

**IN THE COURT OF APPEAL OF TANZANIA**

**AT SUMBAWANGA**

**CIVIL APPLICATION NO. 12/09 OF 2024**

**CHINA HUNAN CONSTRUCTION  
ENGINEERING GROUP (EA) LTD.....APPLICANT**

**VERSUS**

**PENDO KASYAMUKULA.....RESPONDENT**

**(An application for extension of time within which to lodge a second bite  
application for extension of time to lodge notice of appeal out of time  
against the decision of the High Court of Tanzania,  
at Sumbawanga)**

**(Mashauri,J.)**

**dated the 18<sup>th</sup> day of November, 2019**

**in**

**Labour Revision No. 05 of 2018**

\*\*\*\*\*

**RULING**

*14<sup>th</sup> & 19<sup>th</sup> March, 2024*

**MASOUD, J.A.:**

Aggrieved by the decision of the High Court, Labour Division in Labour Revision No. 05 of 2018 which was resolved against her, the applicant lodged a notice of appeal and subsequently an appeal before the Court of Appeal, that is Civil Appeal No. 37 of 2020. When the appeal was scheduled for hearing on 16<sup>th</sup> February, 2022, the applicant who was the appellant did not enter appearance despite being duly served with the notice of hearing. The appeal was struck out because of an issue of incomplete record of appeal which was raised by the respondent

in the absence of the appellant. The Court at page 3 of its typed Order had this to say:

*"As correctly submitted by Mr. Budodi, the record of appeal is suffering from the ailments which renders the appeal incomplete and hence incompetent. It is our view that had the counsel for the appellant appeared in Court he would have sought leave of the Court to file a supplementary record of appeal which would have included the said missing documents. Since the appellant and her advocate are not in attendance and no reason is advanced for their absence, we are constrained to agree with Mr. Budodi that in the circumstances of the case, the only option is to strike out the appeal for being incompetent".*

In her further attempt to challenge the impugned decision of the High Court, Labour Division, the applicant filed Misc. Labour Application No. 3 of 2022 seeking extension of time within which to file a fresh notice of appeal. The application was dismissed for want of merit on 15<sup>th</sup> September, 2022. As a result, the applicant, lodged a second bite application, namely, Civil Application No. 726/09 of 2022, seeking extension of time to lodge the said notice. It was, however, eventually withdrawn on 20<sup>th</sup> September, 2023 at the instance of the applicant in

terms of rule 58(3) of the Tanzania Court of Appeal Rules, 2009 as amended (hereinafter the Rules).

Still determined to challenge the High Court decision in Labour Revision No. 05 of 2018, the applicant preferred the instant application under rules 10 and 4(2)(a) of the Rules seeking for two orders; one, extension of time within which to lodge a second bite application on the ground of technical delay and illegalities, and two, subject to the preceding relief, extension of time to lodge the intended notice of appeal out of time.

The application is supported by an affidavit deposed by Mr. David Shiweiwei, a principal officer of the applicant. Apart from accounting for the background of the instant application, the applicant also stated reasons in paragraphs 16, 17, 18 and 19 of the affidavit why the extension of time should be granted as sought in the notice of motion. From the said paragraphs, the applicant raised two grounds for preferring the application, **one**; technical delay and **two**; illegality.

The respondent opposed the application and for that matter, she lodged an affidavit in reply deposed by Mr. Mathias Budodi, her learned advocate. In a nutshell, the affidavit in reply contends that the failure of the applicant, a limited liability company which has an advocate representing it, directors and staff members, to appear before the Court

when her appeal was called on for hearing was attributed to negligence on her part and her advocate; there is failure on the part of the applicant to account for each day of the period of delay; and that there is no excusable technical delay because of the obvious negligence on the part of the applicant.

When the application was called on for hearing before me, the applicant was represented by Mr. Chapa Alfredy, learned advocate, while the respondent was advocated by Mr. Mathias Budodi, also learned advocate.

Submitting on the issue of technical delay, the applicant's learned advocate briefly stated that the delay is not inordinate and has not been occasioned by negligence or lack of diligence on the part of the applicant. The applicant, the learned advocate argued, has all along been busy in the court corridors pursuing her rights. Since the applicant was busy in the court corridors pursuing her rights, in particular from 16<sup>th</sup> February, 2022 when her appeal was struck out by the Court, it means that the resulting delay is, according to the applicant's learned advocate, excusable in law for it is a technical delay. It was his view that once a technical delay is pleaded and seen on the face of it, it would amount to sufficient cause for granting the sought extension of time. He relied on the case of **Stephen Ngalambe vs Onesmo Ezekia Chaula and Another**, Civil Appeal No. 27 of 2020 (unreported).

As to the claim of existence of illegalities in the impugned decision of the High Court, the learned advocate for the applicant drew my attention to paragraph 19(a)-(f) of the affidavit in support which enlists the instances of errors complained of by the applicant, and which the applicant claims to amount into grounds of illegalities. They read thus:

- a. whether the High Court was correct in finding that the ex-parte award delivered on 28/9/2016 by Hon. Boniface L. Nyambo (Mediator) was illegally set aside in that the Arbitrator Mr. Mwalongo, A. has no power to set aside the ex-parte award of his fellow arbitrator.*
- b. Whether the High Court was correct in law to proceed revising and set aside the CMA Ruling delivered on 15/10/2017 by Hon. Mwalongo A. (Arbitrator) while the application for Revision was far beyond the time limit.*
- c. Whether the High Court was correct in law, after condoning the delay to proceed determining the case, uphold and grant reliefs as contained in the ex-parte award dated 28/9/2019 instead of remitting back to CMA for hearing the matter on merit inter parties.*
- d. Whether the High Court was correct to grant condonation without the respondent to account each day of delay for the period of six years.*
- e. Whether a mere promise to be paid is sufficient ground for extension of time.*

*f. Whether the CMA Mediator, Mr. Boniface Nyambo had jurisdiction to issue an ex-parte award dated 29.8.2016 instead of the Arbitrator.*

According to Mr. Alfredy, the afore listed grounds of illegalities suffice as sufficient cause for granting extension of time to the applicant to pave way for her to challenge the impugned decision of the High Court. He cited, among others, the cases of **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported); and **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R 182.

When replying, Mr. Budodi, learned advocate for the respondent submitted that, the affidavit of the applicant does not establish good cause but gross negligence on the part of the applicant and her advocate. For such reason, he invited me to look at what the Court held when it struck out the applicant's appeal on account of the appellant's non-appearance for the hearing of the appeal without reason, and find that the application does not meet the requirement of rule 10 of the Rules to be considered for the sought reliefs. He referred me to the case of **Omar R. Ibrahim vs Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (unreported).

To drive home his argument that the delay was a result of the negligence on the part of the applicant and her advocate, Mr. Budodi also referred me to the applicant's application which she withdrew at her own instance due to existence of some defects and irregularities as averred in paragraph 16 of the affidavit in support which is subsequent to the striking out of the appeal for her non-appearance. Reliance was made by Mr. Budodi on the case of **The Commissioner General of Tanzania Revenue Authority and Another v. Urban J. Mtui**, Civil Application No. 532/01 of 2021 (unreported) in relation to the argument that in the circumstances the delay is not technical.

As if the foregoing is not sufficient, Mr. Budodi added that the instant application by the applicant was filed after a lapse of fourteen (14) days if one counts from 20<sup>th</sup> September, 2023 when the initial application (the second bite) was withdrawn up to 4<sup>th</sup> October, 2023 when the instant application was filed. He thus argued that the applicant did not act promptly in lodging the instant application, and to make it worse, the said delay of fourteen (14) days was not accounted for in the affidavit supporting the application.

With regard to the claim of illegalities listed in paragraph 19 of the affidavit in support, it was Mr. Budodi's submission that they were not grounds of illegalities within the framework of the principle obtaining in the case of **Lyamuya Construction Co. Ltd** (supra). In this respect, he

said that the claimed grounds of illegalities are not apparent on the face of the record as they would require a long-drawn argument or process. He advanced yet another argument to assail the claim of illegalities, saying that a ground of illegality cannot apply where the applicant was negligent in pursuing her right.

I am now to determine whether the applicant has established good cause for extension of time. I will first consider whether there is in the circumstances technical delay which is excusable before moving to the claim of existence of grounds of illegalities.

The impugned judgment in Labour Revision No. 5 of 2018 was, as alluded to herein above, delivered on 18<sup>th</sup> November, 2019. Being aggrieved by the decision, the applicant lodged the notice of appeal timeously on 28<sup>th</sup> November, 2019. Consequently, her appeal was scheduled for hearing on 16<sup>th</sup> February, 2022 and parties were all duly notified. As already shown above, neither the applicant nor her learned advocate appeared for the hearing as is clearly stated by the Court at page 1 of its ruling. To make it worse, there were no reason advanced for their absence. As already alluded to, the appeal was struck out.

In the circumstance, I am in agreement with Mr. Budodi that the delay between the lodging of notice of appeal on 28<sup>th</sup> November, 2019 as averred in the affidavit in support and the subsequent striking out of the



appeal on 18<sup>th</sup> February, 2022 as a result of non-appearance of neither the applicant nor her advocate and without advancing reasons, is not excusable technical delay. I say so because the appeal would not have been struck out had the applicant appeared and applied for leave to lodge a supplementary record of appeal to include the missing documents or if she furnished good reason for their non-appearance on the hearing day. I am in this finding guided by the case of **The Commissioner General of Tanzania Revenue Authority and Another v. Urban J. Mtui** (supra); and **William Shija v. Fortunatus Masha** [1997] T.L.R. 213.

The failure of either the applicant or her advocate to appear without advancing reason is, in my view an exhibition of negligence in the circumstances of the instant case. The justification given in paragraph 12 of shifting the blame to the respondent's counsel for raising the issue of incompetence of the appeal due to incomplete record signifies the negligence on the part of the applicant in pursuing her appeal as there are also no reason averred justifying the non-appearance of the applicant and therefore failure to pray for leave to lodge supplementary record of appeal to salvage the incompetent appeal that she lodged.

It is common ground that subsequent to the striking out of the appeal on 18<sup>th</sup> February, 2022, the applicant filed a first bite application

before the High Court, which was dismissed for want of merit on 15<sup>th</sup> September, 2022. As a result, the applicant lodged a second bite application, namely, Civil Application No. 726/09 of 2022, seeking extension of time to lodge the said notice. It was, however, eventually withdrawn on 20<sup>th</sup> September, 2023 at the instance of the applicant in terms of rule 58(3) of the Rules.

At paragraph 6 of the affidavit in reply, the applicant has it that the same had to be withdrawn because it had some defects and irregularities which were noted by the single Justice of Appeal when the application was called on for hearing, and which led to the applicant withdrawing the application. Following the striking out of the appeal which was contributed to the applicant's non-appearance, one would have expected the applicant and her advocate to be diligent and careful enough. On the contrary, she filed a second bite application which as per her own admission was marred by significant defects, so much so that it had to be withdrawn on the hearing day. It was thus the filing of a defective application which caused a further delay subsequent to the dismissal of the first bite application.

In view of the foregoing, I have no option, but to find that the filing of such application exhibited lack of care on the part of the applicant and her advocate as argued by Mr. Budodi. It would therefore follow that the period subsequent to the dismissal of the first bite

application on 15<sup>th</sup> September, 2022 by the High Court and the withdrawal of the second bite application on 20<sup>th</sup> September, 2023, because of defects and irregularities does not equally amount to an excusable technical delay, for reasons already stated.

Consequent to my finding that there is no justification for excusable technical delay, it means that the relevant period remains unaccounted for. There is therefore no good cause shown for the relevant period of delay. I take note further that the applicant did not in her supporting affidavit account for the subsequent delay of fourteen (14) days which is between the withdrawal of the second bite application on 20<sup>th</sup> September, 2023 and the lodging of the instant application on 4<sup>th</sup> October, 2023 as very well argued by Mr. Budodi.

Having disposed of the issue pertaining to technical delay, I am now left with the grounds of illegalities alleged by the applicant in paragraph 19(a)-(f) of the affidavit in support. It is indeed settled that an illegality can, by itself, constitute a good cause for extension of time. See, among others, **Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra), and **Lyamuya Construction Co. Ltd** (supra). I gather from such authorities that a ground of illegality has to be claimed by an applicant in his affidavit; it has to be apparent on the face of the record; it must not be one that would not be

discovered by a long-drawn argument or process; and it has to be a point of law of sufficient importance.

In so far as the above elements of a ground of illegality are concerned, I have no doubt that they entail a showing on the part of the applicant of their existence in the averment in the affidavit in support and not merely claiming that there is an illegality. Such showing would necessarily assist, among other things, in demonstrating that the alleged ground of illegality is not a mere point of law justifying appealing on the point of law as well as demonstrating that it is of vital importance. The latter I think reflects what was stated in **Lyamuya's case** that:

*"It cannot...be said that in Valambhia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one."*

In the light of the above, the question is whether the applicant has shown the above elements in her averments in relation to the grounds of the alleged illegalities.

With the foregoing in mind, I took time to consider the grounds of illegalities alleged by the applicant. I am settled in my mind that there was nothing other than the mentioning of the said grounds. In my resolve, I am of a considered of opinion that the alleged grounds of

illegalities are at best mere points of law/facts which could make good grounds of appeal, but not grounds of illegalities within the meaning of the statements of principle emerging from the afore cited authorities. In the circumstances, they do not constitute good cause.

For reasons stated herein above, the application fails and is accordingly dismissed with costs.

**DATED at SUMBAWANGA** this 19<sup>th</sup> day of March, 2024.

B. S. MASOUD  
**JUSTICE OF APPEAL**

This Ruling delivered on 19<sup>th</sup> day of March, 2024 in the presence of Mr. Mathias Budodi, learned counsel for the respondent also holding brief for Mr. Chapa Alfred, learned counsel for the applicant, is hereby certified as a true copy of original.



  
A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**