IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 6844 OF 2024

CASE REFERENCE NO. 202403281000006844

BETWEEN

AMINA SANGALI AND 20 OTHERS ..... APPLICANT

VERSUS

ST. JOHN UNIVERSITY OF TANZANIA..... RESPONDENT

RULING

Date of last Order: *24/05/2024*
Date of Ruling: *28/05/2024*

MLYAMBINA, J.

The Applicants are seeking for an extension of time to lodge Revision against the Ruling delivered by the Commission for Mediation and Arbitration at Dar es Salaam (herein CMA) dated 24th March, 2023 in *Complaint No. CMA/DSM/KIN/674/2022.* The brief facts necessary to be noted for the purpose of this ruling, as per the supporting affidavit is that; the Applicants were employees of the Respondent in different capacities and dates until 2018. Later on, the Respondent issued a closer notice of the College in the name of St. Mark's Center being one of Respondent's Centers and one of the Applicants' working place.

On receiving letter for closure, the Applicants proceeded to

make follow ups of their payments which include salaries, pension and overtime payments. Their efforts were futile despite sending various letters seeking for payment from the Respondent. Following failure by the Respondent to effect payments, the Applicants lodged a claim to the Labour Officer seeking for payment of claimed benefits.

In response, the Respondent lodged objection by denying to be the employer of the Applicants. The Labour Officer upon hearing, proceeded to issue Compliance Order in the Applicants' favour.

The Respondent being dissatisfied with the Compliance Order, on 20th June 2020, preferred the objection to the Labour Commissioner seeking nullification of the Compliance Order. The Labour Commissioner on 24th July 2020, dismissed the Respondent's objection and ordered the Respondents to pay the Applicants' benefits as contained in the compliance order.

Feeling aggrieved with the Order of the Labor Commissioner, the Respondent preferred an appeal to this Court. On 22nd April, 2022 the High Court heard and struck out the Respondent's appeal for being incompetent.

Showing discontent, the Respondents lodged a Notice of Appeal to the Court of Appeal of Tanzania, seeking to appeal against

the High Court decision. Despite lodging the Notice of Appeal, the Respondent could not proceed further with the appeal process and instead decided to settle the outstanding claims with the Applicants and consequently, the deed of settlement was executed by the parties and lodged to this Court.

Following settlement, the Respondent opted to withdraw the Notice of Appeal earlier on lodged to the Court of Appeal. That having settled the matter through deed of settlement, the Applicants lodged an application for condonation at the CMA explaining reasons for delay and the same was registered as *CMA/DSM/KIN/674/2022,* claiming to be constructively terminated and claiming the payment of TZS 1,841,507,045.099 being salary arrears deducted but unpaid loan amount, one month salary in lieu of notice and compensations for unfair termination. The CMA heard the application and subsequently dismissed the same through the ruling rendered on 24th March, 2023.

Immediately after obtaining copies of CMA ruling and proceedings, the Applicants lodged an application for revision to this Court on 3rd May, 2023, and the same was registered as *Revision No. 100 of 2023.* Following the raised Preliminary Objection by the Respondent, the application was struck out for lack of notice of

intention to seek revision.

After striking out the application, the Applicants proceeded to lodge the Notice to seek revision and followed by an application seeking extension of time which was registered by this Court as *Misc. Labour Application No.248 of 2023*.When the same came for hearing on 21st September 2023, the Court *suo motu* raised the concern on lack of proper representation on Applicants' application and proceeded to struck out the application.

Immediately thereafter, *Misc. Labour Application No.302 of 2023* was again lodged to this Court and following objections raised, the Court struck out the application for failure to indicate statement of legal issues on 16th November 2023.

Soon thereafter, the Applicants lodged to this Court another application for extension of time registered as *No.26612/2023lIC/DSM/APL/26612/202*. Following existence of negotiation to settle matters relating to the present dispute and the one relating to an application lor execution of labour Commissioner order, it was unanimously agreed by the parties, all applications pending in Court be withdrawn to pave the way for parties to allow negotiations to take place.

Following those understandings, the Applicants withdrew the

application being one of the conditions for negotiations. The matters subject of negotiation application included application for extension of time by the Applicants above referred, *Misc. Labour Application No. 267 of 2023* preferred by the Respondents and an application for execution in respect to salary arrears lodged by the Applicants. It was alleged that all applications by the Applicants were withdrawn with leave to refile the same in the event negotiations became unfruitful.

It has been further alleged by the Applicants that from 8th December 2023 when the negotiations began todate, the Respondents has failed to honor the terms of agreement to deliberate on reliefs sought by the Applicants relating to employment contracts terminated by the Respondent. Thus, the meetings by the parties were set to take place on 15th January 2024, despite reminders by the Applicants to the Respondents and a number of physical follow ups, the Respondent has stayed quite on the process hence this application.

In counting for each day of delay, the Applicants maintained that from December 2023 when the Applicants' applications were withdrawn to the 11th March 2024, the Applicants have in all occasions made communication to the Respondent to no avail.

More so, from 11th March 2024 until when this application was lodged, it was the time spent to prepare this application. Following

termination of the present Applicants, for bread earning purposes, the Applicants stand scattered all over Tanzania and at all material times, it has placed a lot of difficulties in tracing individuals to let them together at one Centre which is Dar es Salaam for signature. This has taken until 28th March 2024 to accomplish the signature exercises.

In line with the provisions of *Rule 24 (3) (c) of the Labour Court Rules, GN No. 106 of 2007*, the Applicants were of the view that the CMA ruling denying application for condonation plus the proceedings in the CMA, manifests errors material to the merits of the dispute before CMA involving injustice to the Applicants and therefore the following statement of legal issues are relevant to wit:

1) Whether the learned arbitrator was justified to involve herself in extraneous matters instead of determining the grounds for delay adduced in the application for condonation.
2) Whether the learned arbitrator was justified to conclude that the Applicants reasons for delay had no enough explanations without considering the scries of events leading to Applicants delay.
3) Whether the learned arbitrator acted judiciously for her failure to consider the import of rule 11 (3) of GN No. 64 of 2007
4) Whether the learned arbitrator decided properly that the Applicants were not attending work as usual after closure of

Respondent's campus.

The main ground which this Court is invited to consider is that; the delay by the Applicant is technical one and not actual. The Applicant has invited the Court to rule that this delay is technical. To buttress the position, the Applicant cited the decision of the Court of Appeal in Civil Application No.153/15 of 2021 between **Katibu Mtendaji Kamishna ya wakfu wa Mali ya Amana Zanzibar v. Hadia Ahmada Mzee and 2 Others** and Civil Application No.557/16 of 2022 between **KCB Bank Tanzania Limited v. Vodacom Tanzania Limited**, whereby in both cases it was held that technical delay is excusable.

It was submitted by the Applicants that for issues raised specifically illegalities committed by the CMA in its decision on condonation application as well stipulated in the main affidavit, it is necessary that the High Court be not denied the chance to examine the correctness of the CMA decision.

Lastly, according to the Applicants, is the confusion brought by the Respondent through her deponed affidavit whereby voluminous documents have been presented. One of the key issues in which the Respondent stresses is the status of the employment of the Applicants by the Respondent. Despite existence of orders of the labour officer and

Labour Commissioner, parties seem stand locked horns on this crucial issue. It is only through giving avenue for the Applicants which will unveil the reality of the Matter.

In response, the Respondent was of submission that this application should be dismissed as the same is *Res Judicata* under the order of the Court dated the 21st day of December 2023, Mganga J. The reason was that the Applicants prayed to withdraw the application without asking for leave to refile. To back up the position, the Respondent cited the High Court decision in the case of **MS. Aslam Akbar Khan (As administrator of Estate of the Late Gulfiroz Begum) v. MS. Ashraf Akbar Khan & 2 Others,** Misc. Land Application No. 47 of 2022 (Unreported attached), on page 11, the Court held that:

> ...a suit withdrawn without leave to file it afresh cannot be reinstituted afresh in respect of the same subject matter ...

The High Court Judge went further on at page 12 to state that:

> ... The application is improperly before this Court as the Applicant is precluded by the law from filing the same as he did not obtain a leave to reinstitute the application ...

Further, the Respondent submitted that the above position is also the Court of Appeal position as shown in page 5 of the same cited judgment.

At this juncture, I do agree with the Respondent that the order of this Court shows the application was merely withdrawn. Indeed, it is a settled principle of law that the matter withdrawn without leave to refile must not be re-entertained. The rationale underlying such principle are largely four: *First*, to prevent wastage of the Court and parties' precious time. *Second*, to prevent endless litigation. *Third*, to prevent abuse of the legal procedure by the parties. *Four*, to accord interest of the society by bringing litigation to an end.

However, it is my firm view that the above principle should not be interpreted in strict sense in labour matters because the withdraw of the application does not render or apply as a *Res-judicata*. Therefore, it cannot bar the Applicants from filing a fresh application in the circumstances of this matter where there has been a multiple of applications which did not let the main controversy been determined and at large there was an understanding that the withdrawal was to pave way settlement of the disputes between the parties.

As properly rejoined by the Applicants, out of series of application lodged to this Court for extension of time, none of them was determined by the Court to its finality.

Again, reading the records in entirety one will note that the application for extension of time registered as *26612/2023HC/DSM/APL/26612/202* was withdrawn at the request of the Respondent seeking settlement of the matter. Since settlement has failed, I find the Applicants have all justification as to why they knocked the Court door seeking extension so that the matter can be determined on merits once for all.

It is my further view that withdrawal of the matter under *Regulation 34 (1) of the Labour Court Rules, GN No. 106 of 2007* does not give a room of praying to withdraw with leave to refile. As such, strict and stringent interpretation of *Order XXIII Rule 1 (2) of the Civil Procedure Code Cap 33 Revised Edition of 2019* can not be applied in labour matters unless there are good reasons so to do and any submission to that effect should be supported with *Rule 55 (1) of the Labour Court Rules (supra).*

Again, the Respondent was of submission that all the issues raised in the affidavit are about revision, while the 2 facts in the application at hand are about the extension of time, which contravenes *Rule 24 (3, c)*

of the Labour Court Rules, GN.No.106 of 2007 that requires the statement of legal issues should arise from the material facts hence the application is incompetent as there are no issues for determination as per facts from the Affidavit.

It was the Respondent's submission that introducing in the supplementary Affidavit reasons not in the main affidavit is an abuse of the Court process and the same goes against the decision of the Court of Appeal in **Charles Christopher Humphrey Richard Kombe a/c Humphrey Building Materials v. Kinondoni Municipal Council,** Civil Application No. 456.17 of 2021 (unreported), where the Court of Appeal had this to say

> ...However, it is important to understand the meaning, essence, and context of a supplementary affidavit. Notably, a supplementary affidavit is similar to a regular affidavit, but it is made to support or supplement an existing valid affidavit not otherwise...

I have gone through both the affidavit and the supplementary affidavit. As properly rejoined by the Applicants, supplementary affidavit is similar to a regular affidavit as per the decision of **Charles Christopher Humphrey** (supra). The issues listed in the supplementary affidavit, as it was deposed therefrom, were issues clearly termed as

additional issues. There are no law limits the supplementary affidavit to contain additional issues. I have equally noted true that these are issues discovered from the added documents which were introduced through Court leave and which fortunately the Respondent did not oppose.

On the merits of the Application, it was the Respondent's humble submission that, the reasons advanced are factual and not technical for the reason that the Applicant ought to account for each day for the delay.

According to the Respondents, the Applicants were aware of the existence of the facts way back in 2019. The delay was caused by the Applicant's negligence as well as inaction.

In the lights of the parties' submission on whether the Applicants have advanced technical delay or not, a reference must be made to the case of **Fortunatus Masha v. William Shija** (1997) TLR 154, where the claim of technical delay was addressed by the Court of Appeal as follows:

> With regard to the second point, I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation cross only

> because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted...

In the instant matter, the Court is of the findings that the delay is technical one. As alluded earlier on, in all occasions, the Applicants' applications have been kicked out on technicalities despite the application for extension of time on revision being timely made. It cannot be correctly said that the delay was caused by the Applicant's negligence and inaction. It is therefore in the interests of justice for the Applicants be afforded extension of time to lodge their revision so that all issues in controversy are determined.

On the submission that there were illegalities committed by the CMA, the Respondent were of the reply that the Applicants have failed to point out the illegalities committed by the CMA. Thus, illegalities must be shown on the face of the record, but before this Court, nothing has been shown.

The Respondent went further to invite this Court to consider the legal personality and operational autonomy of St. Mark's Centre were under *Section 19 (3) of the Universities Act, 2005 (Act No. 7 of 2005),* which states as follows:

> It shall be lawful for- (d) an associate college, institute, school, centre or, as the case may be,

> directorate to retain its independent and separate legal personality or status, its academic or professional and operational autonomy ...

I verily heed to the call made by the Respondent on looking into the application of *Section 19 (3) of the Universities Act (supra).* However, such call is prematurely made in this application for extension of time.

In any case, the grounds raised by the Applicants on whether the CMA considered the import of *Rule 11 (3) of GN No. 64 of 2007* and on whether the learned arbitrator decided properly that the Applicants were not attending work as usual after closure of Respondent's campus, attracts this Court to grant the application so that the same alleged illegalities will be addressed on merits.

In conclusion, I grant this application. The Applicants are given 14 days time to file their intended application. Order accordingly.

Y. J. MLYAMBINA
JUDGE
28/05/2024

Ruling delivered and dated 28th May, 2024 in the presence of learned Counsel Magoli Nyamoyo for the Applicants and Sosthen Mbedule for the Respondent as well as Allen Mtetemela, Advocate (Principal Officer) of the Respondents.

Y. J. MLYAMBINA
JUDGE
28/05/2024