IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 361/01/2018

TAMICO (KMCL) on behalf of
ENOCH JOSEPH and 113 Others .....APPLICANTS

VERSUS

BULYANHULU GOLD MINES LIMITED ..... RESPONDENT

(Application for extension of time within which to lodge notice of appeal and apply for leave to appeal from the Decision of the High Court of Tanzania of Tanzania at Dar es Salaam)

(Rugazia, Mwarija and Juma, JJ.)

dated the 24th day of April, 2014

in

Miscellaneous Civil Appeal No. 6 of 2009

.....

RULING

7th & 17th May, 2019

NDIKA, J.A.:

The applicants were on 2nd May, 2018 refused extension of time by the High Court of Tanzania at Dar es Salaam (Kitusi, J. as he then was) in Civil Application No. 753 of 2016 for lodging a notice of appeal and applying for leave to appeal to this Court to challenge the decision of a full bench of the High Court of Tanzania at Dar es Salaam in Miscellaneous Civil Appeal No. 6 of 2009 dated 24th April, 2014. Being unhappy with the refusal, the applicants now apply to this Court for the same relief by way of a second bite, so to say, under Rules 10 and 45A of the Tanzania Court of

Appeal Rules, 2009 (the Rules) as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, Government Notice No. 362 of 2017.

In support of the application, Mr. Samwel Said, the Secretary General of a trade union under the name of Tanzania Mines, Energy, Construction and Allied Workers Union (TAMICO) representing the applicants, swore an affidavit. In response, Mr. Reginald Bernard Shirima, an advocate acting for the respondent, deposed an affidavit in reply.

The essential facts of the matter are very brief. That sometime in 2007 TAMICO, acting on behalf of the one hundred and fourteen applicants herein filed a labour dispute in the now defunct Industrial Court of Tanzania, disputing a retrenchment exercise that the respondent had carried out against the applicants who until then were its employees. The dispute (Trade Inquiry No. 35 of 2007) was decided by C.E.R. William, then the Deputy Chairperson, in favour of the applicants. That decision was reversed by the appellate Industrial Court (Mwipopo – Chairman, Mkasimongwa and Mtiginjola, Deputy Chairmen) in a subsequent revision. Thereafter, the applicants unsuccessfully appealed to a full bench of the High Court and now they are desirous of appealing to this Court.

Since the impugned decision of the High Court was delivered on 24th April, 2014, the applicants ought to have initiated the appeal process by filing a notice of appeal within thirty days of the date of the decision in terms of Rule 83 (2) of the Rules, but none was duly filed. They also failed to apply for leave to appeal within fourteen days of the decision in terms of Rule 45 (a) of the Rules. As stated earlier, the applicants' initial application to the High Court for extension of time bore no fruit, hence this application.

It is evident from the accompanying affidavit that the application is anchored on the following grounds: first, that following the dismissal of the applicants' appeal by the High Court, TAMICO, as the applicants' representative, could not lodge a notice of appeal and apply for the leave within time because it needed to consult with each of the applicants on all key matters including projected costs of the intended appeal and engagement of an advocate. At that time, most of the applicants had retreated to their respective villages in remote parts of the country and that they could not be reached easily even by cellphone. Secondly, the sorry state of affairs is partly attributed to the delay in being supplied by the High Court with a copy of judgment and decree for the appeal purpose. Thirdly, that the intended appeal presents a legal point of sufficient importance requiring the Court to decide on the legality of the

retrenchment exercise conducted by the respondent to the detriment of the applicants.

Through the affidavit in reply, the respondent, in essence, attributes the delay to the applicants' inaction and negligence. It is averred that the applicants might have retreated to their respective homes but they then slept on their right of appeal after the decision of the High Court was rendered. The deponent further claims that the alleged consultations between the applicants are materially unsubstantiated as it is not stated, for example, when the consultations began and ended. It is also stated that the applicants could have lodged a notice of appeal and applied for leave to appeal without having to wait for the supply of a copy of proceedings from the High Court.

At the hearing, Mr. January Kambamwene, learned counsel, appeared for the applicants. He began his quest by reviewing the law governing appeals in labour matters under the regime that existed until 2003. He contended that due to the nebulousness of the law at the material time, it was not known if the applicants could legally challenge any decision of a full bench of the High Court to the Court of Appeal on an appeal arising from the Industrial Court. He elaborated that the position was only settled by the Court vide its pronouncement in **Stephen**

Mashaka v. Dar es Salaam Water and Sewerage Authority, Civil Appeal No. 99 of 2013 (unreported) handed down on 30th November, 2016.

Relying on the supporting affidavit, the learned counsel urged me to grant the application on the ground that the delay involved in this matter arose from the time-consuming consultations and the delay in obtaining a copy of the proceedings. Citing the decisions of the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185 and **Abubakar Ali Himid v. Edward Nyelusye**, Civil Application No. 51 of 2007 (unreported), the learned counsel contended that the prescribed limitation time ought to be extended because the intended appeal questions the legality of the retrenchment exercise conducted by the respondent. It was his submissions that the appeal presents a legal point of sufficient importance. On this point, he made reference to Paragraphs 12 through 15 of the accompanying affidavit, saying that the said averments laid bare the intended point.

For the respondent, Messrs. Gasper Nyika and Reginald B. Shirima, both learned counsel, appeared. Mr. Nyika began his submissions by ruling out the alleged vagueness of the law on the right of appeal from a decision of a full bench of the High Court to the Court of Appeal as a relevant factor

in the matter. Then, the learned counsel faulted the applicants for failing to substantiate the alleged difficulties involved in their consultations to determine the course to be taken after losing their appeal in the High Court. It defeats commonsense that the consultations took four years, he added. As regards the alleged substance of the intended appeal, Mr. Nyika argued that Paragraphs 12 through 15 of the accompanying affidavit disclose no apparent illegality of the decision sought to be challenged. The learned counsel went on to urge me to dismiss the application with costs.

In a short rejoinder, Mr. Kambamwene reiterated the claim that the consultations were time-consuming but unavoidable before taking any essential step towards appealing to this Court. He also maintained that the ambiguity of the law on the right of appeal from a decision of a full bench of the High Court was a factor in the delay. It was only after the **Stephen Mashaka's** decision clarified the position that it dawned on the applicants that they could pursue an appeal to the Court.

Before dealing with the substance of this application in the light of the opposing submissions of the parties, it bears repeating that although the Court's power for extending time under Rule 10 of the Rules is both wide-ranging and discretionary, it is exercisable upon good cause being shown. It may not be possible to lay down an invariable or constant

definition of the phrase "good cause", the Court consistently considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: (see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014). See also **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

I have carefully considered the competing arguments and in the end I have reached the conclusion that no basis has been shown in the application why the extension of time sought should be granted.

For a start, I wish to deliberate on the contention that vagueness of the right of appeal to this Court from a decision of a full bench of the High Court under section 28 of the repealed Industrial Court Act, Cap. 60 RE 2002 was a factor in the delay in this matter. In my considered view, this contention is without any foundation for two reasons: at the forefront, this argument, being essentially a factual representation, ought to have been raised by the applicants in their notice of motion or supporting affidavit but it was not. It was raised from the Bar by the applicants' counsel. In the circumstances, it deserves no consideration. Secondly, having read the decision of the Court in **Stephen Mashaka** (supra), I do not go along with Mr. Kambamwene's submission that it can be deemed to have the seminal moment that settled the law on the right of appeal to the Court on matters from the defunct Industrial Court. In my view, that decision simply stated what the law was at the time in the following terms:

> *"... we should express at once that the repealed Industrial [Court] Act which governed the proceedings giving rise to this appeal did not provide otherwise and, that being so, an appeal to this Court could only lie with leave of the High Court or that of the Court of Appeal in terms of section 5 (1) (c) of the AJA."*

It is evident that in that case it was not an issue whether an appeal lay to the Court of Appeal from a decision of a full bench of the High Court on an appeal from the Industrial Court. The issue was whether an appeal from such a decision lay with or without leave. In the circumstances, I would agree with Mr. Nyika that the law at the material time on the right of appeal to this Court was not unclear. The applicants' complaint here plainly borders on a plea of ignorance of law.

To extend the argument a little longer, even if it were assumed that the law on the point was ill-defined and that the aforesaid decision handed down on 30th November, 2016 removed the vagueness complained of, it is yet again undisputed that the applicants dawdled thereafter for over nine months until 20th July, 2018 when they lodged this matter. The alleged vagueness of the law is, by any yardstick, nothing but a smokescreen for indolence on the part of the part of the applicants.

The dejection of this application is further laid bare by its failure to give an account of each day of the delay. For while it is common ground that the decision intended to be challenged was delivered on 24th April, 2014 and that this matter was lodged on 20th July, 2018 following the dismissal by the High Court of the initial application for extension of time 2nd May, 2018, the supporting affidavit is materially discrepant in the

following respects: first, it does not provide any timeline in which the alleged consultations between TAMICO and the applicants were done before it was decided to pursue an appeal to this Court. Secondly, no date is indicated when the initial application for extension of time was lodged in the High Court vide Civil Application No. 753 of 2016. Obviously, by its year of registration, one would only decipher that it was made in 2016, over twenty months after the impugned decision was handed down. These omissions are, in my view, significant and inexcusable; for they make it impossible for me to determine if the applicants acted with promptitude and diligence following the handing down of the impugned decision until when they lodged the initial application for extension of time in the High Court. In addition, the respondent is justified in criticizing the applicants' contention attributing to the delay in being supplied by the High Court with a copy of proceedings as being feeble and unacceptable. Indeed, the applicants did not need any document for the purpose of taking the two essential steps in initiating their intended appeal.

It is settled that in an application of this nature, each day of delay must be accounted for and that failure to do so would result in the dismissal of the application: see, for example, the unreported decisions of this Court in **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2

of 2007; **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011; **Crispian Juma Mkude v. Republic**, Criminal Application No. 34 of 2012; and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014.

I should add that beyond our borders, the Supreme Court of South Africa stated, in a similar vein, in **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292 that when seeking condonation of delay, a full detailed and accurate account of the causes of the delay and its effects must be furnished for the Court to exercise its discretion accordingly.

In the circumstances, I reject the applicants' explanation of the delay involved and hold them to have failed to account for each and every day of the delay.

What remains to be dealt with is the contention by Mr. Kambamwene that extension of time be granted on the reason that the intended appeal questions the legality of the retrenchment exercise conducted by the respondent to the detriment of the applicants and that this is a legal point of sufficient importance. Mr. Nyika disagreed as he argued that Paragraphs

12 through 15 of the accompanying affidavit disclose no apparent illegality of the decision sought to be challenged.

Having examined the content of Paragraphs 12 to 15 of the supporting affidavit along with the impugned decision of the High Court, I am inclined to agree with Mr. Nyika that the said affidavit discloses no manifest illegality of that decision that would warrant extension of time on the authority of the decisions of the Court in **Devram Valambhia** (supra) and **Abubakar Ali Himid** (supra). Indeed, in the former case the Court did not say that extension of time would be granted whenever any "point of sufficient importance" is raised. To be sure, the Court held, at page 188, that:

> *"We think that where, as here,* ***the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules [now Rule 10 of the 2009 Rules] for extending time.*** *To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even*

though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law." [Emphasis added]

The above position was restated by the Court in **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) thus:

"We have already accepted it as established law in this country that where the point of law at issue ***is illegality or otherwise of the decision being challenged, that by itself constitutes 'sufficient reason'*** *within the meaning of rule 8 of the Rules [Rule 10 of the 2009 Rules] for extending time.... As the point of law at issue in these proceedings is the illegality or otherwise of the decision of the High Court annulling the respondent's debenture with Tri-telecommunications (Tanzania) Ltd, then this point constitutes 'sufficient reason' ... for extending the time to file a notice of appeal and applying for leave to appeal. This is notwithstanding the fact that the*

respondent brought the applications very belatedly ..."[Emphasis added]

In **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), a single Justice of the Court elaborated that:

> *"Since every party intending to appeal seeks to challenge a decision either on point 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 be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."*** [Emphasis added]

In the instant case, Mr. Kambamwene does not allege that the intended appeal questions the legality of the decision of the High Court sought to be appealed from. Not even by any stretch of imagination can it

be said that the contents of Paragraphs 12 to 15 of the supporting affidavit allege that the aforesaid decision is illegal. On the contrary, the point to be raised in the intended appeal only questions the lawfulness of the retrenchment exercise that culminated in the termination of the applicants' employment with the respondent. For the purpose of seeking extension of time, this ground is clearly misconceived as it does not assail the legality of the impugned judgment itself on any ground such as want of jurisdiction, fraud or abrogation of the right of hearing. As such, it does not meet the threshold articulated in the decisions of the Court cited above.

In conclusion, I would dismiss the application as I find no merit in it. This matter being a labour dispute, I order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 16th day of May, 2019.

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL