IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISC. APPLICATION NO. 198 OF 2023

BETWEEN

NORTHERN ENGINEERING WORKS LTD..... APPLICANT

VERSUS

PETER RWEGASIRA ..... RESPONDENT

RULING

Date of last Order: *14/08/2023*
Date of Ruling: *08/09/2023*

MLYAMBINA, J.

The Applicant through representation of Mr. Switbert Rwegasira, Learned Counsel filed this application urging the Court to grant the following orders: *One*, to extend time within which to set aside an ex parte judgement delivered on 03/05/2023 by K.T.R. Mteule, J in Labour Revision No. 403 of 2022 of this honourable Court. *Two*, to set aside an ex-parte judgement delivered on 3rd May, 2023 by K.T.R. Mteule, J in *Labour Revision No. 403 of 2022* of this honourable Court.

In response, the Respondent's Counsel one Mr. Samuel Jerome Mjaki, opposed the application on two points which will be determined first before going to the merits of the application. *One*, the Applicant's application is incompetent before the law for lumping distinct and separate applications together, hence omnibus. *Two*, the Applicant's

second application/prayer is distinct and premature with no enabling provision.

The application proceeded by way of written submissions. The points of opposition and the main application were argued jointly.

Mr. Mjaki jointly argued the points of opposition. He maintained that this application is omnibus because the Applicant lamped two distinct and separate applications in one application. He argued that the second prayer for the Court to set aside ex-parte judgement is prematurely brought before the Court and incompetent to move the Court to grant the intended application for lack of jurisdiction.

In respect to the second prayer, the Applicant omitted to cite the enabling provision. Mr. Mjaki argued that it is not a technicality to hide on. To support his submission, he referred the Court to the case of **Tanzania Electric Supply Co. Ltd v. Mufungo Leonard Majura and 14 Others**, Civil Application No. 210 of 2015, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Mr. Mjaki was of the view that the Applicant ought to have filed an application for enlargement of time for the Court to acquire jurisdiction to determine an application for setting aside an ex parte judgment. He added that lumping together the two distinct applications as she did, is rubber stamping the Court. Mr. Mjaki further persuaded the Court to be

guided by the most recent Court of Appeal case of **ALAF Limited v. The Board of Trustees of the Public Service Social Security Fund (PSSF) and Another**, Civil Application No. 529 of 2023, Court of Appeal of Tanzania at Dar es Salaam (unreported) delivered on 26th July 2023 where it was held:

> ...whereby the first prayer is for extension of time for filing an application for stay of execution and the second prayer is an order for stay of execution. From these prayers the irritating question is for which reason this Court should enlarge time to file an application which is already before the Court? I get the concern of Ms Sheikh that they filed the omnibus application so as to save time, but I decline to accept as filing improper application cannot be condoned on that reason.

On the basis of the above holding, Mr. Mjaki urged the Court to struck out the application for being improper and incompetent before the Court.

In response to the points of opposition raised, Mr. Rwegasira admitted that the application is omnibus. He defended himself that the applications were jointly filed to avoid multiplicity of unnecessary applications and wastage of time and money by the parties as well as time of the Court as it was the position in the case of **MIC Tanzania Limited v. Minister for Labour and Youth Development and**

Attorney General, Civil Appeal No. 103 of 2004, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was held:

> The parties will find themselves wasting money and time on avoidable applications which would have been conveniently combined.

Mr. Rwegasira argued that the combination of the prayers in this application is not bad in law and it does not prejudice the Respondent in any way. He further urged the Court to refer to the case of **MIC Tanzania Limited** (supra). In line with the provision of *Rule 55(1) (2) of the Labour Court Rules, GN. No. 106 of 2007* the Counsel urged the Court to determine both prayers.

In rejoinder Mr. Mjaki reiterated his submission in chief to the points of opposition.

After considering the rival submissions of the parties, it is crystal clear that the application is omnibus as rightly conceded by the Applicant's Counsel. The first prayer is for extension of time to set aside ex-parte judgement while the second prayer is for the Court to proceed and set aside ex-parte judgement. I have noted Mr. Rwegasira's argument that the prayers were joined to avoid multiplicity of applications. As much as the argument is convincing, it is my view that

the prayers in this application were wrongly joined because of the following reasons.

First, the provisions cited by the Applicant only empowers the Court to extend time within which to file an application to set aside ex-parte judgment. Under such circumstance, no provisions of the law have been cited to move the Court to grant the second prayer. Thus, the Court is not properly moved to determine the second prayer.

Second, the second prayer is filed out of time without leave of the Court. The Court cannot proceed to set aside ex-parte judgement while no leave of the Court has been obtained to file such application out of time.

Third, this Court is bound by the decision of **ALAF Limited** (supra) if the application to set aside ex-parte judgement is already filed then the application for extension of time is worthless.

Fourth, the law recognizes the two applications as distinct. This is reflected under *Rule 37(2) of the Labour Court Rules (supra)* which is to the effect that:

> Where a default judgement has been entered or an extension of time has been granted, the complainant or the Respondent

as the case may be may apply to the presiding Judge for necessary orders.

From the wording of the above provision, it is my view that when a party delayed to file an application to set aside ex-parte judgement, he/she is required to file an application for extension of time first before filing an application to set aside ex-parte judgement.

On those reasons, it is my view that the prayers at hand ought to have been brought separately. I further decline the Applicant's prayer of determining both applications. For the interest of justice and for speed dispensation of justice, I hereby expunge the second prayer and proceed to determine the first one of extending time within which to file an application to set aside ex-parte judgement.

Regarding the prayer of extending time, Mr. Rwegasira argued that, according to *Rule 56(1) of the Labour Court Rules (supra),* this Court has power to extend time. He stated that the *Labour Revision No. 403 of 2023* was heard ex-parte because the Applicant's representative was seriously sick as evidenced by the medical shits attached to the affidavit in support of the application. He alleges that the Applicant's representative communicated with the Respondent's Advocate and informed him about his sickness. That, the Applicant's representative further asked his fellow Advocate to inform the Court about his sickness.

Mr. Rwegasira went on to submit that the Respondent's Advocate failed to serve the Applicant with the written submission as ordered by the Court. Thus, following his sickness, he also failed to file reply submission. He argued that, sickness is a good ground for extension of time as it was held in the case of **Felix Tumbo Kisma v. Tanzania Telecommunication Limited and Another**, Civil Application No. 01 of 1997 (unreported) as cited in the case of **Hodi (Hotel Management) Company Limited T/a Mount Meru Hotel v. Richard Nkomo**, Misc Labour Application No. 12 of 2021, High Court of Tanzania, Arusha Sub Registry (unreported).

It was further submitted by Mr. Rwegasira that the Applicant's representative recovered on 03/06/2023 and found that the ex-parte judgement was already pronounced. At the conclusion, Counsel Rwegasira maintained that the Applicant failed to file the submission as ordered because he was not served with the written submission. He also reiterated the reason of sickness. He therefore urged the Court to grant the extension of time sought basing on the ground pleaded.

In response to the application for extension of time, Mr. Mjaki submitted that; the Applicant's Advocate works with the diary, in an office which has persons to cover for him in case of his absence. He stated that the claim of being sick is an afterthought. He added that the

Applicant's Counsel one Mkakatu appeared before the Court on the first hearing date when the Court ordered the impugned revision to be argued by way of written submission.

Counsel Rwegasira submitted that the Applicant's Counsel one Zubery Mkakatu on scheduling date requested the written submission to be served to him through the email and the same were sent accordingly as deponed in the Counter affidavit. It was argued that despite the fact that the extension of time is within the Court's discretion, the Applicant has not provided the reasonable grounds as well as he has not accounted for each time of delay for the Court to grant the same considering that the Respondent will be prejudiced as he has been out of job for couple of years. He therefore urged the Court to strike out this application for being incompetent.

Regarding the merit of the application, as rightly submitted by Mr. Rwegasira, this Court's power to extend time is provided for under the provision of *Rule 56 of the Labour Court Rules (supra)* where the Court may extend time upon good cause shown. There is no straight forward explanation or meaning as to what amounts to good cause. However, the Court in range of decisions elaborated what amounts to sufficient cause including the case of **Felix Tumbo Kisma** (supra). For instance, in the case of **Arisony Gilman v. A to Textile Mills Ltd**, Revision No.

06/2013 Labour Division, Arusha Sub Registry (unreported), the Court held that:

> What amounts to sufficient cause has been defined from decided cases, a number of factors has to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for the delay, lack of diligence on part of the Applicant.

In the instant matter, the Applicant alleged that he was sick therefore, he failed to file the application to set aside ex-parte judgement on time. I totally agree with Mr. Rwegasira's argument that sickness is a good ground for extension of time to be granted. This has been stated so in numerous decisions including the case of **Vicent Okwaro V. Robert Athanas,** Misc. Civil Application No 18 Of 2022, High Court, Musoma Sub Registry (unreported) where it was held that:

> Sickness has been considered as good ground for extension of time if dully established.

Again, in the case of **Esther Manonga v. Esther Lohay**, Misc. Civil Application No. 74 of 2022, High Court, Arusha Sub Registry (unreported) the Court was of the view:

> ... that mere allegation of sickness is not enough, the Applicant must produce concrete evidence, which are normally required to be presented in the affidavit filed in support of the

application filed. The reasons and ground should not be assumed, or presumed, the same must, as a matter of guiding principle be proved or justified by evidence.

In this case, the Applicant has attached a fainted claim form which does not clearly show that the same belongs to Mr. Zuberi. Moreover, the alleged form even if it is to be considered by the Court, it does not show where the Applicant's officer was treated and the seriousness of his sickness which prevented him to file an application to set aside ex-parte judgement within fifteen days required by the law under *Rule 38(2) of the Labour Court Rules (supra).*

Upon perusal from the records, the Court noted the following: On 21/03/2023 the Court ordered the impugned application between the parties to proceed by way of written submissions. The Applicant was to file his submission by 31/03/2023, Respondent's submission (the Applicant herein) was to be filed by 11/04/2023 and rejoinder if any by 17/04/2023. The matter was further scheduled for mention on 18/04/2023. On the date when the matter was called for mention, the Applicant did not appear. The matter was further adjourned to 25/04/2023. Again, the Applicant did not appear to Court nor filed his written submission. Thus, the matter was scheduled for judgement on

03/05/2023 where the Applicant also did not enter appearance hence the Court entered ex parte judgement.

The claim form attached to this application barely shows that the Applicant's officer was treated on 04/05/2023, one day after when the judgement was pronounced. The Applicant's representative attended to hospital as an outpatient. No further reason has been stated as to why the Applicant failed to file an application to set aside ex-parte judgement within time. The record as indicated above clearly shows that the Applicant abandoned the impugned application.

As rightly submitted by Mr. Mjaki, the Applicant's representative works in an office in which they have persons to cover him in his absence. To the contrary, no one appeared before the Court. Furthermore, it is my view that, if they had interest to prosecute the matter, they could have acted immediately after the ex-parte judgement was pronounced. However, the Applicant again took two months to file an application to set aside ex-parte judgment. Therefore, the Applicant's conduct in this case cannot be condoned.

As regards the reason that the Applicant was not served with the written submission on time, it is my view that the same has no relevance to the present application. The time limit to file an application to set aside ex-parte judgement is counted from the time when the ex-

parte judgement was pronounced. Submissions were filed before the judgement was pronounced.

On the basis of the above analysis, it is my view that the present application has no merit. The Applicant has not demonstrated sufficient reasons for the grant of extension of time sought. Thus, the application is dismissed accordingly.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

08/09/2023

Ruling delivered and dated 8th September, 2023 in the presence of Frank Simon Ngairo, Driver of the Applicant and learned Counsel Tibiita Muganga for the Respondent. Right of Appeal fully explained.

Y.J. MLYAMBINA

JUDGE

08/09/2023