IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 370 OF 2022

INSURANCE GROUP OF TANZANIA LIMITED ..... APPLICANT

VERSUS

JOEF GROUP (T) LIMITED ..... RESPONDENT

(Arising from the Order of this Court in Civil Revision No. 38 of 2021)

RULING

29th November 2022 & 25th January, 2023

KISANYA, J.:

This is an application for extension of time within which to file an application for setting aside the dismissal order of this Court in Civil Revision No. 38 of 2021, dated 17th May, 2022. The application is brought under section 14(1) of the Law of Limitation Act, Cap. 89, R.E. 2019 and supported by the affidavit of Emmanuel William Kessy, learned counsel. The respondent filed a counter affidavit taken out by her Managing Director, Joseph Edward Missana.

The facts leading to this application are as follows. On 22nd November, 2021, the applicant filed under a certificate of urgency, an application for revision of the ruling and the garnishee orders of the Resident Magistrate Court of Dar es Salaam at Kisutu in execution of the judgment and decree

in Civil Case No. 296 of 2015. The said revision was registered as Civil Revision No. 38 of 2021. It was dismissed for want of prosecution on 17th May, 2022 on the account that the applicant had defaulted to appear when the revision was placed for orders on 8/12/2021 and on other five occasions.

It is the applicant's averment that upon filing the application for revision, she made follow up of the assigned judge and summons but in vain. It is further stated that the online system revealed that Civil Revision No. 38 of 2021 was between **Gofrey Sayi and Anna Siame** and is pending before Hon. Mruma, Judge. The applicant states that he was not aware of the dismissal order until 1st August, 2022. He alleges that, after making physical follow up of the matter in the registry books, it came to her knowledge that Civil Revision No. 38 of 2021 was assigned to two different matters of the same category. It is further stated that, on the same day (1st August, 2021), the applicant detected that her application for revision had been dismissed for want of prosecution and thus, forced to file the present application for extension of time to set aside the dismissal order.

With leave of this Court, the application was heard by way of written submissions. The written submission in support of the application was filed by Anindumi Semu, learned advocate, while Mr. Edward Lisso, also learned advocate filed the written submission in opposition of the application.

In his submission in chief, Mr. Semu started by pointing out that the

application is made under section 14 (1) of the LLA and praying to adopt the supporting affidavit to form part of his submission. The learned counsel reiterated the facts deposed in paragraphs 2, 3, 4 and 5 of the affidavits as summarized afore. He submitted that the said facts show that the applicant knew about the dismissal order after lapse of time required to file an application to set aside the dismissal order.

Mr. Semu further submitted that the Court is required to distinguish technical delay and actual delay. He expounded his argument by citing the case of **Fortunatus Masha vs William Shija and Another** [1997] 154 and urged the Court to consider that the applicant lodged the application for revision seven days after delivery of the ruling of the trial court.

The learned counsel was of the further argument that the respondent will not be prejudiced if the application is granted. It was also his argument that the applicant was not negligent as stated in the counter affidavit. His argument was based on the reason that the mix up of the date and information in the registry and court online system was out of the control of the applicant.

With regard to the grounds for extension of time, Mr. Semu relied on the case of **Elias Mwakalinga vs Domir Kagaruki and 5 Others**, Civil Application No. 120/12 of 2018 cited with approval in **Damari Waston Bijinja vs Innocent Sangano**, Misc. Civil Application No. 30 of 2021 where

it was held that the factors are the length of delay, the reasons of delay, whether there is arguable case such as point of law on illegality, and the degree of prejudice to the respondent if the application is granted.

As for the length of delay, the learned counsel contended that the applicant was ready to file the application on 1st August, 2022 but failed because it took time to locate the court file and obtain the copy of ruling appended to the affidavit as *Annexure IGT3.*

Mr. Semu further submitted that it was not practical to account for each day of delay in the circumstances of this case on the contention that the registry is not accountable to show when the documents were granted or issue exchequer receipt.

On the ground of illegality, Mr. Semu submitted that the applicant was denied the right to be heard as the dismissal order was made without her knowledge. The learned counsel referred the Court to the case of **Pili Ernest vs Moshi Musami**, Civil Appeal No. 39 of 2019 where it was held that courts should not make decision on the matter affecting rights of the parties without according them an opportunity to be heard.

In the light of the foregoing, Mr. Semu asked this Court to consider the circumstances of the case and grounds advanced by the applicant and proceed to grant the application.

Mr. Lisso vehemently contested the application. The learned counsel adopted the counter affidavit as part of his submission. Relying on the case **Shelina Jahangir and 4 Others vs Nyakutonya N.P.F Company Limited**, Civil Application No. 47/08 of 2020 (unreported) in which the Court of Appeal restated the general principle on application of this nature, he submitted that the issue for consideration and determination by this Court is whether the applicant has shown good or sufficient cause. He was of the view that the applicant has failed to demonstrate any sufficient reason for the delay to pursue the matter with due diligence. It was his further contention that the applicant has demonstrated that she was not diligent.

As for the contention that the delay was caused by a technical delay, Mr. Lisso submitted that the case of **Dr. Fortunatus Macha** (supra) is irrelevant to the facts under consideration on the contention that the delay herein was due to the applicant's ineptitude in pursuing the matter.

Mr. Lisso cited the case of **Bharya Engineering & Contracting Co. Ltd vs Hamoud Ahmed Nassor,** Civil Application No. 342/01 of 2017 (unreported) where it was held that each and every day of delay must be accounted for in applications of this nature. He went on to submit that the applicant has dismally failed to account for the delay to act on time as required by the dictates of the applicable law.

Responding to the applicant's argument that it took time to locate the court file to obtain the copy of ruling attached in affidavit, Mr. Lisso submitted that had the applicant been diligent in the pursuant of the matter, he would have, upon perusal of the file, discovered that the application was initially assigned to Hon. Itemba, J and called on for mention 8th December, 2021. On that account, he submitted that the contention that the applicant did not get the name of the assigned judge was not supported by the record.

The learned counsel was of the view that the applicant was seeking refuge on the confusion at the time of filing the revision instead of explaining away the delay. He further submitted that the applicant's assertion on the said confusion is not supported by an affidavit from the Court Registry or Registrar of the Court. It was therefore his argument that the said assertion is hearsay and of no evidential value. To support his argument, Mr. Lisso cited the case of **Francoma Investments Ltd vs TIB Development Bank Ltd**, Civil Application No. 270/01 of 2020.

As regards the applicant's submission on the length and reasons of delay and the ground that the applicant was denied chance to be heard, Mr. Lisso submitted that the cases of **Damar Watson Bijija** (supra) and **Pili Ernest** (supra) are out of contest and are irrelevant in this case. He reiterated that the position on the applicable principle was given in the case of **Shelina Jahangir and 4 Others** (supra). It was also his submission that

the ground of illegality does not feature in the applicant's affidavit and thus, urged me to disregard it for being an afterthought. The learned counsel was of the view that the Court acted properly and within the mandate of the law in dismissing the case and that there is no any illegality on face of the record to warrant the grant of the prayer sought.

On the basis of the foregoing, Mr. Lisso humbly implored this Court to hold that the applicant has failed to show any sufficient reason for the delay and to account for the delay. He then submitted that the application deserves to be dismissed in its entirety for want of merit, with costs.

Rejoining, Mr. Semu submitted that it was not in dispute that Civil Revision No. 38 of 2021 was filed promptly and in time. He contended that what transpired presenting the matter in the court registry was pecuniary and neither the applicant nor her counsel were in a position to control what happened as the parties were not served with the summons. In that regard, he was of the view that where court records in the court registry was wanting and or missing and moved this Court to consider the case of **Maruna Papai vs R**, Criminal Appeal No. 104 of 2011, CAT at DSM (unreported) where it was held, among others, that each case should be determined on the basis of its own circumstances. He pointed out that the applicant was not informed by the registry office of the whereabouts of her Civil Revision filed in court when the official online system of the Court showed different parties on the

same case number.

He submitted that the case of **Francoma Investment** (supra) is distinguishable from the circumstances of this case on the reason that the applicant herein did not mention another person but referred to the online system as per printout appended thereto. It was his further submission that the case of **Shelina Jahangir and 4 Others** (supra) is not applicable in the circumstances of this case. He also urged me to consider the case of **The Director General LAPF Pension Fund vs Pascal Ngalo**, Civil Application No. 76/08 of 2018 on the technical delay.

After hearing the parties on the application, I agree with Mr. Lisso that the crucial issue for consideration and decision is whether reasonable or sufficient cause has been established to warrant the sought extension of time. This issue is based on the provisions of section 14(1) of the LLA cited in the chamber summons.

I agree with both learned counsel that applications of this nature are determined by considering several factors underscored by case law. The said factors include, reason for the delay, length of the delay, explanation accounting for such delay and in some cases, existence of a point of law or illegality of sufficient public importance in the impugned decision. See for instance, the case of **Elius Mwakalinga** (supra) relied upon by the applicant's counsel and **Shelina Jahangir and 4 Others** (supra) referred

to this Court by the respondent's counsel. In the latter case, the Court of Appeal held as follows:

> *"Various factors are taken into account when determining what constitutes good cause. Among the factors were stated in* ***Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women Christian Association of Tanzania****, Civil Application No. 2 of 2010 (unreported). These are; to account for all period of delay which should not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. See:* ***Tanga Cement Company Limited vs. Jumanne D. Masangwa & Another****, Civil Application No. 6 of 2001 and* ***Ludger Bernard Nyari vs. National Housing Corporation****, Civil Application No. 372/01 of 2018 (both unreported)."*

In terms of the record, the dismissal order intended to be set aside was issued on 17th May, 2022. Since item 4, Part III of the Schedule to the LLA provides that, an application for an order to set aside dismissal of the suit be lodged within thirty (30) days from the date of dismissal, the time within which to lodge an application to set aside the order dismissing the revision lapsed on 16th June, 2022. However, it was until 30th August, 2022 when the applicant filed the present application.

In view of the established principle, the first issue for consideration is whether the applicant has accounted for each and every day of delay. As indicated herein, Mr. Semu contends that it was not possible for the applicant due to the chronology of events in the affidavits. In that regard, I agree with Mr. Lisso that the applicant's counsel has conceded that each and every day of delay was not accounted for.

A glance at paragraphs 4 and 5 of the supporting affidavit indicate that dismissal order was known to the applicant on 1st August, 2022 after "making physical follow up of the registry books." It is also on record that the applicant prepared the chamber summons and supporting affidavit on the same day (1st August, 2022). Further to this, the supporting affidavit was sworn on 1st August, 2022. However, the application was filed 29 days later on 30th August, 2022. The supporting affidavit does not explain what transpired between 1st August, 2022 and 30th August, 2022. Mr. Semu's contention that it took days to locate the court filed in order to obtain the ruling appended to the affidavit was not deposed in supporting affidavit. It is trite law that any statement not raised in affidavit must be regarded for being a statement from the bar. [See **Ahmed Teja t/a Almas Autoparts Ltd vs Commissioner General**, TRA, Civil Appeal No. 283 of 2021, CAT (unreported)].

For the reasons stated, I hold that the applicant has failed to account for about 29 days of delay.

Second for consideration is the ground that the delay is technical. It is trite law that technical delay refers to the time lost when the litigant was pursuing matter in court and constitutes a sufficient cause for extension of time. There is a plethora of authorities advocating that stance. This include, the case of **Fortunatus Masha** (supra) where the Court of Appeal held:

> "*A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

Similar position was taken in the case of **The Director General LAPF Pensions Fund** (supra) as follows:

> *"The applicant's main explanation for the delay is that time was lost when she was pursuing matters in court. This, I think, constitutes what is known as technical delay, developed by caselaw."*

In the present case, it is not disputed that the application for revision

was filed in time. Unlike in the case of **Fortunatus Masha**, the applicant's application for revision was not dismissed or struck out for being incompetent. Thereafter, the applicant did not file an incompetent application for extension of time which was held to be incompetent.

I have further considered, the applicant's argument that the time lost when she was making follow up of the application for revision. Much as the applicant filed the application for revision under certificate of urgency on 22nd November, 2021, she was expected to show how she was pursuing that matter from 17th May, 2022 to 30st August, 2022. Such evidence is wanting in the supporting affidavit. Even if one case number was assigned to two different parties, there is no evidence to exhibit how the applicant pursued her application for revision during the period of delay, apart from 1st August, 2022 when she made "physical follow up of the registry book". Considering further that it was not proved that the revision in the applicant's name was found in the judicial system (JSDSII) during the period of delay, I find no technical delay in the case at hand.

Even it is taken that there was a technical delay (which is not decided herein), the applicant was required to account for delay from 1st August, 2022, when he learnt about the dismissal order and prepared the chamber summons and affidavit to 30th August, 2022 when the present application was filed in the Court. As stated afore, this was not done.

As for the assertion that the applicant was not informed by the registry of the whereabouts her application for revision, I find no evidence to prove such contention. The applicant was expected to demonstrate how she channeled the matter to the Deputy Registrar or Judge In-Charge. In absence of evidence to such effect, the argument that the record in the court's system was missing lacks legs to stand on.

Last for consideration is the ground of illegality. I am alive to the trite law that illegality of the decision being challenged is a sufficient ground for extension of time. See for instance the case of **The Principal Secretary Ministry of Defence and Notional Service vs. Devram Valambia** [1991] TLR 387. However, the law is also settled that, for the ground of illegality to stand, it must be on the face of record without attracting a long argument.

As rightly submitted by Mr. Lisso, the ground of illegality was not deposed in the supporting affidavit. Being guided by the position of law stated in **Ahmed Teja t/a Almas Autoparts Ltd** (supra), the assertion that the applicant was denied the right to be heard is a mere statement from the bar and thus, disregarded. This is also when it is considered that the respondent was not given time to produce evidence to disapprove such fact. That aside, it is on record that the application for revision was dismissed on the ground that the applicant had failed to appear when the matter was

called on for orders for more than five times. Considering that the applicant has not proved how she made follow up of the matter after filing it through online system, I hold the view that the ground that she was denied the right to be heard will require a long-drawn argument. Thus, it cannot stands as a ground for extension of time.

In the ultimate event, this application is found without merit. It is hereby dismissed in its entirety with costs.

DATED at DAR ES SALAAM this 25th January, 2023.

S.E. KISANYA
JUDGE