

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CIVIL APPLICATION NO. 323/13 OF 2021

LUSAJO WATSON MWAKASEGE APPLICANT

VERSUS

NJOMBE DISTRICT COUNCIL RESPONDENT

(Application for extension of time to file memorandum of appeal and record of appeal against ruling of the High Court of Tanzania at Iringa)

(Matogolo, J.)

Dated 22nd day of September, 2020

in

Labour Revision No. 06 of 2020

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RULING

12th & 14th December, 2023

NGWEMBE, J.A.:

By a notice of motion taken out under Rule 10 and 48 (1) of the Court of Appeal Rules 2009 as amended (the Rules), the applicant has moved this Court to extend time so as to file his memorandum of appeal to challenge the ruling and drawn order of the High Court dated 22nd September, 2020 in Labour Revision No.06 of 2020.

At the hearing date of this application, the applicant appeared in person, while the respondent enjoyed the legal services of Mr. Egidy Mkolwe and Ms. Ansila Makyao, both learned State Attorneys. When the

applicant was invited to argue his application, he maintained what is provided for in his affidavit in support to the notice of motion.

In regard to the background of this application, the applicant at once was an employee of Njombe District Council (respondent). However, he alleged that in the course of employment, the employer withheld his salaries for reasons unknown to him, but the respondent disclosed that his salaries were withheld due to absenteeism from employment. This created a labour dispute, which landed to the Commission for Mediation and Arbitration (CMA) for Njombe, registered as CMA/NJ/AUG/43/2019. Upon hearing and in final determination of that dispute, the CMA dismissed it for want of jurisdiction. Being dissatisfied with that dismissal, he successfully lodged a Labour Revision No. 6 of 2019 before the High Court of Tanzania at Iringa. Upon hearing that revision, judge Matogolo on 22nd September, 2020 delivered the court ruling by striking out the revision for the same reason that, the applicant failed to exhaust his remedies available to civil servants. Equally, he was dissatisfied with the High Court ruling and he wanted to challenge it in this Court, unfortunately by the time he intended to do so, he was already out of time, hence this application for extension of time.

In his notice of motion, he grounded one reason which caused his delay to appeal to this Court timely. Such reason was disclosed as his late discovery of the defect in the certificate of delay. In support to his notice of motion Mr. Geoffrey Mwakasege, learned advocate sworn an affidavit stating that he was the one who represented the applicant at CMA and in the High Court, thus conversant on the subject matter.

In considering the contents of his affidavit, he averred that the applicant collected copies of ruling and drawn order on 6th November, 2020 and on 31st December, 2020, he noticed the certificate of delay had serious error, which is found in the citation of the delivery of the impugned ruling. It is stated that the court ruling was delivered on 25th March, 2013 while the actual date of ruling was 22nd September, 2020. Having noted that defect, he lodged a letter to the High Court Deputy Registrar, requesting for a correct certificate of delay. However, he lamented that, since he wrote his letter to date the Deputy Registrar never responded and the certificate of delay is yet to be corrected to date.

He proceeded to lament on inaction of the Deputy Registrar in his written submission. He further submitted by introducing other reasons that, the intended appeal has overwhelming chances of success and that the ruling of the High Court comprised illegalities subject to correction by

this Court. However, the two reasons were not pleaded neither in his notice of motion nor in the affidavit.

In response thereto, Ms. Makyao, learned State Attorney responded by filing an affidavit disputing the contents of the applicant's affidavit as she amplified in her written submission. She insisted that, the applicant has failed to disclose any good cause for delay, instead he was negligent for failure to examine the correctness of the certificate of delay from 6th November, 2020 to 31st December, 2020 equal to fifty-six (56) days. Supported her assertion by referring this Court to the case of **Martha Khotwe v. Miston Mwanjamila**, Civil Application No. 5 of 2014 (unreported), where this Court insisted that, negligence does not constitute good cause to warrant extension of time.

Went on to argue that, the allegation of overwhelming chances of success and illegality of the High Court ruling were not pleaded neither in the notice of motion nor in his affidavit. Therefore, those grounds are new. She rested her case by inviting this Court to dismiss the application with costs.

Went on to challenge the prayer of the applicant to let this Court to compel the Deputy Registrar of the High Court to issue a corrected certificate of delay. In that regard they went on to submit that, if the

applicant would be granted the prayed extension of time, yet that order will remain nugatory because the applicant cannot file his appeal as he still relies on the defective certificate of delay. That to date he has failed to secure a correct one from the Deputy Registrar.

In his rejoinder, the applicant argued that, he did not delay for all those fifty-six (56) days, rather he was late for only seven (7) days.

Having dispassionately examined the record of appeal and carefully considered the respective written submissions and oral arguments of parties, whose details will be manifested in due course, to my understanding, the main issue for determination by this Court is whether the applicant has demonstrated good cause to warrant enlargement of time to do what he intends to do.

At the outset, I think our law is settled as per Rule 48 of the Rules that, the application in this nature must be in a form of notice of motion supported by an affidavit. The notice of motion shall state the grounds for the reliefs sought and shall be supported by an affidavit. The grounds and reliefs outside the notice of motion and affidavit, obvious should be ignored, even if it is brought in the oral or written submission. Notably, written submission is never part of the evidence given in the affidavit. There are good number of precedents pronounced on the same stance –

see **Farida F. Mbarak & Another v. Domina Kagaruki & Others** (Civil Reference 14 of 2019) [2021] TZCA 600. In that case the applicant did not state the grounds in the application, but proceeded to argue them at the hearing date. The Court in considering those grounds, it cited Rule 48(1) of the Rules and held:

"From the above provisions of the law, it is settled that the grounds upon which the relief of extension of time is sought, must be stated in a notice of motion and the supporting affidavit."

In regard to this application, the applicant raised two new issues, that is, overwhelming chances of success of the intended appeal and illegalities of the ruling of the High Court. Much as I would agree with the applicant that those two issues are relevant and capable of being considered by this Court. However, those two were not raised neither in the notice of motion nor in his affidavit, thus lacks foundation to be considered by this Court. I am justified not to deal with those two grounds. For clarity, the issue of overwhelming chances of success of the intended appeal and the prayed order to compel the Deputy Registrar of the High Court to issue a proper certificate of delay lack foundation to be considered by this Court.

Considering the prayer for extension of time, it has been repeated without number, that extension of time is purely within the Court's discretion. However, it is a requirement of law that, such discretionary powers of the Court are exercised judiciously, meaning the Court will grant extension of time upon being satisfied that, the applicant has demonstrated a good cause for delay. There is, however, no invariable definition of what constitutes good cause. In the case of **Tanga Cement Company Limited v. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 (unreported); and **Lyamuya Construction Company v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application 2 of 2010) [2011] TZCA, the Court discussed in details on what constitutes good cause for extension of time.

In the present matter, the question remains, whether the applicant has managed to demonstrate good cause for his delay which may warrant this Court to exercise its powers under Rule 10 of the Rules? To answer this question, I intend to consider the parties' submission. Undoubtedly, there is no dispute that, the decision which the applicant seeks to challenge on appeal was delivered by the High Court on 22nd September, 2020. Consequently, the applicant on 29th September, 2020 he lodged a

letter requesting for copies of ruling and drawn order for the purpose of appeal. The record of the High Court was collected on 6th November, 2020, while the certificate of delay which was issued on the same date, excluded thirty-eight (38) days up to that date of 6th November, 2020. However, the certificate had an error on the date of delivery of the impugned ruling which is recorded as 25th March 2013 instead of 22nd September, 2020. It is also absolute truth that, the applicant did not take any step to notify the Deputy Registrar on that error until on 31st December, 2020 when he wrote a letter to the Court requesting for correction of that certificate of delay. Correctly as the learned State Attorneys have underscored, the applicant neither reminded the Deputy Registrar on his request for the correction of errors in the certificate of delay nor did he take any further follow up for the proper certificate of delay. Instead, he ventured to this Court with this application for extension of time. In that regard, the learned State Attorney referred that inaction of the applicant as negligence, though himself, maintained his stance to deny negligence and that the delay was not inordinate. I do not think it is hard to detect negligence in this application.

Extracting from the facts, he received copies of record of the High Court for the purpose of preparing his appeal fifty-six (56) days without

detecting any defect in the certificate of delay. This shows that the applicant and his advocate, none of them read the document despite the fact that they requested them for preparation of the appeal. Knowing that they had 60 days, on the 56th day, that is when they started reading the documents. This period of time must have been accounted for, but the applicant did not say anything about it. The applicant was right to state that he was late for only seven (7) days, but he failed to justify the cause of his delay for those seven (7) days. Even a delay of a single day, must be accounted for and justified with good cause. Therefore, the applicant is duty bound to disclose sufficient reason for that delay of seven days.

It is also noted that the applicant after writing a letter to the Deputy Registrar requesting for a correct certificate, there is no record indicating that he took initiative to remind the Court on his request. Making follow up to the Deputy Registrar was his duty, which was expected from a diligent litigant. Similar position was held in the case of **Tropical Air (T) Tanzania Limited v. Godson Eliona Moshi** [2018] T.L.R. 363 [CA], where the court *inter alia* held:

"Being the one who had presented the appeal at the High Court, by any parity of reasoning, one would have expected to find him at the forefront in making a follow up of its judgment. One is left to

wonder as to how, he could have remained idle for more than three months waiting for notification from the High Court regarding the outcome of his appeal."

As was rightly put forward in **Blacks' Law Dictionary 9th Edition** due diligence is a continuous effort reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. Failure of that expected standard is categorized as negligence. Negligence is the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation. The rule has been in place time immemorial that, negligence cannot constitute a good cause for extension of time.

By the conduct of the applicant on failure to make further follow up to the Deputy Registrar, amounted into a constructive abandonment of his cause and adopted another cause of applying for extension of time. Again, on hearing of this application he went into irrelevant matters like a prayer for this Court to compel the Deputy Registrar to issue him with the rectified copy of a certificate of delay, the order which I cannot see the avenue to deal with.

Just as the rolling stone which gathers no moss or a jack of all trades, who masters none, the applicant did not manage to undertake a

serious pursuit in any of the avenues. It is evident he exhibited no diligence and promptness in this application for extension of time.

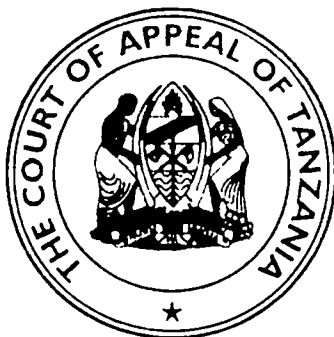
It is on that basis; I find good cause for such delay does not exist in this application. Since the application has no merit, it is imperative to dismiss it, as I hereby do, each party to bear his own costs.

Order accordingly.

DATED at **IRINGA** this 14th day of December, 2023.

P. J. NGWEMBE
JUSTICE OF APPEAL

The Ruling delivered this 14th day of December, 2023 in the presence of Mr. Geoffrey Mwakasege, Applicant's relative, and Ms. Ansila Makyao, learned Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL