

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)**

AT DODOMA

MISCELLANEOUS CIVIL APPLICATION NO. 10096 OF 2024

BETWEEN

PASCHAL RWECHUNGURA.....APPLICANT

VERSUS

THE CHIEF SECRETARY, PRESIDENT'S OFFICE..... 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

PRIME MINISTER'S OFFICE LABOUR, YOUTH,

EMPLOYMENT AND PERSONS WITH DISABILITY..... 3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

RULING

19/06/2024 & 03/7/2024

MANYANDA, J:.

Paschal Rwechungura, the Applicant, is seeking an extension of time to file an application for leave to file judicial review under Section 14(1) and (2) of the Law of Limitation Act, [Cap. 89 R. E. 2019] and Rule 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedures and Fees) Rules, GN No. 324 of 2014. He is seeking for leave to file a judicial review case against the respondents namely, The

Chief Secretary President's Office, The Public Service Commission, Prime Minister's Office Labour, Youth, Employment and Persons With Disability and Attorney General, hereafter referred to as the 1st, 2nd, 3rd and 4th Respondents, respectively or jointly as "the Respondents".

The application is brought by way of a Chamber Summons accompanied with an affidavit sworn by the Applicant, it is supported by two affidavits, one of Mr. Henry Njowoka, the Applicant's Advocate and another of Mr. Rashid Umande, a Court Clerk of this Court. The Respondents did not contest the application as they did not file any counter affidavit, albeit, they are allowed to argue on legal points. The Applicant seeks reliefs listed in the Chamber Summons as follows:

- 1. That, this Honourable Court be pleased to grant the Applicant extension of time within which to file an application for leave to apply for judicial review against the final decision made on 1st March, 2023 by the President of the United Republic of Tanzania on termination of the Applicant.*
- 2. Any other relief(s) this Honourable Court may deem just and fair to grant.*

A brief background of this application as gathered from the facts deponed in the affidavit is as follows:

The Applicant was terminated from employment by the decision of the President on 01/03/2023. After termination of his employment, he filed an application for leave in this Court, well within time, on 30/8/2023, which was registered as Misc. Civil Application No. 41 of 2023. However, the case was found to differ in terms of documents appearing in the Digital File in e-CMS and the hard copies in their files.

Therefore, the case was withdrawn on 04/04/2024 with leave to refile. But, by that time the six months' time limit had elapsed, hence he could not file an application for leave without time been extended. He came up with this application.

When this matter was called on to hearing, Ally Kimweri learned Advocate represented the Applicant and the Respondents enjoyed representation services of Omary Ally Ngatanda, learned State Attorney.

Mr. Kimweri for the Applicant submitted relying on the authority in the case of **Ultimate Security Limited vs. Chande Ali Lubugile and others**, Civil Application No. 428/2001 of 20123 [2023] TZCA 17332 (13th

June, 2023) where the Court of Appeal of Tanzania directed at page 15 that failure to file a counter affidavit means the Respondents do not dispute the facts in the affidavit but can only argue on points of law.

The counsel for the Applicant proceeded with his submission that employment of Applicant was terminated by the decision of the President on 01/03/2023. Thereafter, he made an application for leave in time on 30/8/2023. The application was found to differ in terms of documents appearing in the e-CMS and hard copies in their files. Whereas, the application was withdrawn on 04/04/2024 with leave to refile. But, by that time the six months period had elapsed. He was of the opinion that the delay was caused by technical delay.

To support his point, he cited the cases of **Fortunatus Masha vs. William Shija, and Another [1997]** TLR 154 and **Lyamuya Construction Company Limited vs. Board of Registered of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported) [2011] TZCA 04 (03 October, 2011) in the latter case it the conditions to be fulfilled in application for extension of time were listed that the Applicant must account for all period of delay; that the delay

should not be inordinate and diligence on the part of the Applicant that he or she has acted promptly by filing this application.

He argued that all these conditions have been met as the delay has been accounted for and this matter has not been inordinately delayed.

The counsel cited another case of the **Principal Secretary Ministry of Defence and National Service vs. Devram Valambia**, [1992] TLR 382 where it was held that illegality is a ground for extending time. He also cited the case of **Michael Lessani Kweka vs. John Eliafye** [1997] TLR 152 where it was held that court have power to extend time if good causes have been shown. He prayed the application to be granted.

Mr. Gatanda, State Attorney, submitted acknowledging the facts deponed in the affidavits and confined his argument on points of law only. He went on arguing that this Court is *functus officio*, therefore this Court cannot grant this application because it was already granted. He cited the cases of **Bibi Kisoko Medard vs. Minister for Lands, Housing and Urban Development and Another** [1983] TLR 250 and **Kanundu vs. Republic** [1973] EA 540, where circumstances under which a court becomes *functus officio* were explained.

Mr. Gatanda went on with his submissions that the Applicant had filed an application for leave in this Court, but the same was withdrawn on 04/04/2024 with leave to refile the same. According to him, by this order, the Applicant was already granted with permission to refile. He was of the view that following grant of the permission (leave), reckoning of time limit of six (6) months per the law, started afresh, that is, from the withdrawal date 04/04/2024.

He submitted further that this Court did not specify any time limit, therefore, it remains that the time of six (6) months set up by the law under Rule 6 of GN No. 324 of 2014 is still in existence. According to his view, since this Court granted the permission, then it is *functus officio* because that time in Misc. Application No. 41 of 2023 is still existing. The State Attorney prayed this application be dismissed with costs.

In his rejoinder, Mr. Kimweri replied that this Court is not *functus officio* because it becomes *functus officio* after reaching a decision on merits. He distinguished the cases cited by the State Attorney arguing that unlike the instant case, those cases were determined on merit. He added that since Misc. Application No. 41 of 2023 was marked as withdrawn with leave to refile, then, the same was not finally decided on merits.

Mr. Kimweri opined that the order to refile was not meant to extend the time limit because the impugned decision was given on 01/3/2023 by 04/04/2024 when the refiling order was given the six months for filing of leave had expired.

The central issue for consideration and determination in this matter is whether the Applicant has advanced sufficient reason to warrant this Court to exercise its discretion and grant the extension of time requested.

My perusal of the records of this matter shows that it is clear and right as submitted by the Mr. Kimweri and conceded to by Mr. Ngatanda that the Applicant filed in this Court an application for leave in time on 30/8/2023 via Misc. Civil Application No. 41 of 2023. However, due to some legal defects, the same was withdrawn on 04/04/2024 with leave to refile, whereas, by that time, the six months' time limit had elapsed. Mr. Kimweri treats this as technical delay which is good ground for extension of time but Mr. Ngatanda argues that this Court as *functus officio* because the effect of the order for refiling is as good as extension of time. He cited the cases of **Bibi Kisoko Medard vs. Minister for Lands, Housing and Urban Development and Another** [1983] TLR 250 and **Kanundu vs. Republic** [1973] 1 EA 540.

The legal principle of *functus officio* was well elaborated in the case of **Bibi Kisoko Medard vs. Minister for Lands, Housing and Urban Development and Another** (supra) cited by Mr. Ngatanda whereas at holding (i) it was stated as follows: -

(i) In matters of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio;

However, I could not find a case allegedly called **Kanundu vs. Republic** [1973] 1 EA 540 cited by Mr. Ngatanda but, there is a case called **Kamundi vs. Republic** [1973] 1 EA 540 which I found did not deal with the principle of *functus officio*.

As it can be seen, the principle of *functus officio* bars a court from re-handling a matter which it had finally determined. In the case at hand, this Court granted leave to the Applicant to withdraw the application with option to refile the same. In other words, by granting leave to refile the application, this Court knew that it did not finally determine the controversy between the parties. Hence, the rationale behind allowing the Applicant refile his application was to give them another chance to be heard. I agree with the counsel for the Applicant that this Court did not

determine the application before it in Misc. Civil Application No. 41 of 2023, what it did was to allow the defective application be withdrawn and may, at the applicant's option, be replaced with another fresh application on the same facts. This Court, by doing so, waived the application of the principle of *functus officio*.

The next question is whether by granting leave to refile, this Court also waived the time limitation by the Applicant to bring the application.

Time limit for filing of application for leave to apply for prerogative orders is provided under Rule 6 of the GN No. 324 of 2014 which reads as follows: -

"6. The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of the proceedings, act or omission to which the application for leave relates."

As seen, from the provision quoted above, an application for leave, must mandatorily be made in six months' time from the date of issuance of the impugned decision. In this matter, the decision was given on 01/3/2023, therefore, six months' period elapsed on 01/09/2023. A leave to challenge the said decision by way of judicial review as of right, was

supposed to be made before 01/09/2023, beyond of which enlargement of time became necessary upon adduction of good cause. I say so because, the effect of withdrawing the case meant it went with its record, in court remained nothing, any act of re-bringing the application, mean to bring a fresh application, hence subject to time limitation.

In the case cited by the Applicant's counsel, the case of **Michael Lessani Kweka vs. John Eliafye** [1997] TLR 152 this Court held that courts have power to extend time if good cause has been shown.

As to what amounts to good cause, the court of Appeal of Tanzania, in the case of **Salim Lakhani and Two Others vs. Ishfaque Shabir Yusufali (as Administrator of the Estate of Late Shabir Yusufali)**, Civil Application No. 455 of 2019 (unreported) held that: -

"What amounts to good cause is yet to be definedit depends on the circumstances of each case. The discretion under Rule 10 of the Rules has to be exercised according to the rules of reason and justice....."

Therefore, the term "good cause" has not been defined, the same depend on the facts of each case but the applicant has to put material upon which the court can act in exercising its discretion to extend the time.

A case in point is **Alliance Insurance Corporation Ltd vs. Arusha Art Ltd**, Civil Application No. 33 of 2015 (unreported). The Court of Appeal of Tanzania stated that: -

"Extension of time is a matter for discretion of the Court and that the applicant must put material before the Court which will persuade it to exercise its discretion in favour of an extension of time".

Guidelines for extension of time were well spelt in the leading case cited by the counsel for Applicant, Mr. Kimweri, the case of **Lyamuya Construction Company Limited vs. Board of Registered of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported) [2011] TZCA 04 (03 October, 2011). In that case, the conditions to be fulfilled in application for extension of time were stipulated as being: -

- 1. Applicant must account for all period of delay.*
- 2. The delay should not be inordinate.*
- 3. Diligence on the part of the Applicant.*

Moreover, illegality on the record or the impugned decision was also held to be a ground for extension of time as was held in the case of the **Principal Secretary Ministry of Defence and National Service vs.**

Devram Valambia, [1992] TLR 382 where it was held that illegality is a ground of extending the time.

Another ground for extension of time is legal technicality as propounded by the Court of Appeal of Tanzania in the famous case of **Fortunatus Masha vs. William Shija, and Another [1997]** TLR 154 that prosecution of an incompetent matter filed in a court of law in time and in good faith without negligence constituted good cause for extension of time. The same principle was clearer restated by the Court of Appeal in **Emmanuel Rurihafi and Another vs. Jonas Mrema**, Civil Appeal No. 314 of 2019 at page 9 as follows: -

*"It is common ground that, the struck-out appeal was filed within time. The delay arising from prosecution of the said appeal was, therefore not actual. It was a mere technical delay. As held in **Bank M (Tanzania) Limited vs. Enock Mwakyusa**, Civil Application No. 520/18 of 2017, a prosecution of an incompetent appeal when made in good faith and without negligence, ipso facto constitutes sufficient cause for extension of time."*

See also, **Bharya Engineering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (unreported).

Therefore, while it is true that the Applicant retained the right to refile and could not be barred by the principle of *functus officio*, that did not give him automatic extension of time. I say so because, in extension of time, the Applicant must demonstrate good cause as explained above, and must do so in a formal application as the instant one, been granted leave may itself constitute one of the reasons for extension of time.

In this matter, the Applicant has proved through the three unopposed affidavits supporting his application that he filed his first application for leave well in time on 30/8/2023 challenging a decision made on 01/03/2023, which was withdrawn with leave to refile on 04/04/2024. He can be said to have prosecuted an incompetent matter, in good faith and which constitute technical delay.

In the result, I concur with the applicant's unopposed submission that the cause of delay in this matter is technical. Moreover, I am satisfied that the Applicant exercised due diligence in filing the instant application.

Given the reasons above, this Court finds it expedient to grant the application by extending the time requested by the applicant to file an application to file leave to apply for judicial review within 30 days from the

date of this order. No order as to costs regard being to the nature of the application.

It is so ordered.

DATED at DODOMA this 3rd day of July, 2024



A handwritten signature in blue ink, appearing to read "F. K. Manyanda".

F. K. MANYANDA

JUDGE

Delivered at Dodoma in the presence of the counsel for both parties by virtual court this 3rd day of July, 2024. Right of appeal explained to the parties



A handwritten signature in blue ink, appearing to read "F. K. Manyanda".

F. K. MANYANDA

JUDGE