IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 459 OF 2020

MAGNET CONSTRUCTION LIMITED..... APPELLANT

VERSUS

BRUCE WALLACE JONES ..... RESPONDENT

[Appeal from the Ruling and Drawn Order of the High Court of Tanzania at Musoma]

(Galeba, J.)

Dated the 26th day of June, 2020
in
Miscellaneous Labour Application No.3 of 2020

JUDGMENT OF THE COURT

1st & 5th November, 2021

WAMBALI, J.A.:

The respondent's employment was terminated by the appellant through an email dated 29th February, 2016 while he was on leave in South Africa. The respondent was not satisfied with the termination of his employment which he considered to be unfair. He therefore lodged a labour complaint in the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/TRM/64/2016 to contest the termination. After hearing the parties' evidence the CMA delivered an award in favour of the respondent and ordered the appellant to compensate him, USD 90,000 equivalent to twelve months salary plus USD 1000 as one month salary in

lieu of notice. The computation of the award was based on monthly salary of the respondent to the tune of USD.7000 which he was paid by the appellant.

The appellant was aggrieved and he filed an application for revision in the High Court of Tanzania Labour Division in Labour Revision No. 11 of 2016. Unfortunately, the respective application was struck out for wrong citation of the enabling provisions of the law. As a result, the appellant lodged Labour Application No. 7 of 2017 for extension of time within which to file revision afresh. As it turned out, the respective application was struck out for want of prosecution as neither the appellant nor his advocate appeared on the scheduled date of hearing, that is, 15th July, 2019. Still determined to pursue justice, the appellant filed two Miscellaneous Labour Applications No. 27 of 2019 and No. 33 of 2019 for extension of time to file revision. Equally important, both were terminated by being struck out and withdrawn respectively for different reasons. Lastly, the appellant lodged Miscellaneous Labour Application No.3 of 2020, subject of this appeal, seeking extension of time to restore Miscellaneous Labour Application No.7 of 2017. As it were, the application was dismissed for the reason that the appellant failed to account for the period of delay of 51 days. Aggrieved, the appellant has appealed to this

Court through a memorandum of appeal consisting of three grounds of appeal premised on the following complaints:-

1. *That the judge erred in both law and fact by holding that the appellant failed to account for delay relying upon summons or notice of hearing served to a party via text message without proof of service.*
2. *That the judge erred in both law and fact by holding that, summons or notice of hearing was duly served without proof of service as required by the law.*
3. *That the judge erred in both law and fact for failure to hold that illegality on the original decision to be impugned can be argued for the court to extend time in a miscellaneous application relating to and/ or arising from the original decision.*

When the appeal was placed before us for hearing, the appellant was duly represented by Mr. Henry Simon Njowoka, learned advocate who held the brief of Mr. Philemon Raulencio, learned advocate, with instruction to proceed. On the other side, the respondent was represented by Mr. Edison Philipo, also learned advocate.

Noteworthy, when invited to address the Court in support of the appeal, counsel for the appellant outrightly, adopted his respective written submissions and explained briefly on the substance of his stance in the appeal.

The appellant's counsel submitted jointly in respect of the first and second grounds of appeal. Mr. Njowoka contended that basically the complaint in the two grounds of appeal is on the mode of service which was considered effective by the High Court. He submitted that the summoning of the appellant was wrongly done by short message service (SMS). He argued that the respective means of communication could not ensure that the appellant was duly notified of the date of hearing of the application. Indeed, he added, there was no proof which was made available to the court that the appellant was served. He therefore urged us to find merit in the argument that non-appearance of the appellant on the scheduled date of hearing was due to non-service of the notice of hearing. Nevertheless, Mr. Njowoka readily conceded that the appellant's affidavit in support of the application did not clearly state how the appellant accounted for the delay of the period from 16th August, 2019 to 6th October, 2019 (51 days) which was also the basis of the decision of the High Court as reflected at page 282 of the record of appeal.

Submitting on the third ground of appeal, the appellant's counsel told the Court that the issue of illegality as a basis for extension of time was wrongly rejected by the High Court much as in his evidence at the CMA the respondent agreed to be an employee of another company and not the appellant. In the circumstances, Mr. Njowoka submitted that the illegality pointed out is apparent on the face of the record and urged us to consider it together with appellant's complaint in the first and second grounds of appeal and allow the appeal.

Responding to the submission by the appellant's counsel, Mr. Philipo who did not lodge written submissions resisted the appeal through oral argument and insisted that there is no illegality as alleged by the appellant. He maintained that the decision of the court is sound as the appellant failed to substantiate the illegality which is apparent in the face of decision of the High Court. On the other hand, he joined hands with Mr. Njowoka on his concession that the affidavit in support of the application does not state how the 51 days were accounted for by the appellant to enable the High Court to exercise its discretion to extend time. He was of the firm view that the appellant was duly served to appear through SMS through the mobile phone number he provided in the documents in the High Court record. He argued that the appellant did

not take steps to notify the High Court concerning the alleged loss of the mobile phone which was used to effect service. He concluded his submission by imploring us to find no merit in the appeal.

Rejoining, the appellant's counsel reiterated his submission in chief and insisted that illegality exists in the circumstance of the matter and urged us to allow the appeal.

Having heard the submissions of the counsel for the parties, the major issues for our determination at this point are firstly, whether the appellant accounted for the period of delay as required by law, and secondly, whether illegality was fully established to enable the High Court to exercise its discretion to extend time as prayed by the appellant.

Admittedly, in determining the reason for the delay advanced by the appellant in Miscellaneous Labour Application No.3 of 2020 which aimed to restore Miscellaneous Labour Application No. 7 of 2017, the learned High Court Judge (Galeba, J -as he then was), considered paragraphs 7 and 8 of the affidavit of Ms. Noelina Bippa Ibrahim in support of the application and the submissions of counsel for the parties and ultimately reasoned and concluded as follows:-

> *"For the above explanation to be satisfactory explanation to the court, within the meaning of rule*

36(1) of the Labor Court Rules, there are points that this court will have to consider; ***first****, although the affidavit refers to the loss report of the telephone of Mr. Philemon Semakula, there is no loss report attached to the affidavit, what was attached to the affidavit is an ERV receipt for payment of Tshs.500 being in respect of a loss report. The receipt does not state that what was lost was telephone or the SIM card or anything specific.* ***Secondly****, although the affidavit states that the telephone for reliable communication was reported to the Police on 16/4/2019 but no efforts were made to communicate to the court the appropriate phone numbers for communication purposes after the first one had been lost. The court officials used the phone numbers that were shown in the chamber summons. The court would not have known that a telephone was lost and new numbers were in place. In other words, the court was not informed of the appropriate number to communicate to the applicant. Who is negligent in the circumstances, the court or someone who lost the phone but did not supply a proper communication, if there was any? With the above considerations, this court holds that the first period of delay was not explained to the satisfaction of the court. This is not to say that Ms. Ibrahim did not do painstaking research, she did what was within her*

abilities but the acts and omissions of previous advocates betrayed her".

Having regard to the above reproduced reasons and conclusion of the learned Judge and concession of Mr. Njowoka on the failure of the appellant to account for the period of delay; we find the complaints of the appellant in the first and second grounds of appeal unfounded. We are satisfied that since the appellant failed to account for the delay in lodging the application, the High Court could not exercise its discretion to grant extension of time.

It is settled law that the court can only grant extension of time if the appellant shows sufficient cause. In **Michael Lessani Kweka v. John Eliafye** [1997] T. L. R.152 the Court stated that:-

"The court has power to grant an extension of time if sufficient cause has been shown for doing so".

Therefore to be entitled to extension of time, the applicant must put before the court sufficient material to show not only that he took actions before and after expiry of time to lodge the application but also that he acted promptly and diligently to take the action in order to convince the court to exercise its discretion grant extension of time.

Indeed, for the Court to exercise that discretion, the applicant must satisfy it that since being aware of facts of delay that he is out of time, his conduct must portray that he acted expeditiously and diligently in lodging the application for extension of time. (See **Royal Insurance of Tanzania Ltd v. Kiwengwa Strand Hotel Ltd**, Civil Application No.111 of 2009 and **The Attorney General v. Twiga Paper Products Limited,** Civil Application No.128 of 2008 (both unreported).

It is thus settled law that an application for extension of time is granted upon the exercise of judicial discretion by the Court upon being convinced by the reasons for the delay placed before it. In **Mwita s/o Mhere v. The Republic**, [2005] T. L. R.107, the Court stated that:-

> *"Judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law and the Court has to demonstrate however briefly how the discretion has been exercised to reach the decision it takes".*

In the instant appeal, we are satisfied that the appellant failed to account for the period of 51 days after Miscellaneous Labour Application No.7 of 2020 was struck out till when the application for extension of time

was formerly lodged before the High Court as correctly conceded by Mr. Njowoka in his submission at the hearing of the appeal. Consequently, we dismiss the first and second ground of appeal.

With regard to the third ground of appeal, we are mindful of the settled law that where the point of law at issue is illegality or otherwise of the decision being challenged, that by itself constitutes sufficient cause. For this position see for instance the decision of the Court in **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil References No.6, 7 and 8 of 2006 (unreported).

However, having scrutinized the application which was before the High Court whose decision is the subject of this appeal; we are of the settled opinion that illegality was not sufficiently demonstrated by the appellant. We note that the affidavit in support of Miscellaneous Labour Application No. 3 of 2020 did not clearly show that the decision of the High Court in Miscellaneous Labour Application No.7 of 2017 which was for extension of time raised anything to attract consideration of the alleged illegality. Basically, the decision of the High Court simply struck out the application for want of prosecution. It was from that decision that the appellant lodged Miscellaneous Labour Application No.3 of 2020

seeking extension of time within which to restore the struck out application which was also intended to apply for extension of time to lodge an application for revision against the decision of the CMA.

Our close scrutiny of the notice of application and the supporting affidavit in respect of Miscellaneous Labour Application No.7 of 2017 leads us to the conclusion that there is nothing concerning the allegation of illegality which is apparent in the application which was struck out. On the contrary, paragraph 11 of the affidavit in support of Miscellaneous Labour Application No.3 of 2020 raised a completely new issue of illegality, allegedly in the intended decision for revision of the decision of the CMA. However, the application which was struck out was not intended to enable the appellant to lodge revision against the decision of the CMA if the prayer for extension was ultimately granted by the High Court. Indeed, even if the application for extension of time could have been granted, the issue of illegality would not have been argued before the High Court in Miscellaneous Application No.7 of 2017 as it was not an issue in view of the notice of application and the affidavit as intimated above.

Besides, as we have demonstrated above, the appellant did not convince the High Court that the illegality pointed out in paragraph 11 of

the affidavit in support of the application, was an issue in Miscellaneous Application No.7 of 2017 or the decision which was the subject of Miscellaneous Application No.3 of 2020, whose decision is the subject of the instant appeal.

In the circumstance of what was placed before the High Court, we subscribe to the decision of the Court in **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] T. L.R. 76 that time will not be extended in every situation whenever illegality is alleged as an issue by the applicant. It all depends on the circumstances of each case and the material placed before the court. Particularly, at page 77 the Court stated:-

> *"(ii) This Court has said in a number of decisions that time would be extended if there is an illegality to be rectified; however, this Court has not said that time must be extended in every situation".*

In the event, it cannot be said that the learned High Court Judge improperly exercised his discretion to refuse the application for extension of time without sufficient reasons. As we have demonstrated above, the appellant did not place sufficient material to account for the period of delay in lodging the application. Moreover, he did not also justify the

existence of illegality in the decision of the High Court whose application was intended to be restored. In the circumstances, we equally dismiss the third ground of appeal.

In the end, we are settled that this appeal is devoid of merit, and we hereby dismiss it. However, in view of the circumstances of this appeal, we order that parties shall bear their respective costs.

DATED at **MUSOMA** this 4th day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 5th day of November, 2021 in the Presence Mr. Henry Simon Njowoka, learned Counsel for the Appellant who appeared remotely via Video linked from his Office at Tanga and Mr. Edison Philipo, learned Counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL