

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

MISCELLANEOUS LABOUR APPLICATION. 380 OF 2021

BETWEEN

HESU INVESTMENT LIMITED.....APPLICANT

VERSUS

ANTHONY BURUSHI LUGELA.....1ST RESPONDENT

GODFREY GEOFFREY MARO.....2ND RESPONDENT

SEIF FARID.....3RD RESPONDENT

(From the ruling Commission for Mediation & Arbitration of DSM at Temeke)

(Stanslaus: Arbitrator)

Dated 25th August 2016 in

Labour Dispute No. CMA/DSM/TEM/25/2015

RULING

K. T. R. MTEULE, J.

26th June 2022 & 19th July 2022

Under Rules 24 (1) (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) and (d), Rule 55 (1) (2) and Rule 56 (1) of the Labour Court Rules GN. No.106 of 2007, Section 11 (1) of the Appellate Jurisdiction Act, Cap 141 RE. 2019, the Applicant **HESU INVESTMENT LIMITED** has moved this court seeking for extension of time within which to file Notice of Appeal against the award of the Commission and Judgement of this Court, out of time.

The application is supported by an affidavit deposed to by Mr. Shepo Magirari, the applicant's Counsel and is opposed by the counter affidavit sworn by Mr. Edward Simkoko, Personal Representative for the respondents. The respondents were employed by the applicant on diverse dates holding different positions. On 07th August 2016 they were terminated. Aggrieved by the termination, the respondents referred the matter to the CMA. At the referral stage the Commission determined the dispute in respondents' favors. Being dissatisfied with the award, the applicant filed revision application before this Court. On 11th August 2017 this Court found no need to fault the award issued by the Commission, which triggered the applicant to file Notice of Appeal with the intention of challenging the award issued by this Court.

Submitting in support of the application, the Applicant's counsel contended that, filing of the notice of appeal was delayed by a technical delay. He stated that the impugned decision having been issued on 11th August 2017 the applicant acted promptly by filing notice of appeal on 8th September 2017, only that the said notice was struck out for being incompetent because of the letter for requesting the copies of award having not served on time.

Supporting his submission, the counsel cited different cases including the case of **Fortunatus Masha v. William Shija & Another** (1997) T.L.R. 154, it was held:-

“A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present matter the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted”.

Applicants counsel advanced illegality as another reason to justify extension of time. He submitted that the CMA and the High Court erred in law by using Sub Part E of Employment and Labour Relation Act in determining the dispute of employees who were under probation period of less than six month contrary to Section 35 of The Employment and Labour Relation Act, Cap 366 R.E 2019. He added that in this matter the 2nd Respondent was employed on 11th October 2014 and 3rd respondent was employed on 8th October 2014 and they

were terminated on 7th January 2015, which means they worked under probation for almost 4 months. He is of the view that, it was wrong for the High Court to uphold the CMA decision by awarding 12 months salaries in terms of Section 40 (1) (c) of the Act.

Mr. Mseke asserted another illegality that neither of the parties referred the matter to the arbitration hence it was improper for the Commission to continue with the arbitration. In his view, the CMA contravened Section 86 (7) (b) (i) (ii) of the Act. It is the submission of the Applicant's counsel that the only way of curing the irregularities is by granting extension of time. Supporting his stand, he cited several cases including the case of **Principal Secretary, Ministry of Defence; National Service v. Devram Valambhia** 1992 TLR 185 (CA).

Arguing against the application Mr. Simkoko accused the Applicant of negligence for failure to comply with the legal procedure by lodging incompetent appeal in the Court of Appeal which ended with a striking out order.

In further submission, Mr. Simkoko is of the view that illegality must be apparent on the face of the record. He argued that the asserted illegality is not apparent on the face of the impugned decision.

Bolstering his position, he cited the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application, No. 10 of 2015, Court of Appel of Tanzania, at Arusha (unreported). The Respondent's counsel thus prayed for the application to be dismissed.

After a consideration of the rival submissions from both parties, the issue to be discussed is **whether the Applicant has adduced sufficient cause for this Court to exercise its discretion of granting extension of time to lodge notice of Appeal.**

In addressing this issue, the two reasons advanced by the applicant will be analyzed. The first reason is the delay being not actual but technical while the second one being illegalities.

Starting with the delay being technical, it is not disputed that there was a previous Appeal/application which was struck out for being incompetent after being served to the respondent out of time. The applicant takes this as forming the reason of delay which in his view considered as a technical delay. On other hand the Respondent regards this as a negligence in failing to comply with the mandatory procedure which rendered the appeal incompetent in the Court of Appeal.

Timeliness of filing the notice of Appeal is guided by **Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009** which requires Notice of Appeal to be issued within 30 days from the date of the impugned decision.

I agree with the applicant by citing the case of **Fortunatus Masha v. William Shija & Another** [1997] TLR 154 which held:-

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances, an extension of time ought to be granted."

The above cited authority is relevant in this application as the same involves technical defectiveness of an appeal which was the reason of the striking out. This fits squarely within the definition of technical delay which is already penalized by striking out.

Regarding illegality/irregularities it is well known that the point of illegality is sufficient ground for extension of time. The respective illegality has to be sufficient in content and apparent on the face of record as it was held in the case of **Stephen B.K. Mhauka vs. The District Executive Director Morogoro District Council and two Others**, Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar es Salaam, (Unreported).

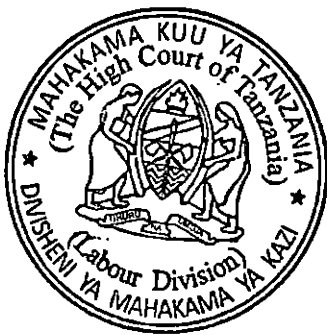
Having gone through the CMA award at page 1 paragraph 2 the arbitrator admitted that the respondents were under probation. It was the respondent's statement that there are some employees who were employed on 11th and 08th October 2014 and were terminated on 07th January 2015.

Whether the respondents were really probationers hence not entitled to the remedies available under Section 40 of the Act as awarded by the CMA can only be determined when the applicant is afforded with an opportunity to lodge an appeal. I join hand with the applicant's Counsel regarding the applicability of *VALAMBIA'S CASE (supra)* in this matter. Therefore, it is my finding that there is a disputed illegality which needs to be addressed by a way of appeal.

On the above ground and taking into account that there is a dispute relating to illegality in the award, and that the delay in this matter is a technical delay, I allow the application for extension of time to file Notice of Appeal. The said Notice of Appeal to be filed within seven (7) days from the date of this ruling.

It is so ordered.

Dated at Dar es Salaam this 19th day of July, 2022.




KATARINA REVOCATI MTEULE
JUDGE

19 / 07 / 2022

Labour Court TZ.