

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 91/18 OF 2022

SABENA TECHNICS DAR ES SALAAM LTD.....APPLICANT

VERSUS

ALFRED KIRCHSTEN.....RESPONDENT

**(Application from the decision of the High Court of Tanzania,
(Labour Division) at Dar es Salaam)**

(Msafiri, J.)

dated the 5th day of July, 2021

in

Labour Revision No. 887 of 2019

.....

RULING

29th June 2023 & 31st January, 2024

LEVIRA, J.A.:

This is an application for extension of time within which to lodge a memorandum and record of appeal against the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam (the High Court) dated 5th July, 2021 in Labour Revision No. 887 of 2019 between the parties herein. The application is by way of a notice of motion made under the provisions of Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The said notice is supported by an affidavit, duly sworn by the applicant's counsel, one Gaspar Nyika. In addition, the applicant has filed written submissions in support of the application.

The application has, however, been opposed by the respondent who filed affidavit in reply as well as written submissions.

A brief factual background of this matter is to the effect that, the respondent was employed by the applicant as an Engineer from the year 2014. However, on 11th January, 2019 he was served, by the applicant, with a notice of termination of employment. Following termination of his employment, he preferred Labour Dispute No. CMA/ILA/292/2019 before the Commission for Mediation and Arbitration at Dar es Salaam (the CMA). The Labour Dispute was heard *ex parte* and on 19th July, 2019, an Award was delivered in favour of the Respondent. The applicant became aware of the Award on 14th August, 2019 and on 2nd September, 2019, she preferred an application to set aside the *Ex parte* Award at the CMA. On 19th November, 2019, the CMA dismissed the applicant's application to set aside *ex parte* Award on ground that the applicant was dully served with the summons to appear. Aggrieved, the applicant filed in the High Court Labour Revision No. 887 of 2019 against that decision. The application was heard and the decision was delivered on 7th July, 2021 where it was dismissed for want of merit.

Aggrieved again, on 30th July, 2023 the applicant filed a notice of intention to appeal to the Court against that decision and served the same on the respondent. According to the applicant, the time to lodge

memorandum and record of appeal had expired on 28th September, 2021 before being supplied with all the necessary documents for appeal purposes. The said documents were copies of summons issued by the CMA to the applicant before proceeding *ex parte* and exhibits which were tendered during *ex parte* hearing. The requested documents were supplied to the applicant after various correspondents on 23rd February, 2022. Therefore, the applicant prepared and filed the present application on 10th March 2022, advancing several grounds which are condensed to two main grounds as follows:

- 1) That, the delay in filing the appeal was a result of the delay in obtaining the necessary documents for the purpose of including them in the record of appeal.
- 2) That there is illegality in the Award of the CMA and the Judgment of the High Court upholding the decision of the CMA which is the subject of the intended appeal because the applicant was condemned without being given an opportunity to be heard as there was no notice which was issued to her before the CMA proceeded to hear the matter *ex parte*.

As intimated above, the application is highly opposed by the respondent through affidavit in reply and written submissions.

At the hearing of the application, the applicant was represented by Mr. Gasper Nyika, learned advocate assisted by Ms. Anthonia Agapiti, also learned advocate whereas, the respondent had the services of Messrs. Luka Elinganiya and Alex Myanga, both learned advocates.

Mr. Nyika commenced his submission by adopting the contents of the notice of motion, supporting affidavit, as well as the applicant's written submissions. He thereafter explained that, the applicant could not lodge the intended appeal within the prescribed time because of delay to be supplied with the documents necessary for appeal purposes. He submitted further that the applicant could not benefit from the exemption in computation of time of filing an appeal under the proviso to Rule 90 (1) of the Rules because there was no letter requesting for the requisite documents which was served on the respondent; hence, disentitled in terms of Rule 90 (3) of the Rules.

Mr. Nyika reiterated the applicant's narration of sequence of events from the time the *exparte* Award of the CMA was delivered as indicated above as a base of his argument, that the applicant acted diligently in lodging this application and thus a good cause for extension of time.

Submitting on the second ground, Mr. Nyika stated that the CMA Award and the High Court's decision upholding the CMA decision which is subject of the intended appeal is tainted with illegalities because the applicant was condemned without being given an opportunity to be heard. He expounded that the two summonses allegedly served on the applicant before the matter proceeded *ex parte* against her were, in law, not dully served. He referred me to Rule 6 (1) (a) (ii) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. NO. 64 of 2007 which provides that service of documents to a party by delivery of a copy of the document must be to a representative authorized in writing to accept service on behalf of the person; and or the employer as per Rule 6 (2) (a) of the same GN, but that was not the case as it can apparently be seen from pages 15 to 18 of the impugned judgment (Annexure SBN5 to paragraph 9 of the supporting affidavit).

According to Mr. Nyika, the purported service of summons to the applicant in this matter was not substantiated and there was no proof from the respondent that the alleged driver who received it was a person in charge or acted on behalf of the person in charge of the applicant's workplace. Therefore, he urged me to find that there is an apparent illegality on the face of record worthy consideration by the

Court; hence, good cause for extending time sought by the applicant herein. In conclusion, Mr. Nyika prayed for the application to be granted.

Replying to the applicant's counsel submission, Mr. Elinganya having adopted the contents of the respondent's affidavit in reply and written submissions, together with a list of authorities, opposed the application as he argued that the applicant has failed to show good cause for the Court to extend time sought in this application. This, he said, is because the applicant ought to have first applied for exclusion of time in terms of the proviso to Rule 90 (1) of the Rules before lodging the present application. He faulted the submission by the applicant's counsel while making reference to paragraph 21 of the supporting affidavit where it is claimed that the applicant acknowledged absence of the letter to the Registrar requesting for accessory documents for appeal purposes without giving reasons.

Mr. Elinganya referred me to paragraph 12 of the supporting affidavit wherein the applicant averred that on 30th September, 2021 and 30th November, 2021 he wrote to the High Court requesting for certified copies of the exhibit tendered before the CMA. He argued that since the impugned decision was delivered on 5th July, 2021, by the time the applicant was applying for the said documents it was already out of time for 85 days, yet there was no reason given by the applicant neither

in the supporting affidavit nor in submissions. He added, that the reason for delay advanced by the applicant, that she was waiting to be supplied with necessary documents is insufficient. More so as he said, this is because the letter to the Registrar was filed 60 days later after filing the notice of appeal which amounted to lack of diligence.

Regarding the ground of illegality raised by the applicant, Mr. Elingaya referred me to the decision of the Court in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported) where it was held that, illegality claimed about must be apparent on the face of record, but this is not the case herein. In addition, he submitted that the claim of illegality was raised and dealt upon by both the CMA and the High Court and they were satisfied that service of summons was effected but the applicant defaulted appearance. Therefore, he prayed that the application should not be granted because the applicant has failed to advance good cause to justify the extension sought.

In rejoinder Mr. Nyika insisted that the illegality sought to be challenged by the applicant is apparent on the face of record as the applicant was not served. However, he said the question as to whether

the service was effected will be determined by the Court upon filling of the intended appeal.

As regards the letter to the Registrar (Annexure SBN - 7) referred under paragraph 12 of the supporting affidavit, Mr. Nyika submitted that, when that letter was lodged, the applicant had already been supplied with other documents necessary for the intended appeal except those which are listed under paragraph 11 of the supporting affidavit.

Mr. Nyika made a clarification that the applicant's intention of making reference to Rule 90(1) of the Rules under paragraph 21 of the supporting affidavit was to show that, she could not benefit from that provision. Finally, he reiterated his prayer that the application be granted.

Having thoroughly gone through the rival arguments from both parties, and the entire record, it is now high time for me to determine whether the applicant has shown good cause to justify extension of time sought herein. It is thus important to state at the outset that extension of time in terms Rule 10 of the Rules under which this application is brought, is in the discretion of the Court upon good cause being shown by the applicant. The said discretion is judicial and so it must be exercised judicially.

Without much ado, I will now move to consider the applicant's reason for the delay. According to the applicant, the impugned decision was delivered on 5th July, 2021 but could not appeal on time because she was waiting to be supplied with the necessary documents by the Registrar. It is on record that the notice of appeal was filed on 30th July, 2021. Therefore in terms of Rule 90 (1) of the Rules, the applicant ought to have lodged her appeal within 60 days of lodging the said notice that is by 28th September, 2021. However, despite several correspondences with the High Court he was served with the last document on 23rd February, 2022 and the current application was filed on 10th March, 2022, 15 days later.

It is settled position that delay even of a single day must be accounted for; – see: **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No.3 of 2007 (unreported) and **Lyamuya Construction Company Ltd** (supra).

In accounting for the period of delay the applicant has stated under paragraph 18 of the supporting affidavit that the time between 23 February, 2022 to the date of filing this application, was spent in preparing and filing this application. The applicant stated under paragraph 21 of the supporting affidavit that having been supplied with all the necessary documents for appeal purposes, on 23rd February,

2022, she could not proceed to lodge the appeal because there was no letter requesting for copies of the judgment and exhibits which was served on the respondent and the Court within 30 days from the date of decision and which would have been a basis of a certificate of delay to be issued by the High Court.

With respect, I wish to state that the Court cannot work on blanket statements to make decision on matters that requires justification. If at all the applicant made an application to the High Court and eventually was supplied with the impugned decision, why then the said letter was not served on the respondent? The information provided in that paragraph leaves a lot to be desired. Suffices here to state that I agree with the respondent that the applicant has failed to state the reason for the delay to file the memorandum and the record of appeal.

I now revert to consider the second ground regarding the alleged illegality. This ground though resisted by the respondent, it cannot hold me much because the law is settled in that respect. In the case of **Principal Secretary, Ministry of Defence, National Service v. Derran Vallambhia** [1992] TLR 185, it was held:

*"In our view, **when the point at issue is one alleging illegality** of the decision being*

challenged the Court has a duty even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight”.

(Emphasis added).

In the current application, the case before the CMA was heard *ex parte* against the applicant and decided in the respondent's favour. The decision of the CMA was unsuccessfully challenged by the applicant in the High Court. While the applicant claims that she was not served with summons to appear for hearing before the CMA and, as a result, she was denied a right to be heard, the respondent was firm that the applicant was duly served. The question as to whether there was proper service on the applicant and hence the right to be heard, is a matter of law. It cannot be answered in this application for extension of time. The right to be heard is one of the fundamental rights which when denied unjustifiably, may amount to illegality worthy consideration by the Court.

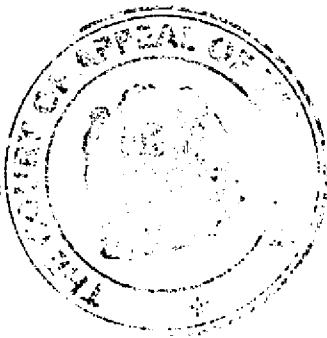
Therefore, since it is apparent on the face of record that the matter was heard *ex parte* against the applicant and the question whether she was properly served is to be ascertained, I find it to be a good cause for me to extend time for the applicant to lodge the


intended memorandum and record of appeal as I accordingly do within sixty (60) days of the date of this Ruling. Having considered circumstances of this matter, I make no order as to costs.

DATED at DAR ES SALAAM this 30th day of January, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 31st day of January, 2024 in the presence of Mr. Idrisa Juma, learned counsel for the applicant and Mr. Lulinga Jonathan Lulinga, learned counsel for the Respondent, is hereby certified as a true copy of the original.




J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL