

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT ARUSHA**

**CIVIL APPLICATION NO. 128/02 OF 2022**

**ARUSHA ART LIMITED.....APPLICANT**

**VERSUS**

**ALLIANCE INSURANCE CORPORATION LIMITED.....RESPONDENT**

**(Application for extension of time to file application for review from  
the Judgment of the Court of Appeal of Tanzania, at Arusha)**

**(Lila, Ndika, Mwambegele, JJ. A.)**

**dated the 19<sup>th</sup> day of April, 2021**

**in**

**Civil Appeal No. 297 of 2017**

.....

**RULING**

2<sup>nd</sup> & 5<sup>th</sup> October, 2023

**MDEMU, J.A.:**

Arusha Art Limited, the applicant herein, has preferred this application so that time be enlarged within which to file an application for review. The application is by way of notice of motion premised under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The supporting affidavit and supplementary affidavit of the

applicant deposed by one Guvantarai Shantilal Sachdev, were filed to support the application thereof.

In the depositions by the deponent both in the supporting affidavit and supplementary affidavit is such that; in the High Court of Tanzania at Arusha, in Civil Case No. 27 of 2012, the applicant filed a suit claiming TZS. 1,318,338,907.00 being loss due to destruction of its building, loss of machinery, spare parts, parked motor vehicles and motor cycles on plot No. 34F, Unga Limited, following fire outbreak. Having heard the case, the High Court (Mwaimu J.) decreed as follows:

- a) The defendant should pay reinstatement costs for the building at the rate of Tshs. 377,534,300/= which is the amount estimated by the middle bidder Jandu Plumbers.*
- b) The plaintiff is awarded replacement costs for three motor vehicles subject to proof of value at the time of loss through documentary evidence to be submitted to the defendant.*
- c) Parties should renegotiate on the amount to be compensated as replacement costs for spare parts stock, equipment and machinery.*
- d) As there is still a room for the parties to negotiate on replacement costs for spare parts stock and*

*equipment and machinery; each party should bear its own costs.*

In the appeal to the Court of Appeal by the respondent herein vide Civil Appeal No.297 of 2017, on 19<sup>th</sup> April, 2021 the Court vacated the High Court decree and instead, ordered the respondent to indemnify the applicant as follows: one, TZS. 132,089,000.00 being loss arising from the damage of garage building; two, TZS. 82,817,709.00 for loss arising from the destruction of spare parts and three, TZS. 40,559,311.00 for the loss due to burnt equipment and machinery. Following this order, the applicant intends to move the Court to review that decision, but as it did not do so in time, it instituted this application to have the time extended. For reasons to be apparent herein, only grounds 2, 5 and 7 in the notice of motion will be the subject of determination. They read as follows after having being chronologically renumbered as grounds 1, 2 and 3:

- 1. On the date of the delivery of the judgment, the applicant's managing director Mr. GUVANTRAI SHANTILAL SACHDEV was attending medical treatment in the United Kingdom because the said director and his family were suffering from among other diseases, the COVID 19.*
- 2. The intended review stands overwhelming chances of succeeding on among other grounds,*

*the decision intended to be reviewed was made without jurisdiction as the Court wrongly assumed the original Jurisdiction of the High Court in deciding the first and second grounds of appeal. The Court's decision is therefore reviewable under grounds (a), (c) and (d) of Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009.*

*3. The intended review also intends to address illegality or otherwise of the decision of the Court in Civil Appeal No. 297 of 2017.*

At the hearing of this application on 2<sup>nd</sup> October, 2023, the applicant was represented by Mr. John Materu, learned advocate whereas the respondent had the service of Mr. Sinare Zaharan, learned advocate also.

Submitting in support of the application, Mr. Materu adopted first, the notice of motion, supporting affidavit, supplementary affidavit and his written submissions together with the filed list of authorities. Having made such adoption, Mr. Materu's main thrust upon which to base his application was in twofold. **One** was that, the applicant was abroad for treatment during the delivery of the impugned decision and upon his return, continued for further treatment here in Arusha. To impress me regarding this ground, the learned counsel cited the case of **Alasai**

**Josiah (Suing by his Attorney Oscar Sawuka) v. Lotua Valley Ltd.,** Civil Application No.498/12 of 2019 (unreported) to bolster his assertion.

**Two**, is in respect of ground of illegality. In this one, his submission was that, this Court had no jurisdiction to resolve grounds 2 and 3 of the appeal. The two grounds read as hereunder as reproduced from page 8 through 9 of the impugned judgement:

- 1. The Honourable High Court Judge erred in law and fact when he ordered replacement costs for three motor vehicles, subject to proof of value at the time of loss through documentary evidence to be submitted to the appellant, instead of dismissing the claim item for absence of evidence or in the alternative on the ground that the suit was prematurely filed.*
- 2. The Honourable High Court Judge erred in law and in fact when he held that, the respondent should pay reinstatement costs of the building at the rate of TZS.377, 654,300.00 being an amount estimated by a bidder contrary to the indemnity insurance principle underlying the contractual relationship between the parties as per evidence tendered before him.*

He concluded by submitting that, the Court lacked jurisdiction because, upon a finding that the trial High Court did not resolve some factual issues complained of in the grounds of appeal, then the Court was mandated to set aside that decision and order a retrial. As the High Court never made a finding to that effect, then this Court had no jurisdiction to entertain such grounds of appeal in terms of section 4(1) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2019. He also cited the following cases urging for a retrial order under the circumstances: **Joseph Ndyamkama (Administrator of the Estate of the late Gratian Ndyamkama) v. N.I.C Bank Tanzania Ltd.& Three Others** [2020] T.L.R. 497 and **Stanslaus Rugaba Kasusura & Another v. Phares Kabuye [1982] T.L.R. 338**. As to illegality being a ground for extension of time, the learned counsel cited the following cases: **P. 9219 Abdon Edward Rwegasira v. the Judge Advocate General**, Criminal Application No.5 of 2011; **Brazafric Enterprises Ltd. v. Kaderes Peasants Development (PLC)**, Civil Application No. 421/08 of 2021 and **the Attorney General v. Tanzania Ports Authority**, Civil Application No. 87 of 2016 (all unreported). On that stance, the learned counsel urged me to allow the application with costs.

In reply, as was to Mr. Materu, in resisting the granting of the application, Mr. Sinare adopted an affidavit in reply, written submissions together with the filed list of authorities. Having done so, it was his submission that, the attached copy of a passport does not indicate if the applicant was abroad for treatment because entries in the said passport is to the effect that, the deponent exit was on 8<sup>th</sup> December, 2020 while entry was on divers' years, that is, 2020, 2019 and 2018. To him therefore, evidence is wanting to the effect that, the deponent returned in the United Republic of Tanzania in the year 2022.

He emphasized further that, the applicant being a corporate entity, its affairs are run by the directors of the company and the Annual General Meeting and therefore, absence of the deponent alone at any given time cannot prevent the applicant to file the intended application for review in time.

As to the ground of illegality in the impugned decision, the learned counsel submitted that, there is nothing in the form of illegality in the impugned decision in the manner the applicant wanted the Court to believe. In his further submission, the learned counsel stated that, what this Court did in Civil Appeal No. 297 of 2017 was just to award replacement costs of the motor vehicles. It therefore made a finding as

to whether it was correct for the High Court to abdicate that duty in adjudication. This to him is not a ground of illegality to base in extension of time. He finally urged me to dismiss the application with costs on account that, this Court had jurisdiction under rule 36 of the Rules to re-appraise evidence on record in its appellate jurisdiction.

I heard the parties. This being an application for extension of time, this Court, in many occasions, did pronounce itself on the requirement to establish sufficient cause in determining whether or not time should be extended. In **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported), just one to mention, the Court observed that, enlargement of time is entirely in the discretion of the court to grant such an application or to refuse it. The Court went on to state that, in the exercise of that discretion, courts may only grant the application where it has been established by the applicant that, the delay was with sufficient cause. In essence, this is the spirit envisaged under the provisions of rule 10 of the Rules.

In the instant application as per paragraphs 2, 5 and 7 of the notice of motion, the applicant stated only two grounds within which the applicant have based to constitute sufficient cause. One, is the ground



that the appellant was on treatment abroad and two, the question of illegality in the impugned judgment.

As to treatment abroad, it is the duty of the applicant to account for each day of the delay by establishing through evidence that at that time, the deponent was abroad for treatment. In **The Board of Trustees of the Free Pentecostal Church of Tanzania v. Asha Selemani Chambanda & Another** (supra), it was held at page 4 of the ruling regarding accounting for days of the delay that:

*"Be it as it may, the issue whether the delay is ordinate or not is settled through decided cases. It revolves around the applicant accounting for each day of delay. See for instance: **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania (YMCA)**, Civil Application No. 2 of 2010 and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (both unreported)".*

Was this done in the instant application? Mr. Zaharan submitted to have not been done. In my considered view, he is right and I have no ground whatsoever to disagree with him. The reason is one, that is, as the deponent deposed to have been abroad for treatment, then he was to establish by way of documentation that he was really abroad. I am

saying so because the copy of the passport annexed to the supplementary affidavit as annexure "A" does not in any way reflect that between the dates of the impugned decision and the date of filing this application, the deponent was abroad. As per that annexure, the deponent exit was on 8<sup>th</sup> December, 2020 while entry was on divers' years, that is, 2020, 2019 and 2018. As per the record, the impugned judgment was delivered on 19<sup>th</sup> April, 2021. It is obvious therefore, as submitted by Mr. Zaharan that; the annexed document is devoid of evidence to substantiate any connection with the absence of the applicant in the United Republic of Tanzania. It is to say, the applicant has failed in total to account for each day of the delay. This ground is accordingly dismissed.

On the ground of illegality, the applicant fronted the issue of jurisdiction of this Court sitting on appeal to determine grounds of appeal and proceed to grant reliefs on matters not decided by the High Court in the exercise of its original jurisdiction. They are mentioned as, one, ordering replacement costs and two, payment of restatement costs. On the other hand, having considered matters without jurisdiction, the impugned judgement on that account is flawed with errors on the face of the record. These two, in the applicant's perspective, is what form the contents of the ground on illegality.

As said, the respondent on his part submitted that those are not errors apparent on the face of record calling for review. Equally, he fronted that, the Court had jurisdiction to do so in the course of appraising the evidence on record. On my part, I have no jurisdiction to go that far. The least a I can say is that, the applicant has demonstrated existence of illegality relating to jurisdiction. In this one, under rule 66 (1) (d) of the Rules, review is permitted where, among other grounds, the issue of jurisdiction is raised.

Having observed so, the principle is clear that, where the issue of illegality is raised as a ground or reason for extension of time, then such reason amounts to good cause. See **Hamis Babu Bally v. the Judicial Officers Ethics Committee and Three Others**, Civil Application No.130/01 of 2020 (unreported) and **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185. For instance, in the case of **Vodacom Tanzania Limited v. Innocent Daniel Njau**, Civil appeal No.60 of 2019 (unreported), at page 9 regarding illegality as a ground for enlarging time, the Court observed that:

*We are of the considered opinion that the learned Judge ought to have exercised his discretion judiciously to consider even the ground of*

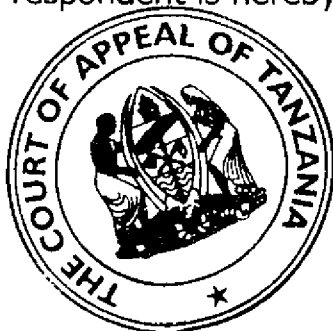
*illegality which was also pleaded by the appellant because "sufficient cause" does not entail only reason for the delay but also sound reasons for extending time. In particular, whether the ground of illegality raised by the appellant was worth consideration in determining whether or not to grant the application.*


In the final analysis, and for the foregoing, I am of the firm view that, the applicant herein has demonstrated sufficient cause basing on the ground of illegality in the impugned decision. I thus find the application meritorious and consequently, I proceed to allow the same. Costs to be in the cause.

**DATED at ARUSHA** this 5<sup>th</sup> day of October, 2023.

G. J. MDEMUS  
**JUSTICE OF APPEAL**

The ruling delivered this 5<sup>th</sup> day of October, 2023 in the presence of Mr. Mitengo Metusela, holdings brief for Mr. John F. Materu, also holdings brief for Mr. Zaharani Sinare, learned advocates for the applicant and respondent is hereby certified as a true copy of the original.



  
J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**