IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 65 OF 2021

PUMA ENERGY (T) LIMITED ..... APPLICANT

VERSUS

KHAMIS KHAMIS ..... RESPONDENT

RULING

10th May & 29th June 2022

Rwizile, J

The applicant asked this Court to grant an order extending time within which to file a notice of intention to appeal to the Court of Appeal of Tanzania against the decision of this court dated 02nd August, 2019 in Labour Revision No. 323 of 2019.

Briefly, the respondent was the employee of the applicant. He was terminated for poor performance at work. Not satisfied with termination, he filed Labour Dispute No. CMA/DSM/TEM/533/2016/12/2017 at the CMA. The dispute was heard and on 20th August, 2018 the award was delivered in his favour. He was granted compensation of TZS 323,950,608.00 equal to 36 months salaries, TZS 24,227,075.00 as

severance allowance for ten years he worked with the applicant, and TZS 195,720,159.00 as subsistence allowance. The applicant was aggrieved, in protest, she filed Revision No. 901 in 2018.

It was struck out but was given seven days to refile. Revision No. 323 of 2019 was preferred but it was struck out for being time barred. The applicant being dissatisfied, filed an application for review, slated as No. 496 of 2019. It was dismissed for want of merit. The applicant was again not happy with decision. Since the applicant was late to challenge the same to the Court of appeal, an application No. 226 of 2020 for extension of time to file notice of appeal was filed. It was also struck out with leave to refile because it had a defective affidavit. Then, the applicant filed Miscellaneous Labour Application No. 372 of 2020, which gave way to the present application.

The applicant has enjoyed services of Mr. Gasper Nyika, of IMMMA advocates, while the respondent has been represented by Mr. Evold Paul Mushi of Law Front Advocates.

The applicant advanced two issues for determination as hereunder;

i. Whether the applicant has shown sufficient cause to warrant extension of time.

ii. Whether the applicant has accounted for all the time of delay.

The hearing of this application proceeded by way of written submissions. Submitting on the first issue Mr. Nyika stated that illegality and delay based on technical grounds amount to sufficient reason for extension of time. He supported his submission by citing cases of **William Shija v Fortunatus Masha** (1997) TLR 213, **Benedict Mumello v Bank of Tanzania** Civil Appeal No. 12 of 2002 (unreported) where the Court of Appeal cited with approval the case of **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (unreported). It was his view that since the applicant was in court pursuing applications relating to the same case, it amounts to technical delay. It is excusable as under section 21 of the Law of Limitation Act [CAP. 89 R.E. 2019] which provides for exclusion of the days spent in court prosecuting a case, in this case, an application for review.

The learned counsel was of further argument that, the decision to be challenged has an illegality. He said, the applicant was not given a right to be heard. To support this point, he cited the cases of **Mrs. Fakhiria Shamji v The Registered Trustees of Khoja Shia Ithinasheri (Mza) Jammat** Civil Appela No. 143 of 2019 (unreported) at page 9 and **Mr.**

Lembrice Israel Kivuyo v M/s DHL Word Wide Express DHL Tanzania Limited Civil Appeal No. 83 of 2008 at page 11.

In his view, where a point of law at issue is illegality, the decision to be challenged by itself constitute sufficient reason for extension of time, as held in the case of **VIP Engineering & Marketing Limited and 2 Others v Citibank Tanzania Limited,** Consolidated Civil References No. 6, 7, 8 of 2006, Court of Appeal of Tanzania (unreported) at page 22 and **Principal Secretary, Ministry of Defence National Service v Devram Vallambhia** [1992] TLR 185.

On the second issue Mr. Nyika submitted that it is trite that the applicant has to account for each day delayed. He argued that dates from 5th August, 2019 to 20th August 2019 was spent by the applicant to prepare and to file the application for review. Then dates between 20th August 2019 and 29th May 2020 was spent to prosecute it. Further, he argued that from 29th May, 2020 to 15th June, 2020 was spent in preparing the application for extension of time to file a notice of appeal.

He then stated that days from 29th May 2020 to 5th June 2020 has to be excluded as the applicant was waiting to be supplied with copies of the ruling and drawn order.

He continued to submit that between 5th June, 2020 and 17th June 2020 was spent by the applicant to prepare the first application and between 17th June, 2020 to 13th August, 2020 was spent on prosecuting the application for extension of time. He stated further that between 25th August, 2020 and 11th March, 2021, the applicant was prosecuting the second application. He then submitted that all the time used to prosecute applications should be excluded. He finalised by submitting that the delay was not caused by lack of diligence on part of the applicant. He therefore prayed that time be extended for him to file notice of intension to appeal.

Making a reply, Mr. Mushi submitted that the decision which the applicant wish to challenge by itself is time barred as that was the reason for it to be struck out. He stated further that the decision of the Judge was based on the applicant's admission. In his view, the Court cannot exercise its discretionary power to extend time to challenge the decision which is time barred.

The learned counsel went on to state that the delay was caused by gross negligence of the applicant who spent time prosecuting applications that were incompetent before the court. Mr. Mushi further argued that, the application for review was dismissed due to ignorance of law and the same is not a sufficient ground for extension of time. He said, it did not amount

to technical delay. To support his submission, he cited the cases of **Elia Kasalile & Others v Institute of Social Work**, Labour Review No. 496 of 2019 at page 10 paragraph 2 and **A.H. Muhimbira and 2 Others v John K. Mwanguku**, Civil Application No. 13 of 2005, **The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman bunju Village Government and 4 Others** (unreported) at page 9 and the case of **Vedastus Raphael v Mwanza City Council and 2 Others**, Civil Application No. 594/08 of 2021 (unreported).

It was his submission further that time spent by the applicant in the application for review should not be excluded, because it was due to ignorance of the applicant to opt to prosecute an application for review as if it was an appeal. He stated that there ought to be an appeal lodged in time but found to be incompetent as held in the case of **Director General LAPF v Pascal Ngalo**, CAT Mwanza, Civil Appeal No. 76/08 of 2020 at page 220

Further, the learned counsel stated that the applicant did not account for each day delayed and also did not state when the notice of appeal was to be filed. He stated that from 5th August, 2019 to 20th August, 2019 constitutes 15 days, which is too long to prepare notice, chamber summons and affidavit. To support his submission, he cited the case of

Wenceslaus Nyalifa v The Permanent Secretary and Another, Civil Appeal No. 82 of 2017.

Mr. Mushi submitted that Revision No. 323 of 2019 which the applicant intends to challenge was struck out for being time barred for one day. He continued to argued that the Court cannot rely on the dates mentioned in his submission. In his view, the applicant was supposed to attach documents to prove the same. He then submitted that the application for Revision No. 323 of 2019 was struck out on 02nd August 2019 and the application for extension of time was lodged on 05th April, 2022. He stated that it is almost 3 years which makes almost 900 days of delay, he asked this court to refer to the case of **Lyamuya Constructions Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania** at page 6.

On the issue of illegality, he submitted that, it is not apparent on the face of the record and is also not a question of jurisdiction. Mr. Mushi added that in Revision No. 323 of 2019 the applicant was given right to be heard. He said, it is the applicant who asked the court to have the application be struck out with leave, he conceded the preliminary objection raised. In the view of the learned counsel, the case of **Mrs. Fakhiria Samji** (supra) is distinguishable because in the present case, it is the applicant who

asked the court to strike down the application. The counsel further supported his point by the case of **Africa Barrick Gold PLC v Commissioner General TRA**, Civil Application No. 350/01 of 2019 (unreported) at page 12.

In his view since the matter was struck out, it cannot be subject of appeal and so there is no room for extension of time to lodge a notice of appeal as per the cases of **Masolwa D. Masalu v The Attorney General & Others**, Civil Appeal 21 of 2017 at page 12, **Joseph Mahona @ Joseph Mbije@ Maghembe Mboje and Another v The Republic**, Criminal Appeal No. 215 of 2008 (unreported) and **Ngoni Matengo Cooperative Marketing Union Ltd v Ali Mohamed Osman** [1959] 1, E.A. 577. What constitutes sufficient reason, he added, was defined in the case of the **Manager Tanroads Kagera v Ruaha Concrete Company Limited**, Civil Appeal No. 96 of 2007 at page 6. He then prayed for the application to be dismissed.

In a rejoinder, Mr. Nyika argued that the applicant intends to appeal against the decision that dismissed the application for being out of time.

He continued to submit that the application for review was not prosecuted due to ignorance but rather the applicant believed there was an error apparent on the face of the record. The court, in his view was moved to

correct its error, reference was made to the case of **Director General LAPF Pension v Pascal Ngalo**, (supra). He then stated that negligence of filling review, if any, has already being penalized by the said application being dismissed and the same cannot be used as a ground to deny the application of extension of time sought under this application.

After going through the submissions, the Court has to determine *whether the applicant has shown sufficient reason for delay to file a notice of appeal.*

The law states clearly that a notice of appeal against the decision of the High Court has to be filed within thirty days from the date of the judgement. This is provided for under Rule 83(1)(2) of the Court of Appeal Rules G.N. No. 368 of 2009, that: -.

(1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the registrar of the High Court

(2) *Every notice shall, subject to the provisions of Rules 91 and 93, be so lodged within thirty days of the date the decision against which it is desired to appeal.*

But in case an aggrieved party is time barred to file a notice, section 11(1) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] gives power to the High Court to extent time to file a notice of appeal. It states: -

> *"Subject to subsection (2) the High Court or where an appeal lies from a subordinate Court exercising extended powers, the subordinate Court concerned, may extend the time for giving notice of intention to appeal from a judgement of the High Court or of the subordinate Court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired."*

It is trite therefore that the High Court cannot simply extend time whenever asked. There are grounds to be considered before granting or refusing an extension of time. That is to say, it is upon the applicant to show sufficient cause for delay. A good cause for delay depends on the circumstances of each case.

The applicant submitted that the delay was caused by technical grounds and that the decision to be appealed against contains illegality. In my perusal, the record shows Revisions No. 901 of 2018 was struck out with leave to refile. Then Revision No. 323 of 2019 which on 02.08.2019 was

struck out for allegedly being time barred. Then the applicant preferred to file an application for Review No. 496 of 2019 which was dismissed for want of merit on 29.05.2020.

In the case of **Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) the court laid down principles to be considered before granting an extension of time to be: -

1. *The delay should not be inordinate*
2. *The applicant should show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*
3. *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.*

From the decision, it has been clearly stated that the application for extension may be granted provided the applicant has not delayed in taking an action, and so delay was not inordinate, and the applicant has not shown negligence. In this application, the applicant filed an application for revision challenging the decision of the CMA. It was struck out for one reason or another. Having in mind that the court fell into an error, an

application for review, was filed but dismissed for want of merit. The time spent from the day the application for revision was filed can be considered to be time used to prosecute the same. In **William Shija v Fortunatus Masha (supra).** It was held:

> *"... I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal.*
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> *Secondly by implication this court was minded to give the applicant a second chance when it categorically told the applicant that it was*

open to him to institute a fresh appeal by taking the necessary steps towards that goal..."

From the decision, there is any reason to differentiate between technical delays and delays caused by negligence. I think, when the applicant appears in court and prosecutes case diligently and honestly, but the same does not achieve the intended goal, the court has to look at that action and be able to state if it is normal delay which is punishable or technical delay which is excusable. In the present case to be fair to the applicant, application No. 901 of 2018 was filed in time. It was struck out with leave. Later, he filed an application for review, which also was also struck out. I think, that all time amounts, in my view, a technical delay that is excusable as held in the case I have just cited. In my view, I think, this application has merit. It should be granted as I hereby do. The applicant is given only 14 days to file the notice intended. Since this is the labour matter, I make no order as to costs.

A.K. Rwizile

JUDGE

29.06.2022