

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LABOUR APPLICATION NO. 02 OF 2022

*(Arising from Application for Revision No. 03 of 2017 in the High Court of Tanzania at
Sumbawanga which originated from Labour Dispute No.*

RK/CMA/SBA/11/2015 in the Commission for Mediation and Arbitration

Sumbawanga)

NOVATUS ^{s/o} WILLIAMS NKWAMA.....APPLICANT

VERSUS

TUGHE.....RESPONDENT

RULING

20th July & 31st August, 2023

MRISHA, J.

Through the present application, this court has been moved under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019(the AJA), to grant the applicant **Novatus Williams Nkwama**, extension of time to file a Notice of his intention to appeal out of time to the Court of Appeal against the Ruling and a Drawn Order delivered by this court on

21.08.2019 before W.R. Mashauri, J. (as he then was) vide Application for Revision No. 03 of 2017.

Other reliefs prayed by the applicant include costs of this application which he has proposed to be borne in the due course and any other reliefs and/or order as this court may deem fit and just to grant in the course of disposing of the instant application.

Procedurally, the application has been made by way of Chamber summons and supported by grounds and reasons stated in the affidavit sworn by Mr. Ladislaus Rwekaza, learned Advocate. Through the above affidavit, the applicant's counsel has, inter alia, stated some reasons for his delay to file a notice of intention to appeal.

Briefly, it has been stated therein, particularly at paragraphs 6, 7, 8, 10, 11, 12, 13 and 14 respectively, that after the Application for Revision No. 3 of 2017 the subject of this ruling was delivered on 21.08.2019, the applicant filed a Notice of his intention to appeal to the Court of Appeal against the same within time.

However, the hearing of such appeal was stayed pending determination of a preliminary objection raised by the respondent to the effect that the applicant's appeal was incompetent before the superior Court for being

time barred. That, after hearing such objection, the Court of Appeal struck the applicant's appeal based on grounds of being incompetent.

It is also stated by the applicant's counsel that the applicant's delay to file the instant application within time was not deliberate as he filed a notice of intention to appeal timely, but he could not file the a notice of appeal soon thereafter because he was prosecuting a Civil Appeal No. 354 of 2020 which was struck out by the Court of Appeal on 21.02.2022, hence found himself out of time.

It is further stated in that affidavit that from 17.09.2019 when the previous notice of appeal was filed, to 21.02.2022 when the last order of the Court of Appeal was made, a period which is equal to 885 days, the applicant was prosecuting the Civil Appeal No. 354 of 2020 before the Court of Appeal of Tanzania sitting at Mbeya, thus led to a technical delay on his part.

Another reasons for delay, as stated in that affidavit is that the rest of the days counting from 22.02.2022 to 01.03.2022 which if summed up, makes a total of 8 days were used by the applicant to prepare and file the present application.

The said counsel has categorically stated that there are overwhelming chances of success in the appellant's intended appeal should his

application be granted by this court. He has also drawn the attention of this court that if the same is not granted as prayed, the applicant will suffer irreparable loss.

The respondent who is Tanzania Union of Government and Health Employees (TUGHE), has on the other side, filed a Counter Affidavit sworn by Mr. David A. Ntonge, in order to oppose the contents of an affidavit deposed by the applicant's counsel.

Through his counter affidavit, the respondent's counsel has therein stated shortly, particularly at paragraphs 9 and 11, that the applicant has failed to account for the said delay in filing this application from 22.02.2022, when his appeal was struck out by the Court of Appeal, to 04.03.2022 when this application was filed.

It is due to such grounds that the respondent's counsel has challenged the present application for being unmerited; hence deserve a dismissal order by this court. It is his view that the applicant will not suffer any loss should the instant application be dismissed.

When this application was called on for hearing on 20th July, 2023, both parties were duly represented by the learned advocates. While Mr. Ibrahim Athuman, learned advocate represented the applicant, Mr. David A. Ntonge, also learned advocate, stood for the respondent.

Submitting in support of the applicant's application, Mr. Athuman prayed to this court to adopt the applicant's chamber summons and affidavit in order to form part of their submission in chief. He went on to submit that the applicant's first ground for seeking an extension of time to appeal out of time against the Ruling and Drawn Order of this court, is on a technical delay to file the same. Suffice for me to say that in submitting about such technical ground, the applicant's counsel reiterated what was stated in the affidavit supporting this application. So, I see no need of repeating here what the learned counsel had submitted before me.

The only thing he added in supporting such ground was to cite, as an authority, the case of **Victor Rweyemamu Binamungu vs Gregory Kabaka & Another**, Civil Application No. 602/08 of 2017, CAT at Mwanza(unreported) which cited the case of **Salim Lakhani and 2 Others vs Ishfaq Shabir Yusufali (As an Administrator of the Estate of the Late Shabir Yusufali)**, Civil Application No. 455 of 2019(unreported).

Having so argued, the counsel for the applicant humbly prayed that this court be pleased to consider the issue of technical delay as a sufficient ground to grant the applicant extension of time.

That apart, Mr. Athuman submitted that his client's second ground for seeking a grant of extension of time, is the illegality and illegality committed by the Commission for Mediation and Arbitration for Sumbawanga (*the CMA*) in Labour Dispute Complaint No. RK/CMA/SBA/11/2015 which is the omission by the trial Arbitrator to append his signature at the end of every witness's testimony contrary to the requirement of the law, which omission raises a point of law allowing the applicant to challenge the decision of CMA in the Court of Appeal.

To support his argument on that point, the learned counsel cited the case of **Unilever Tea Tanzania Limited vs Davis Paulo Chaula**, Civil Appeal No. 290 of 2019, in which it was stated by the Court of Appeal that:

"Upon consideration that the purpose of signing the proceedings is to authenticate them, the Court held that the omission vitiated the procedure of the CMA."

Mr. Athuman also submitted in the same vein, that illegality is a genuine reason for granting extension of time as was stated in the case of **The Principal Secretary Ministry of Defence and National Service v. Devlan Valambya** [1992] TLR 189 where it was stated that:

"Where the issue of illegality and irregularity in the decision sought to be impugned is raised the court is required to extend the time even if it means that the applicant has failed to account for the delay"

Lastly, the counsel for the applicant prayed to this court to consider the applicant's application and the reasons for seeking an extension of time saying that the same are genuine; hence the applicant deserves entitlement to that effect.

On the adversary side, the counsel for the respondent submitted that the applicant's application is devoid of merit because first he has failed to justify the reasons for not filing a notice of intention to appeal to the Court of appeal on time. The learned counsel also submitted that the case of **Mbogo and Another vs Shah** (1968) E.A 93 has set some guidelines to be followed by the court in considering application for extension of time.

That, the first guideline is that the applicant must account for each day of his delay, secondly that the delay must not be inordinate and thirdly that the applicant should show diligence and not apathy or sloppiness in the prosecution of the action that is intended to take. Also, the fourth guideline is if there are sufficient reasons, not otherwise.

Mr. Ntonge submitted further that the affidavit which supports the applicant's application, does not disclose sufficient reasons for him to be granted leave to file a notice of appeal to the Court of Appeal out of time, and it seems the applicant has failed to account for each day of his delay to do so.

The learned counsel for the respondent also challenged the applicant's ground of technical delay stipulated under paragraph 13 of the affidavit arguing that the delay was caused by the applicant himself when prosecuting a Civil Appeal No. 354 of 2020 before the Court of Appeal because the applicant was negligent in prosecuting such case which resulted the same to be struck out.

In addition to the above, Mr. Ntonge submitted that the applicant failed to account for his delay from 22.02.2022 to 04.03.2022, and it is not true that he filed this application on 01.03.2022 because the affidavit sworn by his advocate clearly shows that the present application was filed on 04.03.2022, not on 01.03.2022 which means the applicant also failed to account for two days of 2nd and 3rd March, 2022.

He cited the case of **MZA RTC Trading Company Limited vs Export Trading Company Limited**, Civil Application No. 12 of 2015 to cement his contention. Having done so, the learned counsel submitted that since

the applicant failed to account for those two days, then it means he failed to meet the mandatory requirement which, if complied, could warrant this court to grant him extension of time to file his notice of intention to appeal.

Mr. Ntonge had it that the eight days which the applicant claimed to have spent in receiving instructions, preparation and institution of the instant application are too many given the nature of this application which shows that the applicant was negligent. He also challenged that ground by submitting that such reasons have not been disclosed in the affidavit filed by the applicant's counsel which makes it to be an afterthought. Hence, he prayed to this court not to consider that reason.

Moreover, the respondent's counsel submitted that the cases cited by the counsel for the applicant are distinguishable to the case at hand. Starting with the case of **Victor Rweyemamu Binamungu**(supra), Mr. Ntonge submitted that the applicant in that case passed the test of accounting for each day of his delay and took prompt steps to pursue his application, but in the present case, the applicant failed to account for each day of his delay and failed to take prompt steps to file his application.

Arguing in relation to the case of **Salim Lakhani**(supra), the respondent's counsel was also of the view that the same is distinguishable to the circumstances of this case because in that case the applicant accounted his delay by filing the supporting document.

On the issue of illegality raised by the applicant's counsel, Mr. Ntonge submitted that such reason was not stated in the affidavit supporting the applicant's application which is contrary to the trite law that any submission or facts which the applicant wants the court to give consideration, must be stated in the applicant's affidavit. Thus, the learned counsel urged this court not to accord weight on that ground.

Still on the same ground, the respondent's counsel submitted that the proceedings of the CMA were not annexed to the applicant's application. Due to such alleged omission, the said learned counsel humbly prayed to this court that such ground should not be considered.

Also, Mr. Ntonga submitted that the case of **Devram Valambhia** (supra) cited by applicant's counsel is distinguishable with the circumstances of the instant case because in that case it was observed that an applicant who demonstrates that his intended appeal raises a point of law must make sure that that point is of sufficient important and must be apparent on the face of record, as was emphasized in the case

of Lyamuya Construction Company Ltd vs The Board of Registered Trustees Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010(unreported).

However, the reverting back to the present case, the learned counsel argued that a point of illegality raised by the applicant is not apparent on the face of record because the proceedings of the CMA do not show if there is illegality. Thus, basing on such argument the respondent's counsel prayed that the applicant's application be dismissed because it does not have merit and the applicant is intending to delay the respondent from executing a decree granted to her by the CMA.

Rejoining, Mr. Athuman reiterated his previous stance that the applicant successfully accounted for each day of delay particularly from 22.02.2022 to 01.03.2022 when his application was filed online. He was emphatic that the date of 04.03.2022 appearing in the applicant's chamber summons, refers to a date when such application was filed physically, as stated under paragraph 14 of their affidavit.

He went on submitting that under paragraph 9 of the said affidavit it is shown clearly that the applicant's appeal was struck out on technical ground and not due to negligence of the applicant that cause the said appeal to be struck out by the Court of Appeal.

Also, the applicant's counsel disputed the adverse party's claim that the affidavit supporting chamber summons in this application, does not contain the reasons for the applicant's eight (8) days delay arguing that the counsel for the respondent did not refer any provision of the law which requires that the deponent should state all reasons for delay in his affidavit.

To backup his argument, Mr. Athuman submitted that through the chamber summons, the applicant has stated clearly that, "*the reasons for extension of time to be advanced at the hearing of the application*". Hence, he prayed to this court to consider the reasons for the 8 days delay advance during the hearing of this application.

Regarding the case of **Shaha**(supra) cited by the respondent's counsel, Mr. Athuman submitted that although the decision in that case conflicts with that in **Valambliya's case**(supra), the later case is the current one. Hence, he urged the court to apply the **Valambya's case** which according to him, suits the circumstances of the present application.

Submitting in relation to the case of **MZA RTC Trading Company Ltd**(supra) which was referred to this court by the respondent's counsel, Mr. Athuman contended that the circumstances prevailed in that case are distinguishable to those in the present case in which, as opposed to

the case of MZA RTC case(supra), the applicant has accounted for his 8 days delay.

As for the argument that the court should not act on the point of illegality due to failure by the applicant to annex the proceedings of the CMA, Mr. Athuman submitted that on their side, they raised that point, but no proceedings of the said Commission were submitted.

To fill that gap, the learned counsel referred this court to the provisions of section 59(1) of the Evidence Act, Cap 6 R.E. 2022 and implored it court to take a judicial notice on the existence of the CMA proceedings and consider the point of illegality as a ground for granting the applicant extension of time to file a notice of intention to appeal to the Court of Appeal.

Finally, the applicant's counsel submitted that the case of **Lyamuya Construction (supra)** is distinguishable with the circumstance of this case. He therefore, prayed that for the interest of justice and in adherence to the principles of natural justice, this court be pleased to allow the applicant's application so that he can be able to pursue right by filing a notice of intention of appeal to the Court of Appeal.

The above rival submissions as well as the authorities referred thereto which I have passionately paid attention, indicates that the parties to

this application are battling on propriety of the reasons the applicant has assigned in his application seeking the order of this court to grant him extension of time to enable him lodge his appeal to the Court of Appeal out time. From such contentions, I find that the issue that requires my determination is whether the applicant has assigned some good cause for his application to be granted.

Section 11(1) of the AJA which the applicant has cited in the chamber summons as an enabling provision, provides that:

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

The word "*may*" used in that provision implies that it is the discretion of the High Court to decide whether or not to grant an application for extension of time as the one lodged by the applicant in this case. I am fortified in that observation by the provisions of section 53(1) of the Interpretation of Laws, Act Cap 1 R.E. 2022 which provides that:

"(1) Where in a written law the word "may" is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion."

This means that it is not an automatic right for the party who has delayed to file a notice of intention to appeal from judgement of the High Court to be granted extension of time for that purpose. It goes without saying that being in the discretion of the court to grant an order for extension of time, such discretion must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily (See **Lyamuya Construction Co. Ltd**(supra) and **Kioo Limited vs Felix Burchard Karunda**, Miscellaneous Labour Application No. 12 of 2021(both unreported).

So, the above principle of law entails that the applicant like the one in the present application who sought for an order of the court to grant him extension of time, must comply with the rules of reason and justice. Section 11 of the AJA has not provided such rules, but through case laws, the same are apparent and have been used by courts of law in this jurisdiction as a threshold for granting extension of time in applications as the one lodged by the applicant herein.

In the case of **Lyamuya Construction Co. Ltd**(supra), for example, the following rules, which I am also going to use in determining the above issue, were outlined: -

(a)The applicant must account for all the period of 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 sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

According to the court records, the impugned decision which the applicant in the present application seeks to challenge at the Court of Appeal was delivered by this Court 21st August, 2019, and by virtue of Rule 83(2) of the Court of Appeal Rules, 2009 it is provided that:

"Every notice, shall subject to the provisions of Rules 91 and 93 be so lodged within thirty days of the date of the decision against which is it desired to appeal."

From the above court records and the provisions of the law, it means that the applicant herein was expected to lodge a notice written notice with the Registrar of this court within thirty days of the date of the Ruling of this court in Application for Labour Revision No. 03 of 2017, which was 21st August, 2019.

The records of this court clearly indicates that the applicant lodged the instant application on 4th March, 2022. This is shown not only at page 2 of the Chamber Summons filed by the applicant, but also at page 4 of the Affidavit supporting that Chamber Summons.

Therefore, from the above analysis it means that the thirty statutory days the applicant ought to have lodged his notice with the Deputy Registrar of this Court, lapsed on 21st September, 2019 without the applicant to lodge his notice of appeal as required of him by the law cited above, which tells that he was time barred, that is why he lodged this application.

This means the applicant is now duty bound to account for each day of delay right from 21st day of September, 2019 when the impugned decision was delivered, to 4th day of March, 2022 when his application was filed.

In doing so, the applicant has through his counsel submitted that initially he lodged a notice of appeal with the Registrar of this court in time on 17th September, 2019 but his appeal against the decision of this court was struck out by the Court of Appeal on 21st February, 2022 for being incompetent. So, according to applicant, the delay thereafter was

technical as he had in all that time been prosecuting a Civil Appeal No. 354 of 2020 before the apex Court, which is equivalent to 885 days.

In the case of **Erica Herman Yohane & Another vs Magdalena Herman Muna Gidadi**(Legal Representative of the Late **Herman Muna Gidadi**) Civil Application No. 130/02 OF 2019(unreported) the Court of Appeal had the following to say:-

*"The fact is that all the time from when the Judgment of Moshi J. was passed in the High Court on 27th April 2016, through to 15th November 2018 when Maige J. dismissed an application for restoration of Miscellaneous Civil Appeal No. 100 of 2016, **such delay is explainable because the applicants were busy in courts pursuing the above referred applications. That delay is technical and it is, under the law, excusable.**"*

[Emphasis added]

Similarly in the present application, it is apparent, as submitted by the counsel for the applicant and undisputed by the respondent's counsel that from the midst of September, 2019 through to 21st February, 2022 when the applicant's appeal was struck out by the Court of Appeal the applicant was busy prosecuting Civil Appeal No. 354 of 2020.

Thus, basing on the principle of law and the standard of proof as stated under section 110(1) of the Evidence Act, Cap 6 R.E. 2022 that whoever wishes the court to decide in his favour must prove that a certain fact exists, I am of the view that such delay by the applicant amounts to a technical delay and inclined to hold that the applicant has successfully accounted for it.

The remaining period which requires to be tested is from 22nd day of February, 2022 to 4th day of March, 2022. The counsel for the applicant has submitted that from 22nd day of February, 2022 to 1st March, 2022 which is equivalent to a total of 8 days the applicant spent to prepare and file the present application.

He has also added that those days were used to conduct research together with filing the instant application online and physically because at that time he was at Bukoba. As for the 4th day of 2022 which appears to be the date of filing the present application, as submitted by the respondent's counsel, Mr. Athuman has contended that their application was first filed online and then thereafter they filed it physically.

On my part, I am of the view that being at Bukoba and required to lodge a notice of appeal with the Registrar of the High Court who was working at Sumbawanga High Court Registry, the applicant needed time enough

to prepare and communicate with his lawyer before travelling from Bukoba to Mbeya where his counsel has a firm, then proceed to Sumbawanga and start prosecuting this application so that he can be allowed to file the same

In the circumstances, I am not persuaded to allow the argument of the respondent's counsel that the applicant failed to account for the eight days delay. However, having checked the affidavit supporting Chamber Summons regarding the instant application, I agree with the respondent's counsel that the applicant failed to account for the 2nd, 3rd and 4th day of March.

I say so because I have noted that the applicant's counsel has not attached any document to prove that the instant application was first filed online; the affidavit supporting the Chamber summons in this case clearly show that the present application was filed on 4th day of March, 2023 as rightly submitted by the respondent's counsel.

The counsel for the parties in this application have also locked horns on the point of illegality raised by the applicant's counsel as one of the grounds for seeking extension of time from this court. The law is very clear that illegality is a good reason for extension of time.

In emphasizing that principle of law the Court of Appeal in the case of **Hamis Mohamed (as the Administrator of the Estates of the late Risasi Mgawe) vs Mtumbwa Moshi (as the Administratrix of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019(unreported) stated that:

"It is settled law that where an issue of illegality is raised as a reason for applying for extension of time, such reason amounts to good cause"

However, the only crucial thing the court can consider when such issue has been raised, is to ascertain if the same has been established. This was stressed in the case of **Devram Valambhia**(supra) where it was stated that:

"...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."

Again, in the case of **VIP Engineering and Marketing Limited and Three Others Vs Citibank Tanzania Limited**, Consolidated Civil

Reference No. 6, 7 and 8 of 2006 CA (Unreported) the Court of Appeal stated that:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

It is also important to note that an allegation of illegality in the impugned decision should be clearly visible on the face of record (See **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported)).

The issue here is whether the point of illegality has been established by the applicant. It is apparent that one of his complaints against the decision of the CMA is that the proceedings of the said body were vitiated by the failure of the Arbitrator to append his signature at the end of the testimony of every witness who testified before him.

The Court of Appeal in the case of **Iringa International School v. Elizabeth Post**, Civil Appeal No. 115 of 2019(unreported) held that:

"...this Court has insisted that a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings"

The central part of contentions between the counsel for the parties in the instant application on that point is the respondent's counsel's argument that the application allegation of illegality is not apparent on the face of record because the proceedings of the CMA which have not been annexed to the application lodged by the applicant.

Admittedly, it is glaring from the records this application that the proceedings of the CMA which the applicant is complaining to have been vitiated by illegality, were not attached to the chamber summons which tells, as rightly pointed out by Mr. Ntonge, that such allegation is not apparent on the face of record.

What appears to be apparent is the ruling of this court which the applicant seeks an order for extension of time in order to challenge it. The said ruling clearly indicates that the complaint of the applicant against the decision of the CMA, was not about the Arbitrator's failure to append his signation at the end of the testimony of every witness who testified before such commission, rather he pressed this court to call for the records of that commission vide Labour Dispute No.

RK/CMA/SBA/11/2015 and revise them on the ground(s) that the said commission failed to appreciate the evidence adduced by the applicant.

This can be ascertained at page 2 of the said Ruling the applicant was quoted to have stated that:

"This Hon. Court be pleased to call for the records in complaint No. RK/CMA/SBA/11/2015 and revise and set aside the award of CMA dated 24.6.2016 on the grounds that: -

(a) The Hon. Arbitrator failed to apprehend the evidence available in records which proved that the applicant [sic] under constructive termination"

(b) ...N/A

2. ...N/A

3. ...N/A

Apart from the above shortfalls, the counsel for the applicant has also implored this court to take a judicial notice on the existence of the proceedings of CMA by referring to section 59(1) of the TEA. Will all due respect to the learned counsel, I am unable to follow that invitation because that provision has categorically outlined matters which a court of law can take judicial notice, and the court proceedings are not among them.

Also, the said provision has bestowed the courts of law with power not to take judicial notice on matters listed under paragraphs (a) – (i) in absence of proof by any person who calls upon them to take such judicial notice. This is provided under sub section (3) of Section 59, TEA which is to the effect that:

*"If the court is called upon by any person to take judicial notice of any fact, **it may refuse to do so** unless and until such person produces any such book or document as it may consider necessary to enable it to do so." (Emphasis added)*

Since, in the present application the applicant's counsel has not produced any documentary proof regarding the provisions of the CMA, I am unable to follow his invitation. Hence, due to the reasons I have advanced above, it is therefore, my considered view that the applicant's allegation that there is a point of illegality in the proceedings of the CMA is unfounded for not been on the face of records. The above issue is therefore answered in the negative.

However, before I take leave of the matter, I wish say that although I have observed partly that the applicant was unable to account for almost three days that is 2nd, 3rd and 4th March, 2022, save for the rest of the days which I have pointed above that he has managed to account

for, I am of the view that the three days of delay which he has failed to account for are not sufficient to hold that such delay is inordinate.

This being a court of justice which is normally expected to focus on issues of substance and not allow to be tied up by technicalities, save where need arise, I think that given the circumstances of this case, the interests of justices require that the present application be granted. Having so reasoned as above, I am constrained to hold that the applicant in this application has assigned some good cause to deserve extension of time.

I therefore, allow the present application and grant him extension of time to file a written notice of appeal in duplicate with the Registrar of this court within fourteen (14) days from the date of this ruling.

It is so ordered.



A.A. MRISHA
JUDGE
31.08.2023

DATED at SUMBAWANGA this 31st day of 2023.



A.A. MRISHA
JUDGE
31.08.2023