

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. LABOUR APPLICATION NO. 29 OF 2021

(Arising from Labour Revision No. 7 of 2016)

BETWEEN

GRUMET RESERVE COMPANY LIMITED APPLICANT

VERSUS

MORICE AKIRI RESPONDENT

RULING

A.A. MBAGWA, J.

This is an application for extension of time within which to file a notice of appeal out of time. The applicant, by way of chamber summons and notice of application filed the instant application under section 11(1) of the Appellate Jurisdiction Act, rule 51(1), 24(1), 24(2)(a)(b)(c)(d)(e) and (f) and 24(3)(a)(b)(c) and (d) of the Labour Court Rules, G.N. No. 106 of 2007. The application is supported by an affidavit sworn by Godfrey Tesha, the applicant's counsel.

The application emanates from the ruling of this court (Galeba J) in Labour Revision No. 7 of 2016 which was delivered in favour of the respondent on

20th September, 2019. Aggrieved with the decision of the court, the applicant appealed to the Court of Appeal via Civil Appeal No. 334 of 2019. Nonetheless, the appeal was struck out on the ground that the appellant now the applicant failed to serve the respondent with a copy of notice of appeal contrary to the dictates of law.

Still determined to assail this court's decision, the applicant has brought this application in order to start the appeal process afresh. In the supporting affidavit, the applicant raises two grounds for delay namely, technical delay due to striking out of Civil Appeal No. 334 of 2019 and illegality in the decision sought to be impugned.

When the matter was scheduled for hearing, the applicant was represented by Adolf Temba, learned advocate whilst the respondent enjoyed the services of Dyea Outa, learned advocate as well.

Submitting in support of the application, Mr. Temba adopted the affidavit of Godfrey Tesha and prayed the court to form part of his submission. The applicant's counsel continued that the application is based on two grounds found at paragraph 5 of the affidavit. He elaborated that the two grounds are technical delay and illegality on the face of record in the sense that the Commission for Mediation and Arbitration did not have jurisdiction over the matter.

Elaborating on technical delay, the counsel submitted that the applicant filed a notice of appeal within time in Civil Appeal No. 334 of 2019 but the same was struck out following a preliminary objection on point of law to the effect that the respondent was not served with a notice of appeal. The applicant counsel expounded that the appeal was struck out on 3rd November, 2021. He concluded that since the struck-out appeal had been lodged within time, the delay in filing the present application falls squarely under technical delay which is considered a good ground for extension of time. He supported his submission with the case of **Director General LAFD Pensions Fund vs Pascal Ngalo**, [2020] TLR 216.

The counsel continued that the ruling of the Court of Appeal was delivered on 3rd November, 2021 and the present application was filed on 9th December, 2021 which was a reasonable span of time for waiting a copy of judgment and preparation of the application. He thus beseeched the court to grant the application while referring to the case of **Bank M (Tanzania) Limited vs Enock Mwakyusa**, Civil Application No. 520/18 of 2017, CAT at Dar es Salaam particularly at page 6,7 and 8 where technical delay was held to be a sufficient ground for extension of time. The counsel also referred this court to the case of **Uswenge Webb Luhanga & Another vs Mussa**

Mohamed Mnasi & Another, Misc. Land Application No. 41 of 2020, HC Mbeya registry at page 10 in a bid to convince the court that one month period which the applicant spent after delivery of judgment by the Court of Appeal was reasonable.

With regard to the aspect of illegality on the face of the record, the counsel submitted that there is illegality in the CMA's decision. He lamented that initially, the CMA struck out the respondent's complaint for suing a wrong party but proceeded to grant him 21 days to bring a matter afresh whereas the CMA has no power to grant extension without condonation. The applicant's counsel argued that according to rule 11(1) & (2) read together with rule 10 of the Labour Institution, Mediation and Arbitration Rules GN. 64 of 2007, the party must apply for condonation. He stressed that since the respondent did not seek for condonation, the CMA had no power to grant extension of time. He cited case of **Monica Nyamakare Jigamba vs Mugeta Bwire Bhakome as administrator of the estates of Musiba Reni Jigabha & Another**, Civil Application No. 487/01 of 2018, CAT at Dar es Salaam page 9 and 10 to buttress his point that illegality is a good ground for extension of time.

The counsel added that the prayer for extension of time is not only for purpose of this case but also for the entire legal fraternity in that the intended appeal will set the position whether CMA has discretion to extend time *suo motu*.

In contrast, Mr. Dyea Outa strongly resisted the application stating that technical delay helps the applicant up to the time when the court order is pronounced. He said that in this application, the court order was pronounced on 3rd November, 2021 in the presence of Evodi Mushi and Outa and the judgment was ready for collection on the very day it was delivered. Mr. Outa lamented that the applicant has failed to account for the period between 3rd November, 2021 when the judgment was delivered and 9th December, 2021 when the instant application was filed. He cited the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT at Arusha and submitted that the court stated that the applicant must account for each day of delay. For that reason, the counsel urged the court to refuse the plea of technical delay for failure to account for subsequent days. He stressed that a period of 35 days which the applicant delayed was not reasonable.

Coming on the second ground of illegality, Mr. Outa submitted that there is no illegality in this matter. He said that the Court of Appeal in the case of **Laemthong Rice Company LTD vs Principal Secretary, Ministry of Finance** [2002] TLR 389, held that unless there is a statute which bars the High Court from granting leave *suo motu*, the High Court enjoys inherent jurisdiction. He continued that in the present case no provision was cited which prevents the CMA from granting extension of time *suo motu as such the alleged illegality is without merits*. The counsel was opined that when the respondent submitted his complaint before the CMA, the CMA became vested with powers to grant the orders it made. Further, he argued that if the applicant was aggrieved by the court order, she ought to pursue it in that case file. The respondent's counsel said that the matter under attack emanates from CMA/SR/35/2012 whereas the dispute for which she is seeking extension of time originates from CMA/SER/40/2914. Therefore, it is illegal to seek nullification of an order in CMA/SR/35/2012 through proceedings emanating from file No. CMA/SER/40/2914, the counsel submitted. He argued that the applicant ought to file a revision in respect of CMA/SR/35/2012. He backed up his position by relying on the decision in **Kenya Commercial Bank (T) LTD vs Deata LTD & Others,**

Commercial Case No. 65 of 2006, HC, Commercial Division at Dar es Salaam where the court held that any matter should be brought in a proper forum.

The respondent's counsel further argued that the question of illegality has conditions which should be met before it is relied on. He mentioned that it must not to be drawn or established by long arguments but in this case the applicant has to advance long arguments in order to establish illegality. He added that this ground was raised in the CMA and then in the High Court but it was rejected hence it has ceased to be an illegality rather it is a ground of appeal in that it is arguable point but not illegality. He cited the case of **Alex Maganga vs Director, Msimbazi Centre**, Civil Reference No. 17 of 2003, CAT at Dar es Salaam at page 5 and submitted that the court held that where it appears that even where the application is allowed, it would still be a futile exercise, the court should refrain from granting an application. He continued that the issue of futility of the exercise was also discussed in the case of **Martha Iswalwile Vicent Kahabi vs Marietha Salehe & 3 Others**, Civil Application No. 5 of 2012, CAT at Mwanza at page 5 to 6.

In fine, the respondent's counsel urged the court to dismiss the application for want of sufficient grounds.

Having canvassed the rival submissions and upon appraisal of the record, the relevant issue for determination of this application is whether the applicant has demonstrated sufficient ground to warrant her extension of time. Whereas there is no hard and fast rule as to what is the sufficient ground, courts have endeavoured to develop different factors which are taken into account in determining the good cause depending on the circumstances of each particular case. See **Regional Manager, Tanroads Kagera vs. Ruaha Concrete Co. Ltd**, Civil Application No. 96 Of 2007, CAT at Dar Es Salaam. The factors to be considered include length of delay involved, reasons for delay, the degree of prejudice, if any, that each party is likely to suffer, the conduct of the parties and the need to balance the interests of a party who has a decision in his favour against the interests of a party who has a constitutionally underpinned right of appeal. See **Jaliya Felix Rutaihwa vs Kalokora Bwasha & Another**, Civil Application No. 392/01 of 2020, CAT at Dar es Salaam, **Paradise Holiday Resort Limited vs. Theodore N. Lyimo**, Civil Application No. 435/01 of 2018, CAT at Dar Es Salaam and **Ludger Bernard Nyoni vs. National Housing Corporation**, Civil Application No. 372/01/2018, CAT at Dar Es Salaam (Unreported).

In this application, the applicant has raised two grounds namely, technical delay and illegality. I have keenly scanned the record and found that indeed the struck-out appeal namely, Civil Appeal No. 334 of 2019 was filed within time but was struck out on the ground of the applicant's failure to serve the notice of appeal to the respondent. Since the struck-out appeal was filed within time, it goes without saying that the instant application falls under technical delay.

At the expense of prolonging this ruling, I find it pertinent to reproduce an excerpt from the judgment in **Emmanuel Rurihafi and another vs Janas Mrema**, Civil Appeal 314 of 2019, CAT at Dar es Salaam where the court, while deliberating on technical delay, had the following to say;

'In the circumstance, we have no hesitation to hold that, as the incompetent appeal was filed within time and the appellants were, as a result of their default to attach a copy of the ruling, penalized by having their appeal struck out, the prosecution of the incompetent appeal constituted sufficient cause for extension of time. Consequently, the period between the institution of the said appeal and 17th September, 2018 when the same was struck out has been justified.

At this juncture, it may be imperative to put it clear that, once established, as we have done that, the prosecution of the incompetent proceeding was a mere excusable technical delay in the sense that it was preferred timely and without negligence, the next question to be considered is whether the appellants acted promptly to take necessary steps to institute a competent proceeding'

Going by the facts of the present matter, it is common cause that the applicant has sufficiently exhibited technical delay in filing this application hence a good cause for extension of time. The issue ancillary to technical delay is whether the applicant promptly filed the instant application. It is undisputed that there was a span of thirty-five days between striking of the incompetent appeal by the Court of Appeal and the filing of this application. Whereas, the respondent counsel argued that the applicant failed to account for each day of delay, the applicant contended that the said time was spent for collection of ruling copy and preparation of the instant application. Having anxiously considered the whole circumstances, I am of the considered opinion that the thirty-five day period was reasonable for the applicant to collect the copy of ruling and prepare the application at hand.

On all the above account, I find merits in this application and proceed to allow it. The applicant is therefore given thirty (30) days form the date of this ruling to file a notice of appeal. Since this is a labour matter, each party should bear its own costs

It is so ordered.



A. A. Mbagwa

JUDGE

03/02/2023