

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 471/18 OF 2016

TANZANIA NATIONAL PARKS (TANAPA).....APPLICANT

VERSUS

JOSEPH K. MAGOMBI.....RESPONDENT

(Application from the decision of the High Court of Tanzania
(Labour Division) at Dar es Salaam.)

(Nyerere, Kalombola And Mashaka, JJJ.)

dated the 29th day of April, 2016

in

Revision No. 2 of 2013

RULING

27th April & 8th June, 2017

MKUYE, J.A.:

The applicant, the Tanzania National Parks, (TANAPA) has filed a notice of motion under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking for an order that:

- a) *Time be extended for applicant to lodge a notice of cross appeal in terms of rule 94(1), (2) and (3) of the Rules against the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam in Revision No. 02 of 2013 delivered on 29th April, 2016 out of time.*

The application is supported by the affidavit deposed by Theophilo Alexander, the principal legal officer of the applicant herein of which was adopted as part of the submissions in support of the application. The respondent filed an affidavit in reply deposed by Mr. John Sikay Umbulla, the learned advocate for the respondent. Both parties have filed their written submission pursuant to rule 106 of the Rules.

At the hearing of the application, Mr. Ezra Mwaluko, learned advocate appeared for the applicant and Mr. John Umbulla appeared for the respondent.

What can be gathered from the applicant's affidavital information in support of the application is that the applicant and respondent were involved in a labour dispute. The dispute was dealt with at different levels such as the Appointments and Disciplinary Committee of the Board of Trustees of TANAPA, the full Board of Trustees of TANAPA (the Board), the Commissioner for Labour and the Industrial Court of Tanzania (ICT). Upon being dissatisfied with the decision of the ICT the respondent filed an application for revision against TANAPA at the High Court, Labour Division (the High Court) which was registered as Revision No. 02 of 2013. On 29/4/2016 the High Court entered a Judgment in favour of the respondent

or rather against the applicant. On 10/8/2016 the applicant was served with a Record of Appeal for Civil Appeal No. 141 of 2016 through her advocate Mr. Mwaluko. It would appear that though the applicant intended to appeal or cross appeal, she did not lodge a notice of appeal or notice of cross appeal within time.

According to the notice of motion, affidavital information together with the written submission in support of the application, the reason for the delay by the applicant to file a notice of cross appeal was due to the fact that for a period of more than three years there had been no Board in existence and, hence, the applicant had to depend on the parent Ministry for guidance and approval of some actions to be taken and that by the time the approval to pursue the cross appeal was given, the time limited by the rules to lodge the notice of appeal had expired.

Mr. Mwaluko, at the hearing of application, added that since the Board was established under section 3 of the National Parks Act, Cap 282 RE 2002 as a body corporate capable of suing and being sued, nothing could be done at that time because anything which tended to take liability against the Board had to be done with a sanction of the Board.

The other reason for this application, Mr. Mwaluko argued, is the illegality or disturbing feature in the High Court's decision as indicated on ground No. 1 of the notice of motion, in that the respondent was denied his constitutional right to be heard by the Appointment's and Disciplinary Committee while he was given two chances to defend himself. **One**, to respond in writing against the charges levied against him; and **two** to be heard before a full Board of the applicant during its 20th Extra Ordinary Meeting held on 27/6/1997 where upon he said he had nothing to add.

In elaboration, Mr. Mwaluko submitted that as the Board was, under section 20 (1) of the National Parks Act, given power to appoint and dismiss the employees, it had also power to hear him. It was argued further that since the issue involves illegality, the Court should grant the application. The cases of **Principal Secretary, Ministry of Defence and National Service Vs Divram P. Valambhia** (1992) TLR 387; **Kalunga & Company Advocates Ltd Vs National Bank of Commerce Ltd** (2006) TLR 235; and **Arunaben Chaggan Mistry Vs Naushad Mohamed Hussein & 3 Others** Civil Application No. 6 of 2016 (Arusha) (unreported) were cited in support.

Mr. Umbulla, learned counsel for the respondent, resisted the application. Responding to the applicants' application, through his affidavit and written submission in reply, he contended that the applicant acted negligently and irresponsibly in failing to instruct its lawyer to lodge with the Court of Appeal a notice of intention to cross appeal while waiting for a parent Ministry's direction. Instead, he contended, they set for over a period of three years waiting. According to him, the issue of appealing or not was within the mandate of the Chief Executive Officer and his management team. He did not, however, give authority to support that proposition. He was of the firm view that, the applicant ought to have filed the notice of appeal under rule 83 (1) and (2) or a notice of cross appeal under rule 94 (1) and (2) because they could withdraw it if the relevant authority decided not to appeal at a later stage.

On the issue of illegality of the High Courts' decision, in that the respondent was given an opportunity to be heard twice, Mr. Umbulla maintained that seven senior witnesses of the applicant testified before the Appointment's and Disciplinary Committee on 26/6/1997 in the absence of the respondent and that he did not cross examine them. The learned counsel argued further that even if the respondent was called before the full

Board it was of no help since he was already convicted. Mr. Umbulla added that the applicant has not accounted for the 19 days from when she was given the Ministry's direction on 28/10/2016 to 16/11/2016 when this application was lodged. He cited the case of **Lyamuya Construction Company Ltd Vs Board of Trustees of Young Women's Christian Association of Tanzania** Civil Application No. 2 of 2010 at pg 6 where by Hon. Massati, J.A., gave guiding principles to be looked at including the applicant to account for the period of delay; and that the delay should not be inordinate. The learned counsel argued further that the absence of the Board was not a good cause and he cited cases of **Attorney General Vs Tanzania Ports Authority & Another** Civil Application No. 87 of 2016 at pg 11 and **Ngao G. Ruseno Vs Julius Mwarabu** Civil Application No. 10 of 2016 (Arusha) (unreported) in support. He penned of by urging the Court to dismiss the application with costs as no good cause has been shown.

After a careful examination and consideration of the facts deponed in the affidavits, the written submissions in support and against the application, together with the rival arguments from both counsel, I wish to state at the outset that I will not take the long way in determination this application by dealing with each aspect argued and all the authorities relied upon by the

learned counsel. This, however, should not be taken that I have not taken note of those arguments.

Rule 10 of the Rules provides:

- (i) *The Court may, upon good cause shown, extend the 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 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."*

Under the above cited provision of the law, the requirement which the applicant has to satisfy is to show sufficient cause or reason for the delay in filing the application. This was emphasized in the case of **Kalunga & Company Advocates Ltd** (supra) where the Court stated:

" This Court has discretion to extend time but such extension in the words of rule 8 (now rule 10) can only be done if "sufficient reason" has been shown."

The factors constituting sufficient reasons are not explained but in most cases it will depend on the circumstances of each case. In the case of

Attorney General V Tanzania Ports Authority & Another (supra) the Court observed:

"What amounts to good cause includes whether the application has been brought promptly, absence of any invalid explanation for delay and negligence on the part of the applicant."

Yet in an attempt to define sufficient cause, Mulenga Justice of Supreme Court (JSC) in an Ugandan case of **Boney N. Katatuba Vs Waheed Karim** Civil Application No 27 of 2007 (unreported) which was quoted with approval in the case of **Prosper Baltazar Kileo & Another Vs Republic**, Criminal Application No. 1 of 2010, stated *inter lia*:-

*"Under rule 5 of the Supreme Court Rules, the Court may for sufficient reason, extend the time prescribed by the Rules. What constitutes "sufficient reason" is left to the Courts unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant from taking the essential step in time, or other reason why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than the one that is brought after unexplained delay..." **But even***

where the application is unduly delayed, the Court may grant extension if shutting out the appeal may appear to cause injustice.”

[Emphasis supplied]

I must state here that the powers under rule 10 are to be exercised discretionary with a condition that they should be exercised judiciously.

The issue here is whether there is sufficient reason for extending time to file a notice to cross appeal against the decision in Revision No. 02 of 2013.

It is common knowledge from both sides that for a period of three years there was no Board for the applicant. It is also common ground that from 29/4/2016 when judgment in Revision No. 02 of 2013 was delivered and further on 10/8/2013 when applicant was served with the Record of Appeal the applicant did not file a notice of cross appeal. The two sides are at variance as to whether the notice of cross appeal could be lodged even in the Boards' absence. While the applicant is of a firm view that legally it could not lodge the said notice of cross appeal without the Boards' sanction the fact which led them to liase with the Parent Ministry, the respondent is of the view that lodging of notice of cross appeal was within the powers of the

Chief Executive Officer with its management team and if they did not wish to pursue it later, they could withdraw it.

According to the record, through the letters E3 and E5 attached to the applicants' affidavit which were addressed to Advocate Mwaluko, it is clear that the applicant had liaised with the parent Ministry for guidance as to whether to pursue an appeal or not as the Board was not in existence. It was after the approval by the parent Ministry (vide letter E5) when the applicant instructed the learned counsel to appeal against the decision sought to be impugned. The reason why the applicant had to seek guidance is the nature of the Board's establishment whereby it was given mandate to sue or to be sued under section 8 (1) (b) of the Tanzania National Parks Act which provides:

"(1) There shall be established for purposes of this Act, a Board of Trustees which shall:-

- (a) ...*
- (b) in their corporate name be capable of suing or being sued."*

This being the case, I agree with Mr. Mwaluko that, under such circumstances, no action which attracts liability to the Board could have been taken by the applicant without its approval. Given the situation, the applicant prudently sought guidance from the parent Ministry before pursuing an appeal. The argument that the applicant could have lodged a notice to cross appeal under a guidance of the Chief Executive Officer and his management team, in my considered view, does not hold water due to reasons explained above.

Regarding the issue of illegality of the decision in Revision No. 02 of 2013, indeed, the High Court made a finding that the respondent was denied the right to be heard and declared the decision of the Appointment and Disciplinary Committee a nullity, and it proceeded to quash and set aside decision of Board of Trustees which was upheld by the Industrial Court of Tanzania for the same reason.

The applicant argued that the respondent was given the opportunity twice, that is, when he was given a chance to respond in writing against the charges levied against him; and secondly, when he was given an opportunity to be heard by the full Board at its 20th Extra Ordinary Meeting held on 27/6/1997. The learned counsel for the applicant had explained that the full

Board being mandated to appoint and dismiss the applicant's employees was also mandated to hear the respondent. This, in my considered view, is an issue which needs to be ascertained so that the Court can make the record right if the alleged illegality is established.

It has been held in times without number that the ground alleging illegality constitutes good cause for extension of time. Among the decisions are mentioned by Mr. Mwaluko including **Principal Secretary, Ministry of Defence and National Services' case** (supra); **Kalunga and Company Advocates case** (supra) and **Arunaben's Chaggan's case** (supra). In the later case (**Arunaben's case**) the Court while quoting with the approval the case of **Principal Secretary Ministry of Defence and National Service's case** (supra) stated:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right".

I am aware of the counsel for the respondents' complaint that the applicant did not account for the 19 days from when the applicant was authorized by the parent Ministry to appeal through a letter dated 28/10/2016 up to 16/11/2016 when she lodged this application. Indeed the applicants' counsel did not offer any explanation, albeit a reasonable one, as to how those days were spent. However, that notwithstanding, in the case of **Hamida Hamisi Vs the Principal Magistrate Mbagala Primary Court and 2 Others**, Civil Application No. 118 of 2015 (Unreported) whereby a single Justice of Appeal had to deal with a belated application for extension of time on the ground of illegality, while relying on the case of **Patrobert D. Ishengoma Vs Kahama Mining Corporation Ltd (Barrick Tanzania Bulyankulu) and 2 Others** Civil Application No. 2 of 2013 which also discussed the issue of denial of the right to be heard and illegalities, it was stated as hereunder:-

*"... I am of the considered view that even though there is a considerable delay in the application, pertinent issues have been raised. Firstly the applicant is alleging to have been **There is an allegation of illegality, irregularities and impropriety.** There is the reason of illness*

advanced by the applicant which cannot be brushed aside".

[Emphasis mine]

But again, this Court while dealing with an issue of the application which is delayed in the case of **Prosper Bartazar Kileo and Another** (supra), while quoting with approval a **Ugandan Case of Boney N. Katatuba** (supra), is was stated that:-

"...But even where the application is unduly delayed, the court may grant extension of time if shutting out the appeal may appear to cause injustice".

Considering the circumstances of this case, it is my considered view that, this is among the cases where shutting the door for an appeal on said illegality may occasion injustices. It, therefore, needs to be addressed by the court.

For the foregoing, I will not hesitate to find that the applicant has shown good cause to warrant an extension of time to be granted.

In the result, the applicant is granted an extension of time to lodge a notice of cross appeal which is to be filed within 30 days from the date of this Order. No order as to costs is made.

DATED at DAR ES SALAAM this 1st day of June, 2017.

R.K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL