

TANZANIA / JUDGMENT

JOHN PAUL NDANSHAU V

COURT
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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 10519 OF 2024 JOHN PAUL NDANSHAU..... APPLICANT
VERSUS A-ONE PRODUCTS AND BOTTLERS LTD..... RESPONDENT

RULING

Date of Last Order: 08/07/2024 Date of Ruling: 17/07/2024 B. E. K. Mganga, J. Applicant has filed this application seeking extension of time within which to file revision application so that the court can revise an award issued on 2nd February 2024 by Hon. Ng'washi, Y, Arbitrator in CMA/DSM/ILA/448/2022/270/2022 before the Commission for Mediation and Arbitration(CMA) at Ilala. In the affidavit in support of the Notice of Application, applicant stated that, on 5th August 2022, respondent terminated his unspecified period contract of employment that the two entered on 1st March 2029. That, aggrieved with the said termination, he filed Labour complaint at CMA claiming to be paid TZS 73,749,180/= but the same was dismissed on 2nd February 2024, Hon. Ng'washi, Y, 1 Arbitrator. It was further deponed by the applicant that, being with the said award, he filed Revision No. 5332 of 2024 but on 2nd April 2024, his counsel prayed to withdraw the said revision as it was incompetent. He also deponed that, being out of time, on 5th April 2024 he filed Civil Appeal No.7419 of 2024 showing that he was seeking extension of time. That, on 2nd May 2024 after noting that Civil Appeal No. 7419 of 2024 was wrongly registered in the eCMS instead of Miscellaneous Application, the said Civil Appeal No. 7419 of 2024 was withdrawn with leave to refile. He further deponed that, on 7th May 2024 he was supplied with court order and proceedings and on 9th May 2024 he filed this application seeking extension of time. Applicant deponed further that, days between 7th May 2024 and 9th May 2024 were spent in preparation of this application. In resisting this application, respondent filed both the Notice of Opposition and the Counter Affidavit affirmed by Hassan Dewji her principal officer. In the said counter affidavit, the deponent stated inter- alia that, this is the third time applicant knocking court doors and that applicant has demonstrated lack of seriousness. By consent of the parties, this application was argued by way of written submissions. 2 In her written submissions on behalf of the applicant, Ms. Marietha Loth Mollel, advocate submitted that Revision No. 5332 of 2024 was filed within time but was withdrawn on 2nd April 2024 for being incompetent. She added that, on 5th April 2024 applicant filed application No. 7419 of 2024 but the same was struck out on 5th May 2024 for being wrong filed as Civil Appeal and not Miscellaneous application. It was further submissions of counsel for the applicant that applicant has never slept over his rights as he acted timely and

promptly. Ms. Mollel submitted that the delay is technical and cited the case of Philemon Mang'ehe t/a Bukine Raders vs Gesso Herbon Bajuta (Misc. Civil Application No. 374/02 of 2022) [2023] TZCA 17672 (29 September 2023), Emmanuel Rurihafi and Another v. Janas Mrema, Civil Application No. 314 of 2019, CAT(unreported), The Director General LAPF Pension Fund v. Pascal Ngolo, Civil Appeal No. No. 76/08 of 2018, CAT(unreported) and Johan Harald Christer Abrahsson v. Exim Bank & Others, Civil Application No. 224 of 2018, CAT(unreported) to support her submissions that promptness and that technical delay is a good ground for extension of time. She further cited the case of Lyamuya Construction Company Ltd v. Board of Trustee of Young Women's Christina Association of Tanzania, Civil Revision No. 2 of 2010, CAT(unreported) and Yusuph Nyembo @Kachuo v. 3 The Republic, Criminal Application No. 5 of 2013, CAT(unreported) on factors to be considered in the application for extension of time. It was also submitted by counsel for the applicant that there is illegality that is sufficient to warrant this application to be allowed. On illegality, learned counsel cited the case of Principal Secretary, Ministry of Defence and National Service v. Devran Valhambia [1992]T.L.R 185(CAT) On the other hand, in his written submissions resisting the application, Mr. Mwambene Adam, advocate for the respondent submitted that, applicant has not accounted for each day of the delay and cited the case of Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another (Civil Appeal 82 of

2017) [2018] TZCA 297 (13 December 2018) to support his submissions that applicant was supposed to account for each day of the delay. Learned counsel for the respondent submitted further that, applicant has failed to account for 39 days from the date of withdraw of the first Revision application to the date of filing the second application for extension of time. He added that, in the affidavit in support of the application, applicant did not disclose the date he prayed to be supplied with copy of the withdrawal order. 4 On technical delay, learned counsel for the respondent distinguished the cases cited by learned counsel for the applicant on ground that this is the third time applicant knocking court doors after filing incompetent applications. Counsel for the respondent further submitted that applicant has shown negligence by wrongly filing in the eCMS and application for extension of time as civil appeal. He added that the repeated attempt is pure negligence of an advocate. Learned counsel for the respondent cited the case of Stephen Masato Wassira

v. Joseph Sinde Warioba and Attorney General[1999] T.L.R 332 (CAT) to support his submissions that litigation must come to an end. On illegality, learned counsel for the respondent submitted that, that is submissions from the bar because it is not in the applicant's affidavit in support of the application. Learned counsel cited the case of Hassan Bundala @ Swaga v. Republic, Criminal Appeal No. 386, CAT(unreported), Hamis Bushiri Pazi & four Others v. Saul Henry Amon & Three Others and the Attorney General as interested party, Civil Appeal No. 166 of 2019, CAT(unreported) to support his submissions that the same should be dismissed because as it was not raised in the affidavit. With those submissions, learned counsel for the respondent prayed this application be dismissed for want of merit. 5 In rejoinder submissions, learned counsel for the applicant maintained that

applicant delayed for six(6) days only and that there is illegality. As a starting point, I should point out that, both applicant and the respondent filed an affidavit and the counter affidavit respectively as substitute of their oral evidence to be relied upon in this application. In fact, there is a litany of case laws that, both affidavit and the counter affidavit are substitute of oral evidence. See the case of Phantom Modern Transport (1985) Limited vs D.T. Dobie (Tanzania) Limited (Civil Reference 15 of 2002) [2002] TZCA 6 (10 December 2002), Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another (Civil Appeal 82 of 2017) [2018] TZCA 297 (13 December 2018), Rosemary Stella Chambejairo vs David Kitundu Jairo (Civil Reference 6 of 2018) [2021] TZCA 442 (2 September 2021) and Rustamali Shivji Karim Merani vs Kamal Bhushan Joshi (Civil Application 80 of 2009) [2012] TZCA 16 (27 February 2012) to mention but a few. In disposing this application, I will therefore, only consider what was deponed by the parties in the affidavit and the counter affidavit because that is the only evidence available. 6 It was submitted by counsel for the applicant that there is illegality and that, illegality is one of the grounds for extension of time. With due respect to counsel for the applicant, as it was correctly submitted by counsel for the respondent, in the affidavit in support of the application, applicant did not rely on illegality as a ground for this application to be granted. The least I can say is that, submissions relating to illegality came from the bar. Those submissions are not evidence and cannot be acted upon by the court as it was held in the case of Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another (Civil Appeal 82 of 2017) [2018] TZCA 297 (13 December 2018). Since illegality was not raised in the applicant's affidavit, I will not consider it. It was submitted by counsel for the applicant that the delay is technical and that the same is a good ground for extension of time. I agree with that submission because that is the correct position of the law as it was held See the case of William Shija v. Fortunatus Masha [1997] TLR 213 and Emmanuel Rurihafi & Another vs Janas Mrema (Civil Appeal 314 of 2019) [2021] TZCA 332. In fact, in Rurihafi's case (supra) the Court of Appeal held inter-alia that: - "In the circumstance, we have no hesitation to hold that, as the incompetent appeal was filed within time and the appellants were, as a 7 result of their default to attach a copy of the ruling, penalized by having their appeal struck out, the prosecution of the incompetent appeal constituted sufficient cause for extension of time." In the case of Philemon Mang'ehe t/a Bukine Raders vs Gesso Herbon Bajuta (Misc. Civil Application No. 374/02 of 2022)

[2023] TZCA 17672 (29 September 2023) it was held by the Court of Appeal that:- "For the avoidance of doubt, technical delay is applicable in a situation when the first appeal or application was timely filed but failed to proceed due to some other factors." It is clear from the applicant's affidavit that, he filed revision application No. 5332 of 2024 while within time but the same was withdrawn on 2nd April 2024 as it was incompetent. It is undisputed that, three days thereafter namely on 5th April 2024 applicant filed application No. 7419 of 2024 that was wrongly registered in the eCMS as Civil Appeal No. 7419 of 2024. I should say, human is error. Every one of us unintentionally is prone to commit errors as it has happened to the applicant. In fact, recently, there are increasing errors relating to

citation of the parties and names of the cases in the eCMS possibly because the parties are still learning how eCMS works or due to options available in the eCMS. In my view, the error committed by the applicant in titling the said application as civil appeal though the contents showed that it is an application for extension of time is excusable. In fact, applicant has been 8 punished by striking out the said Civil Appeal so that he can file a proper application. It was submitted by counsel for the respondent that, this is the third application after applicant has filed incompetent applications and prayed that this application be dismissed. With due respect to counsel for the respondent, in my view, that cannot be a ground for dismissing the application. I am of that view because, there is neither a case law nor provision stipulating the number of applications a person is allowed to file in court after striking out previous applications for being incompetent. I am of the considered opinion that, it is upon the court to decide, after assessing circumstances and the nature of the applications, whether applicant should be given another chance or not, depending inter-alia, on the nature of the mistake committed. In my view, as pointed out herein above, the mistake committed by the applicant in the application at hand is not so grave to take harsh action against him. It was also submitted by counsel for the respondent that applicant has failed to account for 39 days from the date of withdraw of the first Revision application to the date of filing the second application for extension of time. With due respect to counsel for the respondent, that submission is not supported by evidence of the parties both in the counter affidavit and the affidavit. I have examined the affidavit in support of the application and I find that applicant accounted for the delay and acted promptly in filing this application. Since the delay is technical and not actual and applicant has accounted for the delay, I hereby allow this application and grant applicant seven (7) days leave from today within which to file the intended revision. Dated at Dar es salaam this 17th July 2024 B. E. K. Mganga JUDGE Ruling delivered on this 17th July 2024 in Chambers in the presence of Gaspar Urassa, advocate holding brief of Marietha Mollel, Advocate for the Applicant and Adam Mwambene, Advocate for the Respondent. B. E. K. Mganga JUDGE 10

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