

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISCELLANEOUS LABOUR APPLICATION NO. 3 OF 2022

CHINA HUNAN CONSTRUCTION

ENGINEERING GROUP LTD APPLICANT

VERSUS

PENDO KASYAMAKULA RESPONDENT

(Arising from the Ruling and Drawn Order of this Court)

(W. Mashauri, Judge)

Dated 18th day of November 2019

In

(Labour Revision No. 5 of 2018)

RULING

Date: 15/07 & 15/09/2022

NKWABI, J.:

Under the provisions of section 11(1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, Rule 24 (1), 24(2)(a)(b)(c)(e)(f), 24(3)(a)(b)(c)(d) and 24(11)(a), Rule 51(1), (2), Rule 56(1) of the Labour Courts Rules, {GN. No. 106 of 2007}, Section 95, Order XX11 Rule 10 (1) and 11 of the Civil Procedure Code {Cap. 33 R.E. 2019} and any other enabling provisions of the law, two reliefs are sought by the applicant. They are as follows:

- (a) Extension of time within which the applicant can lodge notice of appeal out of time to appeal to the Court of Appeal against the

decision of this Court dated 18/11/2019 in Labour Revision No. 5 of 2018.

- (b) Extension of time within which the applicant can lodge a letter requesting for certified copies of records, proceedings, judgment and decree, rulings and drawn orders for the preparation of an appeal to the Court of Appeal of Tanzania against the decision of this Court dated 18/11/2019 in Labour Revision No. 5 of 2018.

In her affidavit, duly sworn by David Shiwewe administrator of the applicant justifies the application for the following grounds:

1. The delay is a technical delay, only the applicant ought to act promptly and diligently to seek the right of appeal.
2. Apparent and serious issues or illegalities on the face of the records which need to be redressed by the Court of Appeal which are:
 - a. Whether the High Court was correct in finding that the Ex-parte award delivered on 28/09/2016 was illegally set aside in that the Arbitrator has no power to set aside the ex-parte award of his fellow arbitrator.

- b. Whether the High Court was correct in law, after condoning the delay to proceed determining the case, uphold and grant reliefs as contained in the ex-parte award dated 28/09/2016.
- c. Whether the High Court was correct to grant condonation without the respondent to account each day of delay for the period of six years.
- d. Whether a mere promise to be paid is sufficient ground for extension.

The application was resisted by the respondent vide the counter affidavit duly sworn by Mr. Samwel Kipasha, learned counsel. Nevertheless, the application was argued by way of written submissions. Mr. Chapa Alfred Sukari, learned advocate, drew the submissions for the applicant. The respondent's submission was duly drawn and filed by Mr. Deogratius Phailod Sanga, also learned advocate.

The facts of the case are sketch because there is neither proceedings nor award of the CMA attached to the application. It suffices to note that the High Court ruled that the decision of Boniface L. Lyambo, Arbitrator, that challenged the award of Mwalongo A., Arbitrator was injudicious. The High Court further found faulty in the decision of Ngaruka O.,

Arbitrator and found good cause for condonation as the respondent was working on temporary terms under the promise to be permanently employed which, this Court, found a good cause for the delay. Then the High Court quashed the ruling of Ngaruka O., Arbitrator and set it aside. It is thus, his Lordship, Mashauri, Judge, as he then was, allowed the application for revision and upheld the award delivered by Boniface L. Nyambo, Arbitrator. The ruling of this Court was delivered on 18th November, 2019.

Following the ruling of this Court, on 27th day of November, 2019 the notice of appeal was lodged in Sumbawanga sub-registry of the Court of Appeal of Tanzania. The appeal was struck out by the Court of Appeal for being incompetent on 17th February, 2022 for non-appearance by the applicant in this application and her counsel on a hearing date, as the Court of Appeal could not order for filing of supplementary record of appeal for the missing documents for lack of such prayer. It is because of that situation, the applicant has filed this application in this Court.

In reply submission on this application, the counsel for the respondent raised two legal points of preliminary objection. I do not intend to be

detained much by them. In the first place the counsel for the applicant seems to admit that extension of to file in this Court a letter requesting for certified copies of records, proceedings, judgment and decree, rulings and drawn orders for the preparation of an appeal to the Court of Appeal of Tanzania against the decision of this Court dated 18/11/2019 in Labour Revision No. 5 of 2018 is against the well established position in **Harji Abdallah Kapikulila v. NCBA Bank Tanzania Limited**, Civil Appeal No. 489/16 of 2021 CAT (unreported) where it was held:

"It follows in our judgment that it was not open and indeed irregular for the learned Judge of the High Court to grant an extension of time to the respondent to submit a letter requesting to be availed with copy of the proceedings, ruling and drawn order for purpose of appeal."

In fact, Mr. Sanga urged me to find, the applicant's application for extension of time to submit a letter requesting to be availed with the copy of proceedings, ruling and drawn order, incompetent for lack of jurisdiction and strike out the entire application. But over the concession

by the counsel for the applicant, I rule that the 2nd limb of the application is incompetent, I strike it out.

As to the legal objection in respect of the application for extension of time within which to lodge a notice of intention to appeal to the Court of Appeal, Mr. Sanga contented that since the notice of appeal had already been lodged, this Court cannot extend time for the applicant to do an act that has already been done. He however did not cite any authority for that position.

In rejoinder submission, Mr. Sukari not only distinguished the case of **Harji Abdalah Kapikula v. NCBA Bank Tanzania Limited**, Civil Application No. 489/16 of 2021 with the circumstances in this application, but also cited for me Rule 56(1) of the Labour Courts Rules, [GN No. 106 of 2007] read together with Rule 55(2) of the Rules which provides:

"In the exercise and performance of its powers and functions or in any incidental matters, the court may act in a manner that it considers expedient in the

circumstances, to achieve the object of the Act and or the good ends of justice."

Mr. Sukari, then, implored upon me to rule that this Court has the requisite jurisdiction to grant extension of time to file notice of appeal.

In my view, since the appeal of the applicant in the Court of Appeal was struck out for being incompetent, this Court has the jurisdiction to entertain the application for extension of time to lodge a notice of appeal against the ruling of this Court. More so, when there is an allegation of illegalities in the ruling of this Court. Based on the above view, I dismiss the preliminary objection against the 1st limb of the application (prayer) by the applicant to have an extension of time to lodge the notice of intention to appeal to the Court of Appeal.

I now turn to consider the merits of the application for extension of time within which to lodge a notice of intention to appeal to the Court of Appeal. The counsel for the applicant clearly showed that the attempt to appeal to the Court of Appeal against the decision of this Court ended when the matter was struck out by the Court of Appeal for non-

appearance of the Applicant herein and her counsel. Else, the Court of Appeal could have given permission to the applicant herein for filing of supplementary record of appeal for the missing documents.

Mr. Sukari appreciated that extension of time is discretionary remedy, for which to be granted, the applicant has to demonstrate sufficient cause for the delay, in this application (technical delay) and illegality in the impugned ruling of this Court.

Insisting that the applicant's delay in lodging the notice of appeal to the Court of Appeal is technical one, Mr. Sukari contended that the delay is not inordinate and has not been occasioned by negligence or lack of diligence by the applicant. He added, all the time the applicant was busy pursuing her right to CMA, High Court, the Court of Appeal and this Court. To support his argument, Mr. Sukari cited the case of **Stephen Ngalambe v. Onesmo Ezekia Chaula & Songea Municipal Council**, Civil Appeal No. 27 of 2020 CAT (unreported) dated 22nd March 2022 where it was held:

"It is our considered view that, in the circumstances of the instant case, filing incompetent applications by itself cannot be said to have amounted to negligence. At

most, that could have been attributed by wrong appreciation of the relevant law by the appellant's advocate, which we think cannot, under the circumstances of this case, be construed to the appellant's detriment."

Mr. Sanga insisted, in reply submission, that the applicant has demonstrated negligence. He explained that the applicant and her counsel failed to appear on a hearing date which led to the dismissal of the appeal for non-appearance. He further stated that the applicant cannot be heard to claim he was away while a company has more than one director, employees and members. He was therefore of the view that the claim of absence is a cover up for the negligent non-appearance. He added, as there is no affidavit of the officer, then there is no evidence as to the absence.

It was also the assertion of Mr. Sanga that the applicant dumped the case to the advocate and neglected to make a follow-up. He said, that is contrary to the authority in **Lim Han Yung v. Lucy Treases**

Kristensen, Civil Appeal No. 219 of 2019 CAT, (unreported) where it was held:

"... We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case."

It is thus, Mr. Sanga is of the view that this is not technical delay, rather it is gross total negligence which cannot amount to sufficient cause for extension of time. He also cited the case of **William Shija v Fortunatus Masha** [1992] T.L.R. 213. Finally, he prayed the alleged technical delay be dismissed for having no merits.

I have closely considered the justification of the delay by invoking technical delay cause of the delay made by the counsel of the applicant, I am persuaded by the counsel for the respondent that the applicant has

failed to establish the alleged technical delay. The counsel of the applicant does not clearly address the so called, by Mr. Sanga, gross or total negligence by the failure of the applicant who had two or more directors and other employees to appear in the Court of Appeal on a day the appeal was fixed for hearing. The non-appearance of the applicant and her counsel led to the collapse of the appeal in the Court of Appeal. The applicant's attempt to heap the blame to the representative encounters the authority of the Court of Appeal cited to me by Mr. Sanga, which is the case of **Lim Han Yung v. Lucy Treases Kristensen** (supra). Thus, technical delay as a ground for extension of time is rejected because it was not technical delay but sheer negligence on the part of the applicant and her counsel.

Next, I discuss the justification advanced by the counsel for the applicant that there are serious issues or illegalities in the ruling of this Court which should be the basis of granting extension of time within which the applicant to file the notice of intention to appeal to the Court of Appeal.

Expounding on the outlined illegalities as the ground for extension of time, the applicant's counsel argued that he intends to invite the Court

of Appeal to revise, correct and give proper legal positions on the High Court ruling in the issues he earlier listed in the affidavit. He then cited the case of **Principal Secretary, Ministry of Defence and National Service v. Deuram Valambia** [1992] T.L.R. 182 where it was stated:

"In our view when the point at issue is one alleging illegality of decision being challenged, the court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the records right."

Lastly, while claiming that respondent will not be prejudiced if the application would be granted, Mr. Sukari prayed the application be granted.

The counter argument from Mr. Sanga is that the position in **Lyamuya Construction Company Ltd** (supra) is accepted on their side but such alleged illegality must be pure point of law which is of sufficient importance and must be seen on the face of the record and not that which will attract a long-drawn process or argument. He drew similarity to the alleged illegalities in this application. As such, he contended, the alleged illegalities will attract a long drawn-argument hence the same do

not amount to a sufficient cause for extension of time. He then prayed the application be dismissed with costs for want of merits.

In rejoinder submission, the counsel of the applicant pressed, without rebutting the submission of Mr. Sanga on the alleged illegalities as a sufficient cause for extension, that the respondent will not be prejudiced if the application would be granted.

Just as the failure to make any rejoinder submission on the alleged illegalities, the applicant seems to have brought this justification for the application for extension of time half-heartedly. I say so because, there is a requirement of the alleged illegalities must be apparent on the face of the record, but the counsel for the applicant did not attach the award of the CMA to this application so that I see for myself if the ruling of this Court has illegalities that are apparent on the face of it. Without it, how can I determine that the ruling of this Court has the illegalities pointed out by the counsel for the applicant? In my view, it is at this point that the decision of the Court of Appeal in **Alliance Insurance Corporation Ltd vs Arusha Art Ltd, Civil Application No. 33 of**

2015 CAT (unreported) can be properly called into play. In the above case, the Court of Appeal had these words to say:


"Extension of time is a matter for discretion of the Court and that the applicant must put material before the Court which will persuade it to exercise its discretion in favour of an extension of time."

See also **James Anthony Ifunda v Hamis Alawi**, Civil Application No. 482/14 of 2019, (unreported) (CAT). To that end, I accept Mr. Sanga's contention that the alleged illegalities, if any, are not apparent on the face of the record and would attract long drawn arguments. Because of that basis, such claimed illegalities, if any, cannot justify his Court to grant this application.

In fine. This application is found wanting in merits. It is thus dismissed. I make no order as to costs because this is a labour matter.

It is so ordered.




J. F. NKWABI

JUDGE

15/09 2022

Date - 15/09/2022

Coram - Hon. M.S. Kasonde - DR

Applicant - Mr. Benard Malimi (Personnel Officer)

Respondent - Absent

B/C - A.K. Sichilima – PRMA

Mr. Benard Malimi Kazungu – personnel officer: I am personnel Officer of the Applicant Company. The matter comes for ruling today.

Court: Ruling delivered this 15th day of September, 2022 in the presence of Mr. Benard Malimi Kazungu personnel officer of the Applicant Company and absence of the Respondent




M.S. Kasonde

Deputy Registrar
15/09/2022