

IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT SUMBAWANGA
MISC. LABOUR APPLICATION NO. 1 OF 2018

DAVIS BERNAD HAULE.....APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK (PLC).....RESPONDENT
(Application for extension of time to lodge notice of appeal
to the Court of Appeal of Tanzania)

R U L I N G

16th October, - 23rd January, 2019

MRANGO, J.

By notice of application the applicant, **Davis Bernad Haule**, has lodged this application for extension of time within which to lodge notice of appeal to the Court of Appeal. It is made under **Section 57 of the Labour Institution Act, 2004, Section 11 (1) of the Appellate Jurisdiction Act, Cap, 141** (henceforth CAP. 141), **Rules 24(1) (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) and (d), 54 and 56(1) of the Labour Court Rules, G.N. No. 106 of 2006** (henceforth the Rules) and lodged on 8th March, 2013. The same is supported by the affidavit sworn by Mr. Evans Robson Nzowa, the applicant's learned counsel.

In opposing the application on 25th day of July, 2018 the respondent, **National Microfinance Bank Plc** through a legal services of VERTEX

Law Chambers filed a counter affidavit sworn Paschal Kamara, the learned counsel for the respondent.

When the application was called on for hearing, Mr. Evans Nzowa, the learned counsel appeared for the applicant; while, the respondent had a legal service of Mr. Sabas Shayo, the learned counsel. The hearing proceed orally.

Arguing in support of the application Mr. Nzowa submitted that the application is for extension of time to lodge notice of appeal in order to appeal to the Court of Appeal of Tanzania against the decision of this Court in Revision No. 05/2013 which was delivered on 04th December, 2013. The application is supported by an affidavit sworn by himself. They prayed for the same to be adopted and form part of his submission.

He went on asserting that the application is made following with an order of the Court of Appeal dated 16th February, 2018 to strike out Civil Appeal No. 58 of 2016 on ground of incomplete of record of appeal. He said the Civil Appeal No. 58 of 2016 was filed in time and it was strike out therefore they are supposed to ask this Court to extend time within which they can file afresh notice of appeal in order to file a fresh appeal to the Court of Appeal of Tanzania.

Mr. Nzowa said the main reason for delay is the fact that they were in court prosecuting Civil Appeal No. 58 of 2016. Their delay is technical as it was held by the Court of Appeal in the case **Fortunatusi Masha versus William Shija & Another** [1997] TLR 154 where the Court of Appeal draws a distinction between cases involving actual delays and those involving technical delays. Where a person has lodged an appeal within prescribed time for one reason or another it has been found incompetent and been strike out a delay is a technical delay.

According to Mr. Nzowa, the other ground for extension of time, is that there is a serious point of law to be determined by the Court of Appeal of Tanzania on the legality of the decision of the Labour Court and Commission for Mediation and Arbitration (herein CMA) proceedings. He said at CMA the same mediator arbitrated the matter something which was not proper. He referred this court to the Court of Appeal decision in the case of **Lusindilo Zuberi versus Ally Hamisi**, Civil Application No. 05 of 1999 (unreported) where it was held that an illegality is sufficient reason to grant extension of time. Based on those reasons they pray this Court to extend time to allow them to lodge notice of appeal to appeal to the Court of Appeal.

In response, Mr. Shayo, the learned counsel submitted that the applicant avers that he was prosecuting Civil Appeal No. 58/2016 which was strike out by the court on 16th February, 2018. But reading the order of Court of Appeal of Tanzania at Pg.2 the Court of Appeal held that the said appeal was strike out because of missing documents such as chamber summons, supporting affidavit and counter affidavit in respect of application for extension of time to file Revision. Therefore, it was their argument that since the ground of striking out the appeal was because of the absence of the documents the applicant ought to have demonstrated as to whether he had those documents in hand and why those documents were not part and parcel of the record of appeal in Civil Appeal No. 58 of 2016. There would have shown whether the applicant was negligent or he had acted with diligent. That has not been accounted for in the affidavit, he submitted.

Mr. Shayo went further asserting that, since the reason for seeking extension of time is based on the fact that the initial appeal was struck out they think that it was imperative for the applicant to demonstrate on those facts. To buttress his argument he referred this court to the decision in the case of **Doctor Ally Shamhai versus Tanga Bohora Jamat** [1997]

TLR 305 where it was held that those who comes to court of law must not show unnecessary delay in doing so, they must show great diligent. Therefore it was their submission that the applicant was not diligent to be given extension of time.

As regards to the decision in the case of **Fortunatusi Masha versus William Shija** cited by the applicant's counsel he said the same is distinguishable in this matter on the reasons that, in the said case the Court of Appeal was minded to give the applicant the 2nd chance to institute a fresh appeal, but also in that case the applicant has acted immediately after the ruling which is not identical to the present application at hand.

Another thing as to why they are resisting the application is because the applicant on his affidavit has failed to account for each day of delay. He said before the court can grant extension of time, it is settled law that the applicant must have accounted each day for delay. See; **Interchick Co. ltd. versus Mwaitenda Ahombokile Michael**; Civil Application No. 218 of 2016; and, **Vodacom Foundation versus Commission General (TRA)**; Civil Application No. 107/20 of 2017 (All CAT - Unreported). He said the ruling striking out the appeal was delivered on 16th February, 2018

and the present application was lodged 08th March, 2018 the applicant has not stated in the affidavit to what he was doing from 16th February, 2018 to 08th March 2018 so as to comply with the requirement of granting the extension of time as per the cited case. Therefore, since the applicant has failed to state what he was doing for each day when the Court of Appeal has struck out the appeal, a delay of almost twenty two days (22) has not been accounted for thus this application lacks merit. He therefore prayed the same to be dismissed.

On the issue of illegality of decision of CMA, it was their reply that illegality could have been a good cause if the applicant had abided to other principles of granting extension of time like account for each day of delay, illegality does not therefore become a good cause for extension of time. In addition he stated that under **Section 91(1) of the Employment and Labour Relation Act** the applicant had a chance to challenge that particular decision of the arbitrator/mediator but he didn't do so at the appeal at the Labour Court, he cannot therefore bring that ground at this hour.

Finally, Mr. Shayo submitted that, the applicant is not entitled to be granted extension of time because he had that chance but he didn't do so.

Even the cited case of **Lusindilo Zuberi** is not applicable in this case. It is distinguishable with the present case because by then (1999) there was no requirement of accounting each day of delay but also in the present application the applicant did not act promptly. Thus he prayed for the application to be dismissed.

Rejoining of what Mr. Shayo submitted, Mr. Nzowa stated that, if there was any negligence before the Court of Appeal that was not related to delay in the filing of the said appeal but was relating to filing incompetent appeal and that was penalized by striking it out in **Fortunatusi Masha**, the same cannot be used yet again to determine the filing a fresh appeal. He therefore insisted that they acted diligently as they filed within 20 days after the striking of appeal. That is not an inordinate delay, the delay being technical that is sufficient reason to extend time.

Mr. Nzowa submitted further that the cases cited by the learned counsel are distinguishable that all two cases of Vodacom and Interchick are related to **actual delays** and not **technical delays**. Therefore the two cited cases are different from technical delays.

On the issue of illegality it was their submission that, it stand in its own and no any other reason that the issue of CMA illegality is a question of jurisdiction, the arbitrator had no jurisdiction to arbitrate the matter which he was a mediator before and the issue of jurisdiction can be raised at any stage of proceedings.

On those reasons they maintain their prayer that they be granted the extension of time to lodge notice of appeal to appeal to the Court of Appeal.

I have gone through this court's record and the submissions by both learned counsel. Without any doubt, I am mindful of the fact that it is common knowledge that the court has a discretion to extend time in which to file notice of appeal out of time. That such discretion is to be exercised judicially is also elementary. It is however, to be observed that in the exercise of such power, the requisite condition is that "sufficient reason" or "good cause" has to be given.

In the case of **Michael Lessani Kwaka versus John Eliafye** [1997] TLR 152 the Court of Appeal of Tanzania held that;

"The court had power to grant an extension of time if sufficient cause had been shown for doing so"

Of course I am also aware that the position of the law is now settled that the court's power to extend time is not only discretionary but also be exercisable in favour of the applicant only upon showing sufficient or good cause. What amounts to sufficient or good cause, no hard and fast rule to determine but will depend upon the facts of each case. That is to say each case will be decided basing on its facts. But factors like whether the application was promptly filed, whether each day of delay was accounted for and whether the applicant acted diligently should be considered.

The question to be resolved is, whether the accompanying affidavit in support of the application discloses a sufficient or good cause for extension of time, a prerequisite for the exercise of the court's powers under **Section 11 of CAP. 141.**

The reason advanced by the applicant is that he timely appealed to the Court of Appeal but on 16th February, 2016 his appeal was struck out for being incompetent on the ground of incomplete record of appeal. He had that since that ground is a technical delay rather than actual delay, the

same amount to sufficient cause for delay. Mr. Shayo contradicted the same on the reason that the applicant failed to account for each day of delay. The applicant had also that there is a question of illegality of the CMA decision. On this point, Mr. Shayo had that the same would have been a sufficient cause if the applicant could have accounted for each day of delay.

In the instant matter, there is no dispute that Civil Appeal No. 58 of 2016 was filed in time, but on 16th February, 2018 was struck out by the Court of Appeal while sat at Mbeya sub registry of Court of Appeal. It is after the appeal was struck out on 16th February, 2018 the applicant rushed to this Court at Sumbawanga registry to register his application. Unfortunately, the application was filed after expiration of twenty two (22) days. It is my considered view that bearing the fact that the delay was technical rather than actual and bearing in mind that Civil Appeal No. 58 of 2016 was heard in Mbeya and this application was filed herein Sumbawanga, in the circumstances of this case, despite the fact that the applicant filed this application after expiration of twenty two days, yet, I find the same was promptly filed. It follows therefore the applicant qualifies to enjoy the discretionary power of this court as provided for

Section 11 (1) of the CAP. 141. In the premises, I find that the applicant has given justifiable and or good cause for this court to exercise its discretionary powers to grant the application.

In sum, the application for extension of time to file notice of appeal to the Court of Appeal of Tanzania from the decision of this court is accordingly granted. The applicant is given thirty (30) days from today within which to file the notice of appeal, if he so wishes. In the circumstances of this application, I make no order as to costs.

It is so ordered.

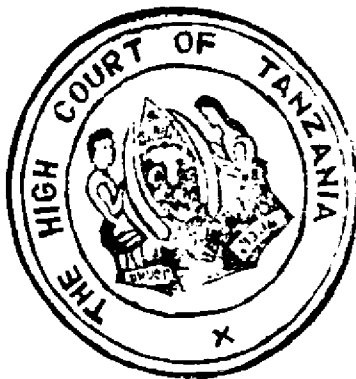



D.E. MRANGO
JUDGE
23.01.2019

Date - 23.01.2019
Coram - Hon. R.M. Mbuya – DR.
Applicant }
For Applicant } - Absent All
Respondent }
For Respondent } -
B/C - J.J. Kabata

COURT: Ruling hereby delivered this 23rd day of January, 2019 in the present of Ms. J.J. Kabata the Court Clerk and in the absence of all parties.

Rights of appeal explained.



~~WAZIRI~~
R.M. MBUYA
DEPUTY REGISTRAR
23.01.2019