

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

CIVIL APPLICATION NO. 348/18 OF 2020

EXIM BANK (TANZANIA) LIMITED APPLICANT

VERSUS

JACQUILINE A. KWEKA RESPONDENT

**(Application for Extension of time to serve the Respondent with the
Letter to the Registrar and Notice of Appeal against the
Decision of the High Court (Labour Division)
at Dar es Salaam)**

(Muruke, J.)

dated the 12th day of June, 2020

in

Revision Application No. 429 of 2019

RULING

15th February, & 12th March, 2021

LEVIRA, J.A.:

This is an application for enlargement of time within which the applicant can serve the respondent with a copy of the notice of appeal as well as a copy of the letter which was submitted to the Registrar of the High Court, Labour Division applying for certified copies of proceedings, judgment and decree which were lodged on 23rd June, 2020. The application is by way of notice of motion made under Rule

10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit duly deposed by Edmund Mwasaga, the Head of Legal Services and Company Secretary of the applicant. However, the application is resisted by Jacqueline Kweka, the respondent herein who filed an affidavit in reply.

Briefly, the background of the matter at hand is to the effect that, the respondent was an employee of the applicant since 1997; working under contract for unspecified period of time. However, on 4th May, 2012 she was terminated from employment on gross negligence. Being aggrieved by the termination, she referred the dispute to the Commission for Mediation and Arbitration (the CMA) where the decision was in her favour. The applicant was aggrieved by that decision and therefore lodged revision application before the High Court Labour Division vide Revision Application No. 429 of 2019. Upon hearing of the said application, the High Court delivered its Judgment on 12th June, 2020 in favour of the respondent with some adjustment of the CMA award, where the 24 months salaries award initially awarded to the respondent was reduced to 12 months salaries. Other terminal benefits awarded by the CMA were upheld.

Still dissatisfied, the applicant lodged a notice of appeal to the Court and applied to the Registrar of the High Court on 23rd June, 2020 as indicated above to be supplied with copies of the judgment, decree, proceedings, exhibits and a certificate of delay for appeal purposes. However, the then applicant's counsel (Amicus Attorneys) did not serve the respondent with copies of the notice of appeal and the letter which applied for certified copies of proceedings, judgment and decree as required by law, hence the current application.

At the hearing of this application, the applicant was represented by Mr. Makarios Tairo, the learned advocate and the respondent had the services of Mr. Elieza Kileo, learned advocate.

Mr. Tairo adopted the applicant's notice of motion and the supporting affidavit to form part of his submission. Thereafter, he submitted that Rule 84(1) of the Rules requires the applicant within fourteen (14) days after lodging a notice of appeal to serve copy of it on the respondent. He added that the applicant was also required to submit a letter to the Registrar of the High Court requesting for copies of judgment, decree and proceedings within thirty (30) days of the date of the impugned decision and serve the same on the respondent

in terms of Rule 90(1) & (3) of the Rules. However, he said the applicant was not able to comply with the requirements of that Rule that is why this application was lodged.

Mr. Tairo submitted further to the effect that under Rule 10 of the Rules, the Court is vested with discretionary powers to extend time limited by the Rules for doing any act authorised by the Rules whether before or after the expiration of that time upon good cause being shown. To support this position, he cited the case of **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 and **Joseph Paul Kyauka and Another v. Emanuel Paul Kyauka Njau and Another**, Civil Appeal No. 7/05 of 2016 (both unreported).

According to Mr. Tairo, one of the grounds to show good cause is to satisfy that the application was brought promptly. He said, under paragraphs 7 & 9 of the supporting affidavit, the applicant stated how the case file changed hands from one law firm to another and that the current counsel for the applicant acted promptly to lodge this application so as to serve the respondent. In addition, he said, there are serious grounds of illegality to be addressed by the Court as demonstrated under paragraph 5 of the supporting affidavit. It was

his argument that the respondent just noted those grounds raised by the applicant in paragraph 6 of her affidavit in reply. She simply disputed them under paragraph 5 of the affidavit in reply, but she did not disclose the basis of her dispute. In other words, he said parties are in agreement that there are strong points attracting the attention of the court. According to Mr. Tairo, this application will not prejudice the respondent because she is aware of what is going on including the application for execution which is currently stayed. Finally, he urged the Court that this application be granted.

In reply Mr. Kileo valiantly opposed the applicant's application. He adopted respondent's affidavit in reply to form part of his submission. It was his submission that the length of delay is one of the factors to be considered in applications for extension of time as decided in the case of **Zawadi Msemakweli v. NMB PLC**, Civil Application No. 221/18 of 2018 (unreported) at page 7.

Mr. Kileo argued that the applicant did not act promptly because the notice of appeal was filed on 23rd June, 2020 and the current application was filed on 21st August, 2020, thus the applicant was out of time for about 58 days, which he said, is a long period of time.

In addition Mr. Kileo submitted that the applicant has failed to advance reasons for delay. As for him, the submission by the counsel for the applicant that there has a change of advocates who represented the applicant does not hold water. He condemned the applicant for keeping quiet with out serving them even by the time the applicant was served with the notice of execution, that is on 27th July, 2020.

The learned counsel argued that, if this application will be granted the respondent is going to suffer a lot bearing in mind that the dispute has so far protracted for nine years. The respondent has a family to take care and currently she has not been able to secure employment as the applicant refused to issue her a clean certificate of service. So, if this matter will take longer time, she is going to suffer.

Another ground argued by Mr. Kileo is that the applicant did not act diligently to ensure that the respondent is served. He argued further that since the applicant was being represented by a highly reputable Law Firm with experienced lawyers (Locus Attorneys); those Attorneys ought to have acted diligently to serve the other side.

The learned counsel went on submitting that, in terms of Rule 84(1) of the Rules, the applicant was supposed to serve the respondent within 14 days, but in vain. Therefore, he said, since the applicant has failed to account for the delay the overriding objective cannot come into play to rescue her application. In that regard, he prayed for the application to be dismissed with costs.

Mr. Tairo made a brief rejoinder stating that the applicant has been able to show good cause as to why this application should be granted. According to him, for the case file to change hands from one Law Firm to another is not a minor thing that can be done within a very short period of time.

Regarding Mr. Kileo's argument that the applicant has delayed for almost 58 days, Mr. Tairo submitted that the argument is not correct because the notice of appeal was filed on 23rd June, 2020 and the respondent was supposed to be served within 14 days. In that sense, the last date was 8th July, 2020 and this application was filed on 21st August, 2020. Counting from 8th July, 2020 and on 27th July, 2020 when the matter was handed to the current Law Firm, the delay is of about 40 days. However, he said, it was from 14th August, 2020

when the application for stay of execution was filed, the counsel for the applicant became aware that the respondent was not served with the documents under discussion.

Mr. Tairo argued that, since the respondent disclosed her knowledge of the existence of an application for stay of execution under paragraph 10 of the affidavit in reply, it is like she is admitting that the application at hand is important otherwise, she could have strongly disputed it.

The learned counsel submitted further that, there are serious legal issues to be addressed by the Court in the intended appeal. He added that judicial process, takes long time, so it is not the parties' fault that this matter has been in court for almost 9 years not as stated by the counsel for the respondent. On the issue regarding issuance of a clean certificate to the respondent for her to secure job, Mr. Tairo argued that the said issue is one of the matters to be dealt with in appeal and therefore it cannot be raised in this application.

According to him, the applicant has been diligent all the time pursuing her rights in court as it can be seen under paragraphs 7 to 10 of the supporting affidavit.

He concluded by stating that the applicant has been able to show good cause for extension of time and therefore prayed for the application to be granted with costs.

Having considered rival arguments from both sides, the question to be considered in this application is whether the applicant has been able to show good cause warranting the sought order.

As introduced above, this application is pegged under Rule 10 of the Rules which requires the applicant to show good cause for the Court to exercise its discretionary powers to extend time. The term good cause as submitted by the counsel for the parties has no single definition. As such, definition of good cause is deduced according to the circumstances of each case. I subscribe to the authorities referred by the counsel for applicant (**Benedict Mumello; Joseph Paul Kyauka** (supra)).

I also agree with the counsel for the respondent that for good cause to be shown, the applicant has to state the length and reason(s) for delay, important legal point involved, whether she acted diligently and whether the other party will be prejudiced if extension of time order is granted as stated in the cited case of **Zawadi Nsenajweku** (supra).

As correctly pointed out by the counsel for parties, Rule 84(1) of the Rules requires the intended appellant (applicant in our case) within fourteen (14) days after lodging a notice of appeal to serve copy of it on persons who seem to him to be directly affected by the appeal. In the current application, the respondent being the party (respondent) in the intended appeal ought to have been served with the notice of appeal lately by 6th June, 2020. Also Rule 90(3) of the Rules requires the intended applicant to serve the respondent with the letter submitted to the Registrar requesting for copies of judgment, decree and proceedings for appeal purpose. However, in the current application both conditions were not met.

The reason advanced by the counsel for the applicant for failure to serve the respondent within time is that there was a change of

advocates from Amicus Attorneys who were representing the applicant from the CMA and the High Court to the Locus Attorneys who are currently representing her. Thus, inadvertently the respondent was not served within time. He urged the Court to consider change of Law Firms to be a serious exercise consuming time; particularly, when the matter involves a financial institution and make a finding that the applicant was not negligent as alleged by the counsel for the respondent.

Apart from the reason for delay, Mr. Tairo indicated that the applicant has raised serious grounds of illegalities on points of law worthy to be considered by the Court as stated under paragraph 5 of the supporting affidavit. The said grounds are as follows:

- (1) *Whether the court erred in law and committed apparent error in law by making a finding that there was good cause which justified the termination of the respondent, and simultaneously award twelve months' compensation, only on the ground that there was none-compliance with some aspects of the procedural requirements;*

- (2) *Whether the court made an apparent error on the record by upholding all the terminal benefits which were erroneously awarded by the CMA to the respondent, while it had already held that the applicant had good cause to terminate the respondent;*
- (3) *Whether the court reached an erroneous decision by its failure to make a finding that the respondent was not entitled to the terminal benefits which were awarded to her by the CMA since there was good cause for her termination, and that the applicant had followed all the procedures to suspend and later terminate her.*

It is settled position that the applicant who seeks enlargement of time to do an act authorised by the law after the prescribed time has expired has to account for each day of delay. There is an unbroken chain of authorities to that effect. (See **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; **Vodacom Foundation v. Commissioner General (TRA)**, Civil Application No. 107/20 of 2017; **Yazid Kassim Mbakileki v. CRDB (1996) TLD Bukoba**

Branch and Another, Civil Application No. 412/04 of 2018 (all unreported).

In the current application, the applicant relied on the fact that her matter changed hands of lawyers from Amicus Attorneys to Locus Attorneys as the main reason for not serving the respondent on time. I am not persuaded with this reason because both firms are manned by lawyers who ought to know Court procedures. I have never come across a situation where failure of the advocate to act within the detects of law being condoned to constitute good cause for enlargement of time and I am not prepared to do so. Having so stated, I agree with the counsel for the respondent that the reason for delay advanced by the applicant does not fall squarely within the meaning of good cause.

However, since "good cause" referred under Rule 10 of the Rules under which this application is brought does not stick only on reasons for delay, I am also compelled to consider the grounds of illegality raised by the applicant. In so doing I will be guided by the widely cherished principle, that whenever illegality is raised as a ground for enlarging time, the same has to be apparent on the face of

record. (See **The Principal Secretary Ministry of Defence and National Service** and **Lyamuya Contraction Company Ltd** (supra); **Chiku Harid Chonda v. Getrude Nguge Mtinga as Administratrix of the late Yohane Claude Dugu**, Civil Application No. 509/01 of 2018 (unreported)).

A quick glance of the grounds of illegality raised by the applicant herein reveals important points of law which I think deserve the attention of the Court. It is apparent on the record of the application that, the High Court made a finding on page 12 of the impugned decision that the respondent was terminated with good cause only procedure was not followed. Thereafter, upheld the arbitrator's award with the reservation as indicated above. Now, whether it was proper or otherwise, it cannot be answered in this application for extension of time. In the circumstances, I find that the points of illegality raised by the applicant constitutes good cause for the Court to exercise its discretion to grant extension of time.

For that reason, I hereby grant this application. The applicant should serve the respondent with copies of the notice of appeal and the letter submitted to the Registrar applying for copies of judgment,

decree and proceedings within fourteen (14) days from the date of this Ruling. Costs shall abide the outcome of the intended appeal.

Order accordingly.

DATED at DAR ES SALAAM this 24th day of February, 2021

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 12th day of March, 2021 in the presence of Mr. John Laswai, learned Counsel for the Applicant and Mr. Eliezer Kileo, learned advocate for the Respondent is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL