IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 421 OF 2022

(Arising from the Judgment and Order of the Court issued on 27/2/2019 by Hon. S.A.N. Wambura, J (as she then was) in Revision No. 507 of 2017)

ALLY FORODHA & 1673 OTHERS ..... APPLICANTS

VERSUS

THE PERMANENT SECRETARY, MINISTRY OF FINANCE ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... ..... 2ND RESPONDENT

RULING

Date of last Order: 22/11/2022
Date of Ruling: 12/12/2022

B. E. K. Mganga, J.

This is an application for extension of time within which applicants can file the Notice of Appeal out of time and leave to appeal to the Court of Appeal against the judgment and order of this Court (Hon. S.A.N. Wambura, J. as she then was) in Revision No. 507 of 2017 delivered on 27th February 2019.

Facts of this application briefly are that, in 1995, Ally Forodha and 1673 others who were employees of Urafiki Textile Mill Limited, were given compulsory leave. On 21st March 1997, applicants were retrenched after

the Government of Tanzania had issued Notice No. 82 of 1997 on dissolution of Urafiki Textile Mill Limited. It is said that, in 2013, applicants wrote a letter to the Labour Commissioner requesting for the Labour dispute to be forwarded before the Commissioner for Mediation and Arbitration henceforth CMA. On 14th May 2013, the Labour Commissioner through a letter with reference No. HA.10/78/01/87 informed applicants that the dispute could not be forwarded to CMA because applicants had never complained to the Labour Minister or the Labour Commissioner. Applicants were therefore, advised to file the dispute at CMA by themselves.

It is further said that, in 2014, applicants filed at CMA Labour dispute No. CMA/DSM/ILA/R.594/14 but the same was struck out on 11th December 2014 by Hon. Mwidunda, Arbitrator, instructing applicants to go to the Labour Commissioner for further directives. On a dramatical change, on 30th March 2015 and 3rd July 2015, the Labour Commissioner wrote two different letters to CMA referring the dispute between the applicants and the respondents to CMA contrary to what was stated in the aforementioned letter. Based on the aforementioned two letters, applicants filed Labour dispute No. CMA/DSM/MIS/67/16/385 at CMA claiming to be paid withheld

terminal benefits and subsistence expenses. At CMA, applicants complained that respondents computed their terminal benefits and salary arrears based on 1995 salary while on 1st July 1996 the government raised minimum salary of employees. Having heard evidence and submissions of the parties, on 22nd September 2017, Hon. Alfred Massay, Arbitrator, awarded applicants to be paid TZS 50,567,452,326/=.

Respondents were aggrieved with the said award, as a result, they filed Revision No. 507 of 2017 before this court. On 27th February 2019, Hon. S.A.N. Wambura, J(as she then was) having heard submissions from both sides, delivered the judgment holding that CMA proceedings were conducted in contravention of Rule 24(1) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007. The court found further that, contravention of the said Rule vitiated the whole CMA proceedings, consequently, quashed and set aside the award of TZS 50,567,452,326/=. Therefore, the court remitted back the file to CMA for the applicants to follow proper procedures in prosecuting the dispute if they were still interested to pursue the matter.

In compliance with the aforementioned court judgment, applicants went back to CMA where they filed Labour dispute No.

CMA/DSM/ILA/245/2019 by filing a referral Form (CMA F1) and an application for condonation (CMA F2). On 24th June 2022, Hon. Massawe Y, Arbitrator, struck out the said dispute holding *inter-alia* that, applicants were supposed to make follow up of their file that was returned by the Labour court so that the dispute can be heard using laws that were applicable at the time the dispute arose and not to file a fresh dispute by filing both CMA F1 and CMA F2 that were not applicable.

It was deponed in this application by Ally Forodha on behalf of the applicants that after the aforementioned Ruling striking out their dispute, applicants engaged their former advocate one Godwin Muganyizi who advised them that the court in its judgment dated 27th February 2019 in Revision No. 507 of 2017 erred to return the filed to CMA on ground that there was no consent of appointment of Ally Forodha to represent 1673 other applicants while the said consent for representation was dully filed. The deponent attached to his affidavit the purported consent for representation and deponed further that the said advocate informed them that after delivery of the aforementioned judgment of this court, applicants were supposed to appeal before the Court of Appeal and that based on that advised, they have filed this application for extension of time within

which to file the Notice of Appeal out of time and leave to appeal to the Court of Appeal.

I should point out from the outset that though respondents were duly served, did not file the Notice of Opposition or counter affidavit to oppose the application.

When the application was called on for hearing, applicants enjoyed the service of Mr. Godwin Muganyizi, learned Advocate from Decorum Attorneys, while respondents enjoyed the service of Ms. Rose Kashamba, State Attorney.

Imploring the court to grant the application, Mr. Muganyizi learned counsel for the applicants, submitted that the main reason for this application is that there is illegality on the face of record on the judgment of the Court. Counsel for the applicants submitted further that, in the judgment of the Court, it was held that applicants were supposed to file representative suit as it is in the Civil Procedure Code [Cap. 33 R.E. 2019]. He went on that, on 3rd July 2014, applicants appointed Ally Forodha to be their representative and signed consent of appointment namely annexture F5 to the affidavit in support of the application. He went on that; applicants filed the said consent (annexture F5) and filed it at CMA. He cited the case

of ***Security Group (T) Ltd v. Samson Yakobo & 10 Others***, Civil Appeal No. 76 of 2016 CAT (unreported) to support his submissions that having signed and filed the said consent appointing Ally Forodha at CMA, applicants were not supposed to file a representative suit. Counsel for the applicants submitted further that, having signed the said consent of representation on 03rd July 2014 appointing Ally Forodha to be their representative, they filed the dispute at CMA in 2015 claiming terminal benefit arrears because they were terminated in 1995.

Mr. Muganyizi submitted further that, on 17th June 2022, after more than two years, applicants became aware that they followed the law. He added that, applicants became aware that the application was properly filed and that there was illegality after they had engaged another Advocate because the previous one was not aware of that fact. He went on that, by filing the dispute at CMA in compliance of the court's judgment, applicants were trading in a wrong jurisdiction and added that in computation of time, a period spent in a wrong jurisdiction should be disregarded. He cited Section 21 of the Law of Limitation Act[Cap. 89 R.E. 2019] to support his submission on the prayer to disregard the period applicants spent at CMA.

Mr. Muganyizi, advocate concluded his submissions by praying that the application be allowed.

On the other hand, Ms. Kashamba , State Attorney simply submitted that respondents do not object the application to be granted.

At the time of composing the Ruling, I took a liberty to go through the court record in Revision No. 507 of 2017 in which this application arose and carefully read the purported consent of representation filed in the said revision and attached as annexture F5 in the affidavit of Ally Forodha in support of this application and find that there is no name of the applicant in serial No. 1653. With that observation, I summoned the parties to address the court on competence of this application.

On 2nd December 2022, only Mr. Muganyizi, learned advocate for the applicants entered appearance and filed proof of service to the respondents. Since respondents were notified but willfully decided not to enter appearance, I proceeded to hear counsel for the applicants on the issue raised suo moto.

Responding to the issue raised by the court, Mr. Muganyizi conceded that **there is no name of the applicant in serial No. 1653** in the purported consent for representation, who consented for Ally Forodha to

file the dispute at CMA as reflected in the record of the court in Revision No. 507 of 2017 or this application on behalf of 1673 others. He conceded further that, **work No. 130586** in the purported consent filed in court as consent for Ally Forodha to represent 1673 others appearing in the record of the court in Revision No. 507 of 2017 **shows the name of O.B. Ngoi** but the purported consent filed in this application for the said Ally Forodha **shows the name of George J. Mhando**. With all these, counsel for the applicants, candidly, maintained that the application be allowed.

I should start with the well settled principle that in an application for extension of time like the one at hand, courts are called to exercise discretion. It has been held several times by both this court and the Court of Appeal that discretion must be exercised judiciously. See the case of ***Mza RTC Trading Company Limited vs Export Trading Company Limited***, Civil Application No.12 of 2015 [2016] TZCA 12 wherein the Court of Appeal held:-

> *"An application for extension of time for the doing of any act authorized …is on exercise in judicial discretion… judicial discretion is the exercise of judgment by a judge or court* ***based on what is fair, under the circumstances and guided by the rules and principles of law*** *…"*

It is my view that in application for extension of time and in exercise of its discretion, the court (i) must strive to be fair to both sides, (ii) must consider carefully circumstances surrounding the application in other words, must critically consider the facts relating to the application and (iii) must consider rules and principles of the law. In the application at hand, I will therefore be guided by fairness, facts or circumstances and well-established principles of law.

I have pointed out hereinabove that respondents did not file either a notice of opposition or the counter affidavit and further that during hearing, Ms. Kashamba learned State Attorney submitted that she had no objection to the application to be granted. It is my view that, acquiesce of the parties is not a guarantee for the court to accept submissions made thereof and grant the application. In my view, the court may, upon scrutiny of evidence and the law, form a different opinion apart from the one formed by the parties. It is my further opinion that, the court is not bound to accept each and every submission submitted by the parties even when it feels that the parties misconstrued the law or did not apply the facts to the law properly.

On circumstance or facts of the application, it is undisputed that the impugned judgment of the court was delivered on 27th February 2019, but applicants filed this application on 27th October 2022 after almost three years and eight months. The only reason that was advanced by the applicants is illegality of the impugned judgment. For all fairness to the parties, I will therefore be guided by a well-established principle of law that illegality is one of the grounds for extension of time. It should be remembered that not every alleged illegality can warrant extension of time. See the case of ***Omary Ally Nyamalege, Administrator of the Estate of the Late Seleman Ally Nyamalege & Others vs Mwanza Engineering Works***, Civil Application No. 94 of 2017 [2018] TZCA 230, ***Lyamuya Construction Co. Ltd vs Board of Registered Trustee of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 [2011] TZCA 4. For illegality to be a ground for extension of time, it must be apparent on the face of record. There is a litany of case laws as to what is apparent error on the face of record. Some of those case are the case of ***African Marble Company Limited (AMC) vs Tanzania Saruji Corporation (TSC),*** Civil Application No. 8 of 2005 [2005] TZCA 87 and ***Chandrakant Joshubhai Patel v. Republic,*** [2004] TLR 218,

Abdi Adam Chakuu vs Republic, Criminal Application No. 2 of 2012 [2017] TZCA 138, ***Ansaar Muslim Youth Center vs Ilela Village Council & Another,*** Civil Application No. 310 of 2021 [2022] TZCA 615 to mention but a few. In ***Chandrakant's case*** (supra), the Court of Appeal held that:-

> "*An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions...It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established…"*

The alleged illegality in the application at hand is that the court held that there was no consent for Ally Forodha to represent other 1673 applicants in both the dispute that was filed at CMA and in Revision No. 507 of 2017 before this court. It is my view that, in the application at hand, the alleged illegality is not apparent on the face of record. I am of that view because, as correctly conceded by Mr. Muganyizi, learned counsel for the applicants, there is no name of the applicant in serial No. 1653 who consented for the said Ally Forodha to represent other 1673 applicants. In my view, in absence of the name of that applicant, it cannot be said that consent was given by all 1673 applicants. It can therefore be argued that

consent was incomplete. Again, in absence of the name of the said person in this application, applicants are praying the court to grant an open cheque to whoever may come in future and claim that s/he was the applicant. From where I am standing, I cannot give that room to the whole world. Court judgment, ruling or orders, must be certain as to who are affected by it whether, positively or negatively. The court cannot issue an open order to unidentified persons. The Court of Appeal was alive to that position in the case of ***Hsu Chin Tai & 36 Others v. The Republic***, Criminal Appeal No. 345 of 2009 (unreported) wherein the Notice of Appeal was titled "**TAKE NOTICE that HSU CHIN TAI & 36 OTHERS appeals to the Court of Appeal of Tanzania…"**. The Court of Appeal after discussions, held as follows:-

> *"A question we ask ourselves, is this a joint notice of appeal? With respect, we think not.* ***It is only one appellant Hsu Chin who has been identified by name. The rest are referred to as "OTHERS", but who are they? How do we know that the "36 others" were desirous of appealing to this Court? With respect, thus is not a joint notice of appeal. The names of all appellants should have been mentioned in the notice of appeal"***

Consequently, the Court of Appeal found the notice of appeal incompetent and struck it out. It is my view therefore that the application is incompetent for lack of the name of the applicant in serial No. 1653 in

the list of the applicants who are alleged to have consented for Ally Forodha to file the dispute at CMA and this application.

With all fairness to the parties, I have just made a random quick comparison of names of the applicants with their work Number in the purported consent in the court record in Revision No.507 of 2017 and this application and find that some names and their work number are not tallying. For example, in the purported consent for representation filed in this application shows that work number for Aminani Mohamed, F. Shabani, Jadi Shengwila, Jifanzie Shabani, John Joseph, Lucas Hungira, Rashid Majid, Rajabu Kigola, Stephen Shauri and Simon Asifu is 270423, 1401551, 17021252, 170623, 270375, 170179, 330195, 46003, 23096 and 2630929 respectively. But work number of the same persons in the purported consent in Revision No. 507 of 2017 is 2702423, 1401519, 1702152, 170738, 170623, 1701729, 330193, 46009, 23098 and 260929 respectively. Surprisingly, both purported consent for representation shows that were executed on the same date namely, on 3rd July 2014 and were filed by learned advocate from Decorum Attorneys.

I have noted further that, some applicants were identified by a single name and initials. For example, **A.O. Nguzo** with work No. 4419, **A.S.**

Nguzo with work No. 310414, **A. Bebwa** with work No. 340156 to mention just a few. In my view, the identity of the applicant with just a single name with initials cannot be established with certainty. In my view, granting this application with uncertainty names of some applicants is an invitation for other persons who were not part to claim in future that the application was given in their favour. From what I have held hereinabove and guided by ***Hsu Chin Tai's case*** (supra), that should be avoided whenever it is possible.

Again, while most of the names are typed, some few are handwritten. A good example of handwritten names is John Kapama with work number 270375, Salum Khalfani with work No. 34019, Masudi Hassan Simba with PF. 519, Fatuma Ndwandwala with work No. 2401312 to mention just a few. It is unfortunately that there is no evidence on record in Revision No. 507 of 2017 or in the affidavit of Ally Forodha in support of this application explaining why those names were handwritten and by who. More so, in the application at hand, it was conceded by Mr. Muganyizi, learned counsel for the applicants that **work No. 130586** in the document filed in court as consent for Ally Forodha to represent 1673 others appearing in the record of the court in Revision No. 507 of 2017 shows the name of **O.B. Ngoi**

but the document filed in this application as consent for the said Ally Forodha shows the name of **George J. Mhando**. This adds up to uncertainty as who the applicants are. In fact, in granting this application, **George J. Mhando** will have a room to be represented before the Court of Appeal using **work No. 130586** while the same work number purportedly belong to **O.B. Ngoi** according to the consent for representative filed by the applicants in Revision No. 507 of 2017.

It was submitted by Mr. Muganyizi, counsel for the applicants that on 17th June 2022, after more than two years, applicants became aware that they followed the law after engaging a new advocate. With due respect to counsel for the applicants. Submissions that applicants became aware on 17th June 2022 that they followed the law is not supported by affidavit of Ally Forodha, as such, it is submission from the bar, which is not evidence. See the case of ***Rosemary Stella Chambejairo vs David Kitundu Jairo***, Civil Reference 6 of 2018) [2021] TZCA 442, ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others***, Civil Appeal No. 147 of 2006, ***A. Nkini & Associates Limited vs National Housing Corporation,*** Civil Appeal No.72 of 2015) [2021] TZCA 564, ***Shadrack Balinago vs Fikir***

Mohamed @ Hamza & Others, Civil Application No. 25 of 2019 [2021] TZCA 45 to mention but a few.

Submissions that applicants became aware on 17th June 2022 after being informed by the current advocate suggest two things. One; that applicants are ignorance of law and two; that counsel who was representing the applicants was either incompetent or negligence. With due respect to counsel for the applicants, ignorance of law has never been a ground for extension of time. See the case of ***Farida F. Mbarak & Another vs Domina Kagaruki & Others,*** Civil Reference No.14 of 2019 [2021] TZCA 600, ***Vedastus Raphael vs Mwanza City Council & Others,*** (Civil Application 594 of 2021) [2021] TZCA 696 and ***Wambele Mtumwa Shahame vs Mohamed Hamis,*** Civil Reference No. 8 of 2016 [2018] TZCA 39. Again, negligence or incompetency of an advocate, cannot be a ground for extension of time. In the case of ***Lim Han Yung & Another vs Lucy Treseas Kristensen,*** Civil Appeal No. 219 of 2019 [2022] TZCA 400 the Court of Appeal discussed whether, negligence of an advocate is a good ground for extension of time and held as follows:-

> ***"It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to***

good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates*…"*

If I may be permitted to add, the reason and logic behind that position is that, the said advocate was chosen by the applicants themselves. Therefore, if the said advocate was negligent or incompetent, the court or the other part, is less concerned because that is poor choice of the applicants themselves and nobody forced them to select the said advocate. More so, extension of time based on incompetency of an advocate chosen by the applicants, will be an invitation for whoever a case is decided against her/his favour, to come up with a similar application, that s/he lost his case because the advocate was incompetent and that, s/he depended on expertism of the advocate believing that the latter is competent. In my view, that will open a flood gate for swarms of bees and Tsetse flies to go through altogether, but at the end, the intended harvest of honey in the name of justice, will be adulterated by swarms of Tsetse flies. That will make litigations to be endless. That cannot be accepted. The least I can say is that, failure to get one case correct or getting it correct, is not a conclusive proof of incompetence or competence. After all, all of us are striving to be competent because there is no one who is competent 100 %. Sometimes we get it correct and sometimes not. I am therefore

not convinced by the argument that applicants were late because the previous advocate did not advise them properly and that they only became aware that the impugned judgment of the court has illegality after consulting the current advocate who advised them properly. I therefore dismiss that ground.

Applicants were supposed to account for each day of the delay from the 27th of February 2019, the date the impugned judgment was delivered to the date of filing this application namely on 27th October 2022. There is nothing in the affidavit of Ally Forodha accounting for that delay. It was submitted by Mr. Muganyizi that applicants became aware on 17th June 2022 that they complied with the law but there is no supportive evidence. Even if it can be accepted that applicants became aware on 17th June 2022 that they complied with the law, yet, they have not accounted for the delay from that date to 27th October 2022.The well-established principle of law in an application for extension of time is that an applicant must show good reason for the delay and must account for each day of the delay. There is a plethora of case laws that in an application for extension of time, an applicant is required to account for each day of the delay. See the case of **Sebastian Ndaula vs. Grace Lwamafa,** Civil Application No. 4 of 2014,

CAT (unreported), ***Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another***, Civil Application No. 278/15 of 2016, CAT, (unreported), ***Finca T. Limited & Another vs Boniface Mwalukisa***, Civil Application No. 589 of 2018) [2019] TZCA 56, ***Zawadi Msemakweli vs. NMB PLC,*** Civil Application No. 221/18/2018 CAT (unreported), ***Elias Kahimba Tibendalana vs. Inspector General of Police & Attorney General,*** Civil Application No. 388/01 of 2020 CAT (unreported) and ***Bushiri Hassan vs. Latifa Lukio Mashayo,*** Civil Application No. 3 of 2007, CAT (unreported) to mention but a few. In ***Mashayo's case*** (supra), the Court of Appeal held *inter-alia* 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."*

Mr. Muganyizi learned counsel for the applicants cited the provisions of section 21 of the Law of Limitation Act[Cap. 89 R.E. 2019] to implore the court to grant the application on ground that they were prosecuting the matter in a wrong jurisdiction namely before CMA. With due respect to counsel for the applicants. Facts and circumstances obtained in this application does not show that applicants were diligent for the said application to be invoked. The said provision requires an applicant to be

diligent for it to be invoked. It is clear in my mind that, applicants formed an opinion of appealing to the Court of Appeal after the ruling of Hon. Massawe Y, arbitrator, on 24th June 2022 striking out Labour dispute No. CMA/DSM/ILA/245/2019 they filed at CMA on ground that applicants, filed both CMA F1 and CMA F2 that were not applicable at the time the dispute arose in 1997. It is my view that, applicants filed this application as an afterthought.

For the foregoing, though respondents acquiesced to the prayer by the applicants, I hereby dismiss this application for want merit.

Dated in Dar es Salaam on this 12th December 2022.

B. E. K. Mganga
JUDGE

Ruling delivered on this 12th December 2022 in chambers in the presence of Silvanus Chingota, Advocate for the Applicants and Rose Kashamba, State Attorney for the Respondents.

B. E. K. Mganga
JUDGE