

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

MISCELLANEOUS LABOUR APPLICATION. 40 OF 2021

LETSHEGO TANZANIA T/A FAIDIKA LTD..... APPLICANT

VERSUS

ELISHA MBOKA MWAMENGO.....RESPONDENT

(Arising from the Revision No. 600 of 2019 High Court of Tanzania, at Dar es salaam, Dated 10th July 2020)

RULING

K. T. R. MTEULE, J.

15th September 2022 & 27th September 2022

This is an application for extension of time to allow the applicant **LETSHEGO TANZANIA T/A FAIDIKA LTD** to lodge a notice of intention to appeal to the Court of Appeal against the judgement and decree of this Court in Labour Revision No. 600 of 2019 (Hon S.A.N Wambura, Judge) delivered on 10th July 2019. The applicant is further praying for any other order as it may deem fit to grant.

The application is made by a Chamber Summons supported by the applicant's affidavit in which an explanation of series of actions which have been pending in court from the time the matter began in the Commission for Mediation and Arbitration of Dar es Salaam (CMA) to the

date when a former appeal therefrom was withdrawn from the Court of Appeal.

According to the affidavit and the counter affidavit, the following are some brief facts of the matter. The matter began in the CMA, where it was dismissed for want of prosecution. Being aggrieved, the applicant challenged the CMA decision by a way of revision. At revisional stage, the High Court quashed the ruling of CMA and ordered the matter to proceed for hearing before another arbitrator. Being aggrieved by the decision of this Court, the applicant appealed to the Court of Appeal where the matter was marked withdrawn as prayed by the appellant on the reason that she did not intend to prosecute it. Now the applicant is coming back to find a possibility of returning her appeal to the Court of Appeal by firstly asking for extension of time vide this application.

In her affidavit, the applicant advanced two grounds for extension of time, firstly being a technical grounds which caused the series of applications; and secondly some illegalities said to have tainted the impugned decision.

Opposing the application the respondent filed a Counter Affidavit of Remmy Ephraim William, the respondent's Advocate. The said counter

affidavit vehemently disputed the reasonability of the grounds advanced by the applicant as the causes of delay.

The hearing proceeded by way of oral submissions. The Applicant was represented by Mr. Leonard Massatu, Advocate, whereas the Respondent was represented by Mr. Remmy William, Advocate.

Mr. Leornad Massatu submitted that in paragraph 15, 16, 17, 18,19,21,22 & 23 of the affidavit the applicant deponed that the reason for extension of time is due to clerical errors contained in critical documents necessary for appeal which was confirmed by the Registrar of the Court of Appeal which resulted to not admitting the applicant's Civil Appeal No. 369 of 2020. According to Mr. Massatu, the errors are contained in the certificate of delay which was issued by the Registrar of High Court in Labour Revision No. 600 of 2019. In his view, parties should not be punished for the error or omission committed by the Court. He referred to the Case of **Mount Meru Flowers Tanzania Limited vs. Box Board Tanzania Limited, Civil Appeal No. 260 of 2018** where the Court affirmed the position at page 10 that a party should not be punished by errors committed by the Court.

Mr. Leonard Massatu named the errors to be existence of two certificates of delay contradicting each other as it was confirmed by Registrar of Court of Appeal.

On second ground regarding illegality Mr. Massatu submitted that it is a trite law that illegality is a reason for extension of time. He made reference to paragraph 25 of the affidavit, where seven points of illegalities have been listed as points warranting determination of the matter in Court of Appeal by a way of appeal. Among the listed points of illegalities is holding of the Court that there is no lacuna in labour laws in relation to time limit in which application for restoration of dismissed matter can be refiled. He referred to page 5 to 6 of the Labour Court impugned decision. Mr. Massatu further cited the case of **Hashim Mandongo vs. Minister of Industry and Trade**, Civil Appeal No. 27 of 2003 (unreported).

Another illegality of the impugned decision mentioned by Mr. Massatu is what he referred from page 7 of the award as a holding that it was a duty of CMA to issue the Ruling to the parties.

In a bid to account for the days of delay Mr. Massatu referred to paragraphs 22 and 23 of the applicant's affidavit, and stated that the

Court of Appeal order for withdrawal was granted on 13th January 2021 and it was ready for collection on 20th January 2021. He explained the time from 21st January to 27th January 2021 as a period where the applicant was seeking instructions to file the application which was accepted on 28th January 2021. He explained further that from 28th January to 5th February was a period of drafting papers and making research, and from 6th February to 11th February was the period used to lodge the papers in the judiciary system while the other days were used to deliver hard copies. For that they thus prayed for the application to be granted.

In reply, Mr. Remmy William for the respondent challenged reasons raised by the applicant's counsel that the delay was due to clerical errors. In his view, this ground is baseless, because it is not true that there were two certificates of delay with clerical mistakes which barred the admission of the appeal. He substantiated his argument by the annexure attached with the affidavit showing that the appeal was admitted as **Civil Appeal No. 396 of 2020** and was withdrawn by the applicant on reason that he was no longer interested to proceed with the appeal where the Court of Appeal consequently marked it withdrawn.

He continued to challenge the applicant's failure to account for every day of delay from **13th January 2021** when the Court of Appeal issued an order for withdraw until **17th February 2021** when the present application was filed. Mr. Remmy referred to the applicant's account of the days in the affidavit that, she collected the order on **20th January 2021** from the Court and that on **21st January 2021** to **27th January 2021** they were seeking instruction from their client and that they received instruction on **28th January 2021** and that on **28th January** to **5th February** was used for preparation of document, and from **6th to 11th February 2021** that was a period of lodging the application in the Court database and the date from **11th to 17th February** was used to deliver hard copies to the Court. According to Mr. Remmy, in all this period, no single paragraph in the affidavit that accounts for the delay of each day. He added that the position of similar nature happened in **Lyamuya Construction Company vs. The Board of Registered Trustees Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010** at page 8 of paragraph where delay of 25 days could not be tolerated.

Mr. Remmy submitted that from 13th January 2021 to 17th February 2021 are more than 34 days which were never accounted for in the affidavit.

Submitting his arguments on illegality raised in paragraph 25 of the affidavit, Mr. Remmy submitted that those are not illegality but grounds for the intended appeal which in his view, are prematurely raised to be argued at this stage.

Mr. Remmy therefore prayed before this Court to see that there is no sufficient grounds raised in the application for the Court to condone the prescribed time.

In rejoinder the applicant reiterated his submission in chief but emphasized that what is deponed at paragraph 20 of the affidavit which refers to a letter of the Registrar of Court of Appeal confirming that the appeal was returned due to clerical errors. He refuted the argument that **Civil Appeal No. 396 of 2020** was admitted in the Court of Appeal. He referred the letter from the Registrar of the Court of Appeal annexed to the affidavit as exhibit LG 13 with reference of paragraph 20 of the affidavit.

After consideration of the rival submissions from both parties, the issue to be determined is **whether the Applicant has adduced sufficient cause for the application for extension of time to be granted.**

It is in accordance with the law that the decision to grant or not to grant an application for extension of time depends upon a party seeking for an order to adduce sufficient cause for not doing what ought to have been done within the prescribed time. What amounts to sufficient cause has been elaborated in several cases [see. **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd.**, Civil Application No. 13 of 2010, Court of Appeal of Tanzania, (Unreported); **Lyamuya Construction Company supra** and **Praygod Mbagha V. Government of Kenya Criminal Investigation 5 Department and Another, Civil Reference No. 4 of 2019, Court of Appeal of Tanzania**, at Dar Es Salaam, (Unreported)]. From the above decisions, I list hereunder some of the factors which may constitute good cause in deciding on the extension of time. These are:-

- a. The applicant must account for all the period of delay*
- b. The delay should 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. The length of delay*
- e. The reason for delay*
- f. The applicant must account for the delay of each day*
- g. Degree of prejudice that the respondent may suffer if the application is granted*
- h. 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*

The above list is not exhaustive as the court is left to exercise its discretion to see if 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. This means, the good cause must be determined by reference to all the circumstances in each case.

In the instant matter the applicant advanced two grounds for extension of time which are, clerical errors in the certificate of delay in the previous appeal in the Court of Appeal and illegality of the impugned decision. To start with the reason of clerical error, the respondent's counsel disputed this to be a reason for delay. The Respondent's counsel has argument that the applicant withdrew her appeal and therefore she does not have further chance to refile it. I found it appropriate to

consider this matter firstly. I have gone through the record, specifically annexure Exh. LG – 14 in the affidavit. It is vivid that the applicant prayed to withdraw the appeal on the reason that she was not intending to continue prosecuting it and subsequently the registrar made an order marking the appeal withdrawn.

Withdrawals of appeals in the Court of Appeal is normally guided by Rule 77 of the Court of Appeal Rules which provides as follows: -

"77:- 1) An appeal may be withdrawn at any time before hearing by a written notice to the Registrar signed by the appellant or his advocate, and upon that notice being given the appeal shall be deemed to have been dismissed.

(2) When any appeal is withdrawn, the Registrar shall forthwith notify the respondent and the Registrar of the High Court.

(3) An appeal which has been withdrawn may be restored by leave of the Court on the application of the appellant if the Court is satisfied that the notice of withdrawal was induced by fraud or mistake and that the interests of justice required that the appeal be heard.

"(4) An appellant may, at any time in the course of hearing, informally apply to the Court for leave to withdraw the appeal and the Court may grant that application".

According to Rule 77 (1) when an appeal is withdrawn by an order of the Court upon a letter having received by Registrar, such an appeal is

deemed to have been dismissed. This means, the order of the Registrar of the Court of Appeal marking the appeal withdrawn, constituted dismissal of the appeal.

In law, dismissal amounts to conclusive determination of a matter. This means, when a matter is dismissed, the doors for such a matter to get another access to a similar court on the similar matter becomes closed.

(See Olam Uganda Limited suing through its Attorney United Youths Shipping Company Limited v. Tanzania Habours Authority, Civil Appeal No. 57 of 2002 (unreported)).

For clarity I quote the following words from **Olam's** case:-

"In our considered opinion then; the dismissal amounted to conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision, by this Court."

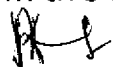
Now the applicant is asking for the Court to extend time to lodge an appeal which is already dismissed by the Court of Appeal after her own action of withdrawing the same Appeal from the same Court of Appeal.

Since the applicant in this application withdrew her own appeal from the Court of Appeal, the said appeal is deemed to have been dismissed. An extension of time cannot be granted to allow filing of a matter which is already dismissed. No matter how good reason for delay, the fact that the intended appeal was once dismissed by the Court of Appeal, sufficiently bar this court from granting an extension of time to reinstitute the said appeal.

By this finding, I see no reasons to dwell on the other grounds of application. The issue as to whether the applicant has adduced sufficient grounds to allow extension of time is answered negatively. This application is therefore dismissed.

It is so ordered.

Dated at Dar es Salaam this 27th September 2022.



KATARINA REVOCATI MTEULE

JUDGE

27/09/2022