THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA
MISCELLANEOUS LABOUR APPLICATION NO. 13 OF 2023
(Originating from Labour Revision No. 21 of 2020 of the High Court of Tanzania at Dodoma)

TANZANIA ELECTRIC SUPPLY CO. LTD.....APPLICANT
VERSUS
FRANK KASINDE & 10 OTHERS.....RESPONDENT

RULING

Last order: 19/3/2024
Date of ruling: 5/4/2024

MASABO, J.:

In this application, leave for extension of time is sought to enable the applicant to institute a review of an order of this court in Labor Revision No. 21 of 2020 dated July 13th, 2022. The application has been preferred by a chamber summons made under rule 24(1), (2) (a)(b)(c)(d)(e)(f); rule 24(3) (a) (b) (c)(d) rule 24(11)(a) and rule 56(1) and (3) of the Labour Court Rules, 2007. Bracing the chamber summons is an affidavit deponed by Norbert Beda Kazembe who is identified as a State Attorney.

From this affidavit, it is deciphered that the applicant is aggrieved by an order of this court dated July 13th 2022 by which his application for revision was dismissed for want of prosecution. It is deponed that the kernel of the matter is the decision of the Commission for Mediation and Arbitration (CMA) at Singida in which an award was issued in favor of the respondents who were formerly employed by the applicant. Aggrieved by the award the

applicant instituted Labor Revision No. 21 of 2022 in this court but the same was dismissed on 13th July 2022 after the deponent who was the respondent's counsel defaulted appearance. Aggrieved further, the Applicant instituted Miscellaneous Application No. 11 of 2022 in this court seeking for restoration of Labor Revision No. 21 of 2022 but this application ended barren after it was struck out by this court on 11th August 2022 due to material irregularities.

The applicant retreated and came back with the present application for extension of time within which to file a review. In support of her application, she has only cited one reason and the same is deponed under paragraph (l) of the affidavit where she has averred that there are illegalities apparent on the face of the record of Labor Revision No. 21 or 2022 because she was adjudged unheard. Further, in paragraph (m) of the affidavit, it is deponed that the decision sought to be challenged has an irregularity because instead of striking out the application the court dismissed it. Thus, it is in the interest of justice that the application be granted else, there will be a miscarriage of justice. The application was vehemently opposed by the respondents who in their joint affidavits put the applicant to strict proof.

The hearing of the appeal proceeded in writing. Both parties were represented. The applicant was represented by Ms. Agness Julius Makubha, learned State Attorney whereas the respondents were represented by Mr. Shabani Hamisi Dinya, Advocate.

Submitting in support of the application Ms. Makubha adopted the content of the affidavit accompanying the application and went on to submit that

there is a fatal irregularity in the proceedings of Labor Revision No. 21 of 2020 because the court dismissed the application without affording the applicant the right to be heard and consequently offended the provision of Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977. She added that this was materially wrong considering that the right to be heard is a fundamental right and the applicant had issued a notice of absence. In fortification, she cited the case of **V.I.P. Engineering and Marketing Limited & 2 Others v. Citibank Tanzania Limited,** Consolidated Civil Reference No. 6, 7 and 8 of 2006 [2007] TZCA 165, TanzLII) and **Abass Sherally vs. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 133 of 2002, CAT (unreported). Based on these two decisions she concluded that the right to be heard is a fundamental right and its abrogation vitiates the proceedings.

On the second irregularity, she submitted that rule 36(1) of the Labour Rules implicitly states that where the party who initiated the proceedings defaults appearance, the application can be struck out. Thus, it was wrong for this court to dismiss the appeal instead of striking it out. Citing the case of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] T.L.R. 185, **VIP Engineering and Marketing LTD & Two Others v. Citibank Tanzania Ltd,** Consolidated Civil References No. 6,7, & 8 of 2006, [2007] TZCA 165 TanzLII and **Mary Rwabizi t/a Amuga Enterprises vs National Microfinance Plc** (Civil Application 378 of 2019) [2020] TZCA 355 TanzLII, she submitted that illegality is a sufficient cause for extension of time and when it is at issue, the court is duty bound to

extend the time for purposes of providing an opportunity for ascertainment and curing of the illegality if any.

Mr. Dinya sharply opposed the application. In his reply submission, he argued that the provision of Article 13(6) of the constitution was not offended as the application was on several occasions scheduled for hearing but the applicant defaulted appearance. He cited the case of **R.B. Policies at Lloyds vs Butler** (1950) 1KB 76 at 81 or (1949) 2. All ER 226 at 226 to 230 where it was held that the right to be heard is not absolute. Those who go to sleep on their rights must not be assisted in court. Thus, having defaulted appearance, the applicant waived her right to be heard and cannot cry foul. He proceeded that, the argument that the counsel was participating in Mwalimu Nyerere Hydro Power tender is a lame excuse as the tender process ended on 3rd June 2022. Hence, the counsel had no excuse for defaulting appearance and the dismissal of the application was justified. On the submission that the application was wrongly dismissed instead of being struck out, it was argued that it is without merit as the rule cited is inapplicable. Moreover, it was submitted that the submission that the delay was technical has no merit and should be disregarded as the delay was wholly occasioned by the applicant's ignorance of the law and procedure which is legally inexcusable. In fortification, he cited the case of **Vedastus Raphael v Mwanza City Council & 2 Others** Civil Application No. 594/08 of 2021 [2021] TZCA 696 TanzLII.

In rejoinder, Ms. Makubha reiterated her submission in chief arguing that the provision of Article 13(6) of the Constitution was offended. She argued further that the case of **R.B. Policies at Lloyds vs Butler** (supra) is

distinguishable as the applicant did not sleep over her right. Her failure to enter appearance was with a good cause and she issued a notice of absence which was disregarded. Concerning the provision of Rule 36 (1) of the Labour Court Rules, it was argued that it implicitly provides for striking out as opposed to dismissal of the application. Hence the applicant's application is with merit as her application was wrongly dismissed. Resting her rejoinder, she argued that the application is with merit as the applicant has fully accounted for the delay. Thus, it should be granted.

I have thoroughly examined the application and its accompanying documents which I have considered alongside the respondents' counter affidavit and the submissions by the parties. A consensus emerging from these documents and the submissions is that the leave for extension of time is sought to enable the applicant to challenge a dismissal order made by this court on 13th July 2022. That, the present application was filed on 8th September 2023 which was approximately 14 months after the dismissal order. There is also a consensus that, before instituting the present application, the applicant instituted Misc. Civil Application No. 11 of 2022 seeking for restoration of the dismissed application but the same was struck out for incompetence. Thereafter, he filed the present application.

Having set the record straight, I will now proceed to the merit of the application starting with Rule 27 (1) of the Labour Court Rules which provides that, any review shall be instituted by filing a written notice of review within fifteen (15) days from the date the decision sought to be reviewed was delivered. This time may be enlarged under Rules 56(1) and (3) upon a good cause for delay being demonstrated. Accordingly, the sole

question for determination is whether a good cause warranting an extension of time has been demonstrated. The law is now settled that the powers for extension of time is within the discretion of the court and as per the provisions above, it cannot be exercised unless a good cause has been demonstrated to the satisfaction of the court.

It is similarly settled that, as the term good is not universally defined, the determination of whether or not a good cause has been demonstrated must take into account several factors including among others, the duration of the delay and whether it is inordinate or not; whether the applicant has accounted for each day of delay, whether the delay was not occasioned by the applicant's apathy, negligence or sloppiness in the prosecution of the action that he intends to take, whether there exists a point of law of sufficient importance such as the illegality of the decision sought to be challenged (see **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4, TanzLII; **Ngao Godwin Losero vs Julius Mwarabu** (Civil Application 10 of 2015) [2016] TZCA 921 TanzLII and **Mohamed Salimini vs The Assistant Registrar of Titles & Others** (Civil Reference No. 12 of 2021) [2024] TZCA 66 TanzLII.

In the present case, the delay is inordinate. As stated above, the dismissal order intended to be challenged by way of review if the present application succeeds was issued on July 13th 2022 whereas the present application was filed on 8th September 2023 which entails that the delay is for more than one year. The applicant has not accounted for the delay but has relied on illegality as the sole ground in support of the application. The illegality as deponed in

paragraphs (l) and (m) is twofold encompassing denial of the right to be heard and a wrong verdict, that is, a final order dismissing the application for want of prosecution instead of striking it out. As correctly argued by Ms. Makuba and as already stated above, the illegality of the decision intended to be challenged is among the factors considered in establishing whether or not a good cause has been demonstrated. The law is settled that, when a point of illegality is at issue, it suffices as a good cause. Expounding this principle in **Devram P. Valambhia** (supra), the Court of Appeal stated that: -

> "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, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight".

Cementing this position in **VIP Engineering and Marketing Limited and Two Others v. City Bank Tanzania Limited** (supra), the Court of Appeal held that: -

> "We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" .....for extending time".

Amplifying this ground further, the Court in **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (supra) held that:-

> "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 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 the record,** such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process"(emphasis added).

In the foregoing, I have asked myself whether the two points raised by the applicant are indeed points of law and are of sufficient importance. Both questions attract positive answers. The point that there was a denial of the right to be heard is indeed a crucial legal point as it entails the derogation of a fundamental right. The final verdict of the application which is the epicenter of the second point is similarly of sufficient important as the two final verdicts, namely a dismissal order and an order striking out the application are distinct and attract different consequences. Mr. Ndinya has invited me to hold that the illegality alleged is without merit because the applicant was availed the right to be heard but forfeited it even after he was given many chances for that. With due respect to the learned counsel, much as his argument appears attractive, it has been made prematurely as this court cannot at this stage determine whether or not the applicant was granted the right to be heard. Such a determination can only be made when determining the intended review. By deciding such a point at this stage, I would run a risk of preempting the intended review and consequently usurp the power of the review court.

That said, the application is allowed. Leave is granted to the applicant to lodge her review within 14 days. Each party shall shoulder its costs. Order accordingly.

DATED and **DELIVERED** at **DODOMA** this 5th day of April 2024.

J. L. MASABO

JUDGE