

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 435/18 OF 2022**

BAKARI ALLY MZEE..... APPLICANT

VERSUS

BROOKLYN MEDIA (T) LTD..... RESPONDENT

**(Application for Extension of Time to Serve Memorandum and Records of
Appeal from the decision of the High Court of Tanzania, Labour Division at
Dar es Salaam)**

(Mganga, J.)

dated the 8th April, 2022

in

Labour Revision No. 329 of 2021

.....

RULING

5th June & 9th August, 2023

FIKIRINI, J.A.:

This application, preferred in terms of rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), is geared towards granting extension of time to permit the applicant, Bakari Ally Mzee, to serve the respondent, Brooklyn Media (T) Ltd with Memorandum and Records of Appeal.

The decision in Labour Revision No. 329 of 2021, delivered on 8th April, 2022, is the origin of the present application. On the one hand, the present application is supported by an affidavit affirmed by the applicant, written submission and a list of authorities. On the other hand, the respondent is contesting the application through an affidavit affirmed by Yusuphu Washokera, the respondent's Managing Director, reply written submission and list of authorities filed.

On 9th June, 2023, when this application came on for hearing, Ms. Marietha Mollel and Mr. David Andindile, learned advocates entered appearance for the applicant and the respondent, respectively. In addressing the Court, Ms. Mollel adopted the notice of motion, affidavit and written submissions filed to support the application and had few remarks. Her main points were: **one**, the annexure about Gates Nos. 1, 2 and 3, was of no use as it did not reflect anywhere that it was an extract from the gate book of the respondent and urged the Court to disregard it. **Two**, beseeched the Court to grant the application, failure of which will deprive the applicant of his right to be heard.

In reply, Mr. Andindile prefaced his submission by adopting the affidavit in reply, written submissions and list of authorities. He then proceeded to criticize the applicant's counsel for submitting from the bar rather than filing an affidavit challenging the averment in the respondent's affidavit involving the gate book extracted pages.

On the merits of the application, Mr. Andindile contested the grant of the application for the applicant's failure to account for each day of the delay. As per the applicant's averment in paragraph 8, the applicant, despite mentioning the date the present application was filed, could not account for what he was doing between 23rd May, 2022 to 19th July 2022 or even if the date taken is 27th May, 2022, still the applicant was out of time to serve the respondent as required in law, considering the documents related to the impugned decision were ready since 13th July, 2022 as per the signature in the affidavit in support. He prayed for the application to be dismissed with costs based on his submission.

Briefly, rejoining Ms. Mollel in responding to the claimed inordinate delay, she contended that a party could file a document with the Court, but that does not mean they are accepted right away or on the same day. She implored the Court to exercise its discretion and grant the application.

This application for extension of time is predicated under Rule 10 of the Rules, the provision from which the Court derives its discretionary powers. For ease of reference, the provision is reproduced below:

*“The Court may, **upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.**”*[Emphasis mine]

Two things that can be deduced from the provision are that the Court is vested with discretionary powers. Those powers are nonetheless to be exercised judiciously and by following the rules of reason and justice, depending on the situation in each case and not acting arbitrarily. Underscoring the exercise of the discretionary powers bestowed upon this Court through its decisions has elucidated and expounded on the subject. In **Tanga Cement Company Ltd v. Jumanne D. Masangwa & Amosi A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported), the Court had this to say: -

"This unfettered discretion, however, has to be exercised judicially, and the overriding consideration is that there must be sufficient cause for so doing. What amounts to sufficient cause has not been defined."

And *two*, the applicant must furnish good or sufficient cause for the delay. The term sufficient cause has not been defined. Still, the courts have, over the years, developed guidelines to be relied on in determining whether the applicant has demonstrated good or sufficient cause. Therefore, the applicant has to place before the Court material information upon which the Court can exercise its discretion, mainly accounting for each day of the delay. See: **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001, **Regional Manager Tanroads Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, **Oswald Masatu Mwizarubi v. Tanzania Fish Processors Ltd**, Civil Application No. 130 of 2010, and **John Lazaro v. Republic**, Criminal Application No. 34/4 of 2017 (all unreported) to name a few.

The present application has two limbs: **one**, accounting for each day of the delay in serving the respondent and **two**, on the issue of illegality. In his affidavit in support, the applicant has accounted for the time frame of his action. In paragraph 5, he averred that on 20th April 2022, he lodged his notice of appeal, as exhibited in annexure B-2. He then proceeded through the Court Process Server to serve the respondent, as indicated in paragraphs 6 and 7 of the affidavit. However, the service could not be effected twice as the respondent declined to accept the service. An affidavit in that regard was annexure B-4.

The affidavit was controverted through an affidavit in reply affirmed by the respondent's Managing Director. In paragraph 4 of the affidavit, the deponent disputed the claim that the alleged Process Server has ever visited the premises on Plot No. 102/206; otherwise, he would have been able to effect service through any of the respondent's employer as it occurred when service of the copy of the notice of motion was done. Ms. Sophia Stephen, the Chief Accountant and Head of Administration received the documents on behalf of the respondent.

In addition, the Managing Director, in his affidavit, particularly paragraph 5, contested the averment by Joshua E. Mwaituka, the Process

Server, that no such person has ever visited the premises. He attached extracts from gate books from Gates Nos. 1, 2, and 3 to his affidavit to support his declaration. Hand in hand with that was an affidavit deposed by Zahra Athumani, the receptionist who disputed seeing the Process Server by the above name.

To start, I wish to look at the gate book extracts. A thorough scrutiny of the Gates Nos. 1, 2 and 3 book extracts did not convince me they were genuine. This is because they did not exhibit anything specifically indicating they were from the premises, such as an emblem/logo, to make anyone take the respondent's Managing Director averment without asking about the genuineness of the submitted Gate book extracts. The extracts could have been coming from any other exercise book. Therefore, without any supporting evidence, the affidavits of Yusuphu Washokera and Zahra Athumani's affidavits on that aspect remain bare and Joshua Mwaituka, the Process Server's affidavit stands unchallenged.

Notwithstanding the above findings, the applicant still had to account for why it could not serve the documents within time. Several days are not unaccounted for from 27th May to 19th July, 2022. The long list of cases cited above and those by the respondent's counsel are all advancing the

position that each day of the delay must be accounted for, the delay should not be inordinate and diligence should be exhibited, which the applicant has miserably failed to do.

Besides the claim that the respondent declined service, the applicant has raised the issue of illegality in the second limb of his application. This is not the first time this Court has been invited to rule on the point. While that is the challenge posed to the Court in this application, it is a settled position in our jurisdiction that an alleged illegality, if established, is sufficient to move the Court to extend time. The Court clearly stated this in the cases of **Principal Secretary, Ministry of Defence and National Services v. Devram Valambhia** [1992] T. L. R. 387 and **VIP Engineering and Marketing Limited & 3 Others v. Citibank Tanzania Limited**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported). In the **Devram Valambhia** (supra), the Court held that: -

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is sufficient importance to constitute sufficient reason within the meaning of rule 8 [now rule 10) of the Rules for extending time. To hold otherwise would amount to

permitting a decision, which in law might not exist, to stand."

The Court went on to state that:-

"In our view, when the point at issue is one alleging the illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

[Emphasis mine]

On a quick review of the ground of illegality raised, I agree that there is a point of law requiring the attention of this Court. The applicant has pleaded illegality in paragraph 9 of the affidavit supporting the application. For ease of reference, the paragraph is reproduced below:-

"That the applicant is challenging gross illegality found in the Judgment and Decree dated 8th June, 2022, in which the High Court held that an application granting condonation is not interlocutory and the same can be challenged by the aggrieved party even if the main case has not been disposed on merit."

In **I.P.T.L. v. Standard Chartered Bank (Hong Kong) Ltd**, Civil Revision No. 1 of 2009 (unreported), the Court stressing the right to be heard before an adverse decision is made, held that:-

"No decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

In the complaint decision, while pursuing his rights, the applicant applied for condonation, which was granted. The respondent contested the decision before the High Court Labour Division that no good cause or sufficient cause was shown to allow the grant of the said application. Accordingly, the Judge allowed the revision, quashed and set aside the ruling granting condonation to the respondent. Whether the decision to grant the application for condonation was interlocutory is a legal point, which I cannot answer at this stage of the application for extension of time. I, nevertheless, find the point constitutes sufficient or good cause for the grant of the prayer sought.

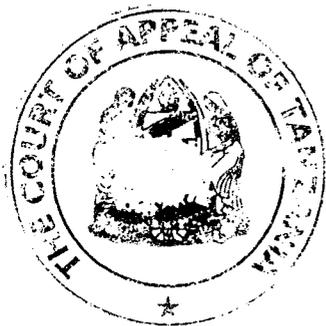
From the above discussion, I find it appropriate to grant the application and allow the applicant to serve the respondent with a Memorandum and Record of Appeal within seven (7) days from the date of delivering this ruling.

DATED at DAR ES SALAAM this 7th day of August, 2023.

P. S. FIKIRINI

JUSTICE OF APPEAL

The Ruling delivered this 9th day of August, 2023 in the presence of Mr. David Andindilile holding brief for Ms. Marieta Mollel, learned counsel for the applicant and also, learned counsel for the respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. E. FOVO", written over a horizontal line.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL