IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 88/08/2017

PETER MABIMBI ..... APPLICANT

VERSUS

1. THE MINISTER FOR LABOUR AND YOUTHS DEVELOPOMENT
2. THE ATTORNEY GENERAL
3. THE REGIONAL MANAGER, TANESCO MWANZA
..... RESPONDENTS

(Application for extension of time within which to file Notice of Appeal and apply for Leave to Appeal from the Order of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 13th day of May, 2003
in
Miscellaneous Civil Application No. 95 of 2002
.....

RULING

28th September & 5th October, 2018.

NDIKA, J.A.:

Peter P. Mabimbi, the applicant herein, took out a Notice of Motion on 13th February, 2017 under Rules 4 (2) (a), (b) and (c) and 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) praying for extension of time within which to lodge a Notice of Appeal and apply for leave to appeal to this Court against the order of the High Court at Mwanza (Masanche, J.) dated 13th November, 2003 in Miscellaneous Civil Application No. 95 of 2002. He also prays for an order directing the High Court (Mwanza

Registry) to supply him with a properly signed extracted order of the High Court intended to be appealed against. In support of the application, the applicant deposed and lodged an affidavit. The application was strongly opposed by the respondents who lodged two separate affidavits in reply; one sworn by Ms. Bibiana Joseph Kileo, Senior State Attorney, filed on behalf of the first and second respondents and the other deposed by Mr. Laurian Hakim Kyarukuka, an advocate, for and on behalf of the third respondent.

The backdrop to this matter is a protracted dispute that ensued in 1996. The applicant was an employee of the third respondent from 1st June, 1988 until 2nd July, 1996 when he was summarily remove from office. Aggrieved, the applicant contested the summary dismissal by instituting proceedings before the Conciliation Board at Mwanza. The Board ordered in its verdict dated 29th October, 1996 that he be reinstated into his former office but it also imposed on him a two-days salary deduction. Dissatisfied, the third respondent appealed to the first respondent against the Board's decision. In his decision dated 12th May, 1998, the first respondent allowed the third respondent's appeal and reversed the Board's verdict of reinstatement. The applicant's dismissal from office, subject to payment of terminal benefits, was confirmed.

After a hiatus allegedly caused by ill-health, the applicant sought and obtained from the High Court at Mwanza vide Miscellaneous Civil Application No. 38 of 2000 an extension of time to apply for leave to seek prerogative orders against the third respondent's decision in the labour dispute. Pursuant to the aforesaid order, on 5th June 2002 the applicant lodged Miscellaneous Civil Application No. 95 of 2002 in the High Court at Mwanza against the respondents herein for leave to apply for the orders of *certiorari* and *mandamus*. That application came to naught; it was refused on 13th May, 2003. Desirous of challenging that decision in this Court, the applicant duly lodged a Notice of Appeal on 20th May, 2003 and applied to the District Registrar of the High Court for a copy of the proceedings and extracted order.

Thereafter, the applicant duly lodged Civil Appeal No. 21 of 2004 in this Court. As it turned out, the appeal was struck out on 7th March, 2005 on two grounds: first, that it was lodged without leave contrary to the dictates of section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 and, secondly, that it was accompanied with a defective extracted order signed by the District Registrar instead of the learned presiding Judge or his successor. Dissatisfied, the applicant applied to this Court vide MZA Civil Application No. 4 of 2005 for review of its decision in Civil Appeal

No. 21 of 2004 on the ground that he was denied a hearing. The Court struck out that matter on 22nd May, 2009 upon sustaining two points of preliminary objection that the matter was misconceived and that it was time-barred as it also sought a review of the decision of the Court that it had rendered on 27th January, 2005 in Civil Appeal No. 37 of 2001. Undaunted, the applicant re-approached the Court on 16th July, 2009 with yet another application for review – Civil Application No. 76 of 2009 – this time seeking a review of the previous order of the Court dated 22nd May, 2009 that struck out his initial application for review. The Court struck out that matter on 25th October, 2013 on the ground that it was barred by the law as there could not be a review of a decision of the Court on review in the same matter.

In the aftermath of the decision of the Court dated 25th October, 2013, the applicant fell in ill and attended treatment at Sekou Toure Hospital and later at Bugando Hospital at Mwanza as evidenced by medical reports attached to the supporting affidavit as Annexure M.17. On 16th December, 2013, he re-approached the High Court at Mwanza and lodged Miscellaneous Civil Application No. 144 of 2013 for extension of time within which to lodge a Notice of Appeal and apply for leave to appeal to this Court from the same decision of the High Court in Miscellaneous Civil

Application No. 95 of 2002. He too sought leave to appeal from the aforesaid decision of the High Court. For yet another time, luck was not on his side; the High Court struck out that application on 12th May, 2015 on reason that it was accompanied by a defective affidavit. Still undeterred, a few days later, on 26th May, 2015 to be exact, the applicant filed another application in the High Court (Miscellaneous Civil Application No. 52 of 2015) seeking the same reliefs. All over again, that quest was barren of fruit; the High Court dismissed it on 31st January, 2017. Thereafter, the applicant took his pursuit to this Court where he lodged the present application on 13th February, 2017.

At the hearing of the application, the applicant appeared in person, unrepresented. On the other hand, Ms. Bibiana Joseph Kileo, learned Senior State Attorney, appeared for the respondents. Ms. Kileo was assisted by Mr. Laurian Hakim Kyarukuka, learned advocate, also a principal officer of the third respondent.

Having adopted the Notice of Motion, the supporting affidavits and the written submissions in support of the application, the applicant urged me to grant the application on the following grounds: first, that the order of the High Court sought to be appealed against was tainted with illegalities, irregularities and improprieties as explained in the supporting

affidavit; secondly, that there were sufficient reasons for the delay; thirdly, that this was a fit case to be resolved by this Court; and finally, that the High Court contributed materially to the delay and confusion in the matter by supplying him with a defective extracted order that resulted in his appeal to be struck out by the Court for incompetence.

The merits of the application apart, the applicant took issue with the legality of the affidavit in reply deposed and filed by Ms. Kileo for and on behalf of the first and second respondents. Briefly, he contended as follows: that the said affidavit was lodged on 27th September, 2018 out of time without leave while the Notice of Motion had been served on 15th February, 2017; that said affidavit contained hearsay averments in Paragraphs 3, 5, 10 and 11; that the affidavit was bad in law for containing opinions in Paragraphs 16 and 17; that the verification clause was defective for failing to state the name of the deponent supposedly verifying as to the truthfulness of the depositions in the affidavit; that the jurat of attestation was defective for not stating clearly whether the attesting officer knew personally the deponent or that the deponent was introduced to him by a person known to him; and finally, that the name of the drawer of the affidavit is not indicated therein. He thus urged me to ignore the impugned affidavit. In support of his submission, he relied on

the unreported decisions of the Court in **Simplisius Felix Kijuu Issaka v The National Bank of Commerce Limited**, Civil Application No. 24 of 2003; and **Amani Girls Home v. Issack C. Kamela**, Civil Application No. 18 of 2014.

On her part, Ms. Kileo warded off the attack on the affidavit in reply. Very briefly, she submitted that the said affidavit was duly lodged as she observed that Rule 56 (1) of the Rules does not prescribe any limitation period for filing such a document. As regards the averments in Paragraphs 3, 5, 10, 11, 16 and 17, she submitted that they were depositions made on behalf of the first and second respondents and that they were not hearsay or opinions but proper factual declarations. On the verification clause, she contended that the said clause was proper because it is not the requirement of the law for a deponent's name to be specifically restated in the clause. She further submitted that the jurat of attestation was proper and that the name of the drawer of the affidavit was clearly indicated. She added that even if the affidavit was in any way faulty such defect should be ignored as it would cause no injustice.

Mr. Kyarukuka, then, took turn to address me on the merits of the application. Having adopted the affidavit in reply and the written submissions he filed, he, at first, indicated that the respondents felt no

need to address the Court on the substance of the applicant's prayer for an order directing the High Court to supply him with a copy of the extracted order the subject of his intended appeal. He argued that the said order was completely unnecessary as the High Court would certainly supply the said order upon request.

As regards the merits of the quest for condonation of delay, Mr. Kyarukuka focused on the applicant's conduct and actions after his initial appeal to the Court (Civil Appeal No. 21 of 2004) was struck out on 7th March, 2005. He blamed the applicant for wasting eight years in pursuit of worthless and ill-advised applications for review before this Court instead of re-launching his appeal by applying to the High Court for extension of time within which to lodge a Notice of Appeal and apply for leave to appeal. He bolstered his stance by referring to the decision of the Court in **Laurean Rugaimukamu v. The Editor, Mfanyakazi Newspaper and Another** [2001] TLR 79. In that case, the Court dismissed a reference by an applicant who failed to take appropriate steps to vary a previous decision of the Court so as to include costs that had not been awarded. The Court viewed the reference as an abuse of the court process as it was instituted after the applicant had lodged a series of misguided and useless applications and references between 1994 and 1996. The learned counsel

added that the respondents would suffer prejudice should the application be granted after the passage of an inordinate period of time since 1996 when the matter arose. Elaborating, he contended that the third respondent would be exposed to an enormous liability of paying up a huge amount of monies to the applicant for his subsistence for years since 1996 when he was summarily dismissed. On this point, he made reference to the decision of the High Court (Mapigano, J.) in **Mobrama Gold Corporation Ltd. v. Minister for Energy and Minerals and the Attorney General and East African Goldmines Ltd. as Intervener**, [1998] TLR 425. In that case, the High Court cited with approval a passage from an English case of **Castellow v. Somerset County Council** [1993] 1 All E.R. 952 thus:

> *"The first is that the rules of Court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time-limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the Court a discretion to dismiss on failure to comply with a time limit. It is also reflected in the Court's inherent jurisdiction to dismiss for want of*

prosecution. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, ***unless the default causes prejudice to his opponent for which an award of costs cannot compensate****. This principle is reflected in the general discretion to extend time conferred by the rules, a discretion to be exercised in accordance with the requirements of justice. It is also reflected in the liberal approach generally adopted in relation to amendment of pleadings. Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to the dismissal of actions without any consideration of whether the plaintiff's default has caused prejudice to the defendant. But the Court's practice has been to treat the existence of such prejudice as a crucial, and often decisive, matter.* ***If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice****."* [Emphasis added]

The learned counsel submitted further that the applicant cannot escape blame for his relentless but ill-advised pursuit of the two review applications by simply fronting his station in life as a lay person. Referring to the decision of the Court in **Charles Machota Salugi v. Republic**, Criminal Application No. 3 of 2011 (unreported), he strongly argued, as held in that case, that ignorance of law has never been an excuse for enlargement of time.

As regards the ground that the application be granted because the order intended to be appealed against is fraught with illegalities, Mr. Kyarukuka, at first, acknowledged that, indeed, illegality of a decision can be a good cause for enlarging a limitation period as held by the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185. On the other hand, he argued that the grounds of illegality complained of by the applicant are an unviable proposition and that they ought to be rejected. In conclusion, he urged me to dismiss the application as no good cause was established for condonation of the delay.

In a brief rejoinder, the applicant argued that he pursued the two applications for review in exercise of his constitutional right. He denied that the said effort was worthless or misguided or that it amounted to an abuse

of court process. On the question of illegality of the decision he seeks to appeal against, he contended that he had indicated in Paragraphs 27 and 28 of the supporting affidavit the questions he sought to raise to the Court as constituting illegalities in the impugned decision. He also referred to Paragraphs 23 and 24 of his written submissions where he said he laid bare the basis of this complaint.

Before dealing with the substance of this application in the light of the competing submissions, I propose to deal with the legality of Ms. Kileo's affidavit in reply very briefly. Of the six points on which that affidavit is attacked, the most obvious is the criticism that the said affidavit does not clearly show whether the attesting officer knew the deponent personally or whether the deponent was identified to him by a person whom he personally knew. As held by this Court in **Simplisius Felix Kijuu Issaka** (supra) this omission is contrary to the mandatory requirement of section 10 of the Oaths and Statutory Declarations Act, Cap. 34 RE 2002. That infraction alone renders the affidavit in reply fatally defective. Accordingly, I strike it out of the record.

I now proceed to consider the merits of the application. Before I do so, it bears restating that although the Court's power for extending time

under Rule 10 of the Rules is both broad and discretionary, it can only be exercised if good cause is shown. Even though it may not be possible to lay down an invariable definition of the phrase "good cause" so as to guide the exercise of the Court's discretion under Rule 10, the Court must consider factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: (see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014). See also **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra); and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

I have given due consideration to all the material on the record in the light of the oral and written submissions of the parties. The question that I have to determine is whether there is a good cause for condonation of the delay.

I should begin by observing that in their respective submissions the parties are not seriously at war about the events that happened before the applicant duly lodged his Civil Appeal No. 21 of 2004 in this Court. That appeal, as already stated, was struck out on 7th March, 2005 for incompetence. The respondents, in the main, assailed the applicant for wasting eight years in a pursuit of what they consider to be worthless and ill-advised applications for review instead of taking essential steps to lodge a fresh appeal to this Court by applying to the High Court for extension of time within which to lodge a Notice of Appeal and apply for leave to appeal. Before dealing with this criticism, I wish to note that the respondents did not fault the applicant's conduct and actions following the termination by this Court of the second application for review on 25th October, 2013. The applicant, in my view, duly accounted for the period of time that ensued. Initially, he fell ill and attended treatment at Sekou Toure Hospital and later at Bugando Hospital at Mwanza as evidenced by the medical reports he produced whose authenticity was not questioned by

the respondents. Between 16th December, 2013 and 31st January, 2017 he was in the corridors of the High Court at Mwanza in an unsuccessful bid for extension of time within which to lodge a Notice of Appeal and apply for leave to appeal to this Court from the impugned decision of the High Court. That pursuit was made through two successive applications, that is, Miscellaneous Civil Application No. 144 of 2013 that was struck out on 12th May, 2015 and Miscellaneous Civil Application No. 52 of 2015 dismissed on 31st January, 2017. Thereafter, the applicant promptly knocked at the doors of this Court where he duly lodged the present application on 13th February, 2017. Given the circumstances, I must determine whether or not the time the applicant spent in pursuing the two review applications should be condoned.

After giving due consideration to the arguments on the question at hand, I am, with respect, unpersuaded that the applicant should bear the blame for pursuing the two doomed applications for review. As rightly rejoined by the applicant, it was within his right to seek a review of the decision of the Court that struck out his appeal on 7th March, 2005 upon a sustained preliminary objection. While noting that he moved the Court for review under the inherent or general powers of the Court under Rule 3 (2) (a), (b) and (c) of the now defunct Tanzania Court of Appeal Rules, 1979

(defunct Rules) on his perception that he was condemned unheard, I have no cause to fault his taking of that recourse nor do I doubt his intention in that matter. In its decision in the first review, the Court might have held that the said application was both misconceived and time-barred but that was far from labelling it a useless endeavour or an abuse of court process.

Admittedly, unlike the applicant's institution and prosecution of the first review application, the second review, also made under the general powers of the Court prescribed by Rule 3 (2) (a), (b) and (c) of the defunct Rules, obviously might have left a sour taste in the mouth. I say so because it sought a review of the decision of the Court handed down on 22nd May, 2009 on the first review. As indicated earlier, the Court refused it on the reason that "there can be no review of a review in the same matter." Nonetheless, it seems arguable that under the defunct Rules it was not settled whether an applicant could seek a further review of a decision of the Court. It is notable that in its decision (made after the current Rules had already revoked and replaced the defunct Rules) striking out the second quest for review, the Court made reference to Rule 66 (7) of the Rules and erased any lingering doubt regarding the finality of a decision on review, even if that decision was made upon a sustained preliminary objection. It provides that:

"Where an application for review of any judgment and order has been made and disposed of, a decision made by the Court on the review shall be final and no further application for review shall be entertained in the same matter."

On the whole, it does not seem to me that the applicant's lodgment and prosecution of the second review was brought as a consequence of mala fides. It is significant that the Court did not, in its decision, suggest or impute bad faith or insincerity on the part of the applicant.

I recall that Mr. Kyarukuka cited the decision of the Court in **Laurean Rugaimukamu** (*supra*) as his trump card. I stated earlier that in that case, the Court dismissed a reference by an applicant who failed to take appropriate steps to vary a previous decision of the Court on the aspect of costs that had not been awarded to him even though he was the successful party. The Court viewed the reference as an abuse of the court process as it was instituted after the applicant had lodged about seven misguided and useless applications and references between 1994 and 1996. It would be helpful to reproduce the relevant passage in that case at page 82 thus:

"When the applicant appeared before us he stated that he could not make the application in time

because he assumed that costs had been awarded. He did not become aware of the true position until the matter came for taxation. This argument may well be true but it cannot assist the applicant in the circumstances of this case. We say so because even after the ruling in the taxation, which was given on 1 June 1994, and the ruling on the reference therefrom which was given on 12 October 1994, and both of which made it clear that costs had not been awarded and could not be presumed, the applicant, for well over a year thereafter, persisted in his contention to the contrary as evidenced by Civil Reference Number 8 of 1994 and Civil Application number 24 of 1995. ***In reality, therefore, although the truth was brought to his door, he refused to accept it, preferring instead to rely on his own wisdom and his ability to have his way. The resulting delay was therefore not attributable to any misapprehension of the judgment; it was entirely of the applicant's own making.*** *His current attempts to shift ground come after realizing the futility of his position and can only be described as an abuse of the court process. We are unable to fault the decision of the single judge and we refuse the extension prayed for."* [Emphasis added]

In my opinion **Laurean Rugaimukamu** (*supra*) is clearly distinguishable from the instant case. It should be noted that in the former decision the applicant lodged and pursued a series of futile applications to vary the earlier decision of the Court which had not granted him costs. When he realized the futility of his effort, he changed his tack in the end by seeking extension of time while he untruthfully attributed the delay to the fact that he had assumed all along that costs had not been awarded. In other words, the delay in taking appropriate recourse did not arise from a misapprehension of judgment. He deliberately and mischievously shut his eyes to the truth and, in the process, he wasted time as he walked on a path to a dead end. That cannot be said of the present applicant. He might have misapprehended the two reviews as the most appropriate recourses to be taken in the circumstances instead of re-approaching the High Court for orders necessary to lodge a fresh appeal but I am unpersuaded that he did so without good faith, sincerity and diligence. Besides, he cannot be blamed for the fact that the reviews ran over a period of eight years. It would be rather imprudent to assume that he had control of or he could influence the speed at which the Court could have dealt with and disposed of his applications for review. On this basis, I am satisfied that the entire

period of time that the applicant spent pursuing the two applications qualifies for condonation.

As regards the question whether a grant of extension of time will be prejudicial to the respondents, I recall that Mr. Kyarukuka submitted that the third respondent would be exposed to an enormous liability to the applicant following the passage of a long period of time since the latter's dismissal should extension of time be granted. In all fairness, this submission presents no shred of prejudice. The third respondent will only be liable at the conclusion of the dispute if the scales of justice tilt in favour of the applicant. That cannot be said to be a source of prejudice. I am, therefore, satisfied that no evidence of prejudice has been established.

As the foregoing analysis is sufficient to dispose of this matter, I find no need to deal with the second limb of the application, which was an argument that extension of time be granted on the ground that the impugned decision of the High Court is fraught with illegalities.

The final issue is the applicant's prayer that the High Court (Mwanza Registry) be directed to supply him with a properly signed extracted order intended to be appealed against. This prayer appears to have been made rather perfunctorily and incautiously. The applicant's submissions provide

no legal basis or argument why I have to direct the High Court's Registry to do its legal duty. I thus agree with Mr. Kyarukuka that there is no merit in that limb of the application. I would, therefore, refuse to issue the said order.

The above said, I grant the application in part and reject it partly. The applicant is hereby granted fourteen days, from the date of delivery of this decision, to file a Notice of Appeal and an application for leave to appeal. This matter being essentially a labour dispute for which costs are normally not awarded, I make no order as to costs.

DATED at **MWANZA** this 4th day of October, 2018.

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL