

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

**CIVIL APPLICATION NO. 301/18 OF 2020**

**MARIAM KHALIFAN MTORO .....APPLICANT  
VERSUS  
SHIRIKA LA UMEME TANZANIA (TANESCO) .....RESPONDENT  
(Application for extension of time from the decision of the High Court of  
Tanzania, (Labour Division) at Dar es salaam)**

**(Wambura, J.)**

**Dated the 20<sup>th</sup> December, 2019  
in  
Labour Revision No. 36 of 2018**

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**RULING**

22<sup>nd</sup> & 31<sup>st</sup> March, 2022

**MAIGE J.A.:**

Before me, is an application for extension of time to lodge an appeal against the decision of the High Court, Labour Division at Dar es salaam ("the Labour Court") in Labour Revision No. 36 of 2018. The application has been preferred under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and it is premised on the affidavit of the applicant one Mariam Khalifan Mtoro (the affidavit). Mr. Norbert Bedder, learned advocate, deposed an affidavit in reply on behalf of the respondent.

The facts giving the background of the application can be narrated as follows. The applicant was until 16<sup>th</sup> day of January, 2009, in the service of the respondent as an accountant. For the reasons which may not be

relevant in this application, her service was terminated on the date just referred. Upon lodging a complaint at the Commission for Mediation and Arbitration, (henceforth, "the CMA"), the applicant procured an award of terminal benefits. Subsequently, the applicant filed another complaint at the CMA for subsistence allowance from the date of termination of her service to 27<sup>th</sup> February, 2012 when she was repatriated. The CMA issued an award of five (5) month's salary as subsistence allowance. The applicant thought that the amount awarded was insufficient. She, therefore, lodged the revision under discussion faulting the CMA for unreasonably refusing to award subsistence allowance from the date of termination to the date of repatriation.

In its judgment, the Labour Court while established as a fact that the applicant was entitled to subsistence allowance, dismissed the application for the reason that, it was wrong to file the claim after the disposal of the first complaint at the CMA and on further reason that, the application was *resjudicata*. The applicant is displeased with this decision. She timely lodged a notice of appeal. However, as the time limit for lodging the record of appeal in has expired, she is, by this application, moving the Court to exercise its indulgence and extend time so that she can lodge the appeal.

At the hearing, Dr. Chacha Murungu, learned advocate represented the applicant whereas Miss. Alice Mturo, learned senior state attorney assisted by Erig Rumisha, Joyce Yonas and Anody Simeo, all learned state attorneys, appeared for the respondent.

In his brief oral argument in support of the application, Dr. Murungu adopted the notice of motion, affidavit and written submissions and urged the Court to hold that, sufficient cause has been established. Deducting from the facts in paragraphs 7,8,9,10,11 and 12 of the affidavit, the counsel pinpointed the events which prevented the applicant from timely lodging the appeal as sickness, attending a funeral ceremony of her close relatives in Mwanza and family meeting in same place as well the closure of the offices of her advocate for three months for the reason of covid 19

In addition to the factual justifications as afore stated, the counsel placed heavy reliance on illegality as justification for grant of the application. He submitted that, the Labour Court having made a finding that, the applicant was entitled to subsistence allowance, it was illegal for it to dismiss the application. The counsel cited numerous authorities in support of the proposition that, illegality is sufficient cause for extension of time. It would suffice to mention the cases of **Convergence Wireless Networks (Mauritius) Limited and others v. Wia Group Limited**

**and Others**, Civil Application No. 263 "B" of 2015 and **Mohamed Saum Nahdi v. Elizabeth Jeremiah**, Civil Revision No. 14 of 2017 (both unreported).

In rebuttal, it was submitted for the respondent that, the issue of illegality cannot arise because in view of the authority in **Lyamuya Construction Company Limited v. the Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), for the illegality to amount to sufficient cause it must be apparent on the face of record, which is not the case in the instant application.

On factual justification for the delay, Miss. Mturo started by drawing the attention of the Court that, since it is common ground that, the applicant was availed with a copy of the proceedings on 25/02/2020, the 60 days period expired on 27/04/2020. In her submissions therefore, the time for the purpose of limitation started running from the date just referred and, it is from that date that, the applicant should have accounted for the delay. The sickness of the applicant and her attendance to funeral ceremony and family meeting in Mwanza having happened prior to the expiry date, she submitted, can in no way be associated with the subsequent delay.

The learned state attorney did not agree with the applicant and her counsel that, the delay in question was associated with the closure of the offices of the applicant's counsel as a result of the threat of covid 19. She treated that as a sign of negligence on the part of the applicant and her counsel as the court business has never stopped for the reason of covid 19. In any event, she submitted, the applicant would have hired a new advocate. She submitted further that, the applicant cannot rely on ignorance of law because the same has never been a ground for extension of time. She prayed therefore that, the application be dismissed for want of merit.

Having duly considered the rival submissions in line with the relevant affidavits and the provision of rule 10 of the Rules, the question which I have to answer is whether good cause has been demonstrated to justify the grant of extension of time. As I understand the law and the parties are in agreement, good cause relates to the events beyond the applicant's control which prevented him or her from timely pursuing the intended action. To link the events with the delay, it is trite law, the applicant is obliged to account for every day of delay. See for instance, **VIP Engineering and Marketing Limited and others v. Citibank**

**Tanzania Limited**, Consolidated Civil Reference No. 6,7 and 8 of 2006 (unreported).

The 60 days period within which the applicant would have lodged the appeal, I agree with the learned state attorney, expired on 27<sup>th</sup> April, 2020. The applicant in this matter has in the first place relied on her attendance to Mwanza in funeral ceremony and family meeting and her sickness to justify the delay. In accordance with the affidavit, these events happened before the expiry of the time limit. The said reasons therefore justify the inaction before the expiry of the time limit. Much more was supposed to be said about the inaction of about three months subsequent to the expiry of the time limit.

In the affidavit, the inaction for the said three months period is associated with the closure of the offices of the counsel for the applicant by reason of Covid 19. This fact though is within the knowledge of the advocate himself is based on the applicant's affidavit which emanates from what she was informed by the said counsel. No doubt that is a mere hearsay which cannot be relied upon to justify such a length period of delay. The advocate, it would appear to me, has for undisclosed reasons avoided to file a supplementary affidavit to support the claim. The facts in question being material in establishing the justification for the delay in

respect of the said period, a supplementary affidavit by the advocate was inevitable in the absence of which, the assertion becomes unproved. This is in line with the principle in **Benedict Kimwanga v. Principal Secretary, Ministry of Health**, Civil Application No. 31 of 2000 (unreported) where it was observed:

*"If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is where the information of that other person is material evidence because without that other affidavit it would be hearsay"*

In my judgment therefore, the three months period subsequent upon the expiry of the time limit has not been accounted for as the law requires.

The applicant has further pleaded ignorance of law as justification for the delay. She is however still enjoying the service of the same advocate whom she engaged more than three months before the institution of this application. She cannot, therefore, take an asylum to ignorance of the law to escape the effect of the inaction and/ or negligence of her advocate. In any event, ignorance of the law has never been a justification for extension of time. See for instance, **Omary Ally Nyamalege (As the Administrator of the estate of the late**

**Seleman Ally Nyamalege) and Two Others v. Mwanza Engineering Works**, Civil Application No. 94/08 of 2017 (unreported).

I will now consider the application in relation to illegality. It is a settled principle of law that, an extension of time can be granted on the sole ground of illegality. This principle was propounded in the famous case of **the Principala Secretary, Minsitry of Defence and National Servive v. Devran Valambia** [1992] TLR 185 where it was held that:

*"We think 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 the Rules for extending time. 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"*

The above principle has been consistently followed in the subsequent decisions of the Court including the decision in **Lyamuya Construction Company Limited v. the Board of Trustees of Young Women's Christian Association of Tanzania** (*supra*) where the



principle was reinstated with clarifications on the scope of its application so that it would apply where the alleged illegality was apparent on the face of the record. In particular it was stated as follows:

*"In VALAMBHIA's case (supra) this Court held that a point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time. But in that case, the errors of law, were clear on the face of the record. The High Court there had issued a garnishee order against the Government, without hearing the applicant, which was contrary to both the Government Proceedings Rules, and the rules of natural justice. 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 a point of law should as of right be granted extension of time if he applied 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".*

The point of illegality demonstrated in the submissions is that, the Labour Court dismissed the revision for being time barred and for being *res-judicata* notwithstanding its finding on the first issue that, the

applicant was entitled to subsistence allowance. The learned state attorney submitted that, the alleged error if at all existed, was not apparent on the face of record as the law requires. With respect, I am unable to buy her view. My quick glance over the judgment of the Labour Court suggests that, the claim for subsistence allowance was granted by the arbitral tribunal but the dispute was on quantum. The Labour Court in its decision observed that, as such, the applicant was entitled to subsistence allowance. That aside, it dismissed the application for the ground that, it was barred, among others, by the doctrine of *res-judicata*. It did not however reverse the decision of the CMA which partly awarded the claim what the Labour Court held to be barred by the law. The point of *resjudicata* which was one of the grounds of the decision, it would appear, was raised by the Labour Court on its own motion in the course of composing the judgment without the parties being afforded a right to be heard. This, on the face of it, demonstrates a clear issue of illegality which, in view of the principle in **VALAMBHIA's** case (*supra*), justifies an extension of time so that so that the alleged illegality, if established, is not left in the court record.

It is for the foregoing reasons that I shall, as I hereby do, grant the application. As a result, extension of time within which to lodge an appeal

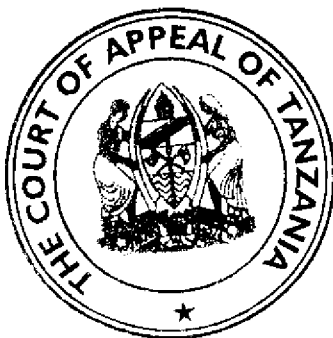
against the decision of the Labour Court in Labour Revision No. 36 of 2018 is hereby granted. The appeal should be lodged within 35 days from the date hereof. This being an employment matter, I will not give an order as to costs.


Order accordingly.

**DATED** at **DAR ES SALAAM** this 23<sup>rd</sup> day of March, 2022

I. J. MAIGE  
**JUSTICE OF APPEAL**

The ruling delivered this 31<sup>st</sup> day of March, 2022 in the presence of Mr. John Chikoro, hold brief of Dr. Chacha Murungu, learned counsel for the applicant and Ms. Alice Mtulo, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.



  
G. H. Herbert  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**