

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
(AT DAR ES SALAAM)

MISC. LABOUR APPLICATION NO. 320 OF 2020

BETWEEN

**REGISTERED TRUSTEE OF
BENJAMIN MKAPA FOUNDATION APPLICANT**

VERSUS

OLIVER MUREMBO RESPONDENT

RULING

S. M. MAGHIMBI, J.

This is an application for extension of time to lodge a notice of appeal against the decision of this Court dated 28/10/2011 in Revision No. 395 of 2015. The application was lodged after the previous notice was struck out by the Court of appeal for inaction of the applicant. The application is lodged under the provision of section 94 (1) (f) (i) of the Employment and Labour Relations Act, [CAP 366 RE 2019] (herein the Act), Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a)(b) (c) (d), 28 (1) (c) (d) (e) and Rule 55 (1) of the Labour Court Rules GN. 106 of 2007 (herein Labour Court Rules) and section 11 (1) of The Appellate

Jurisdiction Act [CAP 141 R.E 2002] (herein the Appellate Jurisdiction Act).

The application emanates from the following background; the respondent was a successful complainant at the Commission for Mediation and Arbitration (CMA) on a dispute concerning discrimination and harassment by the Chief Executive Officer of the applicant foundation. She was subsequently granted general damages of Tshs. 50,000,000/=. Aggrieved by the CMA's award, the applicant unsuccessfully filed before this Court a Revision No. 395 of 2015. This court upheld the CMA's decision and the Revision was dismissed in its entirety on 28/10/2016. Still dissatisfied, it would appear that the applicant intended to appeal to the Court of Appeal against the decision of this court. This is evidenced by a notice of appeal lodged in this court On 10th November, 2016 and served to the applicant on 5th December, 2016. There were subsequent applications filed in this court namely Misc. Labor Application No. 505/2016, an application which was struck out. Another application was Misc. Labor Application No. 124/2017 which was withdrawn. The respondent had also lodged an Execution No. 385/2017 whereby on 14/12/2017, the Honorable Registrar ordered the applicant (then decree debtor) to deposit in court's account the whole of the decretal amount as decreed by the CMA within three weeks of the date of the decision and that if the decree debtor did not comply within the time prescribed, the execution by way of garnishee order will proceed without further notice to the Decree Debtor.

During the pendency of the notice of appeal, the respondent made an application to the court of appeal moving the court to struck out the notice of appeal on the ground that the applicant failed to take

necessary steps to institute the intended appeal within the prescribed time. The application was registered as Civil Application No. 489/18 of 2018 and on the 21st day of July, 2020, the Court of Appeal granted the application and struck out the notice of appeal. On page 10 of the decision of the Court of Appeal, the Court wrote:

Following the dismissal of the notice of appeal, the applicant filed the present application for extension of time to file another notice of appeal. The respondent vehemently opposed the application by filing a counter affidavit. Before this court, and on the day of the hearing, the applicant was represented by Mr. Said Nyawambura Learned Counsel while the respondent enjoyed the services of Mr. Abdallah Kazungu.

On the onset of his oral submissions to support the application, Mr. Nyawambura first prayed for the court to adopt the applicant's affidavit to form part of his submission. He then submitted that immediately after the decision on 08/11/2016, the applicant filed the notice of appeal to appeal to Court of Appeal complying with the provisions of Rule 83 (2) of the Court of Appeal Rules, 2009. That the notice of appeal was struck out, by the Court of Appeal on 21/07/2020 after it was observed that the respondent was served out of time prescribed by the court. That the applicant was served on 05/12/2016 while the notice was lodged on 28/10/2016.

Mr. Nyawambura went on submitting that, after the notice of appeal was struck out is when they lodged this application for extension of time to file new notice of appeal. To support his submission, he cited the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Appl. No. 02 of 2010**, CAT, Arusha (unreported)

which was cited in the case of **Bruno Stanslaus Nyalifa v. PS Ministry of Home Affairs and the Hon. AG**, Civ Appl. No. 82 of 2017 where the court elaborated the grounds for granting an order for extension of time.

He submitted further that the reasons for applying for extension of time are also explained in the affidavit in support of the application and that even if the court sees that the advocate was negligent in any way, the applicant should not be judged by the mistake committed by her advocate. To buttress this submission, he referred the court to the case of **Kambona Charles (as administrator of the estate of the late Charles Pangani) v. Elizabeth Charles, Civ. Appl. No. 529/17 of 2019** as well as the case of **Zuberi Mussa v. Shinyanga Town Council, Civ. Appl. No. 03 of 2007**. He then submitted that the advocate acted on time to file notice but delayed in serving the notice of appeal, an error which was not intended. He therefore prayed for the application to be granted.

In reply, Mr. Kazungu contended that Mr. Nyawambura is misleading the court by not telling the truth of what happened to the court of appeal leading to the striking out of the notice. He submitted that the issue was not late service as Mr. Nyawambura alleges it to be, but it was that they did not take necessary steps to lodge the appeal on time. He submitted further that after filing the notice of appeal on time, the applicant was supposed to apply for copy of proceedings and judgement within 30 days for which he failed to make an application on time and instead, the applicant applied for copies of proceeding on 13/12/2018 which is two years after the judgment was pronounced by Hon. Mipawa (the finding of the court of appeal on page 9 and 10 of the

decision) therefore it is clear there was negligence on the part of the advocate. went on submitting that the cases of **Kambona Charles** (supra) and **Bruno Stanlaus** (supra) cited by Mr. Nyawambura are irrelevant to the case at hand. That in this application the applicant did not account for his delay and that the matter was struck out by three judges of the court of appeal therefore the cases decided by single judges cited by Mr. Nyawambura cannot overrule their decision.

Mr. Kazungu concluded that the applicant has failed to convince the court to grant the application. That this application was made intentionally to make the respondent suffer because of the economic super power of the applicant, he therefore urged the court to dismiss the application.

In rejoinder, Mr. Nyawambura contended that the submission about the notice of appeal being served out of time was not a reason for the notice to be struck out is misconceived. He urged the court to look at the court of appeal decision at page 10 where the court held that the applicant did not serve the respondent with the notice of appeal and the letter requesting copy of proceedings within prescribed time. He added that even after the decision of Honorable Judge Mipawa, there was a requirement to apply for leave through Misc. Appl. No. 124/2017 where the applicant had to withdraw her application following the decision in the case of **Tanzania Teacher's Union Vs. Attorney General & 3 Others, Civil Application No. 96/2016**. That as per the practice of the labour court, on the same date they were handed a copy of judgment and decree, so he could not apply for the copies as it was already given to him. He therefore urged the court to grant the application.

Having heard the parties, and having gone through the records of this application including the decision of appeal striking out the applicants' notice of appeal, I am now guided by the principle laid down in the case of **The case of Lyamuya Construction (supra)** cited by Mr. Nyawambura which listed the factors to take into consideration in the grant of the application at hand. It was held that: -

'As a matter of general principle, it is in the discretion of the court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated: -

- (a) The applicant must account for all 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.'*

As for the application at hand, I find that the main issue to look at, before justifying whether or not time may be extended for the applicant, is to see whether the reason that led to the striking out of the notice of appeal were indeed valid to justify a second chance. Thus I will be mainly guided by the reasoning of the Court of Appeal while striking out the notice of appeal.

First of all, I have noted that Mr. Nyawambura has attempted to blame the striking out of the notice of appeal to the series of application filed in this court as I have mentioned above, but the period of delay that the applicant would have been required to mainly explain is why he delayed so much in taking any action after lodging the notice of appeal. Indeed that is the period that the applicant would have strived to justify because in principle, after what has been determined by the Court of Appeal about the inaction of the applicant, I don't think there is much that this court can determine in disregard of the finding of the Court of Appeal. For instance, while striking the notice of appeal, the Court of Appeal (Madame Justice Levira JA) held on page 10:

*The counsel for the respondent claimed that he tried to serve the counsel for the applicant with a copy of the said letter but he refused service. **We had an opportunity of setting an eye on the said letter.** We observed that **the letter to the Registrar of the High Court applying for the copies of the judgment, decree and proceedings was written by the counsel for the respondent on 13th December, 2018** and it was received by the Court on 17th December, 2018.*

Rule 90(1) of the Rules** requires an appeal to be instituted within sixty days of the date when the notice of appeal is lodged and **an application for proceedings to be made within thirty days of the date of the decision against which it is desired to appeal.** In the current application, **the decision against which the respondent desires to appeal against was delivered on 28th October, 2016** and the **letter to request for the copy of the said decision and proceedings was

written on 13th December, 2018. *It is very clear that the respondent did not comply with Rule 90(1) which required her to apply for the proceedings within thirty days of the date of the impugned decision. (Emphasis is mine)*

Up at this point, the court of appeal found that there was so much delay on the part of the part of the applicant to have the necessary documents compiled so as to pursue her appeal. It should be noted that this reason is independent of the reasons that Mr. Nyawambura sought to justify their delay, that there were a series of applications filed in court because however many those appeals were, the applicant was still duty bound to adhere to the time frames that were set under the Court of Appeal Rules, 2009, which according to the reasoning of the Court of Appeal above, they were highly not complied with.

There is also another aspect which the applicant failed to justify during the hearing at the Court of Appeal. The delay in serving the respondent herein with the notice of appeal. This is found on page 6 of the Court of Appeal's decision:

The respondent's notice of appeal which was lodged on 10th November, 2016 indicated clearly that, she was not satisfied with the decision of the High Court in Revision No. 395 of 2015 which dismissed her appeal against the applicant who was the respondent therein. In the circumstances, the applicant is among persons who are expected to be affected by the intended appeal. Therefore, she is well covered under Rule 84(1) of the Rules which as already alluded above, requires the intended appellant to serve all persons who seem to him to be directly affected by the appeal within fourteen days of lodging the notice of appeal.

However, the respondent did not comply with the requirement of that provision as she served the applicant beyond the prescribed time. To be precise, the notice of appeal subject of this application was filed on 10th November, 2016 and applicant was served on 5th December, 2016. By simple calculation, the applicant was supposed to be served with the said notice by 24th November, 2016. Thus, the respondent delayed to serve her for about eleven days. Failure to serve the applicant within the prescribed time in our settled view amounted to failure to take essential steps required by the law.

The Court therefore held that the applicant was to apply for extension of time to serve the respondent herein with the notice of appeal, something which he did not do. So wrote the Court on page 8:

We note that counsel for both sides were at one that the respondent did not apply for extension of time before serving the applicant. We have perused the record and we agree with the learned counsel for the parties that there was no such application.

The whole decision of the court of appeal is clear that the applicant was inactive in pursuing his appeal and there was no justification in the established delay. This is also clearly observed in the conclusive remarks of the decision of the Court:

*For the above stated reasons, we agree with the applicant that the **respondent failed to take necessary steps after lodging the notice of appeal.** She did not serve the applicant with the notice of appeal and the letter requesting for the copy of*

*proceedings within prescribed time. Therefore, **we hereby strike out the respondent's notice of appeal for failure to take necessary steps.***

It is clear that the notice of appeal was struck out at the court of appeal for reason of inaction. The issue will therefore be, under those circumstances, it justifiable and fair to grant the application for extension of time after the applicant's inaction for more than two years? In determining so, I also have to look at things from the respondent's perspective. The contested decision in this matter was delivered on 28/10/2016 which is approximately four years and eleven months now. In my view the matter has taken too long and has to be finalized to release the parties engage into other productive activities rather than attending courts sessions. It will therefore be highly unfair if the application is granted at the instance of the applicant because the respondent has a right to enjoy the fruits of her decree. That said, it is my conclusive finding that the applicant has failed to adduce sufficient reasons to warrant the discretion of this court to extend time to lodge the notice of appeal. The application is hereby dismissed.

Dated at Dar-es-salaam this 06th day of September, 2021.



S.M. MAGHIMBI.
JUDGE.

