

TANZANIA / JUDGMENT

hector sequiraa vs serengeti breweries limited 2024 tzca 174 12 march 2024

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12 March 2024

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: WAMBALI, J.A..
MAIGE. J.A. And MGEYEKWA. J.A/1 CIVIL APPLICATION NO. 279/18 OF 2022 HECTOR
SEQUIRAA..... APPLICANT VERSUS SERENGETI BREWERIES
LIMITEDRESPONDENT (Application to strike out a notice of appeal against
the decision of the High Court of Tanzania, Labour Division at Dar es Salaam) (Mipawa, J.) Dated
the 2ndday of June, 2016 in Revision No. 287 of 2015 RULING OF THE COURT 7th November, 2023
& 12th March, 2024 WAMBALI. J.A: The applicant, Hector Sequiraa has approached the Court, in
terms of rule 89 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), seeking an order to
strike out the notice of appeal lodged by the respondent, Serengeti Breweries Limited on 23rd
May, 2019 against the decision of the High Court, Labour Division in Revision No. 287 of 2015.
The application is supported by an affidavit of the applicant and contested by an affidavit in reply
deposed by Lucia Minde, the Legal Service Director of the respondent. It is apparent in the
record of the application that on 16th June, 2015, the Commission for Mediation and Arbitration
for Temeke (the CMA) issued an Award in favour of the applicant for the alleged breach of
contract by the respondent that resulted into wrongful termination of his employment. The
award was unsuccessfully challenged by the respondent at the High Court in Revision No. 287 of
2015 as per the decision delivered on 2ndJune, 2015, Dissatisfied, the respondent lodged a notice
of appeal on 29th June, 2016 followed by a letter to the Deputy Registrar of the High Court
requesting to be supplied with a certified copy of proceedings as prescribed under rule 90 (1) of
the Rules. The Deputy Registrar of the High Court responded to the respondent's said letter and
informed her of the readiness of the requested proceedings. Consequently, the respondent
collected a certified copy of the proceedings on 20th September, 2016 as evidenced by her
advocate's letter dated 26th September, 2016. It is not contested that earlier on, the respondent
had on 23rd July 2016 lodged before the Court, Civil Application No. 217 of 2016 for extension of
time to serve the applicant with a notice of appeal. However, the said application was struck out
by the Single Justice of the Court for being time barred. On 11th November, 2016 the respondent
lodged another application, that is, Civil Application No. 469 of 2016 for extension of time, which
was nonetheless dismissed by the Single Justice of the Court on 5th May, 2017 for her non-
appearance. The applicant then on 29th June, 2017 lodged in the Court, Civil Application No. 259
of 2017 seeking an order to strike out the respondent's notice of appeal for failure to take

essential steps which was granted on 1st November, 2017. The striking out of the notice of appeal was not the end of the road for the respondent as on 16th July, 2018, she lodged before the High Court, Labour Division, Miscellaneous Civil Application No. 402 of 2017 seeking extension of time to file a fresh notice of appeal. Unfortunately, the said application was dismissed. In the circumstances, the respondent lodged before the Court, Civil Application No. 373 of 2018 for extension of time which was granted by a Single Justice of the Court on 16th May,

2019. To this end, on 23rd May, 2019, the respondent lodged a notice of appeal, the subject of the instant application. Indeed, on the same date, the High Court, Labour Division received the respondent's letter requesting to be supplied with a certified copy of the CMA's Award, proceedings and exhibits, High Court's proceedings in Revision No. 282 of 2015 and Civil Application No. 402 of 2017. It is noteworthy that the applicant's move to challenge the Single Justice's decision that extended time for the respondent to lodge the notice of appeal was unsuccessful as Civil Reference No. 12 of 2019 was dismissed by the Court on 14th March, 2022. In this application, the applicant's main contention is that, since the notice of appeal was lodged on 23rd May, 2019, the respondent has not taken essential steps to lodge the appeal within the period of sixty days prescribed by the law. The applicant is content that since the respondent's letter requesting for a certified copy of proceedings dated 23rd May, 2019, a reminder letter was written on 29th March, 2022 after 34 months. The applicant maintains that the respondent has not been diligent in following up the requested proceedings resulting on her failure to take essential steps to institute the appeal within the prescribed period. At the hearing of the application, Ms. Raya Said Nassir and Mr. Alex Mgongolwa, learned advocates represented the applicant and respondent, respectively. Submitting in support of the application, Ms. Nassir entirely adopted the applicant's affidavit and written submissions as the basis of her arguments. She submitted that since the respondent wrote the first letter requesting to be supplied with the certified proceedings on 23rd May, 2019, she never reminded the Deputy Registrar of the High Court until 29th March, 2022 when she wrote a reminder letter. Surprisingly, she stated, on 22nd March, 2022 the respondent had also written a letter to the Arbitrator in-charge of the CMA requesting to be supplied with the relevant documents. In her submission, that was not a reminder letter as it was not within the power of the Arbitrator in-charge to issue those proceedings of the CMA because the relevant file was at the High Court Labour Division. Besides, she added, the said letter was not served on the applicant. She argued further that the respondent's averment that she was advised by the High Court clerk to write the said letter to the CMA Arbitrator in-charge is not supported by the affidavit of the respective clerk whose name is also not mentioned. To buttress her submission, she referred the Court to the decision in Phares Wambura and 15 Others

- v. Tanzania Electric Supply Company Limited (Civil Application No. 186 of 2016) [2020] TZCA 1742 (19th August 2020, TANZUI). Ms. Nassir maintained that since the respondent did not make any initiative to follow up the status of the requested certified copy of the proceedings after the expiry of 90 days since she wrote a letter to the Deputy Registrar of the High Court, she contravened the provisions of rule 90 (5) of the Rules. To support her argument, she

made reference to 5 to ensure that the appeal was instituted as required by law. He however emphasized that until the instant application was lodged before the Court, the respondent had not been informed of the readiness of, or supplied with the requested certified proceedings of the CMA by the Deputy Registrar of the High Court despite several reminders. He strongly contended that it is not the role of the respondent to compel the Deputy Registrar of the High Court to supply her with the said proceedings. On the contrary, he submitted, the respondent had to wait for the necessary correspondence from that side after the reminder letter as stated in paragraphs 13 and 14 of the affidavit in reply. The learned advocate also contended that the respondent action of writing a letter to the CMA requesting the relevant proceedings was necessitated by the fact that in the course of following up the matter at the High Court, she was told and advised by one court clerk to do so because the relevant CMA file had been remitted back to it as deposed under paragraph 10 of the affidavit in reply. He submitted that it is not a requirement to serve such kind of a letter to the other party. In his view, it is only the letter to the Registrar of the High Court which has to be served to the other party because it forms the basis of computing the time limit. In the circumstances, he argued that the decisions of the Court referred by the applicant's counsel to support her argument on the contravention of rule 90 (5) of the Rules are not applicable in the present application. On the other hand, Mr. Mgongolwa submitted that the delay by the respondent to remind the Deputy Registrar of the High Court to supply her with the relevant certified proceedings was caused by the fact that soon after the decision to extend time to lodge a notice of appeal was made by the Single Justice on 23rd May, 2019, the applicant lodged Civil Reference No. 12 of 2019 which was decided by the Full Court on 14th March, 2022. All in all, the learned advocate reiterated the respondent's averment in paragraph 16 of the affidavit in reply opposing the applicant's assertion that she has deliberately and willfully been delaying the process of justice or otherwise by not taking any steps in collecting certified proceedings for the purpose of lodging an appeal to this Court. He emphasized that the CMA proceedings and exhibits which have not been supplied to the respondent are important to be part of the record of appeal as required under rule 96 (2) of the Rules to ensure fair determination of the intended appeal. In the end, he implored the Court to dismiss the application for lacking merit. 8 There is no dispute as per the record of the application and parties' submissions that the notice of appeal sought to be struck out was lodged by the respondent on 23rd May, 2019. The notice of appeal was also accompanied with the letter requesting to be supplied with a certified copy of proceedings of the High Court in Revision No. 287 of 2015/ the CMA and Misc. Labour Application No. 402 of 2017. We however wish to pause and observe that the said letter which was written on 22nd May, 2019 by M/S. Excellent Attorneys (Advocates) and stamped with the Labour Division of the High Court Seal on 23rd May, 2019 and received by the applicant's advocates on the same date was not directed to the Deputy Registrar of that court as contended by the respondent. On the contrary, it was directed to the Judge in-charge High Court Main Registry. For clarity, we quote: "EAA/SBL/HC/01/19. The Hon. Judge-In-Charge High Court of Tanzania■ , (Main Registry)." We further note that it is the respondent's counsel letter dated 29th March, 2022 that was treated as a reminder to the said letter which was directed to the Deputy Registrar

of the High Court, Labour Division. Be that as it may, taking into consideration that the first letter which had erroneous title was received and stamped by the Labour Division of the High Court Seal, the question before us remains whether the respondent took essential steps to follow up the said proceedings after she submitted the request on 23rd May, 2019. We are aware that while the applicant asserts that from 23rd May, 2019 it took the respondent 34 months to write a reminder letter dated 29th March, 2022 to the Deputy Registrar of the High Court, the respondent maintains, as per paragraph 14.1 of the affidavit in reply, that she diligently followed up the matter by reminding that office throughout that period as required by law. Particularly, Mr. Mgongolwa emphasized the respondent's averments in paragraphs 13 and 14 of the affidavit in reply where it is stated thus: "13..., 13.1. The current lawyers Ms. Excellent Attorneys (Advocates) received the instruction of this matter at the "Extension of time" stage thus did not handle the dispute from the Commission for Mediation and Arbitration stage. 13.2. The said documents which were served upon the respondent through Ms. Mkono & Co. Advocates the Respondent's lawyer then>were the Judgment, Decree and Proceedings in Labour Revision No. 287 of 2015 only (Hon. 10 Mipawa, J. (rtd) and since the respondent intended to challenge the said Judgment and its decree, the said documents are not the only documents relevant to the appeal purposes. I reiterate the fact that the respondent has to date not officially received all the documents for appeal purposes. 13.3. That the required documents necessary for appeal purposes are the proceedings and those exhibits certified and tendered during trial at the CMA which documents the respondent has to date, not received. 13.4. That to-date, the Respondent has not received the necessary records from the Commission for Mediation and Arbitration (CMA). 14.... The Respondent states that at no time has she deliberately failed to obtain the said relevant documents; further that; 14.1. The Respondent's only duty is to follow up by reminding the Registrar as she had done throughout, which duty the Respondent has diligently done. 14.2. There is no way the Respondent can force or compel the Registrar to make available the requested documents apart from the official way which is writing reminders to the Honourable Deputy Registrar. ii 14.3. In further emphasis, I reiterate the contents of paragraph 13 of this affidavits in reply above." We are also mindful of the respondent's counsel submission that the delay in reminding the Deputy Registrar of the High Court to supply her with the requested certified proceedings was due to the existence of Civil Reference No. 12 of 2019 against the Single Justice's decision to extend time which resulted in lodging the notice of appeal sought to be struck out. However, we respectfully disagree with the learned counsel submission on this point as it is not borne out of the respondent's officer affidavit in reply. We are settled that had the respondent intended to raise that point, she would have done so in paragraph 12 of the affidavit in reply where she simply noted the existence of that Civil Reference without more. Similarly, we take note of the respondent averment and her counsel's submission that until the time of lodging this application, she had only obtained a certified copy of proceedings of the High Court without proceedings and exhibits from the CMA in Labour Dispute No. CMA/DSM/TEM/157/2011. That it was the absence of the CMA proceedings which compelled her to write a letter dated 22nd March, 2022 to the Arbitrator in-charge to request the same after she learnt that the 12

relevant file had been remitted to the CMA. However, this argument cannot assist the respondent to demonstrate that she took essential steps to follow up the relevant requested proceedings. This is so because; one, the said letter was not copied and served on the Deputy Registrar of the High Court to whom she had applied for the same copy in her letter dated 22nd March, 2019 and received on 23rd March, 2019. It is no wonder that in the reminder letter to the Deputy Registrar of the High Court dated 29th March 2022, there is no reference to that letter or any information to that effect. Two, the assertion of the respondent that she was informed by the court clerk to do so is not supported by an affidavit from the said person whose name is also not disclosed. More importantly, in the letter to the Arbitrator in-charge, there is no any indication that she informed him of the fact that she learnt from the High Court that the relevant file had been returned to the CMA as averred in paragraph 10 of the affidavit in reply. Faced with an akin situation, the Single Justice of the Court in *Phares Wambura and 15 Others v. Tanzania Electric Supply Company Limited* (supra) stated that: "... As such it is so unfortunate that the said court clerk who allegedly misled the applicants was not requested to swear to that effect. Surprisingly, the deponents did not even attempt to mention the name of the said court clerk ... The applicants' 13 averment therefore remains to be a bare claim with no proof. In the circumstances, I agree with the counsel for the respondent that there was a need for the said clerk to swear an affidavit to prove what the applicants and their counsel had alleged in their supporting affidavit" Equally, in the present application, the averment in paragraph 10 of the respondent's affidavit in reply which according to the verification clause was brought to her attention by the counsel remains to be bare assertion without proof. Besides, as stated by the applicant's counsel, the deponent did not disclose when she received the said information and advice from the said court clerk. It was thus the duty of the respondent to show clearly in the affidavit in reply how between 23rd May, 2019 to 29th March 2022 which is the period before and after the expiry of 90 days, she took essential steps to remind the Deputy Registrar of the High Court to supply her with the requested proceedings of the CMA. The provisions of rule 90 (5) of the Rules provides that: "Subject to the provision of sub rule (1), the Registrar shall ensure a copy of the proceedings is ready for delivery within ninety (90) days from the date the appellant requested for such copy and the appellant shall take steps to collect a copy 14 upon being informed by the Registrar to do so, or within fourteen days after the expiry of ninety (90) days." In the case at hand, the respondent was bound to follow up with the Deputy Registrar of the High Court before and after the expiry of 90 days from 23rd May, 2019 by reminding him through the letter to be informed of the status of the requested certified proceedings. Unfortunately, the reminder letter dated 29th March, 2022 was written after almost three years as stated above. Besides, the respondent's averment in paragraph 14.1 of the affidavit in reply that she reminded the Deputy Registrar of the High Court concerning the requested proceedings throughout that period is not substantiated. This is in view of the fact that the reminder letter was written once and after a considerable lapse of 90 days. We take note that there is no time frame provided under rule 90 (5) of the Rules within which the intended appellant should follow up the requested proceedings after the expiry of 90 days. However, we are of the view that the respective party

should show diligence by acting within reasonable time. In this regard, the record should demonstrate the efforts taken by the intended appellant including reminding the Registrar of the High Court to supply him with the requested proceedings before and after the lapse of the 90 days 15 prescribed by the Rules. In *Beatrice Mbilinyi v. Ahmed Mabkhut Shabiby* (supra), the Court stated as follows on that provisions: "... Although the provision does not provide time frame for the follow up after the expiry o f ninety days, we would not expect a party who has intention to appeal to have kept quiet for about nine months before following up the documents necessary for the institution o f the appeal. We will not be out o f context if we state that the appellant was not diligent enough to follow up the matter." Indeed, in *Tanzania Private Sector Foundation v. Adolph Qambaita and Another* (Civil Application No. 181 of 2016) [2020] TZCA 264 (27 May 2020, TANZLII), the Court emphasized, among others, that: "... The Rule attempted to solve the problem o f either the Registrar not acting on the appellant's request timeously or the appellant not taking steps to follow up the requested document thereby delaying the process o f appeal at the detriment of the respondent". In this case, we find that the respondent was not diligent enough to follow up the requested certified copy of proceedings as she spent almost 34 months from the date of the first request to remind the Deputy Registrar of the High Court to supply her with the said proceedings. It is in this regard that in *Daudi Robert Mapunga & 417 Others v. 16 Tanzania Hotels Investment Ltd & Four Others* (Civil Application No. 462/18 of 2018) [2021] T7CA 11 (12 February 2021, TANZLII), the Court observed: "While we acknowledge that the Registrar is plainly blameworthy for his inaction in supplying the requested document, we think the respondent's diligence is seriously in question. We are unprepared to let the respondents claim they were home and dry. It would be most illogical and injudicious we think; to accept the respondents' wait for a copy of the proceedings while they take no action on their part to follow up on their request to the Registrar. To say the least, this inaction, in our respectful view offends the ends o f justice." In the circumstances, having regard to what we have stated above with regard to the failure by the respondent to demonstrate that she took essential steps to lodge the appeal by closely following up on her first letter in which she requested certified proceedings from the Deputy Registrar of the High Court, we are settled that the application has merit. We accordingly grant it. 17 Consequently, in terms of rule 89 (2) of the Rules, we strike out the notice of appeal lodged by the respondent on 23rd May, 2019 to contest the decision in Revision No. 287 of 2015. We make no order as to costs. DATED at DAR ES SALAAM this 6th day of March, 2024 F. L. K. WAMBALI JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL A. Z. MGEYEKWA JUSTICE OF APPEAL The Judgment delivered this 12th day of March, 2024 in the presence Ms. Raya S. Nassir, learned counsel for the applicant, and Ms. Lujjaina Mohamed, learned counsel for the Respondent is hereby certified as a true copy of the original. \S . DEPUTY REGISTRAR '1 H COURT OF APPEAL \;/v/ Z

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