

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**  
**MISCELLANEOUS APPLICATION NO. 50 OF 2020**  
**BETWEEN**

**SADIKI FRANK MATERU.....APPLICANT**

**VERSUS**

**THE BOARD OF TRUSTEES**

**OF MSD (MEDICAL STORE DEPARTMENT).....RESPONDENT**

**RULING**

*Date of Last Order: 25/06/2021*

*Date of Ruling: 06/07/2021*

**A. Msafiri, J.**

This Application is made under Rule 24 (1) (2) (a) (b) (c) (d) (f), 24 (3) (a) (b) (c) and Rule 24 (1) (b), Rule 56 (1) of the Labour Court Rules G.N. 107/2007, Section 51 of the Labour Institution Act No. 7/2004 and Section 11 (1) of the Appellant Jurisdiction Act Cap 114 of R.E 2002.

The prayer before this Honorable Court is for the extension of time for the applicant to lodge his Notice of Intention to appeal to the Court of Appeal of Tanzania against the Ruling of this Court in Miscellaneous Labour Application No. 186 of 2019 by Hon. Wambura,J which was delivered on 13<sup>th</sup> December 2019.

This application is supported by an affidavit of Sadiki Frank Materu who is the applicant, the affidavit of Walter Josia Shayo who is an advocate from MM Advocates who are representing the applicant in this matter and the affidavit of Rebecca Stephano, a legal trainee from MM Advocates.

Opposing the application, the respondent filed a counter affidavit sworn by Yohana Marco, A State Attorney duly assigned to handle and defend the respondent in this matter.

At the hearing the applicant was represented by Mr. Leonard Masatu, Advocate, while Ms. Selina Kapange, State Attorney was for the respondent.

In his submission, the applicant's counsel prayed to adopt the affidavit the 3 affidavits in support of the application. He submitted that, the application for extension of time for doing of any act authorized by the Rules is of exercise in judicial discretion as it was stated in the case of **Mwita S/O Muhere and Ibrahim Muhere vs. R** (2005) TLR 107, in which it was held that judicial discretion is the exercise of a judgment by a Judge or of a Court based on what is fair under the circumstances and guided by the rules and principles of laws.

The counsel for applicant stated that, the Court has to demonstrate however briefly how the discretion is to be exercised to reach the decision it

takes. On the same note, the case laws such as the **Principal Secretary of Defence and National Service vs. Devram Valambhia**, (1992) TLR 387, establishes that before the Court exercise its discretion, it must have sufficient material before it counts for the delay, the applicant must diligence in prosecuting the intended action and true such as the illegality of the impugned decision.

As deponed in the affidavit of Sadick Materu particularly paragraph 17,18,19 and 20, on the same note with the affidavit of Walter Joshua Shayo, paragraph 3,4, 5 and 6 on the same note with the affidavit of Rebecca Stephano as paragraph 3,4, and 5; is to the effect that the Misc. Application No. 186 of 2019 its ruling was delivered on 13<sup>th</sup> December 2019, dismissing the applicant's application for extension of time on the ground that he failed to adduce sufficient reasons to enable Court to exercise its discretionary powers.

The counsel submitted further that, after being aggrieved with the said Ruling, on 19<sup>th</sup> December 2019, the applicant wrote a letter requesting for copies of proceedings, Ruling and Drawn Order of Misc. Application No. 186 of 2019 and Notice of Intention to Appeal was prepared. Unfortunately, only a copy of a letter for requesting for the copies of ruling, proceedings and order was filed on 20<sup>th</sup> December 2019. That, it was discovered on 31<sup>st</sup>

January 2020 as deponed by Walter Josiah Shayo at paragraph 5 of his affidavit and one of Rebecca Stephano at paragraph 4 and 5, that Notice of Appeal was not filed along the said requesting letter.

He submitted that, the applicant is accounting for delay from 31<sup>st</sup> January 2020 to 26<sup>th</sup> February 2020 when this application was filed in Court, it is about 26 days. As a principal of law, the applicant has to account for each day of the delay. From 31<sup>st</sup> to 13<sup>th</sup> February 2020, which is about 10 days, those days was used by the counsel for applicant to look for instruction from the applicant and also to prepare papers with intention to lodge the current Miscellaneous Application. From 13<sup>th</sup> February to 20<sup>th</sup> February 2020, about 7 days, the days were used to lodge the paper in the Judiciary account for admission process.

From 20<sup>th</sup> to 26<sup>th</sup> February, about 6 days, was used to lodge, file the papers and deliver the hard copies to the Court Registry after being admitted. He pointed that, the applicant has counted for the period of delay and that the delay was not inordinate, and that the applicant has shown diligence in the action he intends to take.

The counsel for the applicant stated further that, it is a settled law that, a claim of illegality or irregularity of the challenged decision constitute

sufficient reason for extension of time. And the alleged illegality can be challenged by the Court even though there is no other reasons. This was well settled in the case of **Principal Secretary National Defence vs. Valambhia** (supra), and **Kalinga & Co. Advocate vs. NBC Ltd** (2006) TLR at 235.

As it is deponed in the affidavit of Sadiki Frank Materu at paragraph 21 and 22, the Ruling in Miscellaneous Application 186 of 2019 was application for extension of time to file Revision out of time against the Ruling of the CMA dated 9<sup>th</sup> July 2018. Following the decision of Wambura, J. in the Revision No. 462 of 2018 which was struck out without an order to refile a proper application, the applicant has to file the Application for extension of time No. 186/2019. It was an error on the face of record to determine Misc. Application No. 186/2019 as if it was application for Revision, while the said application was one of extension of time to file a Revision out of time.

The counsel asserted that, the Ruling in Misc. Application No. 186 of 2019 was determined on merits without giving opportunities to the parties to address the issues on delay for the applicant to file the dispute before CMA. He referred this court on page 6, paragraph 1 of the Ruling in Misc. Application No. 186 of 2019 where the Hon. Judge allegedly went to analyse the merit of the application for Revision.

He argued further that, the reasons for the applicant to delay to file the application at the CMA could only be addressed after determination of application for extension of the time before the court and the Revision be heard on merit. That means parties were not given opportunity to address the issue of delay at the CMA which was raised suo moto by the trial Judge. It means that parties were denied their right to be heard and this cause fundamental miscarriage of justice.

The counsel referred this court to the cases where the parties were denied the right to be heard and those were cases of **Fabian Muniraha vs. Rukaya Muniraha** (1996) TLR 150 and **EX. 3565/5GT Sylivester S. Nyanda vs. Inspector General of Police & another** (2016) TLSLR 401. In conclusion, he prayed for this court to grant the application for extension of time to lodge Notice of Appeal to the Court of Appeal.

In response the respondent's counsel prayed to adopt the contents of counter affidavit by Yohana Marco, State Attorney, to form part of his submission. She submitted that, it is not disputable that this Court has power to grant extension of time to file any application out of time, however the said powers has to be exercised when the applicant has adduced material facts which will enable the Court to grant such extension. This was

elaborated in case of **Kalinga & Co. Advocates vs. NBC Ltd** (supra) at page 235, as was cited by counsel for the applicant.

The counsel for respondent stated that however, the application which is before this Court does not contain material facts which the Court can extend the time. She referred this court to paragraph 19 and 20 of the applicant affidavit, the one of Sadiki Materu where the applicant stated that on 19<sup>th</sup> December 2019, he only prepared and lodged a letter requesting for a copy of proceedings, ruling and drawn order. He then came to realize on 31<sup>st</sup> January 2020 that the Notice of Appeal was not filed, surprisingly, this application was filed in this Court on 26<sup>th</sup> February 2020, so the said reasons are mere after thoughts because among the first process of appealing to the Court of Appeal is to file Notice of Intention to Appeal.

It cannot be argued that the letter requesting for copies of proceedings, Ruling and Drawn order was timely filed as stated by applicant under paragraph 19 of the said affidavit. The said letter was not even copied to the respondent as required by the law hence the applicant cannot rely on the said letter for this Court to grant him the extension of time.

She pointed that, the applicant has also a duty to account for the delay, because the period of delay between 13<sup>th</sup> December 2019 when the Court

dismissed the Application No. 189 of 2019 to 25<sup>th</sup> February 2020 when this Application was lodged is 73 days. Rule 83 (2) of Court of Appeal Rules Cap 141 R.E. 2002, set the limit for the party seeking to lodge the Notice of Appeal to the Court of Appeal; that the party should lodge the said notice within 30 days from the date of decision. And the current application was filed in this Court on 26<sup>th</sup> February 2020, which means the 30 days within which the applicant could lodge Notice of appeal was already expired on 13<sup>th</sup> January 2020. The counsel maintained that it is a principle of law that the applicant had to count for the delay even for a single day.

This was explained in the case of **PrayGod Mbagwa vs. the Court of Kenya**, Criminal Investigation Department, & Attorney General of Tanzania, Civil Reference No. 04 of 2019, at page 14. The Counsel for the respondent also responded on the issue raised at paragraph 20 of the affidavit of the applicant that when the applicant lawyers resumed work from their annual leave, on 31<sup>st</sup> January 2020, they discovered that the notice of appeal was not filed. She stated vehemently that this was not sufficient reason for this court to extend time since there was no dates to show exactly when the Lawyers started their annual leave and when they resumed work, so, this shows that the delay was caused by negligence.



She stated further that, disclosing the dates was important since it will help the Court to know when the period of delay started to run. The law states clear that, negligence on part of the counsel does not constitute sufficient reasons to extend time. This has been stated in the case of **A.H. Muhimbira & 2 others vs. John K. Mwanguku**, Civil Application No. MBY 13of 2005 (unreported) at page 8.

In regarding the affidavit of Walter Josiah Shayo at paragraph 5, he stated to report after annual vacation but he did not explain when the vacation started and when he reported back to work. So, she said that, the applicant failed to account on days of delay, acted in negligence, thus there is no sufficient cause advanced by the applicant to warrant this Court to exercise its discretion to extend time.

Submitting on point of legality raised by the counsel for the applicant, counsel for the respondent stated that, in paragraph 21 of the applicant's affidavit of Sadiki Materu, he stated that the decision sought to be appealed against is problematic but did not disclose the said problem in his affidavit. So in the current application, the applicant has failed to disclose the kind of problem or illegality in order to be challenged by way of appeal.

She concluded her submissions that there is no sufficient reasons advanced by the applicant that warrants this Court to grant the application of extension of time and prayed that this application lacks merit and therefore should be dismissed.

In rejoinder, the applicant's counsel reiterated his submissions in chief. He further stated the three affidavits on the side of the applicant, contains all relevant facts which the Court can use to grant the extension of time. On the issue of negligence of the Advocates for the applicant, which was raised by counsel for the respondent, he stated that there was no part of negligence which was done by the said Advocates. That they prepared the necessary documents on time and handled them to one Rebecca Stefano, who was a legal Trainee who was instructed to file the necessary documents but unfortunately she misplaced the envelope containing the documents and it was later discovered that only letters of requesting for proceedings, Ruling and Drawn Order was filed. So there is no any negligence for the Applicant. About the letter of the requesting for copies of Rulings not being served to the respondents, the counsel maintained that the letter was properly served to the respondent around December 2020.

He conclusively submitted that the Ruling from which the appeal is sought is problematic and it contains illegality which is meritorious because the said Ruling on Misc. Application 186 of 2019 was application for an extension of time but the Court went further to determine the merit of the case from CMA without giving an opportunity for the parties to be heard on the issue of delay.

He prayed that the extension of time be granted for applicant to lodge his Notice of intention to appeal to the Court of Appeal against the Ruling of this Court in Miscellaneous Labour Application No. 186 of 2019.

Having considered the parties submissions, this case records and the applicable laws, the issue for determination before this court "***is whether the applicant had adduced sufficient reasons for the delay.***"

For the court to exercise its discretionary power of extending time, sufficient reasons for the delay must be adduced. This position is clearly prescribed under Rule 56 (1) of the Labour Court Rules, GN No. 106 of 2007, which provides:-

*"The court may, extend or abridge any period prescribed by these Rules on application and good cause shown, unless the Court is precluded from doing so by any written law."*

In exercising such a discretion, court also has to consider some other circumstances of the particular case including time of the said delay, legal issues involved and diligence on the part of the applicant.

There is thread of authorities which have elaborated on what amounts to good cause, for instance in the case of **Attorney General Vs. Tanzania Ports Authority & another**, Civil Application No. 87 of 2016 which stated:-

*"Good cause includes whether the application has been brought promptly, in absence of any invalid explanation for the delay and negligence on the part of the applicant."*

*[Emphasis added]*

In the matter at hand, the applicant's counsel submitted that the applicant acted diligently to pursue on the intended application. In the case of **Zaidi Baraka & 2 Others vs. Exim Bank (T) Limited**, Miscellaneous Commercial Cause No. 300 of 2015 (High Court Commercial Division), it was held that going by wording of section 11(1) of the Appellate Jurisdiction Act, it is crystal that the section confers discretion to the Court to grant an extension of time. However, such discretion must be judiciously exercised by

considering all the circumstances of the case, and if the applicant had acted prudently and without delay in lodging the application.

This legal position was emphasized in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, Arusha Registry where the Court of Appeal laid down that, for the Court to exercise its discretionary powers; a) the applicant must account for a period of delay, b) delay should not be inordinate, c) the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take, d) if the Court feels that, there are other reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.

Having observed the principle set in the case law which goes hand in hand with Rule 56 of G.N. 106 of 2007, I went on to look at the records in the Court along with submission by the learned counsels. Before analyzing the reasons which were meted out by the applicant, it is important to give a brief account of the background of this matter.

On 20<sup>th</sup> February 2009, the applicant was employed as Quality Assurance Manager of the respondent on a 3 years renewable contract. On 4<sup>th</sup> October 2012, the applicant was suspended from employment. On 30<sup>th</sup>

December 2014, the applicant was served with a termination letter. The applicant made several attempts asking his employer to revise that decision but there was no response.

Being aggrieved by the termination, the applicant referred the matter to Commission for Mediation and Arbitration (CMA) he also filed an application for condonation. After the hearing, the matter was dismissed on the ground that the reasons given for unheard condonation lacked merit. Being aggrieved by the decision, the applicant referred the matter to the High Court vide Revision No. 9 of 2016 praying for revision and setting aside of the CMA decision. That the Revision was heard on merit and on 20<sup>th</sup> October 2017, the Court ordered that the matter be remitted back to CMA and be determined according to the law.

Back to the CMA, the arbitrator ordered for the determination of the Applicant for condonation. After hearing, on 9<sup>th</sup> July 2018 the Ruling was delivered dismissing the application with the referral on the ground that the applicant had no sufficient reasons for delay. Being aggrieved by that Ruling, the applicant filed another Application for Revision No. 462 of 2018 before the High Court.

This application was struck out by the Court on 7<sup>th</sup> March 2019 on the ground of defective verification clause in the applicant affidavit. The ruling

did not make any order of granting leave to re-file the application. Aggrieved, the applicant filed a Miscellaneous Labour Application No. 186 of 2019 seeking extension of time upon which to file a fresh Labour Revision application against the Award of the CMA dated 9<sup>th</sup> July 2018.

After hearing, the Court dismissed that application for extension of time on the ground that the applicant had failed to adduce sufficient reasons to enable the Court to exercise its discretionary powers to extend time. This ruling was delivered on 13<sup>th</sup> December 2019 and it is the subject of this matter before me where the applicant is seeking for extension of time within which he may lodge his Notice of intention to appeal to the Court of Appeal.

Despite the long history of the applicants seeking for justice in Court corridors, I will confine myself on whether he has adduced sufficient reasons to enable this Court to exercise the discretionary powers and grant the prayers. Submitting before this Court, the counsel for the applicant stated that, being aggrieved by the Ruling in Application No. 186 of 2019, on 19<sup>th</sup> December 2019, the applicant wrote a letter requesting for copies of proceedings, Ruling and Drawn Order of the impugned Ruling, and Notice of Intention to Appeal was prepared.

Unfortunately, it was discovered on 31<sup>st</sup> January 2020 that Notice of Appeal was not filed along with the said letter. It was stated on the affidavits

of **Walter Josia Shayo** and **Rebecca Stephano** that after preparing the necessary documents for filing that is a Notice of Appeal and a letter applying for certified copies of proceedings, Ruling and Drawn order, the same was handled over to **Rebecca Stephano**, a legal Trainee for the purposes of filing the same in High Court, Labour Division.

After that, the Advocates went to annual leave and when they came back, they discovered that, only a requesting letter was filed but a Notice of Appeal was not, because it was still in the envelope given to Rebecca Stephano. In such circumstances I am inclined to agree with the respondent counsel that this is not sufficient reason before this Court as it shows that there was negligence on the part of the applicant's advocates.

In the case of **Lyamuya Construction Company Ltd (supra)**, one of the circumstances which was laid down for the Court to check in exercising its judicial powers in granting extension of time was that the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take. And in the case of **Jane Chabruma vs. NMB PLC** Miscellaneous Application No. 12 of 2017, Muroke, J, cited with the approval the case of **Alison Xerox Sila vs. Tanzania Harbours Authority**, Reference No. 4 of 1998, Court of Appeal (unreported) where it was held that;



*'Lapses, inaction or negligence on the part of the applicant seeking extension of time, does not constitute sufficient cause to warrant extension of time...'*

Thus, applying the above legal guidelines, I agree with the respondent's counsel that the incidents narrated in the affidavits of Walter Josiah and Rebecca Stephano shows purely negligence on their part and it has been said timely and again that negligence on part of the counsel does not constitute sufficient reasons to extend time, as it was stated in the case of **William Shija vs. Fortunatus Masha** (1997) TLR 213 (CAT) and again in the case of **A.H Muhimbira & 2 others vs. John K. Mwanguku** (supra) which was referred by the respondent's counsel.

Furthermore, despite stating that the discovery that the notice of appeal was not filed was made on 31<sup>st</sup> January, 2020, the narration in the affidavits does not reveal when the advocates returned back from their annual holiday and as correctly observed by the counsel for the respondent, this could help the Court to determine how they were accountable for the delay. On this analysis, I find that the reason adduced in the applicant affidavit and submission by the applicant's counsel on failure to file the Notice of appeal on time, is not sufficient cause for this Court to extend time as it shows negligence on their part.

On the point of being accountable for the delay, the applicant's counsel rightly submitted that, as a principle of law, the applicant has to account for each day of delay. He stated that the applicant has counted for the period of delay and that delay was inordinate. In response, the counsel for respondent counter argued that the applicant did not count for his delay. She referred this Court to the case of **PrayGod Mbaga vs. the Government of Kenya & Others** (supra) where it was stated that the applicant had to count for the delay even for a single day. She maintained that the applicant's advocates did not reveal when did they came back from their annual leave and later discovered on 31<sup>st</sup> January 2020 that the notice of appeal was filed.

She contended that the current application was filed in this Court on 26<sup>th</sup> February 2020, which means the 30 days within which the applicant could lodge Notice of appeal was already expired on 13<sup>th</sup> January 2020. I agree with the counsel for respondent that it was important for the advocates to account on the time they started their annual leave and when they came back from their annual leave.

Another reason for the delay which was raised by the applicant's counsel is a claim of illegality. He pointed that it is a settled law that a claim of illegality or irregularity of the challenged decision can constitute sufficient

reason for extension of time, and it can be challenged by the Court even though there is no other reasons.

The counsel submitted that the challenged Ruling in Miscellaneous Application No. 186 of 2019 was determined on merits without giving opportunities to the parties to address the issues on delay for the applicant to file the dispute before CMA. This is apparent on page 6, paragraph 1 of the said Ruling, he stated further that at page 6, the Hon. Judge went to analyse the merit of the application for Revision and that parties were not given opportunity to address the issue of delay at the CMA which was raised suo moto by the trial Judge, and that means parties were denied their right to be heard.

On their response, the respondent counsel denied that there is issue of illegality. She stated that the applicant in his affidavit stated that the decision challenged is problematic but did not disclose the said problem so, the illegality was not disclosed.

Basing on the raised point of illegality, I went through the challenged Ruling especially at page 6. As per the record, when the matter came for hearing of Miscellaneous Application No. 186 of 2019, the applicant was praying for the following order;

- i) That, the Honourable Court be pleased to extend time for the applicant to file the application for Revision before Honourable Court against the ruling of the CMA dated 9<sup>th</sup> July, 2018 delivered by Hon. Ngalika E. Mediator,.....

The application was disposed by way of written submissions by leave of Court. The submission of the parties from page 2, 3 and 4 of Ruling seems to base on the merit of the case instead of on the application for extension of time. This was rightly observed by the trial Judge at page 6 of the ruling when she stated that; the applicant had put lot of efforts in challenging the termination which was not important at that application. The Hon. Judge stated further that, the applicant failed to adduce good cause for the delay from 5<sup>th</sup> January, 2015 when he received the letter of termination dated 30<sup>th</sup> December 2015 up to May 2015 when he decided to file an application at CMA. He has only accounted for the delay after the matter was dismissed at CMA. The Hon. Judge finding no sufficient reasons has been adduced by the applicant, she proceeded to dismiss the application.

I tried to find the point of illegality which was raised by the applicant counsel regarding the challenged ruling particularly on page 6, but to no avail. I have observed that, actually it was the trial Judge who discovered that the parties failed to address the Court on the proper prayers which was

filed before her, that is the extension of time for the applicant to file for Revision against the ruling of CMA instead, the parties submitted the facts basing on the merit of the case as if it was the application for Revision.

So, I find that the submissions by applicant's counsel before this Court that the Ruling from which appeal is sought is problematic is untrue and has no basis at all. Furthermore, his submission that in that Ruling the Court went further to determine the merit of the case from CMA without giving an opportunity for the parties to be heard, also has no truth because it has already observed, it was after submissions of the parties when the Court noted that the submissions went to address the merit of the case from CMA instead of an application for extension of time.

Basing on the above analysis, I have failed to see any problem or illegality of the Ruling of Miscellaneous Application No. 186 of 2019. The applicant's affidavits and the submissions of his counsel has failed to convince this Court that there is existence of a point of law of sufficient importance as to warrant the extension of time even without considering other factors of delay in this matter.

In such circumstances, this Court finds that there is no sufficient cause shown for this Court to extend time to file notice of appeal, and accordingly application for extension of time is dismissed for lack of sufficient cause.

It is so ordered.



A. Msafiri

**JUDGE**

06/07/2021

Labour Court TZ.