IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.147 OF 1994

TANZANIA PORTLAND CEMENT COMPANY LTD... APPLICANT

VERSUS

MINISTER FOR LABOUR..... RESPONDENT

RULING

MANENTO, JK:

This is an application by the applicants for the grant of an extension of time to lodge a notice of appeal and for leave to appeal to the Court of Appeal out of time. The application supported by an affidavit of one Ola Sosveen is made under section 10 of the Appellate Jurisdiction Act, 1979. Section 68(e) and Order XLIII(2) of the Civil Procedure Code, 1966 and any other enabling provisions of the law.

The applicant is aggrieved by the decision of this Court in Misc. Civil Cause No.147/1994. The Attorney General did not support the application so he filed a counter affidavit for that purpose. Better still, both the applicants learned counsel and learned state attorney who appeared for the Attorney made ably oral submissions.

Regarding to the first prayer for the grant of an extension of time to lodge the Notice of Appeal for an Appeal to the Court of Appeal, the applicant in his 4th paragraph of the affidavit deponed that the proceedings in Misc. Civil Cause No. 147/1994 that the matter be disposed off by way of written submissions. The ruling was scheduled to be delivered on notice which notice was not communicated to the applicant till 25th June, 2004 when the said Hassan Masoud presented a drawn order for his reinstatement, from the Kisutu Resident Magistrate's Court. Replying on the same issue, the learned state attorney replied that the fact that the applicant became aware of its delivery on 25/6/2004 is strongly disputed.

In his submissions, Mr. Mapande, learned counsel for applicant submitted that Hassan Masoud and others were terminated from the applicants services, but on a reference to the Conciliation Board and subsequently to the Minister, it was treated as if the said Masoud was dismissed, hence an order for reinstatement was wrongly made. Being aggrieved by the decision of the Minister, the applicant made a reference to this court, they urged the reference by way of written submissions and the court had ordered that they would be notified of the date the ruling would be delivered. Unfortunately, no notice was issued to them. They were surprised to be served with a drawn order from Kisutu Resident Magistrates

court, ordering the applicant to reinstate the said Masoud. On their search, they discovered that the courts ruling was delivered on 31/1/2000 over $2^1/_2$ years. He insisted that they had been waiting for the courts notice so that they could make an appearance, but unfortunately, non was served to them nor could they have known of the date the ruling could be delivered.

When Mr. Ngwembe, learned senior state attorney replied to the submissions, he was highly surprised of the submissions of the applicant's advocate that they could not know of the delivery of the ruling for a period of five years. The learned senior state attorney was further surprised, that though the applicant was represented by an advocate, one Mhina, yet they could not make a follow up, as to when the ruling was to be delivered. That, it was the duty of the applicant to make a follow up. The applicant filed the application on 13/8/2004, some five years and eight months. That such an ordinance delay cannot be tolerated by this Court and the applicant cannot be heard of lack of knowledge.

The learned state attorney urged that the act of the applicant was grave negligence and negligence has never been a reason for extension of time to give notice of an intention to appeal to the Court of Appeal. He cited several decided cases on this point, such as: **Inspector Sadiki & another v. Jerald Nkya (1997) TLR 290 Samson Kishosha Gaba v. Charles Kingongo**

(1990) T.L.R. 133. The other case which is not yet reported is **Misc. Civil Application No.14/1996 (unreported) Yuassa Battery Ltd vs. Attorney General and Others** whereby inordinate delay by the applicant was held not to be a reason. However, on that case, the party was aware of the date of the hearing. The consequence for an application filed out of time without sufficient reasons for delay was to have the application fail. See the case of **Salum Sululu Naphan v. Zahor Abdallah Zahor (1988) T.L.R. 41.**

In his reply to those strong submissions of the learned state attorney, Mr. Mapende, learned counsel submitted that once Courts orders are made, they should not be taken for granted. Parties are bound to such orders and they are to obey them. Dealing with the time span, he submitted that it was not surprising for the delay, because the case itself had taken five years to commence, since when it was filed. Finally on this point, he submitted that there was no issue of negligence in this issue, so the cases cited are distinguished. However, on the strength of the Yuasa Case (supra), sufficient reasons have been given so the application should be granted. The learned counsel submitted.

I have perused the case file and found that, the court on 6/8/99 ordered that the ruling would be delivered on notice. That is to say, the parties to the proceedings would be made aware of that date by the Court. Another order

of the court was that of the date the ruling of the court was delivered. That is to say, 31/1/2000. There was no order before that for the issuing of the notice to the parties. The applicant was recorded absent. The Attorney General was represented by one Chidou, a learned state attorney. It is not known as to how Chidou, earned state attorney happened to be in court. The written submissions were finally filed on 10/9/99 and it took the court five (5) months to write and deliver the ruling without giving notice to the applicant. I therefore agree with the learned applicants counsel that there was no negligence in their part in not applying on time. The reasons are that the Court itself did not obey its own order. The order to notify the parties of the date the ruling would be delivered. That information is not found in the Court proceedings or copies of notices Issued to the parties. It is, I should say, that when the court makes its orders, it should follow and obey them. Failure of obey its own orders could lead to such applications like this one, which can lead to the giving of benefit of doubts, perhaps to a party who did not deserve it. The court is then allowed to grant such application in the absence of negligence and if sufficient cause has been given.

The applicant raised in his second prayer a legal issue of interpretation. However, the learned state attorney submitted that there was no issue about interpretation because the applicant's affidavit touched the issue in relation

to the Employment Ordinance Cap 366 and not the Security of Employment Act, 1964. He further submitted that, that was not an oversight. It was the intention of the applicant. Replying to that issue, the learned counsel for the applicant submitted that citation was an oversight. The reason stated is that the judges ruling which is the subject matter of this application is based on the Security of Employment Act, which is attached to the affidavit as exhibit TBL 4, which was adopted as part of his submissions. Without much to say on this point, I agree that the citation of the Employment Ordinance Cap. 366 in paragraph 5 of the applicant's affidavit was an oversight. The context of the paragraph 5 of the affidavit of the applicant relates to the Security of Employment Act, 1964. It is under the Security of Employment Act where the Conciliation Board and the Minister can exercise powers of ordering reinstatement and not under the Employment Ordinance, Cap.366. Still, the whole proceedings in this Misc. Civil Case No.147/94 and not otherwise.

The purpose of the applicant's extension of time to appeal to the Court of Appeal is to have the clear and final interpretation of Sections 26 and 40A of the Security of Employment Act, and especially their consequences. The learned counsel submitted that section 26 covers reinstatement arising out of summary dismissal. It does not give the employer an option of paying the employee the statutory compensation if he does not wish to reinstate the

employee, nor does it cover issues arising out of termination. However, under section 40A reinstatement can be ordered when employee's services has been terminated. Secondly, the employer, under section 40A can opt to pay the employee the statutory compensation if he does not wish to reinstate the employee.

From what I have said, I am of the opinion that a clear interpretation on and under what circumstances of employment can the court apply section 26 and or section 40A of the Security of Employment Act, 1964. I therefore hold that there is a confusion. Let it be cleared by the last Court of the land, for present and future interpretation.

Finally, the application is granted as prayed. Costs shall lie where they fall.

A.R. Manento

JAJI KIONGOZI.

25-10-2005

Coram: E. Mbise, DR-HC

For the Applicant – Applicant absent

For the Respondent – Mr. Mboya, state attorney.

Cc: Livanga.

Court: Ruling read on 25/10/2005 in the presence of Mr. Mboya, State Attorney for the Respondent and in the absence of the applicant.

E. Mbise

DEPUTY REGISTRAR-HIGH COURT

25/10/2005