

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 336 OF 2019

BETWEEN

HAPPY KIWELU.....APPLICANT

VERSUS

SUNSET SOCIAL HALL.....RESPONDENT

RULING

Date of Last Order: 30/04/2020 & 09/06/2020

Date of Ruling: 10/07/2020

A. E. MWIPOPO, J

This application for extension of time to file Revision in this Court is preferred under Rule 24(1), (2)(a)(b)(c)(d)(f), (3)(a)(b)(c)(d), Rule 55(1), (2), and Rule 56(1)(2)(3) of the Labour Court Rules, G.N. No. 106 of 2007.

The applicant namely **HAPPY KIWELU** is applying for the Court Orders in the following terms:

1. That, this Court be pleased to grant extension of time to file labour application for revision out of time against the CMA decision made

on 29/11/2016 in Labour Dispute No. CMA/DSM/KIN/R.576/14, which was received by the applicant on 19/12/2017.

2. That, the Court be pleased to grant leave to file a fresh application for revision out of time.
3. Any other relief that this Court may deem fit and just to grant.

Brief history of the application is that the applicants was employed by the respondent Sunset Social Hall on 01/06/2009 as a cook and she was terminated on 05/10/2014. Aggrieved by the termination, the applicant referred the dispute to the Commission for Mediation and Arbitration Dar Es Salaam where it was registered as Labour Dispute No. CMA/DSM/KIN/R.803/576/14. The CMA did find that the termination was not fair and ordered for the respondent to pay the applicant a total of Tshs. 640,000/= being notice of termination and leave allowance. The applicant was aggrieved by the decision of the Commission and decided to file Revision Application No. 39 of 2017 which was struck out on 13/07/2017 for want of jurisdiction. The Applicants filed another revision application no. 327 of 2017 which was withdrawn later on and on 20/08/2018 she filed Miscellaneous Application No. 255 of 2017 praying for extension of time to file the Revision Application out of time. The Miscellaneous Application No. 255 of 2017 was struck out by this Court for incompetence and the Applicant was given 7 days

leave to file proper application. The applicants filed another Miscellaneous Application No. 392 of 2018 praying for extension of time to file the Revision Application out of time but the same was struck out on 22/05/2019 for incompetence. Thereafter, the applicants filed the current Miscellaneous Application No. 336 of 2019 praying for extension of time to file the Revision Application out of time.

The applicant in this case is represented by Mr. Michael Deogratus Mgombozi, Personal Representative from Tanzania Union of Private Security Employees (TUPSE), whereas the respondent was represented by Mr. Emmanuel Nasson, the learned advocate. When the application came for hearing on 30/04/2020 the Court ordered the hearing of the application to proceed by way of written submissions and parties filed their submissions within time as ordered.

In support of the application, the applicant submitted that there are two main reasons for the Applicant's delay to file revision application within time prescribed by the law. The first reason is that she was served with the copy of the CMA Award late after the delivery of the Award. The second reason for the delay is that she has been in this court since 07/02/2017 litigating her revision application and applications for extension of time which were all struck out in legal technicalities.

The applicant states that after the delivery of the Commission Award on 29/11/2016 she approached Legal and Human Rights Centre (LHRC) for assistance to prepare revision application for revision against the Commission Award. The copy of the Commission Award was received by the applicant on 19/12/2016 and the LHRC delayed in preparing the application for revision as result it was filed on 07/02/2017. After receiving the copy of revision application from LHRC she did file it to the Court within time.

On the second reason for the delay the applicant submitted that from 07/02/2017 to date she has been in Court seeking for extension of time to file revision application but the applications were struck out on technical grounds. She is of the view that technical delay is a good cause for the Court to condone or abridge the period. In support of her position she cited the case of **Christopher and 5 Others v. Tanzania Ports Authority (TPA)**, Misc. Labour Application No. 126 of 2015, High Court Labour Division, at Dara Es Salaam, (Unreported); **Palm Beach Casino v. Theresia Martin**, Misc. Labour Application No. 54 of 2019, High Court Labour Division, at Dara Es Salaam, (Unreported); and **Ally Sacha Bakari and Others v. National Housing Corporations**, Misc. Labour Application No. 344 of 2016, High Court Labour Division, at Dara Es Salaam, (Unreported). The applicant

prayed for the Court to grant the extension of time to file Revision Application against the Commission's Award dated 29/11/2016.

In reply the respondent first raised preliminary objection on point of law that the application for extension of time is incompetent as it is seeking to file application which was dismissed by this Court. The respondent submitted that the applicant filed Revision Application no. 39 of 2017 in this Court which was dismissed on 13/07/2017 for want of jurisdiction as it was time barred. He is of the opinion that the remedy available for a dismissed case is for the applicant to appeal against the decision and not to file another application for extension of time.

Then, the respondent proceeded to submit in opposition to the grounds for the delay as submitted by the applicant. He submitted that the two reasons as submitted by the applicant do not amount to sufficient cause for extension of time. The applicant submission that she filed her first application within time but the same was dismissed for want of jurisdiction is confusing. The applicant have stated in paragraph 17, 18 and 19 of her affidavit that the revision was filed late because her lawyer was in vacation. The reason is no sufficient for the Court to extend the period of limitation.

The respondent submits that the applicant have stated that she has been in Court all the time, but she has been filing defective applications in Court from the time her first application for revision was dismissed. This shows that the applicant lacks diligence hence causes unnecessary trouble and cost to the respondent. He submitted further that the applicant failed to account for delay of each and every day and she has even failed to establish the number of days she has delayed or extent of her delay. Therefore, for the good end of justice to both parties, the respondent is of the view that the matter need to come to an end and he prayed for the application to be dismissed.

The applicant did not file any rejoinder submission.

From submissions from both parties issues for determination are as follows:

1. Whether this application for extension of time is incompetent as it has already been dismissed by this Court.
2. If the answer to the 1st Issue is negative, whether the applicant have provided sufficient cause for the Court to extend the period of time limitation prescribed by the law.

The respondent have submitted regarding the first issue that the application for extension of time is incompetent as it is seeking to file revision application which was dismissed by this Court. The applicant filed Revision Application no. 39 of 2017 in this Court which was dismissed on 13/07/2017 for want of jurisdiction as it was time barred. He is of the opinion that the remedy available for a dismissed case is for the applicant to appeal against the decision and not to file another application for extension of time. The applicant did not file rejoinder submission as result she did not respondent to the objection raised by the respondent.

The record available does not show that the Revision Application No. 39 of 2017 was dismissed by the Court but rather it was struck out for being filed out of time prescribed by the Law. The applicant filed application on 07/02/2017 which was out of six weeks from the date when the award was served on the applicant as provided by section 91 (1) (a) of the Employment and Labour Relation Act, 2004. According to the applicant submission and paragraph 10 of her affidavit the Commission Award was served to the applicant on 19/12/2016. Six weeks ended on 01/02/2017 but the applicant filed the revision application on 07/02/2017 which was out of time prescribed by the law. The applicant stated that the revision was struck out for want of jurisdiction as the matter was filed out of time.

I don't agree with the respondent submission that the Revision was dismissed since the Court Could not have dismiss the matter which was not properly before it. The matter is dismissed only where it was heard on merits and not otherwise. The East Africa Court of Appeal in the case of **Ngoni - Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman**, (1959) E.A.577 expressed the view that an order for dismissal implies that a competent appeal/suit has been disposed of on merits while an order striking out implies that there was no proper appeal/suit capable of being disposed of. Therefore it is obvious that the Revision Application No. 39 of 2017 was struck out by the Court for want of jurisdiction as it was filed out of prescribed time. Moreover, the respondent did not file the alleged ruling of the Court in the alleged revision to support his allegation. Therefore, I find out that the Preliminary Objection raised by the respondent have no merits and as result the answer to the first issue is negative.

The second issue is whether the applicant have provided sufficient cause for the Court to extend the period of time limitation prescribed by the law. The applicant have submitted that reasons for the Applicant's delay to file revision application within time prescribed by the law is that she was served with the copy of the CMA Award late after the delivery of the Award and that she has been in this court since 07/02/2017 litigating

her applications which were all struck out in legal technicalities. In contention the respondent submitted that submitted that the two reasons as submitted by the applicant do not amount to sufficient cause for extension of time. The applicant reasons for the delay that the revision was filed late because her lawyer was in vacation and that all her applications were struck out in legal technicalities are not sufficient for the Court to extend the period of limitation. The filing defective applications in Court shows that the applicant lacks diligence.

In an application for extension of time, it is a discretion of the Court to grant an application for extension of time upon a good cause shown. The Court of Appeal in the case of **Tanga Cement Company Vs. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania (Unreported) the Court of Appeal held that:

".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From

decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant.”

From above decision there are several factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant. Thus, what amount to a good cause depends on the circumstances of each case. (See also the case of **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processors Ltd, Civil Application No. 13 of 2010, Court of Appeal of Tanzania**).

The applicants in the present case have submitted that the delay in filing the revision application was caused by several reasons including that the Commission Award was served late, the applicant's Advocate delayed in preparing the application and that all this time the applicant was busy in court litigating her applications which were all struck out in legal technicalities. The evidence available in record contradicts applicant's assertion that the Commission award was served late to the applicant. Even if the counting of six weeks will start from the date when the Commission

award was served to the applicant still the applicant revision was filed out of time as 6 weeks came to an end on 01/02/2017 while the applicant filed the revision application on 07/02/2017. Therefore this reason is meritless.

Another reason for the delay is that the LHRC delayed to prepare application for revision as the lawyer handling the matter was on vacation. The applicant have asserted this allegation to the LHRC and its lawyer whom his or her name was not revealed without proof whatsoever of the assertion. According to section 110 (1) of the Evidence Act, Cap. 6 of R.E. 2002 the person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts. Therefore she was supposed to prove that the delay was caused by LHRC and the lawyer who was handled the matter.

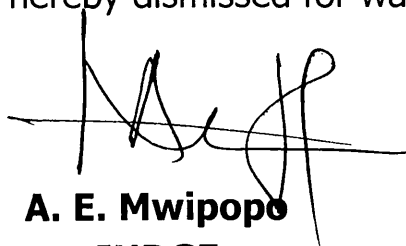
The applicant submitted that from 07/02/2017 to date she was litigating her applications in this Court which all of them were struck out on technicalities. She is of the view that this is a sufficient ground for extension of time to be granted by this Court. The respondent in opposition was of the view that this shows that the applicant lacks diligence. I'm of the same opinion as the respondent that the act of the applicant lodging applications which were struck out by this Court three times in a row for incompetence does not amount to be diligent acting by the applicant, but rather it show's

some negligence on her side. This Court in the case of **Said Ramadhan Vs. Geita Gold Mining, Miscellaneous Labour Application No. 29 of 2013, High Court Labour Division, (unreported)**, was of the opinion that delay was due to lack of diligence as the evidence shows that the applicant has made a mistake on procedure twice. In the present application the applicant have made mistakes three times consecutively. Therefore, I find this reason also to have no merits at all.

The respondent have submitted that the applicant failed to account for delay of each and every day and she has even failed to establish the number of days she has delayed or extent of her delay. I agree with the respondent submission that in application for extension of time the applicant is supposed to account for each day of the delay. The Court of Appeal of Tanzania in the case of **Sebastian Ndaula Vs. Grace Rwamafa, Civil Application No. 4 of 2014, Court of Appeal of Tanzania at Bukoba, (Unreported)**, held that "the position of this Court has consistently been to the effect that in application for extension of time, the applicant has to account for every day of the delay". Also in the case of **Bushiri hassan Vs. Latifa lukio, Nashayo, Civil Application No. 3 of 2017, (Unreported)**, the Court of Appeal of Tanzania stated that "Delay of even a single day has to be accounted for otherwise there would be no proof of having rules prescribing

periods within which certain steps have to be taken". In the present case the applicant failed to establish the number of days she has delayed to file her application or the extent of her delay and she did not account at all for each day of the delay.

Therefore, I find that the application have failed in its totality to convince this Court to extend the time for filing revision application out of time. Thus the application is hereby dismissed for want of merits.

A handwritten signature in black ink, appearing to be 'A. E. Mwipopo', written over a horizontal line.

A. E. Mwipopo

JUDGE

10/07/2020