

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**DAR ES SALAAM**

**APPEAL NO. 13 OF 2022**

**BETWEEN**

**ISHIK MEDICAL AND EDUCATION FOUNDATION..... APPLICANT**

**AND**

**THE LABOUR COMMISSIONER ..... RESPONDENT**

**RULING**

*Date of Last Order: 28/02/2022*

*Date of Ruling: 07/03/2022*

**B.E.K. Mganga, J.**

This is an appeal by Ishik Medical and Education Foundation that runs Feza Schools. Brief facts of this appeal are that, on 25<sup>th</sup> September 2020, Lolengwa Mkonya, senior labour officer, found that the appellant failed to comply with the provisions of labour laws. The senior Labour officer, in terms of section 46 of the Labour Institutions Act [Cap. 300 R. E. 2019] issued a compliance order against the appellant as follows:-

- 1. To pay TZS 1,524,974,532/= being salary that was illegally deducted by the appellant for the months of April, May and June 2020 from Three Hundred and Ninety-one (391) employees.*

2. *To supply unspecified employment contracts to all employees as required by section 14 and 15 of the Employment and Labour Relations Act [Cap. 366. R. E. 2019] and avail copies of the said contracts to all employee.*
3. *To display employees' rights in conspicuous place as required by section 16 of the Employment and Labour Relations Act [Cap. 366. R. E. 2019].*
4. *To develop and maintain an employment policy that promotes equal opportunity and eliminate discrimination at workplace and register to the Labour Commissioner under section 7(1) and (2) of the Employment and Labour Relations Act [Cap. 366. R. E. 2019].*
5. *To develop and maintain HIV and AIDS policy at workplace as required under the HIV and AIDS (Preventive and Control) Act of 2008 and Tripartite Code and conduct on HIV and AIDS at workplace for prevention, care and support and register to the Labour Commissioner.*
6. *Grant employee's right to freedom of association to join trade Union at workplace as required by section 9(1)(a) of Employment and Labour Relations Act [Cap. 366. R. E. 2019].*
7. *To register all employees to Workers Compensation Fund as required by the Workers Compensation Act, No. 20 of 2008.*
8. *To register all employees and submit their contributions to the National Social Security Fund as required by the Social Security Act.*

The above compliance order was served to the appellant on 13<sup>th</sup> October 2020 as it was received by Omari Duduh Hamis, counsel for the appellant. Appellant was aggrieved by the said compliance order. On 11<sup>th</sup> November 2020, in terms of section 47(1) of the Labour Institutions Act [Cap. 300 R. E. 2019], appellant filed objection to compliance order before the Labour Commissioner. In the objection to compliance order, appellant stated that, in March 2020, the government ordered closure of all public schools for unspecified period due to Corona Virus pandemic

(COVID. 19). That, following that announcement, on 18<sup>th</sup> March 2020, appellant's school held an emergency meeting which resolved among other things, payment of 50% of staff salaries for the month of March and the remaining 50% to be paid later when the situation resume back to normal. That, employees were informed that they will not be paid salaries during COVID 19 pandemic. In the said objection to compliance order, appellant stated further that, she has complied with order No. 2, 3, 4, 7 and 8 and that she has partly complied with order No. 6 and promised to comply with order No. 5 above.

On 7<sup>th</sup> December 2020, the Labour Commissioner formed an opinion that, there was no legal justification to prove that there was an amicable agreement between the school Board and the employee to receive half of their salaries as there was no legal agreement attached to the said objection to the compliance order. The Labour Commissioner therefore, dismissed the objection to the compliance order and ordered the appellant to comply with the compliance order within 30 days.

Further aggrieved by the order of the Labour Commissioner, on 28<sup>th</sup> December 2020, appellant filed a notice of appeal before this court stating that the order of the Labour Commissioner was communicated to her on 14<sup>th</sup> December 2020, as a result, the said notice was marked as

**Appeal No. 13 of 2020**, but no memorandum of appeal was filed by the appellant. On 25<sup>th</sup> January 2022, the appellant signed the memorandum of appeal and filed in this court on 26<sup>th</sup> January 2022. The memorandum of Appeal was marked as **Appeal No. 13 of 2022**.

When the appeal was called for hearing, I raised the issue of competence of the appeal before this court and asked the parties to submissions thereof.

Addressing the court on competence of the appeal, Mr. Amos Paul, learned counsel for the appellant, submitted that appellant was served with order of the Labour Commissioner on 15<sup>th</sup> December 2020. Learned counsel submitted that, in terms of section 48(3) of the Labour Institutions Act [Cap. 300 R. E. 2019], conceded that the appeal was time barred and submitted that this court may condone an appeal filed out of time. Counsel for the appellant prayed the court to invoke the provisions of section 48(3) of Cap. 300 R. E. 2019 (supra) and Rule 55(1) of the Labour Court Rules, GN. No. 106 of 2007 and proceed with hearing of the appeal.

Responding to the issue raised by the court and submissions by counsel for the appellant, Mr. Albertus Cornel, Labour Officer, for the respondent, submitted that, the appeal is time barred as it was filed

after the Labour Commissioner has filed execution application No. 592 of 2020 to enforce Compliance Order in terms of Section 47(8) of Cap. 300 (supra). Mr. Cornel submitted further that, the said execution application was as because appellant did not serve the respondent with a notice of appeal. The Labour Officer prayed the appeal be struck out.

In rejoinder, Mr. Amos learned counsel for the appellant reiterated that the appeal was filed out of time and prayed it be struck out.

This ruling therefore emanates from the afore-mentioned issue raised by the court and submissions thereto by the parties.

After consideration of submissions by the parties, it is clear in my mind that the appeal is time barred. In his submissions, counsel for the appellant prayed that the court may condone the delay and proceed to determine the appeal. Both parties having found that the appeal is time barred, prayed that it should be struck out.

The provision that governs appeals to the court by the employer who is aggrieved by the order of the Labour Commissioner is Section 48(1) of Cap. 300 R. E. 2019 (supra). This section provides that time available within which an appeal can be filed before this court against the order of the Labour Commissioner is thirty (30) days from the date of receipt of the order. Mr. Amos, counsel for the appellant submitted

that the order of the Labour Commissioner was issued on 7<sup>th</sup> December 2020 and communicated to the appellant on 14<sup>th</sup> December 2020. The record shows that appellant filed Notice of Appeal on 28<sup>th</sup> December 2020 and was assigned Appeal No. 13 of 2020. The record shows further that, the memorandum of appeal was filed on 26<sup>th</sup> January 2022 and assigned Appeal No. 13 of 2022. I should point out that there is no memorandum of appeal filed in relation to appeal No. 13 of 2020. The said appeal therefore is not existing because. On the other hand, there is no notice of appeal filed in relation to appeal No. 13 of 2022 for the memorandum of appeal to be assigned appeal No. 13 of 2022. Therefore, appeal No. 13 of 2022 is incompetent for lack of notice of Appeal.

I have read Section 48(1) of the Labour Institutions Act [Cap. 300 R. E. 2019] and find that it is clear that, the employer who is aggrieved by the decision of the Labour Commissioner, has to file the appeal to the Labour Court within 30 days of receipt of the labour Commissioner's order. The record clearly shows as conceded by Mr. Paul that the decision of the Labour Commissioner was communicated to the appellant on 14<sup>th</sup> December 2020. Appellant was therefore supposed to

appellant on 14<sup>th</sup> December 2020. Appellant was therefore supposed to file the appeal before this court on or before 14<sup>th</sup> January 2021. In my view, as correctly conceded by the parties, this appeal is time barred.

I have pointed hereinabove that on 28<sup>th</sup> December 2020, appellant filed the Notice of Appeal and was assigned Appeal No. 13 of 2020. The memorandum of appeal was not filed in court until on 26<sup>th</sup> January 2022. No application for condonation was made by the appellant for the delay and no reasons was assigned for that delay. As pointed hereinabove, the record shows further that, the memorandum of appeal was filed on 26<sup>th</sup> January 2022 and assigned Appeal No. 13 of 2022. There is no notice of appeal supporting appeal No. 13 of 2022. It is my view, that filing of the memorandum of appeal on 26<sup>th</sup> January 2022 was intended to create a confusion and belief that the appeal was within time and that the year 2022 was just a slip of the pen. That cannot be regarded as slip of pen because all documents refers to 2022. The memorandum of Appeal itself was not signed by the appellant but by the Registry officer. The said memorandum of Appeal reads in part:-

"THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LABOUR DIVISION)  
(AT DAR ES SALAAM REGISTRY)  
LABOUR APPEAL NO. ....OF 2022

BETWEEN  
ISHIK MEDICAL AND EDUCATION FOUNDATION....APPELLANT  
VERSUS  
THE LABOUR COMMISSIONER.....RESPONDENT

**MEMORANDUM OF APPEAL**

*[Made under Rule 31(1)(2) (sic) and (3) of the Labour Court Rules,  
GN. No. 106 of 2007 and any other enabling provision of the Law]*

...

***It is proposed to ask the Court for an Order that;***

*It allows the Appeal and set aside the whole decision of the Labour  
Commissioner.*

*Dated at Dar es Salaam this 25<sup>th</sup> day of January 2022.*

*Presented for filing this 26<sup>th</sup> day of January 2022.*

Sgd  
REGISTRY OFFICER".

Frankly speaking; there is no memorandum of appeal filed by the appellant as the same was not signed. The signature appearing on the memorandum of appeal is that of the registry officer whose role is only to acknowledge that the memorandum was filed on the date s/he signed and filed the said memorandum in the court file.

It was submitted by both parties that the appeal should be struck out. With due respect to the parties, a time barred matter has to be dismissed and not struck out. This position was given by the Court of Appeal in the case of ***Barclays Bank Tanzania Limited v. Phylisiah Hussein Mchemi***, Civil Appeal No. 19 of 2016 (unreported).



It was further submitted by counsel for the appellant that the court should invoke the provision of section 48(3) of Cap. 300 (supra) by condoning the delay and determine the appeal. With due respect to counsel for the appellant, that invitation is not tenable in law. Once the matter is time barred, the court lacks jurisdiction to entertain it. It was open to the appellant to file an application for condonation in terms of section 48(3) of Cap. 300 (supra) prior to filing this appeal if she had good reasons for the delay. He cannot move the court to invoke that provision at this stage.

For the foregoing, the appeal is hereby dismissed for being time barred.

Dated at Dar es Salaam this 7<sup>th</sup> day of March 2022



  
B.E.K. Mganga  
**JUDGE**