IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

(Arising from Commercial Case No. 76 of 2020)

MISC.COMMERCIAL APPLICATION NO. 119 OF 2021

SIMPLY FRESH TANZANIA LIMITED .....1ST APPLICANT

KETANKUMAR PATEL ..... 2ND APPLICANT

MAHESHKUMAR PATEL ..... 3RD APPLICANT

GLASS & GLAZING AFRICA LIMITED ..... 4TH APPLICANT

VERSUS

YASMINE HAJI ..... RESPONDENT

RULING

ISMAIL, J.

4th, & 5th October, 2021

In this application, the Court's discretion has been called into action, to allow for an extension within which to file a witness statement of 2nd applicant who, it is informed, is the applicants' sole witness in the pending suit. The application is supported by an affidavit of Peter Kibatala, the applicants' counsel, and it sets out grounds on which the prayers are sought.

The extension sought by the applicants comes after the applicants had missed out on the time prescription given by the Court. That was pursuant to the order of the Court dated 9th August, 2021 in which it was directed:

> *"Parties are to file witness statements within 14 days from this date."*

For the reasons adduced in the counter affidavit, the applicants did not adhere to the schedule set by the Court.

The respondent has taken a swipe at the reasons assigned for the applicants' inability to conform to the schedule of filing. Jovinson Kagirwa, the deponent of the counter-affidavit takes the view that reasons assigned for the inability do not constitute sufficient cause. This is partly due to the fact that what is considered to be the ground for such inability revolves around 20th August, 2021, while nothing is said about 13 other days. There is also a concern that no evidence has been provided to prove that the 2nd applicant self-isolated and travelled. Equally contested, is the contention that Mr. Kibatala was the only responsible counsel through whom the said witness statement would be filed.

Hearing of the application was done orally, and itpitted Mr. Alphonce Nachipwangu, learned counsel, who represented the applicants, against

Messrs Jovinson Kagirwa and Simon Lyimo whose services were enjoyed by the respondent. Submitting in support of the application, Mr. Nachipyangu began by praying to adopt the contents of the affidavit of Peter Kibatala, sworn in support of the application. He submitted that the prayer for extension of time is premised on the grounds stated in paragraph 5 (i) to (iii). He argued that he was aware that there is a requirement of accounting for the period of the delay, and that the applicants have done so. The learned counsel argued that the delay was caused by the fact that Mr. Kibatala, who was responsible for the preparation of the statement was involved in criminal sessions that kept him away from the conduct of the proceedings.

The applicant's counsel further contended that the 2nd applicant who was lined up for signing the witness statement had travelled outside the country and stayed in isolation in observance of the Covid Protocols. It was difficult, in his contention, to meet the deadline for the filing of the statement. He argued that this constituted a sufficient reason, and that there was no negligence on the part of the applicants, adding that this is why action was taken immediately. In the counsel's view, there would be no prejudice suffered merely by allowing the filing of a statement which does not touch the merits of the case. On this, he referred to ***Lyamuya***

Construction Co. Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania, CAT-Civil Application No. 2 of 2010 (unreported).

It was the counsel's view that the ***Lyamuya case*** is in all fours with the instant application. Mr. Nachipyangu urged the Court to exercise its discretion judiciously and grant the application.

Mr. Kagirwa was valiantly opposed to his counterpart's submission. While subscribing to the decision in ***Lyamuya Construction's case*** (supra) which forms the yardstick for determination of an application for extension of time, particular attention should be drawn to the discretion of the Court.The counsel argued further, that the question that remains is whether there is sufficient cause for the grant of the extension. On this, the counsel's answer is that the reasons stated in paragraph 5 are flimsy.

Mr. Kagirwa took the view that when the matter was called on for pre-trial conference the applicants indicated that they had 8 witnesses but no statement of either of the witnesses was filed. He argued that the reasons given in the application touch on the 2nd applicant alone. With respect to the 2nd applicant, the counsel's contention is that no supporting documents such as air tickets or medical recommendations have been

tendered to prove the assertion. In the absence of such evidence, the counsel argued, the contention remains a mere assertion formulated to buy the Court's discretion. He urged the Court to resist such temptation, consistent with the holding in ***Abdallah Ngenya v. Amina Luluba***, HC-Misc. Civil Application No. 546 of 2017 (unreported).

With regards to the delay, Mr. Kagirwa argued that the date mentioned in the affidavit and the counsel's submission is 20th August, 2021 which was the last working day for filing a witness statement. The counsel argued that there is no explanation with respect to the period between 9th August, 2021 and 20th August, 2021, that he argues it is unaccounted for.

On Mr. Kibatala's appearance in criminal sessions, the counsel submitted that this is not a sufficient reason. He argued that Mr. Kibatala had never appeared in court at any part of the proceedings. The counsel also contended that instructions to represent a party are made to the firm and there is no reason why the rest of the counsel of the firm did not file the statements. He argued that this reason leaves 7 days unaccounted, counting from the 16th August, 2021.

On the contention that there were on going settlement initiatives, the respondent's counsel argued that it is on record that the applicants did not appear for mediation, and that on 26th July, 2021 the applicants notified the Court that they did not have any intention to settle. The counsel argued that his client resides in Zurich, yet she managed to sign the documents and serve on applicants. He argued that the degree of prejudice is on the respondent. The counsel urged the Court to dismiss the application consistent with the holding in ***Imperial Media Agencies Ltd v. Another v. JCDECAU Tanzania Ltd***, HC -Misc. Comm Application No 262 No. 262 of 2018 (unreported).

In his rejoinder submission, Mr. Nachipyangu reiterated what he stated in the submission in chief. With respect to number of witnesses initially lined up for testimony, the counsel argued that such number need not be the number of actual witnesses to be preferred. He submitted that this number was floated merely as a precautionary measure.

With regards to the supporting evidence, the contention was that self-isolation is a recommendation by international health organizations that required no document in proof. He also played down the need for having an air ticket to prove the self-isolation. Also discounted was the relevancy of the ***Abdallah Ngenya's case*** to this matter. He argued that

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the same is distinguishable. The counsel submitted that the law has not specified a number of causes which can constitute sufficient reasons, arguing that this is the domain of the Court and it is determined on a case by case basis.

Regarding Mr. Kibatala's involvement, the counsel's argument is that Mr. Kibatala was a drawer of the documents and the lead counsel. His non-appearance in the court proceedings does not rule out the fact that he is part of the team. Mr. Nachipyangu denied the contention that the applicants were absent when the matter was called up for mediation.

The counsel held the view that circumstances that befell the 2nd applicant were different from those under which the respondent operated. He maintained that the respondent's counsel has not stated as to how his client would be prejudiced if the application is granted. He urged the Court to grant the application.

From the parties' impressive submissions, the singular question for determination is whether the application is meritorious.

As I move to the heart of the parties' contentions,it behooves me to begin by restating what I find as a known and general principle that underlies the grant or refusal of an application for enlargement of time.

This is to the effect that, this is a relief which is granted on an equitable discretion, requiring a court to act court judiciously and on a proper analysis of the facts, and application of law to facts. It is a discretion that is called into action and exercised only on the court's satisfaction. This is done through presentation of a credible case by a party that desires that such extension be granted. It also requires that the applicant should also act equitably. This astute position was encapsulated in the persuasive decision of the Supreme Court of Kenya in ***Nicholas Kiptoo ArapKorir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014. It was held:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."*

The position in the foregoing decision was underscored in ***Nicholaus Mwaipyana v. The Registered Trustees of Little Sisters of Jesus of Tanzania***, CAT-Civil Application No. 535/8 of 2019 (unreported). The Court of Appeal of Tanzania made the following captivating restatement:

"The power to extend time given under this provision is discretional, but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of the law. That requires the attention of the court to all the relevant factors and materials surrounding any particular case. These factors include the length of the delay, the reason for the delay, and whether or not there is an arguable case, among others."

What comes out of the foregoing decisions is that the court's discretion is properly triggered when an applicant demonstrates that his failure to act timely was due to sufficient cause. As rightly stated by the counsel for the applicants, categories of sufficient cause are numerous and varied: In ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014, the Kenyan Supreme Court laid down key guiding principles for application of the Court's discretion. It was held as follows:

"... We derive the following as the underlying principles that a court should consider in exercise of such discretion"

extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
3. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
4. *where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*
5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
6. *whether the application has been brought without undue delay; and*
7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

The list of conditions in the fabulous Kenyan decision is in consonance with a list of key conditions set by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Limited v. Board of Trustees of YWCA*** (supra). These are:

"(a) The applicant must account for all the period of delay.

(b) The delay should not be inordinate.

(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."

Worth of a note, is the fact that imposition of these stringent conditions is premised on the fact that court orders are not meant to benefit a party who is at fault. This reasoning was distilled by the defunct East African Court of Appeal in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in which it was held that ***"... no court will aid a man to drive from his own wrong."***

As stated earlier on, reasons for the delay by the applicants to comply with the Court order are threefold. One, that the 2nd applicant was put on a voluntary self-isolation after a few travels; two, that Mr. Kibatala's involvement was curtailed by his participation in criminal sessions; and three, that there were efforts to have the matter settled out of court, meaning that the parties were involved in negotiations which would culminate in the amicable disposal of the matter. The question to be

resolved is whether these reasons are strong enough to constitute sufficient cause on the basis of which an extension of time may be granted. The respondent's counsel feel that these reasons are no where near good enough. The counsel's key contention is that nothing has been stated with respect to the days that preceded the last of the 14 days. They are also less convinced that Mr. Kibatala's absence had any impact on the delay in taking the action. I subscribe to the reasoning made by the respondent's counsel, and here is why.

While it may be true that Mr. Kibatala was on record as an attorney who was acting for the applicants, he is not the only one in the firm, and his alleged unrivalled knowledge of the facts of the main case would not serve as the basis for letting time pass without taking essential steps required in the matter. If Mr. Kibatala felt that his hand in these proceedings was indispensable, his available option was to pray to take time off his busy schedule and deal with this matter, knowing that nothing would move without his able involvement. He could also find a stop-gap arrangement which would see him engage a counsel of his choice to work on the witness statement to his liking. To choose to proceed with criminal sessions while knowing that nothing would move in this case was

tantamount to holding this Court to ransom and have it operate at his convenience. This would not be right, and it can't be right.

With respect to self-isolation, I take the view that, while there may be no evidence of any instruction with respect to self-isolation, it is still imperative that the person alleging this fact must have a semblance of proof. In the circumstances of this case, proof would entail, as Mr. Kagirwa submitted, a production of an air ticket which would at least show that the 2nd applicant travelled and got holed up at a certain location, away from the territorial jurisdiction of this Court. This would, at the very least, prove that self-isolation was important after a few travels. In the absence of any of this, it is difficult to give credence to this bare assertion and elevate it to a fact that would constitute a sufficient cause.

Whereas the applicants' submission has overly dwelt on the events that happened on or around 20th August, 2021, it should not be lost on any body that the order to prefer witness statements was made on 9th August, 2021. This means that, while one may be convinced by what happened at the tail end of the period set for filing the statement, the genuine impression gathered from the application and the counsel's support submission is that the applicants chose to sit idle, twiddle their fingers or dawdle along, waiting for the last few days. This left the bulky of the days

unaccounted for, and it is quite legitimate to impute negligence in the applicants' conduct.

The applicants' counsel has poured some cold water on the respondent's contention that the former indicated that they were going to have 8 witnesses testifying for the applicants, but the discussion has dwelt on 2nd applicant. The applicants' counsel feels that that is of no consequence as the number of witnesses was given just for convenience. I take this to be an underwhelming argument. Neither the respondent nor the Court would know if the intention of the applicants' counsel to give a list of 8 witnesses was merely to crowd the deck, without any genuine intention of letting the Court and the adversary plan the way forward in the conduct of the proceedings. This is why the argument that the 2nd applicant was out of reach failed to resonate. In my view, the respondent's query was genuine and plausible.

With all of the applicants' contention lacking the necessary tackiness that would make them constitute sufficient cause, I take the view that, as the respondent's counsel has alluded to, the applicants have not been able to account for days of delay ranging from 9th August, 2021, the date on which the Court granted time within which to file a witness statement, to 20th August, 2021, the last working day of the period set for such filing.

Such inability constituted a failure, on the part of the applicants to conform to the imperative requirement accentuated in ***Bushiri Hassan v. Latina Lucia Masaya*** CAT-Civil Application No. 3 of 2007 (unreported), in which the upper Bench held as follows:

> *"...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."*

See also: ***Vodacom Foundation v. Commissioner General (TRA)***, CAT-Civil Application No. 107/20 of 2017 (unreported).

In the upshot of all this, I take the view and hold that the applicants havefailed to meet the legal threshold set for extension of time. Accordingly, this application is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 5th day of October, 2021.

M.K. ISMAIL

JUDGE