IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 203 OF 2023

(Arising from judgment of this court (Hon. T.N. Mwenehoha, J) that was delivered on 19/8/2021 in Revision No.251 of 2020)

ERNEST MTOKOMA ..... APPLICANT

VERSUS

AZANIA BANK LIMITED ..... RESPONDENT

RULING

Date of last Order: 10/08/2023
Date of Ruling: 22/08/2023

B. E. K. Mganga, J.

On 19th July 2023, Applicant filed this application seeking the court to extend time within which he can file the Notice of appeal so that he can appeal to the Court of Appeal against the judgment of this court in revision No. 251 of 2020 dated 19th August 2021. In his affidavit in support of the Notice of Application, applicant stated *inter-alia* that, the delay is technical, the judgment of this court is tainted with illegality, the

judgment is illegal for failure to award applicant 19 months' salary being the remaining period of the contract of employment.

Respondent opposed the application by filing both the Notice of Opposition and the Counter Affidavit sworn by Charles Mugila, the Director of Legal Affairs and Principal Officer of the respondent. In the said counter affidavit, the deponent stated *inter-alia* that there was no reason for the applicant to pursue revision in the Court of Appeal leaving the appropriate remedy of appeal and that, the said revision application was tantamount to forum shopping and abuse of court process. The deponent of the counter affidavit further stated that, there is no illegality in the impugned judgment of this court.

When the application was called on for hearing, applicant was represented by Mr. Odhiambo Kobas, learned counsel while respondent was represented by Daimu Halfani, learned counsel.

Submitting in support of the application, Mr. Kobas, learned counsel for the applicant argued that, the reason for the delay is technical because, immediately after the impugned decision, applicant filed Revision No. 493/18 of 2021 before the Court of Appeal. In his submissions, counsel for the applicant conceded that, from the facts available in the affidavit, he cannot tell exactly as to when the said revision was filed in the Court of Appeal hence cannot tell whether, it

was filed within 30 days available to file the notice of appeal or not. Upon recollection, learned counsel for the applicant submitted that, the said revision was filed on 15th October 2021 well outside the 30 days available within which to file the notice of appeal. He was quick to submit that, the said revision was filed within 60 days i.e., the time available to file revision to the Court of Appeal. He argued further that, since the said revision was filed within time, but was struck out following a preliminary objection by the respondent that it was preferred as an alternative to appeal, time spent by the applicant pursuing the said revision in the Court of Appeal is a technical delay which constitutes sufficient ground for extension of time. Learned counsel for the applicant cited the case of ***Zahara Kitindi & Another v. Juma Swalehe & 9 Others***, Civil Application No. 4/05/2017, CAT (unreported) to support his submissions. He added that, immediately after the said revision was struck out, applicant applied for a ruling and drawn order on 04th July 2023 but the same was supplied on 10th July 2023. He went on that, the period between 10th July 2023 and 17th July 2023 was spent in preparation of the application and filing and concluded that, applicant acted promptly after his revision was struck out by the Court of Appeal.

On illegality, counsel for the applicant submitted that, the impugned judgment is tainted with illegality because, having found that

termination was unfair procedurally, it ought to have granted applicant compensation provided for under Section 40(1)(c) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] but the Court did not award the applicant. Learned counsel for the applicant referred the Court to the case of ***Exim Bank (Tanzania) Ltd v. Jacqueline A. Kweka***, Civil Application No. 348/18 of 2020, CAT (unreported) and submit that, in the said case, the Court of Appeal observed that the High Court found that termination was unfair procedurally but failed to compensate the respondent, as a result, time was extended. In his submissions, leaned counsel for the applicant conceded that, in the impugned judgment, the Judge did not expressly state that termination was unfair procedurally. He was quick to submit that, in the last page of the judgment, the Court varied the CMA award. Learned counsel for the applicant strongly submitted that, the illegality in the application is serious requiring a determination by the Court of Appeal.

Further imploring the court to allow the application, learned counsel for the applicant submitted that, there is also a serious point of law namely, that, after the employer has complied with payment in lieu of notice as per the contract, whether, the employee is not entitled to be paid the remaining period of the contract.

In further beseeching the court to grant the application, Mr. Kobas, learned counsel for the applicant submitted that, respondent will not be prejudiced by granting extension of time, instead, she will benefit because at the end, the appeal will be determined on merit between the parties. He argued further that, the nature of the application involves the right to be heard because applicant was terminated without being heard, but respondent argued that, there was no need of right to be heard and that, she exercised her contractual terms by terminating applicant and paid him as per termination clause of their employment contract. He added that, the serious issue is whether, a fixed term contract can be terminated without affording employee right to be heard. He went on that, denial of right to be heard constitutes illegality hence a ground for extension of time.

In resisting the application, Mr. Halfani, learned counsel for the respondent submitted that, time that was wasted by the applicant in the Court of Appeal during forum shopping should not be considered because, applicant had a right of appeal and not revision. He added that applicant had a right to choose the forum either appeal or revision depending on what forum was beneficial to him. He went on that, with those choice, applicant chose revision because an appeal has time frame and cumbersome procedures compared with revision where applicant is

just required to file a letter without even serving it to the other party. He submitted further that; applicant has filed this application to circumvent procedures of appeal using the revision that was struck out as reason for extension of time as technical delay.

Mr. Halfani submitted further that; applicant's affidavit is silent as to when the said revision was filed before the Court of Appeal. He added that, the said application for revision was not attached to the application as a result, it is not established as whether, it was filed within 30 days that he was required to file the notice or not. Counsel for the respondent submitted further that, applicant was duty bound to state the dates he filed the said revision to the Court of Appeal and the date it was struck out so that those days can be condoned. Counsel for the respondent submitted further that, promptness and diligence are not grounds for extension of time because they come after the delay has occurred. Counsel for the respondent concluded that, applicant has not accounted for the delay and added that, extension of time cannot be granted simply he was prompt and acted diligently.

On illegality, Mr. Halfani, learned counsel for the respondent submitted that, there is no illegality that has been raised by the applicant. He added that, counsel for the applicant has raised issues of law that can be raised in the application for leave to appeal and not

illegality. Mr. Halfani submitted further that, for illegality to be a ground for extension of time, it must be apparent on the record that is to say; must not requires many arguments and analysis of the record. Counsel for the respondent submitted further that, paragraph 17 of the affidavit in support of the application does not show any illegality.

Counsel for the respondent submitted further that, if the application will be granted, respondent will be prejudiced because, litigation will be endless. He went on that, there is no issue relating to failure to abide by the right to be heard because, parties agreed to terminate the contract based on clauses of the said contract of employment. Counsel for the respondent submitted further that, mutual agreement does not amount to breach of right to be heard. He concluded that, there is no sufficient ground for extension of time and prayed the application be dismissed.

In rejoinder, counsel for the applicant submitted that, applicant did not do forum shopping, rather, he honestly believed that revision was the appropriate and right mode to advance his grievances. Counsel for the applicant submitted that, applicant filed revision within time prescribed to file revision. He submitted further that, it is not true that applicant chose to avoid lengthy procedure of appeal and added that, those submissions are mere speculations not contained either in the

affidavit or counter affidavit, as such, are submissions from the bar. Counsel for the applicant conceded that, the affidavit in support of the application is silent as to when the said revision was filed before the Court of Appeal but maintained that, it was filed within the prescribed period to file revision. Counsel for the applicant strongly submitted that there is technical delay.

On illegality, Mr. Kobas submitted that, illegality in the application at hand are apparent on the face of the record. He maintained that, there was denial of the right to be heard which is a serious illegality. Counsel for the applicant submitted further that, serious points of law are good grounds for extension of time. He submitted further that, the clause on agreement to terminate does not do away with the right to be heard. He concluded that applicant counted for the delay and that the application is merited.

I have considered evidence of the parties both in the affidavit in support of the application and the counter affidavit in opposition of the application and respective submissions made thereof. I should start with the well settled principle of law that, in the application for extension of time like the one at hand, the court is being asked to exercise its discretion. It is also settled that discretion must be exercised judiciously. In the case of ***Mza RTC Trading Company Limited vs Export***

Trading Company Limited, Civil Application No.12 of 2015 [2016] TZCA 12 the Court of Appeal gave guidance as to what amounts to exercise judicious discretion when it 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*** *…"* (Emphasis is mine).

In the application at hand, I will therefore, be guided by circumstances of the application, fairness to both parties and principles of law. One of the principles in the application for extension of time is that, applicant(s) must provide sufficient reason for the delay or provide relevant materials and circumstances justifying the grant of the application as it was held by the Court of Appeal in the case of ***Victoria Real Estate Development Ltd vs Tanzania Investment Bank & Others*** (Civil Application 225 of 2014) [2015] TZCA 354, ***Rose Irene Mbwete vs Phoebe Martin Kyomo*** (Civil Application 70 of 2019) [2023] TZCA 111 and ***Omary Shaban Nyambu vs Dodoma Water & Sewarage Authority*** (Civil Application 146 of 2016) [2016] TZCA 892 to mention but a few. In addition to the foregoing, it is a settled principle of law in our jurisdiction that, in an application for extension of time, applicant must account for each day of the delay. See the case of

Elias Mwakalinga v. Domina Kagaruki and 5 others, Civil Application No. 120 of 2018 [2019] TZCA 231 and ***Airtel Tanzania Limited V. Misterlight Electrical Installation Co. Ltd & Another***, Civil Application No. 37 of 2020[2021]TZCA 517. In fact, even a single day must be accounted for.

Now, in the application at hand, applicant stated in paragraph 15 of his affidavit that after delivered of the impugned judgment, he timely filed Revision application No. 493/18 of 2021 before the Court of Appeal but the same was struck out for being not an alternative to an appeal. In fact, during hearing, Mr. Kobas, learned counsel for the applicant submitted that after delivery of the impugned judgment, applicant immediately filed the said revision before the Court of Appeal while within time. On the other hand, Mr. Halfani, learned counsel for the respondent argued that applicant filed the said revision as forum shopping avoiding lengthy procedures of filing an appeal. The question in my view is, how immediately is immediate. I have raised that question because in the entire affidavit of the applicant in support of this application there is no information as to when he filed the said revision application before the Court of Appeal. It was crucial for the applicant to disclose that date for three reasons. One; the date could have helped the court and the respondent to know whether applicant filed the said

revision within 30 days available to file the notice of appeal as a necessary step in filing an appeal before the Court of Appeal or not. I am of that view because, time available to file revision is 60 days. It cannot be said that applicant acted immediately if he filed the said revision out of the 30 days available to file the notice of appeal. Since applicant has not stated the date he filed the said revision, this court cannot speculate the date relying on submissions that he filed the said revision immediate.

Two; the date of filing revision before the Court of Appeal was important because it would have helped the court to decide whether applicant acted promptly or was negligent. I am of that view because, for an application for extension of time to be granted, the delay should not be inordinate, applicant(s) must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take as it was held in the case of ***Lyamuya Construction Co. Ltd vs Board of Registered Trustee of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 [2011] TZCA 4.

Three; date applicant filed revision before the Court of Appeal could have helped the court to see whether applicant has accounted for each day of the delay. To the contrary, applicant chose not to disclose

the said date. It is my view that, applicant did so knowingly that the said date could have helped the court and the other party that he was not diligent or that he was negligent. It is my view that, applicant is seeking a helping hand of the court to extend time while hiding his hand, as such, the court cannot hold his hand for help. For failure to disclose the date he filed the said revision before the Court of Appeal, applicant has failed to account for the delay from 19th August 2021, the date this court (Hon. T.N. Mwenegoha, J) delivered the impugned judgment to 3rd July 2023, the date Revision No. 493/18 of 2021 was struck out by the Court of Appeal.

It was submitted by Mr. Kobas, learned counsel for the applicant that, there is illegality on the impugned judgment of this court sufficiently to warrant grant of extension of time. Those submissions were strongly countered by Mr. Halfani, learned counsel for the respondent that the alleged illegality is not apparent on the face of record. It is true that illegality may be a ground for extension of time. I should point out that not every alleged illegality can warrant extension of time. See the case of ***Omary Ally Nyamalege, Administrator of the Estate of the Late Seleman Ally Nyamalege & Others vs Mwanza Engineering Works***, Civil Application No. 94 of 2017 [2018] TZCA 230 and ***Lyamuya Construction Co. Ltd vs Board of***

Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 [2011] TZCA 4. For illegality to be a ground for extension of time, it must be apparent on the face of record. There is a litany of case laws as to what is apparent error on the face of record. Some of those case are the case of ***African Marble Company Limited (AMC) vs Tanzania Saruji Corporation (TSC),*** Civil Application No. 8 of 2005 [2005] TZCA 87, ***Chandrakant Joshubhai Patel v. Republic,*** [2004] TLR 218, ***Abdi Adam Chakuu vs Republic***, Criminal Application No. 2 of 2012 [2017] TZCA 138 and ***Ansaar Muslim Youth Center vs Ilela Village Council & Another,*** Civil Application No. 310 of 2021 [2022] TZCA 615 to mention but a few. In ***Chandrakant's case*** (supra), the Court of Appeal held that: -

> "*An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions...It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established…"*

The issue is whether, the alleged illegality in the application at hand is apparent on the face of record or not. The alleged illegality raised by the applicant in his affidavit are that (i) varying the CMA award which awarded applicant three (3) months compensation to nothing, (ii)

failure to award applicant with the 19 months remaining period of the contract, and (iii) basing the judgment on affidavit and counter affidavits which are not part of CMA proceedings. During hearing, Mr. Kobas, upon reflection, correctly, abandoned the alleged illegality in (iii) above. It is my view that, these are not illegality apparent on the face of record. They are just grounds of appeal so to speak.

It was submitted by counsel for the applicant that, there is illegality relating to right to be heard. With due respect to counsel for the applicant, there is no such illegality in the judgment of this court. In his affidavit, applicant stated at paragraph 17(vii) that, "the High Court erred in fact in failing to find according to evidence on record and hold that the Applicant was terminated from employment without being afforded a right to be heard". That complaint does not mean that, the High court denied applicant right to be heard for this court to hold that applicant was denied right to be heard hence an apparent illegality on the face of this court's judgment. Whether applicant was denied right to be heard or not, can be reached after a long-drawn arguments by the parties. It is a matter of evidence hence not illegality sufficient to warrant grant of extension of time. I am of that strong view because, applicant referred to evidence in the CMA record while in paragraph 3 of her counter affidavit, respondent referred to clause 8 of the contract of

employment between the parties. It is my view therefore that, that can only be decided after scrutiny of evidence of the parties hence cannot be illegality on the face of record.

It was stated in paragraph 17(1) of the affidavit in support of the application that, the delay is technical after revision No. 493/18 of 2021 was struck out on 3rd July 2023. During hearing, Mr. Kobas, learned counsel for the applicant submitted that there is technical delay and prayed the court to condone the period applicant spent in the Court of Appeal prosecuting the said revision. It was further submitted by counsel for the applicant that, applicant did not do forum shopping, rather, he honestly believed that revision was the appropriate and right mode to advance his grievances. On his part, in paragraph 9 of the counter affidavit, respondent stated that applicant filed revision instead of an appeal as forum shopping. During hearing, Mr. Halfani, learned counsel for the respondent submitted the said period should not be condoned. It is my view that, honest belief of the applicant that the proper forum was revision and not appeal and proceeded to act on the so-called honest belief cannot be a ground for extension of time. In other words, applicant made poor judgment as to what forum he should approach. In my view, that cannot be a ground for extension of time. It is my view that the alleged technical delay cannot help the applicant

because, as pointed hereinabove, he did not state as to when he filed the said revision No. 493/18 of 2021 before the Court of Appeal so that those days can be condoned. It was not enough, in my view, for the applicant only to state that he filed the said revision before the Court of Appeal.

For all what I have discussed hereinabove, I find that the application is devoid of merit and dismiss it.

Dated at Dar es Salaam on this 22nd August 2023.

B. E. K. Mganga
JUDGE

Ruling delivered on 22nd August 2023 in chambers in the presence of Ms. Lulu Mbinga, Advocate for the Applicant and Daimu Halfani and Ms. Upendo Mbaga, Advocates for the Respondent.

B. E. K. Mganga
JUDGE