

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 176 OF 2015

BARCLAYS BANK TANZANIA LIMITED.....APPLICANT

VERSUS

PHYLISIAN HUSSEIN MCHENI.....RESPONDENT

**(Application for extension of time to lodge a Notice of Appeal from
the judgment of the High Court of Tanzania, Labour Division
at Dar es Salaam
(Wambura, J)**

dated the 28th day of November, 2012

in

Complaint No. 31 of 2010

RULING

10th December, 2015 & 21st January, 2016

KILEO, J.A.:

The applicant, Barclays Bank Tanzania Ltd is seeking an extension of time within which to lodge an Appeal against the Order and Drawn Order of the High Court of Tanzania, Labour Division, at Dar es Salaam in Complaint No. 31 of 2010. The application, by way of Notice of Motion, is preferred under rule 10 of the Court of Appeal Rules, 2009 (the Rules) and is supported by the affidavit of Mr. Paschal Kamala, learned counsel for the applicant. The grounds upon which the extension of time is sought as per Notice of Motion are:

- (1) The Registrar of the High Court Labour Division issued a defective Certificate of Delay, a defect that was discovered*

on 27th August, 2015 and the applicant requested a new one that was issued on 2nd September, 2015 whereby 60 days for filing the appeal expired on 30th August 2015.

(2) That the delay was beyond the applicant's control and it was unseen.

At the hearing of the application the applicant was represented by Mr. Paschal Kamala while the respondent was represented by Mr. Abrogast Mseke. Both counsel had earlier filed written submissions on behalf of their respective clients.

The background facts of the matter are briefly that the respondent filed Complaint no. 31 of 2010 at the Labour Division of the High Court at Dar es Salaam. On 28/11/2012 the Complaint was struck out. The order striking out the Complaint aggrieved the applicant who had expected that it would have been dismissed as the Court found, and there was also a concession that the Complaint was time barred. On the same day that the Complaint was struck out the applicant wrote a letter applying for copies of Ruling, Drawn Order and Proceedings. On 7th December 2012 the applicant filed a Notice of Appeal. In the meantime the applicant also preferred an application for leave to appeal.

On 2nd July 2015 the Deputy Registrar of the High Court Labour Division issued a certificate of delay in accordance with Rule 90 (1) of the Rules. Apparently, the Certificate contained some clerical errors on

the names of the parties. The applicant wrote to the Registrar informing him of the error on 27 August, 2015. The error was corrected on 2nd September 2015 but the Certificate bore the same date that it had been initially issued.

The applicant claims that by 2nd September 2015 when the rectification was done it was already late by two days in filing the appeal.

The only issue for consideration in this matter is whether the applicant has shown good cause for the delay in lodging the appeal. Under rule 10 of the Rules the Court has wide discretionary powers to extend the time for the doing of any act provided good cause has been shown. What constitutes good cause differs from case to case. This Court, in **Joel Silomba v. R.**, -Mbeya Criminal Application No. 5 of 2012 (unreported) held that among factors to be considered in an application for extension of time under rule 10 of the Rules are:

- (a) The length of the delay,*
- (b) The reason for the delay- whether the delay was caused or contributed by the dilatory conduct of the applicant?*
- (c) Whether there is an arguable case, such as, whether there is a point of law or the illegality or otherwise of the decision sought to be challenged.*

According to the submission of the applicant's counsel, essentially the delay came about following a clerical error in the Certificate of delay which needed to be rectified. Mr. Kamala submitted that by the time the error was rectified they were out of time as the Certificate did not reflect the day it was rectified but rather remained with the initial date of issue.

Mr. Mseke for the respondent on the other hand both in his written and oral submissions argued that the delay in filing the appeal was not just for a few days but that it was for over two years as the decision that is intended to be appealed against was issued way back in November 2012. The learned counsel was of the view that the real reason for the delay was the applicant's engagement in the pursuit of a misconceived application for leave to appeal.

I am mindful of the fact that the Court's discretionary powers under rule 10 of the Rules must be exercised judicially. I am also mindful, as stated earlier, that what constitutes good cause depends on the circumstances of each case.

In the present case, the applicant in pursuance of rule 90 of the Rules made an application for a copy of proceedings in Complaint No. 31 of 2010. The application was made on 28/11/2012. On 14 April 2015 the proceedings were dispatched to the applicant as per annexure BB7 to

the affidavit of Mr. Kamala. The applicant thereafter applied for a Certificate of delay so that they could proceed with the filing of the appeal. It was issued on 2nd July 2015. The Certificate had some clerical errors that had to be rectified. Mr. Kamala amply displayed, through this Court's decisions, how defective documents may render a matter to be incompetent - see for example: **Christina Mrimi versus Coca Cola Bottlers Limited**-Civil Appeal No. 112 of 2008 and **Jaluma General Supplies Ltd v. Stanbic Bank (T) Ltd**- Civil Application No 34 of 2010 at Dar es Salaam (both unreported).As for the importance of a Certificate of delay in the lodging of an appeal this Court in **National Social Security Fund v. Kilimanjaro Bazaar Limited**[2005] TLR160 stated:

"A certificate under rule 83(1) of the court Rules is a vital document in the process of instituting an appeal. It comes into play after the normal period of sixty days for filing an appeal has expired. We are of the view that there must be strict compliance with the rule...."

Rule 83 of the Court of Appeal Rules 1979 which were the Rules in force when the above case was determined is similar to Rule 90 of the current Rules. The Certificate of delay was indeed a vital document in the applicant's appeal process

It is my considered opinion that in the circumstances of this case the applicant has shown good cause for the delay in lodging the appeal. A correct Certificate of delay was essential in the circumstances of the case. The applicant had to ensure that the defective one was rectified. The rectified Certificate of delay did not bear the date of the rectification but rather the initial date. The rectified Certificate was issued on 2/9/2015 as per Registrar's letter with Ref. No. Rev. No. 31/2010. If the Certificate had not needed rectification the applicant would have been required to file its appeal by 30th of August 2015. But as stated earlier, a correct Certificate was necessary in the circumstances. The time for filing the appeal ran out while the applicant was processing for rectification of the Certificate of delay. In my considered view the delay was not caused by the dilatory conduct of the applicant. Even if, as suggested by the learned counsel for the respondent, that the real cause for the delay was the fact that the applicant was pursuing a misconceived application, this in my view, in the circumstances of the case, would amount to a good cause as it shows that the applicant was genuinely pursuing the matter albeit mistakenly. Further still, it is my considered opinion that the matter raises an important legal point which calls for consideration, which is whether it was proper for the High Court to strike out the complaint instead of dismissing it in the circumstances.


In view of the forgoing considerations I am satisfied that good cause has been shown for extending the time within which to lodge an appeal against the decision of the High Court, Labour Division in Complaint No 31 of 2010. The application is in the event allowed. The applicant is to lodge the appeal within fourteen days of the delivery of this Ruling to the parties.

This being a matter which originates from a labour dispute I will make no order for costs.

DATED at DAR ES SALAAM this 30th day December, 2015.

E. A. KILEO
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL