

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 332 OF 2020

BETWEEN

THE NATIONAL HOUSING CORPORATION APPLICANT

AND

JANETH DAVID MASHINGIA RESPONDENT

RULING

Date of last order 28/10/2021

Date of Ruling: 11/11/2021

B.E.K Mganga, J

This application has been brought by the applicant seeking extension of time within which to file a notice of Appeal so that she can appeal to the court of Appeal against the judgment of this court (Wambura, J, as she then was) delivered on 5th June 2020 in Revision No. 238 of 2018. The Notice of application is supported by an affidavit of Omary Makalamangi, the Human Resources Manager of the applicant. In the said affidavit, the deponent deposed that the respondent was an employee of the applicant but her employment was terminated on 5th March 2012 and that on 5th June 2020 this court delivered a judgment in her favour. Omary Makalamangi, averred further that on 22nd June 2020, Trustmark Attorneys

who was representing the applicant in court, wrote a letter informing the applicant of the said judgment. He deponed further applicant was supplied with a copy of the judgment on 10th July 2020. It was further deponed that there are serious illegalities that need to be considered by the Court of Appeal. As to the cause of the delay, it was deponed that applicant was not timely informed by her lawyer.

In opposing the application, Mr. Eliacha Aron Ndowo, counsel for the respondent, filed a counter affidavit stating that in the letter written by Trustmark Attorneys, applicant was advised the outcome of the judgment timely so that she can lodge a notice of appeal within time, but she did not, until she became time barred.

When the application was called for hearing, Ms. Ndigwako Mwakajwanga, Senior State Attorney appeared and argued on behalf of the applicant while Mr. Jonathan Kessy, Advocate appeared and argued on behalf of the respondent.

Advancing the argument for the application to be granted, Senior State Attorney submitted that, before both the High Court and CMA, applicant was being represented by Crest Attorneys based in Dar es salaam. She submitted that, applicant became aware of the Judgment of this court by a letter dated 19th June 2020 from her private lawyer informing them what transpired in court. That the said advocate promised

to avail a copy of Judgement to the applicant but the same was received in the applicant's office on 2nd July 2020 which was 3 days after expiry of 30 days of filing notice of Appeal. Senior State Attorney went on that the said Judgment reached the Legal department on 10th July 2020, but all documents relating to the file were in possession of the said external lawyer.

Senior State Attorney submitted further that; this application was filed on 3rd August 2020 while out of time for 27 days. She attributed the cause of the delay to applicant's advocate who retained the file without returning it as he was demanding to be paid. Senior State Attorney submitted that there are illegalities on the judgment and cited a Court of Appeal decision in the case of ***Hamis Mohamed V. Mtumwa Moshi, Civil Application No. 407/17 of 2019*** (unreported) that illegality is sufficient cause of extension of time. Senior State Attorney submitted that in the Judgment the Judge held that the management was a judge on his own case and that this is the illegality applicant is complaining against. Senior State Attorney concluded her submission by citing the case of ***Mobulama Gold Corporation Limited V. Minister of Energy and another (1998) TLR 425*** that it is inappropriate to deny a party extension of time unless it prejudices the opponent and prayed the application be granted.

In countering submissions by the Senior State Attorney, Mr. Kessy, counsel for the Respondent, submitted that on extension of time there are two major requirements namely, (i) a party should have sufficient reasons of which applicant had none. Counsel submitted that the main reason advanced by applicant is that she depended on service of external lawyer who gave them late information relating to delivery of the Judgement in question. Counsel for respondent went on that annexure NHC II to the affidavit in support of the application shows that applicant was advised at paragraph 2 that if she is aggrieved, should issue a notice of appeal within 30 days or file an application for revision within time. Counsel for the respondent went on that annexure NHC II is dated 19th June 2020, but this application was filed on 5th August 2021. Counsel for the respondent insisted that the Judgement was delivered on 5th June 2020 and that applicant was aware. Counsel for respondent argued that applicant was supposed to make follow up of her case in court and not to leave it to the said external lawyer and that failure of making follow up is an indication that applicant was negligent.

(ii) applicant is required to account for each day of delay. Counsel for the respondent submitted that applicant had a duty to account for delay of 27 days of which she has failed to. Counsel cited the case of ***Sebastian***

Ndaula V. Grace Rwamafa Civil Application No. 4 of 2014, CAT

(Unreported) to that effect.

On the alleged illegality, counsel for respondent argued that, for illegality to be a good ground for extension of time it has to be apparent on face of the record of which it is not the case in the application at hand. Counsel for respondent concluded by praying the application be dismissed.

In rejoinder, Senior State Attorney conceded that applicant has failed to account for each day of delay for the 27 days but insisted her prayer of granting the application.

In the case of ***Janeth Mashingia v. National Housing Corporation, Miscellaneous Application No. 366 of 2020***, in application that was filed by the herein respondent against the herein applicant, I found as I hereby do, that it is undisputed by the parties that the judgement, the subject of this ruling was delivered on 5th June 2020 in presence of counsel for the applicant. It is equally to say that the judgment was delivered in presence of the applicant because counsel for the applicant was present. In ***Mashingia's case***, supra, applicant tried to throw blame to her advocate the same way the herein applicant has done. I dismissed the application holding that:-

"...the said advocate was engaged by applicant on her own volition as this court did not participate in their discussion as such, the court is ignorance of their terms and

modes of communication. Therefore, this court is less concerned with all allegations against the said advocate whether they are true or not. It is unfortunate that there is no affidavit of the said advocate attached to the affidavit in support of the application. In absence of that affidavit, whatever alleged against the said advocate cannot be swallowed undigested otherwise he will be condemned unheard. At any rate, it was open to the applicant to choose an advocate who she can pair with and have a close communication”.

I should add in the application at hand that, this court knows nothing in relation to arrangement made between applicant and her counsel in relation to payment of fees etc; as such, that cannot and will not be a ground of extension of time. Because that will open the door of flood gate for all sort of time barred application based on the same ground. The Court of Appeal had an advantage to discuss grounds advanced by the applicant in extension of time on alleged conducts of an advocate in the case of ***Mussa. S. Mussa and another v. Anna peter Mkomea, Civil Application No. 188/17 of 2019*** and held that:-

*“...It is also a considered view of the Court that the attempt by the applicants to throw the blame on their former advocate cannot be accepted and it does not relieve them from being held responsible for whatever snag their wish to challenge the High Court decision is encountering... **the changing of hands of a case between different advocates does not constitute a good case for extension of time...**”*

Therefore, the grounds advanced based on claim against what was allegedly done by applicant’s advocate is hereby dismissed.

Applicant advanced illegality as a ground for extension of time. There is a litany of authority that for illegality to be a ground for extension of time, the same has to be apparent on the face of record. For example in the case of ***Hamis Mohamed v. Mtumwa Moshi, Civil Application No. 407 of 2009*** (unreported) it was held by the Court of Appeal that:-

"It follows then that an allegation of illegality by itself suffices for an extension of time. However, such an allegation of illegality "must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process..."

The alleged illegality in the judgment of this court, the subject of this application, that the management was a judge on his own case, in my view, does not fall in that category.

In the upshot, I find that there is no good grounds for extension of time. The application is therefore hereby dismissed for want of merit.



B.E.K. Mganga

JUDGE

28/10/2021