

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 729 OF 2018

(Originating from Misc. Civil Cause No. 29/1993, "Organization of Tanzania Trade Union (OTU)

SHABANI MASELE.....1ST APPLICANT

SHABANI MVUONI.....2ND APPLICANT

DANFORD NG'OMBO.....3RD APPLICANT

VERSUS

TREASURY REGISTRAR.....1ST RESPONDENT

ON BEHALF OF THE FORMER DEFUNCT KILTEX

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of Last Order: 24/04/2020

Date of Ruling: 03/07/2020

MLYAMBINA, J.

The Applicants are seeking for enlargement of time within which to file an application for review against the decision of this Court by Ihema, J. (Late and as he then was) dated 20th February, 2004. The application was filed on 16th day of November, 2018 which is 16 years and 4 months ago. Counsel Sylvester Frederick Aligawesa for the Applicants, sworn an affidavit in support of the application. In order to clear any doubt and for just and fair analysis of the

advanced reasons, I will hereunder reproduce the entire substantive part (paragraph 1-12) of the supporting affidavit.

1. That, 12/08/1993, the panel of three Judges of the Industrial Court (as then was) delivered their judgment in Misc. Cause No. 21/1993, and read before parties by F.S Mshote, District Registrar (as he then was) on which the Applicants won the case by the reasons the their redundant has to be paid the amount of TZs. 588,451, 578/=.
2. That, since the ruling was delivered in the above mentioned case, no appeal, revision or even review was filed but rather on the time of execution, for the reasons best known to the Honourable Mwaipopo, the High Court Registrar (as he then was) did contrary to what was ordered by three Judges in the mentioned case, when he delivered his ruling on 2/08/2002 into which he ordered payment of the sum of TZs. 93,775,261 instead of 588,451,578 as was ordered by three Judges as per the judgment.
3. That, the Applicants were dissatisfied with the Registrars Ruling and in 2003, filed an application for garnishee order in order to attach the Account of the 1st Respondent and was granted by the Honourable Court, by the District Registrar, Honourable Lila (as he then was), to sudden, on 20/02/2004,

Ihema J. (as he then was), set aside the decree which issued the garnishee order. This ruling was delivered, after the Court's Secretary has already informed the Applicant's that the ruling will be delivered on the date which will be communicated to the parties, but not that very day the ruling was delivered contrary to what was announced.

4. That, the Applicants filed another application in order to file an extension of time so as to file an application of setting aside the ruling of Ihema J. dated 20/02/2004, the same Judge was the one who continued to hear that application (instead of disqualifying himself for he was the one heard the main application, he again denied their application.
5. That, since 09/03/2006, no application was filed before any Court of law because the file got lost and at the same time, the Applicant's Advocate Maira died. And later, the former Applicant one Jackson Mukangara died, thus the substitute Applicants were given Power of Attorney by their fellows to represent them.
6. That, for almost 6 years the Applicants have been struggling to look for their right, especially administratively and Court procedure, in order to see if their file could be found but their struggles ended up in vain.

7. That, it was until in the year 2013 when the Applicant approached our Legal Firm Millennium Law Chambers Advocates (now Aganosibe Law Chambers Advocates) in order to seek Legal Advice.
8. That, our office took initiatives to write to the Registrar High Court, Dar es Salaam Registry, with the aim of enforcing the legal mechanism, seeing that, if possible the new file may be composed and the case to continue, communication has gone all long up to the, 2017, when by struggles and efforts of Honourable Registrars; Musumi, Magesa and Sianne (as they then were), the file was found, and those Honourable Registrars advised the Applicants to follow the normal Court's procedure in order to file an applicable application, on 27th September, 2018 we filed to this Honourable Court an Application Registered As No. 523/2018, so that we may obtain leave to file an application for review against the decision of the Court by Ihema J. (late and he then was) dated 20th out of time.
9. That, before hearing the Attorney General rose a preliminary objection, which we conceded and prayed for withdrawing our application with leave to file a fresh suit, our prayer was granted on 29/10/2018, by Honourable I.C. Mgeta. J.

10. That, after we have ascertained ourselves, now this application.

11. That, this application is of much importance and there are good chance (s) of success upon granted leave to file our application.

12. That, the delay is not influenced by negligence (s) on the side of the Applicants, but rather was unavoidably influenced by the following grounds:

- a) The former representative of the Applicants Mr. Jackson Mukangara, died hence no one could represent them, the Applicants had to look for other representatives.
- b) Their council one learned Counsel Mr. Moses Maila died while the process was in move.
- c) Loss of the Court's file also has contributed a lot.
- d) Most of the Applicants were scattered away to make such nomination/appointing of the new representative (s) become difficult,
- e) Poverty also has contributed, such that even the current counsel is volunteering.

The application has been resisted by both Respondents through counter affidavit sworn and filed by Erigh Stephen Rumisha, A State

Attorney at the office of the solicitor general by virtue of his employment.

According to the sworn statement from Eligh Stephen Rumisha, loss of files cannot be reasons for delay as on 21st July, 2014 the copies of files were already submitted to the Court and no immediately action taken by the Applicants in respect of application for review of Misc. Civil Cause No.29/1993.

The Respondents were of further sworn statement that there is naked negligence on part of the Applicants and they have not accounted for each day of delay.

By order of the Court and in full compliance of the schedule, the application has been disposed by way of written submissions. The Applicants filed their written submission drafted by their counsel Sylvester Frederick Aligawesa. The reply submission of the Respondents was drawn and filed by Eligh Stephen Rumisha, State Attorney.

The major submission by the Applicants was that the delay to file the intended review was not influenced by negligence, neither on the parties nor on their Advocate (s), struggles to look for their rights were /are in move since then.

In view of the Applicants, Misc. Civil Application Cause No. 29 of 1993 dated 20th February, 2004 and that of 9th March, 2006, both being adjudicated by the same Judge Ihema, J. were full of illegalities as well as irregularities.

Further, the illegalities and irregularities were also done with the former Registrars, for example, on 12th August, 1993, the panel of three Judges of the then Industrial Court, delivered their Judgement in Misc. Cause No. 21 of 1993, whereby the Applicants were to be paid the sum TZs 588,451, 578/= of which according to the then applicable law, the decision of the panel of three Judges could not be changed or altered by a Registrar or a single Judge as F.S Mshote, the District Registrar did. The same mistakes were done by Honourable Mwaipopo, the High Court Registrar (as he then was), when delivered the ruling in executing the same. The Applicants cited the case of **Republic v. Yona Kaponda and Others**, Court of Appeal of Tanzania at Dar es Salaam, Misc. Economic Criminal Application No. 2 of 1985 in which Honourable Makame, J.A (as he then was) among other things has this to say:

...(ii) in deciding whether or not to allow an application to appeal out of time, the Court has to consider whether or not there is 'sufficient reasons' not only for the delay, but also

sufficient reasons” for extending the time for the intended appeal...

Also, in the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia**, Court of Appeal of Tanzania (1992) TLR, it was stated:

...(vii) where the point of law at issue is the illegality or otherwise of the decision being challenged that is a point of law sufficient importance to constitute a sufficient reason...

In winding up their submission in chief, the Applicants submitted that their delay to file the intended review was not due to negligence but was encumbered with obstacles such as:

1. In 2004, the former counsel for the Applicants filed an extension of time in order to set aside the decree by Honourable Ihema, Judge to sudden the file was lost, and for many years nobody could make a follow up because the Advocate who was representing them Moses Maira died and their Mukangara also died.
2. In the year 2013, the Applicants approached the Advocate from Millennium Law Chambers Advocates, to assist them on seeking their rights, whereby it took actions promptly with due

diligence (paragraphs 7-8 and 9 of the affidavits are humbly refereed).

3. Poverty and scattered away of the Applicants, caused difficulties to unite them so as to appoint the current representatives.

In reply to the prayer for that extension, the Respondent submitted that though the grant of extension of time is entirely in this Honourable Court's discretion, the Applicant must adduce sufficient cause or reasons. The Applicant cited the case of **Kalunga and Company Advocates v. National Bank of Commerce Limited** [2006] TLR 235. The Applicant went on to cite the Court of Appeal Decision in Civil Appeal No. 1 of 2002, **Yusufu same and Hawa Dada v. Hajidja Yusufu Dar es Salaam** (unreported) in which at page 7 the Court had this to say:

It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it. *This 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. From decided cases a number of factors have to be taken into account, including *whether or not the application has been brought prompt; the absence of any or valid*

explanation for the delay; lack of diligence on the Applicant.”

[Emphasis added].

On the illegality point, the Respondent replied that there is no any tenable explanation on the same at all, it was just mentioned, thus not established for this Court to consider as a sufficient ground for extension. On that note, the Respondent cited the case of **CRDB Bank Ltd and Serengeti Road Service**, Civil Application No 12 of 2009, Court of appeal decision at Dar es Salaam (unreported) where the Court of Appeal Applied with approval the Applicant cited case of **Principal Secretary, Ministry of Defence and National Service** (*supra*).

The Respondent had no issue with the principle set by the Court of Appeal in the case of **Kalunga and Company Advocates v. National Bank of Commerce Limited** [2006] TLR 235 in respect of illegality. But they maintained that the Applicant failure to establish/demonstrate the said illegality cannot warrant this Honourable Court to grant this application for extension of time.

Further, the Applicants are applying for extension of time to revise a decision of 20th February 2004 by this application which was filed on 16th November, 2018. That is 16 years and 3 months ago while the same was supposed to be filed on or before 21th April, 2004.

The Respondents cited the case of **R.B. Polies at Lloyds v. Butler** [1950] 1KB. 76, at 81 or (1949) 2 ALL ER 226 at 230, the Court had this remark regarding time limit:

The reasons why we should have statutes of limitation are inter alia that long dormant claims have more of cruelty than justice in them and the person with good cause of action, should persue his right with reasonable diligence. It was further remarked in that English case (at pages 229-230) that, those who go to sleep on their claims should not be assisted by the Courts in recovering their property, there shall be an end of matters filed in Court, and there shall be protection against state demands.

It was the Respondent's submission that this application is misplaced and baseless to be granted as there are no sufficient reasons advanced by the Applicants. The Respondent's cited Court of Appeal decision of **Yusufu same and Hawa Dada v. Hadija Yusufu** (*supra*) at page 9, the Court had this to say:

It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to *encompass all reasons or causes which are*

outside the Applicant's power to control or influence resulting in delay in taking any necessary step.

The Respondents maintained that as far as this application before the Court is concerned, there is no any reason adduced by the Applicant showing that the same was outside the Applicant's power or control that influenced his delay, in taking necessary action rather all of the reasons were within their reach but still they made a choice to just sleep on their right of action with no apparent reason. The Respondents re-cited the decision in **Lyamuya Construction Company Ltd** (supra), at page 6-7 in which the Court had this to say:

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 guidelines may be formulated;

- a) The Applicant must account for all the period of delay,*
- b) The delay should not be inordinate,*
- c) The Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take,*

d) If the Court feels that there are another sufficient reason...

The Respondents cited another Court of Appeal decision, Between **Sebastian Ndaula v. Grace Rwamafa [Legal Personal Representative of Joshwa Rwamafa] (unreported)**, Civil Application No. 4 of 2014 at Bukoba, at page 6-7, the Court quoting the case of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited** (unreported) while considering an application for extension of time under *Rule 8 of the Court of Appeal Rules, 1979* (old rules) where an Applicant was required to show "sufficient reason" had this to state:

It is trite law that an application before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, *act very expeditiously* and that the application has been brought in good faith. *[Emphasis added]*

In the light of the afore authority, the Respondent submitted that while knowing that the Applicants were late to pursue their right, the Applicants failed to act very expeditiously as required, regardless of having knowledge that the application was out of time, the Applicants chose to just delay the same with no any tenable explanation.

Further the delay again was with no explanation at all. In view of the Respondent, this can in no way be termed as acting diligently and promptly. As regards the Applicants cited cases of **Khalfan Bushiri Kiyu v. Tanzania Investment Bank** protecting litigants from being punished for errors committed by Court, it was the submission of the Respondents that this judgment is misplaced and distinguishable in the matter at hand as the Applicant has failed to demonstrate an error committed by Court in the case at hand hence inapplicable. On the Applicant's cited case of **Bulyanhuru Gold Mines** (supra), the Respondents maintained that it is distinguishable from the current application because in the stated case, the issue was the issuance of notice to the parties upon the expiry of 30 days required to issue an award. But that is not at issue in the matter at hand as there is nowhere in this application, the Applicant stated delay in issuing the award as a reason of his lateness.

In view of the above, it was the Respondents submission that the Applicant has failed to act expeditiously enough for this Court to grant extension, as the same is tainted with unreasonable delay which is not accounted for, hence failed to establish sufficient cause for their application to be granted by this Court.

Having considered the evidences and submissions of the parties widely, I have noted, both parties do agree that extension of time, though it is the discretion power of the Court, has to be granted only if the Applicant proves that the delay was occasioned by sufficient cause and each day of delay has been accounted for.

In the case of **Allison Xerox Silla v. Tanzania Hobours Authority**, Civil Reference No. 14 of 1998 Court of Appeal of Tanzania at Dar es Salaam (unreported), as quoted by my brethren Honourable Arufani Judge in **Attorney General v. Masumin and Another**, Misc. Civil Application No. 11/2015 High Court Dar es Salaam (unreported) at page 9, it was stated *inter alia* that:

...where an extension of time is sought consequent to a delay the cardinal question is whether sufficient reason is shown for the delay; other considerations such as the merit of the intended appeal would come in after the Applicant has satisfied the Court that the delay was for sufficient cause.

The afore was earlier on maintained by the Court in the case of **Republic v. Yona Kaponda and 9 others** (*supra*) as cited in the case of **Ihembe Industries Co. Ltd v. Tanznaia Electrical Mechanical and Electronic Services Agency (TEMESA)** (*supra*).

In the case of **The International Airline of the United Arab Emirates v. Nassorror**; Civil Application No. 263 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 7 it was found that the consideration in granting application for extension is to assess whether the extension of time has been brought promptly as well as whether there was diligence on the part of the Applicant. Again, in the case of **Tanzania Coffee Board v. Rombo Millers Ltd**, Civil Application No. 13 of 2015 (unreported) the Court of Appeal of Tanzania held that:

Extension of time should be considered on two grounds; that every day must be accounted for which the Applicant did; and the reason for the delay must be sufficient....

The principle that an Applicant must account for each day of delay has been held so in various cases including the case of **Kombe Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Application No. 379/01 of 2018 Court of Appeal of Tanzania, (unreported) **Lyamuya Construction Company Limited (supra)**, **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018, Court of Appeal of Tanzania, Mwanza (unreported).

Further, both parties do not dispute that where there is a complaint of illegality or irregularity on the part of the trial Court, such complaint constitutes sufficient ground and a fit case for grant of extension of time so that the Court of Appeal may have an opportunity to correct the illegality complained of and put the record right. This was the position in the case of **Principal Secretary, Ministry of Defense and National Service** (*supra*). However, it is also an established principle of law that illegality alone has never been a good cause for granting extension. In the case of **Etiennes Hotel v. National Housing Corporation**, Civil Reference No. 32 of 2005, Court of Appeal of Tanzania (unreported), it was held *inter alia* that:

Plea of illegality is accepted principle as sufficient ground for extension of time but subject to diligence...

It is the findings of this Court that, the Advocate's negligence does not amount to sufficient cause for extension of time. This has been the Court of Appeal position in various cases including the case of **Calico Textile Industries Ltd. v. Pyrali Esmail Premji** [1983] TLR 28 (CA).

In order for the Court to establish whether there was a good cause or sufficient reason, depends on whether the application for

extension of time has been brought promptly as well as whether there was diligence on the part of the Applicant. This was held in the case of **The International Airline of the United Arab Emirates v. Nassorro**; *Civil Application No. 263 of 2016, Court of Appeal of Tanzania at Dar es Salaam* (unreported) at page 7.

I do understand that, as a general rule, a party should not be denied in his application for extension of time. That was the position in the case of **Mobrama Gold Corporation Ltd v. Minerals and Others** (1998) TLR. 425 where it was held that:

It is generally inappropriate to deny a party an extension of time. Where such denial will stifle his case as the Respondent delay does not constitute a cause of procedural abuse or contemptuous default and because the Applicant will not suffer any prejudice, an extension should be granted.

However, it is also another rule that time limits promulgated by the parliament must be abided with as it was held in the case of **Dr. Ally Shabhay** (*supra*).

In the light of the above established principles, it is pertinent time to consider the five grounds stated by the Applicants, to wit;

- 1) The Court file was misplaced /lost for remarkable long time, though it is now found.

- 2) The untimely deaths of both the counsel and representatives of the Applicants.
- 3) Difficult and cumbersome procedure or modality of organizing the Applicants to meet and appoint a representative as the Applicants are scattered all over the country.
- 4) Poverty of the Applicants.
- 5) Illegality and irregularity of the impugned decision.

To start with the point of misplacement of file, the Applicants told the Court *inter alia* that since 9th March, 2006, no application was filed before any Court of law because the file got lost until on 2017 when the file was found.

Much as I may agree with the Applicants on their struggles with the misplaced file, there is nothing in record to establish or account for the delay from 2017 up to 27th September, 2018 when this application was filed.

The Applicants never accounted for each day of delay for almost a year. This was contrary to the principles enunciated in among other cited cases of **Lyamuya Construction Co. Ltd** (*supra*).

As regards the deaths of the Applicants' representative, I do agree that death is the good ground for extension. However, annexure WT5 to the affidavit in support of the application is a mere Special

Power of Attorney of which the former employees of KILTEX Dar es Salaam appointed/ ordained and nominated Mr. Shaban Hussein Masele, Shabani Rajabu Mvuoni and Danford Ng'ombo Varelian to be true representatives in the suit. There is nothing to prove as to when exactly Counsel Maira (deceased) and the Applicant's representative were called to the many. Also, the special Power of Attorney shows it was certified on 23rd October, 2018. There are no further concrete details for accounting the delay.

On the issue of difficult procedure and modality of organizing the Applicants to meet, I find it too to be unreasonable ground in the globalized world of today where a group of people may be connected within a second through various internet-based platforms. Even if such means is difficult to the Applicants, the delay of the Applicants is beyond tolerance.

The Applicants have advanced a reason of poverty. Though not replied by the Respondent, the issue of poverty or financial constraint is not a sufficient reason for extending time. In the case of **Wambele Mtumwa Shahake v. Mohamed Hamis**, Civil Reference No. 8 of 2016, Court of Appeal of Tanzania Dar es Salaam (unreported) the Court observed:

*As regards the issue of financial constraint, again that is not a sufficient reason for extending the time as was held in the case of **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 where the Court stated as hereunder”*

*“we are aware that financial constraint is not a sufficient ground for extension of time (see **Zabits Kawuka v. Abdul Karim (EACA)**) Civil Appeal No. 18 of 1937 page 11.*

Even if I may agree with the Applicants that the delay was caused by poverty, as stated earlier, the Applicants have not accounted for each day of delay.

On the last point of illegality and irregularity, there are no much details of the illegality, even if such points exist, illegality is subject of diligence. The Applicants have not demonstrated sufficient grounds in prosecuting their rights. In the case of **Omary Ally Nyamalege (as the administrator of the estate of the late Seleman Ally Nyamalege) and Others v. Mwanza Engineering Works**, Civil Application No. 98/08 of 2017, Court of Appeal of Tanzania observed:

Applying the above settled position to the instant application, I have no difficulty in holding that the Applicant’s contention that the decision sought to be challenged is fraught with

illegalities is nothing but an unsubstantiated general complaint. Without the details of the alleged illegalities, it is impossible to determine whether the said illegalities are apparent on the face of the record and that they are of sufficient importance to merit the attention of this Court.

The Court is of further view that, even if it can agree there are illegality on the impugned decision, illegality is subject to diligence as held in the case of **Etiennes Hotel** (*supra*).

In the circumstances of the above the application is dismissed for lack of sufficient cause. Taking into account of the nature of the case, let costs be shared. Order accordingly.



Y. J. MLYAMBINA
JUDGE

03/07/2020

Ruling delivered and dated 3rd July, 2020 in the presence of the 1st and 3rd Applicants. The 2nd Applicant and the Respondents being absent. Right of Appeal explained.



Y. J. MLYAMBINA
JUDGE

03/07/2020