



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/025

Order No.: 033 (NBI/2019)

Date: 11 March 2019

Original: English

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**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

AMBO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON APPLICANT'S MOTION  
FOR EXTENSION OF TIME TO FILE  
AN APPLICATION**

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**Counsel for the Applicant:**

Jomo K. Nyaribo, Muthaura, Mugambi, Ayugi & Njonjo Advocates

**Counsel for the Respondent:**

AAS/ALD/OHR

## **Introduction**

1. The Applicant was a Logistics Assistant serving with the United Nations Organization Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO).

2. On 28 February 2019, he filed the current motion for extension of time to file an application pursuant to articles 7 and 35 of the Rules of Procedure of the United Nations Dispute Tribunal (UNDT).

## **Background facts**

3. The Tribunal has taken these facts from the application and the supporting documentation provided by the Applicant.

4. The Applicant is a former staff members of the International Criminal Tribunal for the former Yugoslavia (ICTY) who entered into service with MONUSCO in 2001.

5. On 24 October 2012, the Applicant left his duty station in Kisangani, Democratic Republic of the Congo, for his Rest & Recuperation (R&R) break. Between 29 October 2012 and 12 November 2012, he was admitted to the Nairobi Hospital in Nairobi, Kenya.

6. The Chief of MONUSCO's Mission Support Centre, Mr. Rajesh Chadha, sent an email to the Applicant on 21 April 2014 stating that the mission had not heard from the Applicant "for a very long time" and that they were not aware of his whereabouts and "current health condition". Mr. Chadha explained in his email that as part of MONUSCO's downsizing strategy, the mission had proposed the nationalization of three FS-3 posts, including the Applicant's, in its 2014-2015 budget. Mr. Chadha concluded his email by informing the Applicant that his employment with MONUSCO would end by 30 June 2014 if the General Assembly accepted MONUSCO's staffing proposal for 2014-2015.

7. By facsimile dated 1 July 2014, the Field Personnel Division, Department of Field Support (FPD/DFS) authorized MONUSCO to extend the contracts of the

47 international staff members affected by the retrenchment up to 30 September 2014 only. FPD/DFS directed MONUSCO to explore placement opportunities “within or outside the Mission” for the affected international staff members prior to separation.

8. In a memorandum dated 14 January 2015, Mr. Daniel Thomas Dale, Chief Human Resources Officer (CHRO), MONUSCO, requested that the Applicant submit sick leave certification within ten working days or report for duty after receiving clearance from the United Nations Medical Services Division (MSD). He further informed the Applicant that if he failed to report within the period stipulated or to provide valid justification for his absence, MONUSCO would consider him as having abandoned his post pursuant to staff rule 9.3. The Applicant did not submit any documentation showing that he complied with Mr. Dale’s instructions.

9. On 17 March 2015, the Applicant’s mother sent a letter to Mr. Chadha informing him of the Applicant’s absence from work due to ill health and his inability to return to work.

10. One of the supporting documents the Applicant submitted with his motion is a medical report dated 20 July 2015 from one Dr. Marx Okonji at Nairobi Hospital certifying that he was fit to return to work effective 20 July 2015. The Applicant sent this medical report to MSD and received a response on 13 August 2015 stating: “We are informed by your mission that you left your mission and did not submit any medical reports in support of sick leave accordingly. As such, no sick leave can be certified and your clearance to return to work cannot be processed.”

11. On 24 September 2015, Mr. Tinkamanyire Mugisha, Officer-in-Charge (OiC) of the MONUSCO Human Resources Section (HRS), informed the Applicant that his separation had been effected as of 30 September 2014. It appears however that the Applicant’s separation was not formalized until 16 October 2016.

12. The Applicant sought assistance from OSLA on 26 November 2015. OSLA's response to his email states in relevant part that:

Your matter may be urgent because you need urgent action taken by the Administration, or because you are very close to a deadline to challenge a decision. The most common deadline is 60 days to challenge an "administrative decision", but shorter deadlines may apply: please see [here](#). **Contacting OSLA does not suspend any deadline. Missed deadlines may mean there is nothing that can be done to resolve your case. Prior to OSLA assessing your case and agreeing to represent you, you remain responsible for meeting all deadlines.**

13. OSLA subsequently informed the Applicant that it would not represent him.

14. The Applicant wrote to Mr. Mugisha on 7 December 2015 to contest his separation from service.

15. The Applicant sought legal advice from his current legal representative, Mr. Jomo K. Nyaribo, in October 2016.

16. The Applicant requested management evaluation of the decision to separate him from service effective 30 September 2014 on 11 November 2017. The Management Evaluation Unit (MEU) informed him by letter dated 17 November 2017 that his request was time-barred since he had waited more than two years since the statutory deadline to request management evaluation.

17. The Applicant filed the current motion on 28 February 2019.

### **Considerations**

*Did the Applicant submit a timely request for management evaluation?*

18. In accordance with staff rules 11.2(a) and 11.2(c), for an application to be receivable, the applicant must first submit a request for management evaluation within the applicable time limit, which is "60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

19. The Applicant was informed of his separation on 24 September 2015 but MONUSCO did not formalize the process until 16 October 2016. Since the Tribunal has two different dates for the same administrative decision, it will look at both dates in turn. If the Applicant received notification of the administrative decision on 24 September 2015, he had until 23 November 2015 to submit his request for management evaluation. Since the Administration failed to formalize his separation in September 2015, the issue became moot until it was effected on 16 October 2016. Thus, the Applicant was given an inadvertent reprieve until 15 December 2016 to submit a request for management evaluation of the decision to separate him from service.

20. The Applicant indicates in his application that he requested management evaluation on 7 December 2015 and 11 November 2017. The Tribunal notes that the Applicant's annex 3, which is a letter dated 7 December 2015 and addressed to Mr. Mugisha, the OIC of the MONUSCO Human Resources Section, is not a request for management evaluation under staff rule 11.2. Even if the Tribunal were inclined to accept it as such, it was sent to Mr. Mugisha on 7 December 2015, which was two weeks/14 days after his 23 November 2015 deadline.

21. The Applicant's request for management evaluation of 11 November 2017 was received by MEU 337 days after the 15 December 2016 due date and 719 days after the 23 November 2015 due date. No matter which way one looks at these dates, the Applicant failed to submit a timely request for management evaluation.

22. Noting that art. 8.3 of the UNDT Statute, estops the Tribunal from suspending or waiving the deadlines for management evaluation<sup>1</sup>, the Tribunal holds that it cannot entertain the current motion since the underlying request for management evaluation is time-barred.<sup>2</sup>

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<sup>1</sup> *Nianda-Lusakueno* 2014-UNAT-472; *Egglesfield* 2014-UNAT-402; *Wu* 2013-UNAT-301.

<sup>2</sup> See *Costa* 2010-UNAT-036, *Samardzic* 2010-UNAT-072, *Trajanovska* 2010-UNAT-074, and *Adjini et al.* 2011-UNAT-108.

*Is the Applicant's motion for extension of time to file an application timely?*

23. Under article 8.1(d)(i)(a), the Tribunal is competent to hear and pass judgment on an application if the application is filed within 90 calendar days of the applicant's receipt of the response by management to his or her request for management evaluation.

24. Having received the response from MEU on 17 November 2017, the Applicant was required to file his application to the Dispute Tribunal by 15 February 2018. The Applicant filed the current motion for extension of time to file an application on 26 February 2019, which is more than a year after the statutory deadline and therefore time-barred.

*Should the Tribunal suspend or waive the deadline set out in art. 8.1(d)(i)(a) of the UNDT Statute as requested by the Applicant in his motion?*

25. Article 8.3 of the UNDT Statute stipulates that upon written request by the Applicant, the Tribunal may decide to "suspend or waive the deadlines for a limited period of time and only in exceptional cases".

26. The Applicant comes before the Tribunal on the basis of articles 7.5 and 35 of the UNDT Rules of Procedure. Article 7.5 basically reiterates the language in art. 8.3 whereas art. 35 states that the Tribunal "may shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require".

27. In *Thiam* 2011-UNAT-144, the United Nations Appeals Tribunal ("Appeals Tribunal") held: "This Court can exercise its discretion under Article 7 of the Statute upon a written application for suspension, waiver, or extension of time limit by an appellant *prior* to the filing of an appeal."

28. In *Nikwigize* 2017-UNAT-731, the Appeals Tribunal explained further that: "[...], *Thiam* does not allow an applicant or appellant to request a waiver of the time limits for filing a late application or appeal in the untimely (or belated) application or appeal. Thus, the UNDT erred when it appeared to suggest that a waiver could be requested "as part of the belated application".

29. In other words, art. 8.3 does not grant an applicant the right to file a motion for suspension, waiver, or extension of time limits whenever it suits him or her. There is a limitation on the time for filing thus a request under art. 8.3 should be filed before the expiry of the 90-day statutory deadline in art. 8.1(d)(i)(a).

30. In the current case, the Applicant's motion has been filed more than a year after the 15 February 2018 statutory deadline thus the Tribunal cannot and will not entertain the current request for extension of time to file his application.

31. Additionally, the Tribunal notes that an extension or waiver of time can be justified under art. 8.3 of the UNDT Statute if the applicant shows that exceptional circumstances beyond his or her control prevented him or her from acting within the statutory time limits.<sup>3</sup>

32. The Applicant submits that the following "exceptional circumstances" warrant an extension of time: (i) his inability to obtain legal representation from the Office of Staff Legal Assistance (OSLA) in 2015; (ii) his failed attempt to resolve the dispute informally in 2015; (iii) non-payment of his salary by MONUSCO since September 2013, which hampered his ability to retain private legal counsel; and (iv) deterioration of his health.

33. With respect to his assertion regarding OSLA, the Tribunal notes that OSLA promptly and succinctly informed the Applicant that: (i) his matter was under review and that he would be contacted as soon as possible; (ii) he had 60 days to contest an administrative decision; (iii) contacting OSLA would not suspend any deadlines; and (iv) that until OSLA agreed to represent him, he remained responsible for meeting all deadlines. OSLA subsequently declined to represent the Applicant. With this information in hand, it was up to the Applicant to follow up on the deadlines in a timely manner and to make best efforts to find alternative means of representation. The Tribunal finds that OSLA's refusal to represent the Applicant is not an exceptional circumstance.

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<sup>3</sup> *Bofill* 2014-UNAT-478; *El-Khatib* 2010-UNAT-029.

34. The Applicant claims in his application that he sought assistance from the Office of the Ombudsman to negotiate informal settlement with the Administration. He claims the Office of the Ombudsman informed him that his “case was of too great legal complexity” for them to assist him. The Applicant has not provided the Tribunal with any documentary evidence to prove his assertion that he engaged with the Ombudsman’s office. The Tribunal finds that this assertion fails to meet the requirement for an exceptional circumstance.

35. The Tribunal finds that the alleged non-payment of the Applicant’s salary by MONUSCO since September 2013 is not an exceptional circumstance since he never formally challenged this decision.

36. Lastly, the Applicant submits that the deterioration of his health between 2012 and June 2015 should be deemed as an exceptional circumstance. The manner in which the Applicant and his counsel have made best efforts to mislead this Tribunal by muddling and camouflaging the time line is disheartening. There is evidence in the record to show that the Applicant’s physician gave him a clean bill of health in July 2015 thus, his health was not an issue when he was informed of the administrative decision in September 2015. Apart from medical reports dated 2012, 2013 and 2014, the Applicant has not placed any evidence before the Tribunal that would explain his failure to act on his claim between July 2015 and 11 November 2017. The bottom line is that both the Applicant and his legal representative slept on this claim and are now trying to use his long-resolved health issues as a smokescreen to obtain access to the Tribunal. The Tribunal holds that the Applicant’s deteriorating health between 2012 and June 2015 is not an exceptional circumstance for purposes of granting the current motion.

### **Observations**

37. The Tribunal finds this motion to be frivolous, vexatious and an abuse of process. As counsel for the Applicant, Mr. Nyaribo’s attention is drawn to the Tribunal’s observations at paragraphs 68 – 73 in *Haydar* UNDT/2017/050, which are reproduced below:



68. [...], the Tribunal needs to reiterate here that it is committed to dealing with genuine applications that come to it with a view to granting necessary reliefs to wronged and diligent applicants.

69. It is expected at all times that all applicants, especially those who have legal representation, present their applications with a good degree of articulation and a high sense of responsibility. This Tribunal is properly set up by law and has legal parameters for the applications it entertains. It is therefore not the forum for presenting soap box speeches and for making vague and insubstantial claims.

70. This Tribunal is a court of law and therefore it is the duty of the Applicant's counsel to properly school himself/herself in the relevant laws, procedures and processes before approaching this Tribunal [...].

71. [...] Eight years after the Tribunal commenced its work; the teething stages for any counsel are over and this anything-goes trend is no longer acceptable and will no longer be condoned.

72. Applications that are filed by legal counsel must be well-articulated and disclose proper causes of action, in other words, they must disclose the administrative decisions for which the Tribunal's review are sought. They must duly comply with relevant legal conditions and the forms for bringing applications provided on the Tribunal's website. It is not expected that an applicant's pleadings should cite laws except in the portion where arguments or submissions are presented. Any supporting documentary evidence referred to and relied upon in applications and which are in the applicant's custody must be properly annexed.

73. It is mention-worthy that where an applicant has legal representation, this Tribunal will readily presume that there are no concerns about the said applicant's access to justice. It needs also to be emphasized that the bringing of shoddy and vexatious applications and the abuse of the Tribunal's processes will not only result in the offensive applications being struck out but may be met by other sanctions that the Tribunal deems appropriate in the circumstances.

**Conclusion:**

38. In view of the foregoing, the Applicant's motion for extension of time to file an application is rejected.

*(Signed)*

Judge Nkemdilim Izuako

Dated this 11<sup>th</sup> day of March 2019

Entered in the Register on this 11<sup>th</sup> day of March 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi