

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

MISC. APPLICATION NO. 41 OF 2020

BETWEEN

GEORGE TIMOTHY MWAIKUSA.....APPLICANT

AND

NATIONAL MICROFINANCE BANK PLC.....RESPONDENT

RULING

Date of Last Order: 15/04/2021

Date of Ruling: 11/06/2021

A. E. MWIPOPO, J.

This is an application for extension of time to appeal out of time to the Court of Appeal of Tanzania against the Judgment and Decree of this Court dated 19th September, 2019 in the Revision No. 510 of 2018. George Timothy Mwaikusa, the Applicant herein, prays for the order of the Court to grant leave for him to appeal to the Court of Appeal of Tanzania out of time against the respective Judgment and Decree of this Court

In order to understand what incited the filing of this application, a brief background of the dispute will suffice. The Applicant was terminated from employment for misconduct by his employer namely National Microfinance Bank PLC, the Respondent herein, on 6th October, 2016. Aggrieved, he

referred a dispute to the Commission for Mediation and Arbitration at Morogoro which decided in his favour. This time it was the Respondent who was aggrieved and he filed in this Court Revision Application No. 510 of 2018. The Court delivered its judgment on 19th September, 2019 in favour of the Respondent. The Applicant was not satisfied with the Judgment and Decree of the Court and allegedly he filled notice of appeal immediately. He also wrote a letter requesting to be furnished with certified copies of Judgment, decree and proceedings. The requested documents were furnished to him on 24th September, 2019. Thereafter, the Applicant filed the present application for extension of time to appeal to the Court of Appeal out time.

In this application both parties were represented. The Applicant was represented by Mr. Georges Ambrose Shayo, Advocate, whereas the Respondent was represented by Mr. Sabas Shayo, Advocate. By consent of the parties, the Court ordered the hearing to proceed by way of written submissions.

The Applicant's Counsel submitted two grounds for the application, the first one being that there is illegality in the Judgment of the High Court and the second ground is that the delay was caused by sickness and other family issues that were out of his control. The respective illegalities are that the

reason for termination was not valid and the procedure for termination was unfair for the reason that the Chairperson of disciplinary Committee was not impartial. Also, the witness in the disciplinary hearing was the person who wrote the termination letter.

On the ground of sickness and other family issues, the Applicant submitted that he lodged notice of appeal on 2nd October, 2019 which is within 30 days provided by rule 83(1) and (2) of the Court of Appeal Rules. But he failed to lodge the memorandum of appeal within 60 days due to the facts that his wife fell seriously ill which demanded for the Applicant to be close to her until she passed away on 5th November, 2019. Thereafter he attended and completed her burial services. He also fell ill on 26th January, 2020 where he was treated by traditional medicine.

Further, the Applicant submitted that unavailability of the CMA proceedings was another reason for further delay in filing the memorandum of appeal within time. He averred that he requested for the CMA proceedings through a letter dated 7th January, 2020 to the Registrar of the High Court, Labour division who turned down the request vide a letter dated 24th January, 2020.

In his reply, the Respondent submitted that the Applicant did not adduce any sufficient reason to warrant the Court to grant the orders sought because there is no proof for sickness or admission for the Applicant and his late wife. The Applicant was served with the copy of the judgment, decree and proceedings on 24th September, 2019 and lodged notice of intention to appeal on 2nd October, 2019 while he averred that he got family problems soon after the judgment was delivered. But, he failed to pursue the appeal. The Applicant has shown lack of diligence in pursuing the matter.

On the issue of illegality the Respondent's Counsel submitted that the alleged ground for illegality are grounds of appeal. The alleged illegality are not in the face of records and the Applicant is arguing that the Court failed to determine the fairness of reason and procedure for termination. The Counsel submitted further that the Applicant failed to account for each day of the delay.

In rejoinder, the Applicant retaliated his submission in chief and emphasized that he has accounted for the each day delayed.

From the submissions, the issue for determination is whether the Applicant have provided sufficient reasons for the Court to grant him

extension of time to appeal to the Court of Appeal out of the time prescribed by the law.

As a general principle, it is a discretion of the Court to grant an application for extension of time upon a good cause shown, [See. **Tanga Cement Company V. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, (Unreported); and **Praygod Mbaga V. Government of Kenya Criminal Investigation Department and Another**, Civil Reference No 4 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported)]. It is settled that where extension of time is sought, the Applicant will be granted, upon demonstrating sufficient cause for the delay.

The word reasonable cause or good cause has been interpreted in several decisions of the Court to be a relative one dependent upon party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion [see. **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd**, Civil Application No. 13 of 2010, Court of Appeal of Tanzania, (Unreported)]. The good cause must be determined by reference to all the circumstances of each particular case. The sufficient cause sought depends on deliberation of various factors such as the nature of actions taken by the applicant immediately before or after becoming aware that the

delay is imminent to occur. The Court of Appeal observed in **Dar Es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), that:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly. The absence of any explanation for delay lack of diligence on the part of the applicant."

The Court of Appeal had similar position in the case of **Tanga Cement Company V. Jumanne D. Masangwa and Another**, (Supra), where it held that:

".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."

In the present case, the judgment of the High Court was delivered on 19th September, 2019 and the copies of the judgment, decree and proceedings were supplied to the Applicant on 24th September, 2019. The Applicant alleged to have filed the notice of appeal on 2nd October, 2019 which is within thirty days from the date of the decision of the High Court which the Applicant is desired to appeal as provided by rule 83(2) of the Court of Appeal

Rules. The Applicant was supposed to lodge his memorandum of appeal within 60 days from the date of lodging the notice of appeal according to rule 90 (1) of the Court of Appeal Rules. However, the Applicant did not lodge the memorandum of appeal within time and he filed the present application for extension of time to lodge an appeal on 17th February, 2020 which means that he delayed to file the memorandum of appeal which institute the appeal in the Court of Appeal for almost 67 days from 1st December, 2019 which is the last day for filing the memorandum of Appeal.

The Applicant submitted that the delay in lodging the appeal within sixty days from the date of filing the notice of appeal was for the reason of taking care of his ill wife until she passed away on 5th November, 2019, attending and completing her burial services, unavailability of the CMA proceedings and his sickness. The evidence available such as certificate of death, burial permit and deceased identification form from Muhimbili National Hospital which all of them were dated 5th November, 2019 prove that the Applicant's Wife passed away on 5th November, 2019 for liver cancer. In paragraph eight of his affidavit, the Applicant stated that he traveled to Kyela for burial ceremony and associated traditional rituals and he came back on 20th December, 2019. Unfortunately, there is no evidence to prove that he came back on 20th December, 2019 as he alleged. Despite

of the omission, I know that people have different way of mourning to their loved ones and as a result I take it that the Applicant returned from Kyela on 20th December, 2019.

From 20th December, 2019 when he alleged to come back from kyela, the evidence available is silent up to 7th January, 2020 when the Applicant requested for certificate of delay to the Registrar of the High Court, Labour Division. In the respective letter which is attached to the Applicant's affidavit, the Applicant informed the Registrar that he has already been supplied with copies of proceedings of the High Court as well as the copy of CMA proceedings. On 24th January, 2020 the Deputy Registrar of the High Court, Labour Division did write to the Applicant informing him that his request to be supplied with certificate of delay was rejected. The Applicant asserts in paragraph 10 of the affidavit that from 26th January, 2020 when he alleged to recover from sickness to 5th February, 2020 he fell sick and he was treated at Kibiti Hospital where he did not get relief and turned to local medicine where he recovered. But, there is no receipts or documents from Kibiti Hospital to prove that he was treated there. Thus, the Applicant did not provide the explanation of the delay for 18 days from 20th December, 2019 to 7th January, 2020. Also, the Applicant did not provide explanation for the

delay for 12 days from 5th February, 2020 to 17th February, 2020 when he filed the present application.

It is settled that in the application for extension of time the Applicant is required to account for every day of delay. The Applicant is supposed to account for each day delayed as it was held in the case of **Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another, Civil Application No. 278/15 of 2016, the Court of Appeal of Tanzania, (unreported)**. This position was emphasized by the Court of Appeal in a numerous decisions. In **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, Court of Appeal, (unreported), the Court held that:

"the delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

In the present case the Applicant did not account for the each day delayed but he provided general explanation regarding to the respective delay that he was taking care of his late wife burial service and rituals, he was sick and he was making follow up of the CMA proceedings. However, he did not explain the delay for 18 days from 20th December, 2019 to 7th

January, 2020 and the delay for 12 days from 5th February, 2020 to 17th February, 2020 when he filed the present application.

The Applicant submitted that there is point of illegalities in the respective High Court decision. I agree that the point of illegalities is sufficient ground for extension of time. In **VIP Engineering and Marketing Limited and Two Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No.6, 7 and 8 of 2006, Court of Appeal of Tanzania, (unreported) it was held that, I quote:-

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay."

The same issue was discussed in the case of **TanESCO V. Mufungo Leonard Majura and 15 Others**, Civil Application No 94 of 2016, Court of Appeal of Tanzania, (Unreported), where it was stated that:

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned .. suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court."

However, the respective illegality has to be sufficient in content and apparent on the face of record as it was held in **Stephen B.K. Mhauka V.**

The District Executive Director Morogoro District Council and two Others, Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported). The question of illegality does not need to be discovered by a long drawn argument or process as it was held in the case **Ngao Godwin Losero V. Julius Mwarabu, (Supra)** and **Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania, (Supra).**

In applying the above mentioned principles to the application under consideration, the Applicant's alleged illegalities are that the reason for termination was not valid and the procedure for termination was unfair for the reason that the Chairperson of disciplinary Committee and the witness were not impartial. The Applicant illegalities is in respect of Court's holding that there was a fairness in the reason and procedure of termination. I'm of the same position with the Respondent that the alleged illegalities does not qualify to be illegality which is sufficient in content and apparent on the face of record. The respective points of illegality are normal grounds of appeal which are subject to long drawn argument or process. The Applicant is challenging the reasoning and the decision of the Court which found that the reason and procedure for termination was fair. The alleged illegality in the

trial court decision is not apparent on the face of it. Thus, it is not a good cause for the Court to grant the extension of time. In the event, I find that the Applicants have failed to demonstrate a good cause for the Court to extend time to file appeal in the Court of Appeal out of time.

Therefore, the application is dismissed for want of merits. Each party to the suit to take care of his own cost of the suit.



A. E. MWIPOPO
JUDGE
11/06/2021