

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

MISCELLANEOUS LABOUR APPLICATION NO. 68 OF 2023

BETWEEN

SYLVIA BAHAME APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED RESPONDENT

RULING

Date of Last Order: *01/05/2023*

Date of Ruling: *13/06/2023*

MLYAMBINA, J.

This is an application which calls upon the Court to exercise its discretion powers judiciously and not capriciously. It is all about: *One*, extending time to the Applicant within which to lodge a Notice of Appeal to the Court of Appeal of Tanzania against the decision of this Court made on 25th October, 2019 by Hon. Wambura, J (as she then was). *Two*, extending time to be supplied with certified copies of the impugned proceedings, judgement, decree and exhibits. The application is supported with an affidavit of the Applicant Sylvia Bahame. It has been made under the provisions of *Rule 56(1) & (3) of the Labour Court Rules, G.N. No. 106 of 2007* together with *Section 11 of the Appellate Jurisdiction Act [Cap 141 Revised Edition 2019]*.

The brief facts of the case, as expounded at the hearing, by senior learned Counsel Mathew Kabunga for the Applicant is that; on 31/07/2013 the Applicant entered into contract of employment with the Respondent. They agreed for a yearly salary of Sixty Million Tanzanian Shillings (TZS 60,000,000/=) payable Five Million Tanzanian Shillings (TZS 5,000,000/=) per Month usually on 20th each month. It was alleged that the contract was unlawfully terminated on 16th day of February, 2015.

The Applicant was aggrieved with the Respondent's decision of terminating her employment. The matter was referred to the Commission for Mediation and Arbitration (herein CMA) and registered *as Labour Dispute No. CMA/DSM/ILA/R240/15*. Her complaint was granted. The Respondent filed *Revision No. 895 of 2018* before this Court. It was decided in the herein Respondent's favour.

The Applicant preferred to lodge an appeal before the Court of Appeal. The said appeal was withdrawn on the ground that it was lodged out of time so that the Applicant would start the appeal process afresh.

The Court of Appeal of Tanzania granted the application of withdrawing the appeal on 15/02/2023. It allowed the Applicant to refile the appeal because the anomalies were caused by the High Court.

It was the submission of Counsel Mathew Kabunga that the Deputy Registrar deducted only 53 days but delayed in issuing certificate of delay, as a result, it caused delay in lodging appeal in time. Therefore, the delay in lodging the appeal was not due to negligence of the Applicant. It was caused by the Court itself. The position was well noted by the Court of Appeal of Tanzania by the time it allowed withdrawal of the appeal with leave to refile. To buttress his submission, Counsel Kabunga cited the case of **Mobrama Gold Corporation v. Minister of Energy & Minerals & 2 Others** [1999] TLR 425 in which it was held that:

It is generally inappropriate to deny a party an extension of time where such denial will stiff his case. As the Respondent delay does not constitute a case of procedural abuse because the Applicant will not suffer any prejudice if the application has been granted. The Right to be heard is not only the principle of natural justice but also enshrined under *Article 13(6)(a) of the Constitution of the United Republic of Tanzania as amended from time.*

It was the humble submission of Counsel Kabunga that; if the time of extension of time is not granted, it will lock the Applicant's right to be heard, hence breach the Constitutional natural right of to be heard.

In reply, Counsel Evodi Mushi for the Respondent submitted that; reading the notice of application, the supporting affidavit and the submission

made by the Applicant's Advocate, the Applicant is seeking extension of time to file Notice of Appeal out of time to challenge the decision of this Court delivered on 25/10/2019.

It was the submission of Counsel Evodi Mushi that the previous notice of appeal was filed within time on 04/11/2019. It was the records of appeal which were filed out of 60 days. Thus, when the matter came for hearing, the Court of Appeal of Tanzania noted that the records of appeal were filed out of time because the Certificate of Delay excluded days from 4/11/2019 when the Applicant filed notice of appeal and the letter requesting for necessary documents to prepare and file records of appeal up to 27/12/2019 when the Appellant was notified by the Court to collect the necessary document. That was the essence, the Court of Appeal noted that the records of appeal were filed out of time. Thereafter, the Appellant conceded and prayed to withdraw the appeal. But the Court of Appeal did not grant leave to refile the appeal. It simply marked the appeal withdrawn.

Therefore, it was the opinion of Counsel Evodi Mushi that the application should be for extension of time to file record of appeal out of time and not the application for extension of time to lodge notice of appeal.

Counsel Evodi Mushi maintained that there was no valid reasons for the Applicant not to file the appeal on time. Thus, a delay from 27/12/2019

when she was notified to collect the necessary document to 5/5/2020 was more than five month and no good reason which has been submitted by the Applicant to convince this Court for such delay. As such, there is no valid reason for the Applicant to file a fresh appeal. The negligence was not of the Deputy Registrar. It was on the part of the Applicant and her Advocate. In case there was any abnormality in the certificate of delay, they could have brought it to the Deputy Registrar for correction. He therefore prayed this application be dismissed for want of merits.

I have devotedly considered the affidavit evidence and the submissions of both Counsel. It is my view that the Court while laying stress on necessity to eliminate any kind of delay in pursuing rights of a party, it must also guard fair trial to satisfy the demand of substantive justice. The aim is to see the matter is dissolved conclusively on merits. In so doing, the Court will avoid disillusionment or cynicisms to both parties and to the entire justice consumers. If the Court strives onto procedural impairments of cases only, there will be a danger of forgetting its main purpose.

Besides the above reasoning, an application for an extension of time for lodging a Notice of Appeal to the Court of Appeal of Tanzania against the decision of this Court is potentially of critical importance, especially where the application was made shortly after the withdrawal of the appeal. The

application was withdrawn on 15th February, 2023. Thereafter, this application was filed on 14th March, 2023. The reasoning thereof is that *Civil Appeal No. 108 of 2020* was withdrawn before the Court of Appeal under *Rule 102 (1) of the Court of Appeal Rules* with a view to retreating and sorting out the shortcomings. In a way, the Court of Appeal impliedly permitted refiling the proper appeal after rectifying the error on the face of the records. For that reason, arguing that there was no leave to refile, to my view, is not a correct position discerned from the withdrawal order by the Court of Appeal.

Very fortunate, Counsel Mushi never contested the prayer for withdraw of the appeal. As such, any move to rectify the shortcomings of the record, as a matter of justice, must not be objected unless there was untold negligence or reckless in pursuing the records with the view of refiling the appeal before the Court of Appeal.

In any case, I do agree with Counsel Evodi Mushi that the Applicant has *inter alia* moved this Court for an extension of time within which to lodge a Notice of Appeal to the Court of Appeal of Tanzania against the decision of this Court made on 25th October, 2019. However, once the appeal was withdrawn, all other preliminary stage for appeal process died naturally including the Notice of Appeal. Therefore, the said abnormally in the

Certificate of Delay are to be cleared to pave way for a proper appeal before the Court of Appeal, of which was not contested by Counsel Mushi during withdrawal of the appeal.

At any yardstick of reasoning, Courts of law exist to dispense justice by deciding rights of the parties and not to punish them on the mistakes done by the Court itself. The administration of justice requires disputes should be investigated and decided on merits basis. That means, the delay caused by the Court cannot be a justification of punishing a litigant especially where the litigant has taken steps to rectify the error immediately upon her discovery of such error. That is the principle; "an error of the Court should harm no one." The case of **Michael Lessani Kweka v. John Eliafye** (1997) TLR 152 highlights the need of acting diligently upon discovery of any omission as follows:

Although generally speaking a plea of inadvertence is not sufficient, nevertheless, I think that extension of time may be granted upon such plea in a certain case, for example, where the party putting forward such plea is shown to have acted reasonably diligently to discover the omission and upon such discovery, he acted promptly to seek remedy for it.

Again, in an application for extension of time, the basic principle is to show that the delay has not been caused by the dilatory conduct of the

Applicant on her part. That was the position in the case of **Shanti v. Hindocha** (1973) E.A. 209. The delay should also not be an abuse of the process as was stated in case of **Mobrama Gold Corporation** (*supra*).

Applying discretion in an application for extension involve an assessment of a number of key different factors which have to be weighed against each other. It requires an evaluation of the facts often based on degree upon which a decision maker can legitimately arrive. In this case, it is apparent that the Deputy Registrar deducted only 53 days but delayed in issuing certificate of delay. Such error caused delay in lodging appeal in time. I therefore, agree with the Applicant that the delay in lodging the appeal was not due to negligence of the Applicant. It was caused by the Court itself.

I have even weighed to see whether any party will be prejudiced if an extension is granted. I find, none will be prejudiced because the appeal will be determined by the apex Court once for all. In reaching such finding, I have considered the following factors: *First*, the centre of claim is on substantial merits of the decision of this Court. Therefore, whoever aggrieved should not be denied with the right of appeal, particularly when the appeal was withdrawn with the view of correcting the error on the record. *Secondly*, the issues in the case were identified early on at the withdrawn appeal before the Court of Appeal. It was on records of appeal been filed

out of time. Therefore, a short extension of time would not undermine the case management process. *Thirdly*, the extension would not increase the cost of the litigation because both parties will be afforded a right to pursue their appeal up to the last ladder of the Court. *Fourthly*, it would be disproportionate to refuse the extension without genuine reasons. *Fifthly*, the extension of time would put the parties on a more or less equal footing than they would have been if the extension were not granted.

Conclusively, the application is granted as prayed. The Applicant is given 14 days' time to clear her shortcomings and lodge the intended proper appeal before the Court of Appeal. The application being a labour matter, I issue no order as to costs.

Y.J. MLYAMBINA

JUDGE

13/06/2023

Ruling delivered and dated 13th June, 2023 in the presence of the Applicant, learned Counsel Majura Magafu for the Applicant and learned Counsel Linda Mafuru holding brief of Evodi Mushi for the Respondent.



Y.J. MLYAMBINA

JUDGE

13/06/2023