

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

LABOUR DIVISION

LABOUR APPLICATION NO 27 OF 2021

*(Arising from the decision of the High Court of Tanzania at Musoma in High Court Revision
No. 06 of 2018)*

ERICK THOMAS APPLICANT

VERSUS

NORTH MARA GOLD MINE LIMITED..... RESPONDENT

RULING

18th and 29th March, 2022

F. H. MAHIMBALI, J.:

The applicant after being aggrieved by the decision of this Court (Galeba, J, as he then was) in Labour Revision no. 06 of 2018 delivered on 13th December, 2019, appealed to the Court of Appeal of Tanzania. However, his appeal to Court of Appeal was on 2nd November, 2021 struck out for being out of time. He has now filed this application for extension to time to file Notice of Appeal to Court of Appeal. The application is filed under section 11(1) of the Appellate Jurisdiction Act, Cap 141 together with Rule 24 (1), 24(2) (a), (b), (c), (d), (e), (f) and 24 (3) (a), (b), (c) (d), Rule 55 (3) of the Labour Court Rules, GN 106 of 2007.

The said application has been supported by the affidavit dully deponed by Mr. Alhaji A. Majogoro, lerned counsel for the applicant.

The hearing of this application was done by way of written submissions. Whereas the applicant was advocated for by Mr. Alhaji Majogoro, the respondent was advocated by Mr. Faustin A. Malongo who opposed the application.

The main reason for the grant of the application is allegedly technical delay. That the applicant first lodged his Notice of Appeal timely before the Court of Appeal against the said decision of this Court (Hon. Galeba J, as he then was) and his appeal was then on 2nd day of November, 2021 struck out by the Court of Appeal of Tanzania on reason of time limitation. The applicant hurriedly upon being supplied with the said copy of the Court's ruling, filed this current application seeking extension of time to file Notice of Appeal out of time. In support of his application on technical delay, he cited numerous cases by the Court of Appeal of Tanzania, namely; **William Shija V. Fortunatus Masha**, Civil Application No. 06 of 1997 [1997] TLR 213, **Yunus Seif Kaduguda v. Razak Seif Kaduguda**, Misc. Land Application No. 12 of 2020 to mention but a few.

The application is opposed by the respondent on the reason that the appeal being time barred, the only available remedy is dismissal.

There cannot be re-opening of the appeal process. On this, reliance was sought in the case of **Fortunatus Masha V. William Shija** [1997] T.L.R 154, **D.N Bahram Logistics and Another V. National Bank of Commerce and Another**, Civil Reference No. 10 of 2017, Court of Appeal of Tanzania at Dar es Salaam, **Neema Nanyai Vs. Richard Samata Swika**, High Court of Tanzania Dar es Salaam, Civil Appeal No. 239 of 2019.

Having considered the rival submissions by both parties' counsel, the vital question here is whether the application is meritorious.

In reaching this verdict, I have dispassionately considered and weighed the rival arguments from the parties through their respective counsel. For sure I am mindful that to refuse or grant this application is the court's discretion. However, to do so there must accounted reasons for that. It must be done judiciously and with flexibility. In **Mbogo Vs. Shah** (1968) EA the defunct Court of Appeal for Eastern Africa held:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time....."

As a general rule, a time barred appeal amounts to dismissal. When that is ordered, then the appeal process cannot be reopened if it is so ruled by the Court of Appeal. 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 filing this subsequent application upon being supplied with the necessary copies of the Court of Appeal. He is opposed by the respondent that his delay is not technical but actual and real, thus statutorily barred by time limit.

Where a party timely lodges his notice of appeal against the decision of this Court and subsequently lodges his appeal to Court of Appeal timely, but the said appeal is struck out as it is the case here, considering that an appeal to Court of Appeal is a process, and depending on the circumstances and facts of each case, there can be a remedy of re-opening the appeal process as held in the case of **D.N Bahram Logistics and Another V. National Bank of Commerce and Another** (supra), where at page 12 it was held that:

*"In our view, the principle of technical delay is only applicable, as stated in **Fortunatus Masha** {supra} and approved in **Salvand K. A. Rwegasira**{supra}, if the original appeal was lodged in time but that it was subsequently terminated on account of incompetence or some other ground. If the said appeal was struck out on account of being time-barred, the delay involved would be actual or real and, on that basis, it would require being fully **accounted for**" [Emphasis added].*

With this guidance, it is clear that as the former appeal was struck

out for being time barred, then legally speaking it is not a technical delay as submitted by Mr. Alhaji Majogoro learned counsel but actual or real delay in which then it needed accounting by the applicant.

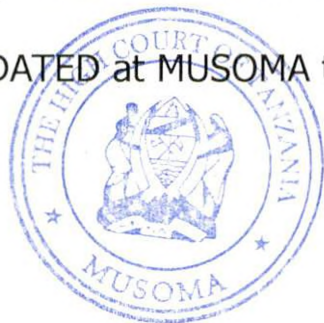
In my considered view, the accounting as per law appears to be stated in the applicant's affidavit from paragraph 7 to paragraph 15. As there was a timeous filing of the Notice of Appeal and the appeal itself to Court of Appeal against the High Court's decision, but the only defect encountered by the CAT when hearing the said appeal, was failure to comply with the requirement of 60 days' rule pursuant to rule 90(1) of the Court of Appeal Rules, 2009 (the rules) in which the applicant did not serve the respondent with a copy of a letter requesting for copies of proceedings. On that basis, the Court of Appeal considered the appeal being not properly before it and consequently struck it out. In the circumstances of this case, the striking out is remedied by the re-processing the appeal as done here.

The pertinent question would however be why did he not comply with the law on that requirement? Was it deliberately or by an oversight? I consider it as an oversight after he had done all that was needed in the procession of the said former appeal. I am persuaded that the delay though not so technical as per meaning in the case of **D.N Bahram Logistics and Another V. National Bank of Commerce**

and Another (supra) but it cannot however be considered as inordinate delay in the circumstances of this case. I am convinced that the 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.

The legal position is, when a matter is struck out it can be refiled whereas when the matter is dismissed, the appropriate legal cause is either an appeal or revision. As the Court of Appeal opted for striking it out, suggests that there can be a re-opening of appeal process. In consideration of the reasons accounted for by the applicant's counsel, the application is meritorious.

DATED at MUSOMA this 29th day of March, 2022.




F.H. Mahimbali

Judge

Court: Ruling delivered this this 29th day of March, 2022 in the presence of Mr. Castory Peja, advocate for the respondent, Mr, Gidion Mugo, RMA and Appellant being absent.


F.H. Mahimbali

Judge

29/03/2022