

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

CIVIL APPLICATION NO. 401/18 OF 2018

RAMADHANI J. KIHWANI APPLICANT

VERSUS

TAZARA RESPONDENT

**[Application for extension of time within which to appeal from the decision of
the High Court (Labour Division)]**

(Nyerere, J.)

dated the 24th day of February, 2017

in

Revision No. 215 of 2016

RULING

17th May & 11th June, 2019

MWAMBEGELE, J.A.:

Ramadhani J. Kihwani; the applicant herein, by a notice of motion taken out under rule 10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules), moves the Court to grant orders for extension of time to appeal to the Court against the decision of the High Court, Labour Division (Nyerere, J.) handed down on 24.02.2017. The application is supported by an affidavit sworn by Ramadhani J. Kihwani, the applicant. No affidavit in reply has been filed by

the respondent TAZARA; an acronym of Tanzania and Railway Authority, to resist it.

When the application was placed before me for hearing on 17.05.2019, the applicant appeared in person, unrepresented. The respondent did not enter appearance despite being duly served with the notice of hearing on 07.05.2019. The rubber stamp impression on the notice of hearing indicates that the same was received by a Senior Legal Officer of the respondent on the said 07.05.2019. Prompted, the applicant prayed, and was granted, leave by the Court to proceed with the hearing in the absence of the respondent in terms of rule 63 (2) of the Rules.

Arguing for the application, the applicant opted to adopt the notice of motion as well as the flanking affidavit as part of his oral arguments without more. As can be gleaned from the affidavit, the main reason for the delay is that he timely lodged in the Court Civil Appeal No. 166 of 2017 which was struck out on 07.05.2018 on account that the record of appeal did not contain the memorandum of appeal hence the present application which was lodged on 06.09.2018. On being probed by the Court why it took so long; about four months, to lodge the present application, the applicant clarified that it took about four months following his matter up

with the Legal and Human Rights Centre as the lawyer who was assigned to attend to his problem had travelled. The applicant thus submitted that he had good cause for the delay and prayed that the application be granted so that he could assail the decision of the Labour Division of the High Court.

I have dispassionately considered the reasons for the delay brought to the fore by the applicant. As already explained above, the applicant timely filed his appeal to this Court but the same was struck for want of some relevant document which ought to have been incorporated in the record of appeal. It is the law in this jurisdiction that in order for an applicant to succeed to prompt the court to exercise its discretion under rule 10 of the Rules to order an enlargement of time in applications of this nature, he must bring to the fore good cause for the delay – see: **Mumello v. Bank of Tanzania** [2006] 1 EA 227 and **Kalunga and Company Advocates v. National Bank of Commerce** [2006] TLR 235.

The Rules do not define what entails good cause. However, case law has it that extension of time being a matter within the Court's discretion, cannot be laid by any hard and fast rules but will be determined by reference to all the circumstances of each particular case - see: **Regional**

Manager, TANROADS Kagera v. Ruaha Concrete Company Limited,
Civil Application No. 96 of 2007 (unreported).

In the case at hand, I am satisfied that the applicant has explained away the delay up to the moment Civil Appeal No. 166 was struck out by the Court on 07.05.2018 on a technicality. The period of delay up to the moment when the appeal was struck is what case laws describes as an excusable technical delay – 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) 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). It held:

"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."

Additionally, to cement the foregoing, I find it irresistible to quote what a single Justice of the Court stated at p. 155 in the case - **Fortunatus Masha** (supra) - in allowing an extension, the Court observed:

"... 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].

But the applicant has not explained away the period of delay falling between 07.05.2018 when his appeal was struck out by the Court and 04.09.2018 when the present application was lodged. That is about 110 days unaccounted for. In the affidavit supporting the application, it is deposed at paragraph 7 that “the main ground for the delay was due to the applicant’s applications pending and determined in other courts”. No explanation is deposed in the affidavit why it took about four months (110 days) to lodge the instant application. That the four months were spent following the matter up with the Legal and Human Rights Centre was just stated during the hearing of the application and upon being prompted by the Court. No affidavit by the lawyer from the said Legal and Human Rights Centre who allegedly travelled in the said four months was sworn to

verify what the applicant stated. I particularly note that the documents in this application had been prepared by the said Legal and Human Rights Centre. Nothing is deposed on when did the applicant take the documents to the Legal and Human Rights Centre and when did that lawyer travel and when did he come back to attend to the applicant's problem. In the circumstances, it is my considered view that the averment that the four months were used in following up the matter with the Legal and Human Rights Centre remain unsubstantiated and, if anything, it is but an afterthought. In underlining the dire need to supply evidence in applications of this nature, in **NBC v. Sadrudin Meghji**, [1998] TLR 503 the Court recited an excerpt from its earlier decision in **Kighoma Alli Matima v. Abbas Yusuf Mwingamno**, Civil Application No. 5 of 1987 (unreported) which excerpt, I think, merits recitation here:

"Sufficient reason has been considered in a number of cases. Sometimes a slight lapse by an advocate might be overlooked, but not a lapse of a fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time".

I am guided by the foregoing principle. In the case at hand, the advocate who handled the applicant's case at the Legal and Human Rights Centre for almost four months, ought to have deposed an affidavit to that effect so as to verify what the appellant claimed orally during the hearing of the application. Short of that, as already stated above, the applicant's plain allegation remains unsubstantiated. In applications for enlargement of time, like the present, all material persons must swear affidavits to trigger the Court exercise its discretion under rule 10 of the Rules – see: **Mary Rugomora v. Rene Polete**, Civil Application No. 2 of 1992 (unreported).

For the foregoing reasons, I find and hold that the applicant has not explained away every day of delay to warrant the Court exercise its discretion to grant the enlargement sought – see: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014, **Saidi Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004 and **Abood Soap Industries Ltd v. Soda Arabian Alkali Limited**, Civil Application No. 154 of 2008 (all unreported). In **Bushiri Hassan** (supra),

for the instance, the Court made the following observation to underline the dire need to explain away every day of delay in applications of this nature:

“Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken”.

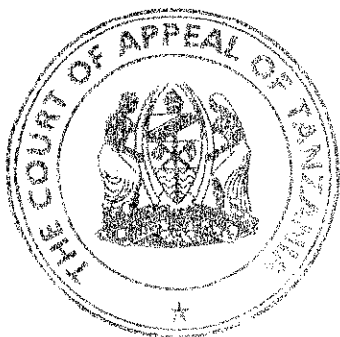
The above said, I find this application wanting in merits. It stands dismissed. As the respondent did not enter appearance despite being duly served with the notice of hearing, no order is made as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 29th day of May, 2019.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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




B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL