

IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 11 OF 2022
(Arising from the decision of this Court in Misc. Civil
Application No. 18 of 1995 (Hon Bubeshi, Ihema, Manento JJJ (as
they then were) dated 6th April 2001)).

DUNIA OMAR MSUBA.....1ST APPLICANT

YASINI SHABANI MNYETE.....2ND APPLICANT

*(ON THEIR OWN BEHALF AND ON BEHALF OF 51 OTHER APPLICANTS NAMED
IN ANNEXTURES DY1(A) & DY1(B) IN THE AFFIDAVIT)*

VERSUS

**THE REGISTRAR OF THE INDUSTRIAL COURT OF
TANZANIA.....1ST RESPONDENT**
THE ATTORNEY GENERAL.....2ND RESPONDENT
TANZANIA BREWARIES LTD.....3RD RESPONDENT

RULING

07/6/2022 & 01/07/2022

MZUNA, J.:

This is an application by **Dunia Omar Msuba and Yasini Shaban Mnyete** (referred herein after as the applicants), under representative capacity for and on behalf of other 51 applicants, seeking for extension of time within

which to apply for leave to appeal to the Court of Appeal out of time as well as application for leave to appeal to the Court of Appeal. It has been preferred under section 5(1) (c) and 11 (1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 and 45(a) and 47 of the Tanzania Court of Appeal Rules, 2009 (as amended).

The application was strongly objected for by **The Registrar of the Industrial Court of Tanzania, The Attorney General and Tanzania Brewaries Ltd**, referred herein after as the 1st, 2nd, and 3rd respondent respectively.

Hearing of this application proceeded orally. Dr. Chacha Bhoke Murungu the learned Advocate appeared for the applicants whereas Ms. Leonia Maneno, the learned State Attorney represented the first and second respondents. On the other hand, Ms. Julita Sulumbu, the learned counsel advocated for the 3rd respondent.

As a matter of fact, the said applicants were employees of the 3rd respondent. They were retrenched. Subsequently thereafter, the said applicants entered into a voluntary agreement No.7 of 1994 with the third respondent. There is another voluntary agreement No.12 of 1995 which was

blessed by the court by consent of parties. The applicants are disputing it allegedly that they were not heard and that it had no better termination benefits as compared to voluntary agreement No 07/1994 which they took part in its preparation unlike the other one which they never blessed.

All along, they have been trying to challenge it at the Court of Appeal but due to the fact that the drawn order of the court was not signed and supplied to the applicants within time, there occurred a delay to lodge the appeal. It is for that reasons that they have filed the instant applications first for extension of time to file leave out of time as well as for leave to appeal to the Court of Appeal.

The main issue for determination is whether the applicants have demonstrated sufficient reasons for the delay?

In his submission, Dr. Chacha Bhoke Murungu argued based on the filed affidavit that the application should be allowed because the applicants have been diligent in prosecuting their case and that there are some illegalities on the challenged Award by the Industrial court which did not consider that the applicants did not take part in the voluntary agreement No 12/1995 as opposed to No. 7/1994. That the decision of the High court comprising of a panel of three Judges fell as well in that same error, a defect

which calls for intervention of the Court of Appeal. This he further said, shows, the applicants were not heard. The delay is attributed by failure by the High court to supply a drawn order within time, striking their application from time to time above all that there were constant applications to the Court of Appeal all the time. It was his view that they have accounted for the delay from 2001 to 2022 as per paragraph 1-38 of the affidavit. He urged the court to find that sufficient cause has been established and therefore both applications for extension of time to file leave as well as application for leave to appeal to the Court of Appeal out of time should be granted.

The learned counsel insisted that there is illegality of the decision sought to be challenged citing the case of **Selina Chibago v. Finihas Chibago**, Civil Application No. 182 'A' of 2007, Court of Appeal at Dsm, (Unreported) which cited with approval the Court of Appeal case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 182 at page 189.

Similarly, on the issue of leave he said that there is a triable issue and or disturbing features which must be established before granting leave which he said exist in the case under consideration citing the case of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo**, Civil Application

No. 138 of 2004, CAT at Dar es Salaam (unreported). He therefore prayed for this application to be allowed.

Responding to the above submission, Ms. Leonia Maneno, the learned State Attorney said that the application is an abuse of the court process. That the applicants are aggrieved by the award granted on 31/03/1995 after being retrenched on 3rd April 1995 and 30th June 1995. That they challenged the Award of the Industrial court in Misc. No. 18/1995 before the High court Dar es Salaam seeking for certiorari and mandamus. The application was refused by a panel of three judges.

Again they filed Civil Appeal No. 32/2002 before the Court of Appeal which was withdrawn on request of the Advocate Mr. Kashumbuga. Similarly, the applicants took more time to re-institute various applications and then withdraw them like Civil Application No. 64/2007 at the Court of Appeal.

She challenged the allegation that they spent more time requesting for the drawn order because the District Registrar supplied them same on 11th April 2017. She is of the view that the application for extension of time to file appeal to the Court of Appeal should not be granted because they have failed to account each day of the delay citing the case of **Lyamuya**

Construction Company Ltd Versus Board of Trustees of Young Women's Christians Association of Tanzania, Civil Application No. 2 of 2010.

That upon receipt of the record in Misc. Civil Application No. 18 of 1995, they ought to have acted upon it immediately. They failed to do so instead filed numerous applications with defects which were withdrawn or struck out by court and therefore by filing defective application the advocate exercised negligence. The delay is inordinate and the court should not exercise the sought discretion. It should not grant same because what is being challenged on the part of the court was a result of bargaining which had the blessings of the Trade Union. The application should be dismissed.

On her part, Ms. Julita Sulumbu, the learned counsel for the 3rd respondent joined hands with the submission of the learned State Attorney for the respondent No 1 and 2. She said that the grounds advanced by the applicants that it took time for them to mobilize in order to get funds to engage an advocate who could represent them constitute negligence not sufficient cause to grant the sought application. That they have failed to account for each day of the delay given the fact that the delay is inordinate

from 2017 when they were supplied with relevant documents in Civil Application No. 18 of 1995.

She touched as well on the award that it was a voluntary agreement which the first respondent awarded based on fairness. She insisted that the first respondent had no mandate to vary it. Above all that the applicants were paid as per the agreement. It was her view that the application is bad in law and therefore should be dismissed.

In his rejoinder submission, Dr. Murungu the learned counsel reiterated his submissions and said that the illegality is visible. That they acted diligently because the application for leave was filed within 30 days after being granted leave to file notice on 21/04/2022. That merely because there are on and off applications cannot be judged that there is negligence on their part.

Having passionately read the submissions of both parties as well as the attendant affidavit and counter affidavits, this court will deal with two issues. **First** whether sufficient reasons have been shown to grant extension of time. If the first issue is answered in the affirmative, **the second issue** is

whether there is an arguable case to warrant leave to appeal to the Court of Appeal?

The advanced grounds for extension of time includes issue of technicality in that the Industrial court of Tanzania registered Voluntary Agreement No. 12 of 1995 but failed to consider voluntary agreement No. 7 of 1994 and the High court fell in the same error in determining Misc. Civil Application No. 18 of 1995. It was held in the case of **Principal Secretary, Ministry of defence and National Service v. Devram Valambhia** [1992] TLR 182 at page 189 that:-

"Where a 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 right".

Issue of illegality sometimes if proved to exist, is sufficient reason to grant extension of time for leave even if the applicant had not accounted for the delay.

Ms. Leonia Maneno, the learned State Attorney approached this application with another look. She says it is an abuse of the court process as

their application to challenge the Award of the Industrial court in Misc. No. 18/1995 before the High court Dar es Salaam seeking for certiorari and mandamus was refused by a panel of three judges. Again they filed Civil Appeal No. 32/2002 before the Court of Appeal which was withdrawn on request of the Advocate Mr. Kashumbuga. Similarly, the applicants took more time to re-institute various applications and then withdraw them like Civil Application No. 64/2007 at the Court of Appeal.

On her part, Sulumbu, the learned counsel challenged the allegation that it took time for the applicants to mobilize in order to engage an advocate who will represent them in court. This according to her is total negligence otherwise ought to have accounted for each day of the delay. Above all that there is no way the Industrial Curt or even High Court could blend something not brought before it which in view of the opinion of Ms. Leonia Maneno had the blessing of the Trade Union.

There are matters which the learned counsel for the applicants did not dispute like the allegation that the applicants were paid even if they say it was too minimal. Second that the challenged award had the blessings of the Trade Union. I understand this court cannot deal with the outcome of the

intended appeal. I am to deal with whether there is sufficient cause for the delay.

The cited case of **Lyamuya Construction Company Ltd Versus Board of Trustees of Young Women's Christians Association of Tanzania**, (Supra) on issue of extension of time stated that;

- a) The applicant must account for the delay for the period of the delay.*
- b) The delay should not be inordinate.*
- c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take,*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

It is no doubt that the delay is inordinate. The decision which is intended to be appealed against was delivered on 31 March, 1995. The decision of the High court was delivered on 6th April 2001. This is the one which is subject for appeal as they did so in Civil Appeal No. 32 of 2002 after being supplied with the copies of proceedings, decision and record. (*See paragraph 8 of the affidavit*).

Subsequently thereafter there were various applications which were withdrawn including among others that the drawn order was not signed by

the judges who made the decision subject for appeal. After concerted efforts to request for same they were supplied with it on 13th April 2017 (*see paragraph 17 of their affidavit*).

Their application in Misc. Civil Application No. 54 of 2018 for extension of time to file notice of appeal was struck out for being defective and incompetent. They filed another Application No. 98 of 2018 in 2020 for leave to appeal in a representative capacity which was struck out so they filed another Application No. 27 of 2020. There occurred similar applications and they say a delay from 2001 to 2020 was due to a delay in being supplied with relevant necessary documents for appeal purposes.

The present application was filed on 21st April 2022 almost after 27 years. Section 11 (1) of the Appellate Jurisdiction Act, cap 141 RE 2002, to which this application relates, reads: -

*"(1) Subject to subsection (2), **the High Court or, ...may extend the time** for giving notice of intention to appeal from a judgment of the High Court or..., for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, **notwithstanding that the time for giving the notice or making the application has already expired.**"*

(Underscoring mine)

Prima facie, that provision entails that this court is enjoined to exercise its discretionary powers. I should say that granting or not granting leave is the discretionary powers vested to this court which should be exercised judicially. The term discretionary power(s) is defined in the case of **Mwita Mhere v. R** [2005] TLR 107 where the court defined it by citing **Black's Law Dictionary**, 6th edition, and held that:

"Judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law...the court has to demonstrate, however briefly, how the discretion has been exercised to reach the decision it takes..."

The argument advanced by the learned State Attorney presupposes negligence on the part of their advocate. I agree. Failure of the part's advocate to check the law is not sufficient reason for extension of time. The Court of Appeal in the case of **Calico Textile Industries Ltd (1983) v. Pyraliesmail Premji** [1983] TLR 28 held that:-

"Failure of a party's advocate to check the law is not sufficient ground for allowing an appeal out of time."

Similar position was also echoed in the case of **Calico Textile Industries Ltd Vs. Pyraliesmail Premji** [1983] TLR 28, the court struck out the notice of appeal after it had found that *"failure to check the requirements of*

the law properly...cannot be sufficient reason for allowing Appellant, who is represented by a learned Advocate, to file his appeal so much out of time..."

However that is also subject to its limitations and exceptions. In the case of **Michael Lessani Kweka v. John Eliafye** [1997] TLR 152, the Court of Appeal observed that:-

"Although generally speaking a plea of inadvertence is not sufficient, nevertheless I think that extension of time may be granted upon such plea in certain cases, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it."

The applicants contributed for the delay as they say under paragraph 35 that they had difficult moments in mobilizing themselves for funds to pay the advocate in order to prepare their applications. It took almost one month in that exercise from 16th March 2022 to 19th April 2022. That some were staying in Arusha. "Financial constraints" it has been held cannot constitute "sufficient ground for extension of time". That position was stated in the case of **Yusufu Sane and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002, CAT at Dar es Salaam (unreported) which cited with approval the case of **Zabitis Kawuka v. Abdul Karim** (EACA) Civil Appeal No. 18 of 1937. It is therefore

my finding that the alleged financial constraints and mobilization is a lame excuse.

At most it shows the application "has not been brought promptly", "absence of any or valid explanation for the delay", "lack of diligence on the part of the applicant" and of course their advocate (See **Dar es Salaam City Council v. Jayantilal P. Rajani** - CAT Civil Application No. 27 of 1987 (unreported), and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda** - Civil Application NO. 6 of 2001 (unreported)).

All above considered, still there is issue of degree of lateness. It was held in the case of **Royal Insurance Tanzania Limited vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008, cited with approval in the case of **Sebastian Ndaula vs. Grace Rwamafa** (*Legal Personal Representative of Joshwa Rwamafa*), Civil Application No. 4 of 2014, CAT, unreported that:

"It is trite law that an application 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 had been brought in good faith."

In other words, in a situation like this, a party must account of each day of the delay in order to show there is good cause. In the case of **Sebastian Ndaula vs. Grace Rwamafa** (Supra), Hon Juma, JA, (as he then was) was very particular at page 8 where he held that:-

*"The position of this court has consistently been to the effect that in an application for extension of time, the applicant has to account for every day of the delay:- see- **Bariki Israel vs. The Republic**, Criminal Appeal No. 4 of 2011 (unreported). The need to account for each of the days of delays becomes even more important where matters subject of appeal like the present one is, was decided eighteen years ago on 6/02/1997.*

The applicant has suggested in his supporting affidavit that he has all along been pursuing his case both in the High Court, and in this Court. But, on a closer look, there are some gaps which the applicant has not accounted for..."

From the above case law, I gather the following; **First**, it is prudent for matters like this which had taken about 30 years to be attended with a serious note. This no doubt is based on a well known principle that "litigation must come to an end." **Secondly**, though matters may be pending for number of years, courts will take into account how the party concerned had acted by accounting for every day of the delay after being aware that it is out of time. **Lastly**, merely because a party had been in court corridors

pursuing his rights is not an automatic guarantee that extension can be granted without material facts supporting the delay.

If I may hasten to add in view of the decision of this court in **Mobrama Gold Corporation Ltd vs Minister for Energy and Minerals and Two Others** [1998] TLR 425 (HC) courts will hesitate to grant extension of time if there is "*...procedural abuse or contemptuous default*" and there is every reason to believe that the respondent will "*suffer prejudice.*"

The case under consideration is a clear proof of abuse of legal process. The alleged illegality is not clearly discernible on the record but from long arguments.

For the above reasons, I find that the applicants have failed to account for each day of the delay instead were negligent. The first issue on extension of time to file leave to appeal out of time fails. Similarly, leave to appeal to the Court of Appeal fails.

Application stands dismissed with no order as to costs.

M. G. MZUNA,

JUDGE.

01/07/2022.