IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 188 OF 2022

(Originating from Misc. Civil Application No. 554 of 2020 and Civil Case No. 184 of 2001)

DOMINIC MBALAMULA & 33 OTHERS ..... APPLICANTS

VERSUS

TANZANIA BREWERIES LIMITED ..... RESPONDENT

RULING

Date: 22 & 31/05/2023

NKWABI, J.:

The applicants are earnestly asking this Court to grant them the following orders:

1. Extension of time for lodging outdated Notice of Appeal.
2. Costs for the case to follow the events.
3. Any other relief(s) that this Court may deem just and fit to grant.

The application is supported by the affidavit of Donimic Mbalamula as legal representative. The application is resisted by way of a counter-affidavit by Huruma Ntahena, principal officer of the respondent. The applicants too filed a reply to the counter-affidavit.

In a labour dispute against three defendants (applicants in this application) that involved unfair termination, the respondent won the case. The applicants pursued an appeal to the Court of Appeal, but had to withdraw on the defect on the notice of appeal. Then they lodged a miscellaneous civil application No. 554 of 2020 for extension of time to lodge notice of appeal which was granted by this Court where the applicants were ordered to file notice of appeal within 30 days. That time lapsed without a successful lodgment of the notice. It is thus the applicants are before this Court for a further extension of time.

The hearing of this application was carried out by way of written submissions. The 1st applicant drew and filed the written submissions for himself and his colleagues. The respondent's written submission in reply was drawn and filed by Mrs. Nsangizyo Zilahululula, learned counsel for the respondent. The applicants too filed a rejoinder submission.

It is trite law that when there is objection on point of law, that point of law must be decided first in accordance with **Inter-Consult Limited v. Mrs. Nora Kassanga & Another,** Civil Appeal No. 79 of 2015 where it was stated that:

"As it is usually the practice of the Court, since a notice of preliminary objection has been raised on the appeal, we allowed the same to be heard first before the appeal could be heard on merit."

In this application, the respondent raised an objection that this Court has no jurisdiction to entertain a labour matter. It was explained that the suit arose out of employment matters. The respondent cited section 3 of the Industrial Court of Tanzania Act, Cap. 60 R.E. 2002. The counsel too fortified her view with the case of **Tambueni Abdallah & 89 Others v National Social Security Fund,** Civil Appeal No. 2000, CAT, (unreported) where it was held that:

"It is clear to us that trade disputes have to follow that prescribed procedure and there is no room for going to the High Court straight the High Court has no original jurisdiction to entertain trade disputes such matters are dealt with in accordance with the Act."

It is prayed that the application be ruled to be incompetent.

In response in the rejoinder submission, it is stated that in the first place that objection was not pleaded in the counter-affidavit. But as to the jurisdiction of this Court, it is submitted that section 52 of the Labour Institutions Act, Cap. 300 R.E. 2019 does not apply retrospectively. Civil Case No. 184/2001 was filed prior the enactment of Labour Courts Act of 2004. The applicants cited **Ramanlal Haribhai Patel v. Benros Motors Tanganyika Ltd** [1968] EACA No. 12.

I have considered the arguments of both parties, while I reject the view that the objection ought to be raised in the counter-affidavit, the objection is baseless because the main case was determined by this Court, so, it is this Court that has the jurisdiction to entertain this application. In any case, the counsel for the respondent did not cite any case law that supports her view. The one she cited which is **Tambueni Abdallah & 89 Others** (supra), is distinguishable to the case at hand. In the premises, the objection on jurisdiction is crumbles to the ground.

The next complaint in a nature of preliminary objection for my consideration and determination is that the applicant did not seek leave to sue or defend the application for the benefit of the other persons which contravened the

provisions of Order 1 Rule 8 of the Civil Procedure Code, Cap. 33 R.E. 2019. She cited **Aniceth Muswahili & 5 Others v. Ako Catering Services Ltd,** Revision No. 29 of 2013 HC (unreported).

It is added that some of the applicants were reported dead, so it was important for the application for leave for a representative suit. She backed that view with the decision of the Court of Appeal in **KJ Motors Ltd & 3 Others v. Richard Kishimba & 7 Others,** Civil Appeal No. 74 of 1999 (unreported) which quoted with approval the case of **Adinani Mohamed Almasi & 5 Others v Mwajabu Abdallah Jongo & Others,** Misc. Land Application No. 42 of 2021 where it was stated that:

> *"The rationale for this view is fairly apparent where, for instance, a person comes forward and seeks to sue on behalf of other persons, those other persons might be dead, non-existent or fictitious. Else he might purport to sue on behalf of persons who have not, in fact, authorized him to do so. If this is not checked it can lead to undesirable consequences. The Court can exclude such possibilities only by granting leave to the representative to sue on behalf of persons*

whom he must satisfy the Court they do exist and that they have duly mandated him to sue on their behalf."

In rejoinder submission, the applicants said that the provision does not impose mandatory requirement to file or defend a representative suit, but filing or defending under representative suit is an option on the parties themselves, thus it was a wrong interpretation on the part of the counsel for the respondent. It was added that the objection is not pleaded in the counter-affidavit. It is pointed out that parties are bound by their pleadings, so it is an afterthought. It was also contended that that point was determined by De-Mello, J.

I have already rejected the claim by the applicants that the objection should be ignored for it was not in the counter-affidavit, I need not repeat that position, so the objection is not an afterthought. I have considered the objection and I am of the view that the same is merited. The applicants ought to have sought leave for a representative suit (application) based on the rationale stated in **KJ Motors Ltd & 3 Others** (supra). That non-compliance is fatal to the applicant's application.

I turn next to consider the protestation by the applicants that the counter-affidavit of the respondent is incurably defective, in that the deponent therein was sworn instead of being affirmed. The deponent too did not verify the facts pleaded therein. They urged the counter-affidavit be struck out and the application be determined ex-parte. They prayed that the application be granted.

Responding to the above, the counsel for the respondent conceded the objection on the counter-affidavit and asked this Court to strike the counter-affidavit out. However, she was quick to point out that despite the striking out the counter-affidavit, the respondent is entitled to submit on points of law. She referred me to **Sakina Issa v. Rashid Juma,** Misc. Civil Application No. 55 of 2021 HC (unreported).

The applicants rejoined that the case of **Sakina Issa v. Rashid Juma** (supra) is distinguishable with the facts of this case because in **Sakina's** case the respondent filed the notice of preliminary objection without filing counter-affidavit, the court allowed the respondent to argue the preliminary objection, while in this application, once the counter-affidavit is struck out, that amounts to non-appearance, whereby the Court has to proceed ex-

parte. It is pressed by the applicants that they have given sufficient cause to warrant the grant to this application as the facts in their affidavit are admitted by the respondent.

This complaint shall not detain me in my determination because the respondent counsel conceded it and asked this Court to strike the counter-affidavit. I proceed to strike it out. But does the striking out the counter-affidavit amount to non-appearance of the respondent as suggested by the applicants? I do not purchase that view because, the respondent submitted on matters on point of law which is permitted in law.

The above discussion, disposes this application in favour of the respondent. However, to show that this application is flawed even on merits, I have to demonstrate it albeit very briefly.

On the merits of the application, it is submitted that the applicants timely lodged the notice on 13th December 2021, but the Deputy Registrar rejected to sign the notice and ordered them to collect the notice of appeal after they received the copies of ruling and drawn order which granted that extension of time. They were unable to get the assistance from the Judge In-charge because at the time, the Judge in-charge was on vacation.

It is further argued that on 13/01/2022 the Deputy Registrar supplied them with the notice of appeal which they served the respondent on 20/01/2022. On complaint to the then Judge In-charge, the Judge in-charge ordered Fredrick Rutashobya Lukuna to reply to their letter and swear an affidavit exempting them from the blame on the delay, but the Court was to blame. It is thus argued that that is sufficient cause for extension of time. They referred me to **Felix Tumbo Kisima v. TTCL Limited & Another** [1997] T.L.R 57 where it was stated thus:

> *"Sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons and causes which are outside the applicant's power, control or to influence resulting in delay in taking any necessary step."*

Since the counter-affidavit is struck out, I will just consider the affidavit and its attachment and the submissions of the applicants. In the first place, have the applicants provided this with the materials to grant them the extension of time they are seeking? On the perusal of the affidavit, the answer should be in the negative. Though the applicants have attached the affidavit of Deputy Registrar Lukuna, the affidavit of the Deputy Registrar, Luambano,

if there is one, has not been attached. Luambano is the one who is said to cause the mess. That Deputy Registrar ought to have sworn an affidavit. That is as per **Ramadhani J. Kihwani v TAZARA,** Civil Application No. 401/18 of 2018, CAT (unreported) in which it was stated that:

> *"In application for enlargement of time, like the present, all material persons must swear affidavits to trigger the Court exercise its discretion under rule 10 of the Rules – see:* ***Mary Rugomora v. Rene Polete****, Civil Application No. 2 of 1992 (unreported)."*

For the above position of the law see also **Jacqueline Ntuyabaliwe Mengi & 2 Others v. Abdiel Reginald Mengi & 5 Others,** Civil Application No. 332/01 of 2021, (unreported) where the Court stated that:

> *"We note that paragraphs 8 and 14 of the 1st applicant's affidavit and paragraph 10 and 11 of Kahendaguza's affidavit* ***contain hearsay not supported by evidence.*** *For instance, in paragraphs 14 and 11 of the respective deponents affidavits they have averred an information obtained from the DR Fovo regarding how best they could*

deal with the so-called defective decree while the said DR has not sworn any affidavit to that effect." [Emphasis mine].

In this application, even the order of the Judge in-charge that directed Lukuna to swear an affidavit has not been attached to the affidavit. Looking at the affidavit sworn by Lukuna the same is vague as to the circumstances that caused the delay because it merely states that *"for unavoidable circumstances".* There ought to be transparent. This gives chance for hearsay evidence as Lukuna did not attend to that alleged notice of appeal. Further, the prior lodged notice of appeal has not been attached to the affidavit. The applicants claim that at the material time the Judge in-charge was on leave, but they have not said that there was no any Judge who was the acting judge in-charge at the material time.

In the circumstances, this Court cannot say that the applicants have provided sufficient cause for the delay or that they have accounted for each day of the delay. The applicants cited for their assistance the case of **John Hilarius Nyakibari v. Republic,** Criminal Appeal No. 125 of 2020, CAT, (unreported) where it was stated that:

"For, it is settled that generally inefficiency of court staff in the performance of their duties should not penalize the unsuspecting litigant."

In my view, the case of **John Nyakibari** (supra) does not assist the applicants who have not brought material(s) to this Court to prove their allegations contrary to the settled law as I have indicated above. The applicants cannot therefore, in the circumstance, be assisted by their claim that they had no hand in the mess caused by the registry including the Deputy Registrar and that they cannot be penalized for it, but it be considered a sufficient cause for extension.

The next basis for granting extension of time, according to the applicants, is the existence of illegality in the impugned decision in Civil Case No. 184 of 2001 which was noted by De-Mello, Judge in Misc. Civil Application No. 554 of 2020.

It is also the rejoinder submission of the applicants that De-Mello, J. found illegality(ies) on the face of judgment and granted them extension of time on the basis that parties were not availed the right to be heard. They insisted that extension of time should be granted citing **Finca (T) Ltd & Another**

v. Boniphace Mwalukisa, Civil Application No. 589/12 of 2018 (unreported). They added that they could not mention the illegality because it had already been determined by De-Mello, J.

I have considered the submissions of the applicants on this wing of the justification for extension of time to lodge the notice of appeal. In my view, the applicants have not availed this Court with material(s) to determine whether there are illegalities and whether the same are apparent on the face of the record. The judgment of this Court in Civil Case No. 184 of 2001 is not attached to the affidavit in support of the application. The applicants too claim that De-Mello, Judge, in her ruling found that there were illegalities in the judgment of this Court, but that ruling of De-Mello, Judge was also not attached to the affidavit in support of this application. In the premises, there is no material supplied to this Court to rule that indeed there is/are illegality(ies) in the judgment of this Court that are apparent on the face of the record to warrant this Court to grant the application for extension of time. In my view, I think, I am supported by **Moses Mchunguzi v. Tanzania Cigarette Co. Ltd,** Civil Reference No. 3 of 2018, CAT, (unreported) where it was stated that:

"It must be made clear that in order for the Court to rely on the issue of illegality as one of the reasons for seeking extension of time, a party must not only list it as one of the grounds for seeking extension but must also establish it and explain it and explain sufficiently to deserve extension of time."

See also **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) where it was ruled that:

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of

jurisdiction; not one that would be discovered by long drawn argument or process."

At this point in my ruling, I am also, I think, bound to advice the applicants in this application and anyone there who would file a suit with many parties be it plaintiffs, defendants, applicants or respondents to adhere to the not settled law that all the names of the parties to the suit or application have to be mentioned. That is in accordance with **Juma Marumbo & 42 Others v Regional Commissioner Dar-es-Salaam & 2 Others,** Civil Application No. 242 of 2016 where it was stated that:

"There is no gain saying therefore that as the application stands, apart from Juma Marumbo, the other applicants have not been disclosed out of the 65 persons listed in the Annexture. It is therefore not certain who the other 42 applicants are.

The effect of an omission to disclose all applicants in an application is to render it incompetent."

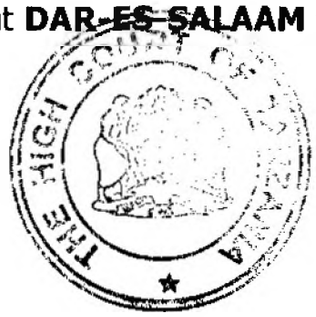
See also **Bernad Masaga, Merchant K. Ikunguru & Others v National Agricultural & Food Corporation & 2 Others,** Civil Application No. 177 of 2006. In this application it was ruled that:

"As it is, no information was forthcoming to show who those ***others*** *are, and whether there was leave granted to Ikungura to represent them. In the light of the failure to disclose who those others are, it will be fair to say that, strictly speaking, there is no proper application before the Court in terms of Rule 46 (1) [now Rule 48 (1) of the Rules."*

On the account of the above discussion save for the advice, I find that the application is not only incompetent but also the applicants have failed to demonstrate sufficient cause for extension of time and have failed to account for each day of the delay. I dismiss the application with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 31st day of May, 2023.



J. F. NKWABI

JUDGE