

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 158 OF 2021

NATIONAL INSURANCE CORPORATION (T) LTD..... APPLICANT

VERSUS

SHENGENA LIMITED.....RESPONDENT

RULING

A.A. MBAGWA, J.

The applicant herein, NATIONAL INSURANCE CORPORATION (T) LTD filed this application under section 11(1) of the Appellate Jurisdiction Act, Cap 141 praying before this Honorable Court for the following orders: -

1. That this Honorable Court be pleased to grant extension of time within which to file a notice of appeal against the decision of Hon. Justice Kimaro J, (as she then was) dated 28th September, 2005 on the ground of illegality.
2. That costs of the application be provided for.
3. That this Honorable court be pleased to grant any other reliefs it deems right and just to grant in the interest of the parties.

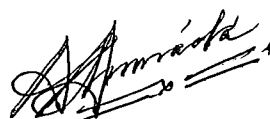
The application was brought by the way of chamber summons supported by an affidavit sworn by Paul Shaidi, the applicant's Principal Officer. Upon



service, the respondent contested the application through a counter affidavit sworn and filed by Ndanu Emmanuel, the respondent's counsel

The brief facts of the application may be told as follows; Sometimes in August, 2005, the respondent instituted a suit to wit, Commercial Case No. 75 of 2005 against the applicant. The applicant failed to appear and file written statement of defence as such, on 28th September 2005 (Hon. Justice Kimaro J. (as then she was) entered a default judgement in favor of the respondent under the provision of order VIII Rule 14(1) of the Civil Procedure Code. Hardly had the default judgement been delivered than the applicant filed an application for review of the default judgement which, however, was dismissed by Luanda J (as he then was) on 16th February, 2007. Discontented with dismissal order, the applicant, by way of revision in Civil Application No. 20 of 2007 successfully challenged the dismissal order in the Court of Appeal. As such, the dismissal order was set aside and substituted for the order of rejection by the Court of Appeal. On account of the ruling in Civil Application No. 20 of 2007, the review application was restored and heard before Hon. Werema J (as he then was) who, on 15th June, 2009 rejected the review on the reason that the grounds raised befitted an appeal than a review.

Consequently, the applicant filed an application for extension of time to file a notice of appeal in order to appeal against the default judgment as

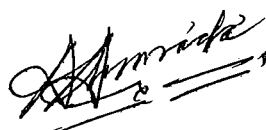
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suggested by Werema J, in his ruling. However, the application was on 14th June, 2010 struck out by Hon. Makaramba J (as he then was) following a preliminary objection which was raised by the adverse party. Still undaunted, the applicant, by way of revision, successfully filed Civil Application No. 230 of 2015 in the Court of Appeal. The Court of Appeal overturned the High Court ruling (Makaramba J) and ordered the High Court to rehear the preliminary objections raised.

Thus, the application for extension of time was remitted to the High Court before Hon. Fikirini J (as she then was). Upon hearing the parties, Hon. Fikirini J, on 13th October, 2020, ordered the applicant to file amended affidavit within seven (7) days. When the application was called for hearing on 4th October, 2021 it was discovered that the amended affidavit was not duly filed as such, the applicant prayed and was allowed to withdraw the application. It is against this backdrop; the applicant is before the Court seeking an extension of time to file a notice of appeal with the view to challenge the default judgment.

During the hearing of this application, the applicant enjoyed the services of Mr. Charles Mtae, learned State Attorney while the respondent was represented by Mr. Ndanu Emmanuel, learned advocate.

In his submission, Mr. Mtae elaborated that the ground for seeking extension is illegality which has two limbs. He expounded that first one



was that the suit from which the default judgment resulted was instituted out of time contrary to item 7 of part 1 of the Schedule to the Law of Limitation Act. The learned State Attorney clarified that the period for institution of the suit was six years from the date the cause of action arose but the suit i.e., Commercial Case No. 75 of 2005 was instituted after the lapse of time. In a bid to make a point, Mr. Mtae submitted that the cause of action arose in 1983 but the suit was filed in 2005 which is more than 13 years. To fathom his assertion, the learned State Attorney referred the Court to annexure NIC 1 (plaint) and annexure to NIC 4 (a ruling by Hon. Werema J. at page 8) attached to the application.

Regarding the second limb of illegality, the learned State Attorney submitted that the default judgment was entered contrary to the provisions of Order VIII rule 14 of the Civil Procedure Code. He lamented that the said order directs that upon failure to file written statement of defence, the court should allow the plaintiff to prove his claims but in this case the Court simply entered default judgment without requiring the respondent/ plaintiff to prove his case. The learned State Attorney referred this court to annexure NIC 2 (default judgment dated 28th September, 2005) to substantiate his version.

To bolster his arguments on the illegality as a ground for extension of time, Mr. Mtae referred this court to the case **Lyamuya Construction**



Company LTD vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2020, CAT at Arusha at page 6 and 7 and **Mrs. Mary Kahama (Attorney of Georgia George Kahama) and Another vs H.A.M. Import and Export (T) LTD and 2 others**, Civil Application No. 52/17 of 2017, CAT at Dar es Salaam.

Mr. Mtae continued that the decision by Hon. Kimaro J. was never determined by the Court of Appeal because of the issues of time. He added that since the default judgment was entered, the applicant, at all the material time, has been trying to seek remedies in court. He stressed that the delay, if any, in this matter was a technical delay which is excusable as was amply held in the case of **Stephen Ngalambe vs Onesmo Ezekia Chaula and Another**, Civil Appeal No. 27 of 2020, CAT at Iringa at page 14 to 15.

The learned State Attorney concluded with a prayer for this Court to allow the application so that the applicant may be heard by the Court of Appeal on illegality issues highlighted above.

In reply, Mr. Ndanu Emmanuel submitted that the conditions set by the Court of Appeal and this court in order to grant an extension of time include that the applicant must account for the length of delay, reasons for delay, degree of prejudice that the respondent may suffer if the

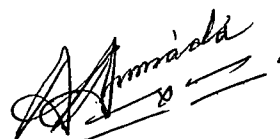


application is granted and an issue of illegality. Mr. Emmanuel challenged that applicant has banked only on the point of illegality as a ground for extension of time without accounting for delay particularly from the time when the applicant withdrew the application on 4th October, 2021 to 1st November, 2021 when the application at hand was filed.

The respondent's learned counsel, while referring to the case of **Moto Matiko Mabanga vs Ophir Energy PLC and 2 others**, Civil Application No. 463/01 of 2017, CAT at Dar es Salaam in particular at page 9, stressed that it is the requirement of the law that the applicant must account for each day of delay. It was the counsel's submission that since the applicant has not accounted for almost 27 days of delay, the application lacks merits.

Regarding the illegality, the respondent's counsel submitted that in the case of **Moto Matiko Mabanga** (supra), the Court of Appeal held that for an illegality to stand as a ground for extension of time, it should be apparent on the face of record. He concluded that it would be a long process in this matter for one to appreciate the issue of illegality.

Regarding entering default judgment without proof, the respondent's counsel replied that the State Attorney quoted a different provision from the one used by the trial judge in entering default judgment. He submitted that the Judge cited Order VIII rule 14(1) of the Civil Procedure Code.




Pertaining to technical delay, the respondent's counsel submitted that he had no issue with the time taken in the Court of Appeal rather, he was concerned with the time taken after withdrawal of the application before Mkeha J. He maintained that the applicant did not act diligently after withdrawal of the case. He thus invited the court not to condone negligence committed by the applicant. The counsel added that the respondent is likely to suffer more if the application is granted because it is an old case. Finally, the respondent's counsel prayed the court to dismiss the application.

Having canvassed the parties' depositions and upon considering the rival submissions, the relevant issue for determination is one namely, whether the applicant has demonstrated sufficient cause to warrant extension of time.

The applicant has raised the issue of illegality as a ground for extension of time. The applicant predicates illegality on the time limitation of instituting the case and the modality in which the default judgment was procured. On the contrary, the respondent contends that the alleged illegality is not apparent on the face of record rather it requires a long drawn argument for one to see it.

It is common cause that there is no fast and hard rule as to what constitutes sufficient cause for purpose of extension of time. The position

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is that a sufficient cause is determined upon consideration of all the circumstances obtaining in a particular case. See **Regional Manager, Tanroads Kagera vs. Ruaha Concrete Co. Ltd**, Civil Application No. 96 of 2007, CAT at Dar Es Salaam. As such, the court, invariably, considers different factors including length of delay involved, illegality, diligence, reasons for delay, the degree of prejudice, if any, that each party is likely to suffer, the conduct of the parties and the need to balance the interests of a party who has a decision in his favour against the interests of a party who has a constitutionally underpinned right of appeal. See **Jaliya Felix Rutaihwa vs Kalokora Bwasha & Another**, Civil Application No. 392/01 of 2020, CAT at Dar es Salaam, **Paradise Holiday Resort Limited vs. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018, CAT at Dar Es Salaam and **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372 of 2018, CAT at Dar Es Salaam.

I have dispassionately scanned the depositions and in particular on the allegations of illegality in the decision sought to be impugned. It should be noted that this court is not enjoined to go into merits of the alleged illegality for that falls within the exclusive domain of the appellate court. What I am required at this juncture is to investigate whether, on the face of record, the issue of illegality exists. The counsel for the applicant

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contends that the suit was filed out of the prescribed time and that the default judgment was entered without proof contrary to the clear position of law. On the contrary, the respondent counsel submitted that the alleged illegality is not apparent on the face of record. I have had time to navigate through annexure NIC 1 (a plaint in Commercial Case No. 75 of 2005) and the default judgment under attack which is contained in annexure NIC 2 (the proceedings of Commercial Case No. 75 of 2005 dated 28th September, 2005). With due respect to the learned counsel for the respondent, it is ostensibly clear that the court simply entered default judgment after the defendant failed to file written statement of defence. In view thereof, I agree with the applicant's counsel that there is an apparent issue of illegality on the face of record.

Pertaining to the issue of accounting for the days of delay, the respondent's counsel strenuously argued that the applicant has not accounted for days of delay particularly from the time when the applicant withdrew the application on 4th October, 2021 to 1st November, 2021 when this application was filed. The counsel for the respondent insisted that the applicant had a duty to account for each day of delay. He cited the case of **Moto Matiko Mabanga vs Ophir Energy PLC and 2 others**, Civil Application No. 463/01 of 2017, CAT at Dar es Salaam in particular at page 9 to buttress his stance. It is true as rightly submitted

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by the respondent's counsel that the applicant did not offer any explanation about the delay of twenty-seven (27) days. However, it has been recently held by the Court of Appeal that in certain circumstances where the ground of illegality exhibits, the same may sufficiently stand even without accounting for delay. See **Reuben Lubanga vs Moza Gilbert Mushi & 2 Others**, Civil Application No. 533/01 of 2021, CAT at Dar es Salaam, **Rovitha Kemilembe vs MIC Tanzania Limited**, Civil Application No. 192/17 of 2021, CAT at Dar es Salaam and **the Attorney General vs Emmanuel Marangakisi (As Attorney of Anastasious Anagnostou) and 3 Others**, Civil Application No. 139 of 2019, CAT at Dar es Salaam.

I have considered the chequered history of the matter as recounted in the applicant's affidavit. It is trite law that extension of time is granted at the discretion of the court upon being furnished with sufficient cause by the applicant. As alluded to, there is no one determining factor of the sufficient cause rather the same is arrived at upon consideration of multifarious circumstances surrounding the case. It is also settled that illegality if established may alone, in some circumstances, constitute good cause for extension of time.

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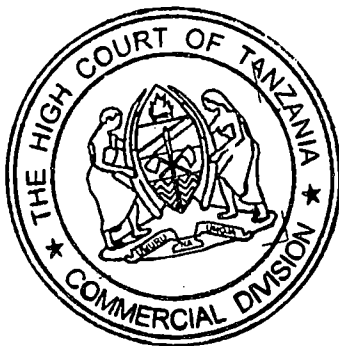
That said and done, I am persuaded that the applicant has sufficiently demonstrated illegality in the decision sought to be challenged hence sufficient cause has been established.

In view of the above, I hold that the application is meritorious and consequently I allow it. The applicant is given ten (10) days from the date of the ruling to have the notice of appeal filed. Each party has to bear its own costs.

It is so ordered.

Right to appeal is explained.

Dated at Dar Es Salaam this 26th of May, 2023.




A. A. MBAGWA

JUDGE

26/05/2023