

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

MISC. LABOUR APPLICATION NO.09 OF 2021

(Arising from Ruling and Order of the High Court (Hon. Nyerere, J in Labour
Misc. Application No.23 of 2015)

JOSEPH C. MAGESSA APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED RESPONDENT

RULING

Date of last Order: 31.05.2021

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A.Z.MGEYEKWA, J

I am called upon in this matter to decide whether this court should exercise its discretion under section 56 (c) of the Labour Institution Act, 2004 (No.7 of 2004) and Rules 43 (1) (a) and 43 (1) (b) of the Labour Court rules, 2007 to extend time within the applicant to file a Notice of intention to appeal to the Court of Appeal of Tanzania against the Ruling and Order of this court in Misc. Application No.23 of 2015 dated 20th October, 2017.

The application is supported by an affidavit deposed by Andrew Innocent Luhigo, the applicant. The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing counter affidavit, deposed by Ms, Dorah Constatine Nyambalya, for the respondent.

When the matter was called for hearing on 31st May, 2021, the appellant enjoyed the legal service of Mr. Andrew Luhigo, learned counsel, the respondent enjoyed the legal service of Mr. Galati, learned counsel.

Mr. Luhigo was the first one to kick the ball rolling. Reiterating what was deposed in the supporting affidavit, the learned counsel urged this court to adopt the applicant's application and form part of his submission. Mr. Luhigo asserted that in the application for extension of time the applicant has to state good reasons for his delay. To fortify his contention, Mr. Luhigo referred this court to the case of **Zahara Kitindi and Another v Juma Swahele and 9 others**, Civil Application No. 04/05 of 2017 at Moshi (unreported).

He went on to submit that the Court of Appeal of Tanzania it its numerous authorities held that in granting the application for extension of time the court has to consider the following conditions; first condition, the applicant has to account for the days of delay, he argued that the applicant on paragraph 14 of his affidavit has accounted the delay of 3 years, 3

weeks and 13 days. Second condition, the delay should not be ordinate. The counsel for the applicant contended in respect of technical delay, that events that led to the delay have been sufficiently covered in paragraphs 14, 15, and 17 (i) of the affidavit. The applicant submitted that these events constituted a technical delay which amounts to a sufficient reason for allowing extension of time. Mr. Luhigo asserted that the 3 years is a long duration but in all those years the applicant was before the Court of Appeal of Tanzania corridors. To bolster his submission cited the case of **Fortunatus Msha v William Shija and Another** [1997] TLR 154, the Court of Appeal of Tanzania distinguished the real delay and technical delay. Insisting, Mr. Luhigo stated that the period when the applicant was in court corridors is a technical delay, the applicant was searching for his right to appeal.

In the third condition, the applicant is required to show that he acted diligent, not negligent, he referred this court to paragraph 14 (c) of the applicant's affidavit. Mr. Luhigo added that on paragraph 14 (a) and 14 (c) of the applicant's affidavit the applicant lodged an appeal before the Court of Appeal within time and the appeal was struck out still the applicant promptly lodged the instant application. The fourth condition is the ground of illegality. The applicant's Advocate stated that the applicant has stated his intention to challenge the ruling and order of this court. To support his

assertion he referred this court to the chamber summons. He went on to state that in paragraphs 15 and 17 of the applicant's affidavit the applicant has stated that the ruling of this court is tainted with illegalities. Mr. Luhigo stated that the issue which attracts the attention of the Court of Appeal of Tanzania is whether she had jurisdiction to review his fellows' judge revision.

In conclusion, the learned counsel for the applicant beckoned upon this court to grant the applicant's application as stated in his chamber summons and affidavit.

Mr. Galati, the learned counsel for the respondent vehemently resisted the application. He began with disputing the length of the delay. The learned counsel urged this court to adopt the counter affidavit and form part of his submission.

The learned counsel for the respondent contended that the Labour decision was delivered on 20th October, 2017 then after 3 years the applicant filed the instant application. He added that it is a delay of 3 years therefore the applicant was supposed to state good reasons for his delay. The learned counsel complaint that the applicant has not stated why he did not file the intent appeal within 30 days as stated under Rule 82 (2) of the Court of Appeal Rules. Mr. Galati went on to state that the learned counsel for the applicant is the affidavit is sworn by Mr. Andrew Luhigo,

the learned counsel for the applicant whereas he verified that all that is stated under paragraph 14 are true and best to his knowledge. He added that reading paragraph 14 it is vivid that what is stated thereto is hearsay evidence. He spiritedly contended that an affidavit being a substitute of oral evidence needs to contain facts known to the deponent.

The learned counsel for the respondent argued that the applicant has not accounted for days of delay. Mr. Galati fortified his submission by citing the case of *Zainabu Ally Gafusi and Another v Asha Said*, Application No. 155/5 of 2017, Court of Appeal of Tanzania at Arusha (unreported). He argued that it is uncontroverted fact that the applicant took three years to institute the instant application, and the respondent contended that the delay has not been explained out from 18th October, 2017 to 18th December, 2017. He stated that the applicant was not diligent in pursuing his appeal at the Court of Appeal of Tanzania.

The learned counsel for the respondent valiantly argued that the applicant was negligent and the same is not a good reason for extension of time. Mr. Galati added that lack of diligence is not a good ground for extension of time. To bolster his argumentation he cited the case of **Paul Martin v Bertha Anderson**, Civil Application No.7 of 2005 (unreported), the Court of Appeal of Tanzania at Arusha. He referred this court to paragraphs 11 and 12 of the applicant's affidavit and insisted that there

are days when the applicant was not in court corridors. Mr. Galati argued that the applicant's delay is not a technical delay. He distinguished the cited case of **Fortunatus Masha** (supra) he stated that the facts in Masha' case reveal that the applicant filed an appeal at the Court of Appeal of Tanzania and a Decree was missing thus he was required to file a fresh application after the first application was struck out. While in the instant application, the applicant did not lodge a Notice of Appeal a delay of more than 40 days.

Regarding the ground of illegality, the learned counsel stated that illegality can be a ground of extension of time if it is apparent on the face of the record, not the one which is discovered by a long argument or process. He spiritedly argued that saying that the judge who decided the matter had no jurisdiction is an arguable ground, it is not apparent on the face of the record. Fortifying his submission he cited the case of **Dominick Ishengoma v Geita Gold Mine Ltd**, Misc. Application No. 141 of 2019 HC (unreported).

On the strength of the above submission, Mr. Galati urged this court to find that this application is unmerited and the same be dismissed.

In his rejoinder, Mr. Luhigo reiterated his submission in chief. He added that saying the verification clause does not reflect what is stated under paragraph 14 (a) of the affidavit was supposed to be stated in his counter

affidavit. He insisted that the applicant has accounted for the delay starting from 28th October, 2017 to 18th December, 2017. To support his submission he referred this court to paragraph 14 (a) of the affidavit. He also insisted that the applicant's delay is a technical delay since it is occasioned for a period when a party was seeking his rights in court.

Having carefully considered the submissions made by the learned counsels in their written submission and examined the affidavit and counter affidavit, the issue for our determination is ***whether the applicant is meritorious.***

The position of the law is settled and clear that an application for extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as it was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga**

Cement Company Ltd v Jumanne D. Massanga and another, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter affidavit, Mr. Luhogi has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. The applicant's Advocate has raised two main limbs for his delay, technical delay, and illegality. I have opted to address the second limb. The applicant alleges that the decision of this court is tainted with illegality.

The illegality is alleged to reside in the powers exercised by this court in excess of its review of this court decision it is alleged that Hon. Nyerere, J had no power to review the decision of his fellow Judge. Supporting his application, Mr. Luhigo referred this court to paragraph 15 and 17 of the applicant's affidavit. Reading paragraph 15, the applicant alleges that the ruling of this court dated 20th October, 2017 in Labour Application No. 23 of 2015 is tainted with illegality. In paragraph 17 (i) of his affidavit, the applicant cemented that the High Court ruling originating from review proceedings is tainted with illegalities. In his submission, the learned counsel for the applicant elaborated that there is an issue of jurisdiction,

which attracts the attention of the court of appeal on whether the Hon. Judge had jurisdiction to review his fellow Judge revision.

On his side, the learned counsel for the respondent opposed the application, on paragraph 11 of the counter affidavit, the learned counsel for the respondent argued that there is no any illegality in the ruling sought to be appealed against. In his submission, Mr. Galati stated that the alleged illegality is not apparent on the face of the record. In his view, he stated that saying that the judge had no jurisdiction to decide the matter is arguable, not apparent.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 at page 89 thus:

*"In our view, when the point at issue is one alleging illegality of the decision being challenged, **the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if***

the alleged illegality be established, to take appropriate measures to put the matter and the record straight." [Emphasis added].

Similarly, in the cases of **Arunaben Chaggan Mistry v Naushad Mohamed Hussein & 3 Others**, CAT-Civil Application No. 6 of 2016 (unreported) and **Lyamuya Construction** (supra), the scope of illegality was taken a top-notch when the Court of Appeal of Tanzania propounded as follows:-

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

Applying the above authorities, it is clear that the ground of illegality that has been cited by the applicant touches on jurisdiction. In my view, the raised illegality bears sufficient importance, and its discovery does not require any long-drawn argument or process. In my considered view, this point of illegality meets the requisite threshold for consideration as the

basis for enlargement of time and that this alone, weighty enough to constitute sufficient cause for extension of time.

For the sake of clarity, I have read the case of **Dominic Ishengoma** (supra). In **Ishongoma's** case, the issue for discussion was the illegality was based on damages claimed drawn long argument by the parties. In my view, this cited case is distinguishable from the instant case. In the instant case, unlike the cited case of **Ishingoma** (supra), the ground of illegality 'jurisdiction' is on the face of the record, reference is made in the above cited case of **Arunaben Chaggan Mistry** (supra). There is no long argument to establish the same. However, as pointed earlier the Court of Appeal of Tanzania will have time to investigate the allegations and remedy the alleged illegalities.

In sum, based on the foregoing analysis I am satisfied that the above ground of illegality is evident that the present application has merit. Therefore, I proceed to grant the applicant's application to lodge a Notice of Appeal within twenty-one days from today.

Order accordingly.

Dated at Mwanza this date 31st May, 2021.


A.Z.MGEYEKWA

JUDGE

31.05.2021

Ruling delivered on 31st May, 2021 via audio teleconference, whereas Mr. Andrew Luhigo, learned counsel for applicant and Mr. Galati, learned counsel for the respondent were remotely present.




A.Z.MGEYEKWA

JUDGE

31.05.2021