

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

MISCELLANEOUS LABOUR APPLICATION NO. 461 OF 2022

BETWEEN

BERNARD GINDO & 19 OTHERS.....APPLICANTS

VERSUS

TOL GASES LIMITED.....RESPONDENT

RULING

Date of last order: 06/03/2023

Date of Ruling: 10/03/2023

MLYAMBINA J.

In case of entry refusal on non-compliance with the 'strictly enforced' dress code rules, should a wedding guest be denied re-entry upon refinement of the required dress? The answer is in the negative. Indeed, such question is relevant in this application in which the Applicants are seeking for extension of time to lodge an appeal before the Court of Appeal.

The Respondent has opposed the application on the *inter alia* reason that their appeal was struck out before the Court of Appeal on non-compliance with the strict rules. Now upon complying with the required rules, should the Applicants be denied to go to the Court of Appeal? In order to answer such question, I will first consider the long

background of this matter. The Applicants were employees of the Respondent. They were each employed at different dates and positions. On 15th August, 2011 they were retrenched from employment.

Aggrieved by the termination, they referred the matter to the Commission for Mediation and Arbitration (to be referred as 'CMA') claiming for unfair termination. At the CMA, their dispute was dismissed for lack of merit. Aggrieved by the CMA's decision the Applicants preferred application for revision before this Court which was registered as *Revision No. 18 of 2012*. Still, The Labour Court dismissed the application for lack of merits on 15th March, 2013.

Again, being dissatisfied by the Labour Court decision, the Applicants filed Notice of intention to Appeal to the Court of Appeal which was filed on 20th March, 2013. On the same date, the Applicants wrote a letter requesting for copies of proceedings, ruling and drawn order but the same were supplied to them late.

Thereafter, they received a letter from Registrar for collection of copies of proceedings, ruling and drawn order dated 27th June, 2016. Upon receipt of the documents and certificate of delay, the Applicants lodged their appeal to the Court of Appeal.

When the appeal was first called for hearing on 10th June, 2020, the Court of Appeal noted and invited parties to address it on the competency of the appeal. Regard was to a defective certificate of delay that had certified a wrong date and it made reference to the name of the first Applicant, Bernard Gindo while leaving out the names of other Applicants. The Applicants' Counsel conceded on the defect and sought leave of the Court in terms of *Rule 96 (7) of The Court of Appeal Rules, GN. No. 368 of 2009 ('the Court of Appeal Rules')*. The same was granted accordingly. Then the Applicants filed the supplementary record of appeal.

Subsequently, the matter was scheduled for hearing. Again, the Applicant's counsel sought leave of the Court to file a supplementary record of appeal in order to include 16 exhibits which were tendered by the Respondent and admitted at the CMA. Pursuant to the provision of *Rule 96 (8) of the Court of Appeal Rules (supra)*, the prayer to file another supplementary record was declined. The Court proceeded to strike out the application for being incompetent on 24/12/2020.

Then, the Applicants decided to start afresh from by approaching this Court with an application for extension of time to file another Notice of intention to Appeal to Court of Appeal. The application was filed on

13th January, 2021. The application for extension of time before this Court was struck out on 06/07/2021 because no leave was granted to the first Applicant to represent other Applicants as he appeared and signed the notice of representation.

Following the striking out of an application for extension of time on 06/07/2021, the Applicants held a meeting and chose the first Applicant, Bernard Gindo to represent other Applicants in the suit. They then filed an application for representative suit which was also struck out on 12/09/2022 for failure of all Applicants to sign in the alleged minutes. It was observed that only 20 Applicants signed out of all 28 Applicants.

Afterward, the Applicants decided to abandon the representative suit application. They decided to file the present application for extension of time within which they may file a Notice of intention to Appeal in the Court of Appeal against the Judgement and Decree of this Court in *Labour Revision No. 18 of 2012* delivered on 15th March, 2013.

In this application, the Applicants moved the Court to determine only one issue; *whether the Applicants have adduced sufficient grounds for extension of time to file Notice of intention to appeal.*

The application was argued orally. Before the Court, the Applicants were represented by Mr. Richard Madibi, Learned Counsel whereas Mr. Frank Kilian, Learned Counsel appeared for the Respondent.

In his submission in support of the application, Mr. Madibi adopted the Applicant's affidavit to form part of his submission. He narrated at length the background of the dispute which has been explained above. As to the reason for the delay to file the present application, Mr. Madibi stated that; some Applicants are residing up country. Thus, they had to trace them as averred at paragraph 24 of the affidavit. Mr. Madibi argued that; in this application, it was a technical delay which is a good ground for extension of time to file Notice of Appeal. To support his preposition, he referred the Court to numerous Court decisions including the cases of **Fortunatus Masha v. Willium Shija and Another** [1997] TLR 154. P 12, **Kabudeco v. Wetu Limited**, Civil Application No. 526/11 of 2017, Court of Appeal (unreported), **Eliakim Swai and Frank Swai v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 Court of Appeal at Arusha (unreported), p. 11 and the case of **Victor Rweyemamu Binamungu v. Geoffrey Kabaka & Another**, Civil Application No. 602/08 of 2017 Court of Appeal at Mwanza (unreported).

It was further submitted that; another reason for the delay is at paragraph 26 of the supporting affidavit. Mr. Madibi added that; there also five illegalities on that regard. He prayed to refer the Court to the case of **VIP Engineering and Marketing Ltd and 2 others v. Citibanda Tanzania Limited**, consolidated Civil Reference No.6,7 and 8 of 2006 as cited in the case of **TanESCO v. Mufungo Leonard Majura and 15 others**, Civil Application No. 94 of 2016 Court of Appeal at Dar es Salaam. He further relied to the cases of **Principal Secretary, Minister of Defence and National Service v. Devram Valambia** (1992) TLR 185, as cited in the case of **Geoffrey M. Mwaluhwavi v. Baypoot Financial Services (T) Limited**, Miscellaneous Labour Application No.316 of 2020 High Court – Labour Division at Dar es salaam.

Mr. Madibi strongly submitted that; the Applicants have accounted each day of delay, and that their delay is not inordinate. He added that; the Applicants have been diligent in pursuing their rights and the impugned decision have illegalities. He therefore prayed for the application to be granted.

In response to the application, Mr. Kilian stated that they have two reasons to refuse this application. *First*, that the Applicants have

demonstrated highest degree of negligence in prosecuting their application. He stated that; the negligence started on 10/6/2020 when their *Civil Appeal No. 128/2016* came up for hearing before the Court of Appeal, where it was noted that the Certificate of delay was defective. That, the certificate only mentioned Benard Gindo and isolated others. The Counsel further stated that; the Applicants' letter requesting for copies of proceedings was dated 26/3/2013 but the Certificate of delay was referring 20/3/2013.

It was further submitted that; the Applicants applied to file supplementary records of Appeal under *Rule 96(7) of Court of Appeal Rules (supra)*. Thereafter, the matter was adjourned on 24/12/2020, then the appeal was set out for hearing but the Applicants were not ready for hearing. They informed the Court of Appeal their record were incomplete, as it was not attached with crucial exhibits capable to dispose the appeal. They again prayed to file supplementary records of appeal as per *Rule 96 (7) of the Court of Appeal Rules (supra)*.

Mr. Kilian went on to submit that; the Court of Appeal refused their prayer for adjournment and to file supplementary records of appeal. They then relied under *Rule 96 (8) of the Court of Appeal Rules* which does not allow prayer to file supplementary records of appeal to

be filed twice. He stated that the Applicants were condemned to be negligent because the second prayer could be accommodated in the first prayer. So, they found themselves in deadlock. He insisted that the Applicants and their Advocate were negligent.

Mr. Kilian argued that; once the Court of Appeal found that their hands were tight under *Rule 96 (8) of the Court of Appeal Rules (supra)*, the remedy is not to start afresh. The remedy is that there is no case anymore which can be entertained by the subordinate Court and even by the Court of Appeal of Tanzania itself. He further argued that once this application is allowed, will be circumventing the provision of *Rule 96(8) of the Court of Appeal Rules (supra)* and allow the Applicants to bring another supplementary record of appeal in a back door.

The second reason for refusing this application is that the Applicants have failed to account each day of delay. Mr. Kilian submitted that; this application was filed on 18/11/2022 after striking out of Labour *Revision No. 333/2021* by Hon. Revocati J, on 12/9/2022. He insisted that; the Applicants must have accounted each day of delay. He said, the delay of 74 days is inordinate delay.

Mr. Kilian further stated that; there was a delay of 58 days counting from 20/9/2022 up to 18/11/2022, when this application was

filed. He added that; there was also a delay of 74 days from 6/7/2021 when *Miscellaneous Application No. 13/2021* was struck out till when *Application No. 333 of 2021* was struck out on 20/9/2022.

It was further contended that; the Applicants cannot rely on Benard Gindo because they did not give him power to file an application on their behalf. Therefore, from 02/12/2020 when the Court of Appeal struck out their application up to 06/07/2021 when Hon. Judge Mganga delivered ruling to the effect that Benard Gindo had not obtained instruction to file application on behalf of 27 others, that period of time cannot be relied by the Applicants that they were in the Court corridors.

He therefore prayed for the cited cases be disregarded because the Applicants have failed to account for the delay and acted negligently in prosecuting their case, something which is not condoned in the cited cases in granting extension of time. It was argued that; negligent is not a good cause for extension of time. to support his submission, he relied to the case of **Silver Sendewu v. Betty Huba @Elizabeth Sendeu Huba**, Miscellaneous Criminal Application No. 161 of 2020 High Court of Tanzania, Dar es Salaam District Registry (unreported) p.9. In the upshot, Mr. Kilian prayed for the application not be granted.

In rejoinder, Mr. Madibi submitted that; Counsel Kilian mislead himself in submitting that this Court based on *Rule 96 (8) of the Court of Appeal Rules (supra)* cannot grant this application. He argued that; *Rule 96 (8) (supra)* does not provide for extension of time to file Notice of Appeal. It is on filing supplementary records of appeal. He further argued that; *Rule 96 (8) (supra)* has to be read together with *Rule 96(7) of the Court of Appeal Rules (supra)*. Counsel Madibi stated that; after the struck out of *Appeal No. 128 of 2016*, all the Appellants filed an application for extension of time to file Notice of Appeal. The same application formed part of technical delay as all the Applicants were before this Hon. Court.

It was strongly submitted that; all the Applicants gave authority to Benard Gindo to swear an affidavit. The application was struck out on reason that Benard Gindo had no powers to file the application to represent 27 Others before CMA. He stated that; they were supposed to obtain leave before this Court, a thing which was missing. He further reiterated his submission in chief.

After full consideration of the affidavit, counter affidavit, submission for and against this application, I find the main issue is;

whether the Applicants have adduced sufficient reason warranting grant of the extension of time.

Before going to the merit of the application, I will respond to Mr. Kilian's assertion that; since the Court of Appeal in terms of *Rule 96(8) of the Court of Appeal Rules (supra)* struck out the Applicants' application, they are not allowed to start afresh by bringing this application. The Court of Appeal order was to the following effect:

In the end, pursuant to *Rule 96 (8) of the Rules*, we decline the application for filing supplementary record of appeal and since we find the appeal to be incompetent before us. We proceed to strike it out.

The above order, in my view, is quite clear that; what was declined was an application to file supplementary record of appeal. Following such decision, the appeal was also found to be incompetent and the same was struck out. In line with such order, the issue to be addressed is; *whether the Applicants are precluded from starting afresh and bring the present application.*

In this aspect, the Court found it prudent to revisit the wisdom of the Court in the case of **Tanganyika Cheap Store v. National Insurance Corporation of Tanzania Limited**, Civil Appeal No. 51 of 2005, Court of Appeal of Tanzania, Dar es Salaam (unreported). In the

referred case, though the circumstances are not similar to the present one, its wisdom can be adopted to the present case. In the referred case, the Court elaborated the effect of striking out an appeal. It was stated that the notice of appeal and the entire appeal becomes ineffectual. It was further observed that any party who desired to pursue the matter he/she was supposed to follow proper procedures by complying with the law.

Being guided with the wisdom of the Court of Appeal in **Tanganyika Cheap Store** case (supra), I find the Applicants were at liberty to follow proper procedures afresh. Therefore, any appeal by the Applicants to the Court of appeal in respect of the matter at hand is barred by time limitation. That being the case, the present application is a proper one so as to avail the Applicants with an opportunity to refile their appeal to the Court of Appeal subject to sufficient reasons adduced herein. However, the position would have been different if the matter was dismissed before the Court of Appeal. To the contrary, the matter was struck out leaving the Applicants at liberty to still pursue their right if they still desire to do so.

Back to the merit of the case, it has been decided by range of decisions that the grant of extension of time is a discretion of the Court

upon demonstration of sufficient cause. This was also held in the case of **Silver Sendewu** (*supra*). In the present application, the Applicants insisted that the delay in filing this application is a technical one. That, they have been in Court corridors pursuing their right.

Indeed, technical delay is one of the reasons to be considered in granting an extension of time as argued by Mr. Madibi. That was the Court's position in the case of **Fortunatus Masha v. Willium Shija and Another** (*supra*) quoted with approval in the case of **Eliakim Swai and Frank Swai v. Thobias Karawa Shoo** (*supra*) where it was held 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 time of applying for filing 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. Emphasis added

From the above demonstrated background, it is crystal clear that though the matter took long period of time, the Applicants have been filing several applications which resulted to the present delay. As held in **the Eliakim Swai's** case (supra), though the filed applications appeared to have been incompetent, they have already been penalized by striking out the same. The Applicants have been persistent to approach the Court to be afforded with the right to be heard on their appeal. Their efforts cannot be ignored by this Court.

Immediately after striking out the appeal at the Court of Appeal, the Applicants took necessary initiatives to file an application for extension of time before this Court but they were faced with legal technicalities. In the circumstances of this case, it is my view that a ground of technical delay may succeed to the circumstances of this case.

In the premises, the extension of time sought is hereby granted. The Applicants are granted fourteen days leave to file Notice of intention to Appeal to Court of Appeal.

It is so ordered.


Y.J. MLYAMBINA

JUDGE

10/03/2023

Ruling delivered and dated 10th March, 2023 in the presence of learned Counsel Bahati Makamba for the Applicant and Frank Kilian for the Respondent.




Y.J. MLYAMBINA

JUDGE

10/03/2023