IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 505/18 OF 2019

FRADY TAJIRI CHAWE (As Administrator of the Estate of the Late Donatus Chawe Sanga) and 443 Others ..... APPLICANTS

VERSUS

TANESCO ..... RESPONDENT

(Application for Extension of Time to file an Appeal against the decision of the High Court of Tanzania, Labour Division at Dar es Salaam)

(MZIRAY, J., MIPAWA, J., AND MASHAKA, J.)

dated 9th day of February, 2016
in
Consolidated Revision Application No. 78A of 2008

RULING

21st Feb & 6th March, 2023

MWAMPASHI, J.A.:

Before me is an application by way of a notice of motion brought under rules 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is for extension of time within which to file an appeal against the judgment and decree of the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court), in the Consolidate Revision Application No. 78A of 2008. It is supported by an affidavit sworn by Mr. Peter Kibatala, the advocate for the applicants and resisted by an affidavit in reply sworn by Mr. Howa Hiro Msefya, the Principal Officer of the respondent.

For the better appreciation of the matter before me and mostly for the sake of narrowing and making the issues involved clear, I find it appropriate to first give the detailed factual background of the matter as hereunder.

The applicants herein, filed a Trade Inquiry No. 61 of 2006 in the then, Industrial Court of Tanzania (the Industrial Court) challenging the retrenchment exercise carried by the respondent against them. The inquiry ended in their favour as the Industrial Court found that the retrenchment procedures were fatally flawed. In its award, the Industrial Court ordered the respondent to reinstate the applicants and pay each of them 18 months salary. In addition, the respondent was directed to follow the procedure in case she still wanted to retrench the applicants.

The award by the Industrial Court aggrieved both parties and each preferred its own application for revision of the award before the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court). The applications were however, consolidated and heard together in the Consolidated Revision No. 78A of 2008. In its decision dated 09.02.2016, the High Court dismissed the applicants' application but allowed the respondent's. The reinstatement order by the Industrial Court was quashed and the order for payment of 18 months salary was set aside

and replaced by an order that the applicants be paid a three (3) months salary each.

Aggrieved by the High Court decision and desirous to appeal against it, the applicants did on 22.02.2016, duly lodge a notice of appeal and request for a certified copy of the proceedings for appeal purpose. They also, on 24.02.2016, filed before the High Court an application for leave to appeal which was however, withdrawn on 31.08.2017 on account that the leave sought was no longer required following the decision of this Court in **Tanzania Teachers' Union v. A. G. and Others**, Civil Appeal No. 90 of 2016 (unreported). As the period of time within which the applicants could have appealed against the High Court decision had long elapsed, the applicants had to file, before this Court, a Civil Application No. 500/18 of 2017 (1st Application) for extension of time to file an appeal out of time. However, when the application was called on for hearing on 06/11/2018, at the instant of the advocate for the applicants, the application was marked withdrawn the reason being that, having delayed to file the appeal, the proper remedial measure was for the applicants to seek for a certificate of delay from the Registrar of the High Court instead of applying for extension of time.

Thereafter, on 13.11.2018, the advocate for the applicants wrote to the Registrar of the High Court, Land Division, requesting to be issued with a certificate of delay, insisting that the certificate should cover the period up to 06.11.2018, when the 1st Application was withdrawn. It appears the Registrar of the High Court was inflexible to issue a certificate of delay which would cover the period up to 06.11.2018 as requested by the advocate for applicants and which would clearly be contrary to the provisions under rule 90 (2) of the Rules. Thus, on 17.12.2018, he wrote to the advocate for the applicants inviting him to a meeting in his office for discussion and more clarifications on the requested certificate of delay. The invitation was not accepted by the advocate who, on 25.02.2019, wrote back to the Registrar of the High Court, a long letter giving the background of the matter and still insisting that a certificate of delay covering the period up to 06.11.2018, should be issued the soonest. As the Registrar of the High Court did not respond, on 24.04.2019, the advocate sent him a reminder which made the Registrar of the High Court to issue a certificate of delay dated 31.07.2019 which excluded a total of 107 days from 22.02.2016 when the applicants requested for the copy of the proceedings up to 08.07.2016 when the applicants were notified that the requested copy was ready for collection. The advocate for the applicants was discontented with the certificate issued because to him, it was defective

and not in accordance with the "directions" of the Court in its order dated 06.11.2018. It is thus, deposed in paragraph 20 of the supporting affidavit that, the advocate for the applicants and his colleague one Omar Msemo, made several physical follow-ups to the Registrar of the High Court, including on 25.09.2019 and lastly on 22.10.2019, pressing for the issuance of a rectified and correct certificate, but to no avail. It was at this point in time, that the advocate for the applicants realized that he had no other option but to file an application for extension of time hence the instant application which was filed on 25.11.2019.

When the application came up for hearing before me, the applicants were represented by Mr. Peter Kibatala, learned advocate whereas the respondent had the services of Mr. Masunga Kamihanda, learned State Attorney.

Having adopted the contents of the supporting affidavit as part of his oral submission, Mr. Kibatala gave a history of the matter and insisted that the delay to file the appeal was firstly due to the fact that by then the law on whether decisions by the High Court, Labour Division, were appealable to the Court with leave or not, was not settled. He contended that it was not until when the Court, in **Tanzania Teachers' Union** (supra), made it settled that leave was no longer required, that the applicants' application for leave to appeal which had

been pending before the High Court, was to be withdrawn on 31.08.2017 but when the period within which to appeal had already elapsed.

Mr. Kibatala went on submitting that in the 1st Application which was withdrawn on 06.11.2018, it was directed by the Court that the applicants be issued with a certificate of delay which would have enabled them file their appeal. He further argued that, when the Registrar of the High Court was approached, he declined to issue such a certificate hence the instant application. He thus urged me to grant the application arguing that the delay has been sufficiently accounted for. He insisted that the applicants have been in court corridors from when the impugned decision was delivered up to the time the Registrar of the High Court declined to issue a certificate of delay that would have excluded the period of time from 06.11.2018 as directed by this Court in the 1st Application.

In addition, Mr. Kibatala submitted that the application has to be granted because the impugned decision is tainted with illegalities that need to be taken care of by the Court. To substantiate this ground, Mr. Kibatala referred me to paragraph 6 of the supporting affidavit.

To concretize his arguments, Mr. Kibatala placed reliance upon the following decisions of the Court; **Benedict Mhagama v. Kalaita**

Yohana (The Administrator of the Estate of late Sophia Mohamed), Civil Application No. 376/17 of 2019, **Barclays Bank Tanzania Limited v. Tanzania Pharmaceutical Industries and 3 Others**, Civil Application No. 62/16 of 2018 and **Abraham Abraham Simama v. Bahati Sanga and 2 Others,** Civil Application No. 462/17 of 2020 (all unreported).

Mr. Kamihanda resisted the application arguing that the applicants have failed to show good cause warranting enlargement of time as sought in the notice of motion. Having adopted the affidavit in reply which had been earlier filed by the respondent on 30.12.2019, he pointed out that though, he has no qualm about the position stated in **Tanzania Teachers' Union** (supra), he still insist that no good cause has been shown. He then contended that in the 1st Application it was complained by the advocate for the applicants that a certificate of delay had not been issued while the same had been issued since 08.07.20116. It was further submitted by Mr. Kamihanda that, the delay from when the second certificate of delay was issued on 31.07.2019, up to when the instant application was filed on 25.11.2019, has not been accounted for by the applicants. He insisted that the delay of the period of four (4) months is inordinate. On this, reliance was placed on the decision of the Court in **Lyamuya Construction Company Limited v. Board of**

Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 02 of 2010 (unreported).

Mr. Kamihanda did also submit that the averment in the supporting affidavit that it was the Registrar of the High Court who caused the delay, firstly by delaying to respond to the applicants' request for the certificate of delay and then by issuing the certificate which was not in accordance with the directions of the Court, lacks substance. He argued that no affidavit to that effect from the Registrar of the High Court which is to that effect has been filed in support of the averment.

Regarding Mr. Kibatala's argument on the ground of illegalities, it was submitted by Mr. Kamihanda that the same is neither stated in the notice of motion nor in the supporting affidavit. He therefore prayed for the application to be dismissed for being baseless.

In his rejoinder, Mr. Kibatala argued that the case of **Lyamuya Construction Company Limited** (supra), should be considered harmoniously with other decisions of the Court that followed it. He also argued that the circumstances of this matter and the common sense clearly show that it was not possible for the affidavit of the Registrar of the High Court to have been procured by the applicants. He further contended that most of the averment in the supporting affidavit

including the fact that after being issued by the certificate of delay on 31.07.2019, he and his colleague made several physical follow-ups to the Registrar of the High Court pressing for him to issue a correct certificate of delay and the complaints against the Registrar of the High Court, have not been countered by the respondent.

Having examined the notice of motion, the affidavits for and against the application and also having considered the submissions made by the counsel for the parties, the only issue for my determination is whether good cause has been shown by the applicants warranting extension of time as sought in the notice of motion.

First of all, I find it apposite to begin my determination of the above posed issue by emphasizing that the mandate given to the Court under rule 10 of the Rules, is not only discretionary and broad but must be exercised judiciously in accordance with the rules of reason and justice not according to private opinion or arbitrary. See- **Lyamuya Construction Company Limited** (supra).

It is also settled that the Court can only exercise the powers under rule 10 of the Rules, if good cause is shown. Though there is no universal definition of what constitutes good cause, in exercising such powers, the Court is required to consider the prevailing circumstances of the particular case and should also be guided by a number of factors

such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. See- **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R 387, **Dar es Salaam City Council v. Jayantilal P. Rajan,** Civil Application No. 27 of 1987 (unreported) and **Lyamuya Construction Company Limited** (supra).

It is also worth restating the settled position of the law that, illegalities in an impugned decision constitute good cause for purposes of extension of time. To this effect, the Court in **VIP Engineering and Marketing Limited and 2 Others v. Citibank Tanzania Limited**, Consolidated References Nos. 6, 7 and 8 of 2006 (unreported), stated that:

> *"We have already accepted it as 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 constitutes "sufficient reason" within the meaning of rule 8 (now rule 10) of the Rules for extending time".*

Further, in **Lyamuya Construction Company Limited** (supra) the Court observed that:

> *"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA'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 be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process".***
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> [Emphasis supplied]

It is also settled that in applications for extension of time, the applicant is required to account for each day of delay. This was emphasized by the Court in **Elius Mwakalinga v. Domina Kagaruki and 5 Others**, Civil Application No. 120/17 of 2018 (unreported) where it was stated 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".*

Before I proceed any further, I find it apposite to also point out that, as it can be clearly observed in the notice of motion, the supporting affidavit and even in the submission by Mr. Kibatala, this application is, to the greater extent, premised on the notion that, in its order dated 06.11.2018 in the 1st Application, the Court directed the Registrar of the High Court to issue the applicants with a certificate of delay which would exclude the period of time up to the date of the order so as to enable the applicants file their intended appeal and that the Registrar of the High Court declined to abide by the order. With due respect, I find that there has been a misconception of the Court order on the part of the advocate for the applicants. I have keenly examined that order and found that the direction did not mean that the certificate to be issued should not be in accordance with rule 90 (2) of the Rules. The Court did not direct exclusion of any particular number of days or period of time as Mr. Kibatala tend to suggest. The Registrar of the High Court cannot, therefore, be blamed for his persistence of issuing the certificate of delay in accordance with the law and not otherwise. He did not defy any order or direction of the Court.

Regarding the issue as to whether the applicants have shown good cause by accounting for the whole period of delay, I agree with Mr. Kamihanda that the period from when the application for leave to appeal

was pending before the High Court till when it was withdrawn, up to 31.07.2019, when the applicants were issued with the certificate of delay which they claim was defective and not in accordance with the Court order, is excusable. The delay was technical. The position of the law is settled that where a party has been diligent in taking essential steps in the furtherance of his intended appeal but, on the way, he is caught up in the web of technicalities, sufficient cause is to be taken to have been shown for the delay. See- **Felix Tumbo Kassim v. Tanzania Telecommunication Co. Ltd and Another** [1997] T.L.R. 57, **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154 and **Dalia Burhan Nindi v. Zainab Ismail Msami**, Civil Application No. 235/17 of 2021 (unreported).

I also agree with Mr. Kamihanda that the problem is in regard to the period from 31.07.2019 when the applicants were issued with the certificate of delay which, to Mr. Kibatala, was defective and not in accordance with the direction of the Court in the 1st Application, up to 25.11.2019 when the instant application was filed. There is a period of almost four (4) months which has not been accounted for by the applicants. The record show that after the reminder to the Registrar of the High Court by Mr. Kibatala on 24.04.2019 which was followed by the issuance of the certificate of delay on 31.07.2019, the applicants

remained idle. No action was taken by the applicants until on 25.11. 2019 when they filed the instant application.

The delay from 31.07.2019 when the certificate of delay which is regarded by the applicants to be defective was issued or even from 22.10.2019 when the advocate for the applicants claim to have approached the Registrar of the High Court for the last time, which is the time the applicants became aware that the certificate of delay issued by the Registrar of the High Court could not enable them to file their intended appeal and therefore that an application for extension of time for that purpose, was inevitable, up to 25.11.2019, when they filed the instant application, has not been accounted for. It is trite principle of law that after an applicant becomes aware that he is out of time, for instance in filing an appeal, he must act very expeditiously to apply for extension of time within which he can file it. In the case of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 166 of 2008 (unreported) the Court stated 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, act very expeditiously and that the application has been brought in good faith".*

I also find that the claim by Mr. Kibatala and the averment in paragraph 20 of the supporting affidavit that, after the issuance of the certificate of delay, Mr. Kibatala and his colleague one Omar Msemo kept making follow-ups and personal communications with the Registrar of the High Court and that their last visit to his office was on 22.10.2019, is not backed by any cogent evidence. Under these circumstances the averment by Mr. Kibatala ought to have been supported by affidavits sworn by at least one of the two persons named in the said affidavit, that is, Mr. Omar Msemo or the Registrar of the High Court. As rightly argued by Mr. Kamihanda the law is settled that where an affidavit mentions another person, that other person must swear an affidavit otherwise the averment in which he is mentioned will become nothing but hearsay. See- **NBC Limited v. Superdoll Trailer Manufacturing Company Ltd,** Civil Application No. 13 of 2002, **Benedict Kimwaga v. Principal Secretary Ministry of Health,** Civil Application No. 31 of 2000, (both unreported) and **John Chuwa v. Antony Ciza** [1992] T.L.R. 233. In the former case it was stated that:

> *"...an affidavit which mentions another person is hearsay unless that other person swears as well".*

Finally, it is the issue on the complaint that the impugned decision is tainted with illegalities and that the application be granted on that ground. This issue should not detain me at all. As rightly argued by Mr.

Kamihinda, there is nothing from the applicants that establishes the existence of any illegality in the impugned decision. The grounds stated in the notice of motion are nothing but grounds fit for an appeal and not illegalities fit for extension of time. Even what is stated in paragraph 6 of the supporting affidavit does not disclose anything that amounts to illegality for purposes of extension of time. In short no apparent illegality on the face of the impugned decision has been disclosed by the applicants.

In the result and for the above reasons, I find that no good cause has been shown upon which discretionary powers under rule 10 of the Rules, can be exercised to extend time within which the applicants may file their intended appeal. The application is therefore dismissed accordingly.

DATED at **DAR ES SALAAM** this 6th day of March, 2023.

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered on this 6th day of March, 2023 in the presence of Mr. Omary Msemo, the counsel for the Applicant and Ms. Lilian Samson Milumbe and Mr. Francis Wisdom, both State Attorney of the Respondent, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL