IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 5/01 OF 2022

RAMADHANI BAKARI & 95 OTHERS ..... APPLICANTS

VERSUS

AGA KHAN HOSPITAL ..... RESPONDENT

(Application for Extension of time to appeal against the decision of the High Court of Tanzania at Dar es Salaam)

(Manento, J.K, Kalegeya, J. & Mandia, J.)

dated the 17th day of August, 2007
in
Miscellaneous Civil Appeal No. 11 of 2005

.....

RULING

4th July, & 29th August, 2023

KAIRO, J.A.:

Before me today is an application for extension of time to file an appeal to the Court out of time. It has been preferred under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) on the ground that:-

(i) There is a serious point of law involved that requires Court's determination.

(ii) The delay made by the applicants was not deliberate but a technical delay as the applicants have never rested to pursue their rights in Courts' corridors.

Briefly, the background of this dispute as can be discerned from the record is that, the applicants sued the respondent in the Industrial Court of Tanzania at Dar es Salaam challenging the manner in which the redundancy exercised was carried out together with the payment effected to them thereof. The Industrial Court granted some of the applicant's claims, the move which irked the respondent who decided to file revisional proceeding in the same court before the panel of three members. Upon hearing of the parties, the Industrial Court concurred with the previous decision. The respondent was further aggrieved and lodged an appeal to the High Court before the panel of three Judges in terms of the law governing the conduct of trade disputes by then. After hearing the parties, the panel allowed some of the claims and rejected others in the decision pronounced on 17th day of August, 2007.

The applicants were not amused with the outcome and decided to appeal to the Court. Procedurally, they were required to obtain leave before lodging the appeal, therefore applied for it at the High Court but refused for failure to demonstrate serious issue for determination by the Court. Still adamant, the applicants again applied for leave in the Court on a second bite which was granted on 19th November, 2012 and went on to file Civil Appeal No. 100 of

2013 which was struck out on 23rd October, 2014 for being filed beyond 60 days without attaching a certificate of delay. It means that the Notice of Appeal crumbled as well. The applicants were later on 20th May, 2015 allowed by the High Court in Misc. Civil Application No. 573 of 2014 to file the Notice of Appeal out of time. The applicants then applied for an extension of time to file leave to appeal to the Court in Civil Application No. 301/18 of 2016 which was granted on 3rd May, 2017. They were ordered to file the application for leave to appeal to Court within 30 days from the date of decision. For some reasons, the applicants did not comply with the order, the omission which forced them to pray for another extension of time to file leave in Miscellaneous Civil Application No. 728 of 2019 and granted on 10th June 2016. They further applied for leave through Misc. Civil Application No. 294 of 2021 and granted on 26th November 2021. They are now before the Court seeking for an order to be allowed to lodge their appeal out of time on the grounds above explained.

When the application was called on for hearing, Messrs. Evans Nzowa and Pongolela David appeared for the applicants and the respondent, respectively. In the affidavit sworn by the 1st applicant on behalf of the rest of the applicants, together with the written

submission filed on 23rd February, 2022, the applicants narrated what transpired from the time when the dispute ensued, which narration is recapitulated in the brief history of the dispute above given. As such, there is no need of repeating it to avoid monotony.

When invited for his oral submissions, Mr. Nzowa submitted that the High Court erred to allow the 7th ground of appeal thereby finding that proper consultation was conducted prior to redundancy exercise. Further, that it was an error for the High Court to find that the Industrial Court had no power to order additional payments after the parties failed to agree on the offered redundancy package.

As regards the second ground concerning technical delay, Mr. Nzowa submitted that the applicants have been in Court corridors since 23rd October, 2014 when Civil appeal No. 100 of 2013 was struck out for failure to attach a Certificate of delay as the appeal was lodged beyond the prescribed time limit. He concluded by praying the Court to see merit in the application and grant the prayers sough therein.

On the other hand, the respondent forcefully opposed the application through an affidavit in reply sworn by Mr. Kieran

Katanga Kitojo and written submission in reply which formed part of Mr. Pongolela's oral submissions.

Regarding the first ground into which the applicants interrogate the propriety of **one,** the consultations conducted prior to redundancy process; and **two,** the additional payments ordered by the Industrial Court, Mr. Pangolela submitted that the two aspects do not qualify to be called points of law. Rather, they are points of facts while currently the Court is not a place to resolve the two listed issues in the circumstances of this case. He went on to submit that the said point of law is not apparent on the face of record as the law dictates, instead it will require the Court to take a long-drawn process to find out or identify the alleged points of law. He also added that the ground was neither pleaded in their affidavit nor in written submission, as such, there is no point of law which was raised at all.

Responding to the second ground, whereby the applicants advanced the reason of technical delay, Mr. Pongolela refuted the contention submitting that it does not fit in the circumstances of this application. He clarified that the plea of technical delay could have been applicable if the first appeal No. 100 of 2013 was filed within time and later declared incompetent and not as it happened in this

application where the said appeal was filed out of time. He cited the case of **Fortunatus Masha vs William Shija and Another** [1997] T.L.R. 154 to back up his argument.

It was his further contention that the applicants cannot plead technical delay as a reason for delay because no any material facts have been advanced in their affidavit to reflect the pleaded ground for the extension of time sought. According to him, whatever stated in the applicants' submission were mere statements from the bar and prayed the Court to disregard the same.

Mr. Pongolela further submitted that, the applicants on 26th November, 2021 were given 30 days within which to lodge their appeal but until the date of filing this application, that is 10th January, 2022, they had not yet done so. He contended that since the expiry date of filing was 25th December, 2021, then, there are 15 days which the applicants have not accounted for. According to him, the said delay is an actual one and not technical as claimed by the applicants adding that the law is long settled that even a single day has to be accounted for.

Mr. Pongolela also contended that though the applicants associated the cause of delay with the delay to get respective ruling,

the said reason was not stated in their affidavit contrary to the settled principle that parties are bound by their pleadings. That aside, Mr. Pongolela further contended, there was no letter by the applicants showing that they requested for the said copy while they were in court when the ruling was pronounced. He also added that the applicants did not state if they now have the proceedings they stated to be the cause of delay to file the intended appeal within the given 30 days so as to assure the Court that they will now be able to file it if given time. He concluded by praying the Court to dismiss the application with costs for failing to exhibit good cause.

In his rejoinder, Mr. Nzowa insisted that the delay to file the appeal within the 30 days ordered was caused by the failure to get the respective ruling. But he conceded that the applicants did not attach the letter requesting for the ruling to which he contended to be an oversight. Nevertheless, the applicants requested for it as they deponed in paragraph 22 of their affidavit, Mr. Nzowa submitted.

Responding to the attack from Mr. Pongolela for failing to state whether or not the applicants currently got hold of the documents they were waiting for from various courts, Mr. Nzowa submitted that the applicants were currently availed with all the

required documents for appeal purpose as per the letter dated 18th November, 2022 from the Registrar addressing to them on the readiness of the documents but that they did not so state in the affidavit as they were not yet availed with the same at the time of filing this application.

As regards the first ground, Mr. Pongolela insisted that the points raised were pure points of law. He elaborated that the question as to whether the Industrial Court had mandate to order for additional payments or not, relates to the powers of the Industrial Court as provided in Section 28 of the Industrial Court Act Chapter 60 R.E. 2002. Likewise, the requirement for consultation prior to redundancy exercise was provided in section 6 (1) (g) of the Security of Employment Act, Chapter 387 R.E. 2002. He reiterated his prayer to have the application granted.

Having considered the parties submissions, the central issue for determination is whether the applicants have exhibited good cause to warrant the extension of time sought. According to rule 10 of the Rules under which this application is predicated, the applicants must exhibit good cause for delay to do what was supposed to be done, for such an application to succeed. However, what amounts to good cause has not been defined but the Court

has invariably considered various factors as we previously stated in **Lyamuya Construction Company Ltd vs. The Registered Trustees of the Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). These are **one**, to account for all period of delay; **two**, the delay should not be in ordinate; the applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action he intends to take and **three**, the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged. [See also **Ludger Bernard Nyoni vs National Housing Corporation**, Civil Application No. 372/01 of 2019 (unreported).

As earlier stated, the applicants have advanced two grounds to convince the Court to exercise its discretion and grant the extension of time to file the intended appeal out of time.

I will start with the issue of technical delay. In elaboration, the applicants have narrated a litany of what happened from the moment the decision sought to be challenged was pronounced on 17th August, 2002 to the time when the current application was filed on 10th January, 2022 as above narrated. In all that time of about 20 years, the applicants claim to be diligently in courts' corridors

pursuing their right. However, for the purpose of this ruling, I will discuss the period between 26th November, 2021 when the High Court granted the applicants 30 days leave to lodge their appeal to 10th January, 2022 when this current application was filed as the other periods have already been addressed by various courts when dealing with various matters concerning this dispute. Simple calculation denotes that 30 days period given lapsed on 25th December, 2021 which means there are 16 days after the expiry of the given period which the applicants are legally bound to account for them.

I am aware that Mr. Nzowa in his oral submission associated the delay to file the appeal with what he alleged to be the non-supply of the ruling granting leave to the applicants. It was his contention that the fact was deposed in paragraph 22 of the applicants' affidavit. However, going through the said paragraph, I observed that the applicants are categorical that they delayed to file the appeal because they were still following up the proceedings of various applications previously lodged which according to them were to be included in the contemplated record of appeal. In other words, the referred paragraph is talking of following up of the proceedings and not ruling as Mr. Nzowa submitted in his oral submissions. It is

the cherished principle of law that parties are bound by their pleading whereby a party is not allowed to depart from his pleadings thereby changing his case from which he had originally pleaded [see: **James Funke Gwagilo vs Attorney General** (2004) T.L.R. 161 and **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal No. 357 of 2019] (unreported) as rightly observed by Mr. Pongolela. Thus, the reason that the applicants were waiting for the concerned ruling which assertion were not stated in the affidavit, amount to words from the bar which the Court cannot rely on as are not worthy considering. In the same vein, the 16 days delay were the actual delay which was not accounted for and not technical as he claimed. The law is long settled that the applicant has to account for each day of delay, even a single day as rightly submitted by Mr. Pongolela [see: **Hassan Bushiri vs Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Dar es Salaam City Council vs Group Security Co. LTD**, Civil Application No. 234 of 2015, and **Tanzania Fish Processors Limited vs Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018 (all unreported)].

In **Dar es Salaam City Council** (supra) the Court observed as follows:

"...the stance which this Court has consistently taken is that an application for extension of time, the applicant has to account for every day of delay."

In the circumstances, therefore, the technical delay as a ground for extension of time is inapplicable in the circumstance of this application and further it's the finding of the Court that the applicants have failed to account for the 16 days lapse as above analysed.

Regarding the issue of illegality, Mr. Nzowa has pin-pointed two errors allegedly committed by the High Court in its decision; **one,** that the industrial Court had no power to order additional payments; and **two**, that proper consultation was conducted prior to redundancy exercise.

In riposte, Mr. Pongolela vehemently refuted the contention. He first contended that the ground was not deponed in the affidavit of the applicants. Going through the affidavit, it is true that the applicants did not plead the said ground therein. Nevertheless, it is undeniable fact that the said ground was stated in the notice of motion which, in my opinion was enough to alert the respondent that the applicant would rely on them. It would have been different

if the ground had not featured in the notice of motion nor in the affidavit.

Though the applicants were expected to state them in the affidavit as well, but in my view, the omission is not fatal and can be rescued by the overriding principle, the same having been stated in the notice of motion.

Mr. Pongolela further attacked the ground submitting that the issues forming part of the alleged points of law are first, not apparent on the face of the record; and second, they do not qualify to be so called. According to him, the same are points of facts while the Court at the current stage is procedurally required to determine if points of illegality are involved in the intended action.

I have gone through the judgment, subject of the intended appeal, and suffice to state that the two issues in contention were discussed by the Court in the concerned Judgment when analysing grounds of appeal number 3 and 7. But further, and correctly in my view, as submitted by Mr. Nzowa in his rejoinder, the two issues are provided in section 6 (1) (g) of the Security of Employment Act, Chapter 387 R.E.2002 and section 28 of the Industrial Court Act,

1967 Chapter 60 R.E. 2002 respectively. In view of the above, I do not subscribe to Mr. Pongolela's arguments as regards this ground.

It is a settled law that in an application for an extension of time where the applicant raises illegality as a ground, the Court has a duty to grant it and that it is not for the Court extending time to determine as to whether or not the point raised is correct. This is because such a determination would be the domain of the Court that would preside over the intended appeal. I am fortified in this stance in the case of **VIP Engineering and Marketing Limited and Three Others vs Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 CA (unreported) wherein the Court observed as follows:-

> *"we have already accepted it as an established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitute "sufficient reasons" within the meaning of rule 8 of the Rules for extending time" (now rule 10 of the Rules)."*

In view of the above analysis, I find it appropriate to grant this application so that the raised points of illegality can be considered in the contemplated appeal. The application for extension of time to

file appeal is therefore granted. The same is ordered to be filed within 30 days from the date of delivery of this ruling. Costs shall be in the cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 23rd day of August, 2023.

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered this 29th August, 2023 in the presence of Mr. Pongolela David, learned counsel for the Respondent hold brief for Mr. Evans Nzowa, learned counsel for the Applicants is hereby certified as true copy of original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL