THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

MISCELLANEOUS CIVIL APPLICATION NO.42 OF 2020

(Arising from the decision of the Inspector General of Police)

OCTAVIAN MBUNGANI (EX. E 8648 CPL) ..... APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

28/10 & 14/12/2021

RULING.

MATOGOLO,J.

This is an application by the applicant one Octavian Mbungani for an order that the court be pleased to enlarge time to allow the applicant to file an application for Judicial Review of the decision made by the first respondent on 16th March 2011. He also prays for costs and any other order as the court deems fit and just to grant.

The application is by way of chamber summons made under Section 14 (1) of the Law of Limitation Act (Cap 89 R.E 2019). The same is supported by an affidavit sworn by the applicant.

At the hearing of this application parties were represented, the applicant was represented by Ms. Theresia Charles learned advocate while the respondents were represented by Ansila Makyao learned State Attorney.

The application was disposed of by way of written submissions.

Ms. Theresia submitted that, in an application for extension of time, it is commonly understood and not disputed that, can only be granted if the applicant has advanced sufficient reasons for a court to grant his prayers, to support her argument she cited the cases of ***Yona Kaponda and 9 Others vs Republic (1985) T.L.R 84, Elinazani Matiko Ng'eng'e v. The Republic***, Criminal Application No. 39/01 of 2017 Court of Appeal of Tanzania (unreported) as referred in the case of ***Ally Mohamed Mkupa v The Republic***, Criminal Application No 93/7 of 2019 Court of Appeal of Tanzania at Mtwara (Unreported), the Court held;

> *"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 expiration*

of that time and whether before and after the doing of the act, and any reference in these rules to any such time shall be constructed as a reference to that time as so extended"

She submitted further that, it is trite law that an extension of time is absolutely premised in the discretion of the court to grant or refuse to grant. Extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. To support her argument, she referred this court to the case of ***Meis Industries Ltd and 2 Others v. Twiga Bank Corporation***, Miscellaneous Commercial Cause No. 243 of 2015 (unreported) as cited in the case of ***Rashid Ahmed Kilindo v The Attorney General, Honourable*** Misc. Application No. 49 of 2020, High Court of Tanzania (unreported) where it was held:-

"It is now settled that, where the point of law at issue is an illegality of the decision sought to be challenged, it can constitute a sufficient cause".

The learned counsel submitted further that there is now a new development in our jurisprudence on what constitute sufficient reason when one is applying for extension of time. The development is based on a ground of irregularities or illegalities, she supported her argument by referring the case of ***Zuberi Nassor Mo'd v Mkurugenzi Mkuu Shirika***

la Bandari Zanzibar, Civil Application No. 93 of 2018, Court of Appeal at Zanzibar (unreported

She said the above position was supported in the case of ***Principal Secretary, Ministry of Defence and National Services v Devram Valambia (1992) T.L.R 182*** where it was stated that:-

> *"In our view when the point at issue is one alleging illegality of a 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 right"*

She also referred the case of ***Matheo Paulo &Another v The Republic***, Criminal Appeal No. 398 &400 of 2016 Court of Appeal at Tabora

She submitted further that, the main reason which prevented the Applicant to lodge his application for Judicial review within a mandatory statutory period is because the applicant was pursuing such application in this court with good faith believing the same to be competent but the said application did not stand up to its finality as it was struck out on technical bases by this Court on 3rd November, 2020. Soon thereafter the Applicant lodged the present application, thus there was lack of negligence on part of

the Applicant and that lack of negligence on the part of the Applicant constitute sufficient reason for the court to grant an application for extension of time, she bolstered her argument by the case of ***CRDB (1996) Limited v. Geroge Kilindu,*** Civil Appeal No.162 of 2006 Court of Appeal of Tanzania (Unreported) which made its reference in the case of ***Rashid Ahmed Kilindo v. The Honourable Attorney General*** (supra) the court had this to say:-

> *"Sufficient cause may include, among others, bringing the application promptly, valid explanation for the delay and lack of negligence on the part of the Applicant".*

She went on submitting that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called " technical delays" in the sense that the original application was lodged in time but the present situation arose only because the original application for one reason or another has been found to be incompetent and a fresh application has to be instituted as it was argued in the case of ***Fortunatus Masha v. William Shija and Another [1997]T.L.R 154.***

She said another reason which on their side they treat as a sufficient reason to warrant this application is the fact that the judgment/ decision made by the trial court above stated is tainted with material illegalities as

pointed out under paragraph 8 of the Applicant's affidavit. The applicant is alleging illegalities in the whole proceedings and Judgment/decision of the first Respondent.

She submitted that, among of the illegalities include the breach of principle of natural justice in particular the Constitutional right to be heard and the failure to address some key issues raised by the applicant in the letter of appeal to the Inspector General of Police (first respondent in this case) as the bases of the decision was on video evidence which was not tendered in evidence. The Constitutional right to be heard is provided under Article 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

She contended further that, it is trite principle of the law under the realm of Audi Alteram Partem rule that, a just and fair includes the right to be heard, right to know adverse evidence, right to present case, right to rebut evidence, right to cross examine, right to legal representation and right to reasoned decision, thus the court was required to accord the parties a full hearing before reaching into decision. Therefore, the act of the trial court to make the decision basing on the video evidence which was not tendered in evidence as well as failure in addressing key issues raised by the applicant in the letter of appeal amounts to denial of the right to be heard on the part of the applicant. To support her argument, she referred the court to the case of ***Hussein Khanbhai v. Kodiralph Siara***, Civil Revision No. 25 of 2014 Court of Appeal of Tanzania (unreported) the court held that:-

"That right is so basic that a decision which is arrived in violation of it all be nullified, even if the same decision would had been reached had the party been heard, because the violation is condemned to be a breach of natural justice".

Also, she referred the case of ***Director of Public Prosecution v. Sabinus Tesha & Raphael J. Tesha (1993) T.L.R 237*** in which it was held that:-

"In this Country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13 (6)(a) includes the right to be heard amongst the attributes of the equality before the law and declares in part that, wakati haki na wajibu wa mtu yeyote vinahitajika kufanyiwa uamuzi wa mahakama au chombo kingenecho kinachohusika, basi mtu huyo takuwan a haki ya kupewa fursa ya kusikilizwa kikamilifu".

She submitted that, another illegality is based on the trial court failure to properly evaluate the evidence adduced by the Applicant hence leading to injustice on the part of the Applicant. The court is duty bound to

consider the evidence of both parties before making the decision a thing which was not considered by the trial court as a result reached into a wrong decision and failure to consider the parties evidence, denies the parties legal rights. She bolstered her argument by referring the case of ***William Joseph Sanga v. Republic,*** Criminal Appeal No. 42 of 2020 High Court of Tanzania, Mbeya District Registry.

She submitted further that, illegality should not be left unattended otherwise they are prone to not only mislead and misdirected readers but also may create bad precedent. She bolstered her argument by referring the case of ***Matheo Paulo &Another v The Republic*** (supra) and the case of ***Principal Secretary, Ministry of Defence and National Services v Devram Valambia*** (supra).

She concluded by praying to this court to grant the application of extension of time as prayed.

In reply Ms. Ansila Makyao prayed to adopt all contents of their counter affidavit and submitted that, it is undisputed fact that granting extension of time is a Court's discretion upon satisfaction that there is a good cause thereon however, the court's duty is bound to ensure that all legal requirements have been met.

She submitted that, Rule 6 of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 G.N No. 324 requires application of this nature to be instituted and set into

motion within 6 months from the date the alleged authority made a final decision.

She submitted that, the 1st respondent made his final decision to terminate the applicant on 16.03.2011 whilst the first application for judicial Review was lodged by the applicant on 30.07.2018 as Civil application No. 21 of 2018, she said, from 16.3.2011 when the impugned decision was made by the 1st respondent to 30.7.2018 when the 1st application for leave of judicial Review was filed the delay was already far beyond seven (7) years.

She went on contending that, there is no any ruling of the court condoning this inordinate delay. She was of a considered opinion that the applicant's delay is inordinate and is rooted far beyond, prior to the filing of even the first previous application which was struck out, hence the present application.

She submitted that, the instant application is unmerited and inexcusable in Law as the applicant has totally failed to convince this Court on the cause of delay and he has as well, failed to account for each day of delay. She argued that, the applicant failed to account for the delay of 44 days running from 03.11.2020 when his previous application was struck out to 17.12.2020 when he filed the instant miscellaneous application.

She submitted further that, the purported ground of technical delay is inapplicable and is actually misplaced because, the previous application was struck out due to lack of diligence on the party of the applicant

himself, considering that the applicant all the time he was represented by a senior Advocate. She argued that, if at all a technical delay the applicant ought to have filed the instant application timely, spending 44 days without acting immediately to file his intended fresh application is not justifiable in law.

She supported her argument by citing the case of ***Wambura N.J Waryuba vs The Principal Secretary Ministry of Finance and Another***, Civil Application 320/01 of 2020 CAT, (unreported), at page 8 the Court had this to say:-

> "Furthermore, it is a trite law that, in application for the extension of time, the applicant should account for each day of delay, and failure to do so would result into the dismissal of the application"

Also held that;

> *"It cannot be gain said that the applicant has failed account all the period of delay. He has not accounted for the days from 28th July, 2020 when the seven days expired within which he was supposed to file reference and the date of filing of this application on 5th August, 2020"*

She also cited the case of ***Osward Mruma v. Mbeya City,*** Civil Application NO. 100/06 OF 2018 (Unreported) at page 10, last paragraph, Mwangesi J.A had this to say:-

> *"Delay even of 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"*

With regard to the issue illegality as alleged by the counsel for the applicant, Ms. Makyao submitted that, it is not contested that illegality can be a sole ground for extension of time but application for extension of time basing on illegality is not automatic as per applicant's submission. She contended that, the purported illegality must be of sufficient importance and must not involve a long drawn processes or arguments and must be on the face of records, she cemented her argument by referring this court to the case of o ***Lyamuya Construction Company Limited versus Board of Trustees of Young Christian Association of Tanzania***, Civil Application No. 02 of 2010 (unreported) at page 9.

She went on submitting that, it is also a trite law and a firm legal stance that even if the alleged illegality is a sole ground for extension of time, courts has the duty to consider other factors, such as the length of delay, the reason for delay and if there is an arguable case. She cemented her argument by citing the case of ***Mega Builders Limited vs. D.P.I Simba Limited***, Civil Application No. 319/16 of 2020 CAT Dar es Salaam (unreported) whereby it was held that:-

"Despite the development of jurisprudence and wide interpretation of what amounts to a "good cause" the other factors (such as length of the delay, the reason for delay, whether there is an arguable case on the appeal and degree of prejudice) cannot be ignored even if the applicant decides to rely solely on the ground of illegality".

She said in the instant application there is no even iota of illegality and this Court cannot in itself belabor to crank the cupboards to find out the alleged illegality. She argued that, the applicant's notion that there was a breach of the principal of natural Justice by the 1st respondent is a mere illusion. The applicant has however acknowledged under paragraph 9 of his submission that there was a trial and he has referred page 2 of the proceeding of what he calls the court (Disciplinary Authority) and that the applicant was convicted. These facts alone embrace everybody that hearing was conducted and the applicant was afforded chance to defend his case. She was of the considered view that there is nowhere principal of natural justice was violated in the course of admonishing the applicant.

Ms. Makyao submitted that, since the application is devoid of merit, the 1st and 2nd respondent prayed for the application to be dismissed with costs

In rejoinder Ms. Charles reiterated what she submitted in chief and she added that, the respondents to submit about the previous delay of

seven years that was already been discussed in and the order which was drawn by the court, if she was not satisfied with the decision she had a room to appeal against the said order. She contended that, the respondents have no room to rise that issue at this stage because it was already discussed and a ruling to that account was delivered by the court.

With regard to the issue of failure to account 44 days of delay, she submitted that, the said days were the days the applicant was waiting to be supplied with the copies of the Ruling in Civil Application No.21 of 2018 which was struck out on 3rd November, 2021 in order to file this application for the second bite. The said Ruling was supplied to the Applicant on 14th December 2020 soon thereafter and without delay he lodged the present application on 17th December 2020. She concluded by insisting for the application to be granted.

Having read the respective submissions by the parties and having perused the court records it is my considered opinion that, the crucial issue to be determined here is whether the applicant has advanced sufficient reason to warrant the grant of extension of time to file the application for Judicial Review.

As it was correctly submitted by both learned counsel, it is principle of law that, an application for extension of time is in the discretion of the court to grant or refuse it, the same was stated in the case of ***Benedict Mumelo versus Bank of Tanzania (2006) 1 EA 227***, where the Court of Appeal of Tanzania held that:-

"Extension of time to appeal is discretion of the Court to grant or to refuse it and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause".

In this application the applicant has disclosed in his affidavit the reasons for delay is that, there is illegality, that the decision which is subject of this application is tainted with material illegalities including breach of principle of Natural Justice in particular the right to be heard and failure to address some of key points raised by the applicant in the letter of appeal to the IGP as also amply addressed by Ms. Charles in her written submission in support of the application as the bases of the decision was on video evidence which was not tendered in evidence.

But those allegations were denied by Ms. Makyao learned State Attorney as disclosed in her reply submission summarized above.

Having carefully studied the court record I have found that, the applicant was afforded right to be heard as he was given a chance to defend himself and the complaint by the applicant that, the bases of the decision was on video evidence which was not tendered in evidence, does not hold water because even though the said video was not tendered in evidence still the evidence was sufficient to prove their case. He was told of the reason for his admonishing him as he was summoned and appeared before the Disciplinary Authority as disclosed at paragraph 9 of his submission. Annexture A2 collectively shows that after witnesses have

given evidence against him, he was given opportunity for defence. His appeal letter was placed before the IGP along with the Disciplinary Authority to which he scrutinize before he came to his decision. For that reason that cannot be termed as illegality as the same is not on the face of records as it was discussed in the case of ***Lyamuya Construction Company Limited versus Board of Trustees of Young Christian Association of Tanzania***, (supra). The Court clearly said:-

> *"In Valambhia's case... this court (The Court of Appeal) held that... since every party intending to appeal seeks to challenge a decision on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrate 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 would add that it must also be apparent on the face of the record, such as question of jurisdiction, not one that would be discovered by a long draw argument or process".*

Hence the reason of illegality raised has no merit as the applicant was given the right to be heard and he was given the right to defend

himself although the video was not tendered still the evidence given was sufficient to prove their case.

Another reason advanced by the applicant is that of technical delay that, he filed his application on time but the same was found incompetent and it was struck out.

The said struck out application was struck out on 03rd day of November 2020 and the same application was filed on 17th day of December 2020, after about 44 days. The reason he advanced for not filing this application promptly is that, he was supplied with the copies late on 14th day of December 2020. This reason in my opinion has no merit because there is no evidence attached by the applicant to support his assertion. After his first application being struck out he was supposed to file fresh application immediately but he stayed until after 44 days have elapsed and filed the present one. In my view the applicant was legally bound to tell the court as to what he was doing from when the application was struck out until when he filed the present one, it is a requirement of the law that, in any application for extension of time the applicant is required to account for each and every day of delay. In the case of ***Finca (T) Limited and Kipondogoro Auction Mart Versus Boniface Mwalukisa;*** Civil Application No.589/12 of 2018 CAT at Iringa (unreported) at page W.B. Korosso, J.A, stated inter alia that:-

> *"Delay of even a single day, has to be accounted for otherwise there would there would be no proof of having rules*

prescribing periods within which certain steps have to be taken".

There are several court decisions by the Court of Appeal as well as this court insisting on that position of law.

Having discussed as herein above, it is my considered opinion that, the applicant has failed to advance sufficient reason for the delay and sufficient reason to warrant this court to grant him extension of time so as to file his application for judicial review. Thus, this application has no merit the same is dismissed but I make no order as to costs.

It is so ordered.

F.N. MATOGOLO

JUDGE

14/12/2021.

Date:	14/12/2021
Coram:	Hon. F. N. Matogolo – Judge
Applicant:	
Respondent:	Absent
C/C:	Grace

Theresia Charles - Advocate:

My Lord I am appearing for the applicant.

Mr. Bryson Ngulo – State Attorney:

My Lord I am appearing for the 1st and 2nd Respondent. The matter is of ruling. We are ready.

COURT:

Ruling is delivered.

F. N. MATOGOLO

JUDGE

14/12/2021