

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 78 OF 2021

BETWEEN

BELIAS BUNINI..... APPLICANT

VERSUS

AKIBA COMMERCIAL BANK PLC RESPONDENT

RULING

Last order 26/8/2021

Date of Ruling 17/9/2021

B.E.K. Mganga, J

The applicant was an employee of the respondent. On 21st November 2018 he filed a Labour dispute at the Commission for Mediation and Arbitration alleging that the respondent constructively terminated his employment upon his demotion hence unfair termination. On 2nd December 2020, Matalis. R, Arbitrator delivered an award in favour of the respondent that there was no constructive termination. Aggrieved by the said award and being out of time, he has filed this application seeking extension of time within which to file revision application for the court to revise the said award. The application is supported by an affidavit of the applicant. In paragraph 15 of the affidavit, applicant has deponed that he was supposed to file revision by 12th January 2021, but he failed as he travelled to Musoma on 23rd

December 2020 and returned in Dar es salaam on 8th January 2021 in ill health. That his health deteriorated requiring medical attention from 9th January 2021 up to 31st January 2021 as he was under medication and that thereafter he was advised to isolate himself. He attached a copy of a medical chit. The respondent has filed a counter affidavit of David Asonga, an advocate to oppose the application.

The application was argued by way of written submissions whereas the applicant enjoyed the service of Leonard Masatu, Advocate while the respondent enjoyed the service of Kalaghe Rashid, Advocate.

Arguing the application for and on behalf of the applicant, Mr. Masatu, advocate submitted that the applicant was sick and required to be isolated and unable to meet his lawyers which is why, he failed to file revision application before this court within the prescribed time. He cited the case of **Joseph Matara Mang'ang'a v. Gaudencia Odoyo, Miscellaneous Land Application No. 34 of 2019, High Court, Musoma District Registry** (Unreported) wherein Galeba, J (as he then was) granted extension of time basing his decision on sickness of the applicant. He therefore concluded that this was a sufficient cause for extension of time to be granted. He further cited the case of **Benedict Mumello v. Bank of Tanzania [2006] E.A 227** wherein the court of

Appeal held that grant or refusal of extension of time is a court's discretion and that extension of time can be granted where it has been sufficiently established that the delay was with sufficient cause. He quoted the holding in **Mumello's** case that sufficient cause has not been defined but a number of factors has to be taken into account including whether or not the application has been brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant.

Counsel for the applicant raised to illegalities namely

- (i) That Honorable Arbitrator having found a fact that the respondent advertised the Applicant's job position and there was no consultation done to the Applicant, while the Applicant had the same qualification and experience needed, Honorable arbitrator was wrong that there was no constructive termination and;*
- (ii) That the Honorable Arbitrator's decision and findings that there was no intolerable employment environment created by the respondent to the Applicant is not supported by evidence on record and that the decision of the Arbitrator is contrary to and in violation of the law.*

Counsel cited the cases of **Principal Secretary, Ministry of Defence and national Service v. Devram Valambhia [1992] TLR 182** and **VIP Engineering and 2 Others v. Citibank Consolidated Civil Reference No. 6, 7 and 8 of 2006, CAT** (unreported) to bolster

his argument that illegality once pleaded, is a ground for extension of time.

Mr. Rashid, advocate in his submission for and on behalf of the respondent, argued that the award was delivered on 2nd December 2020 in presence of the applicant, but he has filed this application on 18th March 2021 being late for about 60 days. That applicant has failed to account for the delay prior to 8th March 2021 and from the day he completed isolation to the date he contacted his lawyer and the date of filing the application. That applicant has failed to adduce any reason for the delay for the days he was in Musoma. Counsel further submitted that applicant has failed to account for each day of delay. Counsel for the respondent cited the case of ***Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010*** (Unreported) wherein the Court of Appeal held that in application for extension of time, applicant has to account for all period of delay, the delay should not be inordinate, applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intends to take and that the court can consider illegality of the decision sought to be challenged.

On the issue of illegality raised by the applicant, counsel for the respondent cited the ***Lyamuya case*** (supra) that in order for illegality to be a ground for extension of time, such a point of law has to be that of sufficient importance and that illegality has to be apparent on the face of record such as the question of jurisdiction and not one that would be discovered by a long-drawn argument or process. He therefore prayed the application be dismissed.

I thank both counsels for their industrious research and submissions. It is correct that extension of time is a discretion process that requires the court to act judiciously as it was held by the Court of Appeal in case of ***Mumello*** (supra), ***Zaidi Baraka and 2 others v. Exim Bank (T) Limited, Misc. Commercial cause No. 300 of 2015, CAT*** (unreported) and ***MZA RTC Trading Company Limited v. Export Trading Company limited, Civil Application No. 12 of 2015*** (unreported). In the ***MZA RTC*** case, the Court of Appeal held:-

" an application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law ..."

In the case of ***Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Ltd, Civil Application No. 96 of 2007, CAT***

(unreported) the Court of Appeal held that in determination of an application for extension of time, the court has to satisfy as to whether the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted. The question before me is whether applicant has met conditions stated in ***Regional Manager, Tanroads Kagera*** (supra), ***Mumello's*** and ***Lyamuya's case, supra.***

I have read the affidavit, counter affidavit and the award, the subject of this application and find that the award was issued on **12th December 2020** and on the same date it was collected by Leonard Masatu, advocate for the applicant. Applicant was supposed to file application for revision on or before **13th January 2021**. He filed this application on 18th March 2021 while being out time for **64 days**. There is no reason that has been advanced as to why Mr. Leornad Masatu, advocate who received the award did not take action from the date he collected the award. Therefore, the allegation that the applicant was sick and in isolation for the dates stated in his affidavit unable to contact his lawyer is, but without substance. Applicant was in contact with his lawyer even prior his journey to Musoma. It is my considered view that applicant travelled to Musoma without filing the revision at his own peril. More so, applicant has said nothing special that necessitated him to

travel to Musoma that prevented him to lodge the revision prior his travel. Extension of time based on travel of the applicant to Musoma without justifiable reasons is an invitation for the court calendar to be controlled by individuals who, for example to go for picnic holiday in disregard of the law of limitation knowingly that time will be extended after his return. In such a situation, the law of Limitation also will be of no use. In my view, this cannot be allowed to happen. I am not saying that people who had a matter in court should not travel, but that, there should be justifications, otherwise, courts will be full of endless applications. In the case of **Tanzania Fish Processors Ltd v. Christopher Luhangula**, Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania, at Mwanza, wherein it was held that:

*"The question of Limitation of time is fundamental issue involving jurisdiction ...it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of justice. **Limitation is there to ensure that a party does not come to Court as and when he chooses...**"*

The argument of sickness was advanced in paragraph 5 of the applicant's affidavit. In the said paragraph he averred in part:-

*"... My ill health deteriorated that **required urgent medical attention from 9th January 2021 up to 31st January 2021.** That period from 9th January 2021 to 31st January 2021 was under medication and was advised to isolate myself thus could not meet my lawyers..."*

The medical chit that was annexed to the affidavit as annexure BB4 shows that applicant was admitted at **Kibiti Health Center on 9th January 2021 and was discharged on 19th January 2021**. Three things are clear to me that (i) the said health center is at Kibiti within Coast Region, (ii) according to the affidavit, applicant resides in Dar es salaam and (iii) he was discharged on 19th January 2021 but his affidavit shows he ***required urgent medical attention from 9th January 2021 up to 31st January 2021***. The affidavit and the medical chit are in disagreement. Now, applicant wants the court to believe him that he arrived at his home in Dar es salaam on 8th January 2021 from Musoma suffering from severe Pneumonia and on 9th January 2021 i.e., next day travelled to Kibiti to be admitted. We are not told the reason for such choice but there is a lot to be desired especially when examining what is recorded in the said medical chit. I am not impressed with ground too.

The issue of illegality advanced by the applicant is also bound to fail. What he has advanced as illegality are issues that are not apparent on the face of the record. Those issues can only be resolved after a long-drawn argument or process as it was held by the court of Appeal in the case of ***Lyamuya***, Supra.

In the upshot and for the foregoing, this application stands to be dismissed.

It is so ordered.



A handwritten signature in black ink, appearing to read "B.E.K. Mganga".

B.E.K. Mganga

JUDGE

17/09/2021

LABOUR COURT - TZ