

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS LABOUR APPLICATION NO. 364 OF 2020

BETWEEN

MWAITENDA AHOBOKILE MICHAEL.....APPLICANT

VERSUS

INTERCHICK COMPANY LIMITED.....RESPONDENT

RULING

Date of Last Order: 15/10/2021

Date of Ruling: 19/11/2021

I. Arufani, J.

This ruling is in respect of the application for extension of time to lodge a notice of appeal to the Court of Appeal against the decision of this Court (Hon. Mipawa, J. as he then was) dated 20th March, 2014 delivered in Labour dispute No. 30 of 2010. The application is made under Rule 24 (1), 24 (2) (a), (b), (c), (d), (e) and (f), 24 (3) (a), (b), (c) and (d) and Rule 55 (1) & (2) and 56 (1) of the Labour Court Rules GN. 106 of 2007 (hereinafter referred as the Rules) and section 11 (1) of The Appellate Jurisdiction Act [CAP 141 R.E 2019] (hereinafter referred as the Appellate Jurisdiction Act).

The application is supported by the affidavit of Benjamin Mwakaganda, the applicant's counsel and it was opposed by the counter affidavit sworn by Mathew Simon Kakamba, counsel for the respondent. By consent of the counsel for the parties the application was argued by way of written submission.

Submitting in support of the application, Advocate Kelvin Kidifu prayed to adopt the affidavit supporting the application as part of his submission. He submitted that, the reasons for seeking extension of time are explained at paragraph 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the affidavit supporting the application. He stated that, the appeal which was filed in the Court of Appeal within the time was withdrawn after being found the notice of appeal was not served to the respondent and the certificate of delay had defects as it contained different dates with the letter of requesting for the certificate of delay.

Thereafter the applicant filed in the court an application for extension of time to file notice of appeal to the Court of Appeal out of time but the application was struck out after being found it was incompetent. After the application for extension of time being struck out the applicant filed the application at hand in the court seeking for

extension of time to file in the court the notice of intention to appeal to the Court of Appeal against the above stated ruling of this court.

Advocate Kelvin Kidifu submitted that, from the date of delivery of the impugned ruling on 20th August, 2014 the applicant was pursuing his matter as the appeal they filed in the Court of Appeal was withdrawn and the previous application for extension of time they filed in this court was struck out due to technical reasons. He referred the court to the case of **Fortunatus Masha V. William Shija and another** [1997] TLR 154 and the case of **Yara Tanzania Ltd. v. DB Shapriya & Co. Ltd.**, Civil Application No. 4398/16/2016. In fine he prays the application be granted.

Responding to the applicant's counsel's submission, Mr. Mathew S. Kakamba started by addressing the prayer of the applicant as stated in the notice of application and what is deposed at paragraph 6 of the affidavit supporting the application. He argued that, upon reading what is stated therein he has found it is crystal clear that, there is no doubt that the appeal before the Court of appeal was withdrawn because of fundamental omission occasioned by the previous applicant's counsel at the time he filed the record of appeal in the Court of Appeal.

He stated that, the omission was improper filing of notice of appeal and failure to serve the same to the respondent contrary to Rule 84 (1) of the Court of Appeal Rules. He stated further that, the respondent has not shown any sufficient reason for failure to serve the notice of appeal to the other party. He submitted that, failure to serve the Notice of appeal to the other party is not a technical aspect rather it is an incurable omission. At the end he prays the application be dismissed with costs.

Having considered the parties submission and after going through the court records and the relevant laws, the court has found the issue to determine in this application is whether the applicant has established sufficient or good reasons for the delay to file notice of appeal in the court within the prescribed period of time.

The court has found it is a requirement of the law as provided under Rule 83 of the Court of Appeal Rules, R.E 2019 (hereinafter referred as Court of Appeal Rules) that, a person who is aggrieved by a decision of the High Court and he wish to appeal to the Court of Appeal to file notice of appeal in the High Court within thirty days from the date of the decision against which it is desired to appeal. The intended appellant is also required by Rule 84 (1) of the Court of

Appeal Rules to serve the copies of the notice to appeal to all persons who seem to him will directly be affected by the appeal.

Where the intended appellant has failed to lodge the notice of appeal in the High Court within the time prescribed by the law the high court is vested with power by section 11 (1) of the Appellate Jurisdiction Act to extend the time within which to file notice of appeal to the Court of appeal. it is also a settled law that in any application for extension of time, the applicant is required to state sufficient cause for his delay. What amounts to sufficient or good cause have been discussed in a range of cases including the Court of Appeal case of **John Mosses and Three Others v. The Republic, Criminal Appeal No. 145 of 2006** where the position of the law stated in the case of **Elias Msonde v. The Republic, Criminal Appeal No. 93 of 2005** was quoted. The Court of Appeal stated that:-

'We need not belabour the fact that it is now settled law that in application for extension of time to do an act required by law, all that is expected by the applicant is to show that he was prevented by sufficient or reasonable or good cause and that the delay was not caused or contributed by dilatory conduct or lack of diligence on his part'.

It was also stated by the Court of Appeal in the case of **Blue Line Enterprises Ltd. V. East African Development Bank**, Misc. Application No. 135 of 1995 (unreported) that:-

"...it is trite law that extension of time must be for sufficient cause and that extension of time cannot be claimed as of right, that the power to grant this concession is discretionary, which discretion is to be exercised judicially, upon sufficient cause being shown which has to be objectively assessed by Court."

That being the position of the law in relation to an application for extension of time to do anything required by the law the court has found the reason advanced by the applicant to substantiate his delay were that, the first appeal filed in the Court of Appeal was withdrawn on 1st November, 2019 due to the anomalies found on the record of appeal. It was argued that, after the appeal being withdrawn, on 6th November, 2019 the applicant applied for a copy of the order withdrawn the appeal and he obtained the same on 18th November, 2019 and filed in the court an application seeking for extension of time on 29th November, 2019.

It was stated further that, the application filed in the court by the applicant was struck out on 6th August, 2020 with leave to refile

after the applicant's counsel conceded to the point of preliminary objection raised by the respondent and followed by filing of the present application in the court. The court has considered the afore stated reasons for the applicant's delay to lodge in the court the notice of appeal to the Court of Appeal within the time prescribed by the law and find that, the applicant has demonstrated the whole period of the delay he was in the court's premises pursuing for his right. He has also supported the application by citing in his application the cases of **Fortunatus Masha** and **Yara Tanzania Limited** (supra) where the ground of technical delay was used to grant extension of time.

The court has considered the argument by the counsel for the respondent that withdraw of the appeal of the applicant from the Court of Appeal was not because of technical delay but due to fundament omission of failure to serve the respondent with the notice of appeal and letter of seeking for certificate of delay written to the Deputy Registrar of the court and find that, although it is true that the appeal was withdrawn from the Court of Appeal because of the stated reasons but it has not been established the stated omission is

sufficient ground for denying the applicant the order of extension of time is seeking from this court.

The court has come to the above finding after seeing that, it is true as argued by the counsel for the respondent that Rule 84 of the Court of Appeal Rules is couched with the word "*shall*" and when such word is used in some provision of the law to confer function to be performed it is mandatory for the conferred function to be performed. However, it is not always that when the word "*shall*" is used in a provision of the law and the function conferred to be performed is not performed the omission cannot be cured. To the view there are some circumstances where even if the word "*shall*" is used, the omission can be cured. One of those circumstances is like the one in the present application.

The court has come to the above finding after being of the view that, the effect of failure to comply with the requirements provided in the cited provision of the law is to render an appeal incompetent which its remedy is to apply for withdrawal of the appeal as it was done by the applicant or the appeal to be struck out by the court. It is the view of this court that, after the appeal being withdrawn or struck out if the time to refile the appeal has elapsed, if an appellant

or an applicant wish to refile the appeal is required to seek for extension of time to refile the appeal out of time as the applicant is seeking in the present application.

What the applicant is required to do is to satisfy the court he was delayed by sufficient, reasonable or good cause to file the appeal in the court within the time prescribed by the law. The court has found that, the applicant in the present application has managed to satisfy the court and without being challenged by the counsel for the respondent that for the whole period from when the impugned decision of the court was delivered to the date of filing in the court the application at hand he was pursuing for his rights before the courts but the matters he lodged in the courts were withdrawn and struck out because of the stated technical reasons.

That being the position of the matter the court has found it cannot be said the applicant cannot be granted the order of extension of time to lodge his notice of intention to appeal to the Court of Appeal in the court out of time. The court has come to the above view after seeing the delay of the applicant as held in the case of **Fortunatus Masha** and **Yara Tanzania Limited** (supra) is a technical delay which our courts have been accepting the same as a

sufficient ground for granting extension of time to a person seeking for extension of time.

Although it is true as argued by the counsel for the respondent that there is no time our courts have condoned negligence of the parties in a matter but the counsel for the respondent has not stated which negligence was committed by the applicant which cannot be condoned by the court. The court has found that, a mere fact that the applicant failed to comply with Rule 84 of the Court of Appeal Rules is not sufficient enough to say the applicant was negligent in pursuing for his rights. To the view of this court that can be taken is a human error which in some circumstances our courts have been using the same to grant extension of time.

The above view of this court is being bolstered by what was stated in the case of **Yusufu Same and Another V. Hadija Yusufu**, Civil Appeal No. 1 of 2002, CAT (unreported) where it was stated as follows:-

*"Generally speaking, an error made by an advocate through negligence or lack of due diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and similar jurisdiction **But there are times, depending on the overall circumstances***

surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate." [Emphasis added].

When the Court of Appeal of Tanzania was dealing with the similar issue of negligence of advocate for the applicant in an application for extension of time in the case of **Bahati Mussa Hamisi Mtopa V. Salum Rashid**, Civil Appeal No. 112 of 2018, CAT at DSM (unreported) it used the above quoted excerpt from the case of **Yusufu Same and Another** (supra) to hold there are some circumstances where even if it appears there is element of negligence or lack of due diligence on the part of the advocate for the applicant but extension of time can be granted. In making its decision the Court of Appeal relied also in a persuasive decision made in the Kenyan's case of **Githere V. Kimungu**, [1976 - 1985] 1 EA 101 (CAK) where it was stated as follows:-

"That where there has been a bona fide mistake, and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard; and, accordingly, a procedure error, or even a blunder on a point of law, on the part of an advocate (including that of his clerk) such a failure to take

prescribed procedural steps or to take them in due time, should be taken with a human approach and not without sympathy for the parties, and in a proper case, such mistake may be ground to justify the court in exercising its discretion to rectify the mistake if the interest of justice dictates, because, the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better.”

After taking into consideration the position of the law stated in the cases cited hereinabove together with the position of the law stated in the case of **Yara Tanzania Limited** (supra) where Kenyan cases of **Savings and Loan Kenya Ltd. V. Onyacha Bwomonte**, Civil Application No. 70 of 2004 and **Belinda Murai & Others V. Amos Wainaina**, Civil Application No. 9 of 1978 were cited and stated the court should not keep the door of justice closed as the duty of the court is to do justice to the parties the court has found that, there is no justifiable reason to deny the applicant chance of refiling notice of appeal to the Court of Appeal is seeking from this court.

In fine the court has found the applicant has satisfied it that there is reasonable and sufficient cause for the order of extension of time to file in the court the notice of appeal out of time to be

granted. In the upshot the application is granted and the applicant is given fifteen (15) days from the date of this ruling to file in the court the notice of intention to appeal to the Court of Appeal. Order accordingly.

Dated at Dar es Salaam this 19th day of November, 2021

Jeee

I. Arufani

JUDGE

19/11/2021

Court: Ruling delivered today 19th day of November, 2021 in the presence of Mr. James Mwenda, Advocate for the Applicant and in the presence of Mr. Beatus Kiwale, Advocate for the Respondent. Right of appeal to the Court of Appeal is fully explained.



Jeee

I. Arufani

JUDGE

19/11/2021