

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

MISC. APPLICATION NO. 166 OF 2023

(Arising from High Court Decision Revision No. 546 of 2020 issued on 07th December 2021)

UTORE LEMA..... APPLICANT

VERSUS

ECOBANK TANZANIA LIMITED.....RESPONDENT

RULING

Date of last order: 20/07/2023

Date of Ruling: 04/08/2023

MLYAMBINA, J.

This ruling is in respect of application for extension of time to lodge Notice of Appeal to challenge the decision of this Court issued *in Revision No. 546 of 2020*. It will address on the issue; *whether filing improper application before the Court on time and its withdrawal amounts to technical delay*. Briefly, it must be noted that the impugned decision was issued on 7th December, 2021. Before the Commission for Mediation and Arbitration (herein CMA), the Applicant was awarded TZS 146, 250,403.85 as five-month compensation and other terminal benefits, On revision before this Court, the compensation was reduced to the tune of TZS 90,496,903.85/=. Such compensation was for procedural unfair termination. Before the CMA the Applicant claimed to have been unfairly

terminated from his employment and prayed for reinstatement or payment of compensation.

Being aggrieved with the decision, the Applicant filed *Civil Application No. 59/18 of 2022* to the Court of Appeal, on 5th June 2023, the matter was withdrawn upon prayer of the Applicant. Being out of time, the Applicant filed the present application so as time to be extended.

In support of this application, the Applicant deponed in her affidavit that after receiving the judgement of this Court, she acted diligent in pursuing her rights from 7th December 2022 when the decision was issued till 5th June 2023 when the matter was withdrawn before the Court of Appeal. The affidavit states further that being aggrieved with the decision of this Court the Applicant requested to be supplied with certified copy on 7th December 2021 and served with same on 14th December 2021.

Another reason in fortifying extension of time advanced by the Applicant was of technical delay. The Respondent vehemently disputed the application by filing a counter affidavit challenging the ground advanced by the Applicant by insisting that the Applicant's delay resulted from negligence.

The hearing proceeded orally. The Applicant was represented by Ms. Irene Mchau, Advocate, whereas the Respondent was represented by Mr. Idrissa Juma, Advocate.

Mr. Irene submitted that the impugned decision was issued on 7th December, 2021 before this Court, the Applicant was aggrieved by the said decision. Immediately, thereafter, the Applicant filed application for revision before the Court of Appeal. It was *Civil Application No. 59/18 of 2022*. The Applicant believed that the application was proper but when called for hearing on 5th June 2023, it was found that the application was incompetent for being inappropriate. Hence, the Applicant decided to withdraw the said application for the proper one to be filed. He added that; *Civil Application No. 59/18 of 2022* was filed purposely for the time to be extended after being out of time for one day.

Ms. Irene submitted that the Court of Appeal granted the prayer for withdrawing *Civil Application No. 59/18*. According to her, the delay was not a professional negligence rather it was a technical delay. In support of her position, she requested the Court to rely on the case **Fortunatus Masha v. William Shija & Another** (1997) TLR 144 specifically as to what it amounts to technical delay and on the case of **Rashidi Abiki Mguwa v. Ramadhani Hassan Kuteya & NMB PLC**, Civil Application No. 431 of 2021, Court of Appeal of Tanzania (unreported), pp. 13-14. In the latter case, it was held that:

It is a mandatory requirement prescribed by law to serve the notice of appeal to the opponent party of which he didn't.

In the cited **Rashidi Abiki Mguwa' case**, the Applicant came back before the Court and sought for extension of time to serve the notice. It was the position of the Court that it was a human error.

Ms. Irene went on to submit that this case consists of a purely technical delay on the reason that since 7th December 2022 when this Court delivered its decision, the Applicant was in the Court corridors fighting for his rights.

Ms. Irene submitted that if you read the Counter Affidavit of Abdallah Kichuri for the Respondent in response to the Affidavit of Elisa Abel Msuya, specifically paragraph 9, the Respondent stated that the Applicant failed to account for each day of delay from 5th June 2023 to 15th June 2023 when this application was filed. Challenging the allegations, she submitted that immediately after withdrawing the application, on the same date the Applicant wrote a letter requesting for the copy of order issued in *Civil Application No. 59/18 of 2022*. The said order was issued to them on 9th June 2023 which was Friday afternoon.

Ms. Irene submitted that the Applicant used six days including weekdays to prepare this application. Justifying the delay, she cited the

case of **Attorney General v. Osterbay Villas Ltd & Another**, Civil Application No. 299/16 of 2016 Court of Appeal of Tanzania at Dar es Salaam (unreported), pp. 10-11 in which the Court of Appeal found that the Applicant acted out of 45 days in filing the application, but the Court found the 45 days constituted inordinate delay, hence extension of time was granted. She further referred this Court to the case of **Patrick Magologazi Mongella v. The Board of Trustees of the Public Service Pensions Fund**, Civil Application No. 199/18 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported) pp.4 & 5.

It was further added by Ms. Irene that if this Court finds in alternative that there was professional negligence, the Applicant should not be punished by the negligence of the Advocate, as was stated in the case of **Jamal S. Mkumba & Another v. AG**. Civil Application No. 240/01 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 9. She stated that this being a labour matter and the Applicant was terminated since 2017, now being six years in Court corridor, he should not be punished based on professional negligence. She thus prayed for the application to be granted.

In reply to the application, Mr. Idrisa submitted that the principles which are the yard stick for extension of time are stated in the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of

2015, Court of Appeal of Tanzania, at Arusha (unreported). He was of the view that the delay in filing the appeal resulted from lack of diligence or carefulness on the part of the Applicant. To buttress such view, Mr. Idrisa cited the case of **Rashid Abiki Nguwa v. Ramadhani Hassan Kuteya & Another**, Civil Application No.431 of 2021, Court of Appeal of Tanzania at Dodoma (unreported).

Mr. Idrissa submitted that paragraph 7 of the affidavit of Elisa Abel Msuya reveal the Applicant discovered the technical defect in the cause of preparation of the hearing. Paragraph 9 of the same affidavit reveal that the Applicant prayed to withdraw the application. According to Mr. Idrisa, that was not a technical delay rather it is a manifestation of negligence and misconception of procedural laws which have never been a good cause for extension of time. He re-cited the case of **Ngao Godwin** (*supra*). He stated that for the principle of technical delay to apply, one should show that he was in the Court corridor timely in pursuing the original right. For example, right to appeal which is to be found by the Court not the party to be incompetent for some reasons leading to a fresh pursuit of a right of the same right or remedy found in the Court. He recited the first holding of the case of **Fortunatus Masha** (*supra*). To that effect, Mr. Idrisa was of the view that the application of this case is distinguishable.

Mr. Idrisa added that the Applicant's Counsel allegation regarding Advocate negligence that he should not be punished twice is a submission from the bar. In support of the stand, he recited the case of **Jamal S. Mkumba** (*supra*), on the reason that there is an exception to the application of that Principle at page 9.

According to Mr. Idrissa, the Applicant deponed that everything was in the domestic affairs of his advocate. There was no sworn statement that the Applicant trusted the opinion given by Trustmark Attorneys. The same statement is not reflected in the affidavit of Msuya.

On actual delay, Mr. Idrissa submitted that there is a period between 5th June 2023 when the application was withdrawn to 15th June 2023. On such delay he is of the view that the Applicant never accounted for each day of delay. He further added that the Respondent is likely to be prejudiced as she is incurring costs. Thus, he prayed for the dismissal of this application.

In rejoinder regarding technical delay, Ms. Irene averred that the phrase "another reason" in **Fortunatus Masha's case** (*supra*), can be defined in a wider way for this application to be fitted in to constitute a technical delay.

As regards to the phrase "in a fit case" in the case of **Jamal S. Mkumba** (*supra*), Ms. Irene was of the view that this application is one

of the fit cases where the party cannot be punished for negligence of the Advocate because the Applicant is the lay person and he has nothing to do or control with the good way/route of pursuing his right.

Having considered parties submissions, this Court is called upon to determine one major issue as to *whether the Applicant adduced good reason/cause for this Court to exercise its discretionary power of granting extension of time to file notice appeal against Revision No. 546 of 2020.*

The Law guiding time limit for filing notice of appeal is *Rule 83 (2) of The Tanzania Court of Appeal Rules, 2009.* The rule provides:

Every notice shall, subject to the provisions of Rules 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal.

Rule 83 (2) (supra) provides time limit of 30 days in filing Notice of Appeal to the Court of Appeal. It is an established principle of law that, grant of extension of time is the discretion of the Court upon a good cause being shown. [See. **Tanga Cement Company v. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania (unreported); and **Praygod Mbaga v. Government of Kenya Criminal Investigation 5 Department and Another**, Civil Reference No. 4 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported)].

Again, the word reasonable cause or good cause has to be adduced by a party seeking extension of time in order to move the Court to exercise its discretion. The good cause must be determined by reference to all the circumstances of each case.

In this matter, the Applicant advanced the alleged ground of technical delay for this Court to exercise its discretion of extending time. On technical delay, the Applicant's Counsel contended that the Applicant filed *Civil Application No. 59/18 of 2022* but the same was withdrawn for the allegation of being incompetent.

On other hand, the Respondent's Counsel maintained that the Applicant delay resulted from negligence and inaction of her Advocate from 5th June 2023 when the application was withdrawn to 15th June 2023 when this application was filed. According to the Respondent, that should not be treated as technical delay.

Having such kind of disputed fact, now the question before this Court is; *what amount to technical delay?* In the case of **Fortunatus Masha v. William Shija & Another** [1997] TLR 154 it was held that:

...I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the

original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. In fact, in the present case, the Applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal.

The above authority justifies that for the ground of technical delay to stand there must be original matter lodged in time. However, in the present situation, the original matter was lodged on time but found to be incompetent.

Likewise in this application, it is undisputed that there was *Civil Application 59/18 of 2022* filed to the Court of Appeal. The same was withdrawn for being incompetent. Basing on this legal argument, the Court is of the view that this amounts to technical delay which was orchestrated by negligence of the Applicant's Counsel. It is a technical delay because Mr. Msuya was not idle. He was in the Court's corridor throughout. I therefore agree with the Applicant's Counsel in his submission regarding technical delay, that it constitutes good cause for

extension of time. In the case of **John Harld Christer Abramson** (*supra*), it was held that:

I have with greatest care gone through the record of the case and the submissions made by the two learned counsel. There is no doubt that prior to this application, the Applicant was in this Court pursuing Civil Revision No. 49/16 of 2016 which was struck out for reason that the Court was moved under wrong provision and that *upon being struck out on that technical delay the Applicant acted promptly within two weeks in bringing this present application*. Since the Applicant was not idle but all along have been in this Court pursuing an incompetent application, *that by itself constitutes good cause*. See **Robert Schelten v. Balden Norataian Vaima and 2 Others**, Civil Application No.112 of 2016 (*unreported*). (*Emphasis added*).

The above highlighted portions of the case of **John Harld Christer Abramson** (*supra*) reflect what transpired in instant application. The Applicant acted promptly in filing the present application by filing it on 15th June 2023 after *Civil Application No. 59 of 2022* was withdrawn on 05th June 2023. That means, the filing of this application was within ten days. 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, the Court of Appeal of

Tanzania at Dar es Salaam (unreported), the Court developed five principles for guiding determination of what amounts to good cause for the application for extension of time to be granted. These grounds according to Lyamuya's case are as follows:

- i. That the Applicant must account for all the period of delay,*
- ii. The delay should not be inordinate,*
- iii. The Applicant must show diligence,*
- iv. Other reasons, such as the existence of a point of law of sufficient importance not apathy negligence or sloppiness in the prosecution of the action that he intends to take and lastly,*
- v. If the Court feels that there are other sufficient grounds such as the illegality of the decision sought to be challenged.*

The Applicant in this case has accounted for the delay as he was not negligent. There is accountability on pursuing the application by the Counsel save that the withdraw was caused by the Applicant's Counsel negligence. It is the view of the Court that, Mr. Msuya as long seasoned experienced lawyer, ought to know the proper procedure. The issue is; *should the Court punish the Applicant based on the negligence of his Counsel for filing a wrong application instead of an appeal?* I find that will be unwise. The remedy particularly on normal civil cases, would be to punish the Applicant's Counsel with costs in person but not to deny the Applicant with the right to be heard on appeal.

From the above legal reasoning, the Court is of the position that the grant of extension of time in this application is not only based on technical delay but also the Applicant acted diligent in pursuing his right.

In the circumstances, I allow extension of time as prayed by the Applicant. Each party to take care of his/her own costs.

It is so ordered.

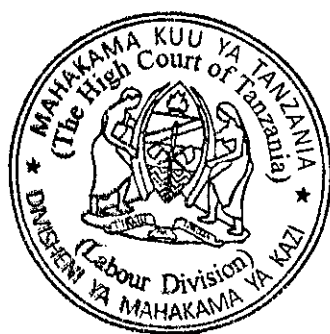


Y. J. MLYAMBINA

JUDGE

04/08/2023

Ruling delivered and dated 4th day of August, 2023 in the presence of Counsel Irene Mchau assisted by Ndehorio Ndesamburo for the Applicant and Antonia Agapiti for the Respondent.



Y. J. MLYAMBINA

JUDGE

04/08/2023