

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

**MISCELLANEOUS APPLICATION No. 388 OF 2022**

*(Arising from the order in Labour dispute number*

*CMA/DSM/KIN/R.699/18/410 Before Hon. Mbena M.S Arbitrator dated 6<sup>th</sup> December 2019)*

**CHITEGETSE MONICA MIGEMBE.....APPLICANT**

**VERSUS**

**AKIBA COMMERCIAL BANK PLC..... RESPONDENT**

**RULING**

**OPIYO, J.**

This Application is brought under Rules 24 (1) (a) (b) (c) (d) (e) (f), and 24 (3) (a) (b) (c) (d) and rule 56 (1) of the labour court rules, GN NO. 106 of 2007. In the application, the applicant is seeking for extension of time to file application for revision to challenge the award of the Commission for Mediation and Arbitration (CMA). The application is supported by the affidavit of the applicant.

In this application the applicant is represented by Dickson Tugara of Lwavet Legal Consultants and the respondent by Catherine Tibasana,

learned counsel of Rod & shepherd Advocates. The application was argued by way of written submissions. In justifying grant of the application, Mr. Tugara submitted that after being aggrieved with the award of the CMA in Labour Dispute No. CMA/DSM/KIN/R.699/18/410, the Applicant herein timely filed in Court an Application for revision which was registered as Labour Revision no. 20 of 2020. On 20<sup>th</sup> September 2022 the Applicant through her Advocate withdrew the application. Thereafter the Applicant decided to change her legal representation for preparation of this application and filing of the instant application. It took her fourteen (14) days to file this Application from the date of the withdrawal as the re-filing the revision was already beyond the 42 days prescribed by section 91 (1) (a) (b) of the Employment and Labor Relations Act [Cap 366 R.E. 2019].

He stated that, the withdrawal of the previous application emanated from a human error which can be rectified by filing a new Application for revision, that is the reason the Applicant is seeking for a leave of this Court to extend time for filing that new application out of time. He made reference to the case of **University of Dar Es Salaam Versus Dorothy Phumbwe Miscellaneous Labour Application No. 348 of 2020** The



High Court of Tanzania Labour Division at Dar Es Salaam where Arufani J. observed that;

*"To the view of this court and as stated in the above cited cases, the court has found that, as rightly argued by the counsel for the applicant what was done by the counsel for the applicant in the application for revision which was struck out was just a human error which can be rectified by granting the applicant extension of time to file a proper application for revision in the court."*

Therefore, as the Applicant immediately after the withdrawal of Labour Revision No. 20 of 2020 initiated the process of filing this Application and no damage has been made to the other party he urged the court to be guided by the spirit that there is a need for achieving substantive justice which requires the parties to be given opportunity to litigate their rights to a conclusive end in granting the application. He cited the case of **Bahati Musa Mtopa Versus. Salum Rashid Civil Application No. 112/07 of 2018 in the Court of Appeal of Tanzania at Dar es Salaam**, to support her argument. In the case, the court of appeal held that:-

*"That where there has been a bona fide mistake, and no damage has been done to the other side which cannot be sufficiently*



*compensated by costs, the Court should lean towards exercising its discretion in such a way that no party is shut out from being heard..."*

The Applicant filed the first Application diligently without delay and she has been all the time in Court Corridors trying to pursue her rights. It is the interest of justice that this Application be allowed for giving the Applicant opportunity to litigate her rights to a conclusive end, he contended and prayed.

In reply, the counsel for respondent started by appreciating the common stand that granting or not of such application is entirely on the discretion of the court depending on sufficiency of applicant's grounds for delay. She cited a number of authorities in support including **Walter Kiwoli Vs. International Commercial Bank (T) Ltd** Misc Appl. NO. 267 of 2019, he Labour Division Dar es Salaam, **Blue Line Enterprises Ltd Vs. East African Development Bank**, Misc. application No. 135 of 1995 and **Lyarnuya Construction Co. Ltd Vs. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Appl. No. 02 of 2010, Court of Appeal





She then continued to submit that, the Applicant claims that after being aggrieved by the award she filed an application for Labour Revision no 20 of 2020, but the same was later withdrawn after which she decided to change her legal representation in order to prepare for this Application which took her 14 days. In the circumstances, the Applicant has not accounted for the entire period of 14 days which she took to file this application as required under the law in the cases cited above, she argued. She added that, the Applicant's application and affidavit were signed by the Applicant on 05 October 2022, and the same were filed on 11 October 2022. There is a gap of about five (5) days which the Applicant has not accounted for at all, thus contravening the principles of delay expressed in the cited cases above that the entire period of delay should be accounted for in such an application.

In her further contention, Ms. Tibasana contended, the applicant after withdrawing the Labour Revision no 20 of 2020 did not pray for leave to re-file the same and thus, has re-filed this application without leave of the Court. That, the Courts have clearly stated in **Halima Hamisi Rajabu Budda and 4 Others vs Abubakari Hamisi Misc. Civil Application 34**



of 2022 High Court District Registry of Arusha (Unreported) on page 7 that:-

"First, I wish to make it clear that upon making a prayer for withdrawal of application or suit leave to re-file the same is not automatic. Order XXIII Rule 1 (2) (b) provides clearly that leave to re-file a suit is under the Court's discretion."

And at page 9 that:-

*"The fact that Mr Kapimpiti prayed to withdraw the appeal so as to make an application for extension of time cannot be equated to a prayer to re-file the appeal. To my understanding a Court of law has to be properly moved to enable it to make the orders sought. Under the circumstances, this Court could not make an order for re-ling the appeal without being moved by the applicant's advocate. .... "*

From there she argued that, it is very clear from the case law cited above that re-filing of an application which has been withdrawn is not an automatic right as the Applicant herein had assumed. The Court must be moved to grant leave to re-file the same and in this case the Applicant's previous Advocate failed to take such action while praying to withdraw the previous application. The Applicant has no leave to re-file the application and that she is seeking to file out of time and hence the facts deposed as to not being given leave to re-file cannot be a factor for the grant of

extension of time. The Court can only grant what is prayed for. Thus, the prayer to withdraw the application cannot be equated to a prayer to re-file the application.

She went on to argue that, the Applicant has also expressed that the withdrawal of the previous application was due to human errors that the prayers on the chamber summons were not properly indicated. However, in the case of **Deodat Dominick Kahanda & Another v Tropical Fisheries (T) Limited & 2 Others Misc Commercial Application No 200 of 2017 High Court Commercial Division at Dar es Salaam** (Unreported) on page 9 Sahel, J held that:


*"The Court of Appeal has held several times that lack of diligence on part of counsel, or an oversight, is devoid of merit as a plea for extension of time. (See cases of Umoja Garage (supra); Tumsifu Elia (Supra); Valambia and Abdul Hassan v Mohammed Ahmed (19891 T.L.R 181))"*

Therefore, the withdrawal of the previous application was made because of the Applicant's negligence in preparation of documents hence, it cannot be a sufficient reason for delay, in her view. She submitted that, the lack of diligence exercised by the Applicant's Advocate who had been previously

engaged in the application which was withdrawn clearly cannot suffice as a ground of extension of time as expressed above. Thus, this Honourable Court is vested with the jurisdiction to not grant such an extension of time as such ground is without merit, she concludes.

In rejoinder, Mr. Tugara submitted that the court in exercising its discretion should not limit itself to the delay, but has to consider as well the weight and implications of the issues involved in the intended action and whether the same is prima facie maintainable. He then submitted that the Applicant's Affidavit which was prayed to be adopted to form part of her application and rejoinder herein clearly elaborates circumstances and reasons for the application to seek extension of time to file for Revision hence this Application.

He further contended that, the Respondents' counsel have well elaborated the fact that leave to re-file an application is not an automatic right but she has misdirected herself in failure to recognise that court had granted the leave to re-file in its generality by stating that "...leave granted as prayed",

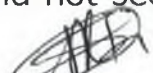




He drew the attention of this court to the holding by Kerefu J.A in the case of **Indo-African Estate Ltd vs District Commissioner for Lindi District & 3 Others, Civil Application No.12 / 07 of 2022, CAT at Mtwara (unreported)** at page 12, where it was held that it is injustice to punish the applicant for the mistake which is beyond his control. Also the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd, Civil Application No. 5 of 2006** where it was held that:-

*"In my considered opinion if the Court denies this application it will amount to penalizing the applicant for a mistake done by the Court itself. This will cause grave injustice on the part of the applicant who under article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 is entitled as of right to appeal against the decision of the High Court.... it will not be in the interest of justice to deny him his right of appeal on this basis because taking such a position would amount to give an unjust decision. I say so because the Court, through its Registrar was the source of the problem...The role of the courts is to meet out justice and not to deny justice to parties because of its own mistakes."*

He continued to state that the essence of the present application is to cure the ambiguity that leave to re-file is not an automatic right because if it was, the applicant would have proceed to file for Revision and not seeking court's leave for extension of time to do so.



He continued that the applicant has accounted for each time of delay because she narrated what caused the delay sufficient enough to warrant granting her application. She also acted with diligence to lodge this application timely. Therefore, Punishing the Applicant for the mistakes of her past representative is being injudicious and against the principle of natural justice and the right to be heard considering the fact that the Applicant is a layperson to legal rules and procedures, he argued. The case of **James Gideon Kusaga Vs Registered Trustee of the North Eastern Diocese of the Evangelical Lutheran church in Tanzania, Civil Applicatin No 145/12 of 2023 TZCA at Tanga**, at page 4, Kitusi JA was cited in substantiation. The court observed that;


*'Certain delay is not on applicants making and cannot be blamed on him, this change of course is in my view, sufficient to explain the ten day delay which is not inordinate in the obtaining circumstances'*

His further contention is that, it is a legal requirement that before any claim or application is physically tendered in court, it must be filed online, the online judicial case filing system (JSDS/e Case Registration), where this application was filed on the 5<sup>th</sup> day of October, 2022 and therefore,

Respondent counsel has misdirected himself for failure to consider the common legal practice which he normally conducts before instituting any judicial action. He then reiterated the prayer for the granted as prayed.

It is a fact as argued by both sides that in granting an extension of time, the court in exercising its discretion it has to consider the good cause for delay as established by the Applicant, among other factors. The other factors to be considered include length of delay and the degree of prejudice that the respondent may suffer if the application is granted (see **Philemon Mang'ehe T/A Bukine Traders Versus Gesbo Hebron Bajuta, Civil Application No. 8 of 2016, Court of Appeal of Tanzania at Arusha** citing with approval at page 5 the decision in the case of **Henry Leonard Maeda and Another v. Ms. John Anael Mongi, Civil Application No. 31 of 2013** at page 19 ( as cited by Tugura) stated that:-which state that;

*"In considering an application under the rule, the courts may take into consideration, such factors as, the length of delay, the reason for the delay and the degree of prejudice that the respondent may suffer if the application is granted."*



Therefore, an application for extension of time is entirely in the discretion of the Court to grant or refuse. This unfettered discretion of the Court however has to be exercised judiciously, and overriding consideration is that there must be sufficient cause for doing so (see the case of **Tanga Cement Company v. Jumanne D. Masangwa and Another, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, (Unreported) CAT.**

What constitutes reasonable or sufficient cause has not however been defined under the law. The rationale is that decision being a matter for the court's discretion cannot be laid down by any hard and fast rules, but to be determined by reference to all the circumstances of each particular case. This was clearly held in the case of **Meis Industries Limited & Another Versus. Twiga Bankcorp, Miscellaneous Commercial Cause No. 243 of 2015 (Unreported), Mwambegele, J.** (as he then was).

The applicant's reason of withdrawal of the former timely filed matter is a technical delay rather than actual delay, as it is out of no fault on the part of the applicant. She also did not indulge in laxity prohibited by the law as



he filed her application within two weeks only after the withdrawal irrespective of the fact that she had to change an advocate.

Considering the fact that the Applicant has been in court corridors trying to pursue her rights, and the previous application which was later on withdrawn on human error was filed in court within time, it is my considered view that, the applicant deserves a chance to have her matter be heard to the conclusive end as prayed. Filing this application promptly, just after 14 days from the date the previous application was withdrawn adds credit to her as it indicates her diligence in taking the necessary action that she has accounted for each day of delay. Using only 14 days for preparation of the application is not inordinate to deny her right to a second chance to file a fresh application, given the fact that it is the same period that was used to find for new representation as noted above.

What would have stood on her way would have been if leave to re-file was not prayed for and subsequently granted as argued by the respondent's counsel. But, perusal of records shows that the same was prayed for and accordingly granted making the respondent argument on that baseless.



It follows therefore that, indeed as argued by applicants counsel, the denial of this application basing on the fact that the delay was caused by her former representative's (advocate) and that she failed to account for the five days from date of withdrawal of Labour Revision No. 20/2020 to the 14 days of re-filing this application is the denial of the principle of natural justice and the right to be heard. Also, it is without doubt that 14 days to re-filing this Application is a timely judicial period for filing most court documents in any court hierarchy hence, the applicant was right in her capacity to re-file this application 14 days from withdrawal of the previous one.

Therefore, the application is granted. The intended revision application be filed within 14 days from the date of this ruling.



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**M. P. OPIYO,**

**JUDGE**

**2/6/2023**

