IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

MISC. CIVIL APPLICATION NO. 15 OF 2022

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF DECISION OF THE TANZANIA POLICE FORCE DATED 08TH FEBRUARY, 2018

BETWEEN

EX- INSPECTOR VICENT JOSEPH LYIMO..... APPLICANT

AND

INSPECTOR GENERAL OF POLICE .....1ST RESPODENT

THE MINISTRY OF HOME AFFAIRS.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL .....3RD RESPONDENT

RULING

11/7/2022 & 3/8/2022

SIMFUKWE, J

The applicant herein has filed the instant application seeking leave to file application for prerogative orders of CERTIORARI and MANDAMUS out of time. The application has been brought under **section 14(1) of the Law**

of Limitation Act, Cap 89 and **section 95 of the Civil Procedure Code, Cap 33 R.E 2019** and any other enabling provision. The application is supported by applicant's affidavit which was contested by the counter affidavit deponed by ASP Victor Frank Shamazala.

According to affidavit of the applicant in a nutshell, the applicant was employed by the 1st respondent as Superintended of Police. Following disciplinary action, he was demoted to be Inspector of Police which had the effect of early retirement by reason of age. Dissatisfied, he opted to appeal to the the Commission of Police, Migration and Prison Service who dismissed his appeal as revealed through the letter dated 31st May, 2021. Still aggrieved, the applicant intends to file Judicial review, and being out of time he filed the instant application.

During the hearing the applicant was unrepresented, thus the learned State Attorney Mr. Yohana Marco who represented the respondents herein prayed the application to be argued through written submissions. The court granted the prayer and the parties filed their respective submissions in time.

Supporting the application, the applicant submitted among other things that, the 2nd respondent issued the decision of applicant's appeal in late November 2021 after being pressurized to do so by the President's office upon the complaints from him via Annexure Vicent-1. The said decision was dated 31st May,2021. Following such circumstances, six months required to seek court redressed as required under **Rule 6 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules, GN 324 OF 2014** had elapsed.

The applicant stated another reason for the delay that in February 2022 he was beavered as stated under paragraph 5 of his affidavit.

The applicant cited the case of **Edward vs Edward (1968) 1WLR 149** which underscores the computation of the law of limitation with reservations that:

> *"...so far as procedural delays are concerned, Parliament has left a (sic) discretion in the courts to dispense with the time requirement in a certain respects (sic). That does not mean, however, that the rules are to be regarded as, so to speak, antique time pieces of an ornamental value but of no chronometric, so that lip service only need to be paid to them. On the Contrary, in my view, the stipulations which Parliament has laid down or sanctioned clearly indicates they would be relaxed .."*

In that respect, the applicant argued that what constitutes sufficient reason to warrant an extension of time in civil cases is advised not to be laid down by any hard and fast rules rather by looking references to all circumstances of the particular case for the court to exercise judicial discretion in order to extend the time limited by the rules.

On the issue *whether the extent of delay is intolerable*, the applicant argued that the delay was of four months from the time he was issued with the appeal decision by 2nd respondent in November 2021 to April 2022 when he filed the first application which was struck out on technical ground. He argued that this period included the time of bereavement of his lovely biological mother as sworn under paragraph 5 of his affidavit.

Further to that, the applicant submitted that the consideration of length of time elapsed was discussed in the case of **Damari Watson Bijinja vs Innocent Sangano, Miscellaneous Civil Application No. 30 of 2021 (HC),** quoting with approval the case of **Elius Mwakalinga V Domina Kagaruki and 5 others, Civil Application No. 120/12 of 2018,** where the tests of extension of time were listed to include:

a. *The length of the delay*
b. *The reason(s)for the delay*
c. *Whether there is an arguable case such as whether there is a point of law on the illegality or otherwise of the decision sought to be challenged, and*
d. *The degree of prejudice to the defendant if the application is granted*

On the issue ***that the applicant was issued with the decision of his appeal sometimes late in November 2021***, the applicant stated that the chronological events which led to the present application, show that he has done due diligence to pursue his rights including swearing affidavit to speak nothing but the truth. That, under paragraph 7 of the Respondent's Counter Affidavit, he admits serious miscarriage of justice occasioned by the 2nd respondent who was reluctant to issue the appeal decision. That, the 2nd respondent who had the duty to draw issues and deliver them to the Applicant, delayed until the President's office activated the same after being time barred. He referred to Annexure VICENT-1 of his Affidavit and argued that the same is self-explanatory.

In response the issue as to **whether the respondent's Counter Affidavit is in conformity with the law by having a verification clause not in the domain of the deponent,** he was of the firm opinion

that, the Respondent's Counter Affidavit is incompetent and bad in law for having a defective verification clause which contravenes **Order 19 Rule 3 of Civil Procedure Code Chapter 33** which require an Affidavit to be confined to such facts as the deponent is able of his own knowledge to prove, and if from information obtained, the source of which are to be set out therein. He challenged the counter affidavit by stating that the deponent introduced himself to be an employee of 1st Respondent and not the 2nd Respondent. Neither did the deponent swear on behalf, but under paragraph 6 of the Counter Affidavit the deponent stated facts which are not in his domain by saying that the 2nd Respondent delivered its decision to the Applicant on 24th May, 2021 contrary to the date dated in the appeal decision, thus 31st May,2021 as indicated in annexure V1CENT-2 of Applicant's Affidavit.

It was the applicant's submission that the incurability of a defective verification clause in the Affidavit was clearly discussed in the case of **Jamal S. Mkumba and Others vs Attorney General, Civil Application No: 240/01 of 2019,** in which the court of appeal stated that:

> *"Where an averment not based on personal knowledge, the source of information should be clearly disclosed,"*

The applicant argued that in the instant matter, nothing of this sort have been done by the deponent in his Counter Affidavit.

Moreover, the applicant submitted in respect of the issue as to whether there is likelihood of merit of substantive case. It was his opinion that the logic behind judicial review is that, those vested with the duty to decide over the rights of citizens has an obligation to act within the boundary of

law and to be guided by the rules of natural justice. Also, it presupposes the right of individuals of access to courts whenever the rights are encroached upon. Thus, in the circumstances of the application at hand, the entire process by the 1st and 2nd Respondents in determining the rights of the applicant was encroached with a number of **unfair hearings, procedural impropriety with respondent's attempt to deny applicant's rights of access to Court.** That, at paragraph 7 of Respondent's Counter Affidavit, he admits up to date the 2nd respondent has not furnished the applicant with the decision of his appeal. It was the applicant's opinion that what has been issued to him was a mere notice of completion of determination of his appeal. Thus, it is serious miscarriage of justice to deny the applicant his right to access the court. That, the Constitution of Tanzania under **Article 13 (6) (a)** provides for fair hearing as among the principles of natural justice.

The applicant continued to expound that natural justice is a common law principle developed by courts, which every judicial, quasi judicial and administrative agency must follow while taking any decision which adversely affect the rights of private individual. The same implies fairness, equity and equality. He referred to the case of **Kishosha Gabba vs Charles KingongoGobba(1990) TLR 133** (HC), which held that:

"...In determining whether or not to allow an application for leave to appeal out of time the Court has to consider reasons for delay as well as the likelihood of success of the intended application..."

He also cited the case of **The Attorney General vs Lesinoi Ndeinai & Another [1980] TLR 214**, CA at page 228 which held that:

"...The Executive like the Judiciary it entitled or bound to do what the Constitution and the law of the country provide..."

In conclusion, the applicant submitted that, he is aware that, extension of time is a discretionary remedy. However, under the rules of natural justice, the people who heard with astonishment doctrines preached from the thrones and the pulpit subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of the claim, and found it weekly and fallaciously supported, and common reason assured them, that, if it were of human origin, like the present case at hand, *no Constitution could establish it without power of revocation, no precedent could sanctify, no length of time could conform it.*

Basing on the above arguments, the applicant prayed this court to be pleased to grant prayers sought in Applicant's chamber summons supported by Affidavit.

Before replying to the applicant's submission, Mr. Yohana Marco the learned State Attorney noted two anomalies in respect of the application as well as corresponding submission. The first anomaly is that the applicant is not clear as to what he wants this court to do for him. That the chamber summons has the words which suggests that this is an application for leave to apply for orders of certiorari and mandamus. Though the chamber summons appears to be made under **section 14(1) of the Law of Limitation Act, Cap 89** without specifying the edition. The first prayer confuses matters as it is ambiguous in construction. He quoted the impugned prayer which reads:

> *"That, this Honourable Court be pleased to grant leave for application (sic) to file his application for leave to apply for*

prerogative orders of CERTIORARI and MANDAMUS out of time."

In respect of above quotation, it was Mr. Yohana's view that the same is hard to construe. That, it has more than one meaning whose consequences is for the court to guess. He referred the court to the case of **Said Salim vs Ramadhani Kengia, Misc. Land Application No 294 of 2017,** (unreported) in which this court struck out the application for being uncertain and urged this court to do the same to the instant application.

The learned State Attorney also raised another anomaly in respect of the applicant's submission, that the part of chronological of material events contains the material which can neither be found in the applicant's affidavit nor were availed to the respondent. Mr. Yohana was of the view that this approach offends the due process of law in which the claims must be comprehensively availed to the other party before the same is tabled for legal adjudication. That, the effect of embodying new facts in submission is that the other party forfeits the right to answer those allegations when filing its counter affidavit. He thus prayed the part of chronological of material events of the applicant's submission be disregarded in so far as it does not align with contents of the applicant's affidavit.

Replying the allegations that the deponent of the counter affidavit introduced himself being the employee of the 1st respondent and not the 2nd respondent, the learned State Attorney contended that it is not clear where did the applicant obtain the said facts, that he either cooked it for unknown reason. It was stated that the respondents' counter affidavit does not contain such facts as alleged.

Under the allegations that under paragraph 6 the deponent verified facts regarding dates of delivery of commission's decision which are not in his knowledge; Mr. Yohana stated that once the Commission's decision is delivered, it becomes a public document that whosoever takes it can speak about its content.

Tackling the gist of the application, Mr. Yohana assumed that the applicant is seeking for extension of time. He said that the applicant has not accounted for the period of delay. He argued that the delay in the delivery of Commission's decision is immaterial since time started to run after delivery of the impugned decision. That, the said decision was delivered on 24/5/2021 as per paragraph 4 of the applicant's affidavit and Annexure Vicent-1. That the applicant was to act within six months as per **GN No. 324 of 2014.** That the said period elapsed on 23/10/2021 as reckoned under **section 61(2) of the Interpretation of Laws Act [Cap 1 R.E 2019**. However, this application was filed on 6/5/2022 seven months later after the expiry of the prescribed period.

The learned Sate Attorney submitted further that the reasons for the delay are found under paragraph 4 and 5 of the Applicant's affidavit which is attributed to the applicant being lately informed of the delivery of the decision and second that the applicant was bereaved.

On the first reason; it was stated that Annexure Vicent-1 is a letter dated 8/3/2022 requesting for copies of decision and proceedings. That, if the same is to be construed as the letter of the applicant, then its content and date differs from the assertion under paragraph 4 of the applicant's affidavit. That, such paragraph asserts that through Annexure Vicent-1 the applicant complained to the office of the President which compelled the

Commission to deliver the decision which finally delivered the same in late November, 2021 whereas the said complaint letter is dated 8/3/2022. Thus, the facts under such paragraph are untrustworthy.

Countering to the reason that the applicant was bereaved by his mother, it was stated that the death certificate has not been attached. It was the argument of the learned State Attorney that the importance of having death certificate is to see when did the said death occur in order to prevent the Applicant from relying on a death which occurred way back before occurrence of circumstances which led to this application. It was Mr. Yohana's observations that the applicant has failed to account for the delay and the claim of the death of his mother cannot anchor the application in absence of the death certificate.

Also, the learned State Attorney for the respondents challenged Annexure Vicent-2 under paragraph 6 of the applicant's affidavit which is the letter dated 31/5/2021 informing the applicant of the dismissal of his appeal. That, it is not clear when did the applicant receive the said information since nowhere in his affidavit this has been stated and absence of such facts makes the dates on the letter be deemed the date on which the applicant was informed. Therefore, the seven months period which the applicant has delayed has not been accounted for.

Moreover, Mr. Yohana argued that he is aware that failure to account for delay itself cannot bar the court's discretionary powers to extend time if the applicant has shown point of law of sufficient importance. However, in the instant application there is no any point of law apparent on the face of the record. He continued to state that paragraph 6 of the applicant's affidavit attempts to show existence of point of law by the statement that,

the decision was illegal and no reasons were given for the decision. It was Mr. Yohana's comments that these points were to be on the face of the decision itself. However, the said decision has not been attached. Under these circumstances the court cannot be in a position to acknowledge the existence of any point of law and being the result thereof this application falls headlong.

It was the learned State Attorney's prayer that the application be dismissed with costs and he prayed any other relief the court may deem fit and just to grant in favour of the respondents.

I have considered the rival submissions of both parties as well as parties' affidavits. The issue for determination is ***whether this application has merit***.

Before going to the gist of this application, through the parties' submissions they have raised the anomalies which I find it prudent to tackle first.

Mr. Yohana for the respondents noted that through the applicant's chamber summons especially under paragraph 1, the applicant is not clear as to what he wants this court to do for him. The learned State Attorney has urged this court to be persuaded by the case of **Said Salim** (supra) and strike out this application. I have gone through the ruling of my learned sister, **Hon. Maghimbi, J.** in the said case. However, I have found the same to be distinguishable to the instant matter. In that case, there was uncertainty in the records of the application which confused the court as to which decision the applicant seeks to appeal against. In the matter before me, the noted confusion is found under the prayers. I have read the impugned paragraph of the chamber summons, through it, I

discovered that, the applicant is praying this court to extend time within which he can file application for leave to apply for Prerogative Orders. If one reads such prayer together with applicant's affidavit and his submissions, he will find that the applicant is seeking extension of time to apply for leave to file Prerogative Orders. Therefore, I am of considered opinion that there is no confusion as contended by Mr. Yohana.

On the 2nd anomaly, that the part of chronological material events is not found under the applicant's affidavit so the same should be disregarded. The applicant did not counter this as he did not opt to file rejoinder. I have gone through the said chronological material events *vis a vis* the applicant's affidavit, indeed I found what has been alleged by the learned State Attorney. There are so many facts in the submission of the applicant under that part which are not reflected in his affidavit. Thus, the only option is to expunge the said part from the applicant's submission.

Coming to the gist of this application, it is an established principle of law that to grant or not to grant extension of time is the discretion of the court. Such discretion must be exercised judiciously. Also, it has been established that, the applicant must establish good reasons for the court to extend time. In the case of **Keroi Madule vs Mepukor Mbelekeni, Civil Application No. 13 of 2016 (CAT)** it was held that:

> *"As a matter of general principle, it is entirely in discretion of court to decide whether to grant or to refuse an application for extension of time. That discretion is however judicial and so, it must be exercised according to the rule of reason and justice. The deciding factors being showing "good cause" by the applicants, and good cause*

depend on variety of factors including the length of delay, the reason for delay, the chances of appeal succeeding if application is granted and degree of prejudice to respondent if the application is granted."

I will be guided by the above authority in determining this application. The reasons for the applicant's delay to file application within six months as required under **Rule 6 of GN No. 324 of 2014** are found under paragraphs 4, 5 and 6 of the applicant's affidavit which reads:

4. That, in the event the applicant decided to write a complaint letter at (sic) President's office and with effect President's office compelled the said Commission who finally issued and delivered the same to applicant sometime in late November, 2021 with surprising and frustrated date of decision dated 31st May, 2021 and that affected applicant's reasonable time of six months to seek court redress. Copy of the applicant's complaint letter to President's office is hereby annexed VICENT-1 to form part and parcel of this Affidavit.

5. That, after said Commission issued and delivered the appellate decision late in November, 2021 the applicant while preparing for court redress sometimes in early February, 2022, I was bereaved with the loss of my lovely biological mother one Josepha Joseph and contributed to this further delay as the applicant is the only son taking care of the family affairs.

6. That, the illegal decision of the 1st respondent affected applicant's retirement age and the decision by Commission failed to adhere the constitutional mandatory legal principle of giving reason(s) for every decision. Copy of the

commission of police force, migration and Prison Service decision is hereby annexed VICENT-2 to form part and parcel of this affidavit.

From the above quoted paragraphs, the applicant has moved this court to extend time basing on two reasons, that he was bereaved by his mother and second, that the impugned decision is tainted with illegality. I will discuss one ground after another starting with the issue of illegality.

I am aware that whenever there is an allegation of illegality, then it is important to give an opportunity to the party making such allegation to have the issue considered. In the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia [1992] TLR 182** it was stated inter alia that:

"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 of ascertaining the point and if the alleged illegality be established to make appropriate measures to put the matter and record right."

Also, in the case of **Fatma Hussein Shariff v Alikhan Abdallah (As Administrator of the Estate of Sauda Abdallah) & 3 Others, Civil Appeal No. 536/17 of 2017**, CAT at page 13 it was held that:

"It should be noted that, for illegality to be considered as a good cause for extending time, it has to be on point of law of sufficient importance and it must be apparent on the face of record and not one that would be discovered by a long-drawn argument or process."

I subscribe fully to the above decisions. In this matter, under paragraph 6, the applicant stated that the decision by the 1st respondent was illegal. He annexed **Annexure 'Vicent-2'** which is the letter informing him on the status of his appeal.

With due respect to the applicant, the said annexure is not the decision, it is the reply to his letter which informed him the status of his appeal which he filed to the 2nd respondent. For this court to determine whether there is illegality so as to extend time, the impugned decision ought to be presented before the court for the court to ascertain the alleged illegality on the face of the record. Since the applicant did not attach the said decision, and being the one who ought to present before the court sufficient material for the court to extend time, then, it is difficult for the court to state whether there is illegality on the face of the record.

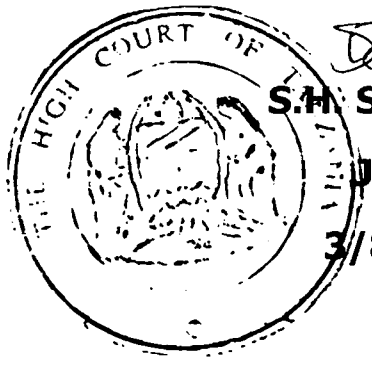
Under paragraph 5, the applicant has advanced the reason that he was bereaved by his mother thus he could not file the application in time. The applicant alleged that he was bereaved by his mother on February, 2022. He did not mention the date of death nor attach a death certificate to prove his assertion. However, from February, 2022 to 11th May 2022 when the applicant filed the instant application, he has not accounted for that period. This court hesitates to believe that for almost three months the applicant was at the funeral of his mother as no funeral in Tanzania extends for such a long time. Annexure Vicent-2, a letter dated 31/5/2021 shows that the appeal of the applicant was dismissed on 24/5/2021. The applicant deponed further at paragraph 4, that he received a letter dated 31/5/2021 sometimes in late November 2021. From November 2021 to February, 2022 when he was bereaved, it is a period of three months unaccounted by the applicant. I therefore find the two reasons advanced

to be the cause of the delay to hold no water for the court to rely upon the same to extend time.

For the foregoing reasons, it is my considered opinion that the applicant's reasons for the delay to file the application for leave to apply for Prerogative Orders are not good reasons warranting this court to grant extension of time sought in the chamber summons. Therefore, I hereby dismiss this application without costs.

It is so ordered.

Dated at Moshi this 3rd day of August, 2022.



S.H. SIMFUKWE

JUDGE

3/8/2022