IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO 532/01 OF 2021

THE COMMISSIONER GENERAL OF

TANZANIA REVENUE AUTHORITY .....1ST APPLICANT

THE ATTORNEY GENERAL ..... 2ND APPLICANT

VERSUS

URBAN J. MTUI ..... RESPONDENT

(Application for extension of time to file Notice of Appeal from the judgment and decree of the High Court of Tanzania at Dar es Salaam)

(Hon. Mwaikugile, J.)

Dated 16th August ,2013

in

Civil Case No. 365 of 2001

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RULING

9th & 18th May, 2023

MAIGE, J.A:

This application is for extension of time to file a notice of appeal. It was instituted after a similar application had been dismissed by the High Court on 15th October, 2021. This Court has power to deal with an

application like this under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) read together with rule 45A (1) (a) thereof.

The impugned decision pertained to the lawfulness or otherwise of the service of the respondent and it was pronounced on 16th August, 2013 with the result that, the termination was illegal and the respondent be paid TZS 383,364,476.30 and accruing interest thereon at the rate of 13% as general damages.

Aggrieved, the applicants, having obtained an extension of time from the High Court (Munis, J), lodged a notice of appeal on 23rd September, 2016 and applied for a copy of the proceedings soon thereafter. The notice of appeal was however struck out on 23rd October, 2021 for failure to take essential steps towards lodging the intended appeal. Still aggrieved, the applicants commenced another application for extension of time to lodge a notice of appeal which was dismissed by the High Court and thus the instant application.

In the affidavit in support of the application, which was seriously rebutted by the respondent's affidavit in reply, the applicants associate the delay with bonafide prosecution of various proceedings before and after the striking out of the initial notice of appeal. To them, the delay was a mere excusable delay. In the second place, the applicants have

relied on illegality to justify their application. The illegality involved being that, the High Court did not have jurisdiction to entertain the suit.

At the hearing of the application, the applicants were represented by Mr. Hospis Maswanja, learned Senior State Attorney and Ms. Nalindwa Sekimanga, learned State Attorney. The respondent on his part, enjoyed the service of Messrs. Cornelius Kariwa and Mike Kariwa, both learned advocates.

In her brief submissions, Ms. Sekimanga adopted the notice of motion and affidavit and submitted, in respect to illegality that, as the dispute involved was purely a labour dispute, the High Court acted without jurisdiction. The matter was within the exclusive jurisdiction of the defunct Industrial Court of Tanzania ("the ICT") under section 4 of the repealed Industrial Court of Tanzania Act ("the ICTA"), she clarified.

In reaction, Mr. Cornelius Kariwa adopted the affidavit in reply and submitted that; the application is an abuse of court process in that; although the dispute has stayed for more than 23 years, the intended appeal is yet to be instituted notwithstanding expiry of more than 52 months from the time when the High Court extended time to lodge a notice of appeal. Relying on the decision of the Court striking out the

notice of appeal, he contended that, the inaction amounted to a serious negligence which cannot be the basis for extension of time.

Having heard the submissions for and against the motion, it is desirable to determine the application. The vexing issue which I have to address is the applicants have established good cause for extension of time. I propose to start with the asserted proposition that, the delay was a mere excusable technical delay. It is common ground that, in as long as it was preceded by a court order extending time, the initial notice of appeal was filed within time. Therefore, the delay between the lodging of the notice of appeal and striking it out, which was on 23rd October, 2021, was a mere excusable technical delay. This is in line with the principle in **Bank M (Tanzania) Limited v. Enock Mwakyusa**, Civil Application No. 520/18 of 2017 (unreported) to the effect that; a prosecution of an incompetent appeal when made in good cause and without negligence, does in itself constitute good cause for extension of time. See also **Bharya Engeneering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (unreported)

What about the delay subsequent to the striking out of the notice of appeal? The justification, according to paragraph 12 of the affidavit is that, the applicants filed an application for extension of time to the Court

on 27th November, 2020 which was struck out for being incompetent. Mr. Kariwa contends that, the act was by itself a signification of negligence. He is quite right. The applicants have always been duly represented. Their counsel know for sure that, the original jurisdiction to grant an extension of time to lodge a notice of appeal is vested in the High Court or the tribunal whose decision is the subject of the intended appeal. The filing of the incompetent application to the Court in my view, exhibits a serious negligence. With respect, such negligence cannot be a justification for extension of time.

We dealt with a similar issue in case **William Shija vs. Fortunatus Masha**, [1997] T.L.R. 213 where the applicant's appeal which was instituted well within time was eventually found incompetent and therefore, struck out. The cause of action available to the respondent was, like the instant case, to file an application to the High Court for extension of time to file a notice of appeal. However, the respondent filed an application for extension of time to institute an appeal to the High Court which was dismissed for want of jurisdiction. On application to the Court by way of a second bite, a single justice of the Court extended time on account that the delay arising from the prosecution of the incompetent appeal was a mere mere excusable technical delay. On reference, the

Court while noting that, the period used in prosecuting the incompetent appeal amounted to an excusable technical delay, it was of the view that, the period spent in the prosecution of the incompetent application at the High Court in so far as it emanated from a clear negligence on the part of the applicant's counsel did not amount to an excusable technical delay. In particular, it was observed as follows:-

> *"Applying the principle enunciated in these cases to the instant case, we are with respect, satisfied that, the negligence on the part of the Counsel for the first respondent in filing wrong application which caused the delay cannot constitute sufficient reason. In our understanding, what featured promptly before the learned single judge was the fact that the wrong application to the High Court was filed immediately after this Court struck out the appeal and that the delay in filing the application which was before him was technical.* Had the learned single judge taken into account the fact that it was the *Counsels of filing wrong applications which caused the delay, we think he would well have come to a different decision."*

Having rejected the justification for the delay for the period subsequent to the order striking out the notice of appeal, the period therefrom up to the filing of the second application for extension of time

at the High Court remains unaccounted for. So, the application cannot be granted on factual justification for delay.

I shall now consider whether the application can be granted on the ground of illegality. It is now settled that, illegality can by itself constitute a good cause for extension of time. This is according to the rule in **Secretary, Ministry of Defence & National Service v. Devram Valambhia [1992] T.L.R 18** to the effect that:

> *"In our view, when the point at issue is one alleging illegality o f the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight"*

It is however the law that, for an extension of time to be granted on illegality, the illegality must be apparent on the face of the record with sufficient importance. This is what we said in **Lyamuya Construction Company Limited v. the Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) where it was observed:

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my*

view, be said that in VALAMBIA'S case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that "of sufficient importance" and I would add that, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."

It has also to be noted that, extension is an equitable remedy. Therefore, in deciding whether or not to grant it, the court is expected as well to consider the reason for the delay and the degree of prejudice that the respondent may suffer if the application is granted. See for instance, the case of **Henry Muyanga v. Tanzania Communication Company Ltd**, BK Civil Application No. 8 of 2014 (unreported), where it was held:

"*The discretion of the Court to extend time under Rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the Court may take into consideration, such factors as, the length of the delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the*

respondent may suffer if the application is granted".

I have taken time to consider the element of illegality relied upon by the applicants in line with the history and circumstances surrounding the case. I am settled, in my mind that; the illegality sought to be corrected in the intended appeal is not of sufficient importance. More so, I am settled that, the grant of the order will lead to serious injustice on the part of the respondent. I have two reasons to justify my view. **First**, the case at the trial court was initiated in 2001 when the defunct ICT was still in operation. It was concluded in 2013 when the same had phased out of existence hardly ten years before. In my view, as the law and dispute settlement machineries under which the jurisdictional issue is based are no longer in existence, it is a matter of common sense that, the intended correction of illegality is not of sufficient importance.

Second and more importantly, this dispute has been pending in courts since 2001. It is now 23 years old. It relates to the fate of the service of the respondent. This means that, throughout this time, the respondent is unemployed. The facts in the affidavits suggest that, while the applicants are responsible for this very inordinate delay and sometime by their negligent inaction, the respondent is not. Obviously, therefore,

the grant of the application will occasion serious injustice on the part of the respondent. It will not serve any meaningful purpose as well.

In the final result and for the foregoing reasons, the application fails and it is accordingly dismissed with costs.

DATED at **DAR ES SALAAM** this 16th day of May, 2023.

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 18th day of May, 2023 in the presence of Ms. Mercy Kyamba, learned Principal State Attorney for the 1st and 2nd applicants and Mr. Frank Kilian, learned counsel for the respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL