

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

MOROGORO

MISC. LABOUR APPLICATION NO. 13 OF 2022

*(Arising from High Court of Tanzania, Morogoro Sub Registry at Morogoro on
Consolidated Labour Revision no 02 & 07 of 2022)*

KILOMBERO SUGAR CO. LTD APPLICANT

VERSUS

FRANCIS VETELIN JOAKIM & 28 OTHERS RESPONDENTS

RULING

Date of last order: 01/03/2023

Date of ruling: 09/03/2023

MALATA, J

This ruling is in respect to an application for extension of time to file notice of appeal out of time, the application is preferred under Rule 24(1)(2)(a)(b)(c)(d)(e) and (f), Rule 54(1)(2), Rule 55(1)(2), Rule 56(1)(3) of the Labour Court Rules, GN no.106 of 2007, Section 11(1) of the Appellate Jurisdiction Act, the application is supported by the affidavit sworn by **Mercy Grace Kisinza**, the applicant's advocate.

From the documents laid before the court, the undisputed facts giving rise to this matter is that, in High Court Consolidated Labour Revision no. 07 & 02 of 2022, Kilombero Sugar Limited was the respondent. The labour

Revision was instituted by Francis Vetelin Joakim and 28 others. The relationship between the parties to Labour Revision was that of employer and employee relationship.

The applicants (employees) were aggrieved by the award delivered by Commission for Mediation and Arbitration on 16.10.2019 thence preferred a revision to the High Court of Tanzania. Upon hearing the application, the court entered judgement in favour of the employees and ordered for payment of compensation of twelve months salary and other benefits including arrears and repatriation costs.

The applicant herein was dissatisfied with the judgement and decree of the Consolidated Labour Revision no 07 & 02 of 2022 thus wants to appeal to the Court of Appeal.

However, as the applicant failed to prefer an appeal within time, filed an application for extension of time within which to file notice of appeal to the court of Appeal. In the application, applicant raised reason for failure to file notice of appeal that it was due to absence of advocate handling the matter one **Mercy Grace Kisinza** who was attending maternity leave.

Before this court, the applicant was represented by Mr. Emmanuel Godson, learned counsel while the respondent was represented by Mr. Kitua Kinja, learned counsel.

Mr. Emmanuel started his submission in support of the application by praying to adopt affidavit by **Mercy Grace Kisinza** sworn on 1/12/2022. He stated that, an application for extension of time is granted in the exercise of court's discretion which has to be acted judiciously upon being

satisfied that there was sufficient reasons for delay as adduced by the applicant in the application. He further submitted that, the present application, the applicant is seeking invocation of this court's discretion under section 11(1) of the Appellate Jurisdiction Act and Rule 56(1) of the Labour Court Rules, GN no. 106 of 2007 (herein to be referred as Labour Court Rules). The advanced reason for failure to file notice of appeal within time is stated under paragraphs 3,4 and 5 of the affidavit that the applicant's counsel one **Mercy Grace Kisinza** was attending maternity leave which started on 12th September, 2022.

Mr Emmanuel submitted that, the advanced reason was previously considered by this court in the case of **Silvia Kifanyi vs. Victoria Service Station**, Misc. Application no. 07 of 2021. In this case, the applicant delayed to file appeal within time as she was attending maternity leave and the court found it as a sufficient cause for delay and granted it accordingly. In the present case, the applicant shares similar situation of failure to file appeal within time due to maternity leave of the applicant's advocate.

On the quest to challenge the judgement this application was filed on 1/12/2022, Mr. Emmanuel was of the view that, the applicant's delay was with sufficient cause and not inordinate, as the notice of appeal was required to be filed within thirty days from the date of the judgement, the delay was of **nineteen days** which is not inordinate.

By closing his submission, he stated that the applicant acted promptly and he prayed for this court to allow the application.

In reply thereof, Mr. Kinja started, by adopting the counter affidavit as evidence in opposition of the application. He submitted that, the applicant is legally required to enter sufficient cause for this kind of application to be granted by the court as per Rule 56(1) of the Labour Court Rules and section 11 (1) of the Appellate Jurisdiction Act. The advanced reason for delay is that, the applicant's advocate was on maternity leave. He submitted that, the applicant has not submitted any clinic record that the applicant was really attending hospital during that period. In the applicant's affidavit the applicant is Kilombero Sugar Co. Ltd which is a legal person.

It is undisputed that, being a member of Tanzania employer's association, known as Association of Tanzania Employers (ATE), the applicant used the legal service of ATE to handle the case. ATE appointed Ms **Mercy Grace Kisinza** their employee to handle the case who on the due dates is claimed to have been attending maternity leave.

Mr. Kinja learned counsel further differentiate the **Silvia Kifanyi** with the case at hand, by stating that, in Silvia's case, the applicant was an individual person while in the present case the applicant is a company which operate through personnels not as an individual as in the **case of Kifanyi**.

Mr. Kinja further submitted that, **Mercy Grace Kisinza** was appointed by ATE as the internal employee, ATE had an obligation to appoint another person from within to represent the applicant herein. The reason that the applicant failed to file notice due to maternity leave of the advocate lacks merit under rule 56(1) of the Labour Court Rules and Section 11(1) of the Appellate Jurisdiction Act is uncalled for as the Applicant engaged ATE not

Mercy Grace Kisinza. That, ATE the privy to contract with the applicant herein did not file an affidavit on the same but a third-party **Mercy Grace Kisinza.**

Submitting on the length of delay Mr. Kinja stated that in the affidavit it is not stated that the delay is of nineteen days, however, the applicant has to account for each day of delay. He further stated that delay even of a single day has to be accounted for otherwise there is no point of having issues of extension of time on the basis of good cause for delay.

As to the issue of irreparable loss or prejudicial, the respondents are not at work since 31/03/2020 following the retrenchment by the applicants, thus they are being affected by delay and inactiveness of the applicant in paying and executing the decision of CMA and this court's decision.

Finally, he prayed that, the application be dismissed as the applicant has failed to adduce good cause for delay.

By way of rejoinder, the learned counsel for the applicant stated that the fundamental question is whether there is a good cause for delay, he stated that **annexture KL2** to the application confirms the presence of the good cause that is maternity leave. The respondent did not dispute what is contained in annexture **KL2**, it is true that there is no clinic card but KL2 was enough, clinic card contains personal information thus doing otherwise would expose one's privacy information.

As to the case of **Silvia kifanyi**, he was of the view that the case is similar with this case at hand thus it be used in deciding this case.

Having heard the submissions from both parties, the only question before me is whether the application has shown sufficient cause for delay to warrant this court grant the sought orders.

It is a principle of law that, it is discretion of the court to grant application for extension of time upon good cause being shown, that is the spirit of Rule 56(1) of the Rules and section 11(1) of the Appellate Jurisdiction Act.

However, good cause has not been defined. In **Tanga Cement Company Ltd v. Jumanne D. Masangwa and Amos A. Mwalavanda**, Civil Application No. 6 of 2001 (unreported), Nsekela, J.A. (as he then was) observed as follows:

"What amounts to sufficient cause has not been defined. From decided case a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant."

In that regard, the court has developed a number of factors to be taken into account in the determination of application for extension of time. In the case of **Lyamuya Construction Co. Ltd Vs. The Registered Trustees of Young Women Christian Association of Tanzania** the court principled that;

(a) The applicant must account for delay the period of delay

(b) The delay should not be inordinate

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

Based on the above governing principles courts have been considering the circumstances of each case and satisfy itself if it has advanced sufficient cause for delay.

In the present case, the reason for delay is that, the applicant's advocate was on maternity leave. The reason which was strongly disputed by the respondent to be sufficient or good reason for extension of time in the circumstances of this case.

It is undoubted that when a woman is on maternity leave, she is expected not to go to work and stay at home to cater for her health and take care of her newly born baby. The learned counsel for the applicant adopted the affidavit of **Mercy Grace Kisinza** who is alleged to be the applicant's advocate, and she is the one who was on maternity of leave. Looking at the affidavit, the name of the person who did swear the affidavit is **Mercy Grace Kisinza** but the copies of the maternity leave **annexture KL2** bear the name of **Mercy Grace Seuya** and not **Mercy Grace Kisinza**. As such, the person who was issued with maternity leave as per **annexture KL2** is **Mercy Grace Seuya** who had no conduct in this matter and did not swear any affidavit in support thereto.

The name in the affidavit and in the annexure KL2 display two different names and thus two different persons, the affidavit was sworn by Mercy Grace Kisinza and annexure KL2 the name is Mercy Grace Seuya, these are two different people thus annexure KL2 can't be said to be the maternity form of Mercy Grace Kisinza, the advocate. This leaves, the advanced reason of maternity leave with no supporting medical or employer's confirmation on existence of such leave.

The applicant, Kilombero Sugar Company is a legal person, bearing that in mind it is undisputed that, the applicant used the legal service of ATE and not Mercy **Grace Kisinza** who was appointed by ATE as internal employee. ATE being a legal entity could have used another person from within or outside, same applies to the applicant herein which is legal entity could have done the same instead of banking on maternity leave of officer from ATE. As who was rendering legal services to the applicant, the answer is ATE who was accountable to the applicant as it's member. This takes me to rule that, Kifanyi's case is distinguishable as the present is of a legal entity which cannot go for maternity leave.

Further, the applicant had no contractual obligation with Advocate Mercy Grace Kisinza for rendering legal service to applicant. Why then Mercy Grace Kisinza, a stranger is being held accountable. In the circumstances, either ATE or applicant could have appointed another officer to deal with the matter.

Further, as the applicant was aware of the judgement date and very much aware of its implication either applicant or ATE could have appointed other officers to deal with the case but they ignored. This led me to what is said to be inactiveness on the part of the applicant to take necessary steps in

the circumstances or lack of diligence in handling the matter. In the circumstances, I am guided by the position taken by the Court of Appeal in the case of **Lim Han Yun and Another vs. Lucy Theseas Kristensten**, Civil Appeal no. 219 Of 2019 where it was held;

"The appellant cannot throw the whole blame on their advocates. We think that party to a case who engages the service of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow up of his case, can't be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such part can't raise such complaints as a ground for setting aside exparte judgement."

In this case, the judgement was delivered on 11th October, 2022, but there are no supporting evidences to show that the applicant took any necessary steps until 1/12/2022. The applicant has evidentially failed to advance sufficient cause for delay to warrant this court exercise its discretion power to grant what is asked for. As such, I have nowhere to rely upon for lack of reason for delay.

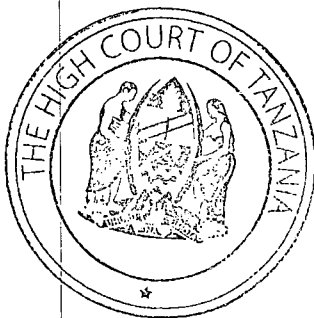
In his oral submission, the learned counsel for the applicant stated that the delay is of nineteen (19) days, this fact was not deposed in the affidavit. It is settled position that in an application for extension of time, the applicant must account for every day of delay, the position was stated in the case of **Yazid Kassim Mbakileki vs. CRDB (1996) LTD Bukoba Branch and Another**, Civil Application No. 412/04 of 2018. The

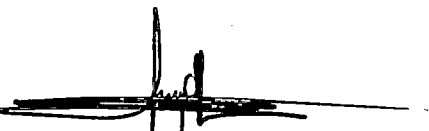
applicant had a duty to account for each day of delay of which he failed to.

All said and done, this court is satisfied that, the applicant has failed to discharge his duty of adducing good cause and account for each day of delay as required by law. Thence, the judicial discretionary cannot be invoked in the circumstances. Consequently, this court has nowhere to rely upon in granting what is asked for, thus, the only remaining remedy is to dismiss the application for lack of merits as I hereby do. Each party to bear its own cost.

It is so ordered

DATED at MOROGORO this 9th March 2023




G. P. MALATA
JUDGE
09/03/2023