

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT MWANZA

Misc. LABOUR APPLICATION NO. 05 OF 2022

(Originating from Misc. Labour Application No. 33 of 2021 and Execution No. 31 of 2020)

BUPOKI KYOMA-----APPLICANT

VERSUS

FINCA TANZANIA MICROFINANCE BANK LTD-----RESPONDENT

RULING

Date of Last Order: 20.02.2023

Date of Judgement: 24.02.2023

MNYUKWA, J.

The application is made under the provision of Rule 24(1), 24(2)(a)(b)(c)(b)(e) and (f), and 24(3)(a)(b)(c) and (d) and Rule 55(2) and 56(1) of the Labour Court Rules, GN No. 106 of 2007 The applicant, **BUPOKI KYOMA** made the present application to call upon the court to Condone the delay of 534 days and extend time for filing the review application outside the prescribed time on a good cause or sufficient reasons underlining Rule 27(2)(1)(b)(c) of the Labour Court Rules, GN No. 106 of 2007.

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The application is supported by the applicant's affidavit and challenging the application the respondent filed a counter affidavit deposed by Wilbard Kilenzi, the respondent's counsel.

At the hearing, the applicant was represented by Mr. Marwa Chacha Kisyeri, the personal representative of the applicant and Mr Steven Kaswahili learned counsel appeared for the respondent and by the order of the court the matter proceeded by the way of oral submissions.

The applicant give reasons for this court to extend time whereas he prays this court to extend time for the reasons that: -

First, he claims that Application No. 33 of 2020 which was filed by the respondent, the applicant was denied the right to be heard for he was not informed and was not served with the notice of application, chamber summons or affidavit. For that reason, he claims that there is illegality on the decision as per Rule 24 (2)(e) of the Labour Court Rules, GN No. 106 of 2007 which requires the notice of application to be served to the other party within 15 days and the application for stay of execution was required to be served to the applicant. Referring to Rule 24 (4)(a)(b) of the Labour Court Rules, GN No. 106 of 2007, he also insisted that the applicant was required to submit the notice of opposition and counter affidavit within 15 days and the applicant did not file counter affidavit because he did not know what was such kind of application. He insisted that the application

was heard before the completion of the pleadings and the applicant was denied the right to be heard contrary to Article 13(6) of the URT Constitution of 1977.

Referring to paragraphs 18,19 and 20 of his affidavit he insisted that as portrayed, illegality or irregularity is a good ground to extend time and the delay of 534 days was because the applicant was not aware of the application of stay of execution which was heard exparte. He, therefore, prays this application to be granted and insisting on the issue of illegality, he refers this court to the case of **Metro Petroleum Tanzania Ltd & 3 Others vs United Bank of Africa**, Civil Appeal No. 1470 of 2019.

Responding to the applicant's submissions, Mr Steven Kaswahili, learned counsel prays this court to adopt the affidavit in reply and the notice of application. He submitted that the ruling which is the subject of this application, was delivered on 21.09.2020 before Mgeyekwa, J. and therefore the applicant must give reasons and account for every day of delay as stated in **Daresalaam City Council vs Group Security Company Limited**, Civil Application No. 235 of 2015. He insisted that the applicant did not account for each day of delay in the 511 days of delay and did not advance reasons for the delay.

Replying on the claim by the applicant that he was not served and therefore not aware, he insisted that the court proceeded ex-parte after

the applicant was served and refused to accept the summons. He refers to page 5 of the trial court's proceeding which stated that the court proceeded ex parte after receiving the affidavit from the court process server. He insisted that, Article 13(6) of the URT Constitution is inapplicable in our situation.

He also referred to paragraph 11 of the applicant's affidavit stating that he was aware of the ex parte decision but he insisted that the applicant did not disclose what he was doing all after he was aware.

Insisting, he cited the case of **Gilbert Zebedayo Mrema vs Mohamed Issa Makongoro** Civil Application No. 309 of 2021 that the illegality claimed must be apparent on the face of the records for the court to consider. He insisted further that, the applicant did not challenge the illegality of the decision but rather the illegality in the events before the decision. He insisted that the application is devoid of merit as stated in **Symposian Kitare vs Resident Director Friedrich Ebert Stiftung** Misc. Civil Application No. 284 of 2017 where the court insisted that litigation should come to an end. He, therefore, prays the application to be dismissed for want of merit.

Rejoining, the applicant's personal representative referred to the case of **Gilbert Zebedayo Mrema** (Supra) cited by the respondent that favoured the position of the applicant and that the case of **Symporian**

Kitare (supra) is distinguished. He insisted that the summons was not served to the respondent and that fact was not stated on his affidavit. He insisted that the applicant was delayed for 534 days because of illegality and therefore not required to account for each day of delay and the non-compliance of Rule 24(2)(e), (4)(a)(b) and (7)(a)(b) is fatal and therefore pray the application to be granted.

From the parties' submissions, their respective affidavit and counter affidavit, as well as the impugned Ruling of this court, I now have one issue for determination which is whether this application is merited.

The application before me is for the prayer of condonation as prayed for by the applicant and extend time to file a matter. It is trite position of the law that granting of the prayer of condonation or extending time for filing the application outside of the prescribed time in respect of the Ruling of this court in Misc. Labour Application No. 33 of 2020 which was delivered on 21.09.2020 before Hon. Mgeyekwa, J. originating from Execution No. 31 of 2020, is the court's discretion.

It is clear that this court is enjoined with discretion to extend time beyond the prescribed time. However, this discretion should be exercised judiciously for the court must be guided by the principle as to whether the applicant has advanced good cause for the court to consider, if the

applicant has accounted for each day of delay or if there was illegality on the face of the impugned decision.

In the application at hand, the applicant is acknowledging to have delayed for 534 days in filing a review application and he is now before me with this application and his argument from his submissions and allegations on his affidavit insisted that there was irregularities and illegalities which is the good cause for an extension of time.

Having gone through the applicant-cited case of **Metro Petroleum Tanzania Ltd & 3 Others vs United Bank of Africa**, Civil Appeal No. 1470 of 2019, I agree with the applicant that illegality is a good point for the extension of time and once exhibited, it is worth for the court to grant the prayer. The same principle was held in the plethora of court decisions including the case of **The Principal Secretary Ministry of Defence and National Service vs. Devram Valambia**, (1992) TLR 185. However, for illegality to be the basis of the grant, it is now settled that it must be apparent on the face of the record and of significant importance to deserve the attention of the upper court. (See, for instance, **Lyamuya Construction Company Ltd vs. Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported)).



In the circumstance of this application, the applicant claims that the decision in Misc. Labour Application No. 33 of 2020 proceeded exparte against the requirement of the law and he was not informed as required. He claims on paragraph 16 (a)-(c) that he was offended for not be properly served nor summoned and therefore denied his right to be heard which is illegality on the face of the record. I perused the records to find his claims for denial of the right to be heard which is unconstitutional and grave illegality in the dispensation of justice. Going the Misc. Labour Application No. 33 of 2020 Judgment, specifically on page 2 para 3 reads as I quote: -

"When the application was called on for hearing, the court proceeded exparte since the respondent did not appear before this court even after being properly served. The summons shows that the respondent was served through Silas Lucas, Isangi Process Server. On the reasons, the Court granted the prayer of Mr. Kilenzi, learned counsel who appeared for the applicant, to proceed with the hearing of the application in the absence of the respondent."

What is claimed by the applicant is contrary to what is on the face of the records. As stated in **Halfani Sudi vs Abieza Chichili** [1998] TLR 527 as it was made it clear that there exists a presumption that a court record accurately represents what actually transpired in court and it

should not be easily impeached. The claims by the applicant that he was neither served nor summoned is contrary to what transpired in the court's judgment and therefore cannot be easily impeached in favour of the applicant that there was an illegality as the same is defeated in the impugned Ruling.

All said, and taking into consideration that the applicant relied only on the point of illegality which has no justification, I find this application devoid of merit and I proceed to dismiss it with no order as to costs.

It is so ordered.




M.MNYUKWA
JUDGE
24/02/2023

Court: Ruling delivered on 24th February 2023 in the presence of the Applicant.


M.MNYUKWA
JUDGE
24/02/2023