

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**MAIN REGISTRY
AT DAR ES SALAAM**

MISCELLANEOUS CIVIL APPLICATION NO. 06 OF 2023

**IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME TO APPLY
FOR LEAVE TO LODGE AN APPLICATION FOR ORDERS OF CERTIORARI,
MANDUMUS AND PROHIBITION**

AND

**IN THE MATTER OF THE DECISION OF THE CHIEF OF DEFENCE FORCE OF THE
TANZANIA PEOPLE'S DEFENCE FORCE OF TERMINATING THE EMPLOYMENT
OF THE APPLICANT WITH THE TANZANIA PEOPLE'S DEFENCE FORCE (TPDF)
ON 13TH APRIL 1994**

AND

**IN THE MATTER OF DENIAL BY THE RESPONDENTS TO PROVIDE ADEQUATE
INFORMATION TO THE APPLICANT REGARDING THE REASONS FOR HIS
TERMINATION FROM EMPLOYMENT WITH THE TANZANIA PEOPLE'S
DEFENCE FORCE (TPDF)**

BETWEEN

OMARY SHAABAN S. NYAMBU.....APPLICANT

VERSUS

**CHIEF OF THE DEFENCE FORCE1ST RESPONDENT
PERMANENT SECRETARY MINISTRY OF DEFENCE2ND RESPONDENT
HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT**

RULING

25/04/2023 & 03/05/2023

KAGOMBA, J

This is a ruling on the application for extension of time to apply for leave to lodge an application for orders of certiorari, mandamus and prohibition filed in this Court by the applicant against the respondents. The application has been preferred under the provision of Section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019] (hereinafter "**LLA**"), Section 2(1) and (3) of the Judicature and Application of Laws Act [Cap 358 R.E 2019]; Sections 17(2) and 18(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions Act [Cap 310 R.E 2019] (hereinafter "**Cap 310**"), Rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014, GN No. 324 of 2014 (hereinafter "**the Rules**").

The application is supported by affidavit of Omary Shaaban S. Nyambu, the applicant. The same is opposed by the respondents through a counter affidavit sworn by Daniel Nyakiha, learned State Attorney from the Office of the Solicitor General.

Briefly, the applicant was employed by the Tanzania Peoples' Defence Force (TPDF) since July 1977. However, his employment came to an end on 13th April, 1994 when he was given retirement benefits without being given documentary proof or correspondence regarding the reasons thereof. After elapse of 17 years of pursuit of information about his termination of employment, he was eventually served with official reply on 25th May, 2011,

informing him that he was not entitled to receive any letter or reasons for termination save with court order. He was however told that the termination was in compliance with a medical report which had indicated that he was suffering from a mental disease up to 100%. a matter which he does not agree with.

The applicant, therefore, applies for extension of time so that he can lodge his application for leave to apply for both orders of certiorari and mandamus to quash (sick!) the decision of the 1st respondent, made in 1994, of terminating his employment. He also seeks extension of time so that he can lodge application for leave to apply for an order of prohibition against the respondents restraining them from proceeding in any way against the applicant other than by the letters of the law. The applicant also prays for costs and any other relief(s) this Court may deem fit and just to grant.

On 20th March, 2023 when this matter first came before me, virtually, a prayer was made by Ms. Frida Muya, learned State Attorney, that both sides wished to proceed by way of written submissions, a prayer which I granted. The resultant scheduling orders were also duly complied with.

In his submission in chief, the applicant narrates the effort he made to get his official termination letter so far in vain. Annex OS3 to the affidavit evidences those efforts. Annex OS 4 is a letter he was served by his employer on 25th May, 2011 notifying him that he was not entitled to receive any letter or reason for his termination of employment unless the employer was so required to do by a court of law. That, by the time he received this letter on

25th May, 2011, the time for lodging his application for judicial review had already elapsed for more than 17 years.

The applicant avers further that, from the date he was notified of the reasons as aforesaid, he was always in court seeking justice, through a constitutional case he had filed which was however unsuccessful for technical reasons. That, his efforts to follow up for court records yielded results late in 2022 when he discovered that he was directed to exhaust available remedies first. He cites the case of **Lyamuya Construction Co. Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010. In this connection, he submits that he has accounted for all the period of delay and that the delay was not caused by his negligence or inaction.

To further buttress his case, the applicant points that there are issues of illegality in the decision of his employer which should prompt this Court to grant his prayers. He cites **Republic V. Yona Kaponda & 9 Others** [1985] T.L.R 84 and **Omary Shabani Nyambu V. Dodoma Water and Sewerage Authority**, Misc. Land Application No. 811 of 2017 (Unreported), to support his arguments. He prays the Court to grant his application.

Opposing the application, the respondents, firstly argued that Section 44 of LLA required the applicant to first seek extension of time from the Minister before coming to Court. That, even if section 14 of **LLA** makes extension of time a court's absolute discretion, the same has to be exercised

judiciously. The case of **Yusuph Same and Another vs. Hadija Yusuph**, Civil Appeal No. 1 of 2002, CAT at DSM; **Chawe Transport Import & Export co. Ltd Vs. Pan Construction Co. Ltd. and Others**, Civil Application No. 146 of 2005, CAT at DSM (Unreported) and **Tanga Cement Company Ltd Vs. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 (Unreported) have been cited, on this point.

It is the respondents' further argument that since the applicant didn't apply for time extension from the Minister, this Court is precluded from granting the prayer for extension of time. They cite, in this regard, the case of **Rajabu Hassan Mfaume (The Administrator of the Estate of the Late Hija Omar Kipara) Vs. Permanent Secretary Ministry of Health, Community Development, Gender, the Elderly and Children & Others**, Civil Appeal No. 287 of 2019, CAT (Unreported).

The respondents' second ground for opposing the application is lack of good cause. They argue that the applicant had not stated any good cause in his affidavit to warrant extension of time. That, all what is seen is applicant's laxity and negligence to sit on his right for 25 years, as the applicant didn't need to wait for sufficient reason from his employer to file for judicial review.

Thirdly, on existence of illegality, the respondents find no apparent discrepancy in applicant's submission or affidavit to suggest any point of illegality in the impugned decision. They cite the case of **Lyamuya Construction Co. Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) for a contention that an illegality has to be serious enough to warrant extension of time.

The respondents further cite the case of **Omary Ally Nyamalege (As the Administrator of the Estate of the Late Seleman Ally Nyamalege) & Others vs. Mwanza Engineering Works**, Civil Application No. 94/08 of 2017, CAT, (Unreported) on a point that illegality has to be substantiated. For the above reasons, the respondents find neither sufficient cause for delay nor good cause for granting of the time extension.

In his rejoinder, the applicant finds the respondents' reply evasive, not addressing the issues he had raised in his affidavit. He further attacked the respondents for raising and arguing on a jurisdictional point without a prior leave of the Court, thereby praying the Court not to entertain it.

Regarding the provision of section 44 of the **LLA**, the applicant rejoined that the respondents' point of law contradicted the holding of the court in **Rajabu Hassan Mfaume (The Administrator of the Estate of the Late Hija Omar Kipara) Vs. Permanent Secretary Ministry of Health, Community Development, Gender, the Elderly and Children & Others** (Supra) in that, the allowable extension of time which the Minister could give, is limited to only one-half of the period of limitation for the type of suit under consideration. He rejoined further that under the circumstances of this case, it is this Court which is vested with the powers to extend time and not the Minister. He cites the case of **Cosmas Mwaifwani vs. The Minister for Health, Community Development, Gender, the Elderly and Children & Others**, Civil Appeal No. 312 of 2019 [2022] TZCA 378 (15 June 2022) for a point that calculation of time for lodging application for judicial review is reckoned from the date of knowledge of the impugned decision by the applicant.

He argued further that section 26 of **LLA** is relied upon where fraud or mistake in the proceeding is involved whereby the period of limitation shall not begin to run until the plaintiff had discovered the fraud or mistake or could with reasonable diligence have discovered. He argued that as per paragraphs 8 to 36 of the affidavit, his effort to demand for information since 1994 in order to ascertain whether there were sufficient reasons for termination of his employment was met with dead silence. He asserts that the reasons for delay have been explained under paragraphs 8 to 37 of the affidavit.

The applicant further cites the case of **Ally Salum Said vs Idd Athumani Ndaki**, Civil Application No. 450 of 2021, [2023] TZCA 191 (19 April 2023), and **Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** [1992] T.L.R 185 on a contention that despite not counting for each day of delay, extension of time can be granted if there is a point of illegality pleaded. He adds that illegality does not need to be serious one but needs to be clearly pleaded. These are the main points of points in contention between the two sides.

In this matter, there two issues to be determined. **Firstly**, whether the Court has jurisdiction to entertain this matter given that the applicant had not applied to the Minister (for Constitutional and Legal Affairs) for extension of time under section 44 of **LLA** as contended by the respondents. **Secondly**; whether the applicant has adduced good cause for the extension of time to be granted to enable him file for judicial review.

On the first issue, it has been submitted for the respondents that this Court is precluded from granting the prayer for extension of time on account of the fact that section 44(1) of **LLA** required the applicant to knock the doors of the Minister first, for extension of time, before coming to this Court. Since the controversy as to whether or not this Court is precluded from exercising jurisdiction over this matter dwells on the provision of Section 44(1) of the **LLA**, the same is extracted for deliberation as hereunder:

"44.-(1) Where the Minister is of the opinion that in view of the circumstances in any case, it is just and equitable so to do, he may, after consultation with the Attorney-General, by order under his hand, extend the period of limitation in respect of any suit by a period not exceeding one-half of the period of limitation prescribed by this Act for such suit.

While it is true that the above cited provision of the law opened the door for the applicant to seek extension of time from the Minister, such powers of the Minister are limited in terms of procedure and the amount of time he can extend.

In the cited case of **Rajabu Hassan Mfaume (The Administrator of the Estate of the Late Hija Omari Kipara Vs. Permanent Secretary, Ministry of Health, Community Development, Gender, Elderly and Children & 3 Others** (Supra), the Court of Appeal agreed with the argument raised by the counsel for the respondents that the broad powers of the Minister to extend time of limitation under sub-section (1) of section 44 of **LLA** is subject to the following three conditions:

“one, the extension may be granted if the Minister is satisfied that it is just and equitable to do so in view of the circumstances of the case. Two, the grant should be made by the Minister after consultation with the Attorney General. Three, the allowable extension must not exceed one-half of the period of limitation for such suit”.

In this particular case, the ultimate aim of the applicant is to secure an order of the Court for time extension so that he can lodge his application for leave to seek judicial review. Under rule 6 of **the Rules**, leave to apply for judicial review shall not be granted unless the applicant was to file his application for leave within **six (6) months** from the date of the proceedings giving rise to the impugned decision. This is to say that, the Minister could only grant half of the available time, which is three (3) months, if the applicant was to knock his door. As already stated, a further time extension would be beyond the powers of the Minister as per section 44(1) of **LLA** to grant.

It is undisputed that the applicant was served with the much-sought reply of his employer on 25th May, 2011, which simply means the application for judicial review is well out of time. Under such circumstances, I agree with the applicant's submission that it is only this Court which has jurisdiction to make an order for extension of time if merited. This disposes the first issue.

The learned State Attorney for the respondents has cautioned that much as extension of time under section 14 of **LLA** is entirely a discretion of the Court, the discretion has to be exercised judiciously. I entirely agree with

him. And this leads to the second issue on whether there is good cause shown by the applicant for granting the extension of time.

The crux of the matter before the Court is pleaded by the applicant under paragraph 5 of his affidavit. That on 13th April 1994 the 1st and 2nd respondents jointly and without any justification, terminated his service with TPDF and paid his terminal benefits without any correspondence as to the reasons that led to the said termination. In effect, the applicant raises an allegation that his termination was arbitrary and the payment he was received was unjustified. Under paragraph 28 of the Affidavit the applicant expresses his views that the termination of his employment was done with "ill motive" and that his basic rights including the right to work, the right to earn adequate income as well as the right to be heard were thereby infringed.

It is the applicant's main contention that in his affidavit there are matters of illegalities which should prompt this Court to grant the extension of time. The respondents have denied most of the applicant's averments as per the counter affidavit sworn on their behalf. For example, they are of the view that the applicant was availed with the reasons for termination of employment vide a letter dated February 2007; and that even the points of illegalities are clear and serious enough to warrant the extension of time.

In deciding this matter, the Court is mindful of the principle of law that each case has to be decided according to its own set of facts and obtaining circumstances. It is apparent that in paragraph 5 of the affidavit, the applicant has raised issues of arbitrariness in the decision of his employer

and denial of certain basic rights when he was terminated in 1994. He alleges that termination of his employment was done without any reasonable ground, and without affording him an opportunity to defend himself, hence existence of illegalities.

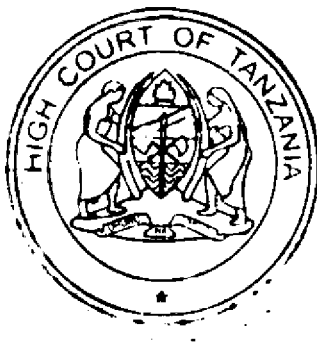
The applicant has persistently been following up for official response from his employer to know what exactly happened to his employment. He also questions the way the retirement benefits were calculated, without any official correspondence. He has doubts over the entire process and seeks to have the matter judicially reviewed, of course, subject to obtaining extension of time to seek leave of the Court.

It is apparent from the respondents' counter affidavit that there is another side of the story. While the respondents maintain that the termination of applicant's employment was premised on health grounds, the applicant denies having such health challenges. As such, this side of the story is still in an oblique state as far as the applicant is concerned. It is for these reasons that issues have to be separated. That, it is not the duty of this Court to determine whether or not the 1st and 2nd respondents' decision was illegal. The applicant has submitted that there was denial of right to be heard on his defence, among other rights. I think this suffices to be a point of illegality as per the decisions of the Court of Appeal in **Ally Salum Said vs Idd Athumani Ndaki**, and **Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** (supra), where illegality was considered sufficient ground for granting extension of time.

It is also my considered opinion that the end of justice requires that the long-fought battle put forth by the applicant should be determined on merit to its finality.

It is for the above reasons I grant this application. Accordingly, the applicant is granted up to six (6) months' time extension to lodge his application for leave to apply for judicial review. No order as to costs.

Dated at Dar es Salaam this 3rd day of May, 2023.




ABDI S. KAGOMBA

JUDGE