IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 240 OF 2023

MWANASHERIA MKUU WA SERIKALI YA TANZANIA ..... APPLICANT

VERSUS

DEUSDEDIT MUGASHA ..... 1ST RESPONDENT

DAR ES SALAAM INSTITUTE OF TECHNOLOGY ..... 2ND RESPONDENT

RULING

Date of the last Order: 30/11/2023
Ruling on: 08/02/2024

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st June 2000, Dar es Salaam Institute of Technology, the hereinabove 1st respondent employed Deusdedit Mugasha, the 2nd respondent as Chief Accountant. It is undisputed by the parties that, the said unspecified period contract of employment had a clause that required the 2nd respondent to work for six (6) months under probation. It is further undisputed by the parties that, the said six-month probation period expired on 30th November 2000. It is also undisputed by the parties that, during the said

probation period, 1st respondent did not inform the 2nd respondent reasons for not confirming him and that 1st respondent continued to work after expiration of the said six-month probation period but was later on, terminated by the 2nd respondent. Aggrieved with termination of his employment, 1st respondent filed Trade Inquiry No. 69 of 2001 before the Defunct Industrial Court of Tanzania(ICT) complaining that 2nd respondent terminated his employment unfairly. On 25th September 2009, Hon. I. A. Mtiginjola, Acting Deputy Chairman, decided the matter in favour of the 1st respondent.

Aggrieved by the decision of the Industrial Court of Tanzania but being out of time, on 6th November 2009, 2nd respondent filed application No. 38 of 2009 for extension of time within which to file an application for revision for this court to revise the decision of the Industrial Court of Tanzania. On 30th November 2011, Hon. S.A.N. Wambura, J (as she then was) found that 2nd respondent adduced no good reasons hence dismissed the said application. Further aggrieved with the said decision, 2nd applicant filed ICT Revision No. 33 of 2011 before this court seeking the court to revise the Ruling dated 30th November 2011 by Hon. S.A.N. Wambura, J(as she then was) that dismissed her application for extension of time. On 29th April 2016, this court(Hon. A.C. Nyerere, J, H.H. Kalombola, J, and L.L. Mashaka, J, as

they then were) dismissed the application of the 2nd respondent for want of merit as they found that, S.A.N. Wambura, J(as she then was) was justified to dismiss the application by the 2nd respondent who did not account for the delay of one month.

Further aggrieved by the decision of this court in ICT Revision No. 33 of 2011, the 2nd respondent filed Civil Appeal No. 106 of 2016 before the Court of Appeal but 1st respondent filed a Notice of preliminary objection that the said appeal was time barred. After being served with the Notice of preliminary objection, 2nd respondent filed Civil Application No. 248 of 2016 seeking extension of time within which to file an appeal before the Court of Appeal. On 1st December 2016, Hon. Mjasiri, JA (as she then was) issued a ruling dismissing Civil Application No. 248 of 2016 on ground that 2nd respondent filed the said application with intention of pre-empting the notice of preliminary objection that was filed by the 1st respondent that Civil Appeal No. 106 of 2016 was time barred. Still unhappy, 2nd respondent filed Civil Reference No. 11 of 2016 before the Court of Appeal challenging the decision of the single Justice(Mjasiri, JA, as she then was). On 25th April 2019, the Court of Appeal (A.G. Mwarija, JA, R. K. Mkuye, JA and F. K. L. Wambali, JA) dismissed Civil Reference No. 11 of 2016 for want of merit. Still discontented, 2nd respondent filed Civil Application No. 233/18 of 2019

before the Court of Appeal seeking the Court of Appeal to review its decision in Civil Reference No. 11 of 2019. On 23rd June 2020, the Court of Appeal, A.G. Mwarija, JA, J. C. M. Mwambegele, JA and R.J Kerefu, JA) dismissed Civil Application No.233/18 of 2019 for want of merit.

After dismissal of Civil Application No. 233/18 of 2018, the 2nd respondent had only one option namely, to let the Court of Appeal hear and determine the Preliminary objection that was raised by the 1st respondent in Civil Appeal No. 106 of 2016. On 6th July 2021, when Civil Appeal No. 106 of 2016 was called on for hearing, Mr. Lukelo Samwel, learned Principal State Attorney, appeared for and on behalf of the 2nd respondent and conceded to the preliminary objection that, Civil Appeal No. 106 of 2016 was time barred. Following that concession, the Court of Appeal struct out Civil Appeal No. 106 of 2016.

On 21st August 2023, the Applicant filed this Application supported by an affidavit sworn by Mr. Lukelo Samwel, Principal State Attorney, seeking the court to extend time within which to file an application for revision so that this court can revised the decision of the Industrial Court of Tanzania(ICT) in Trade Inquiry No. 69 of 2001 issued by I.A. Mtinginjola, Acting Deputy Chairman. In his affidavit in support of the application, Mr. Lukelo Samwel deponed *inter-alia* that, applicant was not party to the Trade Inquiry No. 69 of 2001 that was decided by the

Industrial Court of Tanzania and other applications or appeals that were filed in court. The deponent also stated that, after both Civil Reference No. 11 of 2016 and Civil Appeal No. 106 of 2016 were dismissed and struck out respectively, there is no matter pending before the Court of Appeal. Mr. Lukelo Samwel deponed further that, applicant delayed to file application for revision because she was not aware of existence of Trade Inquiry No. 69 of 2001 and presence of other matters in the Court of Appeal between the parties. It was further deponed that, there is illegality in the decision of the Industrial Court of Tanzania in Trade Inquiry No. 69 of 2001 because, the mere fact that the 1st respondent continued to work after expiry of probation period, does not entitle him to be confirmed as a permanent employee. It was also deponed on behalf of the applicant that, 1st respondent was not entitled to be paid terminal benefits as he was a probationer.

Deusdedit Mugasha, the 1st respondent filed both the Notice of Opposition and the Counter affidavit to oppose this application. In his counter affidavit, 1st respondent stated *inter -alia* that, applicant was not party to Trade Inquiry No. 69 of 2001 but being the chief legal advisor of the Government, in 2005 was afforded right to intervene in the Trade Inquiry he filed against the 2nd respondent but did not. The deponent of the counter affidavit deponed further that, applicant was the attorney

of the 2nd respondent in Civil Appeal No. 106 of 2016. It was further deponed that, applicant filed Revision No. 14 of 2018 and 330 of 2019 respectively, but all were struck out. The deponent of the counter affidavit deponed further that, the application for extension of time was determined by Hon. S.A.N. Wambura, J in application No. 38 of 2009 and that, ICT Revision No. 33 of 2011 was determined against the 2nd respondent. 1st respondent deponed further that, applicant has filed this application for extension of time just to open a room to benefit the 2nd respondent. It was further deponed that, applicant has filed this application in abuse of court process.

The 2nd respondent did not file either the Notice of Opposition or the counter affidavit.

In the reply-affidavit to the counter affidavit, Lukelo Samwel deponed *inter-alia* that, applicant only became aware of existence of Trade Inquiry No. 69 of 2001 on 14th December 2017 after being notified by the Permanent Secretary, Ministry of Education, Science and Technology through a letter with Ref. CFB 86/393/01A/10 date 30th November 2017. The deponent also deponed that, if the decision in Trade Inquiry No. 69 of 2001 will not be revised, applicant and the public at large, will be affected by being ordered to compensate the 2nd

respondent based on apparent error on the decision of the Industrial Court of Tanzania.

When this application was called for hearing, Mr. Erigh Rumisha, learned State Attorney, appeared, and argued for and on behalf of the applicant. Mr. Denis Msafiri, learned Advocate, appeared, and argued for and on behalf of the 1st respondent while Mr. Nelson Ndelwa, learned State Attorney, appeared, and argued for and on behalf of the 2nd respondent.

Submitting in support of the application, Mr. Rumisha argued that, before the Industrial Court of Tanzania, the 2nd respondent was represented by Kanywani Bakileki Mtaki and Nditi Advocates. He submitted further that, the said advocates were appointed by the 2nd respondent. He also submitted that, the Industrial Court of Tanzania decided the dispute in favour of the 1st respondent. He added that, after losing the case, the said advocates did not file an application for revision to revise the decision of the Industrial Court of Tanzania within time, as a result, they filed an application for extension of time but the same was dismissed for want of merit. Mr. Rumisha went on that, after being instructed by the 2nd respondent, the said advocates filed Civil Appeal No. 106 of 2016 before the Court of Appeal but the same was out of time, as a result, on 06th July 2021, the said appeal was struck out. He

submitted further that, applicant took steps to challenge the decision of the Industrial Court of Tanzania by filing Miscellaneous Application No. 14 of 2018 for extension of time to file revision but the same was struck out because there was a pending appeal before the Court of Appeal.

It was submitted by Mr. Rumisha, learned State Attorney for the applicant that, after dismissal of Civil Appeal No. 106 of 2016 on 06th July 2021, there is no other matter that is pending before the Court of Appeal. In imploring this court to grant extension of time, learned State Attorney submitted that, there is illegality on the decision of the Industrial Court because, the 1st respondent was a probationer employee for 6 months. Learned State Attorney strongly submitted that, the Chairperson of the Industrial Court of Tanzania held that the 1st respondent worked two months after expiration of probation period hence he was automatically confirmed and that, termination of his employment by the 2nd respondent was contrary to the law. Learned State Attorney submitted that, that illegality is apparent on the face of record because there is no automatic confirmation. He argued that, a probationer must be confirmed to be permanent employee. He went on that, the said decision of the Industrial Court is contrary to what was held by the Court of Appeal in the case of ***David Nzaligo v. National Microfinance Bank PLC,*** Civil Appeal No. 61 of 2016 (unreported) and

this court in the case of ***WS Insight Ltd (formerly known as Warrior Security Limited) v. Dennis Nguaro***, Revision No. 90 of 2019, HC (unreported).

Learned State Attorney for the applicant further submitted that, even if applicant has failed to account for each day of the delay, illegality is a sufficient ground for extension of time. He cited the case of of ***Vodacom Tanzania Ltd vs Innocent Daniel Njau*** (Civil Appeal 60 of 2019) [2022] TZCA 639 (7 October 2022), ***Attorney General vs Emmanuel Marangakisi*** (Civil Application No. 138 of 2019) [2023] TZCA 63 (24 February 2023), ***EURASIA Holdings Limited vs The Attorney General & Others*** (Civil Application No. 466/01 of 2021) [2023] TZCA 17871 (21 November 2023) and ***Mwanasheria Mkuu wa Serikali v. Alice Celestine Ndyali Msimamizi wa Mirathi wa Mali za Marehemu Celestine Mathew Ndyali & Another***, Misc. Application No. 466 of 2022, HC (unreported) to support his submissions. He added that, in ***Marangakisi's case*** (supra) the delay was eight years, but time was extended based on illegality. He also submitted that, in ***Eurasia's case*** (supra), though applicant did not account for the delay, time was extended in order to avoid double

standard. Based on the foregoing, learned State Attorney prayed the court to grant the application.

Resisting the application, Mr. Msafiri, learned counsel for the 1st respondent submitted that, this application is misconceived, and, it is abuse of Court process. Counsel for the 1st respondent submitted that, after delivery of the decision of the Industrial Court on 25th September 2009, the 2nd respondent filed Application No. 38 of 2009 for extension of time but the same was dismissed on 30th November 2011 for want of merit. Mr. Msafiri added that, 2nd respondent was aggrieved by the ruling that dismissed her application for extension of time, as a result, she filed ICT Revision No. 33 of 2011 but the said revision application was dismissed on 29th April 2016 by this court (three judges) for want of merit.

Counsel for the 1st respondent submitted further that, 2nd respondent was further aggrieved by the decision of this court(three judges), as a result, she filed Civil Appeal No. 106 of 2016 before the Court of Appeal but the same was struck out on 6th July 2021 for being time barred. He added that, in the said appeal, applicant represented the 2nd respondent. He went on that, the State Attorney who appeared before the Court of Appeal namely, Lukelo Samwel, is the same person who has sworn an affidavit in support of this application. Mr. Msafiri

further submitted that, the right course of action that was supposed to be taken by the applicant is to take necessary steps and reinstitute the appeal before the Court of Appeal and not to move this Court to entertain the application for extension of time while a similar application has been decided in Application No. 38 of 2009. He added that, both the applicant and the 2nd respondent cannot simply abandon the appeal process and file this application while this Court has finally determined the application for extension of time. Counsel for the 1st respondent added that, if applicant intended to challenge any decision relating to the dispute between 1st and 2nd respondent, he was supposed to appeal against the decision of this court in ICT Revision No. 33 of 2011 before the Court of Appeal. Counsel added that, in presence of the decision of this Court in ICT Revision No. 33 of 2011, the proper forum is the Court of Appeal and not this Court again. In short, it was submissions of Mr. Msafiri, learned counsel for the 1st respondent that, this Court have decided the application for extension of time hence it is *functus officio.* To support his submissions, Mr. Msafiri cited the case of ***Robert Kadaso Mageni v. The Republic***, Criminal Appeal No. 476 of 2023 CAT (unreported).

It was further submitted by learned counsel for the 1st respondent that, there is no illegality. He added that, illegality is a good ground for

extension of time, but he was quick to add that illegality is not on merit of the decision, rather, on procedure as to how the decision was arrived at. To cement on his argument, he cited the case of ***The Attorney General v. Micco's International (T) Ltd & Another***, Civil Application No. 495/16 of 2022, CAT (unreported). Learned counsel for the 1st respondent submitted further that, there is no complaint by the applicant that the decision of the Industrial Court of Tanzania was arrived at unprocedurally. In short, it was submissions of counsel for the 1st respondent that the complaint by the applicant is on merit of the decision and not procedure hence there is no illegality. Mr. Msafiri submitted further that, previously, mere allegation that there is illegality was a sufficient ground for extension of time, but currently the Court of Appeal has warned itself on the abused of the allegation of existence of illegality and filing of applications. To support his submissions, counsel for the 1st respondent referred the court to ***Micco's case*** (supra). Learned counsel for the 1st respondent went on that, the decision of the Industrial Court of Tanzania may have some erroneous issues, but that cannot be illegality for an application for extension of time to be granted. To support his arguments, learned counsel for the 1st respondent cited the case of ***Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of***

Tanzania (Civil Application 2 of 2010) [2011] TZCA 4 (3 October 2011). He added that, apart from the alleged illegality, applicant ought to account for each day of delay from 06th July 2021 when Civil Appeal No. 106 of 2016 was struck out by the Court of Appeal in the presence of the applicant to 21st August 2023 which is a period of more than 2 years and two months. Counsel submitted further that, there is no explanation at all in the affidavit in support of the application as to what caused applicant not to act diligently in filing this application while, at the time the appeal was pending in the Court of Appeal, he made two attempts to file an application for extension of time. He further argued that, the conduct of the applicant does not support this application on the alleged illegality. For the foregoing, learned counsel for the 1st respondent prayed the court to dismiss this application for want of merit.

Mr. Ndelwa, State Attorney for the 2nd respondent, argued in support of the application. As I have pointed hereinabove, 2nd respondent did not file either the Notice of Opposition or the Counter affidavit. With that in mind, during submissions, learned State Attorney for the 2nd respondent conceded that, he can only submit on matters of law and not facts.

It was submitted by Mr. Ndelwa, learned State Attorney for the 2nd respondent that, the decision of the Industrial Court of Tanzania

contains illegality. He submitted that, the said illegality is, automatic confirmation of the 1st respondent and that the Industrial Court of Tanzania assumed the powers of the employer (2nd respondent) in confirming the 1st respondent. Learned State Attorney for the 2nd respondent added that, the dispute between the 1st and 2nd respondent was unfair termination, hence, the Industrial Court was only supposed to hold whether, it was unfair termination or not, and not to state that 1st respondent was automatically confirmed.

During submissions, Mr. Ndelwa, learned State Attorney for the 2nd respondent conceded that, the relationship between the applicant and the 2nd respondent is that, the two are parties to the suit. Learned State Attorney submitted further that, according to the amendment that was done to the Government Proceedings Act in 2020, which is the current position of the law, whenever the 2nd respondent sues or is sued, applicant has to be joined. Learned State Attorney was quick to submit that, prior to 2020, there was no clear provision in the Government Proceedings Act on joining the applicant whenever a Government Institution is sued or intending to sue. In his submissions, learned State Attorney for the 2nd respondent conceded that, the 2nd respondent is a Government Institution. As pointed out hereinabove, learned counsel for

the 2nd respondent supported the application and prayed that this application be granted.

In rejoinder, Mr. Rumisha, State Attorney for the applicant submitted that, prior to amendment of the Government Proceedings in 2020, there was no requirement of joining the Attorney General because the term Government was limited to Central Government and Local Government but did not cover independent institutions like the 2nd respondent. In his submissions, Mr. Rumisha conceded that, the Constitution of the United Republic of Tanzania defines Government to include Public Institutions. In his rejoinder submissions, learned counsel for the applicant maintained that, applicant was not a party to the case before Industrial Court hence he cannot revive appeal process in Civil Appeal No. 106 of 2016. He added that, Samwel Lukelo appeared before the Court of Appeal as an Attorney to represent the 2nd respondent only because Attorney General was not a party. He went on that, ICT Revision No. 33 of 2011 was between 1st and 2nd respondents as the Attorney General was not a party.

Mr. Rumisha maintained that, applicant became aware of the existence of the dispute between 1st and 2nd respondents on 13th December 2017 when the Permanent Secretary, Ministry of Education appeared to the applicant seeking advice. In his submissions, learned

State Attorney for the applicant conceded that there is no affidavit of the said Permanent Secretary to that effect. Learned State Attorney maintained that, there is illegality in the decision of the Industrial court of Tanzania. He also argued that, **Micco's case** (supra) is distinguishable because in the said case, grounds of illegality were touching on matters of evidence while in the application at hand, it is not a matter of evidence as it was not disputed that 1st respondent was a probationer.

On the issue of *functus officio*, the learned State Attorney for the applicant submitted that, the Court is not *functus officio* because there is no judgment between the applicant and the respondents.

On abuse of Court process, it was submissions of Mr. Rumisha that, applicant as a guardian of public property, in challenging illegality, cannot amount to abuse of Court process. He also submitted that, ***Mageni's case*** (supra) is distinguishable because it is not a case emanating from extension of time, rather, it emanated from interlocutory decision hence not relevant. Learned State Attorney maintained that, ***Marangakisi's case*** (supra) provides a relationship between the office of the Attorney General and other Public Institutions hence explains why Samwel Lukelo appeared before the Court of Appeal in Civil Appeal No. 106 of 2016 and then filed this application. With

those submissions, Mr. Rumisha reiterated his prayer that the application be granted.

I should point out from the start, that, this being an application for extension of time, I will only consider whether there is good reason for the delay. To put it in other words, the question to be answered is whether, applicant has advanced good grounds for time to be extended or not. It is the dictate of Rule 56(1) of the Labour Court Rules, GN. No. 106 of 2007 that, for an application for extension of time to be granted, applicant must show good cause. I will therefore not consider the merit and demerit of the intended revision to avoid pre-empting and determining the revision application that has not been filed.

I have carefully examined the affidavit, the counter affidavit and the reply-affidavit that are evidence of the parties and considered rival submissions of the parties in this application. As pointed out hereinabove, in deciding this application, I will consider the affidavit, the counter affidavit and reply- affidavit because that is the evidence available in this application. I take that stance because, it is settled law in our jurisdiction that, both the affidavit and the counter affidavit are substitute of oral evidence. See the case of ***Rustamali Shivji Karim Merani vs Kamal Bhushan Joshi*** (Civil Application 80 of 2009) [2012] TZCA 16 (27 February 2012), ***Attorney General vs Dickson Paulo***

Sanga (Civil Appeal 175 of 2020) [2020] TZCA 371 (5 August 2020),[2020]1 T.L.R 61(CA),***Chavda & Company Advocates vs Arunaben Chaggan Chhita Mistry & Others*** (Civil Application 25 of 2013) [2017] TZCA 154 (22 May 2017). That being the position, what was neither covered in both the affidavit and the reply-affidavit nor in the counter affidavit, cannot be evidence to be acted upon by this court.

It is evident from the copy of the decision of the Industrial Court of Tanzania attached to the affidavit of Lukelo Samwel in support of this application that, applicant was not a party to the dispute between the 1st and 2nd respondents. It was deponed and submitted that applicant became aware in 2017 existence of the dispute between the respondents after being notified by the Permanent Secretary, Ministry of Education, Science and Technology. It was deponed by the 1st respondent that, applicant was aware and was asked to intervene, but he did not. Though it was deponed on behalf of the applicant that prior to 2017, applicant had no information of existence of Trade Inquiry No. 69 of 2001 between 1st and 2nd respondent and that applicant was notified in 2017 through a letter by the Permanent Secretary, Ministry of Education Science and Technology, in this application, there is neither an affidavit of the said Permanent Secretary nor the said letter. In absence of the affidavit of the said Permanent Secretary and the said

letter, there is no proof that applicant became aware of the dispute between the respondents in 2017. There is a plethora of case laws that an affidavit mentioning another person, that other person must also swear affidavit otherwise it will be hearsay that cannot be acted upon by the court. See the case of ***Sabena Techincs Dar Limited vs Michael J. Luwunzu*** (Civil Application 451 of 2020) [2021] TZCA 108 (14 April 2021), ***Power & Network Backup Ltd vs Olafsson Sequeira*** (Civil Application No. 307 of 2021) [2023] TZCA 80 (1 March 2023), ***Ester Baruti vs Seith Senyael Ayo & Another*** (Civil Application No. 514/17 of 2022) [2023] TZCA 17824 (13 November 2023), ***Elly Matiku & Another vs Mediterranean Shipping Company T. Ltd*** (Civil Appeal No.454 of 2020) [2023] TZCA 17461 (28 July 2023), ***Franconia Investment Ltd vs Tib Development Bank Ltd*** (Civil Application 270 of 2020) [2021] TZCA 563 (30 September 2021) and ***John Chuwa v. Antony Ciza*** [1992] T.L.R. 233 to mention but a few. In absence of the affidavit of the said Permanent Secretary, Ministry of Education, Science and Technology and the letter with Ref. CFB 86/393/01A/10 date 30th November 2017 that is allegedly was sent to the applicant, there cannot be proof that applicant became aware of the existence of decision of the Industrial Court of Tanzania in Trade Inquiry No. 69 of 2001 on 13th December 2017.

It was deponed by the 1st respondent that, applicant being the Chief Legal Advisor of the Government, in 2005 was afforded right to intervene in the Trade Inquiry that was filed against the 2nd respondent but did not. I should point out that, nothing was attached to the 1st respondent's affidavit to show that in 2005, applicant was invited to intervene in the dispute between 1st and 2nd respondent. That averment remains unsupported hence cannot also be acted upon by this court.

I should also point out that, there is no dispute that, applicant is the Chief Legal Advisor of the government including the 2nd respondent. In my view, nothing prevented the 2nd respondent to seek advice or to notify the applicant existence of Trade Inquiry No. 69 of 2001 prior even pronouncement of the impugned decision. More so, in my view, nothing prevented the 2nd respondent to notify the applicant about the decision of the Industrial Court of Tanzania in Trade Inquiry No. 69 of 2001 before expiry of time within which to file revision application before this court. I am of that view because, the 2nd respondent is a Public Institution while the applicant is the Chief Legal Advisor of the government including the 2nd respondent. Submissions by the learned State Attorney for the applicant that before the Industrial Court of Tanzania, 2nd respondent was being represented by Kanywani Bakileki Mtaki and Nditi Advocates, raises two things namely, (i) that, the 2nd

respondent willfully abandoned her advisor that is to say, the applicant and engaged private advocates who, the applicant alleges that they were negligent, which is why, they failed to file revision application against the decision of the Industrial Court of Tanzania within time and, (ii) that, applicant had no established mechanisms to help him to know legal issues that were going on in the office of the 2nd respondent until when he was notified in 2017. It is clear in my view, that, Mr. Rumisha, State Attorney for the applicant, indirectly, was submitting that, both the applicant and 2nd respondent were negligent in discharging their duties. At any rate, there is no proof that, the advocates who appeared before the Industrial Court of Tanzania in Trade Inquiry No. 69 of 2001 on behalf of the 2nd respondent were negligent. I am of that view because, there is no affidavit of the said advocates to confirm that allegations. I therefore cannot conclude, without affording them right to be heard, that they were negligent. There is also a possibility that, the said advocates might have advised the 2nd respondent timely the proper course to be taken, but the later might have been indifference until when she became out of time. I am of that view because, there is no plausible explanation as to why, the 2nd respondent delayed notifying the applicant, if at all the latter was notified or was not timely notified. I

therefore find averment and submissions that Kanywani Bakileki Mtaki and Nditi Advocates were negligent are unsubstantiated.

It was deponed by Mr. Lukelo Samwel, that applicant was notified in 2017 existence of the dispute between the respondents as it was submitted by Mr. Rumisha, State Attorney. Though there is no letter from the alleged Permanent Secretary, Ministry of Education, Science and Technology, assuming that, that is correct status, still in my view, applicant was indifference or did not discharge his duties properly. I am of that view because, when Civil Reference No. 11 of 2016 arising from Application No. 248 of 2016 filed by the 2nd respondent against the 1st respondent was called on for hearing on 29th March 2019, the person who entered appearance and argued for and on behalf of the 2nd respondent is Novatus Rweyemamu, a private advocate, while Denis Msafiri entered appearance and argued on behalf of the 1st respondent. See ***Dar es Salaam Institute of Technology vs Deusdedit Mugasha*** (Civil Reference 11 of 2016) [2019] TZCA 162 (18 April 2019). At that time, applicant was aware because according to Mr. Lukelo's affidavit and Rumisha's submissions, applicant was notified on 30th November 2017. I see no justification for the applicant to have not taken charge and entered appearance before the Court of Appeal

because he had knowledge of existence of the dispute since November 2017. The Court of Appeal delivered its ruling in the said Civil Reference No. 11 of 2011 on 18th April 2019. It cannot be said and there is no evidence to show that applicant was unaware of the said ruling. Also, as pointed out hereinabove, the 2nd respondent filed Civil Application No. 233/18 of 2019 seeking the Court of Appeal to review its ruling in Civil Reference No. 11 of 2016. When the said Civil Application No. 233/18 of 2019 was called on for hearing on 12th June 2020, Mr. Novatus Rweyemamu, a private Advocate, entered appearance and argued for and on behalf of the 2nd respondent while Denis Msafiri, Advocate appeared and argued for and on behalf of the 1st respondent. See ***Dar Es Salam Institute of Technology vs Deusdedit Mugasha*** (Civil Application 233 of 2019) [2020] TZCA 332 (23 June 2020). The said ruling was delivered on 23rd June 2020. There is no evidence, and it was neither argued by the applicant nor the 2nd respondent that, they were not aware of the said ruling. Having lost all her applications before the Court of Appeal, the 2nd respondent had no option other than to bend down and let the Court of Appeal hear Civil Appeal No. 106 of 2016. On 6th July 2021, Lukelo Samwel, Principal State Attorney, who appeared before the Court of Appeal to argue the said Civil Appeal No. 106 of 2016 on behalf of the 2nd respondent, conceded that the said appeal

was time barred, as a result, it was struck out. The Order of the Court of Appeal in the case of ***Dar es Salaam Institute of Technology v. Deusdedit Mugasha***, Civil Appeal No. 106 of 2016 dated 6th July 2021 attached to the counter affidavit is loud and clear to that effect. It is my view that, since applicant was notified in November 2017 existence of the dispute between the respondents as deponed in the affidavit in support of the application, it was his duty, in terms of section 6A(1), (2) and (3) of the Government Proceedings Act[Cap. 5 R.E. 2019] to intervene, but he didn't. No reasons have been disclosed by the applicant as to why, after being notified on 30th November 2017 existence of the dispute between the respondents, applicant allowed Mr. Novatus Rweyemamu, a private Advocate, to handle the aforementioned cases before the Court of Appeal. Whatever decision was made by the applicant, was, in my view, his own choice, hence he cannot now be heard complaining that the persons who handled those cases were negligent. Whatever the case, from what I have pointed hereinabove, I find that applicant was negligent.

My conclusion that applicant was negligent, or indifference is further supported by occurrence of events in this application. It is undisputed by the parties that Civil Appeal No. 106 of 2016 was struck

out on 6th July 2021 in presence of Mr. Lukelo Samwel who sworn both the affidavit and the reply-affidavit to the counter affidavit in support of this application. Strangely, this application was filed on 21st August 2023 almost after two years and there is no account for that delay. Reasons for the delay of two years after the said Civil Appeal No. 106 of 2016 was struck out is undisclosed. Mr. Lukelo Samwel did not advance in his affidavit in support of the application reasons for that delay. On the other hand, in his submissions, Mr. Rumisha, merely argued that whenever there is illegality there is no need to account for the delay. At any rate, this shows that applicant was negligent and negates the blame of negligence thrown towards Kanywani Bakileki Mtaki and Nditi Advocates. As pointed hereinabove, reasons for the delay for two years are not disclosed in the affidavit in support of this application. There is a litany of case laws that in an application for extension of time, like the one at hand, applicant is required to account for each day of the delay. See the case of ***Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another***, Civil Application No. 278/15 of 2016, CAT, (unreported), ***Finca T. Limited & Another vs Boniface Mwalukisa***, Civil Application No. 589 of 2018) [2019] TZCA 56, ***Zawadi Msemakweli vs. NMB PLC,*** Civil Application No. 221/18/2018 CAT (unreported), ***Elias Kahimba Tibendalana vs. Inspector***

General of Police & Attorney General, Civil Application No. 388/01 of 2020 CAT (unreported) and ***Bushiri Hassan vs. Latifa Lukio Mashayo,*** Civil Application No. 3 of 2007, CAT (unreported) to mention but a few. In ***Mashayo's case*** (supra), the Court of Appeal held *inter-alia* that: -

> *"…the delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."*

In the application at hand, applicant has failed to account for the delay. The above occurrences, in my view, sufficiently proves that, applicant was negligent or indifference. With the occurrence of events pointed out hereinabove, I find it unfair for the applicant to attribute what happened in previous applications to negligence, if any, by Kanywani Bakileki Mtaki and Nditi Advocates alone. Applicant has also a junk of share of negligence.

It was submitted on behalf of the applicant that there is illegality in the impugned decision of the Industrial Court of Tanzania and that when there is illegality even without accounting for the delay, is a sufficient ground for extension of time. That is the correct position of the law as it was held by the Court of Appeal in the case of ***TANESCO vs Mufungo Leonard Majura & Others*** (Civil Application 94 of 2016)

[2017] TZCA 239 (5 June 2017), ***Attorney General vs Tanzania Ports Authority & Another*** (Civil Application 87 of 2016) [2016] TZCA 897 (12 October 2016), ***Vip Engineering and Marketing Ltd and 2 Others vs CitiBank Tanzania Ltd*** (Consolidated Civil Reference 6 of 2006) [2007] TZCA 165 (26 September 2007). It is my view that, the Court of Appeal did not intend illegality to be an open cheque that can be cashed at any time to whoever is in need or a multiple key for every padlock to open every gate at any time at the desire of every individual regardless of other rules of the day. In other words, I doubt, and I believe that the Court of Appeal did not intend to lay a rule that a person being aware of the decision can be allowed, after some years, to approach the court with an application for extension of time based on illegality and be allowed. I am cautious that, that state of affairs may result to endless litigations between the parties and is contrary to the policy that every litigation must came to an end. Whatever the case, I am bound by the aforementioned decisions of the Court of Appeal to the position that whenever there is illegality even without accounting for the delay, it becomes a good ground for extension of time.

Submissions by Mr. Rumisha for the applicant that the decision of the Industrial Court of Tanzania contains illegality was supported by

submissions by Mr. Ndelwa State Attorney for the 2nd respondent. On the other, counsel for the 1st respondent argued that there is no illegality, rather, there may be errors on the said decision. The complained illegality by Mr. Rumisha state Attorney for the applicant is, "automatic confirmation of the 1st respondent". In addition to that, Mr. Ndelwa, State Attorney for the 2nd respondent submitted that, the Industrial Court of Tanzania assumed the powers of the employer (2nd respondent) in confirming the 1st respondent.

I have carefully read the impugned decision of the industrial court of Tanzania and considered submissions and evidence of the parties and find that, it is undisputed that, employment contract of the 1st respondent had a six(6) month probation period. It is also undisputed by the parties that termination of employment of the 1st respondent occurred two months after expiration of the said six-month probation period but before confirmation of his employment. It was the findings of the Industrial Court of Tanzania that after expiration of the said six-month probation period, 1st respondent was impliedly confirmed and proceeded to award the 1st respondent remedies for unfair termination. In its decision, the Industrial Court of Tanzania did not specifically state that it confirmed the 1st respondent to his employment, rather, it stated

that, after expiry of the probation period, 1st respondent was impliedly confirmed. Therefore, submissions by learned State Attorney for the 2nd respondent that the Industrial Court of Tanzania assumed the powers of the 2nd respondent in confirming the 1st respondent cannot be valid. I have read the decision of this court in ICT revision No. 33 of 2011 and find that in Miscellaneous Application No. 38 of 2009 that was decided by Hon. S.A.N. Wambura, J(as she then was), 2nd respondent did not advance illegality as a ground for extension of time. It is clear that 2nd respondent after losing her applications and the Appeal in the Court of Appeal now has become wiser and noted that the impugned decision of the Industrial Court of Tanzania contains illegality. In my view, the issue of illegality raised by the 2nd respondent in this application is an afterthought and cannot be heard on that aspect now.

It is undisputed that applicant is the chief legal advisor of the government and further that he was not party to the proceedings before the defunct Industrial Court of Appeal. The pertinent issue raised by the applicant is an automatic confirmation of the 1st respondent after expiry of six-month probation period. This is the illegality complained of by the Applicant, but it was neither raised by the 2nd respondent in Miscellaneous Application No. 38 of 2009 nor discussed in ICT Revision No. 33 of 2011. In other words, the issue raised by the applicant is

whether there has been or there is so-called "automatic confirmation" in our laws. That issue cannot be answered in this application. It is my view that, that is an important issue sufficiently to warrant this court to extend time so that it can be deliberated and decided in a proper forum. See the case of ***Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania*** (Civil Application 2 of 2010) [2011] TZCA 4 (3 October 2011).

It was argued by counsel for the 1st respondent that the court is *functus officio* but counsel for the applicant submitted that it is not. As pointed hereinabove, the applicant was not a party to the proceedings that were conducted before the Industrial Court of Tanzania or before this court in Miscellaneous Application No. 38 of 2009 wherein the 2nd respondent was seeking extension of time but was found lacking merit hence not a party to ICT Revision No. 33 of 2011 that was also dismissed by this court. In the aforementioned applications, the issue of illegality was not raised by the 2nd respondent. It is my view therefore that since applicant was not a party to the previous applications and the issue of illegality was not raised and determined by this court, I find that this court is not *functus officio*.

For the foregoing and in the upshot, I grant the application and grant applicant seven(7) from today within which to file the intended

revision. For avoidance of doubt, applicant shall file the intended revision on or before 15th February 2024.

Dated at Dar es salaam this 08th February 2024

B. E. K. Mganga
JUDGE

Ruling delivered on 08th February 2024 in chambers in the presence of Nelson Ndelwa, State Attorney for the 2nd Respondent but in the absence of both the Applicant and 1st Respondent.

B. E. K. Mganga
JUDGE