

TANZANIA / JUDGMENT

ex f 8347 dc magnus machona nkomola vs the inspector general of police another 2024 tzhc 672 7 march 2024

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MUSOMA SUB-REGISTRY AT MUSOMA CIVIL CASE NO. 440/2024 REFERENCE NO. 20240109000000440 IN THE MATTER OF AN APPLICATION FOR AN EXTENSION OF TIME TO APPLY FOR LEAVE TO FILE JUDICIAL REVIEW AND IN THE MATTER OF A DISMISSAL OF EMPLOYMENT AS A POLICE OFFICER BY THE DISCIPLINARY AUTHORITY WITHIN THE TANZANIA POLICE FORCE (REGIONAL POLICE COMMANDER), AND AS CONFIRMED BY THE INSPECTOR GENERAL OF POLICE ON APPEAL BETWEEN EX. F - 8347 D/C MAGNUS MACHONA NKOMOLA.....APPLICANT AND THE INSPECTOR GENERAL OF POLICE..... 1st RESPONDENT THE ATTORNEY GENERAL.....2nd RESPONDENT Date of Last Order: 21/02/2024 Date of Ruling: 07/03/2024 RULING OF THE COURT Kafanabo, J.: Before this court is an application for an extension of time made under section 19(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R.E. 2019], Section 95 of the Civil Procedure Code [Cap. 33 R.E. 2019] and 14(1) and 21(1)(2) of the Law of Limitation Act, [Cap. 89 R.E. 2019]. i The application is made by a chamber summons supported by an affidavit of the applicant. In the relevant chamber summons the applicant is applying for an extension of time within which to apply for leave to file an application for judicial review after the expiry of the prescribed time. The Applicant also prays for the costs of the application and any other relief the court may deem fit and just to grant. The background of the matter is that the applicant was employed by the Tanzania Police Force on 16th August 2005 as a Police Constable with Force number F - 8347. His initial duty station was Musoma Central Police, in the Mara Region, and thereafter he worked in different sections of the Police Force in the said region. It is on record that on 4th July 2016, the applicant was charged with three disciplinary offences, namely; solicitation of and accepting a bribe, aiding a prisoner to escape, and truancy/absenteeism. The relevant disciplinary authority in the Tanzania Police Force conducted a disciplinary hearing and decided to terminate the applicant's employment in the Tanzania Police Force on 4th August 2016. Moreover, after the termination of his employment as above stated, the applicant was charged with a criminal offence in Criminal Case No. 124/2016 which was instituted on 5th August 2016 at the District Court of Musoma. On 26th July 2017, the applicant was acquitted by the District Court because the prosecution failed to prove their case on the required standards. After the conclusion of the

criminal case, and the applicant being dissatisfied with the decision of the disciplinary authority of the Tanzania Police Force, 2 the applicant appealed to the 1st Respondent being an appellate authority. In response to the appeal, the 1st Respondent, on 27th March 2018 quashed the decision of the disciplinary authority and ordered the disciplinary proceedings to commence afresh (see annex M-05 to the affidavit). Thereafter, a fresh disciplinary action against the applicant, in the disciplinary tribunal, was instituted without re-instating the applicant to the Police Force in order to restore his employment status before disciplinary action was taken against him for the second time, as he had lost his status as a member of the Police Force since 4th August, 2016. It is also gathered from the facts of the case that the disciplinary authority heard the matter afresh as directed, and on 10th July 2018, the disciplinary authority recommended, to the Musoma Regional Police Commander, the termination of the applicant's employment which the latter approved on 6th August 2018. See 'Annex M-06' to the affidavit which contains a decision of the disciplinary authority. On 18th August 2018, the applicant appealed to the 1st Respondent against the decision that terminated his employment citing thirteen (13) grounds of appeal. The appellate authority, (the first Respondent herein), decided the appeal on 24th August 2020, by upholding the decision of the disciplinary authority. The decision on appeal is annexure 'M-12' to the affidavit. Moreover, the said decision was communicated to the applicant on 25th September 2020. Thereafter, the applicant alleges to have been in court corridors attempting to challenge the decision of the 1st Respondent based on the illegality. It is the applicant's firm view, as it will be demonstrated 3 shortly, that the decisions and proceedings surrounding the whole disciplinary action were marred by the illegalities. When this application came for a hearing, the applicant appeared in person and Mr. Aneisius Kamugisha, the learned State Attorney, entered an appearance for the Respondents. The applicant launched his submission in support of the application for an extension of time by adopting the affidavit in support of the application and its annexures as part of his submissions in support of the application. Moreover, he submitted that the first reason for the extension of time is that the decision of the Inspector General of Police, the 1st Respondent herein, is marred by illegalities namely: The Applicant was charged as a civilian in the Police Force disciplinary tribunal, whilst he was no longer an employee of the Tanzania Police force. That the identification parade register used to convict him was a photocopy and he was not informed why it was so used. The applicant submitted further that the disciplinary tribunal received and accepted a statement of the witness whom the applicant was not aware of and was not called as a witness. No investigation was conducted before the charges were leveled against him in a disciplinary tribunal. He was not allowed to cross-examine a key witness whom he was accused of aiding his escape and was not brought before the tribunal to testify. The applicant also submitted that he was charged with three offences, i.e. soliciting and accepting a bribe, abandoning a duty station, and assisting the prisoner to escape. However, in the proceedings, it is indicated that he was found guilty of all the offences without any specific finding on any of the said offences. 4 The Applicant referred to annexes M-06, M-07, and M-12 to the affidavit in support of his application. Moreover, as regards the reason for the delay, the applicant submitted that he received the decision on his appeal on 25/09/2020 from the 1st Respondent. He was not satisfied with the decision and decided to file a suit in court, it was Civil Case No. 06/2020. Since then he has been

in court pursuing his rights. After he had filed the said case, the Respondent raised a preliminary objection (P.O.) which was overruled by the court. Later, the court noted that the case had defects, and thus the applicant prayed to withdraw the same with leave to refile. The leave to refile was granted and the applicant, then, filed Civil Case No. 16/2022, however, when the matter was in court the Respondents raised a P.O. that the applicant was supposed to apply for judicial review, not to file a normal civil suit. On 27/03/2023 the Court struck out the matter on the basis that the applicant was supposed to file a judicial review application, not a normal suit. The applicant further submitted that, being a layman, on 28 and 29 March 2023 he issued a notice to sue the government. However, when he was preparing to apply for judicial review, he came across the case of Caroline Lukas Mwakabungu v. the Regional Commissioner of Iringa & Others Misc. Civil Application No. 03 of 2023 where he learned that the notice to sue the government is not a requirement when applying for leave to apply for judicial review. 5 Therefore, on 10/7/2023 he filed an application No. 31/2023 which was found by the court to have been defective and on 01/12/2023 the same was struck out. On 07/12/2023 he filed this application in court. He prayed that the court be pleased to grant him an extension of time as all the time he had been in court pursuing his rights. Responding to the applicant's submission, Mr. Kamugisha, the learned State Attorney, submitted that the submission made by the applicant is unmeritorious. He also prayed to adopt the counter affidavit of the Respondents as part of his submissions opposing the application for an extension of time. The learned State Attorney submitted that the applicant alleged the illegality of the proceedings which led to the termination of his service as a reason for the extension of time. However, the proceedings with the alleged illegality are not part of the affidavit in support of the application and the decision/proceedings with the alleged illegality have not been attached or substantiated in the affidavit supporting the application. He thus submitted that the submission by the applicant has no support from the facts stated in the affidavit. He urged the court to disregard statements made by way of submissions from the applicant. Moreover, counsel for the respondents submitted that the applicant has not been able to prove that from 25/09/2020 to 07/12/2023 he was in court pursuing his rights. It is not true that all the time from 25/09/2020 to 07/12/2023 he was in court. It was submitted that the Applicant's Civil Case No. 16/2022 was struck out on 27/03/2023. From 27/03/2023 when the 6 matter was struck out, the applicant filed another case, that is Civil Case No. 31/2023 on 10/07/2023 almost four months later. It was the learned State Attorney's submission that the applicant's affidavit does not explain what transpired in the said four months, it is obvious that the applicant was not in Court during that particular time. The learned State Attorney also submitted that the Applicant, in his submission, stated that he issued notice to sue the government after 27/03/2023, but the alleged fact is not stated in the affidavit supporting the application. It is simply a submission with no basis in the affidavit. Moreover, even if he had issued the notice to sue, the applicant was not in court pursuing his rights as alleged, but the doors of the court were open. Moreover, it was submitted that the applicant cannot rely on a notice which was not a procedural requirement and cannot rely on the ignorance of the law because the same is not a defence. The learned state attorney also submitted that the case of Mwakabungu (supra) relied upon by the applicant is not relevant because there was no need to issue notice after the applicant's case was struck out. Further, the explanation offered by the applicant is not in the affidavit supporting the

application. The applicant also did not explain in his affidavit when he came to know about the decision of Mwakabungu's case (supra). It is just a submission from the applicant, it is simply hearsay. The learned counsel also submitted that the applicant, on 10/07/2023, filed a case which was struck out on 01/12/2023, and filed this application on 07/12/2023. During that particular time, six days had lapsed, it is not explained in the affidavit where he was, and he was not in court. The affidavit is silent on the said six days. It was also submitted by the learned State Attorney that it is a settled position of the law that in the application for an extension of time, the applicant must account for each day of the delay, and the applicant has not done that. Citing the case of *Lyamuya Construction Company Ltd v. the Board of Registered Trustee of Young Women's Christian Association of Tanzania*, Civil Application No. 02 of 2010, on page 06 of the typed judgment the Court of Appeal issued guidelines on matters to consider when considering application for extension of time. Finally, the learned State Attorney, submitted that the applicant has failed to account for each and every day of the delay (four months and the said six days). Therefore, the delay is inordinate and there was negligence on the part of the applicant, and the applicant failed to take necessary action on time. Moreover, the illegalities are not part of the affidavit and thus the court will not have the opportunity to look at them and consider them. He, thus prayed for the dismissal of the application. In rejoinder, the applicant submitted that he failed to attach the notice to sue the government in the affidavit supporting the application because he is a layperson and was not aware that in a judicial review application, notice to sue the government is not a requirement. That he came across the case of Mwakabungu (supra), at the time when he had already issued the notice and waiting for the same to expire so that he could file an application in 8 court. Therefore, if he would have attached the said notice in the affidavit the case would have been a normal civil suit. The applicant also submitted that the respondents insisted on accounting for each day, but the court should look into the nature of the matter itself. The Court should not be tied by mere technicalities. This matter is about a person's life and the Court should consider the Constitution of the United Republic of Tanzania under article 107(2)(a), the court should not be bound by the technicalities. The applicant also addressed paragraph 13 of the counter affidavit, where the respondents discussed the contents of a plaint which is strange to the applicant as it is not part of the pleadings in this application. It was the applicant's submission that the Respondents' averment is baseless in the eyes of law. Given the submissions of the parties herein, this court now is called upon to determine the application for an extension of time. The guiding law on the present application is the Law of Limitation Act. Cap. 89 R.E. 2019. In the said Act, under section 14(1) it is provided that: "Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application". Emphasis added. 9 Moreover, since the applicant alleges to have been in court pursuing his rights since he was terminated as a police officer, he also referred this court to section 21(2) Law of Limitation Act. Cap. 89 R.E. 2019 which provides that: "In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or

in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it." Emphasis added. Now, bearing in mind the relevant law, as cited by the applicant, and considering the factual demonstration in the affidavit in support of the application, and the counter affidavit thereof, as well as the submissions of both parties, it is opportune for this court to determine whether the applicant has demonstrated sufficient cause for extension of time. The applicant demonstrated two major reasons for the extension of time. The first factor is that the applicant has been prosecuting, with due diligence, other civil proceedings from 25/09/2020 to 07/12/2023. The second factor is the illegality of the decision of the 1st Respondent and the bodies below in terminating the applicant from the Police Force. io Commencing with the factor, as advanced by the applicant, the applicant has been in court pursuing his rights from 25/09/2020 when a final determination was made regarding his rights by the first respondent to 07/12/2023 when this application was filed. This was sternly resisted by the learned State Attorney for the respondents who made it clear that the applicant has failed to account for each and every day of the delay or to prove that from 25/09/2020 to 07/12/2023 the applicant was in court pursuing his rights. This court, after a thorough analysis of the timelines and the applicant's actions in pursuing his rights, agrees with the learned State Attorney that, amongst the applicant's many applications which made him engaged in the court corridors since 2020, the last straw is on the answer to the question that, what did the applicant do after his Civil Case No. 16/2022 was struck out? It is clear from the record and submissions of the parties that Applicant's Civil Case No. 16/2022 was struck out by this court on 27/03/2023 for being defective. From 27/03/2023 when the matter was struck out, the applicant filed another case, that is Civil Case No. 31/2023 on 10/07/2023. This is an interval, or a pause of more than 'One Hundred (100) days'. The Applicant did not explain in his affidavit what transpired in the said period of more than 100 days so as to constitute sufficient cause for this court to extend time. Moreover, since the purported notice to sue the respondents herein was not part of the affidavit supporting the application, the case of *Mwakabungu ii (supra)*, relied upon by the applicant, is not applicable under the circumstances of this case. Further, failure to account for more than 100 days of the delay is not a mere technicality to be ignored by this court. Humbly stated, the applicant has failed to account for each day of the delay, as correctly argued by the learned State Attorney. Therefore, this court finds that a period of more than 100 days has not been accounted for by the applicant in his application for an extension of time. The law requires an applicant to account for each day of the delay in order for the court to exercise its discretion to extend time. There is a plethora of Court of Appeal decisions cementing on an obligation of the applicant for an extension of time to account for each day delayed. The cases of *Board of Trustees of the Free Pentecostal Church of Tanzania vs Asha Selemani Chambada and Another* (Civil Application 63 of 2023) [2023] TZCA 147 (28 March 2023), *Sebastian Ndaula v. Grace Rwamafa*, Civil Application No. 4 of 2014 (Unreported), *Lyamuya Construction Company Ltd v. the Board of Registered Trustee of Young Women's Christian Association of Tanzania*, Civil Application No. 02 of 2010 (Unreported) are relevant. There is also the decision of this court in *VD Enterprises Limited and Others v. International Commercial Bank*, Misc. Commercial Case No. 65 of 2014 (Unreported). Under the circumstances, the applicant has failed to convince this court to exercise

its discretion to extend time in light of the provisions of sections 14(1) and 21(1) of the Law of Limitation Act. 12 Cap. 89 R.E. 2019 based on the ground that he has been pursuing his rights in courts from 25/09/2020 to 07/12/2023. This court now whirls on the illegality as another ground advanced by the applicant for the extension of time. The applicant demonstrated that the decision of the 1st Respondent is marred by the illegalities and thus the court be pleased to extend the time so that the court can examine and investigate the alleged illegalities. The alleged illegalities, as demonstrated by the applicant, include: First, the Applicant was charged as a civilian in the Police Force disciplinary tribunal, whilst he was not an employee of the Tanzania Police Force. Second, the Applicant was disciplinarily punished for a disciplinary offence of aiding a prisoner to escape which was substantially the same as a criminal offence instituted in the District Court of Musoma in Criminal Case No. 124 of 2016 which the prosecution failed to prove the allegations and thus the applicant was acquitted. Taking into account the fact that the said criminal case was concluded on 26/09/2017 and charges in the disciplinary tribunal were instituted on 18/05/2018. The third alleged illegality is that the decision of the first respondent and the disciplinary authority did not indicate findings made in respect of the three offences of soliciting and accepting a bribe, aiding a prisoner to escape, and absenteeism. Fourth, the conviction in respect of the offence of aiding the prisoner to escape was based on the circumstantial evidence obtained from the identification parade which was marred by the irregularities. Fifth, the appellant's conviction by the disciplinary authority was based on 13 unchallenged evidence (a written statement) of the prisoner escapee who was not called as a witness, and personal opinion of the officer who conducted the inquiry. Sixth, the members of the disciplinary tribunal played triple roles of investigators, prosecutors, and decision-makers in the same proceedings. In response to the applicant's submissions and facts as deposed in the affidavit supporting the application, the learned State Attorney, as indicated herein above, submitted that the applicant alleged the illegality of the proceedings which led to the termination of his service as a reason for extension of time, but the said proceedings are not part of the affidavit in support of the application and the decision/proceedings with the alleged illegalities were neither attached nor substantiated in the affidavit supporting the application. This court, with respect, disagrees with the learned State Attorney. The court disagrees with the counsel for the respondents because, in paragraph 12 of the affidavit, the applicant attached a copy of the decision of the disciplinary authority as annex M-06 to the affidavit. The said attachment incorporates the decision, which is the basis of the applicant's complaint, and the proceedings thereof. Moreover, in paragraph 15 of the affidavit in support of the application, the applicant annexes to the affidavit an appeal (preferred by way of a letter) emanating from the decision of the disciplinary authority to the 1st Respondent. The said appeal enumerates the grounds of appeal, in 14 particular, setting out the illegalities complained of, against the decision of the applicant's disciplinary authority. Besides, in paragraph 22 of the affidavit supporting the application the decision of the 1st Respondent upholding the decision of the disciplinary authority is also annexed. This court further notes that the contents of paragraphs 12 and 15 of the affidavit in support of the application were not denied by the respondents as indicated in paragraph 7 of their counter affidavit. The contents of paragraph 22 of the affidavit were circuitously or evasively disputed by the respondents. No details were provided by the

respondents as to why they disputed the same. Moreover, it is also clear from the affidavit in support of the application that the illegalities complained of by the Applicant are expounded in paragraphs 30, 31, 32, and 33 of the said affidavit. The respondents disputed the applicant's averments through paragraphs 11 and 12 of their counter affidavit by deposing that the decision of the applicant's disciplinary authority was not tainted with irregularities and that the applicant may also be subjected to a disciplinary hearing within the Police Force even after being acquitted by the Court of law on the same offence. Nevertheless, paragraph 12 of the respondents' counter affidavit contains an averment which is more perplexing. It is stated that the applicant did not state any irregularities and that the applicant admitted to the offence he was charged with. What is more bewildering is that the respondents retorted to the alleged irregularities in paragraph 11 of their counter affidavit and did not state when, where, and how the applicant admitted to the offence he was charged with. Moreover, a cursory glance at the 1st Respondent's decision (Annex M-12 to the affidavit), the Appeal to the 1st Respondent from the Applicant (Annex M-7 to the affidavit), and the decision of the applicant's disciplinary authority, the Regional Police Commander, (Annex M-06 to the affidavit) spectacle apparent legal issues on the face of the record that would require to be investigated by a court of law. Without going into the substance of what seem to be illegalities, it is important that a few, amongst several, be mentioned, as follows:

1. The applicant was charged before a disciplinary tribunal in the police force after he had been terminated as a police officer (see Annexes M-02 and M-05).
2. The applicant was charged before a disciplinary tribunal in the police force for the offence of aiding a prisoner to escape of which he was already charged with and acquitted in the District Court of Musoma in Criminal Case No. 124 of 2016 (see annexes M-03 and M-06).
3. The decision of the 1st Respondent (Annex-M12) dated 24th August 2020 did not address the Applicant's grounds of appeal dated 18/08/2018 (Annex M-07). However, it confirmed that the Applicant was properly convicted of aiding a prisoner to escape and soliciting and accepting bribe. The Applicant enlisted thirteen (13) grounds of appeal, but none of them was addressed by the 1st Respondent as the appellate authority. The said enlisted grounds of appeal are some of the illegalities complained by the applicant herein and averred in the 16 affidavit in support of the application and were demonstrated by the applicant in his submission in support of this application.
4. That the purported inquiry into the charges that were levelled against the applicant by the disciplinary tribunal might have contravened sections 7(6) and 8(2) of the Police Force and Prisons Service Commission Act, Cap. 241 of the laws and the Police Force Service Regulations, 1995.
5. This court has also reviewed the decision of the disciplinary authority delivered on 10th July 2018, and confirmed by the Regional Police Commander of the Mara Region on 6th August 2018, and the proceedings thereof conducted from 18th May 2018 to 10th July 2018. The said decision and the proceedings have emblems of the apparent illegalities on the face of the record regarding the conduct of the proceedings. Without stepping out of the purview of this

application for an extension of time, this court is of the view that the applicant, as far as illegality is concerned, has demonstrated that the decision of the 1st Respondent against the applicant herein deserves to be investigated and examined in order for the court to satisfy itself whether relevant laws and procedures were adhered to in determining the charges levelled against the applicant and the rights of the applicant thereof. However, the court will not have an opportunity to examine and scrutinize what transpired at the disciplinary tribunal unless an extension of time is granted allowing the applicant to apply for leave to be permitted to apply for judicial review of the decision of the first respondent. The law on extending 17 time-based on the ground of demonstrated illegality is well settled in our jurisdiction. In the case of *Ntiga Gwisu vs Republic* (Criminal Appeal 428 of 2015) [2019] TZCA 395 (6 November 2019) the court of appeal held that: Certainly, it is settled that the illegality of the decision sought to be challenged can warrant the extension of time as the Court held in *Principal Secretary, Ministry of Defence and National Service*

- v. *Devram Valambhia* [1992] TLR 185 at page 89 thus: "In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight" on the face of the record, they raise allegations of illegalities in the trial proceedings and the decision thereon warranting enlargement of time to the appellant so as to provide an opportunity to the High Court to investigate the allegations and remedy the alleged illegalities, if established. We think if these illegalities had been brought to the attention of the learned Judge, he would have found the enlargement of time prayed for justifiable." 18 Moreover, in the case of *Vip Engineering and Marketing Ltd and 2 Others vs CitiBank Tanzania Ltd* (Consolidated Civil Reference 6 of
- 2006) [2007] TZCA 165 (26 September 2007) the Court of Appeal held that: "It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay." See also the case of the *Attorney General vs Tanzania Ports Authority & Another* (Civil Application 87 of 2016) [2016] TZCA 897 (12 October 2016). Likewise, it is also important to point out that establishing that the decision sought to be challenged contains illegality is not enough for the court to extend the time. The court may extend time if it is also established that the alleged illegality is manifest and/or apparent on the face of the record. The Court of Appeal cases of *Ngao Godwin Losero vs Julius Mwarabu* (Civil Application 10 of 2015) [2016] TZCA 302 (13 October 2016) and *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) are relevant on this point. 19 It is the view of this court that the case at hand meets the test of an illegality apparent on the face of the record. Given that the illegalities subject matter of the applicant's complaint are noted at first glance on the relevant documents constituting the contested decisions. In light of the foregoing, and

given the circumstances of this case, the application for an extension of time is allowed. The applicant is, therefore, given Twenty (20) days within which to apply for leave to apply for judicial review from the date of this decision. Given the nature of the application, no costs are awarded. It is so ordered. Dated, signed, and sealed at Musoma this 7th day of March 2024. K. I. Kafanabo Judge The Ruling has been delivered in the presence of Mr. Magnus Nkomola, the applicant, and Messrs. Aneisius Kamugisha and Abdallah Makulo, State Attorneys, for the respondents. 1 ft K. I. Kafanabo Judge 07/03/2024

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