

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISC.CIVIL APPLICATION NO.15 OF 2023

KASSIM MWINSHEHE MAYOLI..... APPLICANT

VERSUS

DAR ES SALAAM WATER AND SEWAGE AUTHORITY.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE PRESIDENT OF UNITED REPUBLIC OF TANZANIA.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

24/05/2023 & 31/5/2023

KAGOMBA, J

The Applicant, KASSIM MWINSHEHE MAYOLI is before this Court applying for extension of time to file an application for leave to enable him apply for prerogative orders. He also prays for costs of the application and any other or further order which this Court shall deem just to grant in his favour. The application is made by way of a chamber summons under section 14(1) of the Law of Limitation Act, [Cap 89 R.E 2019] ("**LLA**") and is supported by the Applicant's affidavit.

Opposing the application, the Respondents have filed a counter affidavit sworn by FLORENCE SAIVOIYE YAMAT, being a principal officer of the 1st Respondent, together with an affidavit of Stephen Noe Kimaro, a State Attorney assigned to represent the Respondents in this matter.

A brief background relevant to this application can be gleaned from the filed affidavit and counter affidavit, attachments inclusive. Being an employee of the 1st Respondent, the Applicant's employment was terminated on 20th December, 2019 for soliciting and obtaining money from a customer of his employer. Before the decision to terminate his employment was reached, on 27th August, 2019 he was served with a notice and charges to answer. He submitted his statement of defence to his employer on 11th September, 2019 and a decision was taken against him, as per annexure "A" to the affidavit.

Being aggrieved by the decision of his employer, on 13th July, 2020 the Applicant appealed to the Public Service Commission, the 2nd Respondent herein, where again, he was unsuccessful. Undeterred, on 15th April, 2021 he filed yet a further appeal to the President of the United Republic of Tanzania, the 3rd Respondent herein. The Applicant received a letter from the Chief Secretary dated 20th April, 2022 (annexure "D" to the affidavit) informing him of the decision of the 3rd Respondent, who upheld the decision of the 2nd Respondent. In the said annexure "D" two main reason were given for upholding the decision of the 2nd Respondent. Firstly, the Applicant filed his appeal to the 2nd Respondent well out of time, and secondly; the allegation of soliciting bribe were proved against him.

Again, the Applicant is still aggrieved and intends to seek judicial review of the decision of the 3rd Respondent. In his affidavit he has faulted that decision mainly on grounds of embedded illegality and non-service of the actual decision of the 3rd Respondent. He lamented that he was not given right to a fair hearing, allegations vehemently opposed by the Respondents.

During hearing of the application, the Applicant was represented by Mr. Juma Nassoro, learned Advocate, while the Respondents were represented by Mr. Stephen Kimaro, learned State Attorney.

In his submission in chief, Mr. Nassoro after adopting the Applicant's affidavit to be part of his submission, he reaffirmed the requirements of the law under rule 4 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, GN 324 of 2014 ("GN 324 of 2014") on the necessity of obtaining leave before one could lodge an application for judicial review. He also reaffirmed the requirement under rule 6 of GN 324 of 2014 that an application for leave has to be made within 6 months after the date of the impugned decision.

It was Mr. Nassoro's contention that the decision which the Applicant wanted to challenge was made on 26th March, 2022 as per annexure "D" but was communicated later to the Applicant on 3rd April, 2023, being well beyond the six months period prescribed for leave application, hence the necessity to seek for time extension.

As for the grounds supporting this application, Mr. Nassoro underlined two grounds: **Firstly**, that the Applicant was not given opportunity to be heard as paragraph 4, 6, 8 and 10 of the Applicant's affidavit. He elaborated that the Applicant was not given opportunity to cross-examine the person from whom he was accused of soliciting bribe when the matter was heard before the 1st Respondent. That, the Applicant was also not given opportunity to be heard on his appeals before the 2nd and 3rd Respondents.

The **second** ground is that the Applicant was not availed with the decision of the 3rd Respondent. He argued that annexure "D", by its wording, was only informing the Applicant that the 3rd Respondent had made a decision on the Applicant's appeal. Mr. Nassoro submitted further that the Applicant received annexure "D" on 3rd April, 2023 despite the same indicating that the decision of the 3rd Respondent was made on 26th March, 2022.

It was Mr. Nassoro's further argument that in determining whether the Applicant had adduced good or sufficient reason for granting of time extension, in compliance with section 14(1) of **LLA**, the Court may wish to consider the denial of the Applicant's right to be heard as clear illegality. He added that illegality has been held to constitute sufficient ground for granting extension of time. He cited the cases of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** (1992) T.L.R 182; **Kalunga & Co. Advocates vs NBC Ltd** (2006) T.L.R 235 and **Victoria Real Estate Development Ltd vs TIB and 3 Others**, Civil Application No. 255 of 2014, CAT (Unreported) to support his contention.

He further submitted that the right to be heard is a constitutional right which once suppressed it rendered proceedings concerned void. He referred to the case of **Mbeya Rukwa Auto parts and Transport Ltd vs Jestina George Mwakyoma** (2003) T.L.R 251 on this contention.

To shield his argument against any possible missiles from the counsel for the Respondents, Mr. Nassoro elaborated that failure to accord the Applicant his right to be heard was a clear illegality but which should be

deliberated and decided upon during judicial review. He said that this Court is not supposed to consider the substantive claims raised by the Applicant, at this stage. To this end, he cited the decision in **Regional Manager TANROADS-Lindi vs D. B. Shaprya & Co Ltd**, Civil Application No. 29 of 2012 (CAT) as referred in the case of **Victoria Real Estate Development Ltd** (supra).

Besides the ground of illegality, another reason for the Court to grant this application, according to Mr. Nassoro, is that the Applicant was not availed with a copy of the decision of the 3rd Respondent. He elaborated that apart from annexure "D", which is said to be the decision of the 3rd Respondent as per the counter affidavit, the actual decision was not availed. He argued that the Applicant was supposed to be notified if annexure "D" was the said decision, and that there was nothing more.

Still on the decision of the 3rd Respondent, Mr. Nassoro contended that even if annexure "D" was deemed to be the decision of the 3rd Respondent, the same was delivered to the Applicant on 3rd April, 2023 when the time limit for filing an application for leave for judicial review had already elapsed. He strongly opposed the averment in the counter affidavit that annexure "D" was delivered to the Applicant on 27th April 2022 as per the letter dated 10th May, 2023 annexed as annexure KMM-01 to the Counter affidavit. He opposed that averment for a reason that it had not been ascertained since there was no proof of the Applicant receiving the same. He said that soon after the Applicant had receiving annexure "D" on 3rd April, 2023, he immediately sought for legal opinion and proceeded to file this application.

In his reply, Mr. Kimaro learned State Attorney, adopted both the counter affidavit and an affidavit in support of the counter affidavit. He concurred with his counterpart that for the Court to grant extension of time the Applicant must adduce sufficient reasons. He mentioned the grounds to be considered by the Court as: whether the Applicant had accounted for his delay; that the delay should not be inordinate; whether there is illegality involved in the decision to be challenged and whether the Applicant showed diligence and not apathy.

Mr. Kimaro started attacking the Application for not accounting for the period of delay. He argued that the decision which the Applicant intended to challenge was made on 20th April, 2022 and was dispatched to him on 27th April, 2022 as per a dispatch copy (annexure KMM-01 to the counter affidavit), but the Applicant had not given reason for delay to file this application. He found it to be contradictory that the Applicant was not availed with a copy of the decision, while at the same time the Applicant conceded in his affidavit to have received the same on 3rd April, 2023. He added that annexure "D" bore the address of "OFISI YA RAIS -IKULU" to show the letter was a decision of the 3rd Respondent.

On the point that the delay should not be inordinate, Mr. Kimaro submitted that the Applicant had not stated where he was from 27th April, 2022 when the decision was dispatched to him to the filing of this application.

Regarding the ground of illegality, Mr. Kimaro contended that the Applicant failed to prove illegality in the impugned decision, adding that the right to be heard was accorded to him contrary to what was submitted by

his Advocate. He elaborated that there was a letter dated 9th September, 2021 from the President's Office notifying the Applicant to submit additional documents for the decision maker to reach a right decision. That, the moment the Applicant submitted those documents, he was *ipso facto* granted his right to be heard since regulation 62(2) of the Public Service Regulations allows the appellate authority to determine the appeal in absence of the parties.

Mr. Kimaro cited the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No.10 of 2015, CAT, Arusha, which was referred to in the case of **Principal Secretary, Ministry of Defence and National Service** (supra), for the argument that an illegality should be clear on the face of record. He was of the view that it was not the case in this application.

Mr. Kimaro also cited the case of **Lyamuya Construction Co. Limited vs. Boards of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT, Arusha for a contention that a point of law raised should be of sufficient importance, arguing that the Applicant had not established his to be so.

Lastly, Mr. Kimaro argued on the ground that the Applicant was supposed to show diligence and not apathy or sloppiness. He submitted that it was the duty of the Applicant to prove to the Court that he didn't receive annexure "D" on 27th April, 2022 in terms of section 110(1) & (2) of the Evidence Act, [Cap 6 R.E 2022]. For all these arguments, he prayed the Court not to grant the application for lack of good cause.

In his rejoinder, Mr. Nassoro insisted that annexure "D" was not the decision of the 3rd Respondent. He quoted from it the following statements to substantiate his contention, thus: "*Ninapenda kukufahamisha kuwa Rais amepitia rufaa yako*". He said that such words showed that annexure "D" was an information concerning the decision made by the President who is the 3rd Respondent.

He vehemently attacked the copies of "dispatch book" annexed to the counter affidavit which was relied upon by the Respondents to prove service of the decision of the 3rd Respondent to the Applicant. He pointed out that the said "dispatch book" did not mention annexure "D" and neither did it show the name and signature of the recipient nor the date when annexure "D" was dispatched. On this basis, it was his views that annexure "D" was not dispatched to the Applicant on the alleged date.

Mr. Nassoro made himself clear that the Applicant was not denying that he was given right to appeal. However, he argued that the right to be heard doesn't end with a right to appeal. That, the Applicant ought also to have a right to know what was stated by the adverse party during appeal, an opportunity, he said, was denied to him.

He agreed with the position of the law that an illegality has to be on the face of record and of sufficient importance, adding that the Applicant's application met those criteria. He finally expressed his views that the application was well supported by good cause as stated in the supporting affidavit and in his submissions. This marked the end of oral submissions by both legal counsel.

In determining this application, it is the position of the law that whoever desires the Court to grant him extension of time he or she has to adduce reasonable or sufficient cause. Sub-section (1) of Section 14 of the **LLA**, clearly states;

*"14.-(1) Notwithstanding the provisions of this Act, **the Court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application**, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application."*

This provision infers that the Court has to examine the reason adduced by the Applicant if it constitutes a reasonable or sufficient cause. That being the position, the issue to be determined by this Court is whether the Applicant has adduced sufficient cause for the extension of time to be granted.

The Court of Appeal of Tanzania in several occasions has mentioned factors which constitute sufficient cause for time extension. (See the case of **Lyamuya Construction Co. Limited vs. Boards of Trustees of Young Women's Christian Association of Tanzania**, (supra); **Mpoki Lutengano Mwakabuta & Another v. Jane Jonathan (As Legal Representative of the late Simon Mperasoka, deceased)**, Civil Application No. 566/01 of 2018, CAT, Dar es Salaam; **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia**

(supra); and **TANESCO vs. Mufungo Leonard Majura & 15 Others**, Civil Application No.94 of 2016, CAT, Dar es salaam), to mention but a few.

The four points argued by Mr. Kimaro to oppose the application were in line with the position taken in the case of **Lyamuya Construction Company Ltd** (supra). I find no motivation to repeat all of them. I should state however that any or a combination of two or more such points can be considered to be sufficient for granting time extension, if the court judiciously thinks so.

In his submission, the learned Advocate for the Applicant has relied upon the denial of the right to be heard as the primary ground for the application to be granted. It has been stated in paragraphs 4,6,8, and 10 of the affidavit supporting the application that the Applicant was denied by all the three Respondents, one at a time, his right to be heard. While Mr. Nassoro, laboured to show that the Respondents denied his client right to be heard to the fullest extent known by the law, his counterpart vehemently oppose such a contention. Mr. Kimaro argued, among other things, that the right to appeal constituted the right to be heard. He also argued that the law allowed the 3rd Respondent to determine appeals without calling the parties. These arguments simply confirm that there is an issue as to whether or not the Applicant was accorded his right to be heard, and whether or not it was fully given.

I am not oblivious as to the position of the law regarding what this Court must and must not do at this stage. **Firstly**, as correctly argued by Mr. Kimaro, the Court has to glean the pleadings to see if any issue of

illegality has been raised as a ground for extension of time. Such an illegality should be clear on the face of record. (See also the case of **Moto Matiko Mabanga vs Ophir Energy Plc and 2 Others**, Civil Application No. 463/01/2017, CAT, Dar es salaam).

Secondly; since not every trivial point of law is worthy to be entertained, the Court has to consider whether the illegality pleaded is of significant and not trivial, and **thirdly**; since the application requires the Court to determine whether sufficient cause exists for granting time extension, the Court should not attempt to jump its jurisdiction by determining substantive issues reserved for the next forum.

In my scanning of the chamber summons and its supporting affidavit, I vividly find that the denial of right to be heard has been specifically pleaded in the affidavit by the Applicant. This is clearly seen in paragraphs 4, from first to second line; paragraph 6, from third to fifth line, and in paragraph 8 from third to sixth line. In paragraph 8, for example, the Applicant states:

*"8. That according to the content of annexure D above, the 3^d Respondent though dismissed my appeal on technicalities on time limitation, the 3^d Respondent went on merits and **did not give me fair hearing of the issues raised in the decision, including the issue of limitation and even knowing the 1st Respondent's reply in opposition of my appeal and give me opportunity to make reply to the said 1st Respondent's reply. I have been denied right to be heard the decision tainted with illegality**". [Emphasis added].*

It is settled law that right to be heard as enshrined under Article 13(6) of the Constitution of the United Republic of Tanzania [Cap 2 R.E 2019] must be accorded to the parties in any legal proceedings. Once it is infringed such proceedings shall be vitiated. (See, for example, the case of **Kumbwandumi Ndemfoo Ndossi V. Mtei Bus Services Limited**, Civil Appeal No. 257 of 2018, the Court of Appeal of Tanzania, Arusha).

I should state, again, that it is not in the hands of this Court, at this stage, to determine whether the Applicant was indeed denied his right to be heard. It suffices to make an observation that an allegation of illegality in the impugned decision of the 3rd Respondent has been raised as one of the grounds for granting extension of time. It is in this connection that the guidance provided by the Court of Appeal in **Principal Secretary Ministry of Defence and National Services** (supra), has to be observed. The Court of Appeal stated:

"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".

In the same vein, the Court of Appeal in the case of **Laurent Simon Assenga vs Joseph Magoso and 2 Others**, Civil Application No. 250 of 2016, CAT at Dar es Salaam, was of the view that denial of right to be heard was "a *serious allegation of illegality in the impugned decision*" that needed to be investigated by the Court.

In the above premises, therefore, I am of a firm view that sufficient reason has been adduced by the Applicant for this application to be granted. Since illegality is considered a sufficient reason to grant extension of time, the need to analyze the rest of the arguments does not arise.

In the upshot, the application is granted. Since this matter has been ongoing for long time now, I find it expedient and in the interest of justice that the Applicant be granted thirty (30) days only to file his application for leave. No order as to costs.

Dated at Dodoma this 31st day of May, 2023.




ABDI S. KAGOMBA
JUDGE