

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

MISCELLANEOUS APPLICATION NO. 107 OF 2023

JOHN S.K. KIONDO 1ST APPLICANT
PHILBERT MGWASA 2ND APPLICANT
VELMUND NKALUA 3RD APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY RESPONDENT

RULING

Date of last Order: 24/05/2023
Date of Ruling: 19/06/2023

B. E. K. Mganga, J.

Brief facts of this application are that, John S.K. Kondo, Philbert Mgwasa and Velmud Nkalua, the herein applicants, were employees of Tanzania Ports Authority, the herein respondent. It is also undisputed fact that, in 1995, respondent retrenched the abovementioned applicants and others who are not part to this application. It is further undisputed that, the total number of employees who were retrenched by the respondent are 438. It is also undisputed that, Christopher Gasper Richard Rukizangabo and 437 others filed Trade Dispute No. 83 of 2006 before the Industrial

Court of Tanzania against the Respondent. Unfortunately, decided in favour of the respondent as a result, Christopher Gasper & 144 others only were aggrieved with the decision of the Industrial Court of Tanzania. The said Christopher Gasper & 144 Others filed Revision No. 01 of 2015 against the respondent before this court. On 28th April 2016, this Court partly allowed application No. 01 of 2015 filed by Christopher Gasper & 144 Others. It is said that, after being aware of the court's judgment and decree in Revision No. 01 of 2015, applicants filed Miscellaneous Application No. 249 of 2016 seeking the court to extend the decree in Revision No. 01 of 2015 also to cover them. It is further undisputed that, Christopher Gasper & 144 Others were still not happy with the judgment and decree of this court in Revision NO. 01 of 2015 as a result, they filed Civil Appeal No. 84 of 2016 against the Respondent before the Court of Appeal challenging this court's judgment and decree. While the said Civil Appeal was pending before the Court of Appeal, on 18th November 2011, this Court (Nyerere, J, as she then was) dismissed Miscellaneous Application No. 249 of 2016 filed by the applicants. On 24th February 2023, the Court of Appeal delivered its judgment in Civil Appeal No. 84 of 2016 dismissing the appeal filed by

Christopher Gasper & 144 Others against the Respondent for want of merit.

On 17th April 2023, applicants filed this application under Rule 45(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007 seeking the court to extend its decree issued on 28th April 2016 in Revision No. 01 of 2015 between Christopher Gasper & 144 Others and Tanzania Ports Authority so that the said decree can also cover them. In support of this application, applicants filed their joint affidavit.

In resisting the application, respondent filed the Notice of Opposition and the Counter Affidavit of Asia Abdul Shamte. In addition, respondent filed the notice of preliminary objection that the application is time barred.

When the application was called on for hearing of the said preliminary objection, Mr. Evans Nzowa, learned Advocate appeared and argued for and on behalf of the applicants while Lightness Msuya, Asia Shamte and Iman Masebo, State Attorneys appeared and argued for the respondent.

Arguing in support of the preliminary objection, Ms. Msuya, State Attorney submitted that, applicants filed this application for extension of the decree that was issued on 28th April 2016 in Revision No. 1 of 2015

while out of time. Learned State Attorney submitted that, Rule 45(1) of the Labour Court Rules, GN. No. 106 of 2007 requires application for extension of the decree be filed within 60 days from the date of the decision of the Court. State Attorney submitted further that, the word Court is defined to under Rule 2(2) of GN. No. 106 of 2007 (supra) to mean Labour Court. Learned State Attorney added that, from the date the decree was issued namely 28th April 2016 to 27th April 2023 when applicants filed this application, it is six (6) years hence applicants were out of time for six years.

Ms. Msuya submitted further that, Applicants have not filed an application for extension of time. She cited the case of *M/S P. & O International Ltd v. The Trustees of Tanzania National Parks (TANAPA)*, Civil Appeal No. 265 of 2020, CAT (unreported) and the provisions of Section 3(1) of the Law of Limitation Act [Cap. 89 R.E. 2019] to support her submissions that applicants were supposed to file an application for extension of time but they failed. She therefore prayed that the application be dismissed.

In opposing the preliminary objection, Mr. Nzowa, learned counsel for the applicants submitted that, the application was filed within time. He

submitted that, soon after the Judgment in Revision No. 1 of 2015 was delivered on 28th April 2016, on 20th June 2016 applicants filed Miscellaneous Application No. 249 of 2016 praying extension of the decree. He went on that, at the time of hearing of the said application, respondent submitted that there was a pending appeal before the Court of Appeal. He submitted further that, on 18th November 2016, this Court (Hon. Nyerere, J, as she then was) held that since there was a pending appeal before the Court of Appeal, the said application by the applicants was prematurely filed and dismissed the application. Counsel for the applicants submitted further that, it was views of this Court that applicants were supposed to file their application after determination of the appeal by the Court of Appeal. Mr. Nzowa submitted further that, though the Court dismissed the application instead of striking it out, the order was not appealable because the application was not heard on merit.

Counsel for the applicants submitted further that, Rule 50 of the Labour Court Rules GN. No. 106 of 2007 prohibits parties to appeal against interlocutory or incidental decisions or orders unless, such decision has the effect of finally determining the dispute. He added that, what this Court should look at in this application is substance of the matter and not the

words used by the court in Miscellaneous Application No. 249 of 2016. He cited the case of *Ngoni Matengo Cooperative Union Ltd v. Ali Mohamed Othman* [1959] EA 577, and *Stanbic Bank (T) v. Lizzelote Manyanga* (2015) LCD1 to support his submissions that parties were not heard on merit hence the order was interlocutory.

Mr. Nzowa, learned counsel for the applicants cited Section 21(1) of the Law of Limitation Act [Cap. 89 R.E. 2019] and argued that, the said section does away automatically the period the party was prosecuting a case in Court. He went on that, the time applicants were prosecuting Miscellaneous No. 249 of 2016 and time when Civil Appeal 84 of 2016 between *Christopher Gasper & 144 Others v. Tanzania Ports Authority* was pending before the Court of Appeal should be discounted automatically. To support his submissions, learned counsel for the applicants cited the case of *Geita Gold Mining Limited v. Anthony Karangwa*, Civil appeal No. 42 of 2020, CAT (unreported). When probed by the court, counsel for the applicants conceded that applicants were not party to Civil Appeal No. 84 of 2016 hence it cannot be said that they were prosecuting the said appeal before the Court of Appeal.

Mr. Mzowa strongly submitted that applicants filed this application on time on 17th April 2023 and that, the decision of the Court of Appeal was delivered on 24th February 2023. He added that, from the date the decision of the Court of Appeal was delivered, to the date of filing this application is 52 days. He concluded that, the application was filed within time and prayed the preliminary objection be overruled so that the application can be heard on merit.

In rejoinder, Ms. Msuya State Attorney submitted that Miscellaneous Application No. 249 of 2016 was dismissed by this court for lack of merit and that applicants were supposed to file an appeal before the Court of Appeal if they were aggrieved but they did not. She added that, dismissal of the said Miscellaneous Application for want of merit barred applicants to file a similar application. Learned State Attorney cited the case of *Joseph Ndyamukama v. Gaudensia Kaizilege*, Land Case Appeal No. 73 of 2021, HC(unreported) to support her submissions that the remedy for the matter that was been dismissed is to file an appeal but the remedy for the matter struck out is to file another application. She submitted further that, in *Ngoni Matengo's case*(supra) the Court held that the matter ought to have been struck out and not dismissed. She strongly argued that,

applicants in the application at hand, ought to have appealed against the dismissal order. She went on that, circumstances in Rule 50 of GN. No. 106 of 2007(supra) is different from the facts of the application at hand because, the application by applicants was dismissed for lack of merit. She added that, no leave was granted to the applicants to refile the application after the decision of the Court of Appeal. She maintained that, Rule 45 of GN. No. 106 of 2007 (supra) requires an application for extension of decree be made within 60 days from the date the decision of this Court was delivered and not from the date the decision of the Court of Appeal was delivered.

Ms. Msuya submitted further that, Section 2(1) of the Law of Limitation Act (Cap. 89 R.E 2019) and the *Geita Gold Mining case* (supra) cannot apply in the circumstances of this application because applicants were not in Court since 2016 to the time of filing this application.

I have carefully read evidence in both the affidavit in support of the application and the counter affidavit opposing the application filed by the applicants and the respondents respectively and submissions made thereof. It is undisputed that the decree of this court in Revision No. 01 of 2015

was delivered on 28th April 2016. It is also undisputed that applicants filed Miscellaneous Application No. 249 of 2016 and that the same was dismissed on 18th November 2016. It was argued on behalf of the applicants that the order of this court in Miscellaneous Application No. 249 of 2016 was interlocutory, as such, applicants could not appeal before the Court of Appeal. I have carefully read the ruling of this court in the said Miscellaneous Application No. 249 of 2016 and find that it clearly stated that the application by the applicants was dismissed for want of merit. The order in the said Ruling reads in part: -

*"...Under the circumstances this court is justified to rule out that this application has been filed prematurely hence deserves dismissal. The current application have been filed prematurely. **This application is dismissed for lack of merit.** It is so ordered."*

The bolded sentence in the said ruling clearly shows that the application was dismissed for lack of merit. Whether that was proper or not, this court has no power to correct that ruling or order. It was open to the applicants to file an appeal before the Court of Appeal if they were aggrieved or to file an application for review if they thought that there was an error reviewable by this court. It is my view that, since the said ruling dismissed the application for extension of decree for want of merit and the

said ruling has not been set aside by the Court of Appeal, this court has no power to hear the parties on a similar issue in this application.

It was argued by counsel for the applicants that the said ruling was interlocutory and that, in terms of Rule 50 of the Labour Court Rules, GN. No. 106 of 2007, applicants were barred to file appeal or review. From the wording of the ruling quoted hereinabove, the said ruling cannot be interlocutory. The ruling is loud and clear that the application was dismissed for want of merit. As pointed hereinabove, the issue as to whether it was proper or not to dismiss the application of the applicants prior to hearing it on merit in my view, cannot be determined by this court. The logic and reason is clear because any attempt of correcting the said ruling in this application will be seating on appeal of my fellow judge. It is my view therefore that *Ngoni Matengo's case* (supra) and *Manyanga's case* (supra) cited by counsel for the applicants cannot apply in the circumstances of this application. In my view, it is only the Court of Appeal that can correct that ruling if it finds that this court was supposed to strike out the said application and not to dismiss it for want of merit. Submissions by counsel for the applicants to invite this court to interpret the afore ruling that the application was struck out while the language used therein is

unambiguous that it was dismissed for want of merit cannot be accepted. That room is only open to the Court of Appeal and not this court. In short, my hands are tied up.

It was submitted by counsel for the respondent that applicants were supposed to file the application within sixty (60) days from the date of the decree of this court and not from the date Civil Appeal No. Appeal 84 of 2016 between *Christopher Gasper & 144 Others v. Tanzania Ports Authority* was determined by the Court of Appeal. In my view, there is substance in that submission. I am of that view because Rule 45(1) of the Labour Court Rules, GN. No. 106 of 2007 is clear. The said Rule provides: -

*"45. -(1) Where any interested party other than a decree or award holder, is of the opinion that it is desirable to extend any **decree passed by the Court or the Commission** in respect of any dispute between any other parties in a similar situation as his own, he may **within sixty days** after the decision submit a formal application to the Court which passed or executed the decree for such extension."*(Emphasis is mine)

It is clear from the above quoted Rule that, an application for extension of the decree or the award, must be filed within sixty days after the decision and the same must be filed to the Court that passed the decree or executed the award. It was correctly submitted by counsel for the respondent that the word "Court" in terms of Rule 2(2) of the Labour

Court Rules, GN. No. 106 of 2007 means the Labour Court. Submissions by counsel for the applicants that this application was filed on the 52 day after the decision of the Court of Appeal in Civil Appeal No. 84 of 2016 between *Christopher Gasper & 144 Others v. Tanzania Ports Authority* and that it is within time, cannot be valid. It is my view that, drafters of Rule 45(1) of GN. No. 106 of 2007(supra) had good intention to limit the scope of application of the said Rule. In my view, the Rule intended to exclude bystanders who, would be just watching the parties litigating all the way from the Commission for Mediation and Arbitration(CMA) to the Court of Appeal and upon conclusion of litigation, coming in by filing an application for extension of decree knowing that, at that point, they are sure to be paid for what they have been waiting to happen. By that time, the bystanders will be sure that all risks of losing the case has gone and the can enjoy fruits of litigation with very minimal sweat and or application of less energy, time and resources. In my view, that should always be discouraged. It is for the fore going, the date on which the applicants became aware of the decree or award sought to be extended in their favour is of essence. The time, in my view, cannot be endless. Since applicants knew existence of the decree of this court in Revision No. 01 of

2015 and filed Miscellaneous Application No. 249 of 2016 that was dismissed for want of merit and did not appeal to the Court of Appeal or file an application to the court within fifteen days in terms of Rule 27(1) of GN. No. 106 of 2007(supra) for the court to review the said Ruling, I find that the application is time barred and that the court is *functus officio*.

For all said hereinabove, I uphold the preliminary objection and dismiss this application.

Dated at Dar es Salaam on this 19th June 2023



B. E. K. Mganga
JUDGE

Ruling delivered on this 19th June 2023 in chambers in the presence of John S. Kiondo and Velmund Nkalua, the 1st and 3rd Applicants respectively and Lightness Msuya, State Attorney for the Respondent.



B. E. K. Mganga
JUDGE