

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 320/01 OF 2020

WAMBURA N. J. WARYUBA.....APPLICANT

VERSUS

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

**[Application for extension of time to file reference against the decision of
the Single Justice of the Court of Appeal of Tanzania, at Dar es Salaam]**

(Ndika, J.)

dated the 21st day of July, 2020

in

Civil Application No. 225/01 of 2019

RULING

22nd February & 8th March, 2021

KWARIKO, J.A.:

The applicant and others who are not parties to this application, were unsuccessful in Civil Case No. 289 of 1998 in the High Court of Tanzania at Dar es Salaam District Registry. Following that decision, the applicant visited this Court for extension of time to file appeal against that decision in Civil Application No. 225/01 of 2019. That application was dismissed on 21st July, 2020 by Ndika, JA. for being devoid of merits. The applicant was further aggrieved by that decision and intended to file reference against it. However, he was late to do so.

The applicant thus filed this application for extension of time to file reference. The application has been brought by a notice of motion in terms of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (henceforth the Rules). It is supported by an affidavit of the applicant lodged on 12th August, 2020 and his supplementary affidavit which was filed on the 16th February, 2021 by leave of the Court.

In his affidavits, the applicant deponed that he was late to file application for reference because after the decision of the Single Justice on 21st July, 2020, he travelled to Musoma the following day to attend to a sick relative who unfortunately died on 29th July, 2020. He attended funeral rituals until he returned to Dar es Salam on 2nd August, 2020 and the following day his advocate advised him to file reference which was then time barred. Thus, the delay was caused by reasons which were beyond his control.

The applicant also averred that the decision of the High Court is tainted with illegality as the same was pegged on a non-existent law, that is the Industrial Court Act, 1997 which has never been enacted in Tanzania.

On the other hand, the respondents opposed the application through an affidavit in reply sworn by one Baraka Nyambita, State

Attorney. The deponent averred that the respondent has not provided any proof in respect of his travel to Musoma or the illness and death of his relative which allegedly is the reason for the delay to file reference. He stated that the applicant has failed to show good cause for delay and has not accounted for each day of delay.

Moreover, pursuant to Rule 106 of the Rules, the parties filed written submissions for and against the application.

When the application was called on for hearing, the applicant appeared in person, unrepresented, whereas Ms. Rehema Mtulya and Mr. Stanley Mahenge, learned State Attorneys appeared for the respondents.

Arguing his application, the applicant first adopted his affidavits and written submissions to form part of his oral submissions. He submitted that his travel to attend the family matter soon after the delivery of the impugned decision was good cause for the delay to warrant the Court exercise its discretion and grant extension of time to file reference. To support his stance, he cited the Court's decisions in the cases of **Lyamuya Construction Company Ltd v. The Registered Trustees of the Young Women's Christian Association of**

Tanzania, Civil Application No. 2 of 2010 (unreported) and **Kalunga & Company Advocates v. NBC Ltd** [2006] T.L.R 235.

As regards the issue of illegality, the applicant argued that the proper law which the High Court should have applied was the Industrial Court Act of 1967 which was repealed by the Employment and Labour Relations Act, 2004. He submitted, had the High Court rightly applied that law, it would not have found that it had no jurisdiction to entertain his case.

In opposition to the application, Ms Mtulya first adopted the affidavit in reply and supporting written submissions as part of her oral arguments. In respect of the reasons for the delay, the learned counsel argued that the applicant has not proved by documentary evidence that he had travelled to Musoma to attend to a sick relative and ultimate funeral ceremony. In this case, she argued, the applicant ought to have tendered fare tickets, death certificate or burial permit to substantiate the averments.

Furthermore, the learned counsel contended that the applicant has not accounted for each day of delay as it was stated in the Court's decision in the case of **Lyamuya Construction Company Ltd** (supra). Regarding the issue of illegality, Ms. Mtulya dismissed it as being an

afterthought because it was not even raised in the application before the Single Justice. Additionally, the learned State Attorney argued that the applicant has failed to give good cause for grant of extension of time. She supported her argument with the Court's decision in **Benedict Mumello v. Bank of Tanzania** [2006] 1 EA 227.

Ms. Mtulya concluded her submissions that, since the applicant has failed to give good cause for the delay this Court is not in the position to exercise its discretion to grant the application for extension of time. In support thereof, she referred the Court to its earlier decision in the case of **Kalunga & Company Advocates** (supra). She thus implored the Court to dismiss this application with costs.

In his rejoinder, the applicant argued that he could not keep any proof of his travel because he was not aware of another avenue to challenge the decision of the Single Justice, until he was advised so upon his return from Musoma. He argued that the issue of illegality was raised before the Single Justice and was accordingly decided hence not an afterthought.

Having considered the parties submissions, the issue which calls for this Court's decision is whether the applicant has shown good cause for extension of time to file reference. According to Rule 10 of the Rules

which is the provision applicable in this case, for an application for extension of time to do a certain act to succeed, the applicant must show good cause for the delay to do what was supposed to do. However, what amounts to good cause has not been defined but the Court has invariably considered various factors. Amongst the factors to be considered were stated in the case of **Lyamuya Construction Company Limited** (supra). They are: to account for all period for delay; the delay 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 also **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 and **Ludger Bernard Nyoni v. National Housing Corporation**, Civil Application No. 372/01 of 2018 (both unreported).

The record is clear that the decision of the Single Justice was delivered on 21st July, 2020. According to Rule 62 (1) of the Rules, the applicant who desired to file reference against that decision, ought to have done so within seven days reckoned from that date. However, the applicant did not do so. He has explained that he travelled to Musoma on 22nd July, 2020 to attend to a sick relative, who unfortunately died on

29th July, 2020. He attended the funeral ceremony and returned to Dar es Salaam on 2nd August, 2020 and upon advice by his advocate, he found himself time barred to file reference, thus lodged this application on 5th August, 2020.

It is elementary law that, he who alleges must prove as provided for under section 110 of the Evidence Act [CAP 6 R.E. 2002; now R.E. 2019]. In this case, the applicant has alleged that he had travelled to Musoma to attend to family matters. However, he has not presented any proof to that effect. As correctly argued by the learned State Attorney, the applicant could have tendered fare tickets and death certificate, burial permit or proof from the local area authority to prove the alleged death. The applicant has pleaded ignorance of the law that he was not aware that he could apply for reference against the decision of the Single Justice, otherwise, he would have kept the tickets and tendered them herein. Is this excuse plausible? The answer to this is in the negative. This is so because, should the Court give prominence to this kind of reasoning, there would be floodgates of applications with the similar excuses. In a similar situation in the case of **Emmanuel Lohay & Another v. R**, Criminal Application No. 3 of 2013 (unreported), the Court stated thus:

"Ignorance of law is no excuse and cannot amount to sufficient cause for extending time to take a certain step."

[See also **Godfrey Antony & Another v. R**, Criminal Application No. 6 of 2008 and **Innocent Paul Norbert v. Murzah Oils Mills Limited**, Civil Application No. 444/18 of 2018 (both unreported)].

Furthermore, it is trite law that, in an application for extension of time, the applicant should account for each day of delay, and failure to do so would result into the dismissal of the application. (See the cases of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Mpoki Lutengano Mwakabuta & Another v. Jane Jonathan (As Legal Representative of the late Simon Mperasoka, deceased)**, Civil Application No. 566/01 of 2018 (both unreported) and **Ludger Bernard Nyoni** (supra). It cannot be gainsaid that the applicant has failed to account all the period of delay. He has not accounted for the days from 28th July, 2020 when the seven days expired within which he was supposed to file reference and the date of filing of this application on 5th August, 2020.

Moreover, the applicant has alleged existence of illegality in the decision of the High Court. He explained that the learned Judge applied

a non-existent law that is to say, the Industrial Court Act, 1997 instead of the Industrial Court Act, 1967 which was repealed by the Employment and Labour Relations Act, 2004. It is my considered view that the applicant has misinterpreted the applicability of the principal of illegality. The illegality, if any, ought to be of the decision desired to be challenged; in this case it is the decision of the Single Justice. In this respect, I am guided by the famous case of **Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] T.L.R 185, where the Court stated *inter alia* that:

*"Where, as here, 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 for extending time."*
(emphasis mine).

According to the cited decision, the issue of illegality should be apparent in the decision being challenged. The applicant has not said that the decision of the Single Justice contains any illegality for consideration by the Court. He has dwelt on the decision of the High Court which is not the one he intends to challenge herein. Thus, this claim is misplaced and it is refused.

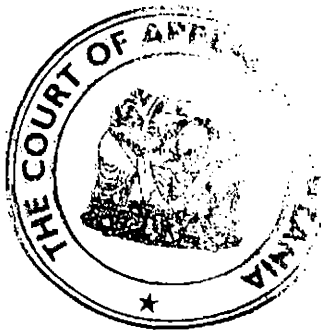
All said and done, I am settled that the applicant has failed to exhibit good cause on which this Court can exercise its discretion to grant extension of time to file reference. The application is thus devoid of merit and it is hereby dismissed with no order as to costs as this matter arose out of an employment dispute.

It is so ordered.

DATED at DAR ES SALAAM this 2nd day of March, 2021.

M. A. KWARIKO
JUSTICE OF APPEAL

The Ruling delivered this 8th day of March, 2021 in the presence of the appellant in person and Ms. Rehema Mtulya, learned State Attorney for the Respondents is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL