

IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

CIVIL APPLICATION NO. 464/08 OF 2021

JOHN LUCHINAAPPLICANT

VERSUS

MUNANKA ENTERPRISESRESPONDENT

**(Application for extension of time to lodge notice of appeal from the decision
of the High Court of Tanzania (Labour Division) at Musoma)**

(Galeba, J.)

dated the 16th day of August, 2019

in

Labour Revision No. 31 OF 2017

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RULING

31st October & 9th November, 2023

KIHWELO, J.A.:

The applicant lodged an application before the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/MUS/311/2016 in which the applicant was claiming TZS. 62, 898, 000.00 which arose out of industrial relation dispute between the applicant and the respondent. Unfortunately, the CMA dismissed the applicant's claim. In an attempt to

overturn the decision of the CMA the applicant approached the High Court in Musoma and lodged Labour Revision No. 31 of 2017 which was equally dismissed on 16th August, 2019 (Galeba, J, as he then was). In dismissing the application, the High Court informed the applicant his right to appeal to the Court should that need arise, subject to the laws applicable.

The applicant lodged an application before the High Court in Miscellaneous Labour Application No. 26 of 2019 seeking among other things extension of time to lodge the notice of appeal which was granted by the High Court (Kisanya, J.) on 29th May, 2020 and the applicant was granted 30 days within which to lodge the notice of appeal. As the applicant did not lodge the notice of appeal within the time set by the High Court, on 5th February, 2021, he filed another application through Miscellaneous Labour Application No. 4 of 2021 seeking further extension of time to lodge the notice of appeal out of time. This time around luck was not on the applicant's side as the application was dismissed on 12th April, 2021 for being devoid of merit.

Furthermore, on 13th August 2021, the appellant, still determined to pursue his appeal, he knocked the doors of the Court armed with the instant

application which was predicated on rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by the affidavit sworn by the applicant.

It is worthy to note that, before hearing of the application could commence in earnest, Mr. Ernest Mhagama, learned counsel for the respondent, informed the Court that, if the Court will be pleased he was ready to argue the preliminary point of objection notice of which was prior lodged in Court on 25th October 2023, to which the applicant who appeared in person unrepresented did not have any qualms.

The notice of preliminary point of objection which was filed under rule 107 (1) of the Rules was to the effect that:

"That the notice of motion filed by the applicant be struck out for contravening rule 55 (1) of the Tanzania Court of Appeal Rules, 2009 as amended which mandatorily requires the notice of motion to be served within the prescribed period of 14 days thus renders the application incompetent."

I allowed Mr. Mhagama to argue the point of preliminary objection and the applicant would rejoin thereafter and it is upon disposal of the

preliminary objection that the application will be determined. This is in accordance with the long-established practice of this Court that where there is a notice of preliminary of objection raised in an appeal or application, the Court hears the preliminary objection first before allowing the appeal or application to be heard on merit.

The learned counsel was understandably, fairly brief but focused in his submission in support of the preliminary objection. He contended that, the instant application was lodged in Court on 13th August, 2021, but quite unfortunate the applicant has not served the respondent to date. In his view, this is in contravention of the mandatory requirement of rule 55 (1) of the Rules which requires notice of motion to be served within fourteen (14) days from the date of filing of that notice.

According to Mr. Mhagama the net effect of the failure to serve the notice of motion within the time prescribed by law is to render the application incompetent and therefore liable to be struck out. Reliance was placed in the case of **Alex Msama Mwita v. Emmanuel Nasuzwa Kitundu and Another**, Civil Application No. 538/17 of 2020 (unreported) to facilitate the proposition of his argument.

In response, the applicant being a lay person not very conversant with the law, insisted that the respondent was duly served with the notice of motion. However, on my further prompting, the applicant could not prove that service was done as he alleged and in a somewhat surprising turn of events he admittedly argued that he never served the respondent. In all, he zealously insisted that it is in the interest of justice that the application for extension of time be allowed to proceed for hearing and the preliminary objection be dismissed.

I have listened the arguments by the parties and more crucially, the submission by the learned counsel. The only question that exercises my mind is whether or not the preliminary objection has any merit. The answer to this question lies on the provisions of rule 55 (1) which provides that:

"55-(1) The notice of motion, affidavit and all supporting documents shall, within fourteen (14) days from the date of filing, be served upon the party or parties affected."

Undoubtedly, the above excerpt is not ambiguous as it is very categorical and couched in mandatory terms that service of the notice of motion within fourteen (14) days of filing is not optional.

In the instant application before me, it is quite obvious that the applicant did not serve upon the respondent notice of motion and the supporting affidavit within fourteen (14) days contrary to the requirements of the law. The applicant was duty bound to effect service within the time prescribed by the law, but this did not happen, as such, I find considerable merit in Mr. Mhagama's submission that the consequence of it, is to render the application incompetent and therefore liable of being struck out.

Luckily, this is not a novel case as there is a considerable body of case law in which this Court has pronounced itself on the effect of failure to serve the notice of motion within the time prescribed by the law. See, for instance **Alex Msama Mwita** (supra) in which faced with an analogous situation we decidedly held that:

"The requirement to serve the notice of motion within the prescribed period is mandatory and its failure to comply with the requirement renders the application incompetent and liable of being struck out."

Corresponding observations were made in the case of **Shirika la Meli la Zanzibar and Another v. Mohamed Hassan Juma and 5 Others**, Civil Appeal No. 56 of 2006 (unreported) and **Enerico Kakala v. Mohamed**

Mussa (Administrator of Estate of the Late Ahmed Zahoro Ahmed)

[2017] TLR 71. We also took guidance from the case of **Sadallah I. Sadallah v. SBC Tanzania Limited**, Civil Application No. 7 of 2009 (unreported) in which we discussed failure to comply with rule 48 (4) of the Rules.

In the result, I uphold the preliminary objection. The application is struck out with no order as to costs this being a labour matter.

It is so ordered.

DATED at MUSOMA this 9th day of November, 2023.

P. F. KIHWELO
JUSTICE OF APPEAL

Ruling delivered this 9th day of November, 2023 in the presence of the Applicant in person, and Mr. Ernest Mhagama, learned counsel for the Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL