

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

(CORAM: WAMBALI, J.A., KEREFU, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 326/18 OF 2021

PATRICK ITULE.....APPLICANT

VERSUS

DIAMOND TRUST BANK (T) LIMITEDRESPONDENT

**(Application for extension of time from the Judgment and Decree of
the High Court of Tanzania, Labour Division at Dar es Salaam)**

(Arufani, J.)

dated the 20th day of September, 2019

in

Revision Application No. 405 of 2018

RULING OF THE COURT

28th April & 12th May, 2023

KEREFU, J.A.:

This ruling is in respect of an application which has been preferred by way of a notice of motion made under the provisions of Rules 10 and 45A (1) (a), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is seeking extension of time within which to lodge a notice of appeal to challenge the decision of the High Court (Arufani, J.), in Revision Application No. 405 of 2018 which was handed down on 20th September, 2019.

It is a second bite application following a refusal by the High Court (Ngunyale, J.), in Miscellaneous Labour Application No. 321 of 2020 vide

a ruling which was delivered on 1st July, 2021. An affidavit sworn by the applicant has been annexed to accompany the notice of motion. On the other hand, the respondent, through his principal officer one Ives Mlawi, has filed an affidavit in reply opposing the application.

Before embarking on the merits or demerits of the application, it is apposite to explore the brief background of the case and the context in which this application has arisen. Way back in June, 2011, the applicant was employed by the respondent as a clerical officer on permanent and pensionable basis. At the working place, the respondent had a loan scheme for its employees whereby employees were allowed to borrow money from their employer on condition that the respective borrower would have been guaranteed by his/her fellow employee(s). The guarantor was then required, in case the guaranteed employee had his employment been terminated before repaying fully the loan, to repay the balance which would have been deducted from his/her salary.

Basing on that arrangement, the applicant guaranteed his fellow employee one Faraja William to get loan from the respondent. However, before Faraja William completed repaying his loan, he was terminated from his employment and two months thereafter, the respondent started deducting the applicant's salary to repay the debt of Faraja William. The

applicant's salary was deducted to the extent of remaining with only TZS 27,000.00 per month. That situation forced the applicant to resign from his employment on ground of being mistreated.

Subsequently, the applicant lodged an employment dispute against the respondent before the Commission for Mediation and Arbitration (the CMA) seeking to be paid TZS 400,000,000.00 being compensation of salaries he would have earned for the whole period of his employment including his retirement and other terminal benefits.

In her defence the respondent denied the applicant's claim, hence the suit proceeded into a full trial. Having heard the parties and considered the evidence adduced before it, the CMA found that the applicant had failed to prove that his resignation from his employment was caused by his employer, the respondent. Thus, the CMA dismissed the applicant's claims.

Aggrieved, the applicant successfully applied for the revision of the CMA's decision before the High Court (Arufani, J.) in Revision Application No. 405 of 2018 where the CMA's decision was varied as the High Court Judge found that the appellant is entitled to be paid:

- (i) compensation of twelve (12) months remuneration as provided for under section 40 (1) (c) of the Employment and*

Labour Relations Act, Cap. 336, Act No. 6 of 2004 (the ELRA) to be calculated at the rate of the salary he was getting at the time of terminating of his employment;

(ii) one month salary in lieu of notice; and

(iii) severance pay as provided for under section 41 and 42 of the ELRA.

Still unsatisfied with that decision, the applicant, on Thursday, 17th October, 2019 approached the High Court Registry to lodge his notice of appeal to challenge that decision. However, the officers at the High Court's Registry advised him to make a follow up of the said notice on the next day which was Friday, 18th October, 2019. On the said day, the applicant, through the comment annotated by the Deputy Registrar of the High Court in the first page of the notice, learnt that the said notice was rejected at the point of admission on account of being filed out of time prescribed by the law and it was not prepared in a proper format prescribed under Form 'D.'

The applicant stated further that, since the two following days, 19th and 20th October, 2019 was a weekend, he could neither file another notice nor make any application in that regard. Alternatively, he consulted his counsel on the matter who advised him that the notice was wrongly rejected by the Deputy Registrar of the High Court as it

was presented for filing on 17th October, 2019 which was well within thirty (30) days prescribed by the law.

The applicant went on to state that, while he was in the course of making follow up on his appeal, he received information from the National Board of Accountants and Auditors (the NBAA) that he was required to attend to the NBAA examination on 30th October, 2019.

He added that, he was also bereaved by his uncle who died on 31st October, 2019 and buried on 6th November, 2019 at Kongoto Village within Bunda District in Mara Region where he attended. That, after the said burial, he found himself out of time to file the notice of appeal, thus, on 12th November, 2019, he filed Miscellaneous Labour Application No. 672 of 2019 in the High Court seeking extension of time within which to file a notice of appeal out of time. However, that application was struck out on 17th July, 2020 for being incompetent.

Again, and undaunted, on 30th July, 2020, the applicant filed Miscellaneous Labour Application No. 321 of 2020 in the High Court seeking for similar prayers. Having heard the parties, the High Court (Ngunyale, J.) dismissed the application on 1st July, 2021 on account of failure by the applicant to adduce good cause and account for the delay

of each day. Following that refusal, the appellant, on 14th July, 2021, lodged the current application as a second bite.

When the application was placed before us for hearing, the applicant appeared in person whereas the respondent was represented by Messrs. Arnold Arnold Luoga and Gilbert Ndaskoy Mushi, both learned counsel. Pursuant to Rule 106 (1) and (7) of the Rules, the parties had earlier on lodged their respective written submission and reply written submission in support of and in opposition to the application.

Submitting in support of the application, the applicant commenced his submission by fully adopting the contents of the notice of motion, the supporting affidavit and his written submission filed in Court on 7th September, 2021. He thereafter, narrated the historical background to this application as indicated above and argued that he had taken various steps to challenge the impugned decision including, timely lodging of the notice of appeal. He stated further that the main reason for the delay was the erroneous move taken by the Deputy Registrar of the High Court on 18th October, 2019 to reject the notice of appeal at the stage of admission by annotating on the first page of the said notice that, *'it was filed out of time and was not submitted in a proper format.'*

That, since the two following days, 19th and 20th October, 2019 were Saturday and Sunday respectively, he could not make any follow up on the matter. It was his argument that he acted diligently in pursuing the appeal, but he was unjustly and technically knocked out by the Deputy Registrar of the High Court. He thus insisted that, since the notice of appeal was lodged within thirty (30) days prescribed by Rule 83 (1) and (2) of the Rules, we should find that the procedure adopted by the Deputy Registrar of the High Court to reject it was improper. Reinforcing his proposition, he cited the cases of **Bruno Wencelaus Nyalifa v. The Permanent Secretary & Another** [2018] T.L.R. 58 and **D.N. Bahram Logistics Ltd & Another v. National Bank of Commerce Ltd & Another**, Civil Reference No. 10 of 2017 [2021] TZCA 60: [04 March 2021: TANZLII].

Upon being probed by the Court if in his supporting affidavit he has accounted for all days of delay and specifically disclosed the date when he came back from the burial of his uncle, the applicant conceded that the affidavit is silent on that aspect. He however, insisted that he had accounted for the delay of each day and beseeched us to grant his application.

In response, Mr. Luoga also commenced his submission by adopting the contents of the affidavit in reply and the respondent's written submission filed in Court on 7th September, 2021. He then fervently resisted the application on ground that the applicant has failed to show good cause to warrant an extension of time sought. He contended that the Deputy Registrar of the High Court was justified to reject the notice of appeal as the same was filed contrary to the requirement of Rule 83 (6) of the Rules as it did not disclose crucial information for processing of an appeal. He then expressed his surprise as to why, after the said rejection, the applicant had to wait for such long without addressing his concerns on the said notice administratively by approaching the Deputy Registrar of the High Court on the same day or even on Monday, 21st October, 2019 after the weekend.

The learned counsel also challenged the applicant's affidavit for failure to account for the delay from 18th October, 2019, when the notice of appeal was rejected to 12th November, 2019 when the applicant filed his application for extension of time. To clarify further on this point, the learned counsel referred us to paragraphs 9 and 10 of the applicant's supporting affidavit and argued that the applicant has failed to account for each and every day of the delay as required by the law. To support his argument, he cited the cases of **Lyamuya Construction Company**

Ltd v. Board of Registered Trustees of Young Women’s Christian Association of Tanzania, Civil Application No. 02 of 2010 [2011] TZCA 4: [03 October 2011: TANZLII]; **Dar es Salaam City Council v. S. Group Security Ltd**, Civil Appeal No. 234 of 2015 [2016] TZCA 641: [11 May 2016: TANZLII] and **Henry Muyaga v. Tanzania Telecommunication Company Ltd**, Civil Application No. 8 of 2011 and (unreported). Based on his submission, he urged us to dismiss the application on account of failure by the applicant to show good cause to warrant grant of the prayers sought in the notice of motion.

In a brief rejoinder, the applicant reiterated what he submitted earlier and emphasized his prayer that the application be granted to enable him to challenge the impugned decision.

Having heard the submission advanced by the parties, the main issue for our consideration is whether the applicant has submitted good cause for the delay to warrant grant of this application.

We wish to start by stating that, the position of the law under Rule 10 of the Rules is settled that, an application of this nature can be granted if the applicant has given good cause for the delay. For sake of clarity, the said Rule provides that:

“The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.” [Emphasis added].

It is essential to also reiterate the settled position that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly with regard to the relevant facts of the particular case. Admittedly, it has not been possible to lay down an invariable definition of good cause so as to guide the exercise of the Court's discretion.

Nevertheless, the Court has consistently looked at a number of factors such as, the reasons for the delay, the length of the delay, whether the applicant was diligent, the degree of prejudice to the respondent if time is extended, to name but a few: See, for instance the cases of **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** [2006] T.L.R. 235, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 [1988] TZCA 26: [25 February 1988: TANZLII] and **Tanga Cement Co. Ltd v. Jumanne**

D. Masangwa and Another, Civil Application No. 6 of 2001 [2004] TZCA 45: [08 April 2004: TANZLII]. In determining this application, we shall be guided by the above principles.

It is on record that, the impugned decision, subject matter of the intended appeal, was handed down on 20th September, 2019 and the applicant, on 17th October, 2019 after lapse of only 28 days well within the time prescribed by the law, manifested his intention to appeal against that decision by submitting the notice of appeal in the High Court's Registry for filing. However, the said notice was rejected by the Deputy Registrar on 18th October, 2019 at the point of admission on account of being filed out of time prescribed by the law.

We are mindful of the fact that, in his submission, the applicant also stated that, in rejecting the said notice, the Deputy Registrar of the High Court also indicated that the said notice was not prepared in a proper format prescribed by Form 'D' in the First Schedule to the Rules. Having perused the content of the said notice, we are unable to locate the Deputy Registrar's comment relating with issues of format envisaged under Rule 83 (6) of the Rules as claimed by the applicant. However, we, like Mr. Luoga, equally wonder as to why, after being aware with the Registrar's comment that the notice of appeal was lodged out of

time, he did not act promptly by approaching the Deputy Registrar on the same day or even on Monday, 21st October, 2019 and explain to him that it was lodged within the time prescribed by the law. It is on record, that the applicant, waited until 12th November, 2019, after lapse of almost 21 days, when he lodged Misc. Civil Application No. 672 of 2019.

Therefore, the next issue for our determination is whether the applicant has accounted for all the period of delay in his affidavit in support of this application. On this, we shall look at two segments of the delay involved separately. The first segment of the delay covers the period from 18th October, 2019 when the applicant learnt that his notice was rejected by the Deputy Registrar of the High Court to 12th November, 2019, when he lodged Miscellaneous Civil Application No. 672 of 2019. The depositions in the supporting affidavit justifying the said delay in this segment are contained in paragraphs 6 to 11 of the applicant's affidavit in support of the application. It is apparent from the said paragraphs that although, the applicant has narrated several reasons for the delay, he had completely failed to substantiate the same with concrete proof. We shall demonstrate; **first**, the applicant's claim that he was consulting with his counsel on the way forward of the matter was not substantiated with the said counsel's affidavit to prove

that aspect. We are increasingly of the view that, since at that moment, the applicant was still within time, he did not act promptly to have his notice of appeal re-filed immediately, within time.

Second, the applicant's claim that he was informed that he was required to sit for NBAA examinations does not support this application because the letter from the NBAA attached under paragraph 9 of the applicant's affidavit on that aspect, clearly indicates that he was required to sit for the said exams on 28th October, 2019. One may wonder, if that was the case, why then the applicant did not take action before that date or immediately thereafter? **Thirdly**, the appellant's narration that he was bereaved by his uncle is not supported by any proof thus, again, it was not verified.

In the circumstances, although, we do appreciate and agree with the applicant that 19th to 20th October, 2019 were Saturday and Sunday which, in terms of Rule 8 (a) and (b) of the Rules are supposed to be excluded from the computation of thirty (30) days of lodging of the notice of appeal, we are of the settled view that, he was still required to account for the delay of twenty-one (21) days, i.e from Monday 21st October, 2023 to 12th November, 2019 when he filed his application.

Unfortunately, that was not done. In the premises, we are of the respectful view that the first segment of delay was not justified.

The next segment of delay starts from 6th November, 2019 when the applicant alleged that the burial of the said uncle took place on 6th November, 2019. It is on record, and as well conceded by the applicant in his submission that his affidavit in support of this application did not disclose the date when he came back from the said burial. In our considered opinion, the undisclosed detail was crucial for the Court to determine if the applicant had acted with promptitude and diligently.

It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of every single day. Indeed, the Court has reiterated that position in numerous cases. See for instance the cases of **Said Salim Bakhresa v. Ally Ngume** [1997] T.L.R 312; **William Shija v. Fortunatus Masha** [1993] T.L.R 203 and **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007 (unreported). In the latter case, the Court emphasized that:

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

Being guided by the above authorities, we find no difficult to agree with the submission of Mr. Luoga that the applicant has completely failed to account for the delay of each day. Therefore, he has failed to show good cause warranting extension of time.

By way of emphasis, we wish to state that, the act of the applicant to only narrate the sequence of events in his affidavit without concrete proof does not constitute good cause for extension of time as we decided in the case of **Brazafric Enterprises Limited v. Kaderes Peasants Development (PLC)**, Civil Application No. 421/08 of 2021 [2022] TZCA 624: [13 October 2022: TANZLII].

It is our further view that, the applicant was also required to show what he has been doing since the date when he became aware that his notice of appeal was rejected by the Deputy Registrar of the High Court. In the case of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008 (unreported), when dealing with an akin situation, we emphasized that:

*"It is trite law that an applicant before the Court must satisfy the Court that **since becoming aware of the fact that he is out of time, acted very expeditiously...**" [Emphasis added].*

Now, since in this application we have found that the applicant has not accounted for the delay of each day in his affidavit in support of the application, he has failed to demonstrate to our satisfaction that he acted promptly and diligently in pursuing the process of lodging his notice of appeal.

Consequently, and for the foregoing reasons, we hereby dismiss the application for lack of merit. Since the application emanated from a labour related matter, we make no order as to costs.

DATED at DAR ES SALAAM this 9th day of May, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 12th day of May, 2023 in the presence of the applicant in person and Mr. George Shayo, learned advocate holding brief for Mr. Arnold Luoga, learned advocate for the respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL