence of any really refers to the filing of an incompetent appeal and not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine timeousness of applying for filing the fresh appeal**".*

This position has been followed time without number in courts' decisions. Among them, is the case of **Bank M (Tanzania) Limited versus Enock Mwakyusa**, Civil Application No. 520/18 of 2017 CAT at Dar es Salaam, cited by the Applicant.

In my considered view, technical delay principle, entitles the Applicant to enjoys, as accounted for, the number of days spent in court while pursuing a case he timely filed up to the date of its striking it out by the court for one reason or the other. Each day subsequent thereto, has to be accounted for up to the date of filing extension of time Application. Treating otherwise, is tantamount to giving the Applicant an unqualified right of bringing fresh case. Buying such averment meant that, he can

even seek extension of time after two years from the date his former timely case was struck out. Allowing such cause, will erode the meaning of having a well cherished principle imposing duty to the applicant to account each day delayed, of which in essence embraces the spirit of Section 14(1) of the Law of Limitation Act, [Cap. 89 R.E.2022] (the **Act**) and that cases must have an end.

In the instant Application, as alluded earlier, the Applicants didn't account for the 69 days of delay, that is to say, from 14th April, 2023 when the Applicants were supplied with the Ruling and Drawn Order of Civil Revision No.19 of 2022 by this court up to 23rd June, 2023 when this Application was filed. On this, Capt. Bendera's has come up with an argument that, the 69 days complained of above are covered by the exclusion right enjoyed by the Applicants under technical delay principle. I decline to accept the assertion, because, the principle doesn't extend to subsequent days of striking out the former case.

The second limb raised by the Applicants as ground for extension of time is allegation of existence of illegality of the decision complained of. Of all the paragraphs forming the affidavit supporting the Application, as correctly submitted, in my view, by the counsel for the Respondent, nowhere illegality is pleaded so as to draw to the attention of this court

on its existence. In **Gibb Eastern Africa Ltd versus Syscon Builders Ltd and 2 Others**, Civil Application No. 5 of 2005 CAT at Dar es Salaam (unreported) the court of appeal, at page 16, stated thus:

*"It is therefore not surprising that both affidavits in support of notice of motion **did not contain any statements of the nature of the judgment and the reason for desiring to appeal against it.** This would enable the Court to determine whether or not a refusal of the application would cause injustice".*

The settled law is that, the allegation of existence of illegality of the decision complained of has to be pleaded and it has to be apparent on the face of record. In **Jeremia Mugonya Eyembe versus Hamisi Selemani**, Civil Application No. 44008 of 2020 CAT at Mwanza, at pp.3 - 4, the Court of Appeal had this to state: -

*"Admittedly, **illegality or otherwise in the impugned decision can by itself constitute a sufficient ground for an extension of time.** This is in accordance with the principle in the *Principal Secretary, Ministry of Defence and National Service vs Devram Valambia* [1992] TLR 185. **However, for illegality to be the basis of the grant, it is now settled, it must be apparent on the face of the record and of significant importance to deserve the attention of the Appellate court**".*

From the above exposition and guided by the decisions above cited, in my considered view, the Applicants have failed to advance sufficient cause warranting this court to exercise its discretionary power to extend the time sought.

In the upshot, I hereby dismiss with costs the application for being unmerited. It is so ordered. Right of Appeal explained

Dated at Dar es Salaam this 23rd day of February, 2024



MUSA K. POMO
JUDGE
23/02/2024



Judgment delivered this 23/02/2024 in presence of Mr. Khalifa S, Ngemba, learned advocate for the Applicant and in absence of the respondent

Sgd: S. B. Fimbo
Deputy Registrar
23/02/2024

