

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS APPLICATION NO. 119 OF 2023

(Arising from an Award issued on 01/07/2022 issued by Hon. U. N. Mpula, Arbitrator, in Labour dispute No. CMA/DSM/KIN/741/20/393 at Kinondoni)

LEDGER HOTELS & RESORTS (PLAZA BAHARI BEACH) APPLICANT

VERSUS

ZEDEDIYA W. CHIKOYA RESPONDENT

RULING

*Date of last Order: 07/06/2023
Date of Ruling: 13/06/2023*

B. E. K. Mganga, J.

On 5th May 2023, applicant filed this application seeking to extend time within which to file an application for revision against the award issued on 1st July 2022 by Hon. U. N. Mpula, Arbitrator, in Labour dispute No. CMA/DSM/KIN/741/20/393 at Kinondoni. In support of the application, applicant filed an affidavit sworn by Gilbert Mushi, her learned advocate. In the said affidavit, Gilbert Mushi stated *inter-alia* that, on 25th August 2022 applicant filed Revision Application No. 270 of 2022 but it was struck out on 27th April 2023 after 264 days at the time applicant was prosecuting the

said Revision in court. Gilbert Mushi stated that there was technical delay. He stated further that, on 28th April 2023 he had a meeting with the applicant discussing whether to appeal or to file an application for extension of time and that, applicant agreed to communicate with her directors and report back to him on 2nd May 2023. He stated further that, 29th and 30th April 2023 were weekends and 1st May 2023 was a Public holiday hence applicant was unable to file the application on those days. In the said affidavit, Gilbert Mushi stated further that, on 2nd May 2023, he got confirmation that he should proceed to file an application for extension of time as a result, he used 3rd and 4th May 2023 to prepare and file this application.

On his part, Zebidiya W. Chikoya, respondent filed both the Notice of Opposition and the Counter Affidavit to oppose the application. In the counter affidavit, respondent stated *inter-alia* that, applicant has failed to show that there was good cause for the delay.

When the application was called on for hearing, Mr. Ceasor Kabissa, learned Advocate appeared for and on behalf of the Applicant while Mr. Andrew Chima, learned Advocate appeared for and on behalf of the Respondent.

Arguing in support of the application, Mr. Kabissa learned counsel for the applicant submitted that, the award was issued on 01st July 2022 and that on 25th August 2022 applicant filed Revision No. 270 of 2022 while in time. He added that revision application No. 270 of 2022 was struck out on 27th April 2023 for being incompetent because the affidavit in support of the application was defective. He went on that; this application was filed on 04th May 2023 while out of time for 8 days. He submitted further that, the delay is justifiable and excusable. He cited the case of *Chama cha Kutetea Haki na Maslahi ya Walimu Tanzania (CHAKAMWATA) v. The Registrar of Organizations*, Misc. Labour Application No. 03 of 2020, HC (unreported), *Golden Sand's Service Apartment's Ltd v. Samm Abdallah Obathany*, Misc. Application No. 394 of 2022, HC (unreported) and *M.B. Business Limited V. Amos David Kassanda & 2 Others*, Civil Application No. 48/17/2018 CAT, (unreported) to implore the court to grant the application.

In resisting the application, Mr. Chima, learned Advocate for the Respondent, submitted that, initially, while in time, applicant filed Revision No. 270 of 2022 supported by a defective affidavit and that the said Revision application was struck out on 27th April 2023. He argued that,

there is no good ground for extension of time. He argued that, reasons advanced in the affidavit that on 28th April 2023 counsel for the applicant had a meeting with the applicant discussing the way forward and agreed to communicate after the said discussion cannot be good ground. He cited the case of *Aga Khan Health Centre v. Clarence Yenga & Others*, Misc. Labour Application No. 7 of 2011, HC (unreported), *Leons Barongo v. Sayona Drinks Ltd*, Revision No. 182 of 2012, HC (unreported) to support his submissions. He went on that, according to the affidavit in support of the application, on 2nd May 2023, applicant and her advocate agreed to file an application for extension of time. Counsel resisted the exclusion of the 29th April 2023 and 30th April 2023 that were weekends and 01st May 2023 that was a Public holiday. Counsel for the respondent argued that, filing of application is open even on holidays because e-filing rules does not exclude public holidays and weekends and prayed the application be dismissed.

In rejoinder, Mr. Kabissa, learned counsel for the applicant submitted that, Electronic Filing Rules exclude weekends and public holidays. Counsel for the applicant submitted further that, applicant was supposed to consult the directors in order to file this application. He went on that, the cases

cited by counsel for the respondent are distinguishable because initially applicant filed the application in time.

I have examined evidence in the affidavit in support of the application and evidence in the counter affidavit opposing the application and considered submissions made on behalf of the parties in this application. This being an application for extension of time, the court is invited to exercise its discretion whether to grant it or not. But, that discretion must be exercised judiciously as it was held by the Court of Appeal in the case of Mza RTC Trading Company Limited vs Export Trading Company Limited, Civil Application No.12 of 2015 [2016] TZCA 12. It is also a settled principle of law in our jurisdiction that, in an application for extension of time, applicant must show good reason/ cause for the delay and must account for each day of the delay. See the case of **Sebastian Ndaula vs. Grace Lwamafa**, Civil Application No. 4 of 2014, CAT (unreported), Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another, Civil Application No. 278/15 of 2016, CAT, (unreported), Finca T. Limited & Another vs Boniface Mwalukisa, Civil Application No. 589 of 2018) [2019] TZCA 56, Zawadi Msemakweli vs. NMB PLC, Civil Application No. 221/18/2018 CAT

(unreported), *Elias Kahimba Tibendalana vs. Inspector General of Police & Attorney General*, Civil Application No. 388/01 of 2020 CAT (unreported) and *Bushiri Hassan vs. Latifa Lukio Mashayo*, Civil Application No. 3 of 2007, CAT (unreported) to mention but a few. In *Mashayo's case* (supra), the Court of Appeal held *inter-alia* that: -

"...the delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

In my view, accounting for the delay does not mean mere mentioning the dates, rather, giving justification for each day of the delay. In the application at hand, it was stated in the affidavit in support of the application that there was technical delay of 264 days because applicant filed Revision Application No. 270 of 2022 but the same was struck out for being incompetent as it was supported by a defective affidavit. I have no problem with that because, even respondent conceded that there was a technical delay. It has been held several times by the Court of Appeal and this court that, technical delay is a good ground for extension of time. See for example the case of *Dominc Ishengoma vs Geita Gold Mining Ltd* (Civil Application No. 146 of 2020) [2022] TZCA 803 wherein it was held: -

"In deed, many times without number, it has been pronounced by the Court that, times spent in court corridors by the applicant, like here, in further pursuit of his rights and resulting into delay, that delay is technical constitutes good cause for extension of time. See- Omary Ally Nyamalege (as Administrator of the Estate of the late Seleman Ally Nyamalege) & 2 Others v. Mwanza Engineering Works, Civil Application No. 94/08 of 2017, at Mwanza and Hamisi Mohamed (as the administrator of the Estate of the late Risasi Ngawe) v, Mtumwa Moshi (as Administratrix of the Estate of the late Moshi Abdallah), Civil Application No. 407/17 of 2019, at Dar es Salaam (both unreported)".

In *Ishengoma's case* (supra), the Court of Appeal did not only consider technical delay in granting or dismissing the application but considered also other factors. In the application at hand, I will also consider other criteria for granting or dismissing this application.

One of the questions that the court has to answer in granting an application for extension of time whether applicant gave good reason for the delay. That being the position, the issue in the application at hand is whether, applicant advanced good reasons for the delay from 27th April 2023 the date Revision Application No. 270 of 2022 was struck out to 5th May 2023, the date this application was filed in court.

It was stated in the affidavit of Gilbert Mushi, counsel for the applicant that he spent two days namely 27th April 2023 and 28th April 2023 discussing with the Applicant whether to file an appeal to the Court of Appeal or to file an application for extension of time and agreed that applicant will communicate her position on 2nd May 2023. It was further stated that, applicant communicated her position to him on 2nd May 2023 evening and that the said counsel used two days namely 3rd May 2023 and 4th May 2023 to prepare and file this application. From those averments, it is clear in my mind that, applicant was indifference as what course she should take. It is my further view that, indecisiveness of a party cannot be a ground for extension of time. I am of that view because, Revision No. 270 of 2022 was struck out on 27th April 2023 that was a working day and the next day namely 28th April 2023 was also working day. Had applicant been responsive, she could have held a meeting with her counsel and concluded it on 27th April 2023 and file this application on 28th April 2023. In alternative, giving applicant benefit of doubt that she took long time in discussion with her counsel, then, she could have given her clear position to her counsel on 28th April 2023 and the latter could have worked on the application on 29th April to 1st May 2023 and file this application on 2nd May

2023. I am of that view because, there is no law that prohibits counsel or any person to work on weekends and or holidays to achieve a certain end. To the contrary, applicant relaxed and enjoyed the 27th and 28th April 2023 that were working days and 29th to 1st May 2023 that were weekends and a public holiday without giving her clear position to her counsel. Affidavit evidence of the applicant is clear that she only gave her counsel a go ahead to file this application on 2nd may 2023 evening. It is my considered view that, applicant decided to relax and sleep at her own risk hence she has nobody to blame. Applicant and her counsel forgot one important legal maxim namely "*vigilantibus et non dormientibus jura subveniunt*" that means "the laws aid the vigilant, not those who sleep". It is clear that in the application at hand, applicant spent time discussing with her counsel relaxingly and finally giving the later her position of filing this application knowing that she was supposed to give reasons for the delay. It is my considered view that, that relaxation, is a sign or lack of interest in the application or negligence on part of the applicant. It has been held several times that, for the application for extension of time to be granted, applicant must not be negligent, must have not shown apathy or lack of interest. See the case of [Lyamuya Construction Co. Ltd vs Board of Registered of](#)

Young Women's Christian Association of Tanzania (Civil Application No. 2 of 2010) [2011] TZCA 4 , Rose Irene Mbwete vs Phoebe Martin Kyomo (Civil Application No. 70 of 2019) [2023] TZCA 111 to mention but a few. In other words, negligence or apathy of the applicant cannot be a ground for extension of time. In the application at hand, applicant was indecisive whether to file an application for extension of time or to appeal to the Court of Appeal, which is why, she took five working days from 27th April 2023 to 4th May 2023 without filing an application for extension of time.

It was submitted on behalf of the applicant that applicant could have not filed this application without consulting directors of the applicant. I have read the affidavit of Gilbert Mushi especially paragraph 3.9(ii) and find that the said paragraph contains also hearsay. The said paragraph 3.9(ii) reads:-

"3.9 (ii) The 8 days' actual delay are accounted as follows:-

(a) 2 days (27th April 2023) the day when revision application 270/2022 was struck out, (28th April 2023) I had a meeting with the Applicant discussing the way forward after the revision no.(sic) 270/2022 was struck out. I advised him that we two available options, one to go to Court of Appeal and second to file extension of time to file revision out of time. We agreed that he will communicate with his directors and will get back to me by 2nd May 2023.

(b) that 2 days (29th and 30th April 2023) were weekends and 1 day (1st May 2023) was a public holiday. Therefore, the applicant was not able to file on the said dates because it was holiday and public holiday and also I was waiting for instructions from the Applicant.

*(c) that on 2nd May 2023 at evening hours I **got confirmation** that I should proceed with this application.*

(d) that 2 days (3^d and 4th May 2023) I used them to prepare and file this application.”

I have carefully read the affidavit of Gilbert Mushi advocate in support of the application and find that, he did not disclose the name of the person he was discussing with in relation to the steps to be taken after revision No. 270 of 2022 was struck. In fact, the above quoted paragraph is the only evidence on behalf of the applicant in relation to what was done after revision No. 270 of 2022 was struck out in an attempt to file this application. It is clear that in the above quoted paragraph, the deponent stated that he discussed with the applicant and the latter agreed to communicate her position after discussing with her directors and finally the deponent got instruction to prepare this application. As pointed shortly hereinabove, there is no name of the person who gave instruction to the deponent, yet in the verification clause, he verified that, that information is true to the best of his knowledge. It is worth to note that applicant is not a

natural person who could have held discussions by the deponent. In shorts, discussions if any, were done by undisclosed person on behalf of the applicant and the Gilbert Mushi, advocate. It is my view that, in the circumstances of the application at hand, the deponent of the affidavit in support of the application was supposed to mention the name of the person he was discussing with on behalf of the applicant. I have noted that in the verification clause, deponent verified that some of the information in the affidavit in support of the application was supplied to him by Wessam Nejam, the General Manager of the applicant. It is worth to point out that the information verified to have been supplied to the deponent by the said Wessam Nejam, the General Manager of the applicant does not relate to the paragraph quoted hereinabove. In the affidavit, the deponent verified that the above quoted paragraph is true to the best of his own knowledge, which in fact, is not true. Assuming that the deponent had a discussion with the said Wessam Nejam, the latter was supposed to file also his affidavit but the same was not filed. It has been held several times that an affidavit which mentions another person is hearsay unless that other person swears as well. Some of these decisions are [Sabena Technics Dar Limited v. Michael J. Luwunzu](#), Civil

Application No. 451/18 of 2020, CAT (unreported), [Franconia Investments Ltd v. TIB Development Bank Ltd](#), Civil Application No. 270/01 of 2020, *Benedict Kimwaga v. Principal Secretary Ministry of Health*, Civil Application No. 31 of 2000, *NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd*, Civil Application No. 13 of 2012. It is my view that allegations in the above quoted paragraph relating to steps that was taken by the applicant in justifying delay and in imploring the court to grant this application are not convincing. I therefore reject them.

For the foregoing, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam on this 13th June 2023



B. E. K. Mganga
JUDGE

Ruling delivered on this 13th June 2023 in chambers in the presence of Andrew Chima, Advocate for the Respondent but in the absence of the Applicant.



B. E. K. Mganga
JUDGE