

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL APPLICATION NO. 153 OF 2022
*(Originating from Commercial Case No. 149 of 2014)***

HASHI ENERGY (T) LIMITED APPLICANT

VERSUS

KHAMIS MAGANGA RESPONDENT

RULING

Last order: 10/5/2023
Ruling: 04/08/2023

NANGELA, J.

This is an application to set aside a Default Judgment of this Court (Mwambegele, J) (as he then was), delivered on the 14th of June 2016. The application was brought by way of a Chamber Summons supported by affidavit of Mr. Mpaya Kamara, the Advocate of the Applicant. It was brought under section 14 (1) of the Law of Limitation Act, Cap.89 R.E 2019. The Applicant seeks for the following orders:

1. That, this Honourable Court be pleased to extend time for the Applicant to file an application for setting aside a Default Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es salaam, Hon. Justice Mwambegele, J., (as he then was) dated 14th June 2014 in Commercial Case No.149 of 2014.
2. Costs of this application and.
3. Any other reliefs that this Honourable Court may deem fit to grant.

On the 10th of October 2022, the Respondent filed a counter affidavit to contest the application and a reply thereto was filed on 15th March 2023. When the parties appeared before me on the 10th of May 2023, the Applicant enjoyed the services of Mr. Mpaya Kamara, learned advocate. Mr. Kamara did as well held brief for Capt. Ibrahim Mbiu Bendera, learned advocate for the Respondent.

Since the matter was set for hearing and, given that Capt. Bendera could not make it for the hearing, Mr. Kamara prayed for this matter to be disposed of by way of written submission. The prayer was granted, and this court issued a schedule for the filing of the parties' written submissions. The learned counsels for the parties herein filed their submission as scheduled.

The gist of this application is a request by the Applicant for an extension of time within which he could lodge an application to the Court to set aside its default judgment issued in respect of the Commercial Case No.149 of 2014.

To support this application, Mr. Kamara adopted the contents of the affidavit filed in support of the application and submitted that, the depositions made under oath underscored four important facts:

- (a) That, the Applicant had applied for extension of time to file defense to the Respondent's counter claim, but its application was declined by this honorable court and ultimately, a default judgement was entered.

- (b) The Applicant's *bona-fides*, in the sense that, the Applicant had preferred an appeal to set aside the default judgement believing that an application for setting aside the Default Judgement on substantially same reasons as those prior advanced while applying for extension of time to file a defence to the Respondent's counterclaim would have been an academic exercise, frivolous and exercise in futility.
- (c) That, as per the Court of Appeal's decision in Civil Appeal No.181 of 2016 whereby the appeal was struck out, the Applicant should have first applied to this honourable court to set aside the said default judgement instead of preferring an appeal.
- (d) That, the default judgement the Applicant seeks to set aside entails illegalities.

Mr. Kamara submitted that, as a matter of law, there must be reasonable or sufficient cause if a court is to extend the time limit and an application for such extension must be made before or after the expiration of such time.

He relied on the legal principles stated in sections 14 (2) and 21 (b) of the Law of Limitation Act, Cap.89 R.E 2019 as well as the cases of **VIP Engineering and Marketing Ltd and 2 Others vs. Citibank Tanzania Ltd**, Consolidated Civil Ref. No. 6 and 8 of 2006 and **TANESCO vs. Mufungo Leonard Majura and 15 Others**, Civil Appl. No.94 of 2016. He cited section 14 (1) of the Law of Limitation Act to that effect.

Mr. Kamara urged this court to grant the application because, the application does disclose reasonable or sufficient cause. According to Mr. Kamara, the required sufficient cause includes the fact that, immediately after the default judgement, the Applicant took steps to appeal to the Court of Appeal, which appeal was however struck out on the grounds that, the Applicant ought to have applied to this honorable court to set aside the default judgement.

Relying on section 21(b) of the Law of Limitation Act, he contended that, by embarking on an appeal, the Applicant had knocked the doors of a wrong forum, and thus, covered by per section 21(b) of the Law of Limitation Act. He submitted that,

the Applicant had acted with diligence and good faith, and that, the whole period spent from the date of default judgement through to 26th of August 2022, while pursuing the appeal in the Court of Appeal should be excluded. He contended that, on 13th of September 2013, the Applicant filed this application.

He contended that, if it be found that the Applicant has not been able to count for each day, still the Applicant does maintain that the default judgment is tainted with illegalities a fact which would require that this court grant the application. Relying on the Court of Appeal decision in **VIP Engineering and Marketing** (supra) as well as the case of **TANESCO vs. Mufungo Lenard Majura** (supra), a claim of illegality constitutes sufficient reason for extension of time.

For his part, Capt. Ibrahim Bendera opposed the granting of the prayers sought in this application. He contended that, no sufficient reasons were adduced by the Applicant. Adopting the contents of the counter affidavit filed in this court, he contended that, from the 14th of June 2016, when the default judgment was delivered and the 28th of June 2016, when the Notice of Appeal was filed in this court, the number of days in

between are fourteen (14) days. Further, from 26th August 2022, when Court of Appeal gave its ruling and the day the application was filed on 13th September 2022, a total of eighteen (18) days lapsed.

In view of that, he contended that, if one adds the number of days together (i.e., the 18 days plus the 14 days) one gets total of 32 days. If the 21 days needed for setting aside a default judgment are subtracted from the 32 days, then there are eleven (11) days of delay which are unaccounted for by the Applicant.

To bolster his submission, he relied on the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis**, Civil Application No. 197 of 2014 (unreported) which cited with approval the case of **Mustafa Mohamed Raze Varian vs. Mehboob Hassanali Versi**, Civil Application No. 168 of 2014. Further reliance was placed on the case of **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372/01/2018 (unreported); as well as the South African case of **Uitenhage Transitional Local Council vs. South Africa Revenue Service**, 2004(1) SA 292.

He contended that, in all these authorities cited hereabove, the court was clear that, in an application for enlargement of time, the Applicant must account for each day of the delay and failure of which his/her application should be dismissed. He contended that, not being diligent in prosecuting another civil proceeding does not exclude the period of the intended appeal from being a delay.

Commenting on the issue of alleged "illegality", Capt. Bendera submitted that, in the **TANESCO case** (supra) cited by the Applicant, the court was of the view that, a point of law of sufficient importance such as the "illegality" of the decision sought to be challenged does constitute a sufficient cause.

He relied on the decisions of the Court of Appeal of Tanzania in the cases of **Charles Zephania mwenesano vs. Daniel Samwel Chuwa**, Civil Appl. No. 274 of 2015 (unreported), **Permanent Secretary Ministry for Works & Another vs. Prochess Eliezer Tarimo & 8 others**, Civil Application No. 236 of 2014; and **Amour Habib Salim vs. Hussein Bafagi**, Civil Application No. 52 of 2009.

However, Capt. Bendera went ahead to analyze the various actions taken by the court that have been termed as illegal and which converge in the same meaning as what the Black's law Dictionary provides. He contended that, the term "illegal" is regarded as (1) an act that is not authorized by law (2) the state of not being authorized, and (3) the state or condition of being unlawful. Deriving his argument from such context, Capt. Bendera submitted that, there was nothing in the default judgement which could be regarded as an "illegality".

He argued that the contention that the general damage amount stated in default judgment was not assigned with any reasons cannot constitute an illegality. He contended, firstly, that, since there was no hearing conducted as between the parties as per Rule 23 (1) of the High Court Commercial Division, nowhere the purported "assigned reasons" to the amount to granted by the court could come from since what was before the court was only the counterclaim.

Secondly, Capt. Bendera contended that, general damages are awarded at the discretion of the court. He relied

on the decision of the Court of Appeal in the cases of **Joao Olivera & Another vs. It Started in Africa Ltd & Another**, Civil Appeal No.186 of 2020 (unreported) and **D.N. Bahram Logistics & Another vs. National Bank of Commerce Ltd & Another**, Civil Ref. No.1 of 2006 where the Court was of the view that the discretion enjoyed by a court cannot be interfered with unless it is clearly wrongly exercised or that, the court misdirected itself in matters which it should not have acted.

He contended that, in the default judgment, the amount was correctly not included in the plaint as it is to be obtained upon court's discretion. As such, he maintained that having considered Rule 23 (1) of the High Court (Commercial Division) Rules, 2012 (as amended), the court used its own discretion. He submitted, therefore, that, challenge on the exercise of this court's discretion cannot be the basis for this extension of time.

Concerning the issue that the ruling of this court in Misc. Commercial Cause No.52 of 2014 ("the application") was issued while the court was *functus officio*, Capt. Bendera submitted that, the application under reference, was brought under a certificate of urgency. He contended that, the urgency of the

matter was prompted by the fact that the 4th Respondent (the Respondent herein), while being accompanied by Police Officers, invaded the Applicant's premises, and drove away three (3) trucks and trailers loaded with petroleum products.

To backup such submissions, he relied on paragraphs 21, 22 and 23 of the Applicant's affidavit and paragraph 8 of the Affidavit in reply filed by the 4th Respondent therein. He maintained, therefore, that, in arriving at its decision, the court determined the application for temporary injunction and refused it for a serious want of merit not affecting the case at all.

Finally, regarding the argument that, the court entered a default judgment in favour of a Respondent who is not the owner of the subject petroleum products, it was Capt. Bendera's submission that, paragraph 7 of the written statement of Defence and the counterclaim (paragraphs 15, 16 and 17) were very clear that the 4th Defendant in the main suit and Plaintiff in the counterclaim is a transporter having trucks containing cargo of petroleum fuel belonging to Mr. Charles

Pius Tungu. In view of such submissions, he urged this court to dismiss the application with costs.

In a brief rejoinder, Mr. Kamara reiterated his submission in chief and distinguished the authorities relied upon by the Respondent on the ground that, the facts of this case are different since there is an issue of illegalities on the said default judgment.

Mr. Kamara contended further that, while the granting of general damages is at the discretion of the Court, the requirement to assign reasons is a legal requirement and, that, the Respondent has not cited any law to the effect that exempts the court from assigning reasons/basis for general damages in the default judgment. On those grounds, he urged this Court to grant the prayers sought in the chamber summons.

I have taken time to carefully consider the rival arguments by the learned counsel for the parties. The questions I am supposed to address are whether the applicant has disclosed sufficient reasons for the delay in lodging the application for which an extension of time is sought and,

whether there are illegalities which would warrant the granting of the prayers sought even where this court finds that there are no disclosed sufficient grounds of the Applicant's delay.

In essence, the principle stands to be that there must be sufficient reasons or cause if an application of the like nature is to be granted. Besides, any delay even for a day must be accounted for and there is a plethora of cases which have cemented the requirement of accounting for every day of delay.

Cases which have established that principle include the case of **Bushiri Hassan vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (unreported), **Karibu Textile Mills vs. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (unreported), and **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and **Tanga Cement Company Limited vs. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001.

In the case of **Tanga Cement Company Limited** (supra) the Court of Appeal was of the view that, when

determining whether to grant an application for extension of time or not:

“a number of factors have to be taken into accounting, [including] whether or not the application has been brought promptly, the absence of any valid explanation for delay, [as well as] lack of diligence on the part of the applicant.”

In the present application at hand, the Respondent’s counsel has urged this court to dismiss the entire application for failure to disclose sufficient reasons for delay. He has contended that, about 11 days were not accounted for if one computed the time from when the default judgement was delivered on the 14th day of June 2016 to 28th day of June 2016 when the Notice of Appeal was filed in Court; and from the 26th day of August 2022 when the Court of Appeal issued its ruling to the 13th day of September 2022 when the application was filed.

According to Capt. Bendera, the 11 days that remains as a balance of days having deducted the 21 days, (time when one may apply to set aside a default judgment), are not accounted for at all. Looking at his reply to Capt. Bendera's submission, I find that, Mr Kamara has not addressed the said 11 days and no explanations are given to account for them.

As a matter of established legal principle, each day must be accounted for and failure to do so means that, the application will not be granted. The cases of **Bushiri Hassan vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (unreported), and **Zuberi Nassor Moh'med vs. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application No.93/15 of 2018, (CAT) at Zanzibar (Unreported), are very clear on that.

As it will be noted in his submission, Capt. Bendera had no issue with the number of days spent in pursuing the appeal and, hence, the issue regarding *bona fides* in pursuing the appeal cannot be raised. His concern, however, was on the issue regarding the 11 days which are unaccounted for by the Applicant aside from the days spent in pursuing the appeal

process which proved failed. Since no response has been received on that, it follows that, the Applicant has not been able to account for each day of his delay.

As regards the issue of illegality of the decision impugned as one of the grounds which may be relied upon by this court to grant an application for extension of time, having looked at both parties' submissions, and, while I do agree that illegality may constitute a sufficient ground for granting of an application for extension of time within which an Applicant is to act, still, that ground alone is not free from limitations.

I hold it to be so, because, as it was stated in the cases of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and, **Praygod Mbaga vs. The Government of Kenya Criminal Investigation Department & Another**, Civil Ref. No.04 of 2019 (unreported), where the issue of illegality is raised, the Court must be satisfied that, such a claimed illegality really exists, and it is apparent.

In the In the **Lyamuya's case** (supra) the Court of Appeal of Tanzania had the following to say:

"Since every party 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 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.**' (Emphasis added).

In his submission, Mr. Kamara has pegged his arguments regarding the issue of illegality on three grounds, namely, granting general damages without any basis or reasons being assigned; the court acting while it was already *functus officio*, and entering judgement in favour of the Respondent while the pleading clearly showed that he was not the owner of the subject petroleum product.

In my view, and, as correctly stated by Capt. Bendera, award of general damages is at the discretion of the court. Moreover, once pleaded, general damages need not be proved. See the cases of **Cooper Motor Corporation Ltd vs. Moshi/Arusha Occupation Health Services** [1990] TLR 96 and **Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service vs. Zawadi Juma Mruma**, Civil Appeal No. 80 of 2009 CAT (Unreported).

There is no dispute that the Respondent pleaded for award of general damages when he filed the counterclaim. That being the case, and since the court acted in line with Rule 23(1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended) and proceeded to issue a default

judgement, I find that, its exercised of discretion to award general damages cannot be regarded as an illegality. Besides, are contended by Cpt. Bendera, such exercise of discretion cannot be a basis upon which one should mount an application for extension of time.

As regards the rest of the points contended to be constituting illegality, I find that the same cannot constitute illegality of the decision intended to be impugned since the question whether they constitute illegality or not, is not such would invite a long-drawn argument or process thus, going contrary to what the Court of Appeal stated in the case of **Lyamuya's case** (supra) concerning an "illegality" and how it should be measured.

In view of what I have stated herein above, I do not find merit in this application. Consequently, I hereby deny it and settle for the following orders:

1. That, the Application is hereby dismissed.
2. The dismissal of this application is with orders as to costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 04TH DAY OF
AUGUST 2023**



**DEO JOHN NANGELA
JUDGE.**

Date: 04/08/2023 Coram: Hon. Nangela, J.

For the Applicant: Absent

For the Respondent: Absent

C/Clerk: Fortunata

Court: Ruling delivered today, this 04th of August 2023 in the
absence of both parties.



**DEO JOHN NANGELA
JUDGE.**