

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

CIVIL APPLICATION No. 36 OF 2019

(Arising from the High Court (Tanga District Registry) in Civil Case No. 4 of 2009)

MICHAEL CHARLES ----- APPLICANT

Versus

**1. PRINCIPAL SECRETARY,
PRESIDENT'S OFFICE
2. ATTORNEY GENERAL
3. TANGA CITY COUNCIL** } ----- **RESPONDENTS**

RULING

27.07.2021 & 03.08.2021

F.H. Mtulya, J.:

This court was invited to resolve labour dispute in **Civil Case No. 4 of 2009** on 15th May 2015 (the case) concerning a primary school teacher, Mr. Michael Charles (the Applicant), who was dismissed from employment for alleged absenteeism from his work station on diverse dates. The Applicant was aggrieved by the decision and decided to file the case in this court to challenge the decision.

This court heard the parties and after full hearing of the case, it dismissed the case without any relief to the Applicant. The issue before this court as displayed at page 2 of the decision, apart from

other issues, was: *whether the termination was lawful*. The holding of the matter is found at page 14 of the decision that: *the plaintiff was lawfully dismissed*. The reasoning of this court as depicted at page 14 of the decision is that: *the final verdict was communicated to him and he appealed to the President, but the said office endorsed the decision to dismiss him. It is apparent that the procedure to dismiss the plaintiff was followed*.

The Applicant was dissatisfied with both the decision and reasoning of this court and interpreted the decision was tainted with illegality on jurisdiction. However, he did not prefer an appeal to our superior court in judicial hierarchy, the Court of Appeal. Instead, he approached the **Commission for Mediation and Arbitration for Tanga at Tanga** (the Commission) and filed a fresh labour dispute in **CMA/TAN/129/2017**. The dispute was dismissed in early stages of hearing in favour of the principle of *res judicata* enshrined in section 9 of the **Civil Procedure Code** [Cap. 33 R.E. 2019] and for want of time limitation in filing trade disputes in the Commission.

Being dissatisfied with the decision, the Applicant preferred Labour Revision No. 11 of 2018 in this court seeking revision in the dispute for two grounds, namely: first, holding of *res judicata*; and, second, *right to be heard*. This court after hearing of the parties, dismissed the Revision for want of merit. The reasoning in favour of

the decision is displayed at page 7 and 8 of the Revision that the Applicant did not exhaust the available remedies to appeal to the Court of Appeal after he had lost his case in this court on 15th May 2015.

Having noted that he was out of time to prefer notice of appeal since delivery of the case on 15th May 2015 to 31st August 2020, when this Application was filed in this court, the Applicant sidestepped the requirement of accountability of days of delay since 15th May 2015 to 31st August 2020 by drafting his seventh paragraph in his Affidavit the following words:

*That, the proceedings and judgment of this court in respect of **Civil Case No. 4 of 2009** is tainted with illegality to the effect that this Hon. Court lacked jurisdiction to entertain the **Civil Case No. 4 of 2009** as the trade dispute based on employment.*

On 27th July 2021, when the Applicant was summoned to appear in this court to substantiate his allegation on illegality of the decision in the case, he invited Mr. Yona Lucas, learned counsel, to argue the Application for him. In his brief submission, Mr. Yona cited page 2 of the judgment and argued that the issue of the case at the face of record shows that civil court was invited to determine a labour dispute hence the decision cannot stand in law. To his

opinion, in an application like the present one, where the issue of illegality is raised, this court has the duty to grant the application in search of certainty of the matter in the Court of Appeal.

To bolster his argument, Mr. Yona cited the decisions in **Tambueni Abdallah & 89 Others v. National Social Security Fund**, Civil Appeal No. 33 of 2000 and **Mathayo Kiwango v. Vocational Education & Training Authority (VETA)**, Civil Case No. 429 of 2002 contending that it is only industrial court, during 2005, which had jurisdiction to determine labour disputes. With extension of time where there is allegation of illegality of the decision complained, Mr. Yona cited the authority in **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & Three Others**, Civil Application No. 6 of 2016, arguing that where there is alleged illegality, it is appropriate to allow the application on basis that the point at issue may be determined.

This submission received a protest from the Respondents' learned State Attorneys, Mr. Rashid Mohamed & Mr. Idrisa Mbondela, in three limbs, namely: not every illegality may warrant extension of time; second, the Applicant failed to account on every day of the delay in bringing his application in this court; and third, the Applicant has no chances of success in the Court of Appeal. In the first limb, Mr. Rashid submitted that the issue complained by the

Applicant on illegality is not apparent on face of record and in any case is not of sufficient importance to persuade this court in granting enlargement of time.

According to Mr. Rashid, Mr. Yona discovered the matter after long process of going into the issues raised and determined by this court hence cannot enjoy that ground of illegality. To substantiate his first limb of submission, Mr. Rashid cited the authority in **Lyamuya Construction Company Ltd v. The Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, arguing that applications for enlargement of time based on illegality, the point must be apparent on the face of record.

On the second limb of his contention, Mr. Rashid submitted that the Applicant raised the issue of illegality to escape accountability on days of delay which he cannot justify since 2015, when the judgment in the case was rendered down by this court. In Mr. Rashid's opinion, the Applicant must account on each day of delay and in any case he was a plaintiff in the case hence opted for the civil jurisdiction in prosecuting labour dispute.

Finally, Mr. Rashid and Mbondela argued that the Applicant has no high chances to succeed at an appeal stage of the case as his complaint lacks merit and it was decided before this court in two

occasions, namely: **Civil Case No. 4 of 2009 & Labour Revision No. 11 of 2018** and one time at the Court of Appeal in **Civil Application No. 8 of 2015**. In supporting his argument with precedent, Mr. Rashid and Mbondela, cited the case of **Rajabu Kadimwa Mgeni v. Iddi Adam** [1991] TLR 38 arguing that applications for enlargement of time must show prospects in intended appeals and not wastage of resource time.

In a brief rejoinder, Mr. Yona contended that the Respondents' learned State Attorneys supported the Application as they admitted the fault on record, but complained on the long drawn process is searching the point of illegality. To Mr. Yona's opinion, the issue at page 2 and its associated holding at page 14 was not disputed by Mr. Rashid and once that is noted, the Applicant cannot be subjected to accountability of days or chances of success in an intended appeal as per cited precedent of the Court of Appeal in **Arunaben Chaggaan Mistry v. Naushad Mohamed Hussein & Three Others** (supra)

In my opinion, there are settled principles in applications for enlargement of time set by our superior court in judicial hierarchy, and this court is not empowered to disturb them. First and foremost is that any applicant seeking enlargement of time, must register relevant materials to persuade this court to exercise its discretionary mandate in his favour (see: **Sebastian Ndaula v. Grace Rwamafa**,

Civil Application No. 4 of 2014; and **Bashiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007). However, there are no pigeon holes or hard and fast rule on what constitutes to relevant material (see: **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd**, Civil Application No. 13 of 2010). From decided cases a number of factors have been taken into account in determining an application for extension of time (see: **Dar Es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987).

I have had an opportunity to read the precedents in **Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) and **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & Three Others** (supra). After several visitations in various decisions of the Court of Appeal, the Court in **Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) listed the factors to be considered in the following text:

- i. The applicant must account for all period of delay*
- ii. The delay should not be inordinate*
- iii. The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intends to take; and*

iv. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

As I stated inhere above, I also had an opportunity to peruse the precedent of the Court of Appeal in **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & Three Others** (supra). This decision at page 12 stated that: *in view of the fact that there is an alleged illegality, it is appropriate to allow the application on the point so that the issue may be considered.* Before arriving in this decision, the Court of Appeal had already considered several other decisions of its own on the raised point of illegality in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] TLR 288, **Ratman v. Cumarasamy** (1964) 3 All ER 93, **The Principal Secretary, Ministry of Defence & National Service v. Devram Valambhia** [1992] TLR 182, **VIP Engineering & Marketing Limited v. Citibank Tanzania Limited**, Consolidated Civil References, 6, 7 & 8 of 2006 and **Attorney General v. Consolidated Holding Corporation & Another**, Civil Application No. 26 of 2014.

I understand the general principle in law that each application for enlargement of time may be decided on its own peculiar facts (see: **NBC Limited & Another v. Bruno Vitus Swalo**, Civil

Application No. 139 of 2019). However, the Court of Appeal has already settled that where there is claim of illegality, enlargement of time may be granted (see: **NBC Limited & Another v. Bruno Vitus Swalo** (supra) and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016). In **NBC Limited & Another v. Bruno Vitus Swalo** (supra), it was stated at page 7 of the typed Ruling that:

*It is now settled that **in its discretionary powers, apart from a point of illegality where raised**, the court has to also consider such factors as the length of delay, the reason for delay, the degree of prejudice and whether or not the applicant was diligent. In applying those principles [the court must bear in mind]...the general principle that **every case is decided upon its peculiar facts**.*

(Emphasis supplied).

Whereas the precedent in **Attorney General v. Tanzania Ports Authority & Another** (supra), the Court held that:

*It is a settled law that **a claim of illegality of the challenged decision constitutes sufficient reason for extension of time** regardless of whether or not a*

*reasonable explanation has been given by the applicant
under the rule to account for the delay*

(Emphasis supplied).

In order to avoid floodgate of applications for enlargement of time in this court through the claim of illegality, our courts of record had put in place the controlling mechanisms in two levels, *viz.* first, special circumstance of sufficient importance and second, the alleged illegality must be obvious at a glance. There is a bundle of authorities on the subject (see: **The Bishop of the Roman Catholic Diocese of Tanga v. Casmir Richard Shemkai**, Civil Application No. 507/12 of 2017, **Lyamuya Construction Company Ltd v. The Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010, **Samwel Munsuro v. Chacha Mwikwabe**, Civil Application No. 539/08 of 2019, **Yazidi Kassim Mbakileki v. CRDB (1996) LTD & Jackem Auction Marts & Court Brokers**, Civil Reference No. 14.04 of 2018 and **The Principal Secretary, Ministry of Defense and National Service v. Devram Valambia** [1992] TLR 387.

The present Applicant registered illegality as displayed at page 2 of the case on the issue of jurisdiction of this court and now is praying for leave for enlargement of time to access our superior court to ask the Court on the dispute. To my opinion this is a special

circumstance of sufficient importance and the alleged illegally is obvious at a glance of the record. In any case, the Applicant is seeking access to our superior court in search of justice as part of cherishing articles 13 (6) (a) & 107A(2) (e) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and precedent in **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2002 and **VIP Engineer and Marketing Ltd. v. Said Salim Bakhresa**, Civil Applicant No. 47 of 1996, on the right of appeal, rights to be heard and gaining confidence to justice stakeholders in this country. Our superior court in the precedent of **VIP Engineer and Marketing Ltd. v. Said Salim Bakhresa** (supra), issued a warning to our courts to always consider confidence of the parties when determining disputes, in the following words:

*...while the importance of litigants complying with the procedures cannot be over emphasized, **it must not be forgotten that there is a danger of consumers of justice losing confidence in the courts**, if judicial officers are obsessed more with strict compliance with procedural rules than the merits of the disputes.*
(Emphasis supplied).

I think, in my opinion, this court is part of the implementation of the directives from our superior court and cannot depart from the directives even if it has good reasons to do so. This dispute has been in courts' corridors of this State since 2009 and for interest of justice and the need to abide with the cited precedents of our superior court in this Ruling, I would rather grant the enlargement of time in favour of substantive determination of the matter to its finality in our final court of appeal.

Having said so, the Applicant has managed to persuade this court to grant the Application in his favour. I have therefore decided to grant the Applicant fourteen (14) days leave within which to file notice of intention to appeal to the Court of Appeal from today, 3rd August 2021, without any further delay, in accordance the laws governing appeals from this court to the Court of Appeal.

It is so ordered.



A handwritten signature in blue ink, which appears to read "F.H. Mtulya", is written over a horizontal line that extends from the seal.

F.H. Mtulya

Judge

03.08.2021

This Ruling is delivered in this 3rd day of August in the presence
Mr. Yona Lucas, learned Advocate for the Applicant who is also
present in person and Mr. Idrisa Mbondera, Solicitor for all the
Respondents.



A handwritten signature in blue ink, appearing to read "B.R. Nyaki".

B.R. Nyaki

Deputy Registrar

03.08.2021