

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**MISC. CIVIL APPLICATION NO. 31 OF 2021**

*(Arising from Judgment & Decree in Labour Revision No. 19 of 2019 before Hon. Mkasimongwa J, originating from Commission for Mediation and Arbitration decision Complaint No. CMA/TAN/KOR/4/2017/ARB)*

**ROBERT KWAYI.....APPLICANT**

**-VERSUS-**

**KILINDI DISTRICT COUNCIL.....RESPONDENT**

**RULING**

*Date of last order: 27/06/2022*

*Date of ruling: 01/07/2022*

**AGATHO, J.:**

The Applicant is seeking extension of time within which he may file Application for Judicial Review before this Court against unlawful termination by the Respondent, the decision that was confirmed by the President of the United Republic of Tanzania. The matter went to the Commission for Mediation and Arbitration (CMA) the decision and award was in his favour. Aggrieved by the CMA decision the Respondent applied for revision of the award before this Court vide Labour Revision No. 19 of 2019. This Court nullified the CMA Award and directed the Applicant if so desire to apply for judicial review.

The Applicant also pray for any other order the Court may deem fit and just to grant.

The Applicant realized that after all that transpired he was out of time to file application for judicial review hence this application for extension of time. The Respondent on the other hand is protesting the said application. The application at hand was by way of Chamber Summons supported by an Affidavit of the Applicant. The Respondent resists the application by filing their Counter Affidavits. The Court directed the parties to dispose the application by way of written submissions. They complied to the schedule set for filing the said written submissions.

The central issue in the present application is whether the Applicant as required by the law has shown any sufficient cause to persuade the Court to exercise its discretion to grant extension of time for filing the application for judicial review. To convince the Court the Applicant was required to:

- (1) show that they have accounted for each day constituting the delay from the time the judgment in Labour Revision Case No. 19 of 2019, to the time the filing this application.

- (2) show any other sufficient cause that may warrant the Court to exercise its discretion to extend time such as illegality of the decision to be challenged, etc.
- (3) show that the delay was not inordinate, that they were diligent, etc.

The above requirements are in line with the case of **The Registered Trustees of BAKWATA versus The Registered Trustees of Dodoma General Muslim Association, Civil Application No. 512/03 of 2019, Court of Appeal at Dodoma** (unreported) where the CAT held that for the Court to grant extension of time it should be guided by the following:

- 1. The applicant must account for all the period of delay;*
- 2. The delay should not be inordinate;*
- 3. The applicant must show diligence, and not apathy, negligence or sloppiness of the action that he intends to take;*
- 4. If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged".*

To determine whether there is sufficient cause to grant extension of time to apply for judicial review I went through the Affidavit of the Applicant's counsel averring the reasons for delay as being (1) technical delay, and (2) that the Applicant contracted CoVID-19 (para 8 of the affidavit). Regarding the technical delay, the Applicant's counsel avers that the Applicant prosecuted that matter



at CMA vide case CMA/TAN/KOR/4/2017/17/ARB that was in his favour. Being aggrieved by that decision the Respondent filed before this Court Labour Revision No. 19 of 2019. The case ended on 17/05/2021 and the ruling was delivered on 16/05/2021. These averments are found in paragraphs 3-6 of the Affidavit of the Applicant's counsel. The copies of the ruling was were supplied to the Applicant on 15/09/2021. From 20/07/2021 to 19/10/2021 the Applicant was under quarantine and self-isolation, and COVID-19 treatment. This averment is visible on paragraph 8 of the Affidavit of the Applicant's counsel and the annexure thereto.

Paragraph 2 of the Affidavit of the Applicant's counsel avers that the Respondent terminated the Applicant from employment and that decision was confirmed by the President of the United Republic of Tanzania. Thereafter, the Applicant in 2017 referred the labour dispute to CMA. Paragraph 10 of the Affidavit contain averment that the procedure and decision of Respondent were tainted with illegality as they breached Rule 47 (4)(a)(b) of the Public Service Regulations, 2003 G.N. No. 108 dealing with principle of natural justice and resulted into unlawful termination of the Applicant.

Moreover, paragraph 11 of the Affidavit of the Applicant's counsel alleges illegality based on discrimination. That paragraph states that

the decision of the Respondent was discriminatory as it was made against the Applicant out of collective decision of the tender board.

The Applicant's counsel states further on paragraph 9 that the delay is of 182 days. But he did not explain clearly how these days lapsed. However, the days spent in court and CMA, and those passed while he was under quarantine after contracting COVID-19 were indeed accounted for.

Besides the issues of technical delay, the Applicant further claims that there is illegality (that is the discrimination in the decision of the Respondent) and unlawful termination for non-adherence to principles of natural justice.

What happened from 19/10/2021 to 23/12/2021 when the application was filed? What was the Applicant doing in these days? That is a delay of 60 days. These days have not been accounted for. The Applicant mention that he contracted COVID -19 and was under self-isolation from 20/07/2021 to 19/10/2021. In **Bushiri Hassan v Latifa Lukilo Mashayo, Civil Application No. 3 of 2007, CAT** it was held that:

*"delay even of a single day has to be accounted for otherwise there would be no point of having rule*

*prescribing period within which certain steps have to be taken."*

The Applicant's counsel on paragraph 8 of his Affidavit averment is on illegality. Indeed, illegality may be a sufficient cause to grant extension of time as held in **Valambia's case; Wafanybiashara wadogo wa soko kuu kariakoo's case and Lyamuya Construction Ltd case.**

The Respondent submitted that failure of the Applicant's to refer the matter to proper channel is not a sufficient cause to extend time and cited the case of **Omari Shamba and Calico Textile Industry Ltd v Pyaraesmail Premji [1983] TLR 28.** But this case held that failure of the advocate of the Applicant to check the law is not a sufficient ground for extension of period of appeal. I do not concur with the Respondent's argument on this as in the present application there was no failure on the Applicant's counsel side to check the law. The taking of a wrong course is after all human error emanating from confusion of the route to take in seeking the remedy to the Applicant's grievance. In my view that is not ignorance of the law rather it is the opaqueness inherent in the laws. It is for that reason the Court is invited to interpret the said laws.



In the present Application it can be safely said that referring the matter to CMA was a misdirection as rightly ruled by this Court. But that cannot be regarded as negligence of the Applicant as contended by the Respondent.

The Respondent also claimed that the issue of delay caused by the illness (COVID-19) was abandoned because it was not found in the Applicant's written submission. With due respect the issue of the Applicant contracting COVID-19 was amongst the averments in the Affidavit and the annexure thereto. I need not to remind the Respondent that evidence may be adduced by Affidavit. In this case the affidavit contained the evidence and so is its annexure. It would have been wrong to attach the annexure to the submissions. I thus find the submission by the Respondent to lack substance as the claim about illness is conspicuous in the Affidavit and hence the same is sufficient cause. To consider it abandoned is a misnomer. It will be a misdirection or inaction on the side of the Court to ignore the evidence found in the affidavit.

There are ample authorities on the question of illegality such as **The Principal Secretary, Ministry of Defence and National Service V Devram Valambhia [1992] TLR 387**. In that case the CAT held that

*"Where 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 right."*

Many of the said authorities point out that the illegality claimed should be apparent on record. It is not every claim of illegality that the extension of time should be granted without the same being apparent on record (see **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT**).

In the present application the illegality claimed by the Applicants is apparent on record.

In terms of requirement that the Applicants must account for the delayed days, there is what is called technical delay see **Hamis Mohamed (As the Administrator of The Estate of late Risasi Ngawe) vs. Mtumwa Moshi (As the Administrator of the Estate of the Late Moshi Abdallan) civil application 407/17 of 2019, Court of Appeal of Tanzania** (Unreported). It was also held in **Elly Peter**



**Sanya v Ester Nelson, Civil Appeal No.151 of 2018 CAT at**

**Mbeya** at page 26 that:

*"It is now settled principle that the delay in taking action within the time specified by law caused by time spent in prosecuting a matter in Court constitutes good cause of delay."*

It is conspicuous in the Applicant's counsel affidavit that they have been to the CMA where Applicant was successful. He came to the High Court where in the labour revision it was held going to the CMA it was a misdirection. Having done all that he found the time lapsed hence this application for extension of time to file application for judicial review. Since he has been diligently prosecuting his right before the CMA and this Court, his delay is not a result of negligence. I am also settled in my view that since the judicial review is the only remedy available, it would be unfair to halt his endeavour as he has shown sufficient cause for the delay. In

**Mobrama Gold Co. Ltd v Minister for Energy [1998] TLR 426**

it was held that:

*"It is generally inappropriate to deny a party an extension of time where such denial will stifle his case; as the*

*applicant delay does not constitute a case of procedural abuse or contemptuous and because the Respondent will not suffer any prejudice an extension of time should be granted."*

Truly, it is the law that delay even of a single day must be accounted for otherwise the law prescribing period of limitation will be useless. That was also emphasized in **Bushiri Hassan v Latifa Lukio Mashayo, Civil Application No. 03 of 2007, CAT** (unreported). The same was reiterated in **Moto Matiko Mabanga v Ophir Energy Plc and Two Others, Civil Application No. 463/01 of 2017, CAT at Dar es Salaam** (unreported) at p. 9. Can the Court in the present application condone the unexplained 60 days delay? In the context of this Case the answer would be yes as the Applicant has been diligently prosecuting his rights and CMA and in this Court. The Court of Appeal of Tanzania in **Hamis Mohamed (As the Administrator of The Estate of la te Risasi Ngawe) vs. Mtumwa Moshi (As the Administrator of the Estate of the Late Moshi Abdallan) civil application 407/17 of 2019, Court of Appeal of Tanzania** (Unreported) granted the extension of time despite delay of a month because the Applicant was diligently pursuing the matter in the Court.

Moreover, in **Attorney General v Wafanyabiashara Soko Dogo Kariakoo Cooperative Society Ltd, Misc. Civil Application No. 606 of 2015** at page 10 where the extension of time was granted citing illegality as sufficient cause despite the Applicants delay for 12 years.

In the case at hand there is illegality of important nature to be addressed via judicial review. The issue of importance of the illegality claimed was emphasized in **Leornad S Ndashau v Joseph J Mkiponya, Misc. Land Application No. 51 of 2021, CAT** (unreported) at p. 12.

It was also held in **Lyamuya Construction Ltd's case** (at page 10) that illegality is a sufficient cause to grant extension of time. However, such illegality should not take a long drawn-out process to get to the bottom of it or take time to decipher the point of law or illegality sought to be challenged.

In the present Application the illegality claimed (breach of rules of natural justice and discriminatory decision) is crystal in the Affidavit of the Applicants. Further, at this stage this Court is not privy to determine the merit of the claimed illegality as that would be determined when judicial review is determined. What matters at this



level is importance of the illegality. That the same has been clearly averred to convince the Court to exercise its discretion to extend time to file application for judicial review.

I was only required to determine whether the alleged illegality has been clearly set out in the Affidavit. The questions of discrimination, unfairness of termination and unlawfulness of the decision due to breach of law and rules of natural justice by the Respondent are worth to be examined via judicial review.

I find the illegality complained about to be apparent on record. This Court should have an opportunity to determine the alleged illegality. Further the technical delay and the illness the Applicant suffered all constituted sufficient cause to extend time.

Before I conclude, it is worth to remark on the averment seen on paragraph 10 of the Counter Affidavit of the Respondent's counsel. The import of that paragraph is that granting of extension of time will be prejudicial to the Respondent and that the Applicant will benefit twice. I should briefly say that the question of prejudice to a party is not yardstick for testing whether to grant or to reject extension of time. In the present case the illegality alleged is visible

on record, the technical delay can hardly be disputed and the fact that the Applicant contracted COVID-19 was substantiated.

For the foregoing reasons, I find the present Application to have merits, there are sufficient causes shown. I thus grant the extension of time to file application for judicial review. The Applicant is given 14 days from the date when he will be supplied with a copy of this ruling to file his application for judicial review. And since this was a labour matter each party shall bear its own costs.

It is so ordered.

**DATED** at **TANGA** this 1<sup>st</sup> Day of July 2022.



A handwritten signature in blue ink, appearing to read "U. J. Agatho", is written over the seal.

**U. J. AGATHO**  
**JUDGE**  
**01/07/2022**

**Date: 01/07/2022**

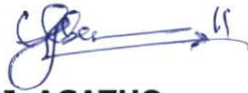
Coram: Hon. Agatho, J

Applicant: Present

Respondent: Mbondela S/A h/b of Tafisa Mutalemwa S/A for

B/C: Zayumba

**Court:** Ruling delivered on this 1<sup>st</sup> day of July, 2022 in the presence of Applicant, and Mbondela S/A h/b of Tafisa Mutalemwa S/A for the Respondent.



**U. J. AGATHO**  
**JUDGE**  
**01/07/2022**

**Court:** Right of Appeal is available as per the law.



**U. J. AGATHO**  
**JUDGE**  
**01/07/2022**

