

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**CIVIL APPLICATION NO. 323/13 OF 2021**

**LUSAJO WATSON MWAKASEGE..... APPLICANT**

**VERSUS**

**NJOMBE DISTRICT COUNCIL..... RESPONDENT**

**(Application for extension of time to file memorandum of appeal and record of appeal against the ruling of the High Court of Tanzania at Iringa)**

**(Matogolo, J.)**

**dated 22<sup>nd</sup> day of September, 2020**

**in**

**Labour Revision No. 06 of 2020**

**.....**

**RULING**

4 & 8<sup>th</sup> December, 2023

**NGWEMBE, JA.:**

This ruling is in respect of a preliminary objection raised by the respondent against the applicant's application. The application is for extension of time with in which to lodge memorandum and record of appeal. It is on record that the applicant was a public servant employed by the respondent. A labour dispute arose between the applicant and his employer (respondent), thus, the applicant referred the same to the CMA. However, the CMA dismissed the application on the ground that it lacked jurisdiction.

The applicant through the services of an advocate preferred a Labour Revision before the High Court, which in turn the High court strike out the revision for being incompetent based on time limitation. Thus, this application for extension of time to appeal to this Court. As such he moved this Court under rule 10 and 48 (1) of Tanzania Court of Appeal Rules, 2009 (the Rules).

Prior to the hearing of this application, on 28/11/2023 the respondent through Ms. Ansila Makyao, learned State Attorney under rule 107 (1) of the Rules lodged in this Court two grounds of preliminary objection namely: -

- 1) That the application is incompetent and incurably defective for failure to comply with the mandatory provisions of Rule 84 (1) of the Court of Appeal Rules, 2009 as amended and failure to attach the notice of appeal to the instant application to warrant the application to proceed.*
- 2) That the application is bad in law for being premature and for want of certificate of delay, hence contravening Rule 90 (1) and (2) of The Tanzania Court of Appeal Rules, 2009 as amended.*

Following the underlying principle, that the preliminary objection has to be heard first, then on the hearing date, the respondent (objector),

enjoyed the legal representation of Ms. Ansila Makyao, learned State Attorney assisted by Mr. Egidy S. Mkolwe also a State Attorney, while the applicant appeared in person. Addressing on the first ground, the State Attorney subdivided it into two limbs. The first limb is on the absence of the notice itself in the records of this application, and the second limb is on validity of the notice itself. Submitting on the first limb, the State Attorney argued that, the applicant failed to attach notice of appeal to this application. Further argued that, the notice of appeal which was served to the respondent indicates that, it was lodged in this Court on 29/09/2020, but the respondent was served on 15/10/2020 equal to 17 days from the date of lodging it in this Court. Such delay to serve the respondent was contrary to Rule 84 (1) of the Rules. Supported this argument with a case of **Gideon Wasonga and 3 others vs. AG and 3 others**, Civil Appeal No. 37 of 2018 (unreported).

Addressing on the second limb, Ms. Makyao argued that, the applicant did not attach the notice of appeal in his application contrary to law. Mr. Mkolwe, learned State Attorney added that, the notice of appeal initiates the appeal and all other documents are dependent thereon.

Therefore, the absence of notice of appeal in this application, renders the whole application incompetent.

On the second ground, the learned State Attorney referred this Court to Rule 90 (1) and (2) of the Rules, that, the application is premature because the applicant had stated in his affidavit that, he wrote a letter to the Registrar requesting for correction of the certificate of delay, but prior to obtaining the correct certificate of delay, lodged this application. Thus making this application premature.

In response thereof, the applicant discredited the objection stating that the respondent did not point out any legal provision, which requires the applicant to attach notice of appeal in the application for extension of time. That he himself as well, knows no rule which requires attachment of notice in the application. The preliminary objection therefore contravene rule 107 (1) (3) of the Rules, he insisted. On service of the notice to the respondent, he responded briefly that same was served timeously.

Responding on the second ground, argued that even Rule 90 (1)(2) of the Rules is not applicable, thus his application is not premature.

In rejoinder, the learned State Attorney repeated that, Rule 84 of the Rules is relevant in relation to the contents of notice of appeal and

reiterated that, failure to attach the notice of appeal was fundamentally fatal.

I have paid due consideration to rule 107 of the Court Rules, which is relevant to determine the preliminary objections raised by the respondent. The Rule is quoted hereunder: -

*"A respondent shall not rely upon a preliminary objection unless such **objection consists of a point of law which, if argued and sustained, may dispose of the appeal or application.**"*  
(Emphasis is mine)

The question for determination in this ruling is, I think simple, that whether the two preliminary objections bear merit as stated in numerous precedents of this Court. The test of a valid preliminary objection is, if it is sustained must be capable of disposing of the whole application. The State Attorney insisted that based on the first ground of objection, the application is incompetent. Supported this ground by referring to the decision in the case of **Gideon Wasonga and 3 others vs. AG and 3 others**, whereas, the appellants were appealing against the decision of the High Court, which dismissed their application to challenge constitutionality of section 148 (5) of the Criminal Procedure Act and section 36 (2) of the

Economic and Organized Crimes Control Act, in respect to their rights to bail.

When the appeal was before the Court of Appeal, a preliminary objection was raised on the ground that, the notice was served to the respondents out of time contrary to rule 84 (1) of the Rules. In the contrary, the objection raised in this application is analogous to the case of **Wasonga**.

The application herein is for extension of time. I am of the determined position that, the preliminary objection would be much relevant as against the appeal itself and not this application. Had it been a complaint on the delay to serve the respondent in regard to the documents of this application, the objection would be valid.

It is for the above reason, I find the first point of preliminary objection is irrelevant, for the reason that it does not pass the test set out in **Mukisa Biscuit Manufacturing Limited Vs. West End Distributors Limited [1969] EA 696** as well as **Unet Kenya Limited Vs. Telkom Kenya Limited and another [2004] 1 EA 348 (CCK); Khaji Abubakar Athumani Vs. Daud Lyakugile t/a D.C Aluminium & Another (Civil Appeal 86 of 2018) [2021] TZCA 32; Shahida Abdul**

**Hassanali Kassam Vs. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported).

The present application is for extension of time within which to lodge memorandum and record of appeal. Therefore, the issue of failure to serve the respondent with notice of intention to appeal is relevant on the hearing of the appeal, but this one is not an appeal. Thus, the first limb of the first preliminary objection is premature and same is overruled.

The second limb was on the applicant's failure to attach notice of appeal in the application. In the contrary, the applicant strongly contested that, submitting that there is no legal requirement to attach such notice of appeal in an application for extension of time. I find the relevant Rule in this point is Rule 49 (1) of the Rules which provides:

*"Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts."*

In line of the above Rule, I have revisited the contents of the applicant's affidavit and find no paragraph which discloses anything related to notice of appeal. Since there is no such disclosure in his affidavit and since there is no provision requiring the applicant to attach notice of appeal

in an application of this nature, I accept the applicant's contention to be correct.

Attachment of notice of appeal is necessary where it is averred in the affidavit and in other applications like stay of execution. See for instance the case of **Panone & Co. Ltd vs. Robert Mngowole** (Civil Application 1 of 2015) [2015] TZCA 519, where the applicant failed to annex the notice of appeal and a copy of the drawn order in an application for stay of execution, the Court found it fatal.

The second ground of preliminary objection is related to prematurity of the application itself. The objector amplified that, the application, contravened Rule 90 (1) and (2) of the Rules. However, the applicant maintained that Rule 90 (1) and (2) were inapplicable to the present application. It is known, Rule 90 (1) and (2) if read as a whole is in the nature of favouring the applicant. That while under subrule (1) the appellant is required to institute the appeal within sixty days, he may have the time spent for preparation of the copies of proceeding excluded as may be certified by the Registrar. Where the certificate of delay is never sought or is issued but does not favour the appellant under the circumstance, the person cannot file his appeal without seeking extension of time. Therefore



I am unable to accept the suggestion that obtaining a certificate of delay is a necessary step in this matter when the applicant is seeking extension of time.

The explanation of the applicant is that he was availed with a defective certificate of delay, which he would not have used for the purpose of appeal. That he wrote a letter to the Registrar requesting for rectification of that certificate of delay, but since then the Registrar has neither answered his letter. He suggests that owing to the circumstance, he chose the other way of applying for extension of time. These facts which the applicant alleged in the affidavit may not be tested at this juncture, but in the merit of the application itself. Apart from that, the letter does not seem to have been filed before the court for the Registrar to deal with it.

In resolving the second ground of objection, I am certain it does not establish anything suggesting that the application is premature or incompetent.

On the basis of the above reasons, I find that the preliminary objections are devoid of merits. There are no points which may defeat the application in terms of competence.

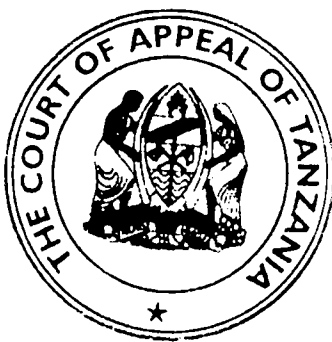
All said and reasoned, the preliminary objections raised by the respondent are overruled and I proceed to order for hearing of the application on its merits.

It is so ordered.

**DATED** at **IRINGA** this 8<sup>th</sup> day of December, 2023.

P. J. NGWEMBE  
**JUSTICE OF APPEAL**

The Ruling delivered this 8<sup>th</sup> day of December, 2023 in the absence of the Applicant, and in the presence of Mr. Bryson Ngulo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**