IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB-REGISTRY

AT TABORA

MISCELLANEOUS LABOUR APPLICATION NO. 4 OF 2023

(Arising from Labour Revision No. 17 of 2020 in the High Court of Tanzania at Tabora, and original Labour Dispute No. CMA/TAB/TBR-MJN/MISC/11 of 2019 before the Commission for Mediation and Arbitration for Tabora)

KULWA SHOTTO.....APPLICANT

VERSUS

NATIONAL MICROFINANCE BANK PLC.....RESPONDENT

RULING

Date of Last Order: 4/12/2023
Date of Delivery: 4/3/2024

KADILU, J.

The applicant filed this application for an extension of time to lodge the notice of intention to appeal to the Court of Appeal of Tanzania against the decision of this court in Labour Revision No. 17 of 2020. The application is brought under Rules 24 (1), (2) (a), (b), (c), (d), (e), (f), Rule (3) (a), (b), (c), (d), and Rule 56 (1) of the Labour Court Rules G.N. No. 106 of 2007 read together with section 11 (1) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] seeking the following orders:

1. *That, this honourable court be pleased to grant an extension of time for the applicant to give a Notice of Intention to Appeal to the Court of Appeal of Tanzania.*
2. *That, this honourable court be pleased to grant any other relief it deems fit and equitable to grant.*

The application is supported by an affidavit sworn by Kulwa Shotto, the applicant. On the other side, the counter affidavit was sworn by George Mwaisondola, an Advocate for the respondent.

The dispute's brief background is that the respondent employed the applicant on 11/9/2008 in the position of Loan Officer. It was alleged that following gross misconduct that occurred in the cause of his employment, the applicant was terminated on 15/8/2017. Aggrieved with the termination, he referred the matter to the CMA. The CMA determined the dispute in favour of the applicant. Dissatisfied with the decision, the respondent filed Revision Application No. 17 of 2020 before the High Court of Tanzania at Tabora.

On 13th December 2022, the High Court delivered a ruling deciding the application in the respondent's favour. Though the applicant was aggrieved, he could not immediately appeal against that decision to the Court of Appeal. Still desirous to pursue his right, he filed the instant application for an extension of time within which to file a Notice of Appeal to challenge the decision of this court in Revision No. 17 of 2020.

The hearing of this application proceeded by written submissions. However, the respondent did not file a reply to the applicant's written submission. I, therefore, had to compose this ruling based on the applicant's written submission alone. Concerning this issue, I wish to state that it is a settled legal principle that failure to file a written submission as ordered by the court is a manifestation of failure to prosecute the case. It is as good as non-appearing on the date fixed for hearing as stated in the case of ***Godfrey Kimbe v Peter Ngonyani***, Civil Appeal No. 41 of 2014.

Having stated so, I now consider the grounds of the application before me. The applicant filed his written submission under the representation of Ms. Stella Thomas Nyaki, Advocate. Supporting the

application, the applicant advanced two grounds to wit, technical delay and illegality on the face of the record. Starting with technical delay, the applicant submitted that his delay was technical for the reason that his Counsel at that time had not informed him of the matter. He further averred that he continued to pursue his case and went to the High Court at Tabora to follow it up when he was informed that the High Court had already delivered a ruling on 13th December 2022 favouring the respondent. He added that on 21st February, 2023 with the help of his Counsel, he managed to obtain a copy of the ruling in respect of Labour Revision No.17 of 2020.

On 9th March 2023, the applicant managed to file an online Misc. Labour Application No. 1 of 2023 which was admitted and registered on 13th March 2023. According to him, when Misc. Labour Application No. 1 of 2023 was scheduled for hearing, it appeared that the application was in contravention of the mandatory requirement of the law as he failed to attach a Notice of Application, Notice of Representation, and the attached affidavit was found to be defective. On 4th August 2023, the Application was struck out for being incompetent. On 21st August 2023, he obtained copies of the said ruling, and on the same date, he filed the instant application.

Ms. Nyaki submitted that the decision of the High Court is mirrored with illegality especially when the learned Judge during the hearing of Revision No. 17 of 2020 reopened a preliminary objection that was already determined by the CMA. According to her, this should be treated as illegality as was discussed in the case of ***Frady Tajiri Chawe v TANESCO,*** Civil Application No. 176 of 2022 with a similar position whereby the court lacked the mandate to hear and determine the

preliminary objection which was already decided. She added that the Judge erred to re-open a preliminary objection that was already decided.

After consideration of the submission from the applicant, the main issue to be determined is *whether the applicant has adduced sufficient cause for the delay for this Court to exercise its discretion in granting an extension of time.* In addressing this issue, this court finds it worth considering two reasons advanced by the applicant in his application regarding the extension of time. First, that the delay was not actual, but rather technical, and second, there is an illegality on the face of the records.

Starting with the technical delay, the deponent in his affidavit in paragraphs 2(iv) (xi)(xii) and (xiii) deponed that, the delay resulted from his Counsel for that time who did not inform him about the status of his case. He further averred that he continued to pursue his application and went to the High Court at Tabora to make a follow-up when he was informed that the High Court had already delivered a ruling on 13th December 2022. He further averred that when Misc. Labour Application No. 1 of 2023 was scheduled for a hearing it appeared that the application contravened the mandatory requirement of the law, as a result, it was struck out for being incompetent.

Therefore, he is of the view that such a delay was just technical. In answering this question, the applicable provision is Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009. It directs that he who intends to appeal should issue a Notice of Intention to Appeal within 30 days. That means the applicant was also, supposed to be served with all documents within 30 days from the date of the decision. However, in this matter, the

delay was more than 90 days from when the decision in Labour Revision No. 17 of 2020 was pronounced. Therefore, such delay cannot be termed as a technical delay. For the principle of technical delay to stand or to be applied, the applicant should file the first application in time, as was discussed in the case of ***Fortunatas Masha v William Shija & Anothers*** (1997) TLR 154 which held that:

> *"A distinction has to be drawn between cases involving real or actual delays and those such as the present one which only involved technical delays in the sense that the original appeal was lodged in time but is incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances, an extension of time ought to be granted."*

The above-cited authority gives a basis under which technical delay may be applied. By filing the application without compliance with the law, the technical delay could not stand as the applicant opted to gamble on what was to be done correctly. If he had filed a similar and proper application like the one at hand, things would have been different because, all along he was on the right track. The technicality of the reason is not acquired by trying different fruitless remedies, but by pursuing a proper remedy, though for some technical reasons, it fails to end on merits.

Thus, the 3 months of remedy gambling in my view, does not constitute technical delay in the context it was set out in the case of ***Principal Secretary, Ministry of Defence and National Services v Devram P. Valambhia*** [1992] TLR 387. The applicant is trying to use the defence of delay being caused by someone else, an Advocate, and

therefore should be imputed on him. That is, negligence be imputed on his former Advocate. Negligence generally connotes inaction rather than acting wrongly. Any action taken by an Advocate on behalf of the client is usually counted as the action of the client. So, if a wrong move, it is still the move by the client, not the Advocate. In the circumstances, it is not the Advocate's negligence that falls in the special circumstances tolerated by the court. The 3 months spent pursuing unfruitful applications constitute an inordinate delay that is not tolerable in accounting for days of delay. This ground advanced by the applicant therefore fails.

Regarding illegality, it is well known that the point of illegality is sufficient ground for an extension of time. However, the respective illegality has to be sufficient in content and apparent on the face of the record as it was held in the case of ***Stephen B.K Mhauka v The District Executive Director Morogoro District Council and two Others,*** Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam. Having gone through the records, I found nothing apparent regarding illegality or irregularity of sufficient importance to warrant the grant of an extension of time.

The record shows that the cause of action arose at Kasulu in Kigoma, but the applicant filed his dispute in the CMA at Tabora. The law requires that a labour dispute is filed at the place where the dispute arose as per Rule 22 (1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007. Therefore, the CMA for Tabora had no jurisdiction to entertain this matter and that was one of the grounds of the application in this court. On this basis, I disagrees with the applicant's assertion regarding illegality in the High Court as deponed in the applicant's affidavit.

In the premises, the court finds that the applicant has failed to adduce good reasons for the delay. Therefore, I hereby dismiss the application for being devoid of merit. Each party shall bear its own costs.

It is so ordered.

KADILU, M.J.
JUDGE
04/03/2024.

The ruling delivered in chamber on the 4th Day of March, 2024 in the presence of Ms. Stella Nyakyi, Advocate for the applicant.

KADILU, M.J.,
JUDGE
04/03/2024.