IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA DISTRICT REGISTRY)
AT IRINGA

MISCELLENEOUS LABOUR APPLICATION NO. 13 OF 2019

MSENGELE MSILU PETER ..... APPLICANT

VERSUS

SELOUS SAFARI COMPANY ..... RESPONDENT

(Originating from the decision of the Iringa Commission for Mediation and Arbitration in Labour Dispute No. CMA/IR/7/2015)

RULING

Date of Last Order: 02/09/2022 &
Date of Ruling: 05/09/2022

S.M. KALUNDE, J.:

The applicant herein has filed a Chamber Summons seeking an order for enlargement of time within which to institute an application for revision against a decision of the Commission for Mediation and Arbitration for Iringa **(Hon. Luwamba Yusuph, CP)** in **Labour Dispute No. CMA/IR/7/2015**. The decision was issued on 24.07.2015. The application is brought under rules Rule 24 (1), (2) (a), (b), (c), (d), (e), (f); 3 (a), (b), (c), (d); and 56 (1) of **the Labour Court Rules, 2007 G.N No 106 of 2007** ("the Labour Rules") and is being supported by an affidavit deponed by the applicant.

In order to appreciate the essence of the application, I find it apposite to state the background of facts leading to the present

application. From the records before the Court, it would appear that on the 10.05.2005, the applicant, MSENGELE MSILU PETER, was employed by the respondent in the position of Head Chef. Having worked for the company for almost nine (9) years on 30.12.2014 his employment was terminated for misconduct. Aggrieved by the decision to terminate his employment, on 30.01.2015 the applicant lodged **Labour Dispute No. CMA/IR/7/2015** at the Commission for Mediation and Arbitration for Iringa (henceforth "the CMA") claiming for payment of Tshs. 15,251,864.00 being compensation for unlawful termination. At the conclusion of the proceedings the CMA was convinced that there was a valid reason for terminating the applicant's employment. The CMA was also satisfied that, in terminating the employment, the respondent had complied with the required legal procedure for terminating the applicant. The impugned decision was delivered on 24.07.2015.

Dissatisfied by the decision of the CMA the applicant lodged, before this Court, **Revision Application No. 68 of 2015.** Unfortunately, on 06.04.2016 the application was withdrawn and subsequently the applicant was granted 14 days within which to lodge a fresh application. Thereafter, the applicant filed **Revision Application No. 07 of 2016** before this Court. However, on 15.11.2017 the refiled application was again struck out for being incompetent. This time the applicant had failed to comply with rule 24(3)(c) of G.N. No. 106 of 2007. In the runup to the decision the Court made the following order:

> *"For the interest of justice, I grant the applicant last opportunity to come to this Court with a competent application for revision. I grant the applicant leave to file a competent application for revision within ten (10) days from today."*

Immediately, on 24.11.2017, in compliance with Court orders, the applicant lodged what was to be a perfected application. The new application was registered as **Revision Application No. 42 of 2017**. Quiet unfortunately, on 29.10.2019 the application was, again, struck out after the applicant conceded to preliminary objections on points of law raised over the competence of the application.

Undiscouraged and having realized that he was out of time, on 18.11.2019 the applicant lodged the present application seeking for the indulgence of this Court in lengthening the time for him to lodge a fresh application for revision. In accordance with the Chamber application, affidavit and submissions before this Court the applicant's main ground in seeking extension of time is that the delay in lodging the application for revision was due to some technical delay. In support of that contention, the applicant argues that the previous applications for revision which were struck out were filed on time only to be struck out on technical grounds. The applicant feels that the application should be granted so that the Court is afforded an opportunity to consider his substantive complaints in an application for revision.

In counteracting, **Mr. Hassan Mwemba**, learned Advocate for the respondent cited the case of **Barclays Bank Tanzania Limited vs. Tanzania Pharmaceuticals Industries & 3 Others**, Civil Application No. 62/16 of 2018 for the argument that whilst the court has discretion in granting or refusing an application for extension of time, the applicant had the obligation to demonstrate good cause for this Court to extend time. The counsel insisted that the applicant had failed to demonstrate good cause for the Court to exercise its discretion in granting the application. In conclusion the counsel prayed that the application be dismissed. In the alternative, Mr. Mwemba submitted that the applicant had failed to comply with the order of this Court (**Hon. L.L. Mashaja, J** (as she then was)) dated 15.11.2017 where the applicant was offered a last opportunity to lodge a competent application.

Having considered the pleadings, records, and submissions of the parties, for and against the application, the question for my determination is whether the application is merited.

The applicant's contention is that delay in lodging the application for revision is due to a technical delay as three of his preceding applications were struck out by the Court on technical grounds. The respondent on the other hand believes that the applicant has demonstrated any sufficient ground for this Court to exercise its discretion in extending time. His view is that there are no materials before the Court to support the application. In support of that view the counsel for the respondent cited the case of **Barclays Bank T. Ltd vs Tanzania Pharmaceutical Industries**

& Others (Civil Application 62 of 2018) [2019] TZCA 159 (27 April 2019 TANZLII).

In the instant case, there is no dispute that the decision sought to be challenged was delivered on 24.07.2015. In view of section 91(1) of **the Employment and Labour Relations Act [CAP.366 R.E. 2019]** the applicant had six (6) weeks to lodge the application for revision. The respective section reads:

> *"91.- (1) Any party to an arbitration award made under section 88 (10) who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award-*
>
> *(a)* ***within six weeks of the date that the award was served on the applicant*** *unless the alleged defect involves improper procurement;*
>
> *(b) if the alleged defect involves improper procurement,* ***within six weeks of the date that the applicant discovers that fact.****"*

By simple arithmetic, six weeks is equivalent to 42 days. Again, calculating the 42 days from 24.07.2015 it would seem that the same expired on 04.09.2015. According to the records, the applicant first attempt to challenge that decision was through Revision Application No. 68 of 2015 which was withdrawn on 06.06.2016 after the applicant conceded deficiencies in the application including non-citation of an enabling provision and that affidavit was defective. However, we are not informed whether the

said application was filed within the 42 days prescribed under section 91(1) of the ELRA. In the circumstances the Court is left to second guess and assume that the said application was filed on time and that the applicant has accounted for every delay. As correctly pointed out by Mr. Mwemba the applicant had a duty to furnish the Court with materials from which the Court would determine the application.

Discussing the importance of supplying the relevant information the Court of Appeal (**Koroso, J.A**) in the case of **Barclays Bank T. Ltd vs Tanzania Pharmaceutical Industries & Others** (supra) cited the case of **Alliance Insurance Corporation Ltd vs. Arusha Art Ltd**, Civil Application No. 33 of 2015 CAT (unreported) where the Court stated that:

> *"**Extension of time is a matter for discretion of the Court** and that **the applicant must put material before the Court which will persuade it to exercise its discretion** in favour of an extension of time."*

In the present case there is no information or date on when the award was served on the applicant or if the revision is based on improper procurement, when did the applicant discovered that fact. Equally, and as I have pointed out above, there is not any materials from which this Court would ascertain whether Revision Application No. 68 of 2015 was filed within the prescribed limitation.

At this juncture I wish to point out that whether the first application was filed on time or not is a very important aspect in

ascertaining whether or not there is technical delay in the present case. I say so because the position of the law is settled that where an appeal or application for revision was lodged on time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. That would amount to a technical delay, in which case having penalized the incompetent appeal or application by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal or application. See **SalvandK. A. Rwegasira vs. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported). Thus failing to demonstrate that the initial application was filed on time is a serious lapse in the application.

Nonetheless, even assuming that the first application was filed on time and this Court excluded the time spent in prosecuting the same, the next huddle for the applicant is to demonstrate that whether he acted diligently and promptly to take necessary steps to institute a competent proceeding.

Undeniably, in the instant case it evident from the records that the applicant has been in and out of the corridors of the court on several occasions. His opening attempt was through **Revision Application No. 68 of 2015**. However, as pointed out earlier we are not informed whether this application was filed on time as required to make a finding that there is a technical delay. The records show that the application was withdrawn on 06.06.2016 for being incompetent. The applicant was granted 14 days within which to lodge an improved application. He lodged **Revision Application**

No. 07 of 2016 we are also not informed whether the same was filed on time. However, on 15.11.2017 the application was struck out again for being incompetent. This time the applicant had failed to comply with rule 24(3)(c) of G.N. No. 106 of 2007. In addition to that there was non-citation of the enabling provision. In the **"interest of justice"** this Court granted the applicant a last chance to lodge a competent application for revision within ten (10) days. This time he complied and filed **Revision Application No. 42 of 2017.** Nonetheless, the third attempt application also struck out on 29.10.2019 for being incompetent.

From the above set of circumstances, the issue for my consideration is whether the prosecution of the previous applications was bonafide and without negligence. I hasten to say that the answer to the above question is in the negative. I say so because after the first application was withdrawn, which we presume without deciding that it was filed on time, the applicant went on to lodge another incompetent application which was then struck out. Acknowledging the need to do justice the Court granted him 10 days to lodge a competent application. The applicant went on to lodge an incompetent application for the second time. Now, having lodged two consecutive incompetent applications the applicant wants this Court to exclude the time spent in prosecuting the incompetent applications in calculating the timeous of the present application. I do not think that is the correct interpretation of technical delay. Having withdrawn the first application which was presumably filed on time, the applicant ought to have been diligent

in his next step in prosecuting his application. However, quite in the opposite he lodged two successive incompetent applications. In my view, that was a demonstration of sheer negligence on his part. Unfortunately, negligence is not a good sign to have in applications of the present nature. I am supported in this view by the decision of the Court of Appeal in **Bank M (Tanzania) Limited v. Enock Mwakyusa**, Civil Application No. 520/18 of 2017, a prosecution of an incompetent appeal when made in good faith and without negligence, ipso facto constitutes sufficient cause for extension of time. In view of the above circumstances, it cannot be said that there was good faith or diligence. The applicant was clearly negligent in prosecuting his application. Having been negligent, he cannot be allowed to benefit from his own negligence.

On another limb, there is also an aspect on whether the applicant acted promptly to take the necessary steps to institute the present application. Again, the answer to that is in the negative. The last application, that is **Revision Application No. 42 of 2017** was struck out on 29.10.2019 for being incompetent. It took the applicant twenty days to lodge the present application; and surprisingly the applicant did not state why there was a delay. In view of the circumstances presented in this case the applicant ought to have lodged the present application promptly to solicit condonation by this Court. At minimum he should have, at least, endeavored to explain what happened in the twenty days. He did not do so.

Considering the circumstances cumulative, I am content that no good cause has been shown. The application stands dismissed. Each party shall foot its costs.

It is so ordered.

DATED at **IRINGA** this **05th** day of **SEPTEMBER, 2022**.

S.M. KALUNDE

JUDGE