IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 173/01 OF 2019

MASUNGA MBEGETA & 784 OTHERS.....APPLICANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL .....1ST RESPONDENT

THE BOARD OF TRUSTEES OF PUBLIC SERVICE SECURITY FUND.....2ND RESPONDENT

(Application for extension of time to apply for review against the decision of the Court on appeal)

(Msoffe, J.A., Rutakangwa, J.A. and Kalegeya, J.A.)

Dated 11th day of September, 2007
in
Consolidated Civil Appeal No. 105 and 81 of 2006

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RULING

25th March & 22nd April, 2022

MAIGE J.A.:

This application has been brought under rule 10 of the Tanzania Court of Appeal Rules, 2009 "(the Rules"). It has been initiated by a notice of motion supported by the affidavit of Stephen Ndila Mboje, learned advocate ("the Affidavit"). Ms. Lilian Machagge, learned State Attorney has deposed an affidavit in reply ("the counter affidavit").

At the hearing, Mr. Alex Balomi, learned advocate who was holding the brief for advocate Deogratias Mwarabu, appeared for the applicants whereas the respondents were represented by Ms. Grace Lupondo, Ms. Lightness Msuya and Mr. Agid Mkolwa, all learned State Attorneys.

In his brief oral submissions, Mr. Balomi fully adopted the affidavit, notice of motion and written submissions and urged me to hold that sufficient cause for extension of time has been demonstrated. He prayed thus, the application be granted as prayed.

Submitting for the respondents, Ms. Lupondo, having fully adopted the counter affidavit and written submissions in reply, criticized the applicants for not accounting for every day of delay as the law requires. She clarified that, the period between 22nd February, 2018 and 4/03/2018 has not been accounted for as much as it is for the period between 6th May, 2019 and 16th May, 2019.

She submitted further that, according to the affidavit and more particularly paragraphs 9,10,13 and 17 thereof, the applicants and their counsel were negligent in not promptly taking proper steps to cause succession of the proceedings after the death of the applicants' representatives.

The application cannot be granted on the ground of illegality, she further submitted, since the alleged illegality is not apparent on the face of the record. Instead, it is an attempt to challenge the reasoning of the Court. To cement her contention, she cited the case of **Kalunga and Company Advocate Ltd v. National Bank of Commerce Ltd,**

[2006] TLR 235 in support of the view that, for an illegality to be a sufficient cause, it must be apparent on the face of the record and not that which would be discovered by a long-drawn argument or process.

Having heard the rival submissions and examined the facts in the relevant affidavits, it is desirable that, I determine the application. To be in a better position so to do, it is necessary to, as I hereunder do, give a brief factual background which precipitated for the initiation of this application.

The applicants were the employees of various firms. As part of their contracts, the applicants were obliged under the Parastatal Pensions Act, Act No. 14 of 1978 ("the Act"), to contribute into the second respondent's Fund, through their employers, a certain percentage of their monthly salary that would assist them upon retirement. In 2001, it would appear, section 26 (2) of the Act was amended by the Parastatal Pensions (Amendment) Act No. 25 of 2001 ("the amendment Act") with the effect of, among others, restricting members of the Fund already in receipts of the monthly payment of pension but had not attained the age of 55 years, from further receiving the same until they attained such age.

Aggrieved by the amendment Act, the applicants, through the representation of their fellow Nassoro Athuman Gogo and Jessey William Lugiana ("the representatives"), successfully initiated proceedings at the High Court of Tanzania ("the trial court") questioning the constitutionality of the above amendment provision for violating the rule against retrospective operation of the law and the right to just remuneration protected under article 23 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977 ("the Constitution"). As a result, the trial court declared, on 30th March, 2005, the said provision unconstitutional and therefore null and void.

On Appeal, the Court having contradistinguished between the phrase "ujira" used in article 23 (1) of the Constitution and the phrase "pension" used in section 26 (2) (b) of the amendment Act, faulted the trial court in holding that, the provision under discussion violated the above provision of the Constitution.

Unhappy with the decision as aforesaid, the applicants, under the representatives, initiated an application for review vide Civil Application No. 163 of 2007 ("the initial application"). While the initial application was pending, the said representatives passed away. The applicants through newly elected representatives lodged at the Court, Civil

Application No. 68 of 2010 to have the proceedings succeeded ("the second application"). Alas, on 3rd day of September, 2010, the second application was dismissed for want of prosecution. A similar application registered as Miscellaneous Civil Application No. 29 of 2011("the second application"), was filed at the trial court on 7th October, 2011. It was however dismissed, on 8th day of February, 2013, for being *resjudicata.*

With the failure of the two attempts to succeed the proceedings, the applicants realized that, the review application could not proceed. Therefore, on 10th July, 2017 when the matter came for hearting, the applicants through their new counsel withdrew the application and subsequently commenced Civil Application No. 409/01/2017 ("the fourth application") for extension of time to file an application for review under their individual capacities, the application which was withdrawn on 22nd February, 2019 due to the change of the status of the second respondent. This is yet another attempt to have time extended therefor.

The issue as it is common in applications of this nature, is whether sufficient cause has been demonstrated. The applicants' account for the period between 11th September, 2007 to 31st July 2017

is associated with prosecution of the initial application which was irrefutably filed within time. The delay arising from prosecution of the said application was, therefore a mere technical delay which could, as a matter of principle, amount to good cause if it was in good faith and without negligence. See for instance, **Bank M (Tanzania) Limited v. Enock Mwakuysa,** Civil Application No. 520/18 of 2017 and **Bharya Engeneering & Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (both unreported)

As revealed herein above, the termination of the initial application was on account of the death of the persons who initiated the application in their representative capacities. It is not in dispute that, after the deaths of the representatives and the incidence reported to the Court in September, 2009, the applicants nominated new representatives to succeed the proceedings. At the instance of these representatives, the second application was filed and on dismissal, the third application was commenced and eventually dismissed for being *resjudicata.*

It is also clear from the affidavit and its annexures that, from September 2009 when the death of the representatives was reported to the Court and the former advocate for the applicants ordered to

make efforts for succession of the proceedings, it was not until in February 2017 when the matter was called for hearing for the next time. There was no progress however since the advocate who was prosecuting the application could not appear and inform the Court on the going as he was not served with a notice of hearing. Thus, when the matter came for hearing in the next time on 12th July, 2017, the newly instructed advocate prayed, which was granted, to have the initial application marked withdrawn as the matter could not proceed in the way it was.

On this, Ms. Lupogo blames the applicants and their counsel for being negligent in taking necessary steps for succession of the proceedings. Though the complaint could have, if everything remained constant, been valid, the circumstance of this case dictates otherwise. The applicants are more than 700 hundred persons living in different parts of the country and were 2487 exclusive the representatives in the review proceedings. The said proceeding was initiated by the representatives for and on behalf of the applicants and seemingly it is they who instructed the advocates. The said representatives having passed away, negligence of the advocate, if any, could not be associated with each and every applicants and more so where there is no evidence of personal service on each of them. It is on that account

that, I will hold, as I hereby do, that the period up to 31st July, 2017 when the previous review application was being prosecuted has been duly accounted for.

The applicants' account for the delay between 31st July, 2017 to 15th September, 2017 is in the first place associated with preparation of the lists of the applicants and collection of relevant documents from the previous advocates. This account has not been contested. In the second place, it is linked with the sickness of the said advocate as per annexure CT5 to the affidavit. While the account for the four days from 27th August 2017 is not in dispute, the justification for the subsequent period is in so far as it is not covered in the four days ED period reflected in CT5, questioned. I was thus urged to so hold. I cannot accept this submission for the reasons hereunder assigned. .

Though it is undeniable that, the ED given to the said advocate covered the four days period of his hospitalization, it is very clear in paragraph 15 of the affidavit that, the said advocate had not fully recovered when he was discharged from hospital. It was not until on 12th September, 2017 when he fully recovered. These facts have not been rebutted in paragraph 15 of the counter affidavit. It cannot therefore, be rebutted by way of submissions because submission is

not evidence but mere arguments from the bar. In the circumstance, I find no reason why I should doubt the evidence in the respective paragraph. I would agree with the applicants and their counsel that, mere discharge from hospital is not an indication of full recovery from sickness. I thus hold that, the period under discussion has been justified.

The period between 12th September, 2017 to 15th September, 2017 which was used for completion of the necessary documentation for lodgment of the fourth application is not in dispute. The period spent in prosecution of the fourth application is however contested for the reason that, the applicants and their advocate were negligent in not making due diligence search to establish the change. With respect, the complaint is without merit. It could perhaps have merit had the applicants' counsel not taken any action when the matter came for the first time immediate after the said change. In this case, as we have seen herein above, the issue of change of the status of the second respondent was brought to the attention of the Court on the date when the matter came for hearing for the first time and, on the same date, the applicants prayed to withdraw the application. In the circumstance, I find the said period has also been duly accounted for.

Last, it is the period between 22nd February, 2019 to 16th May, 2019 when the current application was filed. The justification of the delay in the respective period, is in essence, related to confusions in the names of the applicants. In particular, it is deposed in paragraph 18 and 19 of the affidavit as follows:

> "*18. That, immediately after 22nd February, 2019 when civil application No. 409/01 of 2017 was withdrawn and when the applicants' advocate was in preparation of the fresh application, he noted that some of the applicants whose names were submitted to him do not tally with the names in the former application for which he wrote a letter on 4th March, 2019 to the High Court to get the genuine list of the applicants who were part to the original case at the High Court. The applicants made follow up of the letter for several time only to be informed that the original file which contain the list is in the archive and will take sometimes to retrieve it.* ***Copy of the letter is annexed marked CT7, leave of this Court is craved*** *to form part of this affidavit.*
>
> *19. That, following frequent follow up by the applicants at the High Court, on 6th May, 2019, the applicants succeeded to get the file for perusal where they made copy of the list of the original parties to the suit in Miscellaneous Civil Cause No. 76/2003. Copy*

of the list of the applicants in civil application No. 409/01 of 2017 is annexed marked CT8, leave of this Court is craved to form part of this affidavit."

The applicants' counsel is criticized in paragraph 17 of the counter affidavit for not acting carefully and diligently in resolving the said discrepancies in the names of the applicants. I find no merit on this claim because in the absence of the original file, it would be extremely difficult for the advocate to resolve the confusion. I have also taken into account the fact that this matter involves hundred of persons living in different parts of the country. In the circumstance therefore, I am in no doubt that the period under review has also been duly accounted for.

Before I conclude my ruling, I find it imperative to make a comment though briefly on the issue of illegality which was raised as a ground for extension of time. Illegality, it is trite law, can constitute a sufficient ground for extension of time. See for instance, **Bank M (Tanzania) Limited.** (supra). Since such a ground is ordinarily raised as a matter of necessity to enable the higher court to correct the illegality, if any, it cannot, in my view, be taken into account where, like in the matter at hand, there is sufficient factual justification to

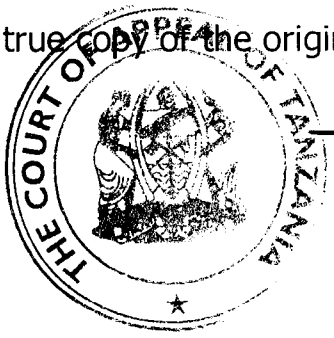
warrant grant of an extension of time. It is on that account that I will not consider the said issue.

In the final result and for the foregoing reasons, therefore, I find the application with merit. It is accordingly granted. The intended application for review should be filed within 60 days from the date hereof. I will not give an order as to costs in the circumstances.

DATED at **DAR ES SALAAM** this 21st day of April, 2022.

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of April, 2022 in the presence of applicant in person and Ms. Hapiness Nyabunya and Mr. Ayoub Sanga, Principal State Attorneys for the respondents is hereby certified as true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL