

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISC. APPLICATION NO. 475 OF 2022

(Arising from Labour Dispute No. CMA/DSM/KIN/460/20/119 before Hon. Mbeyale R. Arbitrator)

BIDCO OIL AND SOAP LTD APPLICANTS

VERSUS

EMANUEL KIMARIO.....RESPONDENT

RULING

5th -15th June, 2023

OPIYO, J.

This application has been preferred under Rules 24 (1), (2). (a), (b), (c), (d), (e) and (f, 243), (a), (b), (c), and (8), and 55 (1), 56 (1), (2) and (3) of the Labour Court Rules G.N No. 106 of 2007. The application is supported by a sworn affidavit of Flora Mmanuel Mbalale. The applicant prays for this court to extend time for them to file the application for revision against CMA award.

According to the pleadings, this application emanated from the Labour Dispute No. CMA/DSM/KIN/460/20/119 at the Commission for Mediation and Arbitration at Dar es Salaam between Emmanuel Kimario and BIDCO



Oil and Soap Limited, where the respondent herein sued the applicant for unfair termination of the fixed term employment contract. The matter was determined fully at CMA and decision reached in favour of the respondent. However, the applicant was aggrieved with the CMA award; she made application to this court via Labour Revision No. No. 293 of 2022 which was however struck out for being incompetent on 22nd day of November, 2022

Both parties were represented. Applicant was represented by Emmanuel Julius Mashamba, learned counsel and respondent by Philip Lincon Irungu, Learned Counsel. The matter was heard by way of written submissions. Arguing for the application, Mr. Mashamba submitted that their former application for revision before this court was filed in time, but after the same being pending before this Honourable Court for 117 days, it was struck out on technical ground for being lodged without having a notice of intention to file revision being filed with the CMA. The applicant is now praying for extension of time to re-file the revision application that was struck out.

He argued that, since the applicant at first filed revision application No. 293 of 2022 within time until when it was struck out on the 22nd day of

November, 2022 on the ground that the applicant did not file a notice to seek revision, this prove that the Applicant was not negligent and that there has been no laxity in taking prompt actions in the matter as has been demonstrated in Applicant's affidavit. That, the applicant has been in court's corridor all the time pursuing his application for revision till it was struck out on a mere technical error and not negligence on her part. Thus, the right of the Applicant to apply for extension of time to file revision out of time cannot be denied while the ground by itself constitute a genuine justification and acceptable as the ground for extension of time to file revision out of time. He made reference to the case of **Antony John Kazembe v Intertek Testing Services (Ea) (Pty) Ltd, Misc. Application No. 71 of 2022. High Court of Tanzania (Unreported)** at Pages 7 and 8, where the Court held that;

"... it is apparent that technical delay may be occasioned by a par not become penalized by refusal to extend the time... technical delay constitutes an excusable grounds to allow extension of time"

He then continued to argue that, the applicant's revision application upon being struck out on the said technical ground, the applicant acted promptly within seven (7) days in bringing this present application. The revision



application no. 293 of 2022 was struck out on the 22nd day of November, 2022 and the applicant acted promptly by filing this application in the 29th day of November 2022.

In reply Mr. Irungu opposed the application by arguing that the assertion by the applicant that the delay occasioned is technical delay for the former application being struck out for failure to file a notice of intention to seek revision (CMA form no. 10) which is compulsory requirement is misconceived. This is because, filing the form was compulsory and he has not stated any reasons for failure to file the notice to seek revision as required under rule 34 (1) of GN No. 47 of 2017. It follows that, the previous application was struck out for failure to comply with the compulsory legal requirement and therefore granting this application is nothing but a waste of this Court's precious time, since the said revision will also be struck out for being incompetent as he has not shown if the said form has been filed.

He continued that, the applicant in terms of item 21 of the law of limitation act was required to file a notice of intention to seek revision within 60 days from the date of the Award. The 60 days lapsed on 29th September, 2022

computed from 29th July, 2022 when the award was delivered. The applicant has been negligent in prosecuting the revision, as there have always been several mistakes in prosecuting the same. He had filed an improper revision and through the order of this court dated 10th October, 2022, he was allowed to amend the application. Upon amending, he again filed an incompetent application that led for it to be struck out.

Furthermore, he submitted that all the time the applicant has been being represented by the counsel who knows the law and ought to have been competent to file proper application to the Court. As such, the reasons for procedural technicality or technical delays are unjustifiable, he contends. That, the cited case of **Anthony John Kazembe v Intertek Testing Services**, cited in the Applicant's submissions is not binding to this Court. The said case made reference to a single justice decision in the case of **Fortunata Masha vs William Shija and Another [1997] TLR 154** which was overturned by the panel of three Justices of Appeal of the Court of Appeal by way of reference in the case of **William Shija vs. Fortunatus Masha [1997] TLR 213**, therefore, the case is not a good



law and not binding. While overturning the decision of the single justice in *William Shija vs Fortunatus Masha* it was held that;

"In determining whether the application should nonetheless be granted, the Court took into account that the counsel had been negligent in adopting the correct procedure and this could not constitute sufficient reason for the exercise of the Court discretion"

He concluded by stating that, since the applicant had been negligent and ignorant to follow the rules of procedure, this Court should then not allow any extension of time for the applicant to file the revision. He argued that the Court of Appeal in dismissing a similar application on the same grounds in the case of **Wambele Mtumwa Shahame vs Mohamed Hamis, Civil Reference No. 8 of 2016**, (Unreported, Copy attached) Mkuye, J.A at page 10 with the approval of case of **Hadija Adamu vs Godless Tumba, Civil Application No. 14 of 2013** held that;

"A regards the applicants apparent ignorant of law and its rules of procedure, I wish to briefly observe that such ignorance has never been accepted as a sufficient reason or good cause for extension of time"

He thus stated that, as the applicant did not provide sufficient cause to enable granting extension of time, his application should be dismissed.

In rejoinder, Mr. Mashamba insisted in what he had submitted in chief on the need to consider that the former application that was struck out was filed within time and his promptness in filing this application after it was struck out which shows that there was no laxity on applicant's part. He added that, it is reason for being struck out that the Labour revision was filed without the notice for revision which is a technical error and not negligence. Therefore, since it was a technical ground the right of the applicant to apply for extension of time to file revision out of time cannot be denied while the ground by itself constitutes a genuine justification. He argued that, such position has not been only a stand of the High Court in the case of **Anthony John Kazembe v Intertek Testing Services** (Supra) Challenged by the Mr. Irungu, but it is a fact in many cases even of the Court of Appeal citing the case of **Bank M (Tanzania) Limited v Enock Mwakyusa, CAT, Civil Application No. 520/18 Of 2017** (unreported) at page 8 - 11, in substantiation where the Court among other things held that:-

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved



technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In this circumstance an extension of time ought to be granted"

He therefore, reiterated his prayer for the application to be granted as his prayer has passed the test.

The parties' submissions and the records have been painstakingly appreciated. After considering parties submissions, the Court has been asked to determine whether applicants have adduced sufficient reasons for delay to warrant granting the application. What constitute sufficient cause has not been categorically defined, it has been left to the wisdom of the court to determine depending on the circumstance of a particular case. This was well articulated in the case of **Regional Manager Tanroads Kagera Vs Ruaha Concrete Company Limited**, Civil application No 96 of 2007, CAT (Unreported) where Nsekela JA, (as he then was) held that:-

"What constitutes "sufficient reason" cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules..."

What is usually required in order to put the necessary emphasis for the court rules in taking relevant actions to be obeyed is to oblige the applicant to put forward some materials on which the court can exercise its discretion granting him extension when there is delay. In the case of **Ratna v Kumarasamy and Another (1964) 3 All ER 933**, cited in the case of **Regional Manager Tanroads Kagera** (Supra) it was observed that if the law was otherwise, a party in breach would have an unqualified right to an extension of time which would turn downfall the purpose of the rules which are important in providing a time-table for the conduct of litigations.

The material the applicant in this application is putting forward is that the reason for delay is a mere technical one as it emanates from the struck out of his former application for revision that was otherwise filed within time. And that, he has been diligent in filing this application after the said struck out of the former revision application. That therefore proves that he has never been idle in pursuing his rights justifying been granted extension of time. It is understandable that one being in Court's corridors is a good reason for being granted extension of time as per the holding in the case of **Amani Girls Home Vs. Isack Charles Kanela**, Civil Application No.



325/08 of 2019, Court of Appeal of Tanzania at Mwanza, but that requires prudence and diligence after conclusion of whatever one was previously pursuing before the court. As per records the applicant's former application was struck out on 22/11/2022 and after just 7 days, she filed this application to make him re-file a fresh application for revision. This is in assumption that by this time he has already rectified the problem that led to the striking out of the former application, because, if not then this application is a waste as if it is allowed the revision application to be filed will be struck out again as submitted with Mr. Irungu. However, because whether the rectification has been done or not is not something to ascertain at this point as it is not a criteria for grant of the current application. Noting it here remains a mere reminder to the applicant not to file fresh application while the same problem still subsists. Such requirement for ascertainment cannot stand on the applicant's way as a diluting agent to the sufficiency of his reasons for delay he has put forward.

In the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported)** the factors

that were held to be looked into for consideration in such circumstances including accounting for all the period of delay, delay not being inordinate, applicant showing diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intended to take.

Therefore, a person seeking for an extension of time had to prove on every single day of delay and sufficiency of the reason for the delay to enable the Court to exercise its discretionary power in granting the application the case of **Daudi Haga V. Jenitha Abdan Machanju**, Civil reference No. 19 of 2006, Court of Appeal. Also the case of **Philimon Simwandete Mbanga v. The Permanent Secretary Ministry of Defence & Another**, Civil Application No. 168/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam at page 6 that: -

"Thus, the applicant has not explained away the delay ... that is a span of about 66 days. There is a plethora of authorities of the Court which hold the view that failure by an applicant for extension of time to explain away every day of delay will not trigger the Court to grant the enlargement of time sought."

I am in agreement that no inordinate delay has been displayed by the applicant since within just within Seven (7) days from the date the former



application was struck out he filed this application. That is a reasonable time being in court corridors pursuing for the copy of the order for the struck application and making preparation for filing this application. Thus, the applicant accounted for each day of delay as he was not idle as argued by Mr. Mashamba. It is well settled principle of law that accounting for each day of delay in granting application of this nature, coupled with the fact that the struck out was not out of any dilatory on part of the applicant, but merely on improper filing, constitutes the delay in this matter a technical delay which in turn constitutes an excusable grounds to allow extension of time. The case of **Johan Harald Christer Abrahsson Vs Exim Bank (T) Limited and 3 Others, Civil Application No. 224/16 Of 2018, CAT at Page 8 (Unreported)** summarise it all in the following words:-

"...that upon being struck out on that technical delay the applicant acted promptly within two weeks in bringing this present application. Since the applicant was not idle but all along have been in this court pursuing an incompetent application, that by itself constitutes good cause"

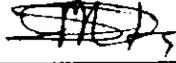
Mr. Irungu argument that making reference to a case of **Anthony John Kazembe v Intertek Testing Services** which referred to a single justice

decision in the case of **Fortunata Masha vs William Shija and Another [1997] TLR 154** which was overturned by the panel of three Justices of Appeal of the Court of Appeal by way of reference in the case of **William Shija vs. Fortunatus Masha [1997] TLR 213**, is a bad law, is in my view a misconception. What has to be noted in connection to this is that that what constitutes to a good cause is not determined by hard and fast rules, it may differ from case to case depending on the circumstances in a particular case. Therefore, the holding of advocates negligence by failure to follow up procedures leading to the striking out of an application not been a good cause does not by itself make all lapses by an advocate in the procedures intolerable. Determination depends on other circumstances surrounding the matter. This can be proved by the subsequent cases of the same court like the **Bank M (Tanzania) Limited v Enock Mwakyusa (supra)** cited by Mr. Mashamba.

Based on the above analysis, I find that applicant have managed to account for all the 7 days of delay after the struck out of the former application for a technical delay. This is a clear exhibition of diligence and promptness in taking necessary actions in this matter. This readily moves



this court to grant extension of time. The applicant to file his intended application within 14 days from the date of this ruling.



M. P. OPIYO,

JUDGE

15/6/2023