

IN THE HIGH COURT OF TANZANIA

**LABOUR DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS APPLICATION NO. 103 OF 2023

MAGNUS K. LAUREAN APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED RESPONDENT

RULING

*Date of last order: 16/05/2023
Date of Ruling: 24/05/2023*

B. E. K. Mganga, J.

On 18th April 2023 Magnus K. Laurean, the above-mentioned applicant, filed this application seeking extension of time within which to file a Notice of Appeal to appeal to the Court of Appeal against the decision of this court (Hon. S.B. Fimbo, Deputy Registrar) dated 14th April 2022 in Execution No. 507 of 2021. In support of the Notice of application, applicant filed his affidavit he sworn on the 8th of April 2023. In the said affidavit, applicant stated that, on 14th April 2022, Hon. S.B. Fimbo, Deputy Registrar, the executing officer, did struck out execution No. 507 of 2021 in which he was claiming to be paid TZS 161,283,250 as terminal benefits and gave him 21 days to refile another execution application. Based on that order, he filed execution application No. 266 of 2022 but the same was struck out on 4th August 2022 by Hon. E.J. Nyembele, Deputy Registrar for being incompetent. He stated further

that, on 12th August 2022, after Execution No. 266 of 2022 was struck out, he filed Execution No. 325 of 2022 praying the court to issue a Garnishee nisi against the respondent's bank account No.0106005409000 maintained at Standard Chartered Bank to recover TZS 22,935,500/= as terminal dues as per this court's decree (Hon. Nyerere, J as she then was) dated 22nd September 2017 in Revision Application No. 283 of 2016. Applicant stated further that, on 25th August 2022, when Execution No. 325 of 2022 was called on for mention before Hon. E. M. Kassian, Deputy Registrar, respondent agreed to pay the said TZS 22,935,500/= and that, respondent paid the said TZS 22,935,500/= through bank account No. 01J2055601300 maintained at CRDB Bank. That, on 28th September 2022, after being paid the said TZS 22,935,500/= Hon. Fimbo marked Execution No. 325 of 2022 as closed.

In his affidavit, applicant stated further that, on 6th October 2022, he filed Miscellaneous Application No. 379 of 2022 before this court seeking interpretation of this court's decree (Hon. Nyerere, J, as she then was) dated 22nd September 2017 and Hon. S.B. Fimbo's order dated 14th April 2022, but he withdrew it on 22nd November 2022. He added that, he was advised by Advocate Elisaria Jastiel Mosha that the decision of Hon. S.B. Fimbo, Deputy Registrar contains illegalities. That, based on

that advice, he filed Miscellaneous Application No. 474 of 2022 seeking this court to extend time within which to file revision application against the ruling and order of Hon. S.B. Fimbo dated 14th April 2022 in Execution No. 507 of 2021 but the same was struck out on 5th April 2023 by Hon. M. P. Opiyo, J for being incompetent. Applicant stated further that, he filed this application on 8th April 2022 and that the delay was technical.

In resisting the application, respondent filed a counter affidavit sworn by Huruma Ntahena, her principal officer. In his counter affidavit, Huruma Ntahena stated that, instead of challenging the order that struck out Execution Application No. 507 of 2021, applicant complied with the order and filed Execution No. 325 of 2022 that has been fully satisfied. The deponent stated further in his counter affidavit that, applicant has filed this application as an opportunist and in abuse of court process. He further stated that, applicant was negligent and that, applicant has not accounted for each day of the delay from 14th April 2022 to the date of filing this application.

When the application was called on for hearing, Mr. Elisaria Mosha, learned Advocate, appeared and argued for and on behalf of the applicant, while Mr. Rahim Mbwambo, learned Advocate, appeared and argued for and on behalf of the respondent.

Advancing the argument for the application to be granted, Mr. Mosha, counsel for the applicant submitted that, applicant delayed because he was prosecuting the same execution diligently from 14th April 2022 up to 28th September 2022 when execution came to an end. When probed by the court as to when applicant was aggrieved by the order of Hon. S.B. Fimbo, Deputy Registrar in Execution No. 507 of 2021 dated 14th April 2022, counsel for the applicant, without hesitation, replied that, it was on 30th November 2022. Mr. Mosha learned counsel for the applicant submitted further that, there was no negligence on part of the applicant because the order of Hon. Fimbo, Deputy Registrar striking out Execution No. 507 of 2021 did not finalize execution, which is why, applicant filed Execution No. 226 of 2022 that was again struck out and finally filed Execution No. 325 of 2022 in which respondent agreed to pay TZS 22,935,500/= as it was Decreed by Hon. Nyerere, J(as she then was) in Revision No. 283 of 2016 dated 22nd September 2017. Counsel for the applicant submitted further that, in Execution No. 325 of 2022, applicant filed a new execution Form claiming 12 months' salary and repatriation as was granted by Nyerere, J, as she then was. In his submissions, counsel for the applicant conceded that, in this court's decree (Nyerere, J, as she then was), subsistence allowance was not mentioned. Counsel for the applicant mentioned the applications

that were filed by the applicant in this court and submitted that, for more than a year, applicant was in Court corridors pursuing his right and that he has accounted for the delay.

Counsel for the applicant submitted further that, there is illegality in the impugned ruling. He argued that illegality is a ground to warrant the Court to exercise its discretion to grant extension of time. He went on that, section 38(1) and (2) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] is clear that the executing Officer has power to compute subsistence allowance once repatriation costs are granted and cited the case of *Hassan Twaib Ngonyani v. TAZAMA Pipeline Ltd*, Civil Appeal No. 201 of 2018, CAT(unreported) to support his submissions. He concluded that, there is sufficient importance of legal issue that need to be decided by the Court of Appeal and prayed the application be granted.

In countering submissions made on behalf of the applicant, Mr. Mbwambo, learned counsel for the respondent, submitted that, applicant has mentioned illegality but failed to prove existence of the said illegality. Counsel for the respondent submitted further that, for illegality to be a ground for extension of time, it must be apparent on the face of the record. He argued that the alleged illegality in the impugned ruling and order is not apparent on the face of the record. He added that,

what was argued by counsel for the applicant is a ground of appeal that cannot qualify to be illegality. In support of that position, counsel for the respondent cited the case of *Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another*, Civil Appeal No. 174 of 2020, CAT (unreported) and *National Housing Corporation v. Janeth David Mashingia*, Misc. Application No. 332 of 2020 HC (unreported). Mr. Mbwambo submitted further that, *Ngonyani's case* (supra) cited by counsel for the applicant on ground that the Deputy Registrar erred, is a ground of appeal and not illegality. He added that, the decree of Hon. Nyerere, J(as she then was) did not cover subsistence allowance. He went on that, it was upon the applicant to disclose before Hon. Nyerere, J (as she then was) as to how many dependents he had, who according to law, were supposed to paid subsistence allowance. Counsel added that, the same was not reflected in CMA award and was not an issue before the court. Counsel concluded that, Hon. S.B. Fimbo, could have not granted subsistence allowance without proof of persons who were covered.

Counsel for the respondent submitted further that, for the applicant to challenge the ruling dated 14th April 2022 was supposed to file the notice of appeal within 30 days from the date the said ruling was delivered. He added that, applicant filed this application on 18th April

2023 that is almost one year thereafter. Mr. Mbwambo submitted further that, all applications that applicant filed prior to filing Misc. 379 of 2022 was not questioning the validity of Hon. S. B. Fimbo's ruling. Counsel went on that, applicant filed Misc. Application No. 379 of 2022 after six months, but in his affidavit, he failed to account for that delay. Mr. Mbwambo submitted further that, applicant was supposed to account for each day of the delay as it was held in the case of *Airtel Tanzania Limited V. Misterlight Electrical Installation Co. Ltd & Another*, Civil Application No. 37/01 of 2020 CAT (unreported) and *Idd Muhunzi v. Tanzania Cigarette Public Company*, Misc. Application No. 565 of 2020 HC (unreported). He submitted further that, from 06th October 2022 when applicant filed Misc. 379 of 2022 to 18th April 2023, is 6 months' and that applicant failed to account for each day of that period. He added that, applicant was filing incompetent applications and argued that, filing incompetent application by an Advocate, cannot be a ground for extension of time. Counsel for the respondent cited the case of *Registered Trustee of Sibusiso Foundation v. Angelus Bandali Ngatunga*, Misc. Labour Application No. 05 of 2015, HC (unreported) to support his submissions. He went on that, lack of diligence by the party or an Advocate, cannot be a ground for extension of time.

On technical delay, counsel for the respondent submitted that, there was no technical delay for 6 months because applicant was busy filing execution applications. Counsel for the respondent added that applicant was grossly negligent.

It was submissions of Mr. Mbwambo learned counsel for the respondent that, applicant complied with the order issued in the impugned ruling by filing a new application and that, based on the said new Execution application, applicant was paid according to what he prayed. Counsel submitted further that, applicant was supposed to file this application before pocketing money that he was paid after filing new Execution applications. Mr. Mbwambo cited the case of *Pravin Girdhar Chavda v. Yasmin Nurdin Yusufali*, Civil Appeal No. 165 of 2019 CAT (unreported) to support his submissions that, litigations must come to an end. He went on that, applicant was paid transport in Execution No. 325 of 2022 and that, whatever was in this court's decree (Hon. Nyerere, J, as she then was) has been executed. Counsel added that, there is nothing pending to be executed.

Mr. Mbwambo further submitted that, the impugned ruling was not interlocutory and added that, the same is not reflected in the applicant's affidavit. Counsel for the respondent argued further that, the argument

that the said ruling did not finalize the matter namely that it was interlocutory is a statement from the bar with no legal impact. He concluded that, applicant has filed this application as an opportunist and in abuse of the Court process and prayed the application be dismissed.

In rejoinder, Mr. Mosha, Counsel for the applicant reiterated his submission on illegality, arguing that the same is apparent on record because the Deputy Registrar held that she has no jurisdiction. Counsel added that, the decision of Hon. S.B. Fimbo was interlocutory hence applicant could not file this application within 6 months alleged by the respondent that he was late.

Having heard submissions for and against the application and considered evidence of the parties in both the affidavit and the counter affidavit, without hesitation, I agree with the submissions by Mr. Mbwambo learned counsel for the respondent that submissions by counsel for the applicant that the impugned ruling is interlocutory, is not supported by the applicant's affidavit. As such, it is submissions from the bar which is not evidence, hence has no legal impact. In fact, there is a litany of case laws both by this Court and the Court of Appeal that, submissions are not evidence. See the case of [Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another](#) (Civil Appeal 82 of 2017) [2018] TZCA 297, *Registered*

Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others, Civil Appeal No. 147 of 2006, [Benjamin Watson. Mwaijibe vs. Ellen & Ethan Consult](#) (Rev. Appl 70 of 2022) [2022] TZHCLD 673 and [Ernest Ngiremisho t/a Tumaini College vs Boniface Philip Kimboka t/a Eureka Training Institute](#) (Misc. Civil Application 30 of 2022) [2022] TZHC 13181 to mention but a few. In the *Bunju Village case* (supra) it was held:-

" . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

I will, therefore, not consider whether, the impugned ruling is an interlocutory or not.

I should also point out the settled principle that, in an application for extension of time, the court is called to exercise its discretion and that, discretion must be exercised judiciously. It is well settled law in our jurisdiction that, discretion must be based on what is fair in the circumstances of the case and in exercising discretion, the court must be guided by the rules and principles of the law. See [Mza RTC Trading Company Limited vs Export Trading Company Limited](#), Civil Application No.12 of 2015 [2016] TZCA 12 and [Cash sales Stores Ltd vs. Damas Njowi & Another](#) (Rev. Appl. 197 of 2022) [2022] TZHCLD

970. I should also point out that in terms of Rule 56 (1) of the Labour Court Rules, for the application to be granted, applicant must show good cause for the delay. The foregoing are the guiding principles in determination of the application at hand.

I have read the affidavit of the applicant and it is clear that applicant has filed this application for extension of time within which to file the notice of appeal so that he can appeal against the ruling and order that was delivered on 14th April 2022 by Hon. S.B. Fimbo, Deputy Registrar in Execution No. 507 of 2021. It was submitted by counsel for the applicant that, applicant delayed filing the notice within the prescribed time because he was prosecuting the same execution diligently from 14th April 2022 up to 28th September 2022 when execution came to an end hence technical delay. It was therefore submitted on behalf of the applicant that at all that time he was in court corridors hence technical delay. With due respect to counsel for the applicant, those submissions in my view, cannot be correct because applicant was not pursuing a similar issue namely attempt to appeal before the Court of Appeal for this court to hold that there is technical delay. In other words, the applications that were filed by the applicant after issuance of the impugned ruling and order has nothing to do with filing a notice of appeal to the Court of Appeal. Those were applications

for executions which are not related to intention to appeal to the Court of Appeal. It is my view therefore that there is no technical delay. The issue that is in my mind is, when did applicant became aggrieved with the impugned ruling and order. In fact, when counsel was probed by the court, he replied that it was on 30th November 2022. Strange as it may sound, that reflects what was in the mind of the applicant namely that had no intention of appealing against the impugned ruling and order but to pursue execution applications. It is beyond imagination that the order was issued on 14th April 2022 but applicant allegedly, became aggrieved on 30th November 2022. Frankly speaking, applicant has made this application as an afterthought especially after satisfaction of the decree in Execution No. 325 of 2022 and after execution application No. 325 of 2022 was closed on 28th September 2022. I agree with counsel for the respondent that applicant filed this application as an opportunist, and in abuse of the court process. I am of that view because, in Execution No. 325 of 2022, applicant was claiming to be paid TZS 22,935,500/= to satisfy the court decree (Nyerere, J as she then was) in Revision No. 283 of 2016 dated 22nd September 2017 and in fact, he was paid the same amount as reflected in his affidavit and court order dated 28th September 2022 attached thereto. If applicant was aggrieved with the impugned ruling and order, he could have not complied with

the order by filing a new Execution application that led him to be paid the aforementioned amount.

It was submitted by counsel for the respondent that, applicant was negligent or apathy or insensible as to the proper route to take, which is why, he filed incompetent applications unrelated to the intended appeal. Those incompetent applications, in my view, cannot be a ground for extension of time. I entirely agree with those submissions. If applicant was interested in appeal, he could have not filed the aforementioned applications that are not related with appeal to the Court of Appeal.

It was submitted by counsel for the applicant that, there is illegality in the impugned ruling and order. On the other hand, it was argued by counsel for the respondent that there is no illegality. There is a litany of case laws that, for illegality to be a ground for extension of time, it must be apparent on the face of record. See the case of *Jubilee Insurance Company (T) Limited vs Mohamed Sameer Khan*, Civil Application No. 439/01 of 2020, CAT (Unreported), *Hamis Mohamed v. Mtumwa Moshi*, Civil Application No. 407 of 2009, CAT (unreported), *Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another*, Civil Appeal No. 174 of 2020, CAT (unreported) and *National Housing Corporation v. Janeth David Mashingia*, (supra) and *Lyamuya Construction Company Ltd v.*

Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 02 of 2010 CAT (unreported) to mention but a few. In ***Lyamuya's case*** (supra) and held that:-

"...the illegality in question must be that which raises a point of law of sufficient importance and the same must be apparent on the face of record not one that would be discovered by a long-drawn argument or process."

In the application at hand, I am of the view that the alleged illegality does not qualify because it is not on the face of the record. Whether in her ruling the Deputy Registrar was right or not, can only be reached after a long-drawn process of hearing the parties as whether, there was evidence in support of the claim or not. It is my view that, the alleged ground of illegality in the application at hand fails to meet the test.

It was submitted by counsel for the respondent that, applicant did not account for the delay. I have examined the affidavit in support of the application and find that applicant did not account for each day of the delay. It has been held several times by this court and the Court of Appeal that, in an application for extension of time, applicant must account for each day of the delay. See for example the case of ***Bushiri Hassan v. Latifa Lukio Mashayo***, Civil Application No. 3 of 2007, CAT (Unreported), ***Elius Mwakalinga v. Domina Kagaruki and 5 others***,

Civil Application No. 120/17 of 2018 CAT(Unreported), *Airtel Tanzania Limited V. Misterlight Electrical Installation Co. Ltd & Another*, Civil Application No. 37/01 of 2020 CAT (unreported) and *Idd Muhunzi v. Tanzania Cigarette Public Company*, Misc. Application No. 565 of 2020 HC (unreported). In the case of *Mwakalinga's case* (supra) it was held *inter-alia*: -

"Delay, even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

Having considered the circumstances obtained in this application, I entirely agree with submissions by counsel for respondent that, applicant was supposed to file this application prior to filing Execution No. 325 of 2022 and prior to receive TZS 22,935,000/= that he was claiming in the said application. It is my view, as was correctly submitted by counsel for the respondent that, litigations must come to an end as it was held by the Court of Appeal in the case of [*Pravin Girdhar Chavda vs Yasmin Nurdin Yusufali*](#) (Civil Appeal 165 of 2019) [2022] TZCA 185. In *Chavda's case* (supra) the Court of Appeal, quoted the holding in the case of *Haystead v. Commissioner of Taxation* [1926] A.C. 155 that: -

"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they

present as to what should be a proper apprehension, by the Court of the legal result. If this were permitted, litigation would have no end except when legal ingenuity is exhausted."

Having quoted the above quoted paragraph, the Court of Appeal concluded: -

"The overarching policy objective being to ensure that litigation comes to an end".

For all what I have discussed hereinabove, I hold that there are no good grounds to warrant this application to be granted. I therefore, dismiss it for want of merit.

Dated at Dar es Salaam on this 24th May 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on this 24th May 2023 in chambers in the presence of Mary Machira, Advocate for the respondent but in the absence of the Applicant.



B. E. K. Mganga
JUDGE