

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 214/18 OF 2020

COSTANTINE VICTOR JOHN APPLICANT

VERSUS

MUHIMBILI NATIONAL HOSPITAL RESPONDENT

**(Application for Extension of Time to File an Application for Review from the
Decision of the Court of Appeal of Tanzania at Dar es Salaam)**

(Mbarouk, Mwarija and Mziray, JJ.A)

Dated the 25th day of January, 2016

in

Civil Application No. 44 of 2013

RULING

24th February & 12th March, 2021

MWAMBEGELE, J.A.:

Before me is an application for extension of time made under rules 10 and 48 of the Tanzania Court of Appeal Rules (the Rules) seeking the indulgence of the Court to exercise its discretion to enlarge time within which to assail by way of review the decision of the full Court in Civil Application No. 44 of 2013 (Mbarouk, Mwarija and Mziray, JJ.A) rendered on 25.01.2016. The application is supported by an affidavit deposed by Costantine Victor John, the applicant and resisted by an affidavit in reply deposed by Audax Kahendaguza Vedasto, then counsel for the respondent.

The material background facts to the present application are very simple and not difficult to comprehend. The applicant, who was an employee of the respondent successfully sued the respondent in the Commission for Mediation and Arbitration (CMA) for unlawful termination. Upon failure of mediation, arbitration was conducted and, on 13.09.2011, the arbitrator (P. M. Chuwa) found that the applicant was unfairly terminated and ordered his reinstatement and payment of all unpaid salaries from the date of his termination.

The respondent was not happy with the decision of the CMA. Her revision to the Labour Division of the High Court was unsuccessful, for Moshi, J. made a finding that the arbitrator's award was properly procured and upheld his decision on 18.02.2013. Undeterred, the respondent lodged in the Court revisional proceedings in terms of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 vide Civil Application No. 44 of 2013. By its ruling pronounced to the parties on 29.01.2019, the Court found merit in the application. It revised and set aside the decision of both the Labour Division of the High Court and that of the CMA. The termination of the applicant was found to have been based on fair grounds.

The applicant was not happy with the decision of the Court. He sought to assail it by way of review. He indeed lodged an application for review which was christened Civil Application No. 125 of 2016. When the application was called on for hearing on 09.06.2020, Mr. Josephat Mabula who appeared for the applicant readily conceded to a preliminary objection raised by the respondent to the effect that the application was time barred. The application was consequently struck out for being time barred.

Still seeking to assail the decision of the Court by way of review, the applicant lodged this application seeking enlargement of time to file an application for review out of time.

When the application was called on for hearing before me on 24.02.2021, the applicant was represented by Mr. Japhet Sayi Mabula, Mr. Nehemia Gabo and Mr. Sylvester Shilikale, learned advocates and Mr. Xavel Ndalaha, Mr. Rashid Mohamed and Mr. Eneza Msuya, learned State Attorneys, joined forces to represent the respondent.

Arguing in support of the application, Mr. Mabula, having adopted the notice of motion, the supporting affidavit as well as the written submissions earlier filed in support of the application as part of his oral arguments, brought to the fore reasons why the application for review was not filed

timely. The first reason is that the applicant is a poor person who depended on legal aid to draft documents. Mr. Mabula cited to me p. 10 in **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 2002 (unreported) to buttress the point that poverty or economic hardship amounts to good cause to extend time.

The second reason is that there are material irregularities leading to illegality of the impugned decision. As a result, the applicant was robbed of his right to be heard. On this point, Mr. Mabula cited to me **Mohamed Salum Nahdi v. Elizabeth Jeremiah**, Civil Reference No. 14 of 2017, **TANESCO v. Mufungo Leonard Majura and 14 Others**, Civil Application No. 94 of 2016 and **Ache Mweddu amd Two Others v. Treasury Registrar (Successor of Consolidated Holding Corporation)**, Civil Reference No. 3 of 2015 (all unreported decisions of the Court).

Mr. Mabula submitted further that the present application was lodged on 17.06.2020 eight days after the Court struck out Civil Application No. 125 of 2016 on 09.06.2020. That, he argued, was quite prompt to show that the applicant was diligent in dealing with the whole thing. The eight

days, he contended, were used in seeking help to file the present application.

Having so said, Mr. Mabula implored me to allow the application and grant the orders sought.

The respondent resisted the application with some force. Speaking through Mr. Ndalaha, and having adopted the affidavit in reply and reply written submissions earlier filed as part of his oral arguments, he submitted that the complaint to the effect that the applicant was not heard just arose at the hearing of the appeal. It therefore cannot be a ground to extend time. To buttress this proposition, the learned state attorney cited p. 21 of **Elia Kasalile and 17 others v. Institute of Social Work**, Civil Application No. 187/18 of 2018 (unreported). Regarding poverty as a ground for extension of time, Mr. Ndalaha submitted that the same was raised from the bar and therefore cannot be relied upon. To reinforce this point, he referred me to p. 11 of **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015 (unreported).

With regard to poverty as a ground to extend time, Mr. Ndalaha was quick to submit that it is not.

Regarding illegality, Mr. Ndalaha submitted that it does not come out clearly in the face of the decision sought to be challenged. He added that as observed in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), an alleged illegality of the decision desired to be impugned must be clearly apparent on the face of the impugned decision.

Joining hands with Mr. Ndalaha, Mr. Mohamed added that the only reason brought to the fore on which the application for review is pegged, is that the applicant was not heard. That complaint did not arise in the decision sought to be assailed. It therefore cannot be a ground to extend time to file an application for review.

The learned state attorney thus implored me to dismiss the application.

In a brief rejoinder, Mr. Mabula submitted that illegality of the impugned decision is deposed at paras 12 and 13 of the affidavit. He further submitted that the Court did not consider the applicant's right to be heard. Regarding financial constraints, he submitted that the same has been pleaded at paras 6 – 9 of the affidavit. He thus reiterated his prayer to have this application allowed and the prayers sought granted.

The parties to this application have taken sharply contrasting positions on whether the application for extension of time to file a review should be granted. While the applicant submits that there is good cause for doing so and therefore the prayer for extension of time sought should be granted as prayed, the respondent is contending that no good cause has been brought to the Court and thus the application should be dismissed.

The law is settled on applications for extension of time; in terms of rule 10 of the Rules, an application of this nature, will only be allowed if an applicant has shown good cause to warrant the Court exercise its discretion to extend time. That this is so has been held in a number of our decisions – see: **Shanti v. Hindocha & Others** [1973] E.A. 207 and **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015, **Yazid Kassim Mbakileki v. CRDB (1996) Ltd Bukoba Branch & Another**, Civil Application No. 412/04 of 2018 and **Tanzania Bureau of Standards v. Anitha Kaveva Maro**, Civil Application No. 60/18 of 2017 (all unreported), to mention but a few.

It is also settled law that in applications of this nature, an applicant must show good cause by accounting for each and every day of the delay

– see: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 and **Sebastian Ndaula v. Grace Rwamafa (legal personal representative of Joshua Rwamafa)**, Civil Application No. 4 of 2014 (both unreported).

Another ground on which an application of this nature will be granted is illegality in the impugned decision – see: **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] T.L.R. 185, **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007 (unreported), **Kalunga and Company Advocates v. National Bank of Commerce** [2006] T.L.R. 235 and **VIP Engineering and Marketing Ltd and Three Others v. Citibank Tanzania Limited v. Citibank Tanzania Limited** (supra). In **VIP Engineering and Marketing Limited** (supra), for instance, the Court had the view that where a point of law at issue is the illegality of the impugned decision that is of sufficient importance, it constitutes good cause for extending time. The same stance was reiterated in **Edward Nyelusye** (supra) that where a point of law at issue is the question of illegality of the impugned decision, time will always be extended and leave to appeal to the Court must be granted even where there is an inordinate delay.

Given the above position of the settled law, the question which pops up at this juncture is: has the applicant shown good cause for the delay to trigger the Court to exercise its discretion to grant the extension of time sought?

The applicant has brought an explanation that he was not satisfied with the decision of the Court which reversed the decisions of the two lower courts which had decided the matter in his favour. He actually filed an application for review which was withdrawn in concession to a preliminary point of objection that it was lodged out of time. He preferred this application some eight days after the withdrawal. Those eight days were used in consultations with his advocates who helped him lodge the present application. This said, it is my considered opinion that the applicant has sufficiently explained why he could not timely file the application.

The foregoing explains away the delay after the withdrawal of the application for review up to the moment the present application was filed. But there is yet another delay of the period from the date of the decision sought to be challenged to the date when the application for review was withdrawn. That period of delay is actual, as opposed to technical. For

the avoidance of doubt, technical delay is applicable only in a situation when the first appeal or application is timely filed. That is to say, if the applicant in the matter at hand had timely filed the application for review which was withdrawn, he would have pleaded technical delay – see: **D. N. Bahram Logistics Logistics and Another v. National Bank of Commerce and Another**, Civil Application No. 506/17 of 2019 (unreported). At p. 10 of the typed decision, we observed:

*"At this point, the germane issue is whether the first segment of delay in the instant case was sufficiently shown to be a period of technical delay. With respect, we do not agree with Mr. Turyamwesiga's characterization of the delay in that segment as technical. We so hold because the supporting affidavit was fatefully silent on two key aspects: one, whether the original appeal was lodged in time; and two, why the said appeal was struck out. In our view, the principle of technical delay is only applicable, as stated in **Fortunatus Masha** (supra) and approved in **Salvand K. A. Rwegasira** (supra), if the original appeal was lodged in time but that it was subsequently terminated on account of incompetence or some other ground. **If the said appeal was struck out on account of being***

time-barred, the delay involved would be actual or real and on that basis it would require being fully accounted for. In the premises, we are of the respectful view that the first segment of delay was not justified."

[Emphasis mine].

In the case at hand, as the delay of the period from the date of the impugned decision to the date when the application for review was withdrawn was not technical, the applicant must account for it. In accounting for that delay, the applicant deposed at para 9 of the affidavit:

"that the applicant faced financial constraints as the result of failure to file application for review in time."

Mr. Mabula argues that the foregoing amounts to good cause for the delay. In **Yusufu Same** (supra) at pp. 10 - 11 the Court had this observation:

"As for the period from 29.11.1996 when the application for leave was dismissed by Bahati J. up to 3.1.1997 when the application leading to this appeal was lodged, the explanation by the respondent is based mainly on her numerous shuttles between Dar es Salaam where the court

*records were and Moshi where her counsel was based, coupled with poverty. **We are aware that financial constraint is not sufficient ground for extension of time. See Zabitis Kawuka v. Abdul Karim (EACA) Civil Appeal No. 18 of 1937. But in the circumstances of this case at hand, where the respondent was a widow, depending on legal aid, her plea of financial constraint cannot be held to be insignificant.***

[Emphasis supplies]

In the case at hand, the applicant was on legal aid and deposed at para 8 of the affidavit that he was unemployed since 25.09.2009 when the respondent terminated his employment. He has deposed at para 9 reproduced above that he could not timely file the application for review which was withdrawn because of financial constraints. As observed in **Yusufu Same** (supra) in the excerpt reproduced above, financial constraints may not be a sufficient ground for extension of time. However, as observed in the same excerpt, there are exceptional circumstances when it can be sufficient. In that case, the person seeking extension of time was a widow on legal aid. It was observed that, in such circumstances, her plea of financial constraints could not be held to be

insignificant. I have the same sentiments here. In the case at hand, the applicant, was equally on legal aid. On the authority of **Yusufu Same** (supra), his plea of financial constraints cannot be taken to be insignificant. I take it as sufficiently demonstrated that the applicant's delay is exceptionally excusable.

The applicant has also deposed that the application will be premised on the ground of the right to be heard which is provided for under rule 66 (1) (b) of the Rules. Without judging on its appropriateness, it is my considered view that he has, nevertheless, shown the ground under rule 66 (1) of the Rules on which the application for review will be pegged.

The discussion above culminates into the conclusion that the applicant has shown good cause for the delay and has also established on which limb under rule 66 (1) of the Rules the intended application for review will be pegged. This disposes of the application. I therefore do not see any overarching need to address the point of illegality of the decision sought to be challenged as a ground for extension of time.

In the upshot, this application is meritorious. It is allowed and the prayers sought are granted as prayed. The applicant is given sixty (60) days reckoned from the date of delivery of this ruling within which to lodge

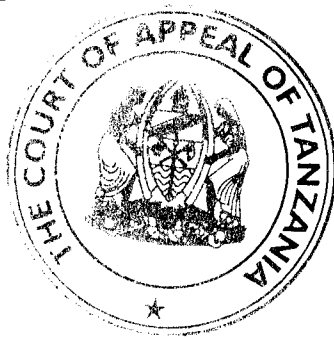
the application for review. This application emanates from a labour matter.

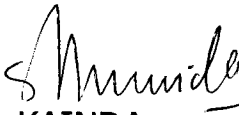
I therefore make not order as to costs.

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

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered this 12th day of March, 2021 in the presence of the Applicant who appeared in person and Mr. Peneza Msuya, learned State Attorney for the Respondent is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL