IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LABOUR APPLICATION NO. 9 OF 2022

(C/F Labour Revision Application No. 203 of 2017)

SILVER JUSTINE ..... APPLICANT

VERSUS

LEOPARD TOURS LTD ..... RESPONDENT

RULING

22/09/2022 & 17/11/2022

KAMUZORA, J.

This application is brought under the provision of section 11(1) of the Appellate Jurisdiction Act Cap. 414 R.E 2019, Section 14(1) of the Law of Limitation Act Cap. 89 R.E 2019 and Rule 56 of the Labour Court Rules GN. No. 106 of 2007. The Applicant in this application is applying for an extension of time within which to file notice of appeal to the Court of Appeal of Tanzania against the decision of this Court (Gwae J) in Revision Application No. 203 of 2017. This application is supported by affidavit of the counsel for the Applicant Mr. Shedrack Mofulu. The application is opposed by the Respondent in counter affidavit deponed by Mr.Elvason Erasmo Maro, counsel for the Respondent.

When the matter was called for hearing, Mr. Shadrack Mofulu appeared for the Applicant while the Respondent was duly represented by Mr. Evalson Maro. As part his oral submission in support of application, counsel for the Applicant adopted the affidavit in support of application and reply to counter affidavit.

Counsel for the Applicant referred the Court of Appeal decision in Civil Application No. 2 of 2010, **Lyamuya Construction Co Ltd Vs. the Board of Registered Trustees of Young Women Christian Association of Tanzania**, which laid down general principles for granting extension of time. He submitted that the Applicant must account for the whole period of delay, the delay should not be inordinate, the Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the case and other sufficient reasons, such as the existence of point of law of sufficient importance, such as the illegality of the decision to be challenged.

The Applicant's counsel explained that the decision of the High court was delivered on 29/11/2021 and this application was filed on 02/03/2022 because the time to file notice of appeal had already lapsed. The reason behind the delay is that before the judgment was delivered, both parties made their submissions to the High Court and the judgment

was supposed to be delivered on 15th November 2021 the day which parties appeared but the trial Judge was not present. That, they were informed by the Court clerk Talita Kayuni that the judgment will be delivered on notice to the parties. Unfortunately, the judgment was delivered on 29/11/2021 without the Applicant or his counsel being summoned or informed. He referred the proceedings of the court annexure A1 to the counter affidavit and submitted that, although the judgment was signed and sealed by the court seal by Hon. Gwae J and dated 29th November 2021, the column shows that the judgment was delivered on 29th December 2021 therefore bringing confusion as to when the judgment was really delivered between 29th November 2021 and 29th December 2021.

The counsel for the Applicant submitted further that after 15th November 2021 when the judgment was supposed to be delivered, they were not informed of the date of judgment until they became aware on the existence of the said judgment. That, by that time, the 14 days of giving notice to appeal to the Court of Appeal had lapsed without them knowing that the judgment was already delivered. He insisted that there was no negligence or sloppiness on the part of the Applicant in the prosecuting or taking necessary action. He therefore prays this Court to

extend time so that the Applicant can file notice of appeal to the Court of Appeal.

Responding to the Applicant's submission, counsel for the Respondent Mr. Maro started by attacking the affidavit in support of application as well as the reply to the counter affidavit for containing falsehood. He submitted that paragraph 5 of the affidavit as well as paragraph 5 of the reply to counter affidavit indicates that the matter was scheduled for judgment of 27th September 2020 which are nothing but falsehood. That, the proceedings show that on 27th September 2021 the matter was scheduled for mention and not for judgment and on that date the counsel for the Applicant applied for extension of time to file written submission as he was bereaved and could not file on time. That, he was granted order and the matter fixed for mention 18th October 2021 thus, it is incorrect to say that the matter was scheduled for judgment on 27th October 2021.

Mr. Maro also pointed the second falsehood on the claim that there were several adjournments and the court promised to inform parties on the date of judgment but in January he was surprised that the judgment was delivered on 29th November 2021. He submitted that on 18th October 2021 when the matter was called before the Hon. Judge,

the counsel for the Applicant was in attendance and an order was made that judgment would be delivered on 15th November 2021. In his view, the matter was adjourned for judgment on 27th September 2021 thus, suggesting that there were several adjournments is nothing but falsehood.

The counsel for the Respondent was of the view that the falsehood in the affidavit goes to the core of the application as such an affidavit cannot be relied upon. Reference was made to the decision of the CAT in Civil Application No. 21 of 2001, **Ignazio Messina Vs. Willow Investment SPRL** which held that no application can be supported by affidavit containing falsehood.

On the merits of the application, it was the submission by counsel for the Respondent that the Applicant has not accounted for the delay. He fully subscribed to the decision in the case of **Lyamuya Construction** (supra). He explained that on the first principle the Applicant was supposed to account for each day of delay. That, the records show that counsel for the Applicant was the last in Court in Labour Revision No. 203 of 2017 on 18th October 2021. That, the affidavit in support of the application does not indicate the submission by counsel for the Applicant that he appeared in court on 15th November

2021 and was advised that the judgment will be delivered on notice thus rendering it as evidence from the bar.

Counsel for the Respondent added that from 18th October 2021 up to 19th January 2022 when the Applicant learned of the existence of the judgment, there is no any indication that they were making any sort of follow up. That, the period of about three months which passed does not demonstrate diligence, rather it demonstrates apathy and sloppiness. That, the law requires a party to follow up development of his case and along that principle is that, once you know the date on which the case is called for whatever orders, you are supposed to follow up development of that case. That, that is the position of the CAT in the case of **Transport Equipment Ltd. Vs. DP Valambia**, [1993] TLR 91, page 98 paragraph. He contended that it was expected for the counsel for the Applicant having appeared in court on 18th October 2021 and took the date scheduled for judgment on 15th November 20221 would have taken some steps to know the fate of the pending judgment. That, there is nothing on record, not even the letter enquiring on the date of judgment until when he learned on the existence of the judgment. That, there is no any explanation from the Applicant himself as to why on his party did not make follow up of his case as he has duty to make follow

up of his case even where he has an advocate. He referred the CAT in the case of **Lim Han Yung and Another Vs. Lucy Treseas Kristensen,** Civil Appeal No. 219 of 2019 (unreported) page 22. The counsel for the Respondent believes that what prompted the counsel for the Applicant to file this application is a letter served to him which advised him that judgment had already been delivered and in compliance of that judgment the Respondent attached a cheque in adherance of that judgment. That, even if it is assumed that he learned of the existence of the judgement on 19th January 2022, the Applicant took the whole of 40 days before filing this application as the application was filed on 2nd of March 2022. That, the affidavit of the Applicant contains no explanation as to what the Applicant was doing before filing this application. That, such inordinate delay has not been accounted for hence nothing but apathy, negligence and inaction. He referred the decision of the CAT in **Paul Joseph Kyauka Njau and another Vs. Emmanuel Paul Kyauka Njau and another**, Civil Application No 7/05 of 2016 (unreported) page 13 second paragraph where 28 days were considered to be inordinate delay. That, the case before this court the delay is 40 days hence inordinate delay which disqualifies the Applicant from the relief sought.

On the argument that there was a confusion as to when the judgment was delivered, the learned counsel for the Respondent submitted that in the first place that does not exonerate them from filing the application having learnt of the existence of the judgment from January. He added that as per annexure A1 the judgment was signed and dated on 29th November 2021 and the top of the judgment there is a date of 29th November 2021 as date for delivery. That, the decree also read November 2021. That, under paragraph 7 of the affidavit counsel for the Applicant stated clearly that the judgment was delivered on 29th November 2021. To him, it was the slip of pen on the column at page 5 of the proceedings were the date entered is 29th December 2021. That, the Respondent made follow up of the judgment on 15th November 2021 and were advised by the clerk that the judgment will be delivered on 29th November 2021 and they appeared and received the judgment. He therefore prayed that the application be dismissed and since this is a labour matter, each party will bear their own costs.

In rejoinder, Mr. Mofulu addressed the issue of falsehood in the affidavit and submitted that no falsehood as alleged. That, under paragraph 6 there is date showing that the judgment was delivered on 29th November 2022 and we are yet to reach that date showing that

there was slip of pen. On the argument that this error goes to the root of the application the counsel for the Applicant submitted that the root of this application is that the judgment was delivered without the Applicant being notified. On the argument that their last presence in court was 18th October 2021, the Applicant's counsel submitted that the proceedings do not state what transpired from 18th October 2021 until when the judgment was delivered but they only shows that the Respondent appeared on the date the judgment was delivered. That, because of that it cannot be said that there was any sloppiness on the part of the Applicant to make follow of the date of judgement hence the case cited by senior counsel for the Respondent cannot be applicable because in that case, there was no follow up at all.

The learned counsel for the Applicant submitted further that in practice of from 15th December to first week of February the court goes for recess and within that time, it is when they became aware that the judgment was delivered. He admitted that they were served with a letter and payment proof on 20th January 2022 but at that time they had already made follow up and collected copy of judgment and the court register for copies collection will prove this thus it is not the Respondent's letter which moved them to file the application. He

insisted that there was confusion on the date the judgment was delivered as there is 22nd October 2021, 20th November 2021 and corrected by pen to read 29th November 2021 and the proceedings show 29th December 2021. He reiterated the prayer that the application be granted for the reason that the Applicant and his advocate were not informed of the date the judgment was to be delivered.

I have considered the application, the record and the submissions by the counsel for both parties. Before I deliberate on the merits of the application, I find it pertinent to address the issue addressed by the counsel for the Respondent regarding the falsehood in the affidavit in support of the application. It is true that, under paragraph 5 of the affidavit as well as paragraph 5 of the reply to counter affidavit the counsel for the Applicant deponed that the matter was scheduled for judgment on 27th September 2020 but it was adjourned followed by several adjournment and the court promised to inform the counsels for the parties on the date of judgment. I agree by counsel for both parties that writing the year 2020 was a typing error as they all seems to intend the year 2021. As well pointed out by the counsel for the Respondent, the records reflect on 27th September 2021 the matter was scheduled for mention and not for judgment and on that date, the counsel for the

Applicant prayed for extension of time to file written submission as he was bereaved and could not file on time. He was allowed to file the submission by 11th October 2021 followed by a rejoinder and the matter was scheduled for mention on 18th October 2021. On that date both parties were represented and the matter was scheduled for judgment on 15th November 2021. I thus agree with the counsel for the Respondent that it is incorrect to say that the matter was scheduled for judgment on 27th October 2021. Similarly, nothing is pointed out to reflect several adjournments of the judgment as deponed by the counsel for the Applicant. The record shows that, the judgment was scheduled for the first time to be delivered on 15th November 2021 but the case was not called in court. However, the judgment was delivered on 29th November 2021 thus, stating that the judgment was not delivered on 27th September 2021 and was followed by several adjournment is falsehood as it does not reflect the reality of the records.

I agree with Mr. Maro that falsehood in the affidavit renders the same defective and such an affidavit cannot be relied upon. However, it is not always that the falsehood will affect the whole affidavit, the court may determine the extent of falsehood if it goes to the root of the matter and opt to either proceed on determining the matter on merit or

expunge the paragraphs containing the falsehood. But if satisfied that the falsehood was intentional and goes to the root of the matter, the court may opt to apply the principle in **Ignazio Messina** (supra).

In the mater at hand, I find that the falsehood pointed out is minor as they are based on the trend of the court proceedings which this court has access to verify. Thus, even if I agree with Mr. Maro that what is contained under paragraph 5 of the affidavit is not what is reflected in the proceedings, I find it prudent to determine the merit of the application as it will assist on the conclusive determination of the rights of the parties.

Now turning to the merit of the application, both counsels agree with the principles for extension of time set in **Lyamuya Construction Co Ltd** (supra). It was the contention by the counsel for the Respondent that the Applicant was unable to account for the whole period of delay and three months delay is inordinate. He insisted that the Applicant and his counsel acted negligently or sloppy for not making follow up of the matter until the date they claim to become aware of the existence of the judgment

I have perused the record and I do not agree with the submission that there is confusion on the date the judgment was delivered. The

judgment itself shows that it is dated 29/11/2021 and the proceedings indicate that the Honourable judge signed to deliver the judgment on 29/11/2021. Thus, the date indicated in the column which is 29/12/2021 is typing error and cannot be considered as the date of delivery of the judgment. That was also acknowledged by the counsel for the Applicant at paragraph 6 and 7 of the affidavit in support of the application.

Now having determined that the judgment was delivered on 29th November 2021, the pertinent issue here is whether the Applicant has well explained the delay in filing the notice of appeal against the decision of this court in Revision Application No. 203 of 2017. In his affidavit and the submission in support of the application, the counsel for the Applicant contended that, they were not aware of the delivery of the judgment until when they became aware on 19/01/2022 when they received a copy of judgment. As well pointed out by counsel for the Respondent, the Applicant's counsel was in court when the court scheduled the judgment to be delivered on 15th November 2021. Although there is no court coram for 15th November 2021, it is also not indicated in the Applicant's affidavit on the date they were informed by the court that the judgment will be on notice. I agree that the Applicant

has not shown if effort was made to make follow up of the matter after 15th November 2021.

Again, the Applicant's counsel claimed that he became aware of the judgment on 19th January 2022 but, the present application was filed in court on 02/03/2022. In his affidavit, nothing is deponed by the counsel for the Applicant as to what they were doing after they learned of the existence of the judgment on 19/01/2022. I agree with the counsel for the Respondent that the period from 19/01/2022 to 01/03/2022 before filing this application on 02/03/2022 was not accounted for by the Applicant. After learning of the existence of the judgment on 19/01/2022, the Applicant took 40 days to take action by filing the present application. It is a settled principle that, in an application for extension of time, the Applicant must account for each day of delay. The affidavit of the Applicant contains no explanation as to what the Applicant was doing before filing this application thus, the delay of 40 was nothing but apathy, negligence and inaction on the side of the Applicant.

Under paragraph 11 and 12 of applicant's affidavit, the Applicant raised the issue on the existence of serious legal issues and chances of success of the intended appeal. It is unfortunate that such issues were

not addressed in the submissions by the counsel for the Applicant and nothing was real pointed out as point of law or illegality that need interference by the Court of Appeal. I will therefore not bother to address this issue for the best reason that counsel for the Applicant has failed to demonstrate the alleged arguable issues touching or error to be rectified on appeal.

In concluding, I find no merits in this application as the Applicant was unable to demonstrate good cause for the grant of extension of time. I therefore proceed on dismissing the application. However, I agree with the counsel for the Respondent that this being labour dispute parties should bear their costs thus, I make no order as to costs.

DATED at **ARUSHA** this 17th Day November 2022

D.C. KAMUZORA

JUDGE