

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

CIVIL APPLICATION NO. 195/9 OF 2019

DAVIS BERNARD HAULE.....APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC (NMB).....RESPONDENT

(Application for Extension of time to appeal from the decision of the High Court of Tanzania, Labour Division, at Sumbawanga)

(Mipawa, J.)

Dated the 28th day of November, 2014

in

Revision No. 5 of 2013

.....

RULING

16th & 23rd March, 2020.

KITUSI, J.A.:

The applicant Davis Bernard Haule wishes to invoke the jurisdiction of this Court to extend time under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The intended order is meant to enable the applicant file an appeal against the decision of the High Court Labour Division, Revision No. 5 of 2013 dated 28th November, 2014, out of the statutory time.

In the Notice of Motion one ground has been cited in support of the application and that is;

- (a) There is no proof of service to the respondent above named of the letter requesting for the copies of the proceedings and drawn order of the decision appealed against which will render the appeal to be incompetent.

The applicant filed a supporting affidavit that has been taken by Mr. Evans Robson Nzowa, his advocate, and written submissions drawn by the same learned advocate in terms of Rule 106 (1) of the Rules. Similarly, the respondent filed an affidavit in reply and written submissions, both through Mr. Paschal Kamala, learned advocate. From the contents of the supporting affidavit and written submissions, the following background, only relevant to the application at hand, can be deciphered.

The applicant lost before the High Court Labour Division and he did the following in a bid to challenge that decision; On 19/12/2014 he lodged a Notice of Appeal and served its copy on the respondent on 31/12/2014. Meanwhile, on 17/12/2014 he wrote a letter to request for copies of requisite documents from the Registrar, but he did not serve a copy of that letter to the respondent.

Following that letter, on 13/4/2015 a certificate of delay was issued to the applicant and subsequently, on 9/6/2015 he lodged Civil Appeal No. 58 of 2016. However, this Civil Appeal was struck out on 16/2/2018 on the ground that its record was incomplete.

Still determined, the applicant went to the High Court and recommenced the pursuit for what he considered to be his right. He obtained extension of time to lodge a fresh Notice of Appeal on 23/1/2019 and lodged the Notice on 21/2/2019, dutifully serving its copy to the respondent on 22/2/2019. So far so good, and the question that lingers and calls for an answer is why didn't the applicant file his intended appeal within time after filing the Notice on 21/2/2019? The answer to this question is provided by the applicant under paragraph 13 of the supporting affidavit which I reproduce below: -

"13. In the course of preparing the records of appeal it came to my notice that there is no proof of service to the respondent of our letter dated 28/12/2014 (annexture "H") requesting for proceedings and

drawn order, which automatically renders the appeal incompetent hence this application."

Under paragraph 14 of the same affidavit the delay has been referred to as technical and that it warrants the court's exercise of its discretionary powers.

The respondent opposes the application as earlier intimated, by an affidavit in reply and written submissions in opposition to the application. The critically relevant part of the affidavit in reply is paragraph 7 which is a reply to paragraph 13 of the supporting affidavit, and it goes thus: -

"The contents of paragraph 13 of the affidavit are partly noted to the extent of the letter dated 28/12/2014, the rest of the contents are disputed. In reply thereto the respondent states that failure to serve the respondent the letter requesting for proceedings does not in any way render the appeal incompetent. The Rules are

clear that failure of a party to serve the letter requesting for proceedings to the opposite party will render the applicant unable to be supplied with certificate of delay, otherwise the applicant (sic) put to strictest proof thereof."

In addition to the affidavit in reply, the respondent raised under rule 107 (1) of the Rules, a Notice of Preliminary Objection to the effect that the application is misconceived on the ground that, I quote; *"failure to serve the respondent of the letter requesting the proceedings cannot vitiate an appeal in terms of Rule 90 (1) and (2) of the Court of Appeal Rules, 2009."*

At the hearing of the appeal the appellant turned up in person and informed the Court that he was going to proceed with the hearing despite absence of his advocate who reportedly succumbed to a sudden illness as he was travelling to Mbeya. He assured me that his advocate has instructed him to inform the Court that there would be no more from the applicant than the written submissions. He maintained

this even when his attention was drawn to the point of preliminary objection.

On the other hand, Mr. Paschal Kamala appeared for the respondent. He had also filed written submissions earlier as per the Rules, so he followed suit and said he would have nothing to add to it. In a way this would appear like the learned counsel was abandoning the preliminary objection, but on reflection, I am satisfied that there is no difference between what the learned counsel stated in the affidavit and written submissions on the one hand, and that which is raised in the Notice of Preliminary Objection, on the other.

In his written submissions the applicant did no more than repeat what is contained in the supporting affidavit, especially the contents of paragraph 13 already reproduced above. On his part the respondent submitted that the application is misconceived because the applicant had enough time to lodge his appeal within the statutory 60 days without any certificate of delay. He further submitted that since the applicant did not require any period exempted, he did not need the

letter. That is about all there is for me to consider in determining this application.

The period for lodging an appeal is 60 days from the day of lodging notice, according to Rule 90 (1) of the Rules, and I should add that the said rule provides the general rule in filing civil appeals. See also the case of **National Microfinance Bank PLC v. Oddo Odilo Mbunda**, Civil Appeal No. 95 of 2015 (unreported). When an intending appellant has no reason for not filing his appeal within 60 days, he has no basis for making use of any other provisions that provide for exceptions.

When the applicant's appeal was struck out, all documents that had been filed there went with it. See **Dhow Mercantile (EA) LTD & Others v. Registrar of Companies and 4 Others**, Civil Appeal No 56 of 2005 (unreported). So, when the applicant lodged the fresh Notice, the period for him to appeal was counted from the date of that Notice as a general rule, not from the date he was supplied with copies of proceedings which were then in his possession. The applicant wrongly placed himself under the exception to Rule 90 (1). With

respect, since the applicant lodged his Notice on 21/2/2019 he ought to have lodged his appeal by 22/4/2019 but instead of filing the appeal, he filed this application on 23/4/2019. The fear that the appeal would have been incompetent because of lack of proof of service of the letter requesting for copies of proceedings, is bone out of a misconception as rightly submitted by Mr. Kamala. That letter would only have been relevant if the applicant needed some days exempted, which was not the case here.

My powers under rule 10 of the Rules are exercised upon good cause being shown. The question is whether the applicant has shown good cause for not filing his intended appeal. I am afraid there is no good cause shown because at best what we have here is counsel's misconception or ignorance of the law, which has never been considered as good cause. See the case of **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported).

Even assuming that the letter being referred to was relevant for the intended appeal, the applicant has virtually given no account why he did not serve it to the respondent in time. Instead, the ground

forming the basis for this application has been couched in a way that suggests that lack of proof of service of the letter is itself an explanation entitling the applicant to an order of extension of time. It does not.

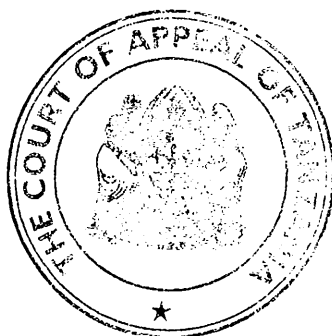
Consequently, this application lacks merit and it is dismissed for being misconceived and for not disclosing good cause for the delay. The respondent shall have the costs of this application.

It is so ordered.

DATED at **MBEYA** this 23rd day of March, 2020.

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of March, 2020 in the presence of the Applicant in person and in the absence of the Respondent, is hereby certified as a true copy of the original.




A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL