

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 478 OF 2021

(Arising from the Judgment and Decree of this Court in Revision No. 860 of 2019 Hon. S. Maghimbi, J delivered on 3rd September 2021)

EDWIN KASANGAAPPLICANT

VERSUS

MIC TANZANIA LIMITEDRESPONDENT

RULING

K. T. R. MTEULE, J.

5th September 2022 & 21st September 2022

This is an application for extension of time to allow the applicant to lodge notice of appeal against the judgement of this Court (Hon. Maghimbi J), dated 3rd September 2021. The Applicant further prays for extension of time to lodge letters for requesting certified copies of records, proceedings, judgment and decree for purposes of supporting the intended appeal in the Court of Appeal.

In the affidavit in support of this application, the applicant tried to account for the days he delayed in lodging the appeal and further advanced reason of illegality as ground to justify grant of extension of time.

According to the affidavit, the said judgment was delivered in the absence of the parties and in time when the applicant was on regular travel. It is further deponed that the copies of judgment and decree and part of the proceedings were supplied to the applicant on 2nd November 2021 while the impugned judgment was issued on 3 September 2021. It is further deponed in the affidavit that when the applicant came back from his travel on 16th November 2021, he could not get a proper briefing from his counsel. It was only after consultation with his counsel when he discovered problems with the judgment hence intention to appeal and instructed K &M Advocates to institute the appeal when it was already barred by limitation of time since he ought to have issued notice of appeal withing 30 days from the date of judgment. The applicant sworn further that the counsel used that time from 17th November to 30th November to prepare the documents for this application. In addition, the applicant claimed illegality in the impugned judgment which calls for determination in the Court of Appeal.

In her counter affidavit deponed by Ms. Josephine Makanza, the applicant disputed all material facts of the applicant's affidavit. The deponent of the counter affidavit accused the applicant with negligence

in attending court on the date of delivery of the judgment and in making follow-up with the registry even after the delivery of the judgment.

She blamed the applicant for failure to use alternative means of communication to consult his counsel on the outcome of the High Court judgment so as to timely lodge notice of appeal if any. She questioned the relevance of the applicant's travel in failure to lodge the application timely.

The respondent refuted existence of any illegality in the impugned judgment. He challenged the applicant for having not identified such illegalities.

The deponent of the counter affidavit questioned the use of ten days from 17th when he was instructed to 26th November 2021 when this application was lodged for the applicant's counsel to prepare this application. In his view, since the counsel had the judgement since 2 November 2021, he had ample time to prepare and lodge the appeal.

The Application was heard by written submissions. The applicant was represented by Advocate Tazan Keneth Mwaiteleke from K & M Advocates while the respondent was represented by Advocate Nuhu Mkumbukwa from Nex Laws Advocates. Parties travelled extensively to

expound the jurisprudence guiding extension of time each trying to oppose the adverse argument. I will point out few of the argument in this judgment although a deep consideration will be given to each point of submission from each party. I appreciate each party for the industrious work done to argue for and against the application.

In the applicant's submission, Mr. Mwaiteleke averred that the delay was caused by reasons beyond the applicant's control and that, it is not inordinate, and it does not prejudice the respondent.

Citing the case of **National Housing Corporation versus Tahera Somji, Civil Application No. 344/17 of 2018** he enumerated grounds for grant of extension of time thus:-

- a. The applicant must account for all the period of delay*
- b. The delay should not be inordinate*
- c. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- d. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged*

Making further reference to the case of **Mashaka Juma Shabani and 42 Others versus The Attorney General, Civil Application No. 279/01 of 2016, Court of Appeal of Tanzania Dar es Salaam**, he added another list to wit: -

- a. The length of delay*
- b. The reason for delay*
- c. The applicant must account for the delay of each day*
- d. Degree of prejudice that the respondent may suffer if the application is granted*
- e. The delay is not inordinate*
- f. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution the action that he intends to take*
- g. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

According to the applicant, the judgement having been delivered in his absence, and having failed to timely do perusal of the case file alleging the record to be with the trial judge, and having been on journey during the time, then he has sufficient reason to justify the delay. In view of Mr. Mwaiteleke, the delay was not inordinate.

Mr. Mwaiteleke further alleged illegality in the impugned judgement. He mentioned the points of laws intended to be challenged to include the court consideration of an issue of jurisdiction of the CMA without affording parties right to be heard, legality of delivery of judgement without a notice to the parties, reliance of an affidavit of a person who could not swear on behalf of the company, compliance with section 40 (1) of the **Employment and Labour Relations Act, Cap 366 R.E 2019**, failure to assign reasons for taking over of the case by another judge and legality of granting damages for unfair labour practices. In the applicant's view, all these points of laws justify illegality of the impugned judgment.

In all the points submitted, the applicant's counsel cited a number of authorities which will as well be considered in this ruling.

In reply, Ms. Mkumbukwa claimed that the time delayed is inordinate when counted to 89 days from the date of delivery of judgment and 58 days from the deadline on which the notice of appeal ought to have been filed. The respondent is in one with the applicant on the list of the factors to be taken into account in determining whether there are sufficient causes to extend time. Ms. Mkumbukwa added the cases which established these factors, including **Lyamuya Construction Co.**

Ltd vs Board of Registered of Young Women's Christian Association of Tanzania (Civil Application 2 of 2010) [2011] TZCA 4 (03 October 2011). In all these cases, the factors listed by the applicant are all covered.

The respondent challenged the legality asserted by the applicant basing on argument that illegality must be apparent on the face of the record. In his view, the applicant has not shown an illegality which is apparent on the face of the record.

Having gone through the parties' submissions, I am inclined to consider one issue as to **whether the applicant has established sufficient grounds to warrant grant of extension of time to lodge notice of appeal and applying for copies of judgment, decree and proceedings of the matter.**

To answer the above issue, I will summarize the applicant's reasons which have been advanced to justify extension of time. The reasons are based on, **firstly**, delivery of judgement in his absence which made him unable to timely trace what transpired in the judgement especially when he alleged the record to have been with the trial judge after the delivery of the judgment. **Secondly**, the applicant's travels which kept him

away from possibility of making follow-up, **thirdly**, the late supply of judgment and decree and **lastly** the illegality of the impugned decision. According to the Respondent, all these do not constitute sufficient grounds to extend time.

Illegality of the impugned decision is among the above reasons given by the applicant to justify his prayer for extension of time. I feel it more conducive and convenient to explore on this issue of illegality before going into the details of other factors. This is because illegality has been one of the causes which automatically qualify extension of time if sufficiently established. Illegality has been constantly considered to be an important factor to allow late appeal from the time of the famous **Valambhia's** case. (See **Principal Secretary, Ministry of Defence; National Service vs Devram Valambhia**, [1992] TZCA, 29). In this case the Hon Justice of Appeal had the following to say:-

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of rule 8 of the Rules for extending time."

Equally in the case of **Lyamuya Construction** supra, one of the factors laid out for consideration in granting extension of time is:-

"If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

On illegality, a more specific holding of the Court of Appeal was in the case of **VIP Engineering and Marketing Limited and 2 Others versus Citibank Tanzania Limited Consolidated Civil References No. 6, 7 and 8 of 2006, (CA)**. For purposes of clarification, I quote the following words: -

"It is therefore settled law that a claim of illegality of the challenged decision constitute sufficient reasons for extension of time under rule, regardless of whether or not a reasonable explanation has been given by the Applicant under the rule to account for the delay."

From the above authority, I have noted the points of law enumerated by the applicant in the affidavit and the submissions. They involve allegation on;- court consideration of issue of jurisdiction of the CMA without affording parties right to be heard, legality of delivery of judgement without a notice to the parties, reliance of an affidavit of a person who could not swear on behalf of the company, compliance with section 40 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019, failure to assign reasons for taking over of the case by another

judge and legality of granting damages for unfair labour practices. All these factors in my view go to the roots of the legality of the impugned judgement. Whether the points constitute merit or not is not within the realm of this Court. It is the task of an appellate court to decide on their merit and this is why extension of time is vital. The essence of this wisdom is to have points of law decided not only for the benefit of the applicant or the appellant alone but also for the benefits of the entire legal fraternity where the right jurisprudence will be laid down by the apex court to guide on appropriate legal position for the disputed grounds of appeal.

I am bound by the position of our Court of Appeal that illegality, if established, constitute a good cause to grant extension of time as per the **Valambhia's case** and the **VIP Engineering case**, both cited supra. It suffices to say that there is a point of law which requires an attention of a higher court for determination. In my view, the point of illegality has been sufficiently established by the applicant to satisfy the court to find reasonable justification of extending time.

In the above circumstances, it is my finding that the applicant has adduced sufficient grounds to warrant grant of the sought extension of time. The main issue is therefore answered affirmatively.

Consequently, this application is granted, and the applicant is allowed to lodge the notice of appeal and apply for copies of judgment and decree out of time in respect of **Revision Application No. 860 of 2019** from this court. The said notice of appeal and letter of application for the copies to be lodged within 7 days from the date of this decision. No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 21st Day of September 2022



KATARINA REVOCATI MTEULE

JUDGE

21/9/2022

