

TANZANIA / JUDGMENT

abdallah chitanda others vs tanzania ports authority 2023 tzca 17573 30 august 2023

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30 August 2023

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM CIVIL APPLICATION NO. 462/18 OF 2022 ABDALLAH CHITANDA & 445 OTHERS..... APPLICANTS VERSUS TANZANIA PORTS AUTHORITY..... RESPONDENT (Application for extension of time to file memorandum of appeal against proceedings, judgment and orders of the High Court of Tanzania, (Labour Division) at Dar es Salaam) (Rwizile. JT Dated the 29th April, 2022 in Labour Revision No. 560 of 2020 RULING OF THE COURT 23th & 30th August, 2023 MGEYEKWA. J.A. This is an application predicted upon rule 10 of the Court of Appeal Rules, 2009 (the Rules), the applicant is seeking an extension of time within which to file a memorandum of appeal against the proceedings judgment, and orders of Labour Revision No. 560 of 2020. The notice of motion initiating this application is supported by affidavits deposed by the applicants' learned counsel Capt. Ibrahim Bendera. In opposing the application, the respondent filed an affidavit in reply deposed by Shija Charles, learned State Attorney. To appreciate the nature and essence of the application the relevant background facts, albeit in brief, as discerned from the affidavits filed for and against the application together with the documents attached thereto, are as follows: The applicants were employed by the respondent serving at its container terminal. On 6th September, 2000, respondent terminated their m from employment for the reason of privatisation of the Container department to Tanzania International Container Terminal Services (TICTS). The applicants found the termination unfair as they ought to be retrenched in due compliance with the procedure. They therefore filed a representative suit at the High Court Dar es Salaam Registry which was struck out for being filed out of time, hence they lodged an appeal before the Court which was struck out for being defective. Thereafter, the applicants reported the dispute to the Labour Commissioner who referred them to the CMA. The CMA dismissed the matter for being lodged out of time. Following the dismissal order, they lodged a revision before the High Court Labour 2 Division. The High Court Labour Division determined the matter and at a result, the same was dismissed. Aggrieved, the applicants lodged the instant application for an extension of time. At the hearing of this application, the applicant enjoyed the legal service of Capt. Ibrahim Bendera, learned counsel while the respondent had the legal service of Mr. Francis Rogers, and learned Principal State Attorney. Submitting in support of the prayer for the

extension of time, Capt. Ibrahim adopted the supporting affidavits as well as the notice of motion to form part of his submissions. He submitted that the reasons for extension of time were well elaborated in the case of Nakumolwa M. Shila v Mwanahamisi Ally Nongwa, Civil Application No. 327/17 of 2021. The gist of Bendera's averment is that the applicants have raised sufficient cause in support of the application at hand. Mr. Capt. Bendera contended that the memorandum of appeal was lodged on 24th May, 2022 and the last day of lodging the same was on 21st July, 2022 which was on the weekend, hence the same is excluded. To buttress his contention, he drew my attention to the case of Barclays Bank TZ Ltd v Jacob Muro, Civil Application No. 357 of 2019. Expounding, Capt. Bendera stated that the applicants filed the memorandum of appeal on 25th July, 2022, however, the Registry Officer instructed them to make some changes which they did as shown paragraph 4 of his affidavit. Capt. Bendera went on to submit that he lodged the memorandum of appeal on the following day on 27th July, 2022 only to find out that they were already out of time. Hence, on 9th August, 2022, they lodged the instant application. Capt. Bendera tried to convince the Court that the applicants were diligent and did not waste any time. In conclusion, the learned counsel for applicants urged the Court to grant the applicants' application so that they can lodge the memorandum of appeal out of time. In his reply submissions Mr. Francis Rogers, attacked the averments that the applicant accounted for the days of delay. According to him, this application is unmerited and deserves to be dismissed since the applicant has failed to account for the days of delay in filing the memorandum of appeal. He went on to submit that the learned counsel in paragraph 4 of his affidavit stated that he was instructed by the Deputy Registrar to effect the said changes. He contended that it was imperative for a court official to swear an affidavit to prove the applicants' counsel claims. The Principal State Attorney drew my attention to the case of Diana rose Spareparts Ltd v Commissioner General Tanzania Revenue Authority, Civil Application No. 245/20 Of 2021. He stressed that it is settled law that when an affidavit mentions another person on a material point, that person must take an affidavit. He went on to submit that the applicants filed their application on 9th August, 2022, counting the days from 25th July, 2022 when they filed the memorandum of appeal to 9th August, 2022 when they filed the instant application is a lapse of 14 days and the applicants have not accounted for the said fourteen (14) days. He stressed that a delay of even a single day must be accounted for. The learned Principal State Attorney referred me to the case of Power and Network Backup Ltd v Olafsson Sequeira, Civil Application No. 307/18 of 2021, He submitted that, the Court has set guidelines for a person who applies for extension of time, to account for the days of delay, must show diligence and not apathy or sloppiness. He placed reliance on 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. In the circumstances, Mr. Rogers 5 implored me to dismiss the application as the applicants have failed to account for the days delayed. The applicants' counsel rejoinder began by a reiteration of what he submitted in chief and maintaining that sufficient cause is evident. He further contended that the need of having another affidavit supporting his averments is irrelevant because the facts in his affidavit was sufficient. He stressed that the applicants acted diligently as they lodged the instant application within ten (10) days. I have carefully scrutinized the record of the application and the contending submissions of the counsel for the parties. The issue for consideration is whether the

applicants have demonstrated good cause to justify the grant of the application. It is settled position that for the Court to grant extension of time, an applicant has to show good cause to move the Court to exercise its discretionary powers (see Rule 10 of the Rules). In determining good cause, the circumstances of each case have to be taken into consideration as there is no single definition of what constitutes good cause. (See *Oswald Masatu Mwizaburi v Tanzania Fish Processing Ltd*, Civil Application No. 13 of 2010 (unreported) and *Republic v Y. Kaponda & 9 Others* [1985] TLR 84. "In considering an application under the rule the courts may take into consideration; such factors as the length of delay, the reasons for the delay and the degree of prejudice that the respondent may suffer if the application is granted." Equally important is that an application of this nature must be filed as soon as an applicant becomes aware of the need to do so and he is obliged to account for the delay for every day within the prescribed period. The decision of the Court in *Bushiri Hassan v Latifa Lucia Masanya*, Civil Application No.3 of 2007 (unreported) articulates the settled law that, a delay of even a single day has to be accounted for otherwise there would be no point in having rules prescribing periods within which certain steps have to be taken. In the fourth and fifth paragraphs in support of the notice of motion, the applicants' counsel had restated the applicants' desire of seeking extension of time to file memorandum of appeal and records of appeal, when he averred that, he lodged the Notice of Appeal on 24th May, 2022 and filed the memorandum of appeal on 25th July, 2022. Since the sixtieth day was on the weekend, he filed the same following day. In the fifth paragraph of his affidavit, Capt. Bendera blamed the Registry Officer for occasioning the delay. He stated that the Registry Officer instructed for some changes to be made, and he complied with the changes, when he presented the records of appeal and memorandum of appeal on the next day, the Registry Officer refused to register the documents for being out of time. On his side, the learned Principal State Attorney contended that the applicants' counsel had failed to support his claims since there was no proof of the registry officer's instructions to the applicants' counsel. It is on record that, the decision in Revision No. 560 of 2020 was delivered on 29th April, 2022 and the Notice of Appeal was lodged on 24th May, 2022, hence, the same was lodged within time. That being the case, the memorandum of appeal and the record of appeal ought to have been lodged on 23rd July, 2022 which was on the weekend. However, under the provision of rule 8 (d) of the Rules, weekend days are excluded. According to the law, the applicants were supposed to lodge their memorandum of appeal and record of appeal on 25th July, 2022. However, the applicants did not lodge same within the prescribed time; hence, they filed the instant application on 9th August, 2022, after a lapse of sixteen (16) days. In the light of that established position, the question to be determined herein is whether or not the applicants have shown good cause to move me to grant their application. In the case of *Bushiri Hassan vs. Latifa Lukio Mashayo*, Civil Appeal No. 3 of 2007, (CAT), (Unreported) the Court held that: - "Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken" Capt. Bendera in paragraphs 4 and 5 of his affidavit claimed that he wanted to file the memorandum of appeal on 25th July, 2022 but was instructed by the registry officer to effect some changes in the document, and having complied, he was informed that he was out of time. On that point, the counsel failed to substantiate his averment by procuring an affidavit of the registry officer to support his allegations. In *Workers Development*

Corp. Ltd v Vocal Networks Ltd, Civil Application No. 28 of 2008 and Jamal S. Mkumba & Abdallah Issa Namangu & 359 Others v The Attorney General, Civil Application No. 240/01 of 2019 (both unreported), the Court emphasized on the importance for an applicant to file an affidavit of a person whose evidence is material to the issue to explain the delay. In Jamal S. Mkumba (supra), we held that: - "...the difficulty in believing Mr. Kambamwene is exacerbated by the fact that he did not procure any affidavit from one of his clients to support his depositions. Worse still, he also did not procure any affidavit from the Court clerk or Deputy Registrar of the Court of Appeal who were in Court when he entered the Courtroom". Moreover, in Issack Sebegele v Tanzania Portland Cement, Civil Application No. 25 of 2002, (unreported), we restated the importance of supporting the applicants claims against a Court clerk that: - "Evidence in support of the applicant's claim against the Court's clerk was necessary; the name of the said court's clerk should have been indicated in one of the paragraphs of the affidavit of the learned counsel and that, the application should have been accompanied with the affidavit of the court registry officer duly sworn to that effect". Applying the above authorities, I do not hesitate in concluding that failure by the counsel for the applicants to file an affidavit of the court registry officer to support his claims that the delay was associated with his or her instructions, renders the assertion unproved, We therefore dismiss the applicants account connected with such assertion. Consequently, the applicant has been unable to account for every day of delay as the law requires. This application is as a result dismissed with no order as to costs. DATED at DAR ES SALAAM this 30th day of August, 2023. A. Z. MGEYEKWA JUSTICE OF APPEAL The Ruling delivered this 30th day of August, 2023 in the presence of Mr. Capt. Ibrahim Mbiu Bendera, learned counsel for the applicant, Ms. Salma Kitwana and Ms. Mwantumu Selle, Principal State Attorneys for the respondent is hereby certified as a true copy of the original. DEPUTY REGISTRAR I COURT OF APPEAL

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