IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 511 of 2022

(Arising from Civil Appeal No. 81 of 2009)

TUICO (O.B.O. THOMAS MASHAKA & 760 OTHERS).....APPLICANT

VERSUS

SOUTHERN PAPER MILLS LIMITED.....1ST APPLICANT

THE TREASURY REGISTRAR (as Successor to

CONSOLIDATED HOLDING CORPORATION) .....2ND RESPONDENT

MUFINDI PAPER MILLS LIMITED.....3RD RESPONDENT

RAI GROUP OF KENYA.....4TH RESPONDENT

RULING

14th June & 31st August, 2023

BWEGOGE, J.

The applicant herein above named instituted an application herein praying for an extension of time within which the same may file a notice of intention to appeal against the judgment and decree of this court in Civil Case No. 81 of 2009 delivered on 6th December,2016 and any other

relief(s) this court may deem just to grant. The application is brought under the provision of section 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019] and supported by the affidavits of Noel Nchimbi, legal officer of the applicant and one Thomas Mashaka, an interested party herein representing 760 others.

The case herein has a protracted and sad legal history. The pleadings and record of this case entail that way back in 2004, the 4th respondent purchased the assets and liabilities of the 1st respondent. Thereafter, the 2nd respondent who sold the assets of the 1st respondent, transferred all employees of the 1st respondent who were on permanent employment terms to the 4th respondent. The 4th respondent vested the assets and liabilities of the 1st respondent, the employees inclusive, to the management of the 3rd respondent. Allegedly, the transfer of employees was not duly negotiated. Hence, the applicant, the representative of the employees, filed a labour dispute in the defunct Industrial Court of Tanzania registered as Trade Enquiry No. 80 of 2006, seeking declaratory orders that employees of the 1st respondent were illegally transferred to the 3rd respondent.

The matter was determined between the parties and judgment was delivered in favour of the employee. The respondents were ordered to

pay the employees their entitlements arising out of their employment contracts which they had with the 1st respondent.

The 3rd and 4th respondents were not amused with the Industrial Court's decision and sought revision (Revision No. 42A of 2007). The Industrial Court decided in favour of the employees thereby confirming the decision in Trade Enquiry No. 80 of 2006. Undaunted, the 3rd and 4th respondents appealed to this court, in Civil Appeal No. 81 of 2009. In December, 2016, this court partly allowed the appeal in that it was unfair to order termination and payment of terminal benefits to the employees while their contract was continuously taken over by the next employer whereas the orders entered by the Industrial Court for payment of salaries for untaken leave, outstanding PPF contributions, and outstanding contributions to TUICO were upheld.

After the delivery of the decision of this court in Civil Appeal No. 81 of 2008 delivered on 06/12/2016, the applicant resorted to execution of the decree of the former Industrial Court in the High Court Labour Division. The certificate of payment was issued by the Court on 04/03/2019. Thereafter, the certificate was filed to the Registrar of the Treasury. However, before payment, the deputy registrar of the High Court Labour Division summoned parties hereto and vacated the certificate on the

ground that it was not executable for lacking a specific payable decretal amount. Soon thereafter, the applicant filed a revision case (Revision No. 499 of 2020) to challenge the order entered by the deputy registrar of the High Court. Unfortunately, the matter was struck out on technical ground with leave to refile. The attempt to refile the revision proceedings was unsuccessful as the matter was dismissed on the ground of time limitation. And, the application for extension of time filed by the applicant in the High Court Labour Division was likewise objected on technical ground and eventually dismissed.

Mr. Richard Madibi, learned advocate, represented the applicant herein. Ms. Victoria Lugendo, the state attorney, represented the 1st and 2nd respondents whereas Mr. Charles Rwechungura represented the respondents herein. Mr Rwechungura didn't contest the application herein. The matter herein was argued orally. The submissions made by the counsel herein are restated hereunder.

In substantiating this application, Mr. Madibi argued that soon after the dismissal of the application for the extension by the High Court Labour Division in Misc. Application No. 473 of 2021 the applicant discovered that some of the orders made in Revision No. 42A of 2007 were quashed by

this court in Civil Appeal No. 81 of 2008. The counsel opined that, based on the above fact, the High Court Labour Division could have rejected the prayers in the application for execution of the decree in the revision case mentioned above.

Further, the counsel argued that the applicant apprehended that the 1st and 2nd respondents herein were not parties in Revision No. 42 A of 2007. Likewise, the 1st and 2nd respondents herein were not the parties in Civil Appeal No. 81 of 2009. But the orders which were made in the said appeal favoured the same by ousting their obligation to pay the employees' statutory terminal benefit after the 1st respondent was sold to the 4th respondent and put under the management of the 3rd respondent. That the 4th respondent had complied with the order of this court in the above mentioned appeal case by effecting payments of the terminal benefits to the beneficiaries represented by the applicant herein. However, the counsel alleged, the 2nd respondent defaulted to pay the statutory segment of the terminal benefits adjudged.

On the above account, the counsel opined that the decision of this court in Civil Appeal No. 81 of 2009 which quashed the order imposing an obligation on the 1st and 2nd respondent to pay statutory terminal benefits to the beneficiaries represented by the applicant herein without the same

being a party to the case was untenable in law. Hence, the counsel asserted that the decision of this court amounts to illegalities of which extension of time is sought to file notice of appeal so that they can challenge the impugned decision in the Court of Appeal based on the particulars stated in the affidavits supporting this application.

The counsel asserted that illegality is good ground for extension of time. The cases; **Principal Secretary, Ministry of Defence and National Service vs Devram P. Valambia** [1992] TLR 387 and **Hamis Mohamed vs Mtumwa Moshi** (Civil Appeal 407 of 2019) [2020] TZCA 13 were cited to bolster the point.

Conclusively, the counsel argued that the applicant was busy executing the decree in court until it was found that the decree was not capable of being executed. That vigilance in pursuit of the case, is yet another reasonable ground for extension of time. The cases of **Fortunatus Masha vs William Shija and Another** [1997] TLR 154; **Eliakim Swai and Another vs Thobias Karawa Shoo** (Civil Application 02 of 2016) [2017] TZCA 182; and **Kabdeco vs Wetcu Limited** (Civil Application 526 of 2017) [2019] TZCA 483 were cited to validate the point. Based on the reasons above, the counsel for the applicant prayed for grant of extension of time and costs to follow the event.

In reply, Ms. Lugendo, the counsel for the respondents countered that under paragraph 26 of the affidavit supporting the application herein, it has been admitted that the applicants were busy in court executing the defective decree, the time which they consider to be a technical delay. That this ground is misconceived. The counsel cited the case of **Dunia Omary Msuba and Another vs the Registrar of Industrial Court of Tanzania & 2 Others** (Misc. Civil Application 11 of 2022) [2020] TZHC 4594 to bring her point home.

The counsel charged that the application herein is an abuse of court process. That the applicant ought to have brought sufficient material in support of the application for the extension of time to explain the inordinate delay. The case of **Hadija Adamu vs. Godless Tumba**, Civil Application No. 14 of 2013, CA (unreported) was cited to buttress the point that ignorance of law or procedure has been stated not to be sufficient ground for extension.

In tandem with the above, the counsel contended that the purported plea of illegality is not apparent on the face of the record. Therefore, the counsel opined, the plea of illegality invoked by the counsel for the application is misplaced. The counsel prayed the application herein to be dismissed.

In rejoinder, the counsel for the applicant maintained his previous stance. Further, he countered that the cases cited by the counsel for the 1st and 2nd respondents are inapplicable in the circumstances of this case. That, be that as it may, the case of **Dunia Omary Msuba and Another vs. the Registrar of Industrial Court of Tanzania & 2 Others** (supra) is the decision of this court which is not binding. The counsel contended that there is nothing to impute the applicant with ignorance of the law.

Responding to the assertion that illegality is not apparent on the face of the record, he argued that the decisions in Revision Case No. 42A of 2007 and Civil Appeal No. 81 of 2009 speak volumes in that this court entered orders which were not prayed for by the 1st and 2nd respondents, let alone the fact that the parties above mentioned never appealed against the decision in Revision Case No. 42A of 2007. The above anomaly, in his opinion, amounts to illegality. This is all about the professional mettle between the counsel for the parties herein.

Now, the turn is on this court to decide whether the application herein is merited.

The provision of section 11 (1) of the Appellate Jurisdiction Act enjoins this court with discretional power to extend the time for giving notice of intention to appeal from the judgment of the High Court, notwithstanding

that the time for giving the notice has expired. It is settled law that the extension of time for taking legal action may only be granted for sufficient cause. What amounts to sufficient cause depends on the circumstances of the case in question. However, the court would be guided by the factors such as:

i) The applicant to account for the period of delay

ii) The delay should not be inordinate

iii) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

iv) Other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

See the case of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4, among others, in this respect.

Pertaining to alleged apathy on the part of the applicant, undeniably, partly, the reason for the failure of legal actions taken by the applicant was inadvertence. As rightly submitted by the counsel for the respondent, a plea of inadvertence and, or mistake on the part of the counsel for the applicant is not sufficient ground for an extension of time. See the cases of **Michael Lessani Kweka vs John Eliafya** [1997] TLR 152, **Calico**

Textile Industries Ltd [1983] vs Pyaraliesmail Premji [1993] TLR 28. However, it is likewise a law that where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek the remedy for it, the plea may be granted by the court. See the case of **Lessani Kweka vs. John Eliafya** (supra).

I have reckoned that the applicant has been taking abortive legal actions namely, the institution of the execution proceedings in respect of the decree of this court and the Industrial Court and attempts to seek revision of the dismissal order of the taxing master which spanned from 2017 to September, 2022 before the application herein was filed in November, 2022. I am of the considered opinion that the applicant has acted reasonably diligent in taking legal actions. Therefore, the same cannot be blamed for apathy.

Concerning the plea of illegality, I am on all fours with the counsel for the 1st and 2nd respondents in that it is a settled principle of law that the illegality pleaded must be apparent on the face of the record of the impugned decision and not that which would be discovered by a long-drawn argument or process. See the cases; **Principal Secretary,**

Ministry of Defence and National Service vs. Devram Valambhia (supra) and **Jubilee Insurance Co. (T) Limited Company (T) Ltd vs Mohamed Sameer Khan (**Civil Application 439 of 2020) [2022] TZCA 623, among others, in this respect.

Having anxiously attended the rival submissions of the counsel herein, I have the following observations: **One,** it is not in dispute that previously, the applicant herein filed a labour dispute in the erstwhile Industrial Court of Tanzania registered as Trade Enquiry No. 80 of 2006 seeking declaratory orders in that the employees of the 1st respondent was illegally transferred to the 3rd respondent. The applicant's action succeeded whereas the respondents separately were held liable to pay the terminal benefits and incidental entitlement of the former employees of the 1st respondent, who were transferred to the 4th respondent and working with the 3rd respondent, based on their employment contract previously executed with the 1st respondent. The decision of the Industrial Court was confirmed by a panel of judges in the same court on revision proceedings (Revision No. 42A of 2007) preferred by the 3rd respondent. **Two,** it is not in dispute that on appeal taken by the 3rd and 4th respondents in this court, the appeal partly succeeded whereas some of the orders entered by the Industrial Court against the respondents, were vacated. It was held, *inter*

alia, that it was unfair to order termination and payment of terminal benefits to the employees whose contracts of employment were continuously taken over by the new employer whereas the orders for payment of salaries for untaken leave, outstanding PPF contributions, and outstanding contributions to TUICO were upheld. It is likewise glaring on the decision of this court that the orders imposed by the Industrial Court on the 1st and 2nd respondents to pay the terminal benefits to the employees were vacated.

Three, it is apparent on the record of the order entered by the deputy registrar of the High Court Labour Division in execution proceedings that, as the decision of this court varied the orders pertaining to reliefs granted by the Industrial Court, it was the decree of this court which would be executed. However, it was found that the orders of this court were not executable for want of a specific decretal amount to be paid. The execution proceedings were dismissed. And, attempts to seek revision of the order of the deputy registrar have proved futile. **Four,** based on the fact that the execution proceedings were dismissed on the ground that the decree entered by this court is not executable, the decree of this court, of which the applicant is the beneficiary has been rendered nugatory.

Given the above factual matrix, I am of the settled view that this court

having varied the decision of the Industrial court in favour of the 1st and 2nd respondents and entered orders pertaining to reliefs which the applicant is entitled to be paid, of which the taxing master found to be not executable, the allegation of illegality raised herein cannot be disregarded. The alleged illegality is on the face of the record, not one requiring long-drawn arguments.

It is settled law that a point of law of sufficient importance such as illegality and, or error on the face of the record of the decision intended to be challenged constitutes sufficient reason for the extension of time so that the defect complained of may be rectified. In such a case, the applicant is not required to account for the period of delay. See the cases of **Principal Secretary, Ministry of Defence and National Service vs Devram Valambhia** [1992] TLR 185; **Tanga Cement Company Limited vs Jumanne D. Masangwa and Amos A. Mwalwanda,** Civil Application No. 6 of 2001, CA (unreported); and **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (supra); among others.

The above premises taken into consideration as a whole, I find that the applicant, being a beneficiary of the decree, which is now rendered nugatory on the technical aspect of the law, refusing extension, in the

circumstances of this case, in my opinion, would be repugnant to justice.

Given the foregoing, I am of the settled view that the applicant has demonstrated that the decree issued by this court in the appeal case aforementioned is irregular and not executable altogether. Likewise, I am of the view that the applicant has not let grass grow under his feet, but acted diligently in seeking legal remedy sought for. I, therefore, find the application herein with merit. The application is hereby granted. The applicant to file the intended notice of intention to appeal within 14 days.

So ordered.

DATED at **DAR ES SALAAM** this 31st August, 2023.

O. F. BWEGOGE

JUDGE