IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LABOUR APPLICATION No. 28 OF 2021

(Arising from the High Court (Musoma District Registry) in Labour Revision No. 2 of 2018; and Commission for Mediation and Arbitration for Mara at Musoma in Labour Dispute No. CMA/MUS/201 of 2017)

NUMET-NORTH MARA GOLD MINE BRANCH ..... APPLICANT

Versus

NORTH MARA GOLD MINE LTD ..... RESPONDENT

RULING

16.06.2022 & 16.06.2022

Mtulya, J.:

The Court of Appeal (the Court) on the 1st of December 2021 sat at Musoma Registry and was ready to proceed with the hearing of **Civil Appeal No. 460 of 2020** (the appeal) between the present parties, Numet-North Mara Gold Mine Branch (the applicant) and North Mara Gold Mine Ltd (the respondent). However, before Mr. Majogoro for the appellant, could produce materials in favour of the appeal, Mr. Malongo, who appeared for the respondent, stood up and raised an issue which needed immediate consideration and determination of the Court before hearing of the appeal.

The Court was not reluctant to receive the raised issue and welcomed Mr. Malongo to address the Court. After Mr. Malongo's submission, it was vivid that the point needed intervention of the Court for want of proper application of the law enacted in Rule

90(1) & (3) of the **Court of Appeal Rules, 2009** (the Rules). In support of his argument, Mr. Malongo cited the decision of the Court in **Jacob Bushiri v. Mwanza City Council & Two Other,** Civil Appeal No. 36 of 2019. The point was readily conceded by Mr. Majogoro and the Court blessed the same and immediately considered the matter before moving into the merit of the appeal. At page 2&3 of the Order, the Court stated that:

> *On our part, we agree with both learned counsels that the appeal is time barred because it was filed outside the statutory 60 days without a valid certificate of delay or complying with Rule 90(3) of the Rules, and thereby disentitling the appellant from reliance on exemption. Accordingly,* ***we strike out the appeal for being time barred.***
>
> (Emphasis supplied).

It is the last words of the quoted passage drafted by the Court which is contested in the present application for enlargement of time and specifically the highlighted words: ***we strike out the appeal for being time barred.***

According to Mr. Majogoro, the final words in the quotation shows that the appeal was struck out with possibility to bring the same again in the Court after following necessary steps, including

filing an application for enlargement of time within which to file Notice of Appeal (the notice) to the Court. In his brief submission in favour of the application in this court, Mr. Majogoro contended that reason of delay was technical one as the first initial notice to the Court was filed within time, but the appeal was declined for want of time limitation.

In order to substantiate his claim, Mr. Majogoro cited the precedent of the Court in **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania & Two Others**, Civil Appeal No. 114 of 2020, arguing that when an appeal is struck out at the Court, the notice suffers consequences of equal measure as the appeal. Mr. Majogoro finally cited the decision of this court in **Erick Thomas v. North Mara Gold Mine Limited,** Labour Application No. 27 of 2021, arguing that this court has already set precedent on the subject and the present application may follow the same course.

The thinking of Mr. Majogoro was not shared by Ms. Caroline Kivuyo supported by Mr. Imani Mfuru, learned counsels, who were marshalled by the respondent to protest the application. According to Ms. Kivuyo, the struck out order emanated from a protest of time limitation time limitation hence this court may not glance the drafted words of the Court displaying *struck out order*, but the reason which had produced the struck out order. In her opinion,

the present reason of delay registered by Mr. Majogoro cannot fit in pigeon holes of technical delay as it emanated from want of time limitation. In order to bolster her argument, Ms. Kivuyo cited precedent in **D.N. Bahram Logistics Ltd & Another v. National Bank of Commerce Ltd & Another**, Civil Reference No. 10 of 2017, arguing that a distinction must be drawn from technical delay and real or actual delays.

According to Ms. Kivuyo the appeal was struck out for want of time limitation hence the applicant must fully account on every day of the delay from when the decision of this court in **Labour Revision No. 2 of 2018** was rendered down on 6th December 2019 to the date of filing the present application on 6th April 2021. With regard to the cited precedents in **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania & Two Others** (supra) and **Erick Thomas v. North Mara Gold Mine Limited** (supra), Ms. Kivuyo distinguished them arguing that the precedent in **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania & Two Others** (supra) did not resolve an issue of time limitation whereas the decision in **Erick Thomas v. North Mara Gold Mine Limited** (supra) does not bind this court.

Finally, Ms. Kivuyo submitted that the decision of the Court in the order was issued on 1st November 2021, whereas the applicant had filed the present application on 6th December 2021 without any

materials in the affidavit displaying where she was for almost thirty two (32) days. In the opinion of Ms. Kivuyo, the present application has no merit whatsoever and this court may wish to dismiss it for want of merit.

Replying the raised issues of Ms. Kivuyo, Mr. Majogoro contended that the application has merit and may be granted by following the wisdom displayed in this court in the precedent of **Erick Thomas v. North Mara Gold Mine Limited** (supra). With regard to the precedent in **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania & Two Others** (supra), Mr. Majogoro contended that it concerns time limitation and all is shown at page 21 of the decision.

In his opinion, Ms. Kivuyo was misleading this court as she is fully aware that; first, the two (2) precedents cited above determined a dispute on time limitation; second, the date when the copy of the order of the Court on the appeal was ready for collection by the parties; and third, the distinction between struck out and dismissal orders; and finally, powers of this court in applications like the present one. According to Mr. Majogoro, this court is not empowered to interpret words used by the Court in their decisions, until when the Court do so. Mr. Majogoro contended further that the Court stated the appeal was struck out, and it will remain so without any interpretations from this court and

the remedy of the same is displayed at page 19 in the precedent of **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania & Two Others** (supra).

To Mr. Majogoro, there is a clear distinction between notice of appeal and appeal before the Court. According to him, the notice of appeal was filed within time, but the appeal itself was delayed. In such case, to Mr. Majogoro, the practice shows that all documents composing the record of appeal, the notice inclusive are struck out and the only remedy is to file an application for enlargement of time in this court by alleging technical delay hence cannot not be required to account on every day of delay.

Finally, Mr. Majogoro claimed that even if the applicant will be required to account for every day of the delay, they will explain on three (3) days delay from 30th November 2021 when the applicant was supplied with the Court's copy of the order of the appeal to 3rd December 2021, when the present application was filed. In his opinion, the three (3) days of delay were utilized in drafting and filing documents in this court and is reasonable time in the circumstances of the present application for the court to appreciate the process.

This court has cited at the very beginning of the present Ruling the words of the Court: *the appeal is time barred because it was filed outside the statutory 60 days without a valid certificate of*

delay...Accordingly, ***we strike out the appeal for being time barred.*** The paragraph displays plain words and does not invite any interpretation of this court or the Court. It is a cardinal principle of statutory interpretation that where words in a statute are clear and unambiguous, courts cannot invite interpolations (see: **The Board of Trustees of National Social Security Funds v. The New Kilimanjaro Bazaar Limited,** Civil Appeal No. 16 of 2004 and **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited,** Civil Appeal No. 13 of 2021). In any case, this court is inferior to the Court and cannot produce its own interpolations on the words displayed in the Court's decisions.

From the record, it is the appeal which was the subject of the struck out order, and not the notice. The distinction was raised by Mr. Majogoro and received no reply from Ms. Kivuyo. In law the result is obvious that Ms. Kivuyo agrees that there is such distinction. In any case there is a chain of precedents of the Court supporting the position (see: **Robert John Mugo** (the Administator of the Estates of the late John Mugo Maina) v. **Adam Molel,** Civil Appeal No. 2 of 1990; **William Loitiame v. Asheri Naftari,** Civil Appeal No. 73 of 2002; **Tanganyka Cheap Store v. National Insurance of Tanzania Limited,** Civil Appeal No. 51 of 2005 and **William Shija v. Fortunatus Masha** [1997] TLR 213).

What are the available remedies in the circumstances like the present one, when a party is still interested his appeal to be determined at the Court? The reply is found at page 19 of the precedent of **Henry Zephyrine Kitambwa v. The President of the United Republic of Tanzania & Two Others** (supra) that:

> *The applicant was correct in contending that when the appeal had been struck out the notice of appeal was also struck out. In that situation, if a party still wished to appeal, a fresh application had to be filed in the High Court seeking extension of time in which to give a notice of appeal.*

From the above passage, it is obvious that the present application is at right truck. However, the issue before this court is when the accountability of every day of the delay should start for this court to determine vigilance on the part of the applicant. According to Ms. Kivuyo, the applicant has to account on every day of the delay since the decision of this court in **Labour Revision No. 2 of 2018** was delivered on 6th December 2019 to the filing date of the present application, 6th April 2021. In order to bolster her argument Ms. Kivuyo cited page 12 in the precedent of **D.N. Bahram Logistics Ltd & Another v. National Bank of Commerce Ltd & Another** (supra) which shows that: *if the appeal was struck*

out on account of being time-barred, it would require being fully accounted for.

Whereas Mr. Majogoro thinks that the applicant is not required to account on every day of the delay from 6th December 2019 as the delay is a technical one. In bolstering his argument, he cited the decision of this court in **Erick Thomas v. North Mara Gold Mine Limited** (supra) and prayed this bench to borrow the wisdom depicted at page 6 of the precedent which is displayed the following words: *refiling of the appeal, in the circumstance, is justifiable.*

I have perused the Ruling of this court in the precedent of **Erick Thomas v. North Mara Gold Mine Limited** (supra). Page 3 of the Ruling, this court displays general practice on existing distinction between struck out and dismissal orders. It stated:

> *As a general rule, a time barred appeal amounts to dismissal. When that is ordered, then the appeal process cannot be re-opened. In the situation at hand, the applicant first lodged Notice of Appeal against the impugned decision timely. However, he was barred by the sixty day's Rule in lodging his appeal pursuant to Rule 90(1) of the Court of Appeal Rules, 2009 (the Rules). The applicant hurriedly re-opened the appeal process by filling*

this subsequent application upon being supplied with the necessary copies of the Court of Appeal.

Finally at page 6 of the Ruling, this court stated that:

I am convinced that refiling of this appeal, in the circumstances of this case is justifiable and has been sufficiently accounted for. ***That might be the reason why the Court of Appeal in its wisdom opted to strike out the appeal instead of dismissing it****...as the Court of Appeal opted for striking it out, suggests that there can be a re-opening of appeal process.*

(Emphasis supplied).

I have already indicated in this Ruling with the support of precedents of the Court that there is obvious distinction between struck out and dismissal orders emanated from our superior court on one hand and technical delay caused by court process on the other. In the present application it is vivid that the applicant cannot be asked to account on every day of the delay from 6th December 2019 to the filing date of the present application, 6th April 2021, as she was in this court and the Court processing his rights complained in the **Labour Dispute No. CMA/MUS/201 of 2017** (the dispute) determined by the **Commission for Mediation and Arbitration of Mara at Musoma** (the Commission). The applicant

cannot be blamed for that period until when the appeal was struck out for want of time limitation.

In my considered opinion, the real issue which invites intervention of this court for determination is whether the applicant had adduced sufficient reasons to persuade this court with regard to the delay from the date when the Court pronounced the order on 1st November 2021 to the filing of the present application. I am aware that there were complaints and conversations during the hearing of the present application as to when exactly the copies of the orders of the Court were supplied to the parties and when exactly the present application was filed.

I took time to glance the record available in the present application. With regard to the date when the parties were supplied with the copies, Mr. Majogoro at the fifteenth paragraph in the affidavit and during the application hearing in this court stated that they were issued with the copy of the order of the Court on 30th November 2021. The respondent disputed the same in its tenth paragraph contending that the decision of the Court was available for collection on 1st November 2021. It is unfortunate that both parties did not produce evidences to substantiate their allegations, either in letters requesting the copies of the order or dispatch book substantiating the matter.

It is unlucky that the Registry of the Court cannot be perused by this inferior bench unless there is special prayer attached with good reasons. This bench will not attempt to file any prayer on the subject for two (2) obvious reasons *viz*: first, it does not have good reason (s) in its possession; and second, it cannot intervene the duties entrusted to the parties or their learned minds in Mr. Majogoro and Ms. Kivuyo. It was their duty to do so and the responsibility cannot be shifted to the shoulders of this bench. For the interest of justice, I let this matter be considered in conjunction with the other reasons of the delay of the applicant.

The issue of filing date will not detain this court as this Registry as put in place controlling mechanisms during filing of documents. It has put in place a Rubber Stamp for all documents brought in the court. The stamp displays: date of filling disputes, date of admission, date of creating control number, date of payment of court fees, name of the Record Management Assistant who is involved in the transactions and date of forwarding the dispute to Deputy Registrar of this court. The record of present application shows that it was not paid any fee or issued control number as it is a labour dispute. However, the record shows that the applicant had filed the application online on the 3rd December 2021 and admitted on 6th December 2021. From the practice of this court and the Court, court's record is sanctity and cannot be

doubted. It is always presumed to accurately represent what actually transpired in court. There is a bunch of precedents on the subject (see: **Halfani Sudi v. Abieza Chichili** [1998] TLR 527; **The Director of Public Prosecution v. Labda Jumaa Bakari**, Criminal Appeal No. 45 of 2021; **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018; **Shabir F. A. Jess v. Rajkumar Deogra**, Civil Reference No. 12 of 1994; **Flano Alphonce Masalu @ Singu & Four Others v. Republic**, Criminal Appeal No. 366 of 2018 and **Paulo Osinya v. R** [1959] E.A 353).

All in all, in an application like the present one, the standard practice is that an applicant is required to produce relevant materials to persuade this court in exercising its discretionary powers to decide in favour of the application (see: **Alliance Insurance Corporation Ltd v. Arusha Art Ltd**, Civil Application No. 33 of 2015; **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008; **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 4 of 2014; and **NBC Limited & Another v. Bruno Vitus Swalo**, Civil Application No. 139 of 2009).

In the present application, Mr. Majogoro had produced the reasons of delay relating to technical delay and prompt approach of the Court just after the decision of this court in **Labour Revision No. 2 of 2018** and filed the notice of appeal within time and

alleged to have filed the present application in three (3) days after the decision of the Court in the appeal.

The current law as displayed by the Court, in an application like the present one, is that applicants have to account on every day of the delay (see: **Dan O' Bambe IKO v. Public Service Social Security Fund & Another**, Civil Application No. 82 of 2005; **Bariki Israel v. The Republic**, Criminal Application No. 4 of 2011 and **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007).

The present record is silent on when exactly the parties were supplied the copies of the struck out order, as to whether on 1st November 2021 or 30th November 2021 to accurately calculate the days of delay. I am aware that it is a settled law, in an application like the present one, the court has discretionary mandate. However, the mandate must be exercised judiciously (see: **Samwel Sichone v. Bulebe Hamis** (supra); **Alliance Insurance Corporation Ltd v. Arusha Art Ltd** (supra); **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited** (supra); **Sebastian Ndaula v. Grace Rwamafa** (supra). This court will scan for the already established pigeons holes of vigilance and good faith on the part of applicant as the materials are abundant to assist this court on its determination (see: **Maryam Nassor v. Abla Estate Developers & Agency Limited & Three Others**, Land Case No. 140 of 2020;

James Funke Ngwagilo v. The Attorney General [2004] TLR 161; **Blay v. Pollard & Moris** (1939) 1 KB 628; and **Gandy v. Caspar Air Charters Ltd** (1956) 23 EACA 139).

In order to determine whether the applicant was vigilant and busy in good faith for want of his appeal be heard at our superior court, the Court had put down criteria in the precedent of **NBC Limited & Another v. Bruno Vitus Swalo**, Civil Application No. 139 of 2009, and was stated at page 7 of the typed Ruling that:

> *It is now settled that **in its discretionary powers, apart from a point of illegality where raised**, the court has to also consider such factors as the length of delay, the reason for delay, the degree of prejudice and **whether or not the applicant was diligent**. In applying those principles [the court must bear in mind]...the general principle that **every case is decided upon its peculiar facts***
>
> (Emphasis supplied).

The directives were echoed in the precedents of **Lyamuya Construction Company Ltd v. The Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 and **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 116 of 2008. In the case of **Royal Insurance Tanzania**

Limited v. Kiwengwa Strand Hotel Limited (supra), the Court stated that:

> *It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time,* ***act very expeditiously*** *and that the* ***application has been brought in good faith****.*
>
> (Emphasis supplied).

In the present application, I have said it all. The materials registered by the applicant's counsel show that the applicant was busy in making sure that his appeal is heard at our superior court by filing the notice of appeal within time in search of justice in our superior court. However, the appeal was turned down for want of time limitation which also collapsed the notice hence the present application. Following the trend of the applicant it is vivid that she wants to approach the Court in good faith. She cannot be blamed to have merely asking the enlargement of time or failed to furnish this court with relevant materials.

The present record shows that the applicant is struggling to have her substantive right determined in the final court of authority, the Court. It is substantive justice where the rights and duties of disputants are fairly determined. The wording of East African Court of Appeal in **Essaji v. Sollank [1998] EA 220** at page 224 are important

in scenarios like the present one. In that decision, their Lordships sought that:

> *The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessary debar a litigant from the pursuit of his rights.*

In my considered opinion, and noting the applicant has furnished this court with relevant materials depicting promptness in filing her dispute and bringing them in this court and the Court in good faith, and being aware of the enactment in articles 13 (6) (a) & 107A (1) (e) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] (the Constitution) and enactment in section 3A of the **Civil Procedure Code** [Cap. 33 R.E. 2019] (the Code), I allow the application and grant the applicant thirty (30) days leave to file notice of appeal in the Court without any further delay, and according to the laws regulating appeals from this court to the Court, to dispute the decision of this court in **Labour Revision No. 2 of 2018** delivered on 6th December 2021.

Ordered accordingly.

F. H. Mtulya

Judge

16.06.2022

This Ruling was delivered in chambers under the seal of this court in the presence of the learned counsel, Mr. Imani Mfuru for the respondent and holding brief of Mr. Alhaji Majogoro for the applicant, through teleconference.

F. H. Mtulya

Judge

16.06.2022