IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 439/01 OF 2020

JUBILEE INSURANCE COMPANY (T) LIMITED..........................APPLICANT

VERSUS

MOHAMED SAMEER KHAN .... RESPONDENT

(Application for extension of time within which to serve the Respondent with the Notice of Appeal arising from the decision of the High Court of Tanzania, at Dar es Salaam)

dated the 12th day of July, 2019

(Mlyambina, J.)

in

Civil Case No. 73 of 2012.

RULING

5th & 12th October, 2022

MWAMPASHI, J.A.:

The applicant herein, Jubilee Insurance (T) Ltd, has lodged this application by way of a notice of motion under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), for extension of time within which to serve the respondent with the notice of appeal arising from the decision of the High Court of Tanzania at Dar es Salaam in Civil Case No. 73 of 2012. The application is supported by the affidavit deponed by one Mr. David Shoo, the legal officer and Board Secretary of the applicant and it is resisted by the affidavit in reply affirmed by the respondent Mr. Mohamed Sameer Khan.

Briefly, the background of the matter goes as follows: The respondent herein, sued the applicant before the High Court of Tanzania at Dar es Salaam in Civil Case No. 73 of 2012. The suit was based on insurance contract and the respondent's claims against the respondent included payment of USD 130,000.00, being the value of his insured motor vehicle, which was involved in an accident and which was allegedly totally damaged. Having heard the evidence from both sides, the High Court (Mlyambina, J), delivered its judgment in favour of the respondent on 12.07.2019 and made the following orders:

1. *The defendant to pay the plaintiff USD 130,300 being the indemnity value of the insured motor vehicle.*
2. *The defendant to pay the plaintiff 12% per month from the date of filing of the suit to the date of judgment.*
3. *The defendant to pay the plaintiff Court interest rate of 12% from the date of judgment to the date of settlement of the decree in full.*
4. *The defendant to pay the plaintiff general damages at the tune of TZS fourteen million.*
5. *The defendant to pay the plaintiff costs of the case.*

Dissatisfied with the High Court decision and intending to appeal against it, the applicant duly lodged a notice of appeal on 07.08.2019, in terms of rule 83 (1) and (2) of the Rules. Having lodged the notice of appeal, the applicant did, however, not serve a copy of the said notice on the respondent within 14 days as required by rule 84 (1) of the Rules, hence the instant application for extension of time within which to do so. It is also worth noting that before filing the instant application on 08.10.2020, the applicant had on 09.03.2019 filed Misc. Application No. 121 of 2019 before the High Court for extension of time within which to apply for leave to appeal. This application was however withdrawn at the instance of the applicant, on 10.07.2020.

According to the notice of motion and the supporting affidavit, the application is premised on the following grounds:

1. *That there exist errors apparent on the face of record which have made the decision of Honourable Mlyambina, J. of the High Court illegal.*
2. *That the applicant spent a considerable amount of time to look for an advocate after the initial advocate withdraw himself from the case.*
3. *That the applicant experienced a technical delay.*

4. That the intended appeal has overwhelming chances of success.

At the hearing of the application, the applicant was represented by Mr. Audax Kahendaguza Vedasto, learned advocate, whilst Messrs. Taher Muccadam and Msengezi Emmanuel, both learned advocates, appeared for the respondent.

The focus and concentration of Mr. Vedasto in his submissions in support of the application was on the ground of illegality. It was however argued by him in regard to other grounds that, as averred in paragraph 7 of the supporting affidavit, the applicant was let down by her previous advocate's inaction and negligence. He contended that contrary to the applicant's instructions and without her knowledge, the said advocate did not serve a copy of the notice of appeal to the respondent within the prescribed period of 14 days. Mr. Vedasto further argued that, by the time the said applicant's advocate withdrew his service on 23.11.2019, the period within which to serve the respondent had expired. He insisted that in the circumstances of this case, the inaction and negligence of the applicant's previous advocate, constitutes a sufficient cause for extension of time.

As regards to the ground on illegality which, as alluded to above, forms the crux of the applicant's application, it was Mr. Vedasto's

argument that the High Court decision is tainted with illegality as it can be manifestly observed on the 2nd and 3rd orders made by the High Court in regard to the interest rates awarded to the respondent. He particularly referred the Court to the 2nd order made by the High Court and argued that the interest rate of 12% per month from the date of filing the suit to the date of judgment which is equivalent to 144% per annum, is illegal and unreasonable. On this, the Court was referred to the case of **Said Kibwana and General Tyre E.A. LTD v. Rose Jumbe** [1993] T.L.R. 175.

Mr. Vedasto also contended that the 3rd order where interest rate of 12% per annum from the date of judgment to the date of full settlement was awarded, is also illegal because according to section 29 read together with Order XX rule 21, both of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC), the allowable court rate is 7% per annum. Mr. Vedasto further argued that interest can only be higher where parties had an agreement to that effect, which is not the case in the instant case. He contended that the High Court had no jurisdiction to award court interest at the rate of 12%. To buttress his argument, he referred the Court to the decision of the Court in **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd** [1995] T.L.R. 205.

In his further submissions, Mr. Vedasto insisted that the High Court decision is tainted with illegality which constitute a sufficient cause for extension of time. He contended that this ground alone suffices for the instant application to be granted. On this, reliance was placed on the decisions of the Court in **V.I.P. Engineering and Marketing Limited and 2 Others v. CITIBANK Tanzania Limited**, Consolidated Civil References Nos. 6, 7 and 8 of 2006, **Juto Ally v. Lucas Komba and Another**, Civil Application No. 484/17 of 2019, **Ngolo s/o Maganga v. Republic**, Criminal Appeal No. 331 of 2017 and **Masunga Mbegeta and 784 Others v. The Attorney General and Another**, Civil Application No. 173/01 of 2019 (all unreported).

For the above grounds, it was argued by Mr. Vedasto, that sufficient cause has been established to warrant extension of time. He therefore prayed for the application to be granted with costs.

Having fully adopted the affidavit in reply, Messrs. Muccadam and Msengezi, learned advocates for the respondent, submitted that the applicant has failed to establish a sufficient cause warranting extension of time and therefore that the application has to be dismissed with costs. They argued that the applicant has failed to account for the delay and that both the applicant and her two advocates were negligent and

did not act diligently. Relying on **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported), they insisted that for the Court to extend time as prayed by the applicant, sufficient cause must be shown and further that though granting such an application is in the discretion of the court, the discretion must be exercised judiciously in accordance with rules of reasoning and justice and not according to private opinion.

Explaining how the applicant has failed to account for the delay, the learned advocates for the respondent pointed out that: **First**, the delay for the period from 07.08.2019 when the notice of appeal was lodged to 23.11.2019 when the applicant's previous advocate withdrew his services which is more than 90 days, is not accounted for. In regard to this period, it was also insisted that according to an email annexed to the supporting affidavit as annexure JBL3, the reason for the withdrawal of the previous applicant's advocate was the failure by the applicant to approve the advocate's instructions for appeal purposes. **Second**, the period from 24.11.2019 after the withdrawal of the previous advocate to 09.03.2020 when the new advocate was instructed and when he wrongly filed the application for extension of time to apply for leave to

appeal instead of filing the instant application which again is more than 90 days, is also not explained. **Third**, that the period also not accounted for, is that from 10.07.2020 when the wrongly filed application was withdrawn to 17.10.2020 when the instant application was filed. It was therefore argued that there was unexplained inordinate delay which exhibit sloppiness, negligence and inaction on the part of the applicant and her advocates and further that the said inaction and negligence of the advocates is not an excuse. To cement this argument the leaned advocate cited the decision of the Court **in Paul Martin v. Bertha Anderson,** Civil Application No. 07 of 2005 (unreported).

Regarding the ground of illegality, the learned advocates for the respondent appreciated the position of the law on illegality as a ground for extension of time, as propounded in **Principal Secretary, Ministry of Defence and National Service v. Divram P. Valambhia** [1992]T.L.R. 185 and in **V.I.P. Engineering and Marketing Limited and 2 Others** (supra). The position was followed in subsequent decisions of the Court, like in **Iron and Steel Limited v. Martin Kumalija and 117 Others,** Civil Application No. 292/18 of 2020 and **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (both unreported), should be

acknowledged. They insisted that illegality does not constitute a sufficient ground in every application for extension of time and also that even where illegality is pleaded, it must be apparent on the face of the record and it should not be that which has to be discerned from long and protracted arguments.

It was further argued by the advocates for the respondent that, the ground of illegality raised in this application is unfounded because the interest rate of 12% per month awarded on the 2nd order was from the date of filing the suit to the date of the judgment and not to the date of full settlement and also that the rate was awarded in the discretion of the High Court. As for the 12% interest per annum from the date of judgment to the full settlement awarded in the third order, it was argued that the same is not illegal because it is within 7% and 12% allowable by Order XX rule 21 of the CPC. They also argued that all cases cited on the issue of interest rates were on appeal and are distinguishable from the instant case.

The learned advocates for the respondents finally submitted that in the instant application, the ground that the intended appeal has overwhelming chance of success is irrelevant. They also argued that the

applicant encountered no technical delay worth of consideration and that the application should therefore be dismissed with costs.

In his brief rejoinder besides reiterating his earlier submissions, Mr. Vedasto contended that even if it is true that the said advocate had no instruction for appeal purposes, he was still duty bound to serve the notice to the respondent. As regards the ground on illegality it was insisted by Mr. Vedasto that there is illegality on the interest rates awarded by the High Court which constitutes a sufficient cause for extension of time. He therefore urged the Court to grant the application by extending time within which to serve the respondent with the notice of appeal.

Having examined the notice of motion, the supporting affidavit as well as the affidavit in reply and also after hearing the rival submissions from the counsels for the parties, the only issue for determination is whether the applicant has managed to show sufficient cause for the Court to extend time within which to serve the respondent with the notice of appeal.

The power of the Court to enlarge time for the doing of any act authorized or required by the Rules is derived from Rule 10 of the Rules under which it is stated that:

"The Court, may, upon good cause shown, extend time limited by these Rules or by any decision of the High Court or Tribunal, for the doing of any act authorized or required by these Rules, whether before or after expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended".

It is a settled position of the law that extension of time is a matter of the discretion of the Court which must be exercised judiciously according to the facts of each case. In applications for extension of time, the Court is required to consider whether or not sufficient cause for delay has been shown to warrant extension of time. There is, however, no definition of what amounts to "sufficient cause" but in determining whether, in a particular case, sufficient cause has been established or not, a number of factors have to be taken into account depending on the circumstances of that particular case. The Court has to look, for instance, at whether the applicant was diligent, reasons for the delay, the length of the delay, the degree of prejudice to the respondent if time is extended, whether there is a point of law or the illegality or otherwise of the impugned decision etc – see, **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987,

Tanga Cement Co. v. Jumanne Masangwa and Another, Civil Application No. 6 of 2001, **Tanzania Revenue Authority v. Tango Transport Co. Ltd,** Consolidated Civil Applications Nos. 4 of 2009 and 9 of 2008 and **Bertha Bwire v. Alex Maganga,** Civil Application No. 7 of 2016, (all unreported).

Also relevant to applications for extension of time is the position of the law that for the Court to extend time, every day of delay must be accounted for. See- **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 and **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011 (both unreported). In the former case, the Court stressed that:

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

Guided by the above demonstrated position of the law, my first task is to examine whether the applicant has accounted for the delay. This question should not detain me. I entirely agree with the learned advocates for the respondent that no good reasons have been advanced by the applicant to justify the

inordinate delay of more than 13 months from 07.08.2019 when the notice of appeal was lodged to 08.10. 2020 when the instant application was filed.

According to an email from the applicant's previous advocate annexed to the supporting affidavit as annexure JBL3, the said advocate who had lodged the notice of appeal on 07.08.2019, withdraw his services on 23.11.2019 for lack of instructions for appeal purposes. This fact is not contested by the applicant and the said advocate cannot therefore be the only one to be blamed for the delay to serve the respondent with the notice of appeal, but the applicant is equally responsible. From 23.11.2019 after the withdrawal of the previous advocate there is a period of more than 90 days up to 09.03.2020 when the applicant's new advocate was engaged and when he wrongly filed Misc. Application No. 121 of 2019 before the High Court for extension of time to apply for leave to appeal, only to later withdraw it on 10.07.2020. This period of more than 90 days has not been accounted for. The applicant has advanced no good reasons why after learning that the respondent had not been served with the notice of appeal on 23.11.2019, she remained idle till when she engaged the new advocate who, as intimated above, ended up wasting more time by filing a wrong

application to the High Court. The applicant ought to have promptly and diligently applied for extension of time soon as it came to its knowledge that the notice of appeal had not been served on the respondent by the previous advocate. Instead, through its new advocate, the applicant filed an irrelevant application before the High Court hence wasting more time. Again, from 10.07.2020 after the withdrawal of the wrongly filed application before the High Court, the applicant wasted the period of about three months before lodging the instant application on 08.10.2020. This period has also not been accounted for.

From the above, it is therefore clear, not only that the applicant has totally failed to account for the delay but also that both the applicant and her advocates exhibited negligence and inaction. It should also be emphasized that the negligence of an advocate or his ignorance of the procedure, is not an excuse and does not constitute a sufficient cause for extension of time. In **Exim Bank (Tz) Ltd v. Jacquilene A. Kweka,** Civil Application No. 348 of 2020 (unreported) the Court stated, among other things, that:

> *"... firms are manned by lawyers who ought to know court procedures. In fact, failure of the advocate to act within the detect of law cannot*

constitute a good cause for enlargement of time".

Further, in the case of **Omar Ibrahim v. Ndege Commercial Services Ltd**, Civil Application No.83 of 2020 (unreported) the Court stressed that neither ignorance of the law nor counsel's mistake constitutes good cause. It was further held that Lack of diligence on the part of the counsel is not sufficient ground for extension of time. See also **Wambura N. J. Waryuba v. The Principal Secretary Ministry of Finance & Another,** Civil Application No. 320 of 2020 (unreported).

Turning to the ground on illegality, it should be restated at the outset that, regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay, a claim of illegality of the impugned decision constitutes a sufficient cause for extension of time under rule 10 of the Rules. See- **VIP Engineering and Marketing Limited & 2 Others** (supra). It is also settled that, where illegality is raised as one of the grounds for extension of time, it must be satisfied that the claimed illegality really exists. Further, in accordance with **Lyamuya Construction Company Ltd** (supra), the illegality in question must be that which raises a point of law of sufficient importance and the same must be apparent on the face of record not one that would be discovered by a long-drawn argument or process.

Applying the above principles to the instant application, I have examined the High Court decision, particularly the 2nd and 3rd orders on interest rates awarded of which it is complained are tainted with illegality. Basing on my observation, I am not persuaded that there is any illegality that is apparent on the face of record and neither can it be discerned from those two orders that can be said to constitute a sufficient cause for the Court to extend time within which to serve a copy of the notice of appeal to the respondent. Given the circumstances and without prejudice, it is my considered view that even if there is any unreasonableness or error on part of the High Court in awarding interest at those rates, the same does not constitute a sufficient cause for extension of time. It should be insisted that not every error committed by a court amount to an illegality.

I have also considered the grounds that the intended appeal stands overwhelming chances of success and also that the applicant spent considerable time looking for an advocate following the withdrawal of its previous advocate. Under the circumstances of this matter, the overwhelming chances of success cannot be one of the grounds that constitutes a sufficient cause under rule 10 of the Rules. It also leaves a lot to be desired that the applicant which is an insurance

company could spend three months looking for an advocate to represent it. This is a demonstration of inaction and negligence and as such, the applicant was a cause of its peril and must shoulder the blame.

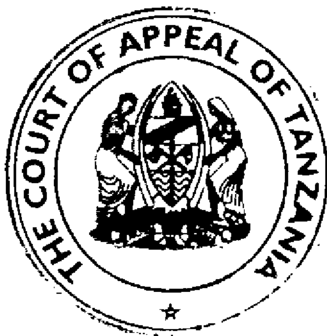
For the above given reasons, I find that no sufficient cause has been shown to warrant extension of time as sought by the applicant. The application is therefore accordingly dismissed with costs.

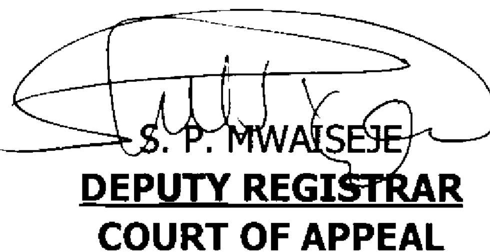
It is so ordered.

DATED at **DAR ES SALAAM** this 10th day of October, 2022.

A. M. MWAMPASHI
JUSTICE OF APPEAL

Judgment delivered on this 12th day of October, 2022 in the absence of both parties is hereby certified as a true copy of the original.





S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL