

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

CIVIL APPLICATION NO. 409/17 OF 2022

SRIYANJIT PERERA APPLICANT

VERSUS

RESEARCH TRIANGLE INSTITUTE OF TANZANIA RESPONDENT

**(Application from the Decision of the High Court of Tanzania (Labour
Division) at Dar es Salaam**

(Biswalo, J.)

dated the 30th day of March, 2022

in

Labour Revision No. 344 of 2021

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RULING

7th June & 12th September, 2023

MAKUNGU, J.A.:

Before me is a notice of motion dated 8th July, 2022, filed by the applicant on 11th July, 2022. The Court is being moved under rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The applicant is seeking extension of time within which to serve the respondent with the notice of appeal out of the prescribed time. The notice of motion is supported by two affidavits one sworn by advocate Mr. Steven C. Byabato and the other by advocate Mr. Daniel Welwel and resisted by two affidavits in reply sworn by advocate Mr. Jovinson Kagirwa for the respondent.

To facilitate appreciation of the issue involved in this matter, it is necessary to begin with the background to this application as can be gathered from the notice of motion and the supporting affidavits.

On the 30th March, 2022, the High Court of Tanzania (Labour Division) at Dar es Salaam entered a judgment and decree against the applicant in the Labour Revision No. 344 of 2021. The applicant was dissatisfied with the said judgment and decree, hence instructed ASYLA ATTORNEYS firm to appeal to this Court. It is the averment of advocate Mr. Steven Byabato that he was instructed by advocate Mr. Daniei Welwel to take necessary steps for appealing. On 28th April, 2022 he filed the notice of appeal and wrote letters to the High Court requesting judgment, decree, proceedings and exhibits.

It is the averment of Mr. Byabato further that in the intervening time he was about to get married thus, on 30th April, 2022 he travelled to Kagera for traditional ceremony and paying bride price and travelled back to Dar es Salaam on 21st May, 2022. On 23rd May, 2022 he returned to the office, but he was very much preoccupied with the preparations for his wedding which was due to take place on 4th June, 2022. He thus, took his annual leave from 30th May, 2022 to 19th June, 2022. It is averred that once he resumed in office, it came to his knowledge that the notice

of appeal was not served on the respondent and that was on 4th July, 2022. Immediately thereafter they prepared the present motion for enlargement of time within which to serve the notice of appeal on the respondent out of time.

At the hearing before me, Messrs. Daniel B. Welwel and Erick Mhimba, learned counsel represented the applicant, while the respondent had the service of Mr. Mvano M. Mlekano, learned counsel.

Having adopted the notice of motion and the contents of the supporting affidavits as part of his oral submission, Mr. Welwel elaborated the contention that the failure to serve the notice of appeal on the respondent was due to an accidental omission on the part of advocate Byabato who was assigned to file and serve that notice of appeal but unfortunately, he forgot to do so. Further elaboration is made in paragraphs 6 through 13 of the affidavit of Mr. Byabato. He contended that the affidavit of Mr. Byabato is exhaustive and sufficiently support the application which has to be granted.

The applicant's advocate argued that good cause warranting extension of time has been established and that the Court should disregard the delay and focus on dispensation of justice by invoking the

overriding objective principle and granting the application which will not occasion any injustice to the respondent.

In his further submissions, Mr. Welwel argued that the CMA's decision is tainted with illegality which the High Court committed the same error. The CMA had no jurisdiction to entertain the matter involved an employee who has a contract of employment as an expert who has a resident permit under the non-citizen. He contended that this ground alone suffices for the instant application be granted. On this, reliance was placed on the decision of the Court in **Principal Secretary Ministry of Defence and National Service v. Divram P. Valambhia** [1992] TLR 185.

For the above grounds, it was argued by Mr. Welwel, that sufficient cause has been established to warrant extension of time. He therefore prayed for the application to be granted with costs.

Mr. Mlekano opposed the application. Having firstly adopted the two affidavits in reply earlier filed on 19th August, 2022 in terms of rule 106 (7) of the Rules, he submitted that the applicant has failed to show good cause for the Court to exercise its discretion in favour of the applicant under rule 10 of the Rules. To cement his argument he referred me to the decision of the Court in **Jubilee Insurance Company (T) Ltd v.**

Mohamed Sameer Khan, Civil Application No. 439/01 of 2020 and **Muse Zongeri Kisere v. Richard Kisika Mugendi & 2 Others**, Civil Application No. 244 of 2019, (both unreported).

Explaining how the applicant has failed to account for the delay, the learned advocate for the respondent pointed out that: **first**, the delay for the period from 23rd May, 2022 when Mr. Byabato returned to office upto 30th May, 2022 when he was granted leave 7 days is not accounted for. **Second**, the period from 20th June, 2022 when he reported back in office to 4th July, 2022 when he was asked if he obtained the exhibits, 14 days, is not explained. **Third**; that the period also not accounted for, is that from 4th July, 2022 when the applicant's advocate became aware that the notice has not yet served on the respondent to 11th July, 2022 when the instant application was filed. It was therefore argued that there was unexplained inordinate delay which exhibit sloppiness, negligence and inaction on the part of the applicant and his advocates and further that the said inaction and negligence of the advocates is not an excuse. To cement this argument the learned advocate cited the decision of the Court in **Mzee Mohamed Akida & 7 Others v. Low Shek Kon & 2 Others**, Civil Application No. 481 of 2017 (unreported). He insisted that Mr. Welwel

had a duty to follow – up the matter and make sure that the notice of appeal was served properly.

Regarding the issue of illegality, the learned advocate for the respondent argued that illegality does not constitute a sufficient ground in every application for extension of time and also that even where illegality is pleaded, it must be apparent on the face of the record and it should not be that which has to be discerned from long and protracted arguments.

It was further argued by the advocate for the respondent that, the issue of illegality raised by the applicant's advocate was not pleaded in the affidavit and also not among the grounds of this application, it is a submission from the bar.

Mr. Mlekano finally submitted that the issue of overriding objective principle, the Court has said many times that this is not an angle to escape procedural aspect of the law. He argued that in the circumstances of this application the overriding objective principle cannot fit. He also argued that the applicant encountered no technical delay worth of consideration and that the application should be therefore dismissed with costs.

In his brief rejoinder apart from reiterating his earlier submission, Mr. Welwel insisted that the affidavit of Mr. Byabato managed to show

good cause for the Court to extend time. As regard the issue of illegality, he insisted that there is a point of law that CMA had no jurisdiction to entertain the matter which constitutes a good cause for extension of time. He therefore urged me to grant the application.

Having examined the notice motion, the supporting affidavits as well as the two affidavits in reply and also after hearing the rival submissions from the learned counsel for the parties, the only issue for my determination is whether the applicant has managed to show good cause for the Court to extend time within which to serve the respondent with the notice of appeal.

The power of the Court to enlarge time for the doing of any act authorized or required by the Rules is derived from rule 10 of the Rules. It is a settled position of the law that extension of time is a matter of the discretion of the Court which must be exercised judiciously according to the facts of each case. In applications for extension of time, the Court is required to consider whether or not good cause for delay has been shown to warrant extension of time. There is, however, no definition of what amounts to "good cause" but in determining whether, in a particular case, good cause has been established or not, a number of factors have to be taken into account depending on the circumstances of that particular case.

The Court has to look, for instance, at whether the applicant was diligent, reasons for the delay, the length of the delay, the degree of prejudice to the respondent if time is extended, whether there is point of law or the illegality or otherwise of the impugned decision etc, see, **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987, (unreported).

Also relevant to applications for extension of time is the position of the law that the Court to extend time, every day of delay must be accounted for. The Court in **Elias Mwakalinga v. Domina Kagaruki and 5 Others**, Civil Application No. 120/17 of 2018 (unreported), stressed that:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

Guided by the above demonstrated position of the law, my first task is to examine whether the applicant has accounted for the delay. This question should not detain me. I entirely agree with the learned advocate for the respondent that no good cause has been advanced by the applicant to justify the delay of 7 days from 4.7.2022 when the applicant's advocate became aware that the notice of appeal has not yet served on

the respondent to 11.7.2022 when the instant application was filed. This period of 7 days has not been accounted for. The applicant has advanced no good reasons why after learning that the respondent had not been served with the notice of appeal on 4.7.2022 the applicant took 7 days before lodging the instant application on 11.7.2022.

From the above, it is therefore clear, not only that the applicant has totally failed to account for the delay but also that both the applicant and his advocates exhibited negligence and inaction. It should also be emphasized that the negligence of an advocate is not an excuse and does not constitute a good cause for extension of time. In **Exim Bank (TZ) Ltd v. Jacquilene A. Kweka**, Civil Application No. 348 of 2020 (unreported) the Court stated, among other things, that:

"...firms are manned by lawyers who ought to know court procedures. In fact, failure of the advocate to act within the detect of law cannot constitute a good cause for enlargement of time."

Turning to the ground on illegality raised by the applicant that the CMA had no jurisdiction to entertain the claim of unfair termination. It should be restated at the outset that, regardless of whether or not a reasonable explanation has been given by the applicant to account for delay, a claim of illegality of the impugned decision constitutes a good

cause for extension of time under rule 10 of the Rules, as propounded in **Principal Secretary Ministry of Defence and National Service** case (supra). It is also settled that, where illegality is raised as one of the grounds for extension of time, it must be satisfied that the claimed illegality really exists. Further, in accordance with **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Womens Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported), the illegality in question must be that which raises a point of law of sufficient importance and the same must be apparent on the face of record not one that would be discovered by a long argument or process.

Applying the above principles to the instant application, I have examined the record of this application and I totally agree with the learned advocate for the respondent that the issue was not raised as one of the grounds of this application, and also not pleaded in the affidavit but it is a submission from the bar. I also observed that the alleged decision of the CMA has not been attached, therefore it is hard to detect the alleged illegality by the applicant. Basing on my observation, I am not persuaded that there is any illegality that is apparent on the face of record that can

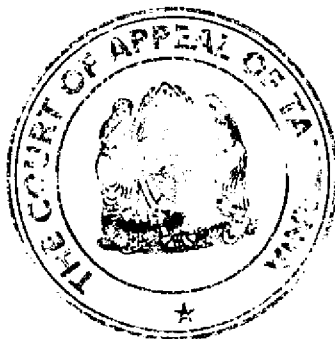
be said to constitute a good cause for the Court to extend time within which to serve a copy of the notice of appeal on the respondent.


For the given reasons, I found that no good cause has been shown to warrant extension of time as sought by the applicant. The application is therefore accordingly dismissed with costs.

DATED at DAR ES SALAAM this 8th day of September, 2023

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 12th day of September, 2023 in the presence of Mr. Lusiu Peter, learned advocate for the Applicant, and Mr. Mvano Mlekano, learned advocate for the Respondent is hereby certified as a true copy of the original.




J.E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL