

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

MISC. APPLICATION NO. 275 OF 2023

(Arising from CMA Award with Reference No. CMA/DSM/KIN/460/20/119)

BIDCO OIL AND SOAP LTD..... APPLICANT

VERSUS

EMMANUEL KIMARIO.....RESPONDENT

RULING

Date of Last Order: 27/11/2023

Date of Ruling: 7/12/2023

MLYAMBINA, J.

This ruling is in respect of the application for enlargement of time so as to lodge revision application, with intention of challenging the Commission of Mediation and Arbitration (CMA)'s Award with *Reference No. CMA/DSM/KIN/460/20/119*. Brief narration of this application can be traced from parties' affidavits and the records available before this Court. Shortly, the impugned Award of the CMA was issued on 29th July 2022 in Respondent's favour to the tune of TZS 55,096,000/= as a compensation for remained period plus general damages. Being dissatisfied with the Award, the Applicant filed *Revision No. 293 of 2022*. Being incompetent as it was filed without CMA Form No. 1, it was struck out with no leave to refile. Subsequently, several applications were filed including *Misc.*

Application No. 475 of 2022 and Revision No. 145 of 2023 to cure the defectiveness. Hence, the present application.

To backup this application, the Applicant deposed in her affidavit that after receiving the Award of the CMA, she acted diligent in pursuing her rights from 29th July 2022 till 05th October 2023 when the present application was filed, after receiving certified copies of *Revision No. 145 of 2023* on 29th September 2023.

In fortifying extension of time, the Applicant further advanced a ground of technical delay as a reason of not filing her revision application within time. The Respondent vehemently disputed the application by filing a counter affidavit challenging the ground advanced by the Applicant. He alleged that the Applicant failed to adduce good reason for delay.

The application was disposed of by way of written submissions. The Applicant was represented by Mr. Emmanuel Julius Mashamba, Advocate, whereas the Respondent was represented by Mr. Phillip Lincoln Irungu, Advocate.

To start with technical delay, Mr. Mashamba submitted that since the Applicant has first filed application for *Revision No. 293 of 2022* and later on *Revision No. 145 of 2023* which were filed within time and being pending before this Court for 300 days until when the last *Revision No. 145 of 2023* was struck out on the 18th day of September, 2023 on the

ground that the notice of intention to seek for revision was filed out of time. This prove that the Applicant was not negligent and that there has been no laxity in taking prompt actions in the matter. It is well demonstrated in Applicant's affidavit that the Applicant has been in Court's corridor all this time pursuing his applications for revision until when they were struck out on technical ground. He added that; since the struck out of the applications were based on technical ground and not negligence, the right of the Applicant can not be denied while the ground by itself constitutes a genuine reason and acceptable ground for extension. To back up the submission, the Applicant cited 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 pp. 7 and 8, where the Court held that:

...it is apparent that technical delay may be occasioned by a party's negligence, but it does not become penalized by refusal to extend the time...technical delay constitutes an excusable grounds to allow extension of time.

Mr. Mashamba went on to cite the case of **Bank M (Tanzania) Limited v. Enock Mwakyusa**, Court Of Appeal Of Tanzania, Civil Application No 520/18 of 2017 at pp. 8 - 11, where the Court 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 these circumstances an extension of time ought to be granted.

On second ground regarding promptness, Mr. Mashamba submitted that; it is clear and undisputed that the revision application number 145 of 2023 which was before this Honourable Court was struck out on 18th September 2023 for want of notice of intension to seek for revision to be filed within time. Thereafter, the Applicant acted promptly by filing this application on 5th October 2023. That's means it was within Seven (7) days from the date of obtaining the written ruling. Thus, the Applicant account for each day of delay. As such, the Applicant was not idle but prompt on pursuing his right. On that basis, this Court has to consider the effort of the Applicant in pursuing his right without unnecessary delay as it was in the case of **Johan Harald Christer Abrahson v. Exim Bank (T) Limited And 3 Others**, Civil Application No. 224/16 of 2018, Court of Appeal of Tanzania (unreported). Mr. Mashamba, therefore, prayed for the application to be allowed.

In reply to the technical delay ground, Mr. Irungu submitted that the previous revision was struck out for failure to have a notice of intention to seek revision (form no. 10) which is compulsory requirement. As stated in paragraph 4 of the counter affidavit, the Respondent stated that the Applicant 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*. He added that the Applicant did not even file a reply to counter affidavit to state reasons for failure to file the Form No. 10 in this Court.

It was further submitted by Mr. Irungu that the Applicant has been negligent in prosecuting the revision, as there has always been several mistakes in prosecuting the revision. As it is seen on the record, the Applicant had filed an improper revision and through the order of this Court dated 10th October 2022, they were allowed to amend the application, upon amending they again filed an incompetent application that led for the application to be struck out.

Challenging the competence of representation, Mr. Irungu submitted that; the Applicant always has been represented by the Counsel who knows the laws. They ought have been competent to file proper application to the Court. As such, the reasons for procedural technicality or technical delays are unjustifiable. Mr. Irungu was of position that the case of **Anthony John Kazembe v. Intertek Testing Service** (*supra*)

is not binding to this Court. The said case referred to a single justice decision in the case of **Fortunata Masha v. 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, as such the case is not a good law and not binding. He added that; while overturning the decision of the single justice in **William Shija v. 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 discretions.

Mr. Irungu further argued that since the Applicant has 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 added that; the Court of Appeal while dismissing a similar application on the same grounds in the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016, (Unreported) Mkuye, J.A at page 10 with the approval of case of **Hadija Adamu v. Godbless Tumba**, Civil Application No. 14 of 2013 (unreported) held that:

As regards the Applicant's apparent ignorance of law and its attendant 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.

Lastly, Mr. Irungu submitted that the Applicant has not provided sufficient grounds to enable this Court grant extension of time. He thus prayed for the application to be dismissed.

Having considered the parties submissions, there is one major issue to be determined by the Court; *whether the Applicants adduced good reason/cause for this Court to exercise its discretionary power of granting extension of time to file revision.*

Timeliness in filing revision application is well captured under *Section 91 of the Employment and Labour Relations Act (herein ELRA), [Cap 366 R.E. 2019]* which directs that the revision application must be filed within six weeks of the date that the Award was served to the Applicant.

The above provision provides time limit of 42 days in filing revision application before this Court. In granting extension of time, a good cause must be shown in case the Applicant failed to observe time limit. Such position has been laid down in numerous decisions, including the case of **Attorney General v. Tanzania Ports Authority & Another**, Civil

Application No. 87 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported), in which it was held:

Good cause includes whether *the application has been brought promptly, absence of any invalid explanation for the delay and negligent on the part of the Applicant.*
[Emphasis added]

Over again, the word reasonable cause or good cause has to be adduced by a party seeking extension of time in order to move the Court to exercise its discretion. The good cause must be determined by reference to all the circumstances of each case.

In this matter, the Applicant advanced two grounds; *technical delay* and *being diligent* for this Court to exercise its discretional power of extending time.

On technical delay, the Applicant's Counsel Mr. Mashamba contended that the Applicant filed *Revision Application No. 293 of 2022* within a time but the same was struck out for being incompetent. He added that the Applicant acted promptly in pursuing its rights.

On other hand, the Respondent's Counsel Mr. Irungu maintained that the Applicant delay resulted from negligence and inaction of its Advocate in prosecuting the matter, as there was a several mistakes.

From 5th June 2023 when the application was withdrawn to 15th June 2023 when this application was filed, that should not be treated as technical delay.

Having such kind of disputed fact, the question before this Court is under which circumstance one could declare delay resulted from technical *delay or negligence*. In resolving the same, I find worth to borrow wisdom from the case of **John Harld Christer Abramson v. Exim Bank (T) Ltd & 3 Others**, Civil Application No. 162/16 of 2021 High Court of Tanzania at Dar es Salaam (unreported) in which it was held that:

I have with greatest care gone through the record of the case and the submissions made by the two learned Counsel. There is no doubt that prior to this application, the Applicant was in this Court pursuing Civil Revision No. 49/16 of 2016 which was struck out for reason that the Court was moved under wrong provision and 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*. See

Robert Schelten v. Balden Norataian Vaima and 2

Others, Civil Application No.112 of 2016 (unreported).

The above authority justifies that for the ground of technical delay to stand, there must be original matter lodged in time. But the matter arose only because the original matter for one reason or another has been found to be incompetent and a fresh appeal must be instituted. Likewise in this application, it is undisputed that *Revision No. 293 of 2022* was filed within a time. Subsequently, it was struck out without a leave to refile for being defective by lacking notice of intention to seek revision. In curing the defect, the Applicant deponed in his affidavit that *Revision No. 145 of 2023* was struck out for being incompetent, as the Form No. 10 was improperly filed at CMA without asking extension of time before this Court. While leave to file *Revision No. 145 of 2023* was granted through *Misc. Application No. 475 of 2023*.

For the sake of justice, this Court troubled itself by inspecting Court registry in justifying the Applicant allegation on existence of application seeking extension to file notice of intention to file revision. It became evident that via *Misc. Application No. 276 of 2023*, the prayer was granted. Since *Revision No. 145 of 2023* was struck out, automatically it allowed the Applicant to refile.[See the case of **John Manson Kayombo (As an Administrator of the Estate of the late Osmund A Millinga) v.**

Prime Minister's Office Labour, Youth, Employment and Persons with Disability and Attorney General, Application for Revision No. 225 of 2023, High Court of Tanzania Labour Division at Dar es Salaam, pp. 50-51 (unreported).

Apart from that, the record also reveals that from 29th September when the Applicant was served with certified copies, they acted promptly by filing the present application on 5th October 2023. It means within 7days, the Applicant managed to file the present application. In such circumstance, one could not claim there was a negligence. In the case of **Twiga Bancorp (T) Ltd. v. David Kanyika**, Revision No.346 of 2013, High Court of Tanzania, Labour Division, at Dar es Salaam (unreported), it was held that:

...negligence needs to be measured by existence of a duty of care that and if a person breached that duty as a result of which, the other person suffers loss or injury/damage, and a person acts negligently, when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.

From **Twiga Bancorp (T) Ltd case** (*supra*), in normal sense of reasonable man, how someone who is negligent can manage to act

diligent in filing application within 7days? Basing on nature of this application, the demarcation should be drawn between technical issues and apathy mistakes, for someone to term it as negligence. For that reason, I have no hesitation to say that Respondent's allegation regarding overturned decision in **Fortunatus's Case** (*Supra*) by three judges, has no relevance in this case as the Applicant's Counsel acted diligent in prosecuting the matter. 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, the Court of Appeal of Tanzania, at Dar es Salaam, (unreported), developed five principles to guide determination of what amounts to good cause for the application for extension of time to be granted, as follows:

- i. That the Applicant must account for all the period of delay,
- ii. The delay should not be inordinate,
- iii. The Applicant must show diligence,
- iv. Other reasons, such as the existence of a point of law of sufficient importance not apathy negligence or sloppiness in the prosecution of the action that he intends to take and lastly,

- v. If the Court feels that there are other sufficient grounds such as the illegality of the decision sought to be challenged.

From the **Lyamuya Construction Company Ltd** case (supra), for the Applicant to enjoy Court's discretionary power, the Court will be guided by the above-mentioned criteria in granting extension of time. All of such principles are reflected in this application.

In such circumstances, I allow extension of time as prayed by the Applicant. The Applicant is given 14 days to lodge his application for revision. Each party to take care of its/his own cost.

It is so ordered.




Y. J. MLYAMBINA
JUDGE
07/12/2023

Ruling delivered and dated 7th December, 2023 in the presence of Counsel Julius Mashamba for the Applicant and Julius Mashamba holding brief of Philip Irungu for the Respondent.




Y. J. MLYAMBINA
JUDGE
07/12/2023