IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISC. APPLICATION NO. 258 OF 2023

BETWEEN

NCBA BANK TANZANIA LIMITED (FORMERLY KNOWN AS COMMERCIAL BANK OF AFRICA (T) LTD ..... APPLICANT

AND

SALVATORY MWANDU ..... RESPONDENT

RULING

Date of last Order: *23/10/2023*
Date of Ruling: *07/11/2023*

MLYAMBINA, J.

This application emanates from the following background: The Respondent was employed by the Applicant as Head of Credit Analysis from 07/06/2013 until terminated on 13/12/2016. The records indicate that; the Respondent was terminated on the ground of misconduct namely, irregular receipt of TZS 58,000,000/= from Tanganyika Famers Association Ltd (TFA) of Arusha contrary to clause 5.2.6 of Human Resources Policy (2015) of the NCBA (T) Ltd. Aggrieved by the termination, the Respondent referred the matter to the Commission for Mediation and Arbitration (herein CMA) claiming for unfair termination both substantively and procedurally. After considering the evidence of the parties, the CMA found that the Respondent was unfairly terminated both substantively and procedurally as claimed. On basis of such finding,

the CMA awarded the Respondent a total of TZS 89,059,615.38 being remedies for unfair termination, severance pay and leave allowance.

Being dissatisfied by the CMA's decision, the Applicant filed *Revision No. 717 of 2018.* Such application was faced with the preliminary objections that; *the Applicant's application for revision is hopelessly time barred and that the notice of application is defective as it is brought under a wrong provision of law.* The Court sustained the first preliminary objection and dismissed the revision application on the ground that it was filed out of time. It was further stated that, the Applicant filed his application on the 43rd day contrary to *Section 91 of the Employment and Labour Relations Act [Cap 366 Revised Edition 2019]* (herein ELRA) which requires revision applications to be filed within 42 days from the date the Applicant was served with the impugned Award.

Again, being aggrieved with the dismissal order made on 22/07/2019, the Applicant intends to lodge his appeal to the Court of appeal. However, due to the limitation, he decided to file the present application for extension of time to lodge the notice of appeal.

The application proceeded by way of written submissions. Before the Court, both parties were represented by learned counsel. Mr. Ignace Laswai, appeared for the Applicant, whereas Mr. Felix Edward Makene was for the Respondent.

Arguing in support of the application, Mr. Laswai submitted that the main ground upon which this application is based is illegality of the challenged decision. It was strongly submitted that the Applicant filed *Revision No. 717 of 2018* within time but the same was wrongly dismissed by the Court. The counsel argued that where there is existence of point of law of sufficient importance such as illegality of the challenged decision, the Court will grant the extension of time. To support his position, he referred the Court to the case of **Lyamuya Construction Company Limited v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where the Court of Appeal laid down principles to be considered in grant of extension of time. He also cited the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185.

Mr. Ignace Laswai submitted at length on how the dismissed application was not out of time by referring to various provisions of the

law and case laws. He argued that the 42nd date on which the revision application was supposed to be filed was supposed to be excluded. Therefore, he contended that the Applicant dully filed his application on the next day pursuant to *Section 60(2) of the Interpretations of Laws Act, [Cap 1 Revised Edition 2019].* On the basis of the alleged illegality, the Applicant urges the Court to grant the present application.

In response to the application, Mr. Makene notified the Court that after the impugned application was dismissed on 22/07/2019, the Applicant filed an application for extension of time to file review which was registered as *Miscellaneous Application No. 509 of 2019.* That, such application was filed on 26/08/2019. Mr. Makene submitted that the extension sought was granted on 26/02/2020 where the Applicant was given 7 days leave to file the review application. The Applicant complied with the order and filed an application for review on 04/03/2020, however, such application was also dismissed for being vexatious and frivolous.

On the merits of the application, it was in reply submitted by Mr. Makene that the background of this case as narrated above clearly shows that this is not a fit case for appeal. He argued that; as a matter of principle revision, review and an appeal being remedies for an

aggrieved parties cannot be used as an alternative upon failure of the other. It was further argued that so long as the Applicant's review application was dismissed, the best practice was to file an application for revision before the Court of Appeal.

As regards the issue of illegality raised, it was argued that the issue of time limitation in this case cannot be termed as illegality because the parties argued on such issue and the Court reached to a decision. It was further submitted that the Applicant failed to account for each day of the delay as it is the requirement in various cases including the case of **Glory Shifwaya Samson v. Raphael James Mwinuka,** Civil Application No. 506/17 of 2019, Cout of Appeal of Tanzania, Dar es Salaam (unreported) where it was held that:

> In sum, in view of my earlier finding that the Applicant failed to account for each and every day of the delay.

It was further replied by Mr. Makene that the Applicant delayed to file the application for almost five years and the delay has not been accounted for but only concentrating on the issue of illegality which cannot stand in this case. Mr. Makene contended that the cases cited by the Applicant's counsel are distinguishable to the circumstances at hand. In the upshot, he urged the Court to dismiss the application.

After dully considering the parties' rival submissions, the Court records and relevant laws, I find the Court is called upon to determine only one issue; *whether the ground of illegality can stand in grant of the application at hand.*

As pointed out above, the application is for extension of time to lodge the notice of appeal pursuant to the requirement of *Rule 83 of the Tanzania Court of Appeal Rules, 2009* (herein CAR) which is to the effect that:

> 83(1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.
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> (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.

The above provision requires an aggrieved party of the decision of this Court, who desires to appeal to Court of Appeal, to lodge notice of appeal within thirty days from the date of the decision intended to be challenged. In the instant matter, the impugned decision was delivered on 22/07/2019 whereas the present application was filed on 06/09/2023. As rightly submitted by Mr. Makene, the delay is of almost

five years now. The Applicant urged the Court to grant this application due to the illegality pointed in his submissions. I join hands with Mr. Laswai's submission that a point of illegality constitutes sufficient reason for the grant of an application for extension of time. This is the Court's position highlighted in range of decisions including the case of **Lyamuya Construction Company Limited** (supra). Again, in the case of **Principal Secretary Ministry of Defence & National Service v. Devram Valambhia** (1992) p.185, the Court held that:

> We think that when as here the point of law at issue is illegality or otherwise of the decision been challenged, that is sufficient importance to constitute sufficient reason for extending time.

Furthermore, the case of **Lyamuya Construction Company Limited** (supra) laid down principles to be considered in granting extension of time as follows:

> As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however the following may be formulated:
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> i.The Applicant must account for all the period of delay.

ii. The delay should not be inordinate.

iii. The Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

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

The Court went on to expound the issue of illegality as follows:

> Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every Applicant who demonstrate that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that "of sufficient importance" and *I would add that it must also be apparent on the face of the record, such as the question of jurisdiction;* not one that would be discovered by a long-drawn argument or process.
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> [Emphasis supplied]

In the instant matter, let alone the fact that the alleged illegality is not apparent on the face of record, the Applicant did not account for his

delay. It should be noted that raising alone an issue of illegality does not automatic grant the Applicant a right to be granted the extension of time sought. The fact that the Applicant raises an issue of illegality in the challenged decision, does not exempt him/her to account for each day of the delay.

It is my observation that despite the requirement that illegality should be apparent, the Applicant should also prove to the Court that he took measures by immediately notifying the Court of such illegality for it to be looked upon. In the instant matter, as stated above, the impugned decision was dismissed on 27/07/2019 and the Applicant took five years to decide to appeal to Court of Appeal. Such delay is inordinate and cannot be condoned by this Court.

The Applicant should have demonstrated what prompted him to file the application after five years. Any reasonable man would believe that the intended appeal is a delaying tactic employed by the Applicant to delay execution processes as submitted by Mr. Makene. It is my view that, if parties will be left at liberty to raise a point of illegality in an application for extension of time at any time they wish to do so, such practice will defeat the Law of Limitation Act which sets the time limit for instituting claims.

Furthermore, the Applicant withheld the information that he filed numerous applications which were dismissed by this Court so as to mislead the Court to grant this application. Such practice should be discouraged. The Applicant cannot be allowed to window shop every remedy provided to an aggrieved party. If he opted to go for review, he should have filed a revision against the reviewed decision as rightly argued by Mr. Makene. The Applicant decided to prefer an appeal to Court of Appeal because his review application did not succeed.

In the upshot, the application is dismissed for lack of merits.

Y. J. MLYAMBINA

JUDGE

07/11/2023

Ruling delivered and dated 7th November, 2023 in the presence of Counsel Hamisa Nkya for the Applicant and Felix Makene for the Respondent. Right of appeal explained.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

Y. J. MLYAMBINA

JUDGE

07/11/2023