

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 520/18 OF 2017

BANK M (TANZANIA) LIMITED APPLICANT

VERSUS

ENOCK MWAKYUSA RESPONDENT

**[Application for Extension of Time to lodge a notice of appeal from the
Ruling and Order of the High Court (Labour Division)
at Dar es Salaam]**

(Moshi, J.)

**Dated the 28th day of October, 2011
in
Revision No. 205 of 2011**

RULING

5th & 25 October, 2018

MWAMBEGELE, J.A.:

This is a ruling in respect of an application for extension of time to file a Notice of Appeal from the ruling of the High Court of Tanzania (Labour Division) in Revision No. 205 of 2011. It is made by a notice of motion taken out under rules 10 and 47 of the Court of Appeal Rules, 2009 (hereinafter referred to as the Rules) and supported by an affidavit duly sworn by Ngussa Erasto. The applicant had earlier filed such an application in the High Court (Labour Division) but Nyerere, J. refused to

extend time on the grounds that the application had not shown good cause to extend the time sought. She has come here on a second bite.

When the application was called on for hearing on 05.10.2018, only Mr. Rahim Mbwambo, the learned counsel for the applicant, appeared. The respondent, though duly served, did not enter appearance. Given the circumstances, the application proceeded in the absence of the respondent in terms of rule 63 (2) of the Rules.

Arguing in support of the application, the applicant first adopted the notice of motion and the affidavit supporting it as well as the written submissions earlier filed and submitted in elaboration that the applicant lodged the first Notice of Appeal timeously leading to Civil Appeal No. 109 of 2012 which was struck out on the ground of incompetence. He added that the applicant thereafter went back to the High Court (Labour Division) to start the process of appeal afresh by applying for extension of time to file a Notice of Appeal. That application was dismissed on the grounds that there was no good cause brought to the fore to grant the enlargement sought. He added that the applicant has been diligently prosecuting the matter and the striking out of Civil Appeal No. 109 of 2012 was not caused by the negligence of the applicant but due to conflicting decisions of the

Court on whether or not leave to appeal was required on decisions from the High Court (Labour Division). He added that before they lodged the appeal, leave was not mandatory. But before the appeal was heard the position changed. Due to this conflicting positions the applicant did not attach the copies of proceedings for leave to appeal and therefore the appeal was found incompetent.

Mr. Mbwambo submitted that Civil Appeal No. 109 of 2012 was also struck out on the ground that the judgment and the drawn order thereof had different dates, the ailment which the applicant was not to blame.

Mr. Mbwambo added that theirs was a technical delay and urged me to draw a distinction between actual delay and technical delay as was the case in **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 [1997] TLR 154 and grant the application.

Prompted, Mr. Mbwambo clarified that Civil Appeal No. 109 of 2012 was struck out by the Court on 06.03.2017 and the present application was filed on 08.11.2017, before which the applicant started to apply for extension of time in the High Court (Labour Division) which was refused on 05.10.2017 after which they were supplied with that decision on

24.10.2017. The learned counsel stated that these details are deposed in the affidavit supporting the notice of motion.

Having summarized the arguments of the learned counsel for the applicant, I should now be in a position to confront the issue in the present application. However, before going into the determination exercise, I wish to point out at this juncture that despite the application proceeding in the absence of the respondent, he did not file any affidavit in reply to counter what has been deposed in the affidavit supporting the notice of motion. This means that the applicant's averments deposed in the affidavit supporting the notice of motion, so far, stand unassailed.

In this application, the Court is asked to exercise its discretionary power to extend time within which to file a Notice of Appeal against the Ruling and Order of the High Court (Labour Division - Moshi J.) made on 28.10.2011 in Revision No. 105 of 2011. This discretionary power by the Court, stipulated under rule 10 of the Rules, under which the present application has *inter alia* been made, is very wide and unfettered. In the unreported case of **Zanzibar Telecom Limited v. Joseph Paschal Sakaya**, Civil Application No. 488/17 of 2016, this Court relied on the cases of **Lalji Gangji v. Nathoo Vassanjee** [1960] 1 EA 315 and

Noormohamed Abdulla v. Ranchhodbhai J. Patel and another

[1962] 1 EA 447 to observe that the wide and unfettered discretion under rule 10 of the Rules is only subject to the fetter upon all such discretions, namely; that they should be exercised judicially.

At this juncture, I it appropriate to reproduce hereunder the provisions of rule 10 for ready made reference. It reads:

*"The Court may, **upon good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."* [Emphasis added].

As shown in the bold expression in the section above, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term "good cause" having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtaining in each particular case. This stance has been taken by

the Court in a number of its decision. In the list are the cases of **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007, **Tanga Cement Company Limited v. Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, **Yusufu Same and another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported), to mention but a few.

In the case at hand, the applicant has stated that the applicant Bank has been diligently prosecuting her case and that Civil Appeal No. 109 of 2012 which was struck out by the Court was timely filed as a result of a timely filed notice of appeal. Mr. Mbwambo has reminded the Court that what is the subject matter of the present application is what is referred to as a technical delay and has urged the Court to follow **William Shija** (supra) to grant the application. I think the applicant is right. I have had an occasion to deal with the point in the recent past in **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil

Application No. 342/01 of 2017 (unreported). As I still subscribe to that view to date, I shall reiterate that stance in the present Ruling.

It is apparent on the record before me that after the applicant was dissatisfied with the decision of Moshi, J., she timely filed the requisite Notice of Appeal and, consequently, timely filed Civil Appeal No. 109 of 2012. However, the said Civil Appeal No. 109 of 2012 was struck out by the Court on 06.03.2017 and the Ruling thereof was read to the parties on 09.03.2017. Thereafter, the applicant rushed to the High Court (Labour Division) to start the process of appeal afresh by filing an application for enlargement of time within which to file a Notice of Appeal. That application was christened Miscellaneous Application No. 133 of 2017. On 05.10.2017, that application; that is, Miscellaneous Application No. 133 of 2017, was dismissed by the Labour Division of the High Court (Nyerere, J.). The Ruling dismissing the application was supplied to the applicant on 24.10.2017 and the present application was filed on 08.11.2017.

As rightly put by the applicant, what is the subject of the present application is one of technical delay. The period of delay up to the moment the Ruling in Civil Appeal No. 109 of 2012 striking it out was pronounced to the parties on 09.03.2017 and up to the dismissal of

Miscellaneous Application No. 133 of 2017 by the High Court (Labour Division) is but a technical delay which is explicable and excusable see: **Fortunatus Masha v. William Shija and Another** [1997] TLR 154 and **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006, **Zahara Kitindi & Another v. Juma Swalehe & 9 others**, Civil Application No. 4/05 of 2017, **Yara Tanzania Limited v. DB Shapriya and Co. Limited**, Civil Application No. 498/16 of 2016, **Vodacom Foundation** (supra) **Bharya Engineering** (supra), and **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302/17 of 2017 (all unreported), to mention but a few. In **Rwegasira** (supra), for instance, the full Court quoted the holding and subscribed to the position taken by a single Justice of the Court in **Fortunatus Masha** (supra), the holding which I cannot resist the urge to recite here:

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a

fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."

In **Fortunatus Masha** (supra) a single justice of the Court had put it this way at p. 155:

*"... a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact*

in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal.”

[Emphasis supplied].

I subscribe to the view taken by the Court in the above cases. The applicant Bank, having been duly penalized by having Civil Appeal No. 109 of 2012 struck out by the Court and the High Court (Labour Division) dismissing Miscellaneous Application No. 133 of 2017, the same cannot be used yet again to determine the timeousness of applying for filing the fresh Notice of Appeal in a bid to file a fresh appeal. On the authority of the decisions of the Court cited, that was an excusable technical delay on the part of the applicant which constitutes good cause under rule 10 of the Rules, under which the notice of motion has, *inter alia*, been taken out, to grant the order sought.

The applicant was also prompt enough to apply for this second bite immediately after she was supplied with the Ruling which dismissed his first attempt to apply for enlargement of time to file a Notice of Appeal.

The above said, I find the present application meritorious and, accordingly, grant it. The applicant is accorded thirty (30) days reckoned


from the pronouncement of this Ruling within which to lodge her notice of appeal. Costs of the present application shall abide by the outcome of the intended appeal.

Order accordingly.

DATED at **DAR ES SALAAM** this 22nd day of October, 2018.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL