IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 114 OF 2002

ALLAN T. MATERU.....APPELLANT/APPLICANT
VERSUS
AKIBA COMMERCIAL BANK.....RESPONDENT

RULING

ORIYO, J

The applicant, Allan Materu, sued his former employer, Akiba Commercial Bank, for special and general damages arising from termination of employment. The claim filed at the Kisutu Resident Magistrate's court as Civil Case No. 70 of 2001 was determined in favour of the respondent. The applicant was dissatisfied and filed Civil Appeal No. 114 of 2002 against the trial court decision.

The Memorandum of Appeal contained two complaints against the trial court decision:-

1. That the trial court erred in deciding that the termination of the appellant's employment had no connection with the criminal case facing the appellant.
2. The trial court erred in deciding that it was not mandatory for the

respondent to suspend the appellant while facing criminal charges.

Parties were granted leave to argue the appeal in writing and a filing schedule was agreed upon. However, the applicant did not comply with the agreed schedule and filed his submissions late without leave of the court. This court (Ihema,J) dismissed the appeal for lack of prosecution on 17/2/2005. However, the judgment did not merely dismiss the appeal but also made a substantive decision on the merits of the appeal. At the bottom of page 2 and the top of page 3 of the typed judgment the court made the following decision:-

> "termination of service of employment is a right arising out of a contract of service as such it is not a disciplinary penalty within the meaning of that term in section 29 of the Security of Employment Act, 1964".

The applicant was unhappy with this court's decision and filed an application for a Review of this court judgment of 17/2/2005. Parties retained the same representation on appeal and on review. The applicant was represented by Mr. Mkongwa learned counsel and the respondent was represented by Mr. Msuya, learned counsel. Mr. Mkongwa

argued that this court misdirected itself in law for not determining the appeal on its merits. He explained his client's failure to file the submissions as scheduled by 7/8/2003 was due to reasons beyond his control. The reasons given by counsel why submissions by applicant were filed on 12/8/2003 instead of the dead line of 7/8/2003, was explained as follows:-

(i) on the last filing day, 7/8/2003, counsel was tied up with another matter at Temeke District Court and by the time he was back it was past 2.30 pm; so it was not possible to file on that day;

(ii) on the next day 8/8/2003 was a public holiday, and a Friday;

(iii) 9/8 and 10/8 fell on Saturday and Sunday respectively

(iv) 11/8/ was a Monday but allegedly there was no business at the court due to a "bomb scare"

(v) So he filed his clients submissions on 12/8/2003.

On that basis counsel argued that court erred because it should have considered the circumstances and the

duration of delay and extend time of filing to 12/8/2003pursuant to the provisions of section 93 of the Civil Procedure code; and determine the appeal on merit.

The respondent bank on its part was not persuaded by the reasons advanced by the applicant. It was stated that reasons advanced by counsel were not sufficient reasons but contended that failure to file submissions as scheduled was due to counsel negligence. The respondent submitted that the applicant ought to have applied for enlargement of time before filing the submissions out of time; and failure to do so entitled the court to dismiss the appeal for lack of prosecution as it did.

Order XLII rule 1 (1) states:-

a) "Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) By a decree or order from which no appeal is allowed, and <u>who, from the discovery of new and important matter or evidence which, after the exercise of due</u>

> diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order." (emphasis supplied)

The law provides for the parameters within which a party may apply for Review. In my considered opinion the case does not fit into any of the criteria above.

In the matter at hand, the applicants written submissions were to be filed latest by 7/8/2003, The applicant had services of counsel who knew that he had a busy schedule on 7/8/2003 and should have filed his client's submissions well in advance and not wait for the last day. If counsel had good reasons for failure to file submissions by

7/8/2003; he knew of legal steps to take to obtain extension of time to file the submissions. Counsel did not file submissions by the deadline and did not seek extension of time to do so. Instead he unilaterally filed the submissions out of time and without leave of the court. I feel constrained to agree with the respondent that the counsel for the applicant was negligent the way he handled his client's case in this respect.

Even if, for the sake of argument, it is assumed that the reasons advanced by the applicant's counsel were meritous and the application for Review granted; what about the second part of the courts decision that termination of service that termination of service of employment is a right arising out of contract and not a disciplinary penalty under section 29 of the Security of Employment Act? It is my view that this second part of the decision would remain and granting Review would not have affected it.

It has been stated time and time again over the years by courts of law in this country that negligence by counsel does not constitute sufficient cause (See Court of Appeal decisions in KIGHOMA ALLI MALIMA VS ABAS YUSUF MWINGAMO, Civil Application No. 5 of 1987 and INSTITUTE OF FINANCE MANAGEMENT VS SIMON MANYAKI, civil Application No. 13 of 1987; both unreported)

In MALIMA'S case the Court of Appeal (Mustafa, J,A. Makame, J.A. and Kisanga J.A; when considering whether there were sufficient reasons for the enlargement of time the court stated as follows:-

> "sufficient reasons has been considered in a number of cases. Sometimes a slight lapse by an advocate might be over looked, but not alapse of fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time."

In the subsequent case of IFM above, the Court of Appeal upheld the decision in MALIMA's case.

Applying the Court of Appeal principles to the facts of the case at hand; the inability or failure by the applicants counsel to file the written submissions within time and/or subsequent failure to apply for the enlargement of time is not a slight lapse or mere inadvertence. Counsel here was obviously not diligent in handling the case. I find counsel lapses here to be serious and of fundamental nature.

On the basis of the foregoing, the application for review is rejected.

Having considered the circumstances of the matter; each party to bear own costs.

K.K. ORIYO

JUDGE

15/2/2006