

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 60 OF 2020

JUMA FAKHI..... APPLICANT

VERSUS

COMMISSIONER GENERAL OF IMMIGRATION SERVICES .1ST RESPONDENT

REGIONAL IMMIGRATION OFFICER OF ARUSHA.....2ND RESPONDENT

BAHATI JONATHAN MWAIFUGE.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1/11/2021 & 18/2/2021

ROBERT, J:-

The applicant, Juma Fakhi, moved this court under section 14 (1) of the Law of Limitation Act, Cap. 89 (R.E 2019) seeking the following orders:-

- 1. That, this Honourable Court be pleased to grant an extension of time to apply for leave to apply for judicial review out of time;*
- 2. That, this Honourable Court be pleased to grant an extension of time to apply for orders of mandamus and certiorari;*
- 3. Any other relief that, this Honourable Court will deem fit to grant.*

This application is supported by an affidavit affirmed by the applicant and resisted by the respondents who filed their counter-affidavit sworn by Kagimbo

Hoseah Alphonse, Assistant Commissioner of Immigration and Regional Immigration Officer at Arusha.

Briefly stated, the applicant was employed by the first respondent prior to termination of his employment. He was charged by the third respondent on 28th August, 2017 for violation of the provisions of Police Force, Immigration and Prison Service Commission (Immigration Service Administration) Regulations, 2015. His charges before the Court Martial emanated from issuing of counterfeit documents. He allegedly appealed to the first respondent on 2nd November, 2017 but his appeal was never determined by the first respondent. On 5th February, 2018 he received confirmation of his termination by the second respondent. Aggrieved, he preferred this application.

At the hearing of this application the applicant enjoyed the legal services of Mr. Emmanuel Anthony, learned advocate while the respondents were represented by Mr. Mkama Msalama, State Attorney. The application was argued orally.

Amplifying on this application, Mr. Anthony submitted that this application is grounded on the reason that the applicant's termination was based on illegality. According to him, particulars of illegality in this matter are that, the applicant's right of appeal was not provided. He maintained that, the applicant's appeal filed on 6/11/2017 to his employer under Rule 41 (6) of the Police Force, Immigration and Prison Services Commission (Immigration Services

Administration) G.N. 438/2015 has not been responded to. However, the punishment given for alleged offences has been approved by the relevant authority. He invited the Court to the decision in **Mirambo Limited vs Commissioner General, TRA and Attorney General**, Civil Application No. 57 of 2020 (unreported) where the Court decided on similar circumstances.

Secondly, during the hearing the applicant was never supplied with a copies of the alleged forged permit as required under Regulation 26 (3) of G.N. No. 438 of 2015. Thirdly, he argued that, the applicant was terminated under a wrong provision of the law (See annexure J5), which makes reference to Regulation No. 27 (i) and (h) while the proper provision for termination is Regulation 27 (1) (i). Lastly, he argued that the applicant was served with a formal charge on the hearing date contrary to Regulation 25 (4) and (5) of GN 438 of 2015, the same was decided in the case of **Amour Habib Salim vs Hussein Bafagi**, Civil Application No. 52 of 2009 (unreported).

In response, Mr. Mkama argued that, in order for the applicant to be granted extension of time he needs to meet the following threshold:

1. The applicant must account for all period of delay.
2. Delay should not be inordinate
3. The applicant must show diligence not sloppiness in the Prosecution of the action he intends to take

4. If the court feels that there are other sufficient reasons, such as illegality of the decision sought to be challenged.

See the case of **Zito Zuberi Kabwe vs The Attorney General**, Civil Application No. 365/01 of 2019.

On the first reason, Mr. Mkama argued that the applicant was terminated on 5/2/2018 (See annexure 4) and the present application was filed on 22/6/2020. Counting from the date of termination until the filing of the application, the applicant is late for two years and three months. The Law Reform (Fatal accident and Misc. Provisions) (Judicial review, Procedures and Fees) Rules of 2014 requires application to be filed within 6 months from the date of the decision sought to be reviewed.

Regarding the issue of illegality, he submitted that, the applicant's appeal was decided by the 1st respondent through a letter dated 5/1/2018 and the applicant was informed on 5/2/2018 (See annexure OCG 4) and the same was admitted by the applicant in his affidavit.

Coming to the second reason, Mr. Mkama contended that, the requirement of the law under regulation 25 of G.N. No. 438 of 2015 was complied with as the applicant was given a copy of the counterfeit working permit which the 2nd respondent had proved that the applicant was involved with and the charge sheet was also supplied to him together with other documents alleged to have been counterfeited. Mr. Mkama also admitted that

it is true that the 3rd respondent did prepare a charge sheet and he was a chairman of the martial court, the said act was allowed by the law under Regulation 25 (1) and (2) and the decision reached was a court decision not a decision of the 3rd respondent.

Regarding the third issue, he argued that, the applicant was served with a charge sheet on 31/7/2017 (See annexure OCG 2) and he replied to it on 31/7/2017 (see annexure OCG 3).

Submitting on the fourth issue, he maintained that, the issue of wrong citation of the provision of law in terminating the applicant does not reflect anywhere in the applicant's affidavit, it is a mere submission from an advocate and not part of the evidence.

Further to that, he maintained that, termination was done by the 1st respondent who followed all the procedures, the 3rd and 4th respondents were only informed by the 1st respondent about the said termination. As for the cases cited by the counsel for the applicant, he argued that, they are all distinguishable since in the current case illegality is not apparent.

He maintained that the argument that the application has overwhelming chances of success is not a good ground for extension of time. He referred the Court to the case of **Azizi Mohamed vs The Republic**, Criminal Application No. 84/07 of 2019 to support his argument. In the end he prayed for the application to be dismissed with costs.

In his brief rejoinder, Mr. Anthony submitted that, the reasons cited in Zito Kabwe's case are not to be considered cumulatively, the court can decide to extend time based on one reason only. The current application is grounded on illegality as a reason for extension of time. He maintained that the letter issued to the applicant on 5/1/2018 was not the result of the applicant's appeal, it was a confirmation of the punishment given to the applicant.

Further to that, he argued that, the alleged counterfeit documents were not supplied to the applicant as alleged by the respondent and the charge sheet was signed by the applicant on 28/8/2017 and not 31/7/2017 as alleged. He maintained that the issue of wrong provision used to terminate the applicant is featured under paragraph 16 of the affidavit thus, it was not a new point. Regarding the applicant's termination, he maintained that, the 1st respondent has no powers to terminate junior officers but to confirm their punishments.

On the argument that overwhelming chances of success is not a good ground for extension of time, he maintained that the case of Azizi Mohamed (supra) cited by the learned counsel for the respondent is not applicable in the circumstances of the present application.

On the basis of the reasons above, he prayed for the application to be allowed.

Having heard the rival arguments made by both parties in this application, the court will now determine the merit of this application.

It is basic that, an application for extension of time is entirely within the discretion of the court to grant where it has been sufficiently established that the delay was with sufficient cause (see **Benedict Mummelo vs Bank of Tanzania**, Civil Appel No 12 of 2002 (Unreported)). The question before this court now is whether the applicant has adduced sufficient reasons to warrant extension of time by this court.

It is trite law that, a party applying for extension of time needs to account for each and every day of delay (see **Bushiri Hassan vs Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported)). However, in the present application, the Court was informed at the outset that, as a reason for extension of time, the application was grounded on illegality of the applicant's termination.

It has been decided in a number of cases that illegality constitutes a good cause for extension of time. In the case of **Principal Secretary Ministry of Defence and National Service vs Devram P. Valambhia** [1992] TLR the Court stated 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 to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right".

However, when considering illegality as a ground for extension of time, Courts have insisted that the point of law involved in the said illegality must be of sufficient importance and it must be apparent on the face of the record. In the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court of Appeal of Tanzania decided that:

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates 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, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."

In the present matter, the particulars of illegality alleged by the applicant, such as failure to be accorded the right to be heard when he filed an appeal objecting his termination and being served with the charge sheet on the date of the hearing contrary to the law (See regulation 25 (4) and (5) of GN 438 of 2015 are apparent on the record and are of sufficient importance as they serve

to determine if the applicant's termination was substantively and procedurally fairly.

Therefore, guided by the settled principle, this court is satisfied that the alleged illegalities in the decision sought to be challenged amount to good cause, hence warrant grant of extension of time.

In the premises and for the interest of justice, this application is hereby allowed and the applicant is given fourteen (14) days, from the date of delivery of this ruling to lodge the intended application. Parties to bear their own costs.

It is so ordered.


K.N. ROBERT
JUDGE
18/2/2022


