

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
MISCELLENOUS APPLICATION NO. 284 OF 2019

BETWEEN

ELLY MATIKU.....1ST APPLICANT

JOHNSON MAINA.....2ND APPLICANT

VERSUS

MEDITERRANEAN SHIPPING

COMPANY (T) LIMITED.....RESPONDENT

RULING

Date of Last Order: 16/04/2020

Date of Ruling: 26/06/2020

A. E. MWIPOPO, J

This is an application for extension of time to file Revision in this Court is preferred under Rule 24 (1), (2) (a) (b) (c) (d) (f), (3) (a) (b) (c) (d), Rule 55 (1), (2), and Rule 56 (1) of the Labour Court Rules, G.N. No. 106 of 2007. The applicants namely **ELLY MATIKU** and **JOHNSON MAINA** apply to the Court Orders in the following terms;-

1. That, this Court be pleased to grant extension of time for the Applicants to file revision application out of time against the CMA

decision/ ruling made on 15/12/2015 in Labour Dispute No. CMA/DSM/TEM/124/2015, by Hon. Belinda, S. Mediator.

2. That any other relief that this Court may deem fit and just to be granted.

Brief history of the application is that the applicants namely Elly Korogo Matiku and Johnson Maina were terminated by respondent namely Mediterranean Shipping Company (T) Limited on 20th July, 2014 and 20th August, 2020 respectively. Aggrieved by their termination, the applicants jointly referred the dispute to the Commission for Mediation and Arbitration Dar Es Salaam Zone at Ilala where it registered as Labour Dispute No. CMA/DSM/ILA/R.803/14/194. On 21st April, 2015 dismissed the dispute for lack of jurisdiction to entertain the matter. The applicants decided to file another Labour Dispute at the CMA Dar Es Salaam Zone at Temeke as Dispute No. CMA/DSM/TEM/124/2015 also they filed application for condonation for the dispute to be heard out of time. The dispute was dismissed on 15th December 2015 by Honourable Belinda, S., Mediator for the failure of the applicant to account for delay from 21st April, 2015 where the Labour Dispute No. CMA/DSM/ILA/R.803/14/194 was struck out by Honourable Makanyaga, A.A Arbitrator up to 5th May, 2015 the date when the Dispute No. CMA/DSM/TEM/124/2015 was filed in the CMA Dar Es

Salaam Zone at Temeke. The delay was for more than 14 days without any explanation on the part of the applicants.

The applicants decided to file Revision Application No. 507 of 2015 to challenge the Ruling of Honourable Belinda, S Mediator in Dispute No. CMA/DSM/TEM/124/2015 but the Revision was struck out for incompetence. The Applicants filed Miscellaneous Application No. 07 of 2017 praying for extension of time to file the Revision Application out of time which was struck out for incompetence and the Applicants were given 3 days leave to file proper application. The applicants filed another Miscellaneous Application No. 325 of 2018 praying for extension of time to file the Revision Application out of time. This Application was struck out on 16th May 2020 after the counsel of the applicants Ms. Judith Kyamba conceded that Miscellaneous Application No. 325 of 2018 was defective and incompetent before the court. Thereafter, the applicants have filed the current Miscellaneous Application No. 284 of 2019 praying for extension of time to file the Revision Application out of time.

During the hearing of the application the applicant was represented by Mr. Othman Omary, learned advocate, whereas the respondent was represented by Mr. Abdallah Kazungu, the learned advocate. When the application came for hearing on 16/04/2020 the Court ordered the hearing

of the application to proceed by way of written submission following the prayer by the Counsel for the applicant which was not objected by the respondent.

In the said order, the Applicants were supposed to file their Submission in Chief by 30th April, 2020 and to serve the respondent on the same date. The respondent was ordered to file his reply submission by 14th May 2020. The applicants filed their Submission in chief on 30th April 2020 but they did not serve the respondent contrary to the court order. As result, the respondent counsel have to go to the High Court Labour Division on 12th May 2020 to cross check if the applicants have filed the respective submission and found that the Applicants have filed their submission in chief since 30th of April, 2010, but they have not served him. The respondent requested for the copy of the Submission from the court record which he was given he was able to file his reply submission on time. The act of the applicant not to serve the respondent pursuant to the Court order is condemned by this Court as it may cause unnecessary delay and the same should not repeat. However, since the respondent was able to file the reply submission within the time as it was ordered by the Court there will be no injustice caused to him by proceeding with determination of the application on merits. Therefore the Court will proceed to determine the case on merits.

In support of the application, the applicant submitted that the main reason for the Applicants' delay was that they were busy in court litigating their revision application and previous application for extension of time which were all struck out in legal technicalities. After the CMA decision in the Labour Dispute No. CMA/DSM/TEM/124/2015 which was delivered on 15th December, 2015, the applicants immediately lodged Revision application No. 507 of 2015 which was on 8th December, 2016 struck out for non-citation of enabling provisions. Since by that time the Applicants were by large out of time to file proper revision application they filed Miscellaneous Application No. 7 of 2017 for extension of time to file Revision application. The said application was struck out on 16th May, 2019 and the applicant lodged the present application for extension of time on 21st May, 2019. The Applicants stated that they were not sleeping but continuously prosecuting and fighting for their right before this Court.

He was of the view that time spent in prosecuting matter before the Court of law is subject to exclusion when accounting for the time of taking action according to the Law of Limitation Act and is a sufficient cause for extension of time. This was emphasized in the case of **ELIBARIKI ASSERI NNKO v. SHIFAYA MUSHI & LEWANGA KINANDO (1998) TLR**, at page 80 where it was held and we quote as hereunder: -

"As the applicant had all the time been acting with diligence to ensure that his appeal is prosecuted but had run out of time because he, in his diligence, had lodged his appeal in the wrong court, the delay in lodging the appeal fell under the ambit of s.21 of the Law of Limitation Act 1971, and there was good and sufficient cause for extending time to file the appeal in the proper court"

Another factor which the applicant is praying for the Court to consider is that the Applicants have always acted promptly and diligently in prosecuting their case save for the facts that they had been unfortunate with their application which have suffered slight mistake and hence rendering them incompetent. Both Revision Application No. 507/2015 and Misc. Application No. 07 of 2017 were timely filed and only to be struck out on legal technicalities which indicates that the Applicants were prompt and diligent in fighting for their rights. To support his position he cited the case **MARY MCHOMBE MBWAMBO (2017) TLS LR 277.**

Another ground for the consideration submitted by the applicant is that when the ruling striking out the application was delivered on 8th December 2016 the Applicants Advocate one Emmanuel Safari was beavered, and upon

his return it was Christmas and New Year which time of the year normally falls under the Courts vacation which normally is on every 15th December to 31st January. This period is excluded to do those act required to be done by law. To support his submission he cited the case of **NATIONAL BANK OF COMMERCE (NBC) LIMITED v. SAO LIGO HOLDINGS LIMITED & MAGRETH JOSEPH, CIVIL APPLICATION NO. 267 OF 2015. (CA) DSM (unreported).**

He submitted that there is apparent illegality occasioned by the CMA which needs to be addressed by this Court. The illegality complained of is found under paragraph 12 of page 13 of the affidavit that the finding by the Honourable Mediator that the Applicants failed to account for the period of 14 days which was period by relying on the provisions of Section 14 of the Law of Limitation Act. The Law of Limitation Act which was not the law under which the application was brought. The illegality is also on the time spent in prosecuting the same dispute over the parties ought to have to be excluded. The applicant is of the view that these illegalities can only be addressed by this Court thus it is a good ground for extending time within which the Applicants can lodge their appeal. In support of his assertion he cited the case of CRDB **BANK V. ALLEN BUTEMBO, MISC. APP. NO. 74 OF 2013, LCCD (2013) 266**, also in **AG VS. THE BOARD OF TRUSTEES OF THE**

**CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND & ANOTHER,
CIVIL APPLICATION NO. 73 OF 2015, (unreported).**

The applicant is of the opinion that the existence of illegality discharged the Applicant from accounting each day of delay. In support of the argument he cited the Court of Appeal of Tanzania decision in the case of **TANESCO AND TWO OTHERS Vs. SALIM KABORA, CIVIL APPLICATION NO. 68 OF 2015, (Unreported).**

The applicant's last ground for the consideration of this application is if the Applicants' will suffer irreparably loss in case the application will not be granted. The Applicants' efforts is to have the opportunity for their claim of unfair termination against the Respondent to be heard. By affording the Applicants' this opportunity the Respondent has nothing to lose as each party will have an opportunity to present their case. In support of his position the applicant cited the decision of the Court of Appeal in the case of **MOBRAMA GOLD CORPORATION LTD VERSUS MINISTER FOR ENERGY AND MINERALS AND 2 OTHERS (1998) TLR 425.**

The Applicants stated that he have demonstrated sufficient reason for this Court to grant application for the extension of time.

In contention the respondent submitted that the Applicants submission based on two issues. The first issue is whether the applicant has established some facts which amounting to sufficient cause or good cause for this

application for extension of time to file Revision Application to be granted. The second issues whether if the application for extension of time to file Revision Application out of time is maintainable in law.

The applicant submitted on the first issue that in all Applications filed by the applicant were struck out by this Court for being defective due negligence by applicants advocates who filed those incompetent applications from time to time. The court record which also prove negligence in the part of the Applicants since 2015 up to 2020, in simple mathematics it is almost 5 years and the Applicants is still negligent for filing incompetent applications.

The Applicants have failed to show any kinds of good cause to support their application. All the respondent found in the court record has highlighted above is the negligence in the part of the Applicants, and it has been settled law of this country that, negligence is not the good cause for extension of time. Since extension of time is the discretion of the court, and the discretion of the court it is the matter of equity then he who comes into equity must come with clean hands.

The respondent is of the view that, the current application neither fall under the clean hands principle of the equity nor suggest the clean hands principles. Under paragraph 8 of the Applicants Affidavit the Applicants did

claim that when Revision Application No. 507 of 2015 was struck out on 8th December 2016, the Applicants counsel one Emmanuel Safari was bereaved and upon his return it was Christmas and New Year which normally falls under Court vacation and therefore the time from 15th December 2016 to 31st January 2017 should be excluded. It is clear that the contents of paragraph 8 of the Applicants Affidavit and submissions under page 9 of their submission has been drafted to mislead this court in determination of this application. The court records show that in Revision Application No. 507 of 2015 the applicants were represented by Advocate Asia Charli and not Advocate Emmanuel Safari as it was submitted by the applicant. Therefore all facts concerning advocate Emmanuel Safari as submitted by the Applicants should be disregarded by this court.

The applicants after he was given leave under Miscellaneous Application No. 07 of 2017 to file the proper application continued to file incompetent application which was registered as Miscellaneous Application No. 325 of 2018. The same was struck out by Honourable Aboud, J on 16th May 2019 for incompetence. It was respondent opinion that the principle of equality before law entails that both parties to the suit must be treated equal before the court regardless of their social status. It will not be fair in the part of the respondent, if this Application is granted, based on the court record that since 2015 the Applicants have always been negligent in pursuing their case

and result costs to the respondent to defend unnecessary litigation. He was of the view that, there must be end in litigation.

The respondent avers that Applicants has tried to belabour much to come out of curb of negligence by insist that the applicants did not slept since 2015 they were court corridor pursuing their rights. The Applicants used of lot time in discussing between technical delay and actual delay, and further narrates that they have failed to file the Revision Application due to technical delay, and technical delay does constitute sufficient cause for extension of time. He requested the Court to disagree with the Applicants submission since the delay is Actual delay in the part of Applicants. The Applicants have already been given chance on 17th July 2018 to file the proper and competent application in Miscellaneous Application No. 07 of 2017 but they failed to do that by keeping filing incompetent application.

The respondent argued that the applicants stated that the Ruling of the Commission for Mediation and Arbitration in Dispute No. CMA/DSM/TEM/124/2015 is tainted with illegality. The applicants relied on paragraphs 12 and 13 of the Applicant Affidavit where there is nothing which constitutes illegality. It should be noted that Commission for Mediation and Arbitration is the creature of statute under Labour Institutions Act. The territorial jurisdiction of the Commission for Mediation and Arbitration is the

matter which is provided and established in the law. In the entirely Ruling of the Commission for Mediation and Arbitration in Dispute No. CMA/DSM/TEM/124/2015 there is no where the Honourable Mediator has cited section 14 of the Law of Limitation or she has referred the same. What is seen here by the Applicant side is the general assumptions.

The respondent submitted regarding the issue submitted by the applicant on the exclusion of time by virtue of section 21(2) of the Law of Limitation Act, for the delay while the matter was filed at the CMA Headquarter instead of CMA Temeke Zone. The applicants is now submitting on the revision application, which is not the matter before this Honourable Court.

There is nothing in the Ruling which is subject to this Application where Honourable Mediator discussed in her decision the place to open the labour dispute. The reason for decision of Honourable Mediator is found under paragraph 2 page 8 of the Ruling where Honourable Mediator dismissed the application following the failure of the applicants to state the reasons for delay to file the dispute from 21/04/2015 up to 05/05/2015.

The respondent is of the view that the applicants claim that their reasons for their delay is covered under exclusion of time by virtue of section 21(2) of the Law of Limitation Act is also baseless and immaterial. The Laws

of Limitation does not applied to the proceedings at the Commission for Mediation and Arbitration. For purpose of calculation of time for filing Dispute at the Commission for Mediation and Arbitration, the respective rule is Rule 4 of Labour Institutions (Mediation and Arbitration), Rules, 2007, G.N. No. 64 of 2007. Section 43(f) of the Laws of Limitations Act, Cap 89 R.E. 2019, provides that the law of limitation Act shall not apply to any proceeding for which a period of limitation is prescribed by any other written law. Therefore, the proper law for determination of extension of time to open the Labour dispute at the Commission for Mediation and Arbitration is Rule 10 of Labour Institutions(Mediation and Arbitration), Rules, 2007, G.N.No. 64 of 2007 as correctly decided by Hounourable Mediator.

He submitted further that for applicants to rely on illegality as the ground of extension of time to file an appeal or revision they needs to show either illegality is on the face of record of the impugned decision or illegality is on the jurisdiction of the court which deliver the impugned decision. Failure to do that, the applicants ground on illegality will be mere a general complaint.

The respondent is of opinion that the applicants have fail to demonstrate the illegality as the ground for extension of time. In support of his submission he cited the case of the **Principal Secretary, Ministry of**

Defence and National Service Vs. Devram Valambia [1992] TLR 185; the case of **NGAO GODWIN LOSERO Vs. JULIUS MWARABU, Civil Application No. 10 of 2015, Court of Appeal of Tanzania, (unreported);** the case of **OMARY ALLY NYAMALEGE (as the administrator of the estate of the late Seleman Ally Nyamalege) and 2 others Vs. MWANZA ENGINEERING WORKS, Civil Application No. 94/8 of 2017, Court of Appeal of Tanzania, (unreported);** and the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010, Court of Appeal of Tanzania, (Unreported).**

Regarding the respondent second issue as to whether the application for extension of time to file Revision Application out of time is maintainable, he submitted that this application for extension of time to file Revision Application out of time is not maintainable. The reason for the argument is that the application is an abuse of the court process. Under Rule 44(2) of the Labour Court Rules, 2007 where there is two or more numerous person who are interested in the same suit, one of them may sought leave to represent the others. The Applicants in this Application are Elly Matiku and Johnson Maina. The applicants were supposed first to file the application for representative suit in order to seek leave to open this application by virtue

of Rule 44(2) of the Labour Court Rules, 2007. Despite the fact to show this Applications was opened by **Elly Matiku** and **Johnson Maina** the Notice of Representation and Notice of Application is signed by one Applicant who is not identified, and the Affidavit is sworn by Judith Patrick Kyamba who is not part to the case. Further, in the verification clause there is no explanation if she has been authorised to swear the Affidavit by the Applicants. This is contrary to Rule 24(3) of the Labour Court Rules, 2007 which requires any application to be supported by Affidavit of the part who brings the application. Therefore Affidavit, being the sworn statement is the evidence and should be taken seriously by this Court.

The respondent argued that Applicants have filed the current application on 21st May 2019 but there is no explanation on delay of each day before filing this application. The applicants have failed to explain in details why they failed to file the current application on 17th May 2019 or the day later but they just waited for 5 day and file it on 21st May 2019. The applicants are supposed to give explanation on that delay for each day of delay. Further, the ground of illegality as submitted by the Applicants is nothing rather than the general complaint which cannot be found or traced on the face of record of the Ruling delivered by the Commission for Mediation and Arbitration. Then he submitted that the application is baseless, have no merits and it is just an abusive of court process and he pray for the Court to

dismiss the application in its totality.

From the lengthy submissions from both parties the issue for determination is whether the applicants have sufficient reasons for the Court to grant him extension of time to file the revision application out of the time prescribed by the law.

It is a trite law that it is a discretion of the Court to grant an application for extension of time upon a good cause shown. The Court of Appeal in the case of **TANGA CEMENT COMPANY VS. JUMANNE D. MASANGWA AND ANOTHER, CIVIL APPLICATION NO. 6 OF 2001**, Court of Appeal of Tanzania (Unreported) the Court of Appeal held that:

".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence

of any valid explanation for the delay; lack of diligence on the part of the applicant.”

From above decision what amount to a good cause depends on the circumstances of each case. (See also the case of **OSWALD MASATU MWIZARUBI VS. TANZANIA FISH PROCESSORS LTD, CIVIL APPLICATION NO. 13 OF 2010, COURT OF APPEAL**).

In the present case the applicants have submitted that the delay in filing the application was not deliberate and was for several reasons including that they were busy in court litigating their revision application and previous applications for extension of time which were all struck out on legal technicalities. Another reason is that the Applicants have always acted promptly and diligently by timely filing their applications but those application were struck out on legal technicalities. They submitted further that when the ruling striking out the application was delivered on 8th December 2016 the Applicants Advocate one Emmanuel Safari was beavered, and upon his return it was Christmas and New Year which time of the year normally falls under the Courts vacation which normally is on every 15th December to 31st January. This period is excluded to do those act required to be done by law. The last reason for the delay as submitted by the applicant is that there is

apparent illegality occasioned by the CMA which needs to be addressed by this Court.

In opposition to applicant submission the respondent submitted that all Applications filed by the applicant were struck out by this Court for being defective due to negligence of applicants advocates who filed those incompetent applications from time to time. The court record which also prove negligence in the part of the Applicants since 2015 up to 2020, in simple mathematics it is almost 5 years and the Applicants is still negligent for filing incompetent applications. The respondent is of opinion that the applicants have fail to demonstrate the illegality as the ground for extension of time. The respondent is of the view that the application for extension of time to file Revision Application out of time is not maintainable for the reason that the applicants have not sought leave of the Court for one of them to represent the other.

After going through the record the evidence available shows that the applicants filed Revision Application No. 507 of 2015 to challenge the Ruling of the CMA delivered by Hon. Belinda, S., Mediator in Dispute No. CMA/DSM/TEM/124/2015 but the Revision was struck out for incompetence on 8th December, 2016. The Applicants filed Miscellaneous Application No. 07 of 2017 for extension of time to file the Revision Application out of time on 4th January 2017. From the date when Revision No. 507 of 2015 was

struck out to the date of filing Miscellaneous Application No. 07 of 2017 there was a delay of 27 days which the applicant is supposed to account for. The Miscellaneous Application No. 07 of 2017 was struck out for incompetence and the Applicants were given 3 days leave to file proper application. The applicants filed another Miscellaneous Application No. 325 of 2018 praying for extension of time to file the Revision Application out of time but it was also struck out on 16th May, 2019 for incompetence. Thereafter, the applicants have filed the current Miscellaneous Application No. 284 of 2019 on 21 May, 2019 praying for extension of time to file the Revision Application out of time.

The applicants have submitted that they have always acted promptly and diligently by timely filing their applications but those application were struck out on legal technicalities. However, the evidence on record shows that the Miscellaneous Application No. 07 of 2017 was lodged on 4th January 2017 which means there was a delay of 27 days from the date the Revision Application No. 507 of 2015 was struck out by the Court which is 8th December, 2016.

Moreover the evidence shows that each application lodged by the applicant in this Court have been struck out for incompetent. I'm of the opinion that lodging incompetent applications three times in a row does not

amount to be prompt and diligent acting by the respondent but rather it show's some negligence on the part of the applicant. Also the applicant have failed to account for 27 days delay in filing Miscellaneous Application No. 07 of 2017.

The Court of Appeal was of the same opinion 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, (unreported)** , where it held that *"the applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence and not apathy, negligence or sioppiness in the prosecution of the action that he intends to take, If the court feels that there other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged"*. Also this Court in the case of **SAID RAMADHAN VS. GEITA GOLD MINING, Misc. Labour Application No. 29 of 2013, High Court Labour Division, (unreported)** held that *"delay was on the main due to lack of diligence, evidence by the fact the applicant has made a mistake on procedure twice. I agree that was inexcusable, given that the applicant was represented, in*

the end result of all the above, I find this application unmerited and dismiss it”.

In the present case the delay appear to be due to negligence where by the applicants have lodged three applications before this Court which were incompetent. Also the applicant have failed to account for 27 days delay in filing Miscellaneous Application No. 07 of 2017.

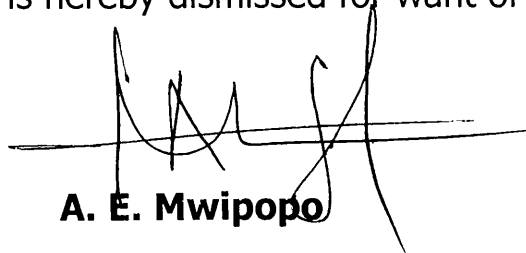
The applicants submitted that when the ruling of the Court striking out the application was delivered on 8th December 2016 the Applicants Advocate one Emmanuel Safari was beavered, and upon his return it was Christmas and New Year which time of the year normally falls under the Courts vacation which normally is on every 15th December, 2016 to 31st January, 2017. This period is excluded to do those act required to be done by law. However as submitted by the respondent, the Ruling of this Court in Revision No. 507 of 2015 shows that the name of the Advocate for the applicant is Ms. Asia Chali and not Advocate Emmanuel Safari as it was asserted by the applicant. This means that the applicant was not telling the truth on this ground for the delay as result I find it to be baseless and without merits.

The applicant submitted that there is apparent illegality occasioned by the CMA which needs to be addressed by this Court. The alleged illegality is that the mediator improperly relied on interpretation of section 14 of the Law

of Limitation Act which was not the law under which the application was brought.

I have read the ruling of the Commission in Dispute No. CMA/DSM/TEM/124/2015 and find that there is nothing in the Ruling which shows that the Hon. Mediator relied on interpretation of section 14 of the Law of Limitation Act, in dismissing the application. The reason for the Hon. Mediator to dismiss the application is that the applicants failed to state the reasons for the delay in filing the dispute for 14 days from 21/04/2015 up to 05/05/2015. Therefore this ground for revision is meritless.

Therefore, I find that the application have failed in its totality to convince this Court to extend the time for filing revision application out of time. Thus the application is hereby dismissed for want of merits.

A handwritten signature in black ink, appearing to read 'A. E. Mwipopo', is written over a horizontal line.

A. E. Mwipopo

JUDGE

26/06/2020