

IN THE HIGH COURT OF TANZANIA

HIGH COURT LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 79 OF 2014

BETWEEN

TANZANIA BREWERIES LIMITED..... APPLICANT

VERSUS

EDSON MUGANYIZI BARONGO & 7 OTHERS.....RESPONDENTS

R U L I N G

12/05/2014 & 10/06/2014

Mipawa, J.

This is a preliminary objection raised by the respondents Edson M. Barongo and 7 others as against the applicant's application for an extension of time to file an application for revision of the decision of the Commission for Mediation and Arbitration at Arusha (Mzava Esq.) dated 01/03/2012. In the Labour Dispute No. CMA/ARS/72/2010. The application for extension of time is made under Rule 24 (1) (2) and (3) and 56 (1) of the Labour Court Rules GN No. 106 of 2007. The fierce preliminary objection raised by the respondents against the application for an extension of time is that:-

..... The application for extension of time to file an application for revision after the earlier filed Application for Revision No. 53 of 2013 was dismissed for being time barred is untenable and barred by the law.

for
Mr. Kobas Learned Counsel who appeared the respondents submitted in support of the preliminary objection that their preliminary objection is to the effect that the application for extension of time to file an application for revision after the earlier application for revision which was Revision No. 85 of 2013 was dismissed for being time barred and therefore the current application is unattainable in law. He submitted that, there was an application for revision which was No. 85 of 2013 filed in this court seeking to revise the arbitration award of the CMA in Labour Dispute No. CMA/ARS/72/2010 dated on 1st March, 2012, that application was filed out of time and the respondent by then who is also the respondent in this particular application raised a preliminary objection which was heard on 22/04/2014 before Hon. Rweyemamu, J. in which the applicant conceded to the preliminary objection and their application was dismissed for being time barred. He further submitted that:-

.....The remedy of the dismissal is provided for under Section 14 (1) of the Law of Limitation Act Cap. 89.... the only remedy the aggrieved party has against that dismissal is to appeal to the Court of Appeal but not to come to this court to seek extension of time within which to file a fresh application for revision.....¹

Mr. Kobas cemented his submission on the preliminary objection by referring to this court first the case of **Hashim Madongo and**

1. Record: Proceedings in Application No. 79 of 2014 TBL Vs. Edson M. Barongo and Others

two others Vs. Minister of Industry and Trade and two others,
Civil Appeal No. 27 of 2003 in which the Court of Appeal of Tanzania
at page 10 held that:-

.....after the application before Kalegeya, J. was dismissed..... it was not open to the appellants to go back to the High Court..... the only remedy available to the appellants after dismissal of the application was to appeal to the Court of Appeal.....²

The decision of the High Court Kyando, J. which the Court of Appeal was referring is found at page four of the typed judgment of the Court of Appeal and it reads:-

.....Under Section 3 (1) of the Law of Limitation Act, 1971 a proceeding instituted outside the period of limitation prescribed for it by law must be dismissed. And a proceeding which is dismissed cannot be resurrected in the manner which the applicants adopt in this matter..... If the applicants were aggrieved by the dismissal of their application by Kalegeya, J. they should take steps known to law against it eg. Appealing to the Court of Appeal.....³

The Learned Counsel for the respondent concluded that since the applicant's application for revision was dismissed by Rweyemamu, J. on 22/04/2014 for being time barred then the only remedy they have is to appeal to the Court of Appeal against the decision of Rweyemamu, J. but not to come to this court by way of an application for an extension of time as they do now.

2. Record: Proceedings in Application No. 79 of 2014 at page.....

3. Miscellaneous Civil Application No. 78 of 2001 [HC] Kyando, J.

In reply to the preliminary objection Mr. Mbwambo, Learned Counsel for the respondent submitted **viva voce** too, that the GN. No. 106 of 2007 Labour Court Rules Rule 56 (1) confers powers to this court to extend any period prescribed by the rules. He said though their application was dismissed on 22/04/2014 for being time barred, but dismissal of an application for being time barred does not prevent the litigant to seek an extension of time. On the case of **Hashim Madongo** (CAT) cited by counsel for the respondent Mr. Mbwambo argued that the decision of the Court of Appeal in that case is a bad law because it is based on the interpretation of Section 3 of the Limitation Act which provides that an application or a matter filed out of time must be dismissed. He added that there is nowhere in the Limitation Act which barred an application for extension of time after dismissal under section three. He submitted that even Section 14 (1), of the Law of Limitation Act does not preclude ^{an} and application for extension of time to bring up a matter that had been dismissed under section three of the Law of Limitation Act equally Section 46 of the Law of Limitation Act read together with Section 43 referred, all do not tell if the matter can be resurrected after being dismissed under Section 3 of the Limitation Act. The counsel for the applicant challenged that the decision of the Court of Appeal cited by counsel for the respondent is a bad law because it overlooked the principle that the issue of limitation goes to the jurisdiction of the court. He

argued that a matter that has been dismissed for want of jurisdiction can always be resurrected, by going to the competent court.

Mr. Mbwambo submitted further that the present matter is before the labour court and it is upon this court to interpret and adjudicate labour matters that the Limitation Act is not one of labour legislation therefore an authority (CAT Appeal authority supra) framed on interpretation of Law of Limitation is irrelevant because the Law of Limitation does not apply in the Labour Court. That the Law of Limitation Act is not relevant in the Labour Court because Section 43 (8) of the Law of Limitation Act disapplies the very Law of Limitation where there is another law provides for limitation. He cited the cases which have decided that the Law of Limitation Act does not apply in the Labour Court the case of **Tanzania Revenue Authority Vs. Merina Mwanyola**, Rev. No. 100/2009 at page 3 where it held that the Law of Limitation Act is not applicable in Labour Court and extension of time is provided under Rule 56 (1) of the Labour Court Rule. Also the case of **Tatu Ramadhani Vs. Najimdin Jaffer**, Miscellaneous Labour Application No. 23 of 2008 also in the case of **TRA Vs. Isaack Kola**, Miscellaneous No. 78/2010. All the cases tell or held that the Law of Limitation Act is not applicable because it is provided under Rule 56 (1) of GN No. 106 of 2007 (ie. extension of time) he argued further that:-

.....The Court of Appeal decision appears on it that the Law of Limitation is the law of general application, we think it is not. The Court of Appeal itself allows resurrection of

matters which were found incompetent by allowing an extension of time (Quality Group Vs. TBA, Civil Application No. 107/2013 CAT.

He submitted that it is not strange that resurrection and allowed especially where the Law of Limitation Act does not apply. He also added that struck and dismissed are similar, but even if they were not similar the dismissal was applied to the Law of Limitation Act which is inapplicable. The learned counsel for the applicant concluded that under labour law jurisprudence this court as an Industrial Court is coated with administering industrial laws in adjudicating labour matters or disputes and it deals with interpretation of labour legislation which are enacted to achieve specific objection unlike other municipal laws whose objective is to achieve legal justice, labour laws objective is to achieve social justice and intended to achieve industrial harmony. He cited Professor Khan in his book titled **Commentary on Labour and Industrial Law** new edition at page 1 - 4 who discussed the concept of labour law jurisprudence *vis-à-vis* other municipal law. He cited also Professor Misra in his book "**An Introduction to Labour and Industrial Laws** page 7 - 10 who talks the concept of social justice and that this court is not bound by technical or procedural points like preliminary objection which had been raised, and argued this court to follow or adopt a procedure or principle aimed at achieving justice and industry harmony.

In rejoinder Mr. Kobas, Learned Counsel for the respondent submitted that, a dismissal of an application for being time barred

bars the fresh application to be reinstated on the same matter, the gist of Section 3 (1) of the Law of Limitation Act, the word dismissal under Section 3 (1) of Cap 89 entails that the matter has already been heard in as far as limitation is concerned and concluded on its merits, therefore it cannot be resurrected by seeking extension of time see **Madongo and 2 others Vs. Minister of Industry and Trade and 2 others supra. Ngoni Matengo Cooperative Union Ltd Vs. Halima Hemed Othman** [1959] EA page 577 - 580 where the court discussed the meaning of striking out and dismissing an appeal (see page 7) of the typed judgment. Dismissal as provided for in the Law of Limitation Act and used to dismiss the applicant application for being time barred implies that a competent application for revision has been disposed off. Therefore the only remedy the applicant has is to challenge the dismissal by way of an appeal but not to come before this court to seek for an extension of time. On the contention that nowhere in the Law of Limitation Act bars an application for extension of time being made by an already dismissed matter Mr. Kobas argued that:-

*.....The Law of Limitation Act does not have to expressly state so as it is well known that the purpose from which it was enacted was to bring time limit within which action should be taken and to avoid the claim to hang over.....for an indefinite time.....In Civil Appeal No. 25 of 2010 between **Sopa Management Ltd. and Tanzania Revenue Authority** the Court of Appeal quoted with approval the text book of B.B. Misra book of Law of Limitation....[that] the aim [of limitation] is to bring the litigation to an end and*

*therefore a claim which is time barred cannot be resurrected
by an extension of time.....⁴*

On the contention by counsel for the applicant that the Court of Appeal case (decision) in **Hashim Madongo supra** is not further a good law Mr. Kobas for the respondents submitted that the dismissal under the Law of Limitation Act bars a matter which has already been dismissed to be refilled, while a dismissal for want of jurisdiction does not bar a party to reinstitute a matter in a proper court with competent jurisdiction. Therefore the context in **Hashim Madongo** case being a dismissal under the Law of Limitation Act bars a fresh matter and it is still a good law up today.

In Application No. 103 of 2013 between **Quality Group Vs. TBA** which purported to resurrect a previous application was held per incurrium, the decision did not address itself properly to the case of Madongo and others the court did not have the opportunity to see the decision in **Hashim Madongo** case and therefore allowed an extension of time. The case was also the decision of a single judge of the Court of Appeal and has therefore not overruled the decision in Madongo, case which is still binding.

4. Record: Proceeding in Application No. 79 of 2014 TBL Vs. Edson Barongo and Others at page.....

On the argument by counsel for applicant that the Law of Limitation is not applicable in the Labour Court as per Section 43 (f) and 46 of the Law Limitation Act. Mr. Kobas, Counsel for the respondent submitted that:-

.....S. 43 (f) principally provides for inapplicability of this Act in a specific matters and subsection f provide for in applicability of the Law of Limitation Act where time limit has been [provided prescribed by any other written law except to the extent provided under Section 46 of the Act Cap. 89 Section 46 principally provides where time limit has been prescribed by any other written law then the provision of the Limitation Act will be applicable as if such period of limitation has been provided by the Law of Limitation Act.....⁵

He further argued that the failure to adhere to the time limit in the Labour Court would be as to adhere to Section 46. The interpretation of Section 46 was done by the CAT in **Hashim Madongo** case at page 9 when the CAT quoted Section 46 of the Act and highlighted it. In Madongo's case where an application was filed under Cap. 310 in which the time limit was six months. Section 19 (3) of that Act was silent in the event where an application was filed out of time (see page 8 of Madongo case). The CAT invoked Section 46 of the Limitation Act which allowed it to invoke Section 3 of the Law of Limitation Act, for a remedy of a time barred applications which is dismissal. He submitted that the Labour Court Rules are silent on the

5. Record: Proceedings in TBL Vs. Edson Barongo and others page.....

remedy of a time barred application, and then Section 46 of the Law of Limitation Act is invoked to call upon the applicability of Section 3 of the Law of Limitation Act for remedy. The Law of Limitation in that regard is the law of general application. As for the decision in **TRA Vs. Merina Mwanyola**, Labour Rev. No. 100 of 2009 cited by Mr. Mbwambo, Counsel for the applicant, the respondent submitted that the applicant in that case had cited Section 14 (1) of the Law of Limitation Act while there are specific rule in the Labour Court to wit, Section 56 (1). The application was for an extension of time. The Law of Limitation Act was not applicable as there was no lacuna in the Labour Court Rules. In the case at hand there is a lacuna on what should be done on a time barred application the Labour Court Rules are silent on that. The same in **Tatu Ramadhani** [Miscellaneous Application No. 23 of 2008] **V. Najmidin Jaffer** an application for extension of time was filed under Section 14 (1) of the Law of Limitation Act the court pointed out that the Law of Limitation Act was inapplicable because there is a specific Rule for extension of time ie. in Rule 56 (1) of GN No. 106 of 2006. The counsel submitted further as regards to the decision in **TRA Vs. Isaack Kola**, Application No. 28 of 2010 that:-

.....This case is distinguishable as he cited Section 14 of the Law of Limitation Act, the court on page two last paragraph give the observation that the situation is provided for under Labour Court Rules and hence Limitation Act was inapplicable....⁶

6. Record: Proceeding in TBL Vs. Edson Barongo and Others Application No. 79 of 2014 at page.....

The learned counsel concluded that the Law of Limitation Act is applicable in this particular court where there is a ***lacuna***. He cited the case of **Soza Plastic Industries Vs. Scolastica Chawalla**, Labour Revision No. 73 of 2012 where this court held that:-

.....The remedy for a time barred application filed without leave is dismissal.....

On the other hand, counsel argued, the court got the powers/remedy for time barred application for dismissal under Section 3 of the Law of Limitation Act. On the contention that this court is not bound by the authority in **Hashim Madongo** case (CAT) supra, Mr. Kobas for the respondents submitted that under the doctrine of precedent (*stare decisis*) the Labour Court being a lower court to the Court of Appeal is bound by the authority in **Hashim Madongo** case and lastly on the concept of social justice the learned counsel for the respondent argued that the respondents were also denied their rights and decided to find the justifiable means of referring the matter to the machinery such as the CMA and an award was given in their favour thence the applicant has no reason to deny the respondent to enjoy their fruits. Therefore applying the same social justice this court should dismiss the application for extension of time and let the respondents enjoy the award from their dispute.

I have duly considered the submission of both counsels for the applicant and counsel for the respondent. It is true as conceded by the applicant's advocate that their application was dismissed by this

court on 22/04/2004 for being time barred as it was filed without the applicants seeking leave before the court for filing the revision. The nagging question here is whether the dismissal order under Section 3 of the Limitation Act Cap. 89 can be resurrected by the same court which 'killed' the application that was time barred before it or whether the 'killed' application by dismissal would need another superior court to resurrect it. First and foremost I must put it clear here that a dismissal of an application or matter under the Law of Limitation Act is quite different and incomparable with the dismissal of application on matter for want of jurisdiction.

As rightly pointed out by Mr. Kobas Learned Counsel for the respondent which I entirely and respectfully agree, that a dismissal under the Law of Limitation Act bars a matter which has already been dismissed to be refilled by way of applying for an extension of time to file an application for revision that was dismissed for being time barred by the court. While the dismissal for want of jurisdiction permits the applicant to refile the same matter before the proper forum ie. before the court of competent jurisdiction. An application can be dismissed or struck out, the Court of Appeal in **Ngoni Matengo Co-operative Union Ltd. Vs. Ali Mohamed Othman** [1959] EA 577,588 attempted to give the distinguishable or difference on the two terms that:-

....An order for dismissal implies that, a competent appeal has been disposed of while an order for striking implies

that there was no proper appeal capable of being disposed.....

I entirely and respectfully agree with the learned counsel for the respondent that the decision of the Court of Appeal in **Madongo and two others Vs. Minister of Industry and Trade and two others**, Civil Appeal No. 27 of 2003 gives the answer to what remedy should be when a application is dismissed by the court. The answer is provided for when the Court of Appeal held at page 10 that:-

.....After the application before Kalegeya, J. was dismissedit was not open to the appellants to go back to the High Court the only remedy available to the appellants after dismissal of the application was to appeal to the Court of Appeal.....

I have not come across any case law from the superior Court of Appeal which had ruled the above position and it is in my considered view a valid and binding authority to this court contrary to what Mr. Mbwambo had attempted to make this court believe that the decision of the Court of Appeal in Madongo case is no longer good law ***c'est-a-dire*** [that is to say] it is a bad law, with respect to the learned counsel I don't share his views. On the resurrection of the matter which was dismissed, I take the view as it were in the High Court of Tanzania Kyando, J. when the Court of Appeal of Tanzania was referring it in its masterpiece decision in **Hashim Madongo and two others Vs. Minister of Industry and Trade and two others** quoted supra where the Court of Appeal of Tanzania on its wisdom did not water down the holding of the High Court Kyando, J. that a

proceeding which is dismissed cannot be resurrected in the manner which the applicants adopt in this matter. Equally in the instant application the applicant cannot convince this court through the manner they had opted to wit by filing an application for extension of time in which to refile the dismissed application. The court cannot resurrect a matter or an application it "killed" [dismissed] under the circumstance of being time barred and without leave of the court to be filed. It needs another power from another powerful forum or court to resurrect the dismissed application or matter ***c'est-a-dire*** [that is to say] a superior court like the Court of Appeal of Tanzania and this is by the applicants going to the Court of Appeal for remedy of a dismissed matter and not to come before this court which "killed" dismissed the matter or application. The decision of the High Court as it appears in **Hashim Madongo** case the Court of Appeal was aware of the decision that a dismissed matter cannot be resurrected by the High Court. Partly the version of the High Court as quoted from the CAT case in **Hashim Madongo** read, per Kyando, J.:-

.....Under Section 3 (1) of the Law of Limitation Act 1971 a proceeding instituted outside the period of limitation prescribed for it by law must be dismissed. And proceeding which is dismissed cannot be resurrected in the manner which the applicants adopt in this matter..... if the applicants were aggrieved by the dismissal of their application by Kalegeya, J. they should take the steps known to law against it eg. Appealing to the Court of Appeal....

The High Court, Kyando, J. was refraining from granting the application before it lest it could brought back an application which

was already dismissed by Kalegeya, J. I think by and large that the present application which seeks to resurrect the application that was dismissed by this court Rweyemamu, J. by the way the applicants have adopted, cannot in my interpreting the case laws above be left to stand, it is worth less because if I grant the present application, I will be granting them an opportunity to bring back an application which Rweyemamu, J. dismissed. This cannot be done *in premio legis* [from the bosom of the law] if aggrieved by the dismissal of their application by Rweyemamu, J. I think rightly that and pointed out in the case above and submitted correctly by the respondents, they should have taken the correct avenue of appealing against the dismissal of their application by Rweyemamu, J. to the Court of Appeal rather than coming from the back yard door by way of application for extension of time to file an application for revision after the earlier one Revision No. 85 of 2013 was dismissed for being time barred and barred by law.

I come now on the contention by counsel for applicant that the Law of Limitation Act Cap 89 where the remedy of dismissal for a time barred application or matter was derived is not applicable in this court. A cursory glance on the Limitation Act Cap 89 on the relevant sections advanced by counsel for the applicant Mr. Mbwambo I found that where the Labour Court Rules provide for a necessary step to be followed then the Limitation Act cannot apply. The case laws which Mr. Mbwambo had submitted Viz: **Tanzania Revenue Authority**

Vs. Merina Mwanyola, Rev. No. 100 of 2009, **Tatu Ramadhani Vs. Najmidin Jaffer**, Miscellaneous Labour Application No. 23 of 2008 and **TRA Vs. Isaack Kola**, Miscellaneous Application No. 28 of 2010 the court in the above cases pointed out that the Law of Limitation Act was not applicable because the applicant had cited rule or Section 14 (1) of the Law of Limitation Act whereas there was a specific rule in the Labour Court Rules providing for that aspect eg. for an extension of time which is Rule 56 (1) of the Labour Court, hence the Law of Limitation could not apply in such circumstances. Likewise in the case where there is a lacuna in the Labour Court Rules, then another law could apply to fill the *lacuna*. There was no lacuna on extension of time Rule [which is 56 (1)] for extension of time.

However as rightly followed by this court in reverting to Section 3 of the Limitation (law) Act for a remedy to a time barred filed application which is dismissal there is a lacuna of the remedy on dismissed application or matters in the Labour Court Rules. Now since the Labour Court Rules do not provide the remedy on the matters filed out of time ie. time barred, it was right for the court to revert to the Law of Limitation Act which provides for remedy on matters which are time barred and that is dismissal as per Section 3 of the Limitation Act. Therefore it is not true as argued by counsel for applicant Mr. Mbwambo that the Law of Limitation Act is inapplicable in the Labour Court. The Law of Limitation Act as the law of general application is applicable in the Labour Court to the extent as provided

in this judgment above and other decisions of this court eg. in **Haruna Andrea Mwanitu Vs. Mzumbe University**, Revision No. 9 of 2012 this court held that:-

.....This application is undisputedly time barred. As rightly pointed out by counsel for respondents, the only legal remedy available is to have the same dismissed.....

On the issue of social justice Mr. Mbwambo argued this court to deal with the matter on the interpretation of labour legislation which are enacted to achieve specific objectives which is social justice intended to achieve industrial harmony. I entirely agree with the learned counsel however social justice cannot be looked on the one side of a coin only, it should be looked on both sides of the employer and the employee because as rightly pointed out by Professor Surya Narayan Misra in his book titled an **Introduction to Labour and Industrial Laws** 14th edition Central Law Publication Darbhanga Allahabad that:-

.....Social justice is different from legal justice. The difference is not of objective but aim at dispensing justice. The difference is due two reasons:-

- (i) Social justice aims at doing justice between classes of society, and not between individual.*
- (ii) The method which it adopts is out unorthodox compared to the method of municipal law. Justice dispensed according to the law of master and servant based upon the principle of absolute freedom of contract and doctrine of **laissez faire**, is legal justice. Social justice is something more than mere justice, it is a philosophy super imposed upon the legal system.....⁷*

7. Misra S. N. an introduction to labour and Industrial Law 14th Ed. [1994] Darbhanga Colomy, Allahabad page 10

Now the above excerpt does not mean that it applies to the applicant employer only but applies also to the employees who had been seeking for their rights in this court and other labour machinery put in the labour laws of Tanzania. The present decision is not against social justice and achieving of industrial harmony but to make sure that the law is followed and that the parties should not come to court wherever they wanted [if granted an extension of time to file a dismissed matter] without due regard to the limitation of time which is a material point in the speedy administration of justice and hence enhancing social justice at large. The point was stressed by the Court of Appeal in **Tanzania Fish Processors Limited Vs. Christopher Luhangula**, Civil Appl. No. 161 of 1994 that:-

.....Limitation is material point in the speedy administration of justice. Limitation is therefore to ensure that a party does not come to court as and when he chooses.....

On the foregone, I must say again that this court cannot resurrect the matter it "killed" (dismissed) and that allowing the present application is to welcome an attempt of this court to resurrect the dismissed application by Rweyemamu, J. which is contrary to the law. The courts cannot allow that **lest the law could be turned to an ass and a scare crow of the law** as one distinguished poet had put it. Again since the law is not a play mate of any one I find that the arguments by the counsel for the applicant as found in this ruling are like mere kicks of a dying horse ***in articulo mortis*** [at the point of death] and I reject them. Consequently I entirely and respectfully

agree will the learned counsel for the respondent that the present application is nothing and I proceed to dismiss it. The applicant if aggrieved with the dismissal order by Rweyemamu, J. should file an appeal against the dismissal order of this court Rweyemamu, J.:-

*.....However unfortunate it may be for plaintiff, the Law of Limitation [Act] on actions knows no sympathy or equity, it is a merciless sword that cuts across and deep into all those who get caught in the web [see **John Cornel Vs. A. Grevo [T] Ltd.** [HC] Civil Case No. 70 of 1998 as quoted in **Makamba Kigoma Vs. UFI and PSRC**, Civil Case No. 109 of 2005 unreported].*

In the event the preliminary objection on point of law raised by the respondent as against the application for extension of time to file an application for revision after the earlier filed Application for Revision No. 85 of 2013 was dismissed for being time barred, is [the preliminary objection] upheld and the present application aforesaid is as a result dismissed.


I.S. Mipawa
JUDGE
10/06/2014

Further rights of appeal explained.


I.S. Mipawa
JUDGE
10/06/2014

Appearance:-

1. Applicant: Huruma Ndahena, Advocate - Present
2. Respondent: Mr. Benson Barongo, Advocate Mr. Kobas,
Advocate for Respondent - Present

Court: Ruling is read over and explained to the parties present as shown in the appearance above.



I.S. Mipawa

JUDGE

10/06/2014