THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

LABOUR DISPUTE MISC.APPLICATION NO. 79/2019

ARISING FROM LABOUR DISPUTE NO.271/2016

KASESE COBOLT CO. LTD …….. APPLICANT

VERSUS

DAVID KABAGAMBE …….. RESPONDENT

BEFORE

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

1. MR.MICHEAL MATOVU

2. MS. SUSAN NABIRYE

3. MS. ADRINE NAMARA

RULING

This application is brought by notice of motion under Section 94 of the employment Act and Rule 45 of the Employment Regulations, for orders that:

1. The time for filing a Notice of Appeal by the Applicant BE EXTENDED /ENLARGED.
2. That the applicant be permitted to lodge an appeal on matters of law and fact.
3. That the costs of this Application abide the result of the Appeal.

The grounds of the application are set out in and affidavit deponed Mr. Enock Musasizi the applicant as follows;

1. That the Respondent lodged a complaint with the Kasese District Local Government sometime in 2008 for alleged wrongful dismissal.
2. That an award was entered by the Labour Office against the Applicant on the 20th September 2008.
3. That the Applicant by way of letter indicated that they were unable to attend the meeting and requested that the same is rescheduled to a date sometime in March 2008.
4. That the labour officer in the absence of the applicant awarded the Respondent Ugx. 56,005,323/-,
5. The Respondent then filed Civil suit No.23 of 2013 in the High Court of Uganda at Fort portal seeking to enforce the award of the Labour Officer and interest on the award. He also sought, payment of general damages for unlawful dismissal and inconveniences caused, costs of the suit and interest on the general damages
6. That the applicant only became aware of the said award after the institution of CS No. 23/2013 and after receiving summons to file a defense on the 16/10/2013, the Applicant filed a defense on the 24/10/2013.
7. In a bid to avoid a multiplicity of suits the applicant addressed all its concerns in the statement of defence, wherein it stated that it intended to raise a preliminary point of law that the suit was incompetent, vexatious, time barred and frivolous which would have the effect of disposing of the entire suit and further prayed that the suit is dismissed including the seeking of the enforcement of the award by the high court of Fort portal.
8. That an attempt to appeal the decision of the Labour officer at that stage would amount into a multiplicity of suits.

That when the matter came before the presiding Judicial officer, he declined to entertain it and ordered for it to be transferred to industrial Court being the specialized court to handle employment matters, however at that time the court was not yet operational. Persistent efforts to have the matter transferred to this honorable Court were futile, until 2/04/2019 when the High Court Fort portal formally confirmed that the file would be transferred to the industrial Court.

That the Applicant being dissatisfied with the decision of the Labour officer and the delay in transferring the file for purposes of determining Civil Suit No. 23 of 2013 wishes to appeal to this honorable court against an award and the in the interest of justice the mistake of the court should not be visited on the litigant. The Applicant has a good and valid appeal which raises several issues of law which ought to be heard and resolved on merit and fighter seeks to lodge an appeal in respect of law and facts.

He prayed that in the interest of justice and equity this honorable Court grants the Applicant extension of time within which to file a Notice of appeal and memorandum of Appeal and to grant the applicant leave to appeal on both law and fact.

In reply, David Kabagambe, the Respondent, deponed that he was employed by the applicant on the 2/2/1998, and on 1/05/2007 he was promoted to the position of Assistant maintenance planner, until 8/2/2008 when he was dismissed. Indeed he made a complaint to the labour officer, Kasese District Local Government, against the dismissal. The Labour officer caused a hearing which was attended by the Applicant's human Resources Manager, one Andrew Lumbuye and her Public Relations Manager One Aruho Amon. The Labour officer found that his dismissal was unlawful and unjustified and ordered the Applicant to pay him Ugx.56,005. 323/- within 1 month from the date of the award. That Applicant was always aware of the decision and therefore this applicant is guilty of inordinate delay and the application is intended to

waste court's time therefore it should be dismissed. That the Applicant closed business and he stand to lose if no payment is made to him and the application is allowed.

REPRESENTATION

The Applicant was represented by Ms. Bridget Byarugaba Kusiime of Shonubi, Musoke & Co. Advocates Plot 14 Hannington Road Kampala and the Respondent by Mr. Edmond Kyamanywa Cooper of Kaahwa, Kafuzi, Bwiruka & Co. Advocates, plot 38 Mugurisi Road Fort Portal.

SUBMISSIONS

Counsel submitted that the application was an omnibus application by way of notice of motion under Section 94 of the Employment Act and Rule 45 of the Employment Regulations.

She raised a preliminary objection to the effect the affidavit in reply was filed out of time without seeking leave of Court and therefore it should be struck out.

Counsel submitted that by way of an affidavit of service filed before this Court on 17/07/2019, it was confirmed that the Respondent was served with this application on 10/06/2019. Counsel argued that it was a well-established principle of the law cited in various cases including ***Barclays Bank vs Aijuke Stanley Misc. Application No. 96/2017*** that where the LADASA Rules are silent on matters heard and determined in the Industrial Court, the Civil Procedure Rules apply and **Order 12 rule 3(2)** provides that service of an interlocutory application to the opposite party shall be made within 15 days from the filing of an application and a reply to the application by the opposite party shall be filed within 15 days from the service of the application and be served on the application within 15 days from the date of filing of the reply. She contended that the Affidavit in reply was served on to the Applicant on 19/07/2019 which was more than 30 days from the date of service. Basing on ***Stop and See (U) Ltd v Tropical Bank***

Limited HCMA No. 33 of 2010 whose holding is to the effect that where a reply was filed out of time, the correct Course would be to apply for leave of court to file out of time and in this case the reply was struck out. She prayed that the affidavit in reply in the instant case should therefore be struck out.

In reply to the Preliminary Objection, contending that the Respondent filed his affidavit in reply without leave of Court therefore it should be struck out, Counsel argued that this application was filed on 8/4/2019 and endorsed by the Registrar of this court on 23/5/2019 and served on them on 10/6/2019. He asserted that if Court was to invoke Order 12 rule 3(2) of the Civil Procedure Rules as submitted by the applicant's Counsel, the application was served late (after the expiry of 15 days) therefore Court should strike it out on that account.

According to him Regulation 45 of the Employment Regulations provides for the application of the rules of procedure for the Industrial Court. He also cited Section 7 of the Labour Disputes (Arbitration and Settlement) Act 2006 and Section 40 which are to the effect that the Minister in consultation with the Chief Justice could make rules prescribing the form and manner in which labour Disputes may be referred to the Industrial Court. Section 40(2) which empowers the Industrial Court to regulate its own procedure where there is no provision of rules to govern questions arising during the hearing of a labour dispute. He contended the Labour Disputes (Arbitration and Settlement) (Industrial Court Procedure) Rules, 2012 under rule 6 provide for applications for extension of time and discretion to grant such extension if it deems fit to do so. Therefore, the Applicant who also failed to abide by the rules regarding the timelines within which to serve the application should not object to an affidavit filed and duly served before the hearing. According to him the Applicant suffered no prejudice and court should only consider substantive justice as provided under Article 126(2)(e) of the Constitution and overrule the objection.

In rejoinder Counsel reiterated that the Affidavit in reply was served out of time and she cited several authorities to the effect that it is trite law that Order 5 Rule (2) of the Civil Procedure Rules provides for service of summons to be effected within 21 days from the date of issue. She cited **Fredrick james Jjunju & Anor vs Madhvani Group Limited Misc. Application No. 688 odf 2015 (Arising from Civil Suit No. 508/2014** that all applications whether by chamber summons or a notice of motion are by law required to be served following after the procedure adopted for service of summons under Order 5 rule 1(2) CPR. According to her this position was adopted in Amdhan Khan vs Stanbic Bank (U) Ltd HCMA 900/2013 which relied on in the Supreme court decision in **Kanyabwera Vs Tumwebwa[2005] 2 EA 86,** where JSC Oder(RIP) held that: "*What the rule stipulated about service of summons , in my opinion , applies to service of hearing notices."* She insisted that the application was signed and sealed on 23/05/2019 and served upon the Respondent on 10/6/2019 and therefore the Notice of Motion had not yet expired. She reiterated that on the other hand the Respondent served his reply way out of the permitted time therefore it ought to be struct out with costs to the applicant. She insisted that the Respondent had not justified the delay and serving his reply upon the Applicant. Based on ***stop and See (U) Ltd vs Tropical bank Ltd Misc. application No. 333 of 2010,*** Courts holding was to the effect that Articl 126(2)(e) of the Constitution of the Republic of Uganda was not a magical wand in the hands of defaulting litigants and given that the respondent has not brought any extenuating circumstances upon which Court can exercise its discretion to decide whether the application of the law should be strictly applied or not, the reply should be struck out with costs.

RESOLUTION OF THE PRELIMINARY OBJECTION

After carefully considering both Counsel's submissions, the Notice of Motion, and the affidavits in support and in opposition, We resolve the Preliminary objection as

follows: The contention of Counsel for the Applicant is whether the Affidavit of reply was competent before this court given that was filed outside the time prescribed by law?

Counsel cited Order 12 rule 3(2) of the CPR as the law prescribing the timelines with regard to the service of interlocutory applications. Order 12 rule 3(2) and which provides that:

> ***"2) Service of an interlocutory application to the opposite party shall be made within 15 days from filing of the application and a reply to the application shall filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing the reply."***

It is not disputed that the Application was endorsed and sealed by the Registrar of this court on 23/5/2019 and served on the Respondent on 10/6/2019. It was also not disputed that the Respondent filed his reply in court on the 19/07/2019a and according to Counsel this was way out of the time prescribed under Order 12 rule 3(2) of the Civil Procedure Rules. Counsel for the Respondent contended that the Applicant could not invoke this rule given that she too had served them outside the 15 days prescribed thereunder.

The interpretation of Order 12 r3(2) of the CPR in **Stop and See U ltd**(supra) however is that the sub rule 3 (2) is meant to give timelines for all interlocutory applications that are envisaged after the completion of scheduling conference such as interrogatories, discovery and alternative Dispute resolution among others and for all manner of applications.

Therefore the instant Application does not be fall within the ambit of Order 12(3)(2) which is intended to give timelines within which pleadings after scheduling should completed and filed but rather it falls under **Order 5** which provides for issue and service of summons. The holding in **Fredrick James Jjunju & Anor vs Madhvani Group**

Limited Misc. Application No. 688 of 2015 (Arising from Civil Suit No. 508/2014 , settled the position of the law regarding service of Applications whether by Chamber Summons, Notices of motion or Hearing Notices as follows:

> ***"… the position of the law is that Applications, whether by Chamber Summons or Notices of Motion and or Hearing Notices, are by law required to be served following after the manner of the procedure adopted for service of summons under Order 5 r.1 CPR. This position was taken in the case of Amdan Khan vs Stanbic Bank (U) ltd HCMA 900/2013, in which this court followed the supreme Court decision in Kanyabwera vs Tumwebwa[2005] 2 EA 86 where, at page 94 of the judgment, Oder JSC(R.I.P) held as follows:***

"What the rule stipulates about service of summons in my opinion applies equally to service of hearing notices." [underlined for emphasis.

Therefore, the procedure for the service of summons under Order 5 also applies to the service of applications brought by either Chamber Summons, Notices of Motions or hearing notices.

Order 5 r. 1 provides as follows:

> **2)** ***"Service of summons issued under sub rule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to court, made within fifteen days after the expiration of the twenty-one days showing sufficient reasons for the extension."***

The Respondent therefore had 21 days from the 10/06/2019 within which to serve his reply upon the Applicant.

We do not agree with the contention of Counsel that the Application having been filed by the Applicant outside the 15 days prescribed under Order 12 r3(2), would entitle the Respondent to also file out of time. A wrong does not right another wrong! And once brought to the attention of Court it cannot be ignored. The Respondent had the

option to protest the late service upon them if they believed that it was indeed the application was served out of time. In light of the Order 5 rule 1(2) the Application was served upon them 19 days after it was endorsed and sealed by the Registrar on the 23/05/2019 and served on 10/6/2019. The reply on the other had was made served on 17/07/2019 over 35 days after the service upon him on 10/06/2019.

Therefore, the Respondent's Affidavit in reply did not comply with **O5 r1(2) (supra)**, because the reply was made outside the stipulated, 21 days, after the Application was served upon him and he did not seek leave of court to serve the same within 15 days after the expiry of the 21 days. ***O5 r1 (3)*** of the CPR provides that*:*

> ***"where summons have been issued under this rule and***
>
> ***a) Service has not been affected within twenty-one days from the date of issue; and***
>
> ***b) There is no application for an extension of time under sub- rule (2) of this rule ; or***
>
> ***c) the application for extension of time has been dismissed, the suit shall be dismissed without notice.***

Therefore, the Respondent's failure to apply for and extension to serve the reply out of time as prescribed under Order 5 r (1) (2), renders the reply incompetent before this court.

Whether the Application has merit

It was Counsels submission that the Applicant's omnibus application is entertained on the basis of the holding in **Magemu Enterprises vs Uganda Breweries Limited HCCS 462/199** cited with approval in **The Registered Trustees of the Dioceses of Kasese vs Benuza Jane (LD Misc. Application No.155 of 2017)** to the effect that an Omnibus applications may be entertained where the applications are of the same nature and one supersedes the other and for the expeditious disposal of the matter, before the Cout as well as avoidance of a multiplicity of suits.

According to her the principles governing applications of this nature are that there must be sufficient reason related to the inability or failure to take a particular step.

She argued that in the case before this court the labour officer's award against the Applicant was only brought to their attention when they were asked to file a written statement of defense in an application filed at the High Court at Fort portal via Civil Suit No. 23/2013 in which the Respondent was seeking enforcement orders including general damages, interest and costs. The Applicant filed an omnibus statement of defence to avoid a multiplicity of suits before the court. She contended that at the time the Employment Regulations had only been promulgated in 2012 and had not yet come into force , therefore the procedure for contesting a Labour officer's award especially with regard to the timelines within which to lodge an appeal were not clear at the time and that's the reason the Applicant decided to contest the award through their defence to Civil Suit 23/2013. When the matter came up for 43oiphearing on the 17/11/2014, counsel submitted that the presiding Judge issued a directive for the file to be administratively transferred to the Industrial Court for further management, which was not done. She contended that it was the Applicant's letter to the Registrar High Court Fort portal and the Assistant Registrar Fort portal's letter to the Registrar High Court marked annexures H1 and H2 which caused the matter to eventually get referred to the High Court in Kampala.

She asserted that the administrative transfer was a delay occasioned by the Court and was sufficient ground for the court to allow this application. She cited ***Bhatt v Tejwart Singh [1962] EA 467,*** referred to in ***Godfrey Magezi & Brain Mbazira V Sudhir Ruperalia SCCA No.10/2002,*** *which stated that mistakes of court Officials have been held to be sufficient grounds for granting extension of time to the Applicant to file an appeal out of time.* It was her submission that he delays to transfer the case from High Court Fort portal to the Industrial Court was on the Court system and therefore it

should not be visited on the Applicant. She refuted the Respondent's assertion that there was inordinate delay on the part of the Applicant because he had not furnished any evidence that there were efforts to transfer the file to this Court or to realize the fruits of the Labour Officer's award which delivered in 2008.

She concluded that that given that from the Respondent had not made any effort to recover the fruits of his judgement since 2013 and it was on the Applicants bequest that the file was administratively transferred to the Industrial court and the Respondent has never taken out any execution proceedings since 2014 when the Industrial Court became operational, granting this application would not prejudice the Respondent in any way.

DECISION OF COURT

Having already established that the Respondent's Affidavit in reply was incompetent before this court, we shall not consider it, nor shall we consider the Applicants submissions in rejoinder in resolving the competence of this application.

Counsel submitted that the application is an omnibus application by way of notice of motion under Section 94 of the Employment Act which provides for the right to appeal to this court against decisions of the labour officer and Rule 45 of the Employment Regulations 2011, which provide for the procedure for the appeal and the timelines within which to be followed. The Application is seeking orders for the extension of time for filing a notice of appeal, permission to lodge an appeal on matters of both law and fact and for costs of the application to abide the result of the Appeal.

Section 94 provides that:

94. Appeals

1)A party who is dissatisfied with the decision of a labour officer on a complaint made under this Act may appeal to Industrial Court in accordance with this section.

2) An Appeal under this section shall lie on a question of law and with leave of the Industrial Court, on a question of fact forming part of decision of the labour officer.

3) The Industrial Court shall have power to confirm, modify or overturn any decision from which an appeal is taken and the decision of the Industrial Court shall be final.

4) the Minster, by regulations, make provision for, the form which appears shall take

Regulation 45 provides that:

45. Appeal

1) a person aggrieved by the decision of the labour officer may within 30 days give notice of appeal to the Industrial Court in the form prescribed in the 17th schedule.

2) Upon require receipt of a notice of appeal the registrar shall within fourteen days, the labour officer to furnish the Industrial Court with information concerning the complaint, the parties involved, the hearing proceedings, the decision of the labour officer on the matter of appeal.

3) The labour officer shall present to Industrial Court the information referred to in sub regulation (2) within twenty-one days after being required to provide information.

4) After receiving the information on the matter of appeal from the labour officer the Industrial Court shall summon the parties for hearing.

5) The rules of procedure for Industrial Court shall apply.

Although such an omnibus application is not ordinarily entertained given our decision in **The registered Trustees of Kasese Diocese Vs Benuza**(supra) given that the application for leave to enlarge time to file a notice of appeal and to appeal on matters of both law and fact are of the same natures and one supersedes the other we shall allow it. the appeal should ordinarily be granted unless the applicant is guilty of

unexplained or inordinate delay in seeking Courts clemency, failed to provide justifiable reasons for his or her failure to file an appeal within the time prescribed by law or unless the extension will prejudice the Respondent or that the appeal has no merits. It is our considered view that it would not be prudent to lock the applicant out unless the circumstances stated pertain.

Regulation 45(supra) however does not provide for the procedure and considerations to be applied to when applications for leave to appeal outside the prescribed 30 days are made therefore we shall apply Section 79(1)(b) of the Civil Procedure Rules which mandates an appellate court for good cause to admit an appeal after the prescribed 30 days have lapsed. Therefore the grant of an application for enlargement of time is discretionary and it depends on the applicant proving **good cause** for the extension of time and therefore Court must ensure that the reasons advanced by the applicant are justifiable and the grant will not prejudice the Respondent's rights. In **Eriga Jos Perino vsVuzzi Azza Victoe & 2Others HCCA No. 09/2009 and Moyo Civil Suit No015/2004, "**good cause"which cited several authorities and **Shanti vs Hindocha and others [1973] EA 207** which held that :

> *"The position of an applicant for extension of time is entirely different from that of an applicant for leave of appeal. He is concerned with showing sufficient reason (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed by dilatory conduct on his own part, but there are other reasons and these are all matters of degree."*

The applicant must therefore show why it was unable to take the steps to appeal in time.

In the instant case that applicant argued that whereas the applicant was desirous of defending itself when she was served to file a defence in CS 023/ 2013 which sought

execution of the labour officers award that was issued exparte and particularly to 2013 to avoid a multiplicity of suits by seeking to quash the said award of the labour officer , because at the time the Employment Regulations were only promulgated on 24/02/2012 had not yet come in force, therefore the mode of procedure of contesting an ward of the Labour Office particularly the timelines within which to lodge an appeal were not clear hence the applicant's contestation of the award by filing an omnibus statement of defence in CS 023 of 2013.

According to Ms. Byarugaba, the labour officers award was made in 2008, and the applicant only got to know about it when the Respondent applied for execution of the award via CS 023/2013 and the Applicant was served to filed a statement of defence in the same matter, which it did. When it came up for hearing on 17/11/2014, the presiding judge issued a directive for it to be transferred to the Industrial Court for further management. The file was only transferred in 2019 , 11 years later at the initiative of the applicant as evidenced by The Applicant's letter to the Registrar High Court Fort portal and the Assistant Registrar Fort portal's letter to the Registrar High Court attached to the application as annexures H1, dated 1/4/2019 and H2, dated 2/02/2019.

We have considered this explanation why the Applicant only took steps to pursue the matter 6 years after the High Court Fort portal directed that it is transferred to the Industrial court in 2013. We found no evidence to indicate that the Respondent actually pursued the realization of the fruits of his award after the directive was issued. We believe that both parties had no control over the operations of the Court system, given that it was the responsibility of the Registrar of the High Court of Fort portal to implement the directive of the Presiding Judge to transfer the file in 2013 and

therefore the holding in **David Nsubuga &3 others vs Margret Kamuge (SC) Civil application No.31 of 1997** ciited in **Godgrey Magezi and Another vs Sudir Rupelaria SCCA No. 10/2002** that "… *errors/mistakes of court officials have been held as sufficient grounds for the extension of time to the applicant to file his or her appeal out of time,* is relevant to the circumstances of this case. The delay in transferring the matter to this court was therefore occasioned by the High Court of fort Portal.

This notwithstanding nothing precluded both parties from following up the transfer of the matter. We are inclined to agree with Ms. Byarugaba that Mr.Kabagambe, the Respondent was not vigilant in formally pursuing the execution of his award.

Although the application only took formal steps after 6 years, in view of the fact that at the time of the directive to have the matter transferred, the Industrial Court it was not yet operational and when it became operational the Registrar in the High Court of Fort portal took no steps to transfer the file until the applicant wrote H1 on 1/04/2019 reminding the Court about the directive and the Registrar transferred the file to the High Court on 2/04/2019 via H2, is sufficient cause why the Applicant could not file a notice of appeal and an application to appeal on matters of law and fact.

With regard to the prejudice on the respondent it is our considered opinion that allowing the applicant to appeal will not inconvenience the Respondent given that there is no evidence that he formally took any steps to pursue the matter after the Judge directed that his application for execution via CS 023/2013, is transferred to the

Industrial Court. It has not been shown to us that the appeal is frivolous and any case the Appeal will settle the dispute once and for all.

In the circumstances we are satisfied that sufficient reasons have been given to grant this application. It is accordingly granted with no order as to costs. Delivered and signed by:

1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE …….

2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ……..

PANELISTS

1. MR.MICHEAL MATOVU ……..

2. MS. SUSAN NABIRYE ……..

3. MS. ADRINE NAMARA ……..

DATE: 2ND DECEMBER 2019