

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

MISCELLANEOUS APPLICATION NO. 08 OF 2023

SAID SOBO & 66 OTHERS APPLICANTS

VERSUS

AL-NAEEM ENTERPRISES LIMITED RESPONDENT

RULING

*Date: 15/02/2023
Date of Ruling: 28/2/2023*

B. E. K. Mganga, J.

Applicants have filed this application seeking the court to extend time within which to file an application for revision with a view challenging an award issued on 29th November 2017 by Hon. Mhanika, J, Arbitrator in labour dispute No. CMA/DSM/ILA/R.161/2016 before the Commission for Mediation and Arbitration (CMA) at Ilala. In the said dispute, applicants were complaining that they were unfairly terminated by the respondent. Having heard evidence of the parties, Hon. Mhanika, J, arbitrator, issued an award in favour of the respondent that applicants were barred by the provisions of section 35 of the Employment and Labour Relations

Act[Cap.366 R.E. 2019] to filing the dispute relating to unfair termination. Having considered the said provision, arbitrator dismissed the dispute filed by the applicants.

Aggrieved with the award, applicants filed Revision application No. 7 of 2018 but counsel for the respondent raised a preliminary objection that Said Sobo, the 1st applicant filed a representative suit without leave of the court. On 2nd April 2019, Peter Mnyanyi, the personal representative of the applicants, conceded to the preliminary objection. Based on that preliminary, this court, (Hon. I.D. Aboud, J) struck out the said Revision application No. 7 of 2018 because applicants did not comply with the provisions of Rule 44(2) and 56(b) both of the Labour Court Rules, GN. No. 106 of 2007. The court *suo moto* granted 14 days leave to the applicant to file a proper application.

In compliance with the aforementioned court order, applicants filed Miscellaneous Application No. 208 of 2019 seeking leave of the court so that Said Sobo and Rashid Husein Lusian can file, appear, and defend their intended revision application on behalf of 65 others. On 20th March 2020, this court(Hon. A.E. Mwipopo, J) granted the application as prayed by the applicants. The said order was issued in the presences of Said Sobo on

behalf of the applicants and Mrs. Genoveva Kato, advocate for the respondent.

On 5th November 2022, Said Sobo, the 1st applicant while before before Geoffrey Clarence Luyanji, Advocate, Notary Public and Commissioner for Oaths, signed the Notice of Application and affirmed his affidavit in support of this application. On 13th January 2023, applicants filed this application in court. In his affidavit in support of the application, Said Sobo deponed *inter-alia* that, after being granted leave by this court in Miscellaneous Application No. 308 of 2019, applicants were made to believe that their personal representative namely Peter Mnyanyi, will file the intended revision but he didn't. That, after noting that no revision application was filed by the said personal representative, they sought advice from Omega Steven Myeya, advocate. Mr. Said Sobo deponed further that, peter Mnyanyi was negligent and that he did not serve them with court orders.

On the other hand, Yusufu Ayub, principal officer of the respondent, filed the counter affidavit opposing the application. In the said counter affidavit, he deponed *inter-alia* that, applicants were negligent because they did not follow up the matter to their personal representative.

When the application was called on for hearing, Omega Myeya and Hilda Msanya, learned Advocates, appeared, and argued for and on behalf of the applicants while Genoveva Kato, Advocate, appeared and argued for and on behalf of the respondent.

It was submitted by Myeya, learned counsel for the applicants that, there is illegality on the award that was issued on 29th November 2019 because only one applicant namely, Said Sobo was heard at CMA out of 67 applicants. In his submissions, counsel conceded that, at CMA, applicants applied for leave to be represented by Said Sobo and that leave was granted. He conceded further that, applicants were not prevented to call witness.

Learned counsel for the applicants submitted further that, in paragraphs 3.10 and 3.11 of the applicants in support of the application, it was deponed that applicants were not properly guided by their Personal Representative hence there was negligence on part of the Personal Representative who did not guide applicants properly. Counsel went on that, at CMA, applicants were represented by Peter Mnyanyi, the personal representative. During submissions counsel for the applicant conceded that the said Peter Mnyanyi was chosen by the applicant on their own will to be

their representative. He further conceded that, incompetence or negligence of an advocate cannot be a ground for extension of time and that, ignorance of the law is not an excuse or a ground for extension of time.

In further attempt to implore the court to grant the application, counsel for the applicants submitted that there is technical delay because initially applicants filed Revision Application No. 7 of 2018 but the same was struck out 02nd April 2019. He went on that, after the said Revision application, applicants filed an application for representative and that on 20th March 2020 the application was granted. Counsel also conceded that on 13th January 2023, applicants filed this application after two years and some months' has elapsed from the date application for representative was granted and further that applicants have not accounted for that delay.

Resisting the application, counsel for the respondent submitted that extension of time is discretion of the Court and that, in order the application to be granted, there must be sufficient reason as to why applicant failed to file the application within time. Counsel for the respondent submitted further that, applicants have stayed for more than

two years from the date they were granted leave to file representative suit without filing the intended revision and no reasons thereof. She added that there is no affidavit of Peter Mnyanyi showing that he was negligent. She went on that, negligence of an advocate or a representative is not a ground for extension of time and cited the case of **Calico Textile Industries V. Pyla Ismail [1983]** TLR 28 to support her submissions.

Counsel for the respondent also submitted that applicants were supposed to account for each day of the delay from the date they were granted leave by the Court. She submitted further that there must be end of litigation because respondent cannot be dragged in Court after every span of years by the applicants without reaching conclusion. She therefore prayed that the application be dismissed for want of merit.

In rejoinder submissions, counsel for the applicants submitted that circumstances of this application warrant the court to grant extension of time.

I have considered evidence of the parties in both the affidavit and the counter affidavit together with submissions made thereto. I am alive that, this being an application for extension of time, I am called to exercise my discretion whether to grant the application or not. I should also point

out at this moment that it is a well settled principle that, discretion should always 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 ..."***

Having considered evidence in both the affidavit in support of the application and the counter affidavit opposing the application and submissions made thereof by the parties, wish, in disposing this application, to start with the issue of illegality raised by counsel for the applicants.

In his submissions, Mr. Myeya, learned counsel submitted that only one witness testified at CMA and that others were denied right to be heard hence illegality. Counsel for the applicants correctly submitted that illegality is a good ground for extension of time. I should point from the outset that, not every illegality raised by an applicant 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, *Magnet Construction Limited vs Bruce Wallace Jones*, Civil Appeal No. 459 of 2020 [2021] TZCA 654, *Franconia Investment Ltd vs Tib Development Bank Ltd*, Civil Application No. 270 of 2020 [2021] TZCA 563 and *Tanzania Harbours Authority v. Mohamed R. Mohamed* [2003]TLR. 76 to mention but a few. 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..."

In the application at hand, there is no illegality whatsoever. As correctly conceded by counsel for the applicants, at CMA, applicants opted to front only one person to testify on their behalf and they were not prevented to call any other witness(es) to testify on their behalf. Since they opted to front one person to testify on their behalf, they cannot be heard at this moment complaining that they were denied right to be heard. To the contrary, they should blame themselves, if any, for their poor choice. It is my view that, applicant have raised this issue as an afterthought.

It was deponed on behalf of the applicants that the delay was due negligence of Peter Mnyanyi, their personal representative and that they were not properly guided by the said personal representative. But it was correctly conceded by counsel for the applicants that incompetence and or

negligence of an advocate or personal representative is not a ground for extension of time. Both this court and the Court of Appeal has several on several occasions held that 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 held *inter-alia*:-

"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..."

This court held in the case of [Ally Forodha & 1673 Others vs The Permanent Secretary Ministry of Finance and Attorney General](#), (Misc. Application 421 of 2022) [2022] TZHCLD 1096 that :-

"...the reason and logic behind that position is that, the said advocate was chosen by the applicants themselves hence, 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... 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... failure to get one case correct or getting it correct, is not a conclusive proof of incompetence or competence..."

I therefore hold that the alleged negligence or incompetence of the personal representative cannot be a ground for extending time to the applicants.

In addition to the foregoing, there is no affidavit of the said Peter Mnyanyi, the personal representative of the applicants. In my view, a conclusion that Peter Mnyanyi was negligent or that he did not properly guide the applicants without affording him right to be heard, will amount to violation of natural justice. I am not prepared to be trapped in that trap. If applicants wanted this court to believe that story, they were supposed also to file the affidavit of Peter Mnyanyi to the effect that he was negligent or incompetent. I am of that view because it has been held several times by both this court and the Court of Appeal that, an affidavit which mentions another person is hearsay unless that other person swears as well. Some of these decisions are [Sabena Technics Dar Limited v. Michael J. Luwunzu](#), Civil Application No. 451/18 of 2020, CAT (unreported), [Franconia Investments Ltd v. TIB Development Bank Ltd](#), Civil

Application No. 270/01 of 2020, ***Benedict Kimwaga v. Principal Secretary Ministry of Health***, Civil Application No. 31 of 200, ***NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd***, Civil Application No. 13 of 2002 (all unreported) to mention but a few. I therefore find all claims relating to negligence and or incompetency of Peter Mnyanyi as reason for the applicants' delay as implausible.

It was submitted by counsel for the applicants that there was technical delay hence good ground for extension of time. With due respect to counsel for the applicants, the alleged technical ground cannot apply in the circumstances of this application. It is undisputed that Revision application No. 7 of 2018 was struck out on 2nd April 2019 for being incompetent and on the same date the court granted 14 days leave to the applicants to file a proper application. It is also undisputed by the parties that applicants filed Miscellaneous Application No. 208 of 2019 seeking leave of the court so that Said Sobo and Rashid Husein Lusian can file, appear and defend the intended revision application on behalf of 65 others. It is further undisputed that on 20th March 2020, this court (Hon. A.E. Mwipopo, J) granted the application as prayed by the applicants. It is

further undisputed that applicants filed this application on 13th January 2023 after lapse of two years and 10 months' from the date leave was granted by this court (Hon. A.E. Mwipopo, J). it is clear from the affidavit in support of the application that the delay for the said period of two years and ten months' was not accounted by the applicants. That period, in my view, is inordinate. There is a litany of case laws that in an application for extension of time applicants must account for each day of the delay and that the delay must not be inordinate. 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."

In the application at hand, applicants have failed to meet the test for the application to be granted. For all said hereinabove, I find that this application is devoid of merit and dismiss it.

Dated in Dar es Salaam on this 28th February 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on this 28th February 2023 in chambers in the presence of Omega Myeya, Advocate for the Applicants and Genoveva Kato, Advocate for the Respondent.



B. E. K. Mganga
JUDGE