IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 225/01/2019

WAMBURA N.J. WARYUBA .... APPLICANT

VERSUS

1. THE PRINCIPAL SECRETARY MINISTRY OF FINANCE
2. THE ATTORNEY GENERAL .... **RESPONDENTS**

(Application for extension of time within which to lodge an appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)
(Sameji, J.)

dated the 25th day of August, 2017
in
Civil Case No. 289 of 1998

....

RULING

12th February, & 21st July, 2020

NDIKA, J.A.:

This ruling resolves a motion made by Mr. Wambura N.J. Waryuba ("the applicant") for extension of time within which to institute an appeal to this Court from the ruling and order of the High Court of Tanzania at Dar es Salaam (Sameji, J. as she then was) dated 25th August, 2017 in Civil Case No. 289 of 1998. The application, made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), is supported by an affidavit deposed to by the applicant. In response to the motion, the respondents lodged an

affidavit in reply sworn by Mr. Lukelo Samwel, a State Attorney from the Office of the Solicitor General.

I propose to begin with the essential facts of the case and the context in which this matter has arisen.

The applicant and several other persons were public servants working with the Ministry of Finance until 1996 when their employment was terminated in public interest. Being dissatisfied, they sued the respondents vide Civil Case No. 289 of 1998 in the High Court of Tanzania at Dar es Salaam challenging the legality of the termination. Messrs. Joseph Ntogwisangu and Fidelis M. Maseke acted as the representatives of the applicant and his other co-litigants. The suit having been unsuccessful, they lodged a series of appeals to this Court the last ones being consolidated Civil Appeals No. 82 of 2011 and No. 136 of 2015. In its judgment dated 5th December, 2016, the Court nullified the proceedings before the High Court as well as the judgment thereon and ordered a retrial of the suit before another judge.

Back in the High Court, the suit was greeted with a preliminary objection on three points. Having heard the parties on the points, the High Court (Sameji, J. as she then was), in its ruling handed down on 25th August,

2017, sustained the preliminary objection on the ground that the court had no original jurisdiction to take cognizance of the matter which it deemed to be a trade dispute. In the result, the court "dismissed" the suit.

Resenting the High Court's decision, the applicant duly lodged a notice of appeal on 21st September, 2017. Then, on 22nd September, 2017 he applied from the High Court for a copy of the drawn order believing that it was the only document required for the intended appeal. In February 2018, roughly five months after the High Court had handed down the impugned decision, he lodged a request for a copy of the proceedings from the High Court but did not serve any copy of it on the respondents. After several follow ups, he was informed by the Deputy Registrar of the High Court vide a letter dated 13th April, 2018 that copies of the ruling and drawn order were ready for collection. The supporting affidavit is silent as to when the applicant, then, collected the said copies, but it is averred in Paragraphs 10 to 12 of the affidavit as follows:

> *"10. That being a layman in law, I opted for legal consultation where I was advised that the request of a copy of drawn order without a request of copy of proceedings and serving the respondents within 30 days after the decision of the High Court is not enough for the purpose of issuing a*

legally competent certificate of delay by the High Court of Tanzania, the information which I believe to be true.

11. That by the time I received the copy of the drawn order and proceedings the time required for appeal had already expired; I thus filed an application for extension of time in the Court of Appeal which was struck out on the ground that the application was defective as the title of the notice of motion shows different applicants while the body of the notice shows my name (Wambura N.J. Waryuba) as the applicant. Hence, the need to file another application supported by this affidavit. A copy of the ruling marked I is attached to form part of this affidavit.

12. That the intended appeal carries strong grounds of both law and fact and has overwhelming chances of success. The applicant desires to move the Court in the intended appeal on the following grounds:

a) The Hon. Judge erred in law and fact to declare that the matter is wholly a labour dispute.

b) The Hon. Judge erred in law and fact when she decided that the High Court had no jurisdiction to retry the case."

On the other hand, the affidavit in reply, in essence, casts the blame on the applicant as it states that the applicant's "negligence, laxity and

ignorance of legal procedure do not constitute a sufficient reason to warrant the Court to grant extension of time."

At the hearing of this matter, the applicant was self-represented while the respondents had the services of Ms. Alicia Mbuya, learned Principal State Attorney, and Ms. Consesa Kahendaguza, learned State Attorney.

Having adopted the contents of the notice of motion, the accompanying affidavit and the written submissions in support of the application, the applicant urged me to grant him a favourable order. In essence, he stresses that being a layperson in law he was oblivious of the procedure for appealing to the Court and thus he could not take essential steps that would have availed him with the exemption under the law of the period necessary for seeking and obtaining a copy of the proceedings from the High Court as would have been certified by the Registrar. On learning that he was not eligible to be issued with a certificate of delay at the time he had presumably been supplied with certain documents by the High Court's regitry, he applied to this Court for extension of time to institute the intended appeal. That initial application was barren of fruit as it was struck out by the Court (Kitusi, J.A.) for incompetence on 30th April, 2019 and that the present quest was subsequently lodged on 17th June, 2019. He adds that the decision

intended to be appealed against was based on non-existent law and, therefore, the intended appeal raises a point of sufficient significance for the consideration of the Court.

On the other hand, Ms. Mbuya, relying on the affidavit in reply and the written submissions in opposition to the application, contends that the application discloses no good cause given that the applicant concedes in the supporting affidavit to have failed to apply for a copy of proceedings in time. While referring to the unreported decision of the Court in **Ali Vuai Ali v. Suwedi Mzee Suwedi**, Civil Application No. 1 of 2006, she submits that the applicant's supposed ignorance of law constitutes no good cause for condonation of the delay. She also questioned the applicant's diligence in pursuing the intended appeal, citing **Frida Aloyce Samky and Five Others v. Tanzania Commission for Science and Technology**, Civil Application No. 58 of 2018 and **Chawe Transport Import and Export Co. Ltd v. Pan Construction Co. Ltd and Three Others**, Civil Application No. 146 of 2005 (both unreported). As regards the alleged illegality of the impugned decision of the High Court, Ms. Mbuya urged that the said complaint be ignored on the reason that it is not raised on the notice of motion. She added that the applicant's argument that the impugned decision is grounded on a non-

existent law is not an apparent error on the face of the record constituting an illegality.

In a brief rejoinder, the applicant sought to distinguish the decisions cited by Ms. Mbuya on the ground that they all concerned represented litigants, not self-represented applicants.

I have considered the notice of motion, the affidavits on record, the contending submissions of the parties and the authorities cited. The sticking point is whether this is a fitting occasion to condone the delay involved and proceed to extend time to institute the intended appeal.

It is essential to reiterate here that the Court's power for extending time under Rule 10 of the Rules is both wide-ranging and discretionary but it is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently looks ate factors such as the length of the delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal: see, for

instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014. Also to be considered is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

It is common ground that in the instant case, the ruling the subject matter of the intended appeal was handed down on 25th August, 2017. The applicant manifested his intention to appeal against that ruling by filing a notice of appeal on 21st September, 2017 but both affidavits are silent on whether the notice of appeal was duly served on the respondents. In accordance with Rule 90 (1) of the Rules, the appeal was due sixty days thereafter, that is, on or about 21st November, 2017 but none was filed.

It is undisputed that the applicant did not apply in time for a copy of the proceedings from the High Court in terms of Rule 90 (1) of the Rules. Had he done so, time would have stopped running until the whole copy of proceedings was availed. According to him, after he had lodged his notice of appeal on 21st September, 2017 and applied for a copy of the drawn order on the following day he believed that he was home and dry. It was in February 2018, approximately five months after the impugned ruling was delivered, that he ultimately applied for a whole copy of the proceedings after he had been advised that a copy of the drawn order that he had requested was not sufficient for appealing. For this sorry state of affairs, the applicant blames his station in life; that he is a layperson in law who did not know the essential steps in the procedure for appealing to this Court.

Having reflected on the circumstances of this matter, I find justification in Ms. Mbuya's criticism of the applicant's explanation. The applicant's supposed inability to come to grips with the procedure for appealing is unacceptable. As held by a single Justice of the Court in **Ali Vuai Ali** (supra), a party's ignorance of the law governing the applicable procedure is not a good cause for granting extension of time. That apart, I find it baffling that the applicant has had the temerity to plead ignorance of procedure as if he was appealing to this Court for the first time ever in his life. I wonder why

he was unable to call to mind that he has sworn in his supporting affidavit that at some point in the course of the present dispute he and his co-litigants lodged several appeals to this Court, the last ones being consolidated Civil Appeals No. 82 of 2011 and No. 136 of 2015 which were determined in their favour. If he was able to institute those appeals then, of course in cahoots with his co-litigants, why was he not able to do so this time?

The fragility of this motion is further laid bare and compounded by the following: first, while the supporting affidavit avers that the applicant was invited by the Deputy Registrar of the High Court to collect the copies of the ruling and drawn order vide a letter dated 13th April, 2018, nothing is stated as to when the copies were collected. There is also no mention of the date he lodged his initial botched application for extension – Civil Application No. 200/01/2018 – which was struck out by the Court (Kitusi, J.A.) on 30th April, 2019. Without this information, it is impossible to determine whether the applicant pursued this matter diligently and that he acted expeditiously after it dawned on him that he was out of time – see, for instance, **Royal Insurance Tanzania Ltd. v. Kiwengwa Strand Hotel Ltd.**, Civil Application No. 116 of 2008 (unreported).

The second point of concern is that although the period the applicant spent in the prosecuting Civil Application No. 200/01/2018 until its termination on 30th April, 2019 evidently amounts to an excusable technical delay (see, for example, the unreported decisions of the Court in **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006; and **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05/2017), the applicant offers no explanation in his supporting affidavit why he waited until 17th June, 2019 to refresh his quest for extension by lodging this application. There was an interlude of about forty-eight days that is unaccounted for. This period is unmistakably inordinate and I cannot ignore it.

It would appear that the applicant noted this flaw in his application and so, he attempted to explain the delay in his written submissions. He thus contended that he being a resident of Ifakara was prevented by distance and costs for travelling to Dar es Salaam to process and lodge the application promptly; that he had to attend to another suit to which he was a party (Land Case No. 4 of 2019) in the High Court at Musoma; and that following the restructuring of the Attorney General's Office confusion arose on who was the proper party to be cited as respondent in the present application.

Whether these contentions have a grain of truth or not, they cannot be acted upon; for they are not evidence but factual statements from the bar.

To be sure, it is settled that in an application for enlargement of time, the applicant has to account for every day of the delay involved and that failure to do so would result in the dismissal of the application: see, for example, the unreported decisions of the Court in **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011; **Crispian Juma Mkude v. Republic**, Criminal Application No. 34 of 2012; and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014. In the premises, I reject the applicant's explanation of the delay involved and hold him to have failed to account for each and every day of the delay.

I now turn to the final facet of the applicant's oral argument that the application be granted on the reason that the decision intended to be appealed against was based on a non-existent law, implying that the intended appeal raises a point of sufficient significance.

Certainly, as held by the Court in **Devram Valambhia** (supra) at page 188 that where "the point of law at issue is the illegality or otherwise of the

decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules [now rule 10 of the 2009 Rules] for extending time." In giving the rationale for that position, the Court stated that:

> *"To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law."*

See also: **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006; **Eliakim Swai and Frank Swai v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016; and **Mgombaeka Investment Company Limited & Two Others v. DCB Commercial Bank PLC**, Civil Application No. 500/16/2016 (all unreported).

In **Lyamuya Construction** (supra), a single Justice of the Court elaborated that:

> *"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in **VALAMBHIA's** case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that **such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process.**"* [Emphasis added]

In the instant application, there is no place for the application of the principle in the **Devram Valambhia** case. In the first place, I agree with Ms. Mbuya that the allegation of the illegality of the impugned decision of the High Court should not be entertained because the applicant did not raise it on the notice of motion. Secondly, I am decidedly of the view that the applicant's contentions made in Paragraph 12 of the founding affidavit that the learned High Court judge erred in declaring that the matter was wholly

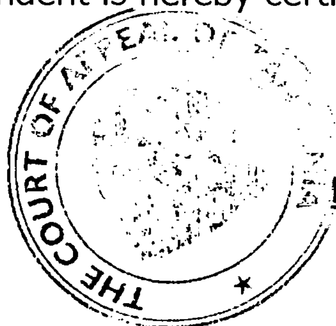
a labour dispute and that the High Court had no jurisdiction to retry the case supposedly raise no more than mere errors of law in the impugned ruling. They do not challenge the legality of the impugned decision. Finally, even if it were assumed arguendo that the applicant had properly pleaded the point on the notice of motion, the alleged illegality is not apparent on the face of the impugned ruling. Stated differently, it is not manifest on the impugned ruling that the outcome of the case was based on a non-existent law or any other error that would bring the legality of the decision to question.

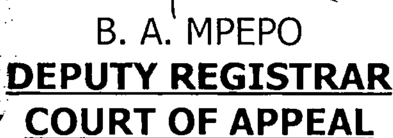
For the above reasons, I decline to exercise my discretion in favour of the applicant and refuse his application. There shall be no order as to costs this being an employment dispute.

DATED at **DAR ES SALAAM** this 24th day of February, 2020.

G. A. M. NDIKA
JUSTICE OF APPEAL

The Ruling delivered this 21st day of July 2020, in the Presence of the Applicant in person and Ms. Narindwa Sekimanga State Attorney for the Respondent is hereby certified as a true copy of the original.





B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL