IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 36 OF 2023

(Originating from Miscellaneous Civil Cause No. 20 of 2022)

ODERO CHARLES ODERO.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

21st November & 11th December, 2023

KAGOMBA, J.

The applicant herein seeks extension of time to lodge a notice of intended appeal to the Court of Appeal of Tanzania (Hereinafter the "CAT") against the judgment of this Court in Miscellaneous Civil Cause No. 20 of 2022. He also prays for dispensation of costs of this application on account of public interest embedded therein.

The application is supported by an affidavit of Odero Charles Odero, the applicant. The respondents did not file counter affidavits but preferred to oppose the application on non-factual matters only.

Briefly, in the Miscellaneous Civil Cause No.20 of 2022, the petitioner who is now the applicant herein, complained about the practice of the 1st respondent of instituting charges against accused persons before completion of investigations. He deemed that practice as a violation of Articles 9 and 59B (4) of the Constitution of the United Republic of Tanzania. He also blamed the practice for prolonging litigations, with various negative consequences to the Judiciary and administration of justice as a whole. Upon hearing, this court (Mgetta, Masoud and Kakolaki, JJJ) (henceforth the "trial Court") found no merit in the petition and proceeded to dismiss the same. Apparently, the applicant was aggrieved, but he did not lodge notice of intended appeal to the CAT within prescribed time, hence this application for time extension.

The hearing of this application proceeded by way of written submissions. Mr. John Seka, learned counsel, drew and filed submissions in chief for the applicant, whereas Mr. Erigh Rumisha, learned State Attorney, drew and filed the reply submissions for the respondents. As of 24th November, 2023 which was the deadline for the applicant to rejoin, no rejoinder was filed in court.

In his written submissions, Mr. Seka firstly sought to adopt the applicant's affidavit and its annexures to form part of this application.

According to him, in moving this court to grant the application, the applicant solely relies on the ground of illegality of the impugned decision, demonstration of which is in paragraph 7, 8 and 9 of the adopted affidavit. In the said affidavit, the applicant concedes that he is out of time and he cannot account for each day of his delay.

In view of the fact that the respondents opted not to file counter affidavits, it's Mr. Seka's contention that they admit the factual averments made by the applicant in the affidavit. He cited the decision of the Court of Appeal in **Martin D. Kumalija & Others v. Iron and Steel Ltd**, Civil Application No. 70 of 2018 (reported as "[2019] TZCA 542 in Tanzlii.org) on this contention. Quoting from the provision of section 11(1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019], the learned Counsel submits that the granting of time extension is a discretion of this court, adding that the illegality observed in the impugned decision is of sufficient legal importance to warrant the granting of time extension so that the intended appeal can receive attention of the CAT.

Learned counsel submitted that the said points of illegality are briefly stated in paragraph 8 and amplified in paragraph 9 of the affidavit, as; refusal to recognize that admitted facts requires no proof; refusal to take judicial notice of notorious facts of the present history and refusal to

prove the case by way of affidavit evidence. Having explained each of the stated points of illegality, the learned counsel expresses his optimism that the CAT will fault the impugned decision by basing on its decision in **Mbeya - Rukwa Auto-parts and Transport v. Jestina George Mwakyoma** [2003] T.L.R 251 on the unfettered right of a party to be fully heard.

Further citing the provision of Article 13(6) (a) of the Constitution, the learned counsel submits that the right to appeal against the impugned decision is not only crucial on the basis of illegality aforesaid, but the same is statutory owing to the fact that the court made the said decision in its exercise of its original jurisdiction and also constitutional as per the cited Article 13(6)(a) of the Constitution. Based on the above submission, he prays the court to permit the extension of time as sought, for the applicant to appeal to the CAT.

Mr. Rumisha has a short-written submission in reply. He concedes that the respondents' opposition to this application is based on legal principles only in line with the decision of the CAT in **Deogratius Kapela v. R**, MZA Criminal Application No. 01 of 2006 (Unreported).

In his counter-legal arguments, Mr. Rumisha contends that while a claim of illegality can be considered as a good cause for granting extension

of time, the errors allegedly committed by the trial court do not amount to illegality. To him, the points alleged in paragraph 8 of the affidavit can attract two different opinions, hence not errors apparent on the face of the record. He cited the decision of the CAT in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, for the contention that there is nothing on the record to justify the granting of time extension.

Further relying on the decision of CAT in **Sebastian Ndaula v. Grace Rwamafa,** Civil Application No. 4 of 2014 (Unreported), Mr. Rumisha also faults the applicant for failing in his duty to account for each day of the delay for more than a year. Regarding the cases of **Devram Valambhia** and **M.B Business** (supra) which were cited by the applicant's counsel, Mr. Rumisha is of the view that each case should be examined on its peculiarity, adding that in the instant matter the applicant has failed to demonstrate alleged illegality.

Having read the submissions and upon considering the law governing the matter at hand, three things are apparent. **One**, ordinarily under Rule 83(1) and (2) of the Court of Appeal of Tanzania Rules, 2009 (as amended), an aggrieved person is required to lodge his notice of

intended appeal within one month from the date of the impugned decision. The cited rule provides;

> *"83.-(1) Any person who desires to appeal to the Court of Appeal shall lodge a written notice in duplicate with the Registrar of the High Court.*
>
> *(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.*
>
> *[Emphasis added]*

Counting thirty days from 19th December, 2022 when the trial court pronounced its judgment, the applicant would have been required to lodge his notice of intended appeal by 17th January, 2023. However, in view of the fact that the applicant was notified about the readiness of the records on 23rd May, 2023 as averred in the unopposed affidavit, the latest time the notice was to be lodged is 21st June, 2023. This means, the applicant's application for extension of time filed on 27th September, 2023 is **99 days** late.

Two; it is not disputed that the applicant has not accounted for each of the **99 days** of delay, which is a settled legal requirement as per numerous decisions of this court and the CAT, the case of **Sebastian Ndaula v. Grace Rwamafa (supra)**, inclusive. The applicant admits this failure under paragraph 6 of his affidavit, and that is why he solely

relies on the points of illegality allegedly embedded in the impugned judgment.

Three; counsel for both sides appear to read the same page of the law that illegality can be a good ground for granting extension of time, provided the same is significant and apparent on the face of the records.

Under the above circumstances, the issue before the court is whether the applicant has raised significant points of law indicating that there could be errors of illegality apparent on the face of the records in the impugned judgment, to sustain this application.

The position of the law on this issue is to be found in the decisions of the CAT in **Devram Valambhia** (supra) and similar decisions, on one hand, and the clarification made by CAT in **Lyamuya Construction** (supra), on the other hand. In **Devram Valambhia**, the CAT observed;

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

In this decision, CAT was categorical that the allegation of illegality of the decision constituted sufficient ground for extension of time.

In **Lyamuya Construction**, the apex court while interpreting its decision in **Devram Valambhia**, installed some safety valves, to curb possible abuse of the "illegality" route as a ground for seeking extension of time. The CAT clarified;

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates 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 record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process". [Emphasis added].***

At this juncture, I should put on record the limitation of my jurisdiction in this application. I am not empowered to determine who is right between the applicant and the trial court. Only what this court has to do is to determine if there are contestable points of law, of sufficient importance and apparent on the face of the record, which may support the granting of this application.

In determining as above, I find it unavoidable to reproduce the entire paragraph 8 of applicant's affidavit, wherein the said points of law have been stated. It reads;

> *"That as aforestated having read the aforementioned ruling; I firmly believe that I can pinpoint to the appellate court, the following apparent errors of law on the face of the record:-*
>
> *(a) The failure by the trial (sic) to take judicial notice of matters of present history in terms of section 58 and 59 [2] of Tanzania Evidence Act;*
>
> *(b) The failure by the trial court to notice that the First and Second Respondents did admit the existence of practice of filing criminal case without awaiting completion of evidence and consequent thereof, the fact did not require further proof;*
>
> *(c) The failure/refusal of the trial court to grant permission to lead further evidence of the existence of the practice by the First Respondent of filing criminal cases without awaiting completion of investigation in circumstances where justice of the suit and principles of overriding objectives warranted accommodation of the request;*
>
> *(d) That the Respondents responses at the High Court amounted to evasive and vague denials amounting to admissions".*

It can be gleaned from the foretasted reasons that, the alleged failure of the trial court to take judicial notice of matters of the present history of the country on the issue under contention, is pegged to the provision of section 58 and 59(2) of the Evidence Act. In section 58, the law provides to the effect that a fact which the court has taken judicial notice of, shall require no proof. The contention by Counsel for the applicant on this point is that, the trail court ought to have taken judicial notice of the recent history with regard to the practice of filing cases before investigation is complete. Learned counsel sees a duty of the trial court to do so under section 58 and 59B of the Evidence Act. Whether there are books or reference materials on the recent history on the impugned practice may be another question, and I don't think I should delve in that detail.

Putting everything within the context of this application, the alleged failure of the trial court to take judicial notice of those facts can be raised as a point of illegality. I hold so because the concern raised by the applicant in paragraph 8(a) of his affidavit is at the very center of the issue in dispute. The same is narrated in the summary of facts in issue on the front page of the impugned judgment; it forms the only issue dealt

with by the trial court and consequently it is part of the decision that was reached and which is being impugned.

Records reveal that the issue for determination before the trial court was "*whether the alleged practice of instituting criminal cases against accused persons before completion of investigation is violative of the provisions of Article 9 and 59B of the Constitution*". Therefore, it follows that, proof of existence of the recent history on the said impugned practice, may be considered both as significant point of law, emanating from section 59(2) of the Evidence Act, and the same is also apparent on the face of the record discovery of which cannot be said to involve any long-drawn argument or process.

By holding as above, I am not oblivious of the fact that from page 8 to 9 of typed judgment, the court clearly explained the reasons for disputing the existence of the impugned practice. Rather, the fact that there might be different positions on how the law can be appreciated, on any matter crucial to the determination of the point at issue and which is apparent on the face of the record, such a point makes a case fit for determination by the CAT, and so is point in paragraph 8(a) of the applicant's affidavit.

As regards the point of law in paragraph 8(b), that the trial court failed to notice that the First and Second Respondents did admit the existence of the impugned practice of filing criminal case without awaiting completion of evidence, I am of the same opinion as in point (a) above. This second point of illegality was uncontroverted. On page 6 of the impugned judgment, it is stated that the first (**NOT** the second) respondent files criminal cases in court before completion of the investigation. Again, despite the trial court giving its reasons for not siding with the applicant on this point, the legal interpretation and the implication of this admission may become food for the CAT to chew and determine since the said point touches on the very issue for determination, and is on the face of the record.

The legal point in paragraph (c) is on failure or refusal of the trial court to permit the First respondent to lead further evidence on the existence of the impugned practice. On page 8 of the impugned judgment the court lucidly records its appreciation "*of the matters on record that are in dispute, and which are critical to the determination of this petition*". The court further confirms to be "*mindful of the need of evidence from the petitioner to establish the allegations on the disputed matters*". On the same page 8, the court expresses its reasons for differing with the

applicant, notably that no international instruments, allegedly breached by the impugned practice were disclosed in the petition. Having perused the judgment, it is not apparent on its face that the applicant prayed to lead additional evidence on the subject but the court refused or neglected. The trial court records are apt on this point, when stating thus;

> *"If we go by the rival submissions on the record which have closely considered,* ***it is disputed whether or not there is evidence sufficiently establishing the allegations*** *which are disputed by the respondents, and which form the basis of the instant petition. This dispute is critical to the determination of this petition". [Emphasis added].*

What can be discerned from the above observation is that the petitioner did not lead sufficient evidence on the allegation. This is not the same as saying that the court refused or neglected to grant him the permission to do so, as far as records are concerned. It follows that the alleged point of illegality in paragraph 8(c) of the applicant's affidavit can only be discerned by a long process of evaluating the records. Hence, the same is not apparent on the face of the record.

Likewise, the point in paragraph 8(d) on evasive denials by the respondents appears to me to be capable of attracting different opinions. That point is, certainly, not apparent on the face of the record.

In final analysis, I find the points of law raised in paragraphs 8(a) and (b) of the affidavit meeting the legal criteria for errors of illegality apparent on the face of the records. The same are potent points of law worth to be considered by the CAT and are capable of sustaining the applicant's application for extension of time.

As the issue herein is answered in the affirmative, this application is granted with no order as to costs. The applicant has one-month to lodge his notice of intended appeal to the Court of Appeal.

Dated at **Dodoma** this 11th day of December, 2023.

ABDI S. KAGOMBA

JUDGE