IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 146/8 OF 2020

DOMINIC ISHENGOMA ..... APPLICANT

AND

GEITA GOLD MINING LTD ..... RESPONDENT

(Application for extension of time to lodge Notice of Appeal and application for leave to Appeal from the Ruling and Order of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated 18th day of February, 2014
in
Civil Revision No. 5 of 2010

RULING

2nd & 8th December, 2022

RUMANYIKA, J.A.:

This is a second bite application, after refusal by the High Court (Ismail, J.) dated 30/07/2020 in Misc. Civil Application No. 147 of 2019. Dominic Ishengoma, the applicant is seeking an extension of time to file Notice of Appeal and apply for leave to appeal to the Court, The application is predicated under Rules 10 and 45A of the Tanzania Court of Appeal Rules, 2019 (the Rules) and supported by an affidavit of 67 paragraphs deposed by Dominic Ishengoma, the applicant. It was opposed by an affidavit in reply deposed by Kashinja Kashindye Lukwaro, Advocate, on behalf of the respondent.

From the record it is gleaned that the applicant was an employee of the respondent until in 2006 when he was terminated. Aggrieved by that

termination, he preferred labour dispute to the Labour Conciliation Board, (the Board) which overturned it and ordered his reinstatement. Not satisfied by that decision, the respondent successfully challenged it before the Minister for Labour who, in turn, reversed the Board's decision as he substituted it with termination without loss of the benefits. Then, the applicant went for execution of the Minister's decision vide Misc. Civil Application No. 17 of 2009 in the RM's court of Mwanza (the executing court). It ordered the respondent to pay him TZS. 30,000/= being subsistence allowance from the date of termination to the date of repatriation, as provided under the Security of Employment Act of 1964. However, as deposed in the applicant's affidavit at paragraphs 15 and 16, the Regional Labour Officer pegged the applicant's dues at TZS. 182,274,000/=. However, the executing court reduced it to TZS. 50,730,000/=. Undaunted, the respondent filed Revision No. 5 of 2010 alongside Misc. Civil Application No. 32 of 2010 before the High Court for stay of execution. Only the application for stay was successful. As for the said Revision, on 18/02/2014 Mwangesi, J. upheld the ruling of the executing court. Then on 25/02/2014, the applicant pressed in writing for the said TZS. 50,730,000/= previously deposited by the respondent as security, which he received under protest on as it excluded allowances for his wife and 4 children, and that, it did not cover them up to the date of repatriation. It is also the applicant's averment under paragraph 31

of the affidavit that, he was entitled to payment of subsistence allowance up to 04/03/2014, when he was paid the said TZS. 50,730,000/= which arreas, the Regional Labour Officer later pegged at TZS. 292,892,000/=. However, the executing court refused it for the reason that the applicant had been fully paid and that, any subsequent claims was an afterthought. On that account therefore, the executing court, Rumisha RM marked the claims closed. Dissatisfied, the applicant appealed to the High Court vide Civil Appeal No. 9 of 2015which was dismissed for being time barred. Still aggrieved, he lodged Notice of Appeal to the Court which later he withdrew after had made a series of applications.

In furtherance of his quest for the additional terminal benefits however, the applicant filed another application for execution before the executing court vide Misc. Civil Application No. 7 of 2017 which later was dismissed for being unfounded, as there was nothing to be executed. He appealed to the High Court vide Civil Appeal No. 65 of 2017 against that decision. However, Siyani, J. struck it out for non-appearance of the applicant. He filed an application to restore it but without a success. Still militant to his quest, unusually and belatedly, he reverted back to the origin to challenge the said decision in Civil Revision No. 5 of 2010 by Mwangesi, J. He applied for extension of time, before

the High Court which also, was not a success. As earlier on indicated, he is here by way of a second bite application, preferred on two grounds:-

1. That, there were sufficient reasons to justify the delay.
2. That, the impugned ruling and order are tainted with illegalities, irregularities and improprieties.

The issue is whether the applicant has met all the conditions to warrant granting of an order of extension of time.

At the hearing of the application on 02/12/2022, the applicant appeared in person without representation whereas, Mr. Silwani Galati Mwantembe learned counsel appeared for Geita Gold Mining Ltd, the respondent.

Having relied on his 43-paged written submissions filed on 15/02/2021, which include 14 pages of the historical background of the matter, the applicant contended as follows: **One**, that, the impugned decision was tainted with illegalities/illegalities, as the High Court Judge did not consider the Minister's order, as after the new and proper calculations, the terminal benefits to TZS. 292,892,000/=. To support his argument that illegality constitutes good cause for extension of time, he cited the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) TLR 182. **Two**, that he was prevented by illness between August, 2014 and 27/12/2017

and, upon consulting some advocates was caught up in the preparations of an application for execution. Then he lodged an application for extension of time to file appeal to the Court. **Three**, that, in between, the High Court judge, in the first instance having dismissed his application for extension of time he did not get copy of that order until on 18/02/2014 and he filed the present application on 22/12/2020. **Four**, that, all that, that time he was not idle but busy in the corridors of the courts pursuing his right and that one constituted good cause. To bolster his point, he cited our decisions in case of **Philemon Mang'ehe t/a Bukene Traders v. Gesbo Hebron Bajuta,** Civil Application No. 8 of 2016 and **Irene Temu v. Ngasa M. Dindi & 2 Others,** Civil Application No.278 of 2017 (both unreported). **Five**, that, if the Court refuses him an extension of time, he would be prejudiced for missing arrears of his terminal benefits, and that, his desire to pursue his right should not be curtailed on the pretext of "litigation must come to an end". He supported his point by citing the Court's decision in the case of **Anche Mwedu Ltd & 2 Others v. Treasury Registrar, Successor of Consolidated Holding Corporation,** Civil Reference No. 3 of 2015 (unreported). Further, he contended that, any shutting out the appeal would cause injustice on his part. To support his point, he cited our unreported decision in the case of **Boney N. Katatumba v. Waheed Karim,** Civil Application No. 27 of 2007.

To wind up, he contended that the intended appeal had overwhelming chances of success, given the illegalities deposed at paragraph 60 of the supporting affidavit. To cement the point, he cited decisions of the Court in the cases of **Iduwandumi Ng'unda v. Jenifer Danister & Another,** Civil Application No. 339/02 of 2017 and **TANROADS Lindi v. DB Shapriya & Co. Ltd,** Civil Application No. 29 of 2012 (both unreported) and urged me to find that the application is merited and grant it.

On his part, Mr. Mwantembe adopted his written submissions filed on 16/03/2021. He expounded them thus; **One,** that, the intended notice of appeal and leave to appeal to the Court ought to have been filed within thirty days and fourteen days of the impugned decision respectively, as provided under rules 83 (2) and 45 of the Rules. However, he contended, the applicant did not observe that time frames. And that, the applicant might have been caught up in the court corridors in further pursuit of his right but that allegation was not enough, without him telling the Court how did it prevent him from taking the essential steps required. To bolster his point, he cited our decision in an un unreported case of **Finca Tanzania Ltd and Another v. Boniface Mwalukasa**, Civil Application No. 589/12 of 208.

He added that, the applicant's contention contradicted with what he deposed at paragraph 36 of the affidavit, that, he received copy of the

impugned ruling on 23/01/2015, no longer on 17/02/2015. The learned counsel also contended that, whereas, the respective medical chit appended to the application showed that, the applicant was admitted in hospital on 08/02/2015 and discharged on 19/3/2015, yet he managed to file Civil Appeal No. 9 of 2015 on 17/02/2015, when, he is presumed to have been in hospital bed ridden. He further argued thus, that the said medical chit and or depositions in the affidavit are doubtful and unreliable. He therefore, urged me to find it to be an unmerited application which is liable to be dismissed. Leave alone the applicant's failure to account for each day of the inordinate delay, as he filed the first instant application about five years after the delivery of the said impugned ruling. To strengthen his point, he cited our decision in **Ramadhani J. Kihwani v. TAZARA**, Civil Application No. 401/18 of 2018 (unreported) and that, as for the irregularities deposed at paragraphs 60 – 65 of the applicant's affidavit, the first instant court could not be faulted because the rule in the case of **Lyamuya** (supra) is inapplicable under the circumstances. If anything, he added, those raised by the applicant could be grounds of the intended appeal.

Having heard the parties sufficiently and, upon considering their written submissions and authorities cited, the issue is whether, the applicant has shown good cause to warrant granting of extension of time.

It is settled law that extension of time is grantable upon the applicant showing sufficient or good cause for the delay. This has been the Court's proposition in a number of cases including **FINCA (T) Ltd & Another v. Boniface Mwalukisa,** Civil Application No. 589/12 of 2018 at Iringa, (unreported).

In the presented application however, as deposed at paragraphs 32 up to 54 of the supporting affidavit, the applicant gave a series of the matters he constantly had in courts of different levels including the Court, in pursuit of his right, sometimes in a style of forward and backwards arrangements. However, all this time his efforts were barren of fruits. In deed, many times without number, it has been pronounced by the Court that, times spent in court corridors by the applicant, like here, in further pursuit of his rights and resulting into delay, that delay is technical constitutes good cause for extension of time. See- **Omary Ally Nyamalege (as Administrator of the Estate of the late Seleman Ally Nyamalege) & 2 Others v. Mwanza Engineering Works,** Civil Application No. 94/08 of 2017, at Mwanza and **Hamisi Mohamed (as the administrator of the Estate of the late Risasi Ngawe) v. Mtumwa Moshi (as Administratrix of the Estate of the late Moshi Abdallah),** Civil Application No. 407/17 of 2019, at Dar es Salaam (both unreported).

However, I don't think that, the rule in **Omar Ally Namalege** (supra) and in many other cases where the Court was faced with the situation similar to the present one, intended to cover any one of the following situations: **one**, where the possibilities of delaying by the applicant tactics like here, were not ruled out **two**, a party who approaches a wrong forum, or proper forum but for a wrong remedy, in any cases unreasonably.

It is noteworthy as indicated before therefore, that, for the interest of timely justice, the applicant ought not to have done the following: **one**, after his second phase application for execution based on the new calculations dismissed on 26/08/2014 for the matter being *res judicata* and the fact that theexecuting court was *functus officio,* the applicant should not have gone back there, **two**, after the High Court (Siyani, J) refused him restoration of the appeal which was previously struck out for non-appearance of the applicant (as deposed at paragraphs 51 and 52 of the supporting affidavit), at least, the applicant should have appealed against that order of refusal, instead of reverting to the original impugned decision, as he did, **three,** as deposed at paragraph 47 of his affidavit, at page 17 of the record of application, with an intention to appeal having navigated up to the Court and the fact that he withdrew the respective notice on 22/12/2017, it was improper for the

applicant to go back to the origin to revive the matter which is sixteen years old in courts.

As alluded to before, most of the time the applicant went to improper forums for wrong remedies. He therefore, cannot seek amnesty of the purported technical delay as he acted unreasonably wrongly. In other words, his forward and backward arrangements were improper, unwarranted and uncalled for under the circumstances, as he had legal guidance, as deposed in his affidavit. The issue of technical delay therefore is neither here nor there.

It is equally significant to state, that, free access to the courts of law and timely justice are available for those who readily, diligently and effectively make good use of the courts, just as the bottom-line has been that, endless litigation and timely justice do not co-exist. Moreover, I am mindful of an undisputed fact that, most of the matters so instituted by the applicant did not directly intend to challenge the said impugned decision, as initially, the applicant had no qualms with the impugned decision until such time when came up with new formula and calculations, therefore change of mind.

Finally, was the issue of illegality and irregularity which I need not to belabour on. It is settled law that illegality of the impugned decision constitutes good cause for extension of time, in this case, within which the applicant to file notice of appeal and leave to appeal. It happens so when the said illegality is

so apparent on the face of the record that it is not the one to be discovered by long drawn argument or process. See- **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (1992) T.L.R 182 and **Lyamuya Construction Company Limited** (supra) According to the applicant, as deposed at paragraph 60 of the supporting affidavit, the illegality which the impugned decision is allegedly tainted with, is that, the High Court ignored both the law and order of the executing court which the applicant and his family to be paid TZS. 30,000/= per diem from the date of termination to the date of repatriation. From the criteria and that rule, as was tested in the case of **Lyamuya** (supra), therefore, I am settled in mind that, that raised one is not a point of illegality worth the name. Rather, it is a point of grievance cum ground of appeal, save for the time bar.

As regards the applicant's contention that there were overwhelming chances of success of the intended appeal, with respect, it no longer constituted good cause for extension of time. See- **M/s Regimanuel Gray (T) Ltd v, Mrs. Mwajabu Mrisho Kitundu and 99 Others**, Civil Application No. 420/17 of 2019 and **The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe and 4 Others**, Civil Application No. 191/06 of 2019 (both unreported). For instance in **M/s Regimanuel Gray (T) Ltd** (supra), we held that:

> ...The fact that there are points of law to be considered by the Court does not, *ipso facto constitute good cause to grant extension of time. Neither does the fact that the appeal has overwhelming chances of success...*

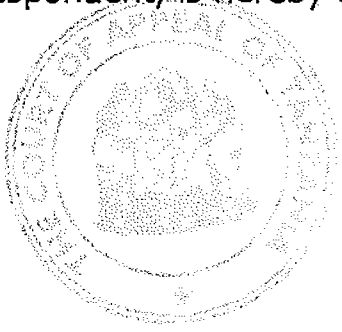
It follows therefore, that the above legal proposition, alters down the issues of the applicant being prejudiced for missing the claims for payment in arreas, shutting of his intended appeal and causing injustice on his part, if the present application is not granted.

In the consequence, the application is unmerited and dismissed out. I make no order for costs because it is a labour matter where ordinarily we do not award the costs. Order accordingly.

DATED at **MWANZA** this 8th day of December, 2022.

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered on 8th day of December, 2022 in the presence of Mr. Halbert Jonathan, son of the Applicant and Mr. Galati Mwantembe, counsel for the respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL