

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 462 OF 2022**

**DESKTOP PRODUCTION LTD .....APPLICANT**

**VERSUS**

**HAMISI KONDO MZENGEKA ..... 1<sup>ST</sup> RESPONDENT**

**YUSUPH HUSSEIN MAGETA ..... 2<sup>ND</sup> RESPONDENT**

**DOTO IGNAS SANGA ..... 3<sup>RD</sup> RESPONDENT**

**ASIA MOHAMED IDDI ..... 4<sup>TH</sup> RESPONDENT**

**SULTAN BAKARI MWEGERO ..... 5<sup>TH</sup> RESPONDENT**

**YUSUPH EPHREM MNALI ..... 6<sup>TH</sup> RESPONDENT**

**ZUBEDA ELIAS MWIRU ..... 7<sup>TH</sup> RESPONDENT**

**CALISTER BEATUS KILAVE ..... 8<sup>TH</sup> RESPONDENT**



**ZENA JOSEPH SEBASTIAN ..... 9<sup>TH</sup> RESPONDENT**

**AISHA MOHAMED SAID ..... 10<sup>TH</sup> RESPONDENT**

**RULING**

17<sup>th</sup> – 28<sup>th</sup> April, 2023

**OPIYO, J**

This application is for extension of time to lodge a notice of appeal out of time. The application if granted intend to go against the Judgement and Corrected Decree dated 26<sup>th</sup> September, 2022 in Revision Application No. 216 of 2021.

The application was supported by the applicant’s affidavit sworn by Shafiq Mohamedbaker Abdulrasul (applicant’s director). The application proceeded by way of a written submission. Both parties were represented by Learned Advocates. Mr. Shehzada Walli was for the applicant and Mr. David Andilile for the respondent.

The learned advocate for the applicant submitted that respondents filed for a labour dispute at CMA claiming for a breach of contract and discrimination and the award delivered on 27<sup>th</sup> April, 2021 therein was in favour of the applicant. He continued that respondents were dissatisfied and filed for a revision application to this Court and on 29<sup>th</sup> August, 2022 in



absence of the applicant the judgment was in favour of the respondents by the order of the applicant to compensate them by the total amount of TZS. 87,511,333/=.

He submitted further that the applicant had no prior knowledge as he was not notified of the same either by summons or letter and even after delivering of the judgement the applicant was never notified of the same. He stated further that it is a general principal that an application for a grant of extension of time is judiciously made and also to have a sufficient cause. He supported his point by referring to the case of **Director Ruhonge Enterprises Vs. January Lichinga**, Civil Application No. 1 of 2006, CAT at Dar es Salaam which cited the case of **Tanga Cement Company Ltd Vs. Jumanne D. Masangwa and Amos A. Mwalwada**, Civil Application No. 6 of 2001, CAT. He then stated that for an extension of time to be granted conditions thereto had been laid out in the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT.

On the second point Mr. Walli submitted that on the accounting of each day of delay the applicant has accounted for each day delayed. He stated

that the judgement was delivered in his absence on 29<sup>th</sup> August, 2022 and as the law provides that a notice of appeal should be lodged within 30 days from the date of the decision which would have been on 29<sup>th</sup> September, 2022; the applicant became aware of it on 08<sup>th</sup> November, 2022 when was summoned to appear in the application for execution No. 446 of 2022. He continued that on the search for the one to represent him, he found one Stallion Attorneys on 14<sup>th</sup> November, 2022 and on 17<sup>th</sup> November, 2022 the applicant filled for this application. On his view, the applicant has accounted for each day delayed. To support his point, he referred to the case of **Buhiri Hasani Vs. Latifa Lukiko Mashayo**, Civil Application No. 03 of 2007, CAT which was cited in the case of **Lugwisha Mwinamila (Administrator of the Estates of the Late Mwinamila Shiduku) Vs. Mnada & 2 Others**, Miscellaneous Civil Application No. 96 of 2021, High Court of Tanzania at Mwanza.

On the issue of the delay to be inordinate, he submitted that the applicant's delay was not inordinate as the judgement was delivered in his absence and has account all the days from the day. He stated further that the applicant in showing diligence and not apathy, negligence or sloppiness; he elaborated that the applicant after being aware on 08<sup>th</sup>



November, 2022 of the judgement held on 29<sup>th</sup> August, 2022, he attended court sessions, looked for an advocate and prepared the application. To support his point, he referred to the case of **Royal Insurance Tanzania Limited Vs. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008, CAT which was cited in the case of **The Regional Manager (TRA) Vs. Atia Nassoro**, Miscellaneous Civil Application No. 22 of 2019, High Court of Tanzania at Bukoba to fortify his argument.

On the issue of illegality, Mr. Walli submitted that there is a serious illegality on the face of the record which is also another ground for extension of time as explained in the cases of **The Principal Secretary, Ministry of Defence and National Service v. Devran Valambhia** (1992) TLR 185, **Arunaben Chaggan Minstry v. Naushad Mohamed Hussein and 3 Others**, Civil Application No. 6 of 2016, CAT at Arusha which cited the case of **VIP Engineering and, Marketing Ltd and 2 Others Vs. Citibank Tanzania Ltd**, Consolidated Civil Reference No. 6,7 and 8 of 2006, CAT.

He went on to submit that the decision contravenes section 38 of Employment and Labour Relations Act [CAP. 366 R.E. of 2019]. He



continued that the decision was delivered in absence of the applicant and was neither summoned nor given a letter to notify the applicant. He stated that, it is the duty of the appellate Court to determine the alleged illegality. For substantiation, he referred cases of **Edwin Kasanga Vs. MIC Tanzania Limited**, Miscellaneous Labour Application No. 478 of 2021 and **The Attorney General Vs. Emmanuel Marangakisi (As Attorney of Anastansious Anagnostou) & 3 Others**, Civil Application No. 138 of 2019, CAT at Dar es Salaam.

Mr. Walli submitted further that when this prayer is refused the applicant will suffer greater hardship and will prejudice the rights of the applicant as he has satisfied all the necessary requirements to warrant the extension of time as prayed. Then the applicant prayed for the application be granted.

Disputing the application Mr. Andilile submitted that; the applicant's affidavit is contended with lies and so should not be acted upon. To support it he referred to the case of Glory **Shifwaya Samson Vs. Raphael James Mwinuka**, Civil Application No. 506/17 of 2019. He elaborated that when the Court heard the application it fixed the date of judgement in the presence of the applicant. He continued that when the

party choose not to enter appearance, such party becomes disentitled to future notice and the Court is not bound to communicate the outcome of the judgement. He supported his point by referring to the case of **Thakur Singh Vs. Bhairam**, Lal AIR 1956 Raj 113 and **Ladha Mal Vs. Nadar** AIR 1936 Lah 742, 166.

He submitted further that, the granting of the extension of time is acted judiciously and upon good cause being shown. He stated that the term good cause has been held in the case of **Principal Secretary, Ministry of Defence and National Services V. Devran Valambia (supra)** He submitted that the applicant under section 56(c) of Labour Institution Act [CAP 300 R.E. 2019] and rule 43(1) of the Labour Court Rules, G.N. No. 106 of 2007 appointed advocate Victoria Mgonja and so the respondent served all documents in respect of Revision No. 216 of 2021 to her address as the applicant indicated in the notice as provided under rule 43(3) of G.N. No. 106 of 2007. In his view as much as the said advocate did not withdraw from the representing the applicant and that did not swear through the affidavit that she did not receive the said judgement; it is clear



from the cited provision of law that service of notices and documents relating to proceedings shall be as provided in the notice of representation.

His further contention is that on the judgment date, he met the said advocate and the human resource manager of the applicant outside the Court and they were told about the judgement and so for him the applicant knew on the same date about the judgement.

Furthermore Mr. Andilile stated that on the allegation that why did respondents served the summons to the applicant and not the said advocate (Victoria Mgonja); respondents did so because the said advocate was introduced by notice in the matter of Revision No. 216 of 2021 and not in the execution application of No. 466 of 2022. On his view the applicant failed to account on each day delayed from 29<sup>th</sup> September, 2022. To hold his point, he cited the case of **Charles Richard Kombe Vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019, CAT.

On the issue of illegality, he submitted that for it to be proved has to be on the face of record as indicated in the case of **Principal Secretary, Ministry of Defence and National Services V. Devran Valambia**





(supra). In his view illegality mentioned by the applicant do not meet the qualifications stated in the case mentioned or even in cases of **Lyamuya Construction Company Limited Vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania** (supra), **Charles Richard Kombe Vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019, CAT and **Chunila Dahyabhai Vs. Dharamshi Nanji and Others**, AIR 1969 Guj 213 (1969) GLR 734. He continued that the applicant statement that section 38 of CAP. 366 R.E. 2019 is contravened is an afterthought as it was never pleaded in the affidavit as an illegality. He went further submitting that cases of **Principal Secretary, Ministry of Defence and National Services V. Devran Valambia** (supra), **The Attorney General Vs. Emmanuel Marangakis (As Attorney of Anastansious Anagnostou) & 3 Others** (supra) and **Edwin Kasanga Vs. MIC Tanzania Limited** (supra) are distinguishable to the fact at hand as they were decided by single justice of appeal and a judge of High Court while the case of **Charles Richard Kombe Vs. Kinondoni Municipal Council** (supra) is a recent decided case by the three justices of appeal.



In rejoinder Mr. Walli reiterated what has been submitted in the submission in chief and added that, what has been stated in the affidavit is what the applicant knows. To support his point, he defined the term affidavit by referring to the case of **D.B Sharria & Co. Ltd Vs. Bish Internal RV**, 2002 1 EA 47 (CAT), **Uganda Vs. Commissioner of prison Exparte Matovu** (supra), rule 24(3)(b) and rule 3(1) of order XIX of Civil Procedure Code [CAP 33 R.E. of 2019].

On the issue of Advocate Victoria Mgonja to swear an affidavit, he submitted that the applicant did not know her whereabouts and so was not able to find her. To support his point, he referred the case of **Mzee Mohamed Akiba & 7 Others Vs. Low Shek Kon & 2 Others**, Civil Application No. 481/17 of 2007, CAT at Dar es Salaam.

On the issue of contravening section 38 of CAP. 366 R.E. 2019, he submitted that affidavit is not a pleading that the respondents' submission should be disregarded. He supported his point by referring the case of **Nasreen Hassanali Vs. Agakhan Health Services Tanzania**, Revision Application No. 84 of 2021, High Court of Tanzania at Dar es Salaam. He then prayed for the application to be granted.



Having gone through the submissions of both parties, this Court finds the issue for fortitude is *whether the applicant adduced sufficient reasons for the delay to file notice of appeal?*

In dealing with the disputed issue, Rule 83 (1)(2) of the Court of Appeal Rules GN No. 368 of 2009 which provides;

*“(1) Any person who desires to appeal to the court shall lodge a written notice in duplicate with the registrar of the High Court*

*(2) Every notice shall, subject to the provisions of Rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal”*

From the above cited provision, the law states clear that the one who wishes to appeal against High Court’s decision must file notice for expected appeal within thirty days. Section 11(1) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] also gives power to the High Court to extend time within which to file notice of appeal to the court of appeal. The granting extension of time is not automatic, one has to adduce good cause which caused the delay. The same was held in **Lyamuya’s case** (supra) which gave principles to it to be considered; them be: -



- i. The delay should not be inordinate*
- ii. The applicant should show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*
- iii. 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.*

In this application the applicant stated that he was not informed about the existence of the application for Revision No. 216 of 2021 and also did not know of its judgement as was not served with it. Respondents on the other side stated that, the applicant knew about the application as they appeared in Court through her advocate, one, Victoria Mgonja.

Having gone through the record, I noted that the application for Revision No. 216 of 2021 was filed in this Court on 08<sup>th</sup> June, 2021 whereas the notice of opposition was filed in Court on 09<sup>th</sup> July, 2021. This means one month after the filling of the application for Revision the applicant knew about it and that is why he filled a notice of opposition.



In the said notice of opposition, the applicant appointed Advocate Victoria G. Mgonja to represent him and directed all services to be done through her.

Not only that, but also the records show that in the proceeding on 08<sup>th</sup> February, 2022 Advocate Victoria Mgonja enter appearance in Court, and also on the hearing date (18<sup>th</sup> August, 2022) she was in attendance and even submitted in contest of the application. It is on that date when the the date and time for judgement was set on her presence. Thus, their argument that they were ignorance is baseless.

On the issue of illegality, the Case of **Charles Richard Kombe Vs. Kinondoni Municipal Council** as cited by the respondent gave out factors that constitutes illegality that in the following words: -

*"from the above definitions it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred."*

So, the reasons for extension of time stated by the applicant of illegality (right to be heard) lacks legal leg to stand on. This is because, the



applicant was present throughout the proceedings through his advocate Victoria Mgonja and for that matter, he was provided with the right to be heard sufficiently.

In accounting for each day delayed from the date of the pronouncement of the judgement (29<sup>th</sup> August, 2022) to the day this application was filed (21<sup>st</sup> November, 2022) the applicant accounted days from 8<sup>th</sup> November, 2022 (the day he allegedly became aware of the application for execution) leaving 70 days un accounted for (from 30<sup>th</sup> August, 2022 to 07<sup>th</sup> November, 2022). It is thus, my finding that the applicant failed to account 70 days as the date for judgement was set in the presence of their representative, for that; the applicant knew the date of the judgement and he had all responsibility to make follow up in making sure that he receives his copy for a judgement for his future use.

In such circumstances the Court finds that the applicant slept on his own right as all along the proceedings she knew what was transpiring, as she was well represented by her advocate Victoria Mgonja. For that matter, it is evidenced that the applicant failed to account for days of delay from the date the judgement was pronounced to the day the notice of appeal was

lawfully supposed to be filed. Also, no illegality was seen as the applicant was aware of the Revision application as he appeared and defended his case.

Hence, this application lacks merit, it is hereby dismissed. I order no costs to either party.



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**M. P. OPIYO**

**JUDGE**

**28/04/2023**

