

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM  
MISCELLANEOUS LABOUR APPLICATION NO. 348 OF 2020**

**BETWEEN  
UNIVERSITY OF DAR ES SALAAM.....APPLICANT  
VERSUS  
DOROTHY PHUMBWE.....RESPONDENT**

**RULING**

*Date of Last Hearing: 23/09/2021*

*Date of Ruling: 05/11/2021*

**I. Arufani, J.**

This ruling is for the application seeking for extension of time within which the applicant can file in the court an application for revision of the decision delivered by Hon. Alfred Massay, Arbitrator of the Commission for Mediation and Arbitration (hereinafter referred as the CMA) in Labour Dispute No. CMA/DSM/ILA/R.138/16/209 dated 28<sup>th</sup> April, 2020. The application is made under Rules 24 (1), (2) (a), (b), (c), (d), (e) and (f), (3) (a), (b), (c), (d) and Rule 56 (1) of the Labour Court Rules, GN. No. 106 of 2007 (hereinafter referred as the Rules).

The application is supported by an affidavit deposed by Prof. David Alfred Mfinanga, Deputy Vice Chancellor of the applicant and it was opposed by a counter affidavit deposed by the respondent.

During hearing of the application, the applicant was represented by Ms. Otilie Rutashobya, Legal Officer for the applicant and the respondent was represented by Mr. Brave Sarango, learned advocate holding brief of Mr. Rahimu Mbwambo, Learned Advocate. The applicant's representative told the court that, after being issued with the award from the CMA they filed in this court Labour Revision No. 205 of 2020 seeking for the award to be revised by the court.

However, the respondent filed in the court a notice of preliminary objection which was conceded by the applicant's representative that the application was defective. After the said concession the application was struck out by the court without leave to refile. As time to refile the application had already elapsed the applicant filed the instant application in the court within two days from the date when the application for revision was struck out to seek for leave of the court to refile the application out of time. The applicant's representative argued that, the defect found in the application was not caused by negligence but was a human error.

She argued further that, as deposed at paragraph 14 of the affidavit supporting the application, the applicant has sufficient reasons to believe the award issued by the CMA is tainted with

illegalities which are supposed to be revised by the court. She went on arguing that, they have managed to show sufficient cause for being granted the order the applicant is seeking from the court as provided under Rule 56 (1) of the Rules. She also referred the court to the case of **University of Dar es Salaam V. Benedict Ambrose**, Misc. Labour Application No. 314 of 2020 to bolster her submission and stated the case had the similar circumstances like the present applicant and the court granted leave to refile the application for revision out of time.

In his response Mr. Brave Sarango told the court that, the application cannot be granted as is stemmed from bad application for revision. He said the applicant was negligent in two ways. Firstly, the counsel for the applicant filed in the court the application for revision without citing correct provision of the law. Secondly, the counsel for the applicant did not seek for leave to refile the application for the revision after the application being struck out. He argued that, the court granted extension of time in the case of the **University of Dar es Salaam** (supra) after seeing the applicant had managed to account for all period of the delay.

He went on arguing that, one of the grounds which can cause the applicant to be denied extension of time is negligence. He referred the court to the case of **Frank Leonard Sanga V. Aneth Abdul Mhina**, Miscellaneous Application No. 310 of 2019, HCLD at DSM (unreported) where the application for extension of time was refused after the court seeing the applicant was negligent in prosecuting his matter. It was his submission that, the applicant cannot be made to benefit from the negligence of his advocate at the expenses of the respondent and prayed the application be dismissed with costs.

In her rejoinder the counsel for the applicant distinguished the case of **Frank Leonard Sanga** (supra) from the instant case by arguing that, the counsel for the applicant failed to account for each day of the delay while in the case at hand the applicant has accounted for each day of the delay. She said in their application everything was done on time as even after realizing that the application was defective, they didn't waste time of the court. She stated that, although the record of the court is not showing they sought for leave of the court to refile the application for revision but they sought for the leave.

She said the honorable Judge failed to grant the sought leave after seeing the error was both on the notice of application and on the chamber summons. She argued that, the present application is not stemming from bad application as argued by the counsel for the respondent. She submitted that, the fact that the applicant was being represented by an advocate that does not mean an advocate cannot make mistake as advocates are also human being. At the end she prayed the court to grant the applicant the extension of time is seeking from this court to enable them to refile proper application for revision in the court.

Having carefully going through the affidavit and counter affidavit filed in the court by the parties and after considering the rival submissions from both sides the court has found the issue to determine in this application is whether the applicant has managed to satisfy the court, they were delayed by good cause to lodge in the court the application for revision, they wish to file in the court out of time. The court has framed the above issue after seeing section 56 (1) of the Labour Court Rules upon which the application is made requires a party seeking for extension of time to show good cause for the delay.

The good cause which a party seeking for extension of time is required to show to move the court to grant extension of time is not defined in the Labour Court Rules or any other labour law. Our courts have tried to define it in number of cases and one of those cases is **Bertha V. Alex Maganga**, Civil Reference No. 7 of 2016 where the Court of Appeal stated as follows:-

*"Whilst it may not be possible to lay down an invariable definition of **good cause** so as to guide the exercise of the court discretion, the court is enjoined to consider, inter alia the reasons for the delay, length of the delay, whether the applicant was diligent and degree of prejudice to the respondent if time is extended."* [emphasis added].

Another case where guidelines to be used by the court when considering what amount to good cause for granting or refusing to grant extension of time were formulated by the Court of Appeal of Tanzania is the case of **Lyamuya Construction Company Limited V. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where were stated to be as follows:-

- (a) *"The applicant must account for all days of the delay.*
- (b) *The delay must 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 reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.”*

That being the factors or guidelines the court is required to consider in determining the present application, the court has found it is deposed in the affidavit supporting the present application and it was also argued by the counsel for the applicant, without being challenged by the respondent that, the applicant filed in the court the application for revision of the impugned award of the CMA which was Revision No. 205 of 2020 within the time. It is also not disputed that the afore mentioned revision was struck out after the court upheld the point of preliminary objection raised by the respondent that the revision was defective and conceded by the counsel for the applicant.

The issue in dispute which counsel for the parties locked horn in this application is whether the applicant can be granted the order of extension of time is seeking from the court or should be denied the sought order on the ground that the applicant was negligent in pursuing for their rights. The court has found it is true as stated in

the case of **Lyamuya Construction Company Limited** (supra) that, one of the factors to be observed by the court in an application of this nature is to see the applicant was not negligent in pursuing for his rights.

The court has considered the argument by the counsel for the respondent that the applicant should not be granted extension of time is seeking from the court because their advocate was negligent in filing a defective application in the court and find that, it is true that it has been stated in number of cases that negligence is not a sufficient ground for granting extension of time. However, it has also been stated by our courts in number of cases that there are circumstances where extension of time can be granted notwithstanding the fact that there are same elements of negligence on the part of the applicant in handling a matter. The above stated position of the law can be seen 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. Some were cited by the appellant's advocate in his oral submission. **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.”*

While being guided by the position of the law stated in the above quoted cases the court has found it will not be proper to say the negligence stated by the counsel for the respondent in the present application was done by the counsel for the applicant in the application for revision struck out for being incompetent cannot be tolerated. To the view of this court and as stated in the above cited cases, the court has found that, as rightly argued by the counsel for the applicant what was done by the counsel for the applicant in the application for revision which was struck out was just a human error which can be rectified by granting the applicant extension of time to file a proper application for revision in the court.

The court has arrived to the above finding after seeing that, first of all and as held in the case of **Fortunatus Masha V. William Shija & Another**, [1997] TLR 154 the delay of the applicant was a

technical delay because the application for revision which was struck out was filed in the court within the time. The present application was also filed in the court in two days from the date when the revision was struck out which was immediately after the application being struck. Secondly, the court has found there is nothing material which has been stated or disclosed to show the respondent will suffer any irreparable damage if the applicant will be granted the order is seeking from the court.

It is because of the above stated reasons the court has found there is justifiable reason to exercise its discretionary powers to grant the applicant the order is seeking from this court. In the upshot the application is hereby granted and the applicant is given fourteen (14) days from today to file the intended revision in the court. It is so ordered.

Dated at Dar es Salaam this 5<sup>th</sup> day of November, 2021.



I. Arufani

**JUDGE**

05/11/2021

**Court:**

Ruling delivered today 5<sup>th</sup> day of November, 2021 in the presence of Ms. Otilie Rutashobya, Legal Officer for the Applicant and in the absence of the respondent whose counsel is well aware the matter is coming today for ruling. Right of appeal is fully explained.



*Jessa*

I. Arufani

**JUDGE**

05/11/2021

Labour Court TZ.