

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LABOUR APPLICATION NO. 31/2020

(Originating from Labour Dispute No. CMA/MUS/ 69/58/2019)

NMB BANK PLC APPLICANT

VERSUS

WILLIAM WILFRED BAJUNANA RESPONDENT

RULING

26th Nov, 2020 - 08th March, 2021

TIGANGA, J

Under Rule 24 (1) (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) and (d), Rule 56 (1) of the Labour Court Rules, GN 106 of 2007, the applicant NMB Bank PLC, a Banking institution, moved this court seeking an order for extension of time to file an application for revision of the award delivered on 30/04/2020, by Honourable S. Msuwakollo, the Arbitrator in Labour Dispute No. CMA/MUS/69/58/2019 and any order (s) that this honourable court deems fit and just to grant.



The application was by way of chamber summons, which was accompanied by the notice of application and notice of representation, and were all supported by an affidavit sworn by Antipas Lakam, an Advocate who represents the applicant and Joseph Kinango also learned Advocate.

The affidavit sworn and filed by Mr. Kinango, Advocate was echoing what was actually deposed by Mr. Antipas Lakam in the affidavit. In essence it is a corroborating affidavit; for that reason I will consider them together.

Both affidavits give the reasons for delay, and the reasons are to the effect that, the award which is sought to be appealed against was delivered on 30/04/2020 by the CMA but the delay was caused by the failure of the court electronic filing system to receive the filed application and display it in the system.

In further elaboration of the detailed reasons for delay, they further said that, from 31/04/2020 to 08/05/202 the applicant sought legal opinion from Vertex Law Chambers on what should be done. That resulted into the preparation of the application for revision in Dar es Salaam and on


08/05/2020, the application for revision was sent to one Dismas Prosper, the Branch Manager in Mwanza, for signing and filing in court.

After printing and signing it, Dismas Prosper gave the document to Advocate Joseph Kinango to assist in filing them in court, but on 01/06/2020 Advocate Joseph Kinango tried to lodge hard copies of the said application but he was advised by the registry officer that the same was supposed to be lodged using an on line system.

It is the deposition of the two deponents further that, on 01/06/2020 to 02/06/2020 Advocate Joseph Kinango was performing sophistication on how to lodge using an online system. However 02/06/2020, he succeeded to lodge it through online system.

On 10/06/2020, he presented hard copy in registry but the Registry Officer one Neema informed him that the court does not receive hard copies as a measure to prevent COVID 19.

Also that on 11/06/2020 to 25/06/2020 the applicant was waiting for a case to be admitted and assigned through an online system, while on

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26/06/2020, Advocate Kinango visited the registry responsible for labour cases to inquire on the progress of the application lodged online, but he was informed by Neema the Registry Officer, that the application is not seen in the system.

On further accounting the day of delay, the affidavits further state that, 27/06/2020 and 28/06/2020 were weekend days, while from 29/06/2020 to 17/07/2020 Advocate Kinango made constant follow up to court IT department and the office of the Registrar of the High Court of Tanzania, Mwanza to get the said application admitted and registered in the system but without success.

According to them, 18/07/2020 and 19/07/2020 were weekend days and 20/07/2020 and 21/07/2020 the counsel wrote letter a formal letter asking for the Hon. Registrar to assist admitting pending online application for Revision against the said award by CMA.

The affidavits further state that, between 22/07/2020 and 04/08/2020 the applicant waited for response from the Registrar in vain

and on 05/08/2020, the applicant lodged a reminder letter over the subject matter but no response was obtained.

Following the failure to respond by the Registrar, between 06/08/2020 and 07/08/2020, both deponents made physical follow up to the office of the Registrar but without success, following that state of affairs, they decided to file this application for extension of time to be allowed to file an application for revision. They deposed that, the award is tainted with illegality leading to injustice to the applicant.

Mr. Antipas Lakam proposed the legal issue to be determined by this court to be, whether the applicant has been diligently pursuing revision application against the award. He asked the court to be pleased to grant the application at hand for the reasons given.

The application was opposed by the respondent, in the Counter Affidavit filed in opposition of the application. Mr. Mwita Emmanuel, learned Advocate who represent the respondent deposed that the applicant never filed any application on time as alleged as there is no proof that the said application was indeed filed. He posed a question that if there is a



pending application why are they filing another application and that had that application been filed timely online there must be an affidavit of the officer responsible to prove that.

He deposed further that, filing an application for extension of time is not a necessary step in exercising the right of revision, but making formal follow up does. He also averred that there are no irregularities in the commission's award or proceedings, and that all orders made by the commission were made in accordance with the law and that the applicant's financial effect is immaterial. Otherwise, the whole affidavit was disputed and the applicant was put to strict proof thereof.

The hearing of this application was done orally. At the hearing, the applicant was represented by Mr. Shayo, learned Advocate, while the respondent was represented by Mr. Julius Mushobozi, learned Advocate.

In the oral submission in chief, Mr. Shayo submitted in line of what the affidavits filed in support of the application contained, which is already on record save for the explanation, argument and the authorities cited in support of the application. Among the authorities cited is the decision in



the case of **Dr Ally Shabhay vs Tanga Bohora Jamaat** (1997) TLR 305 CAT - in which the applicant submitted that the authority requires that those who come to court must show diligently that they came to court while taking action.

He submitted further that, the applicant indeed has shown diligence, by filing this matter in court and what happened was beyond his control as the applicant is not a case admitting officer. According to him, the applicant was served with an award on 14/05/2020 and the law requires him to file revision within 42 days which were ending on 15/06/2020. He submitted that even if he counts from the date of the decision, 42 days would have expired on 11/06/2020 when the applicant had already lodged his application for revision but he was prevented by the challenge in the electronic filing system.

He cited and relied on the authority in the case of **TRA vs Tanga Transport Company Limited**, CAT - Civil Application No. 5/2006, that a party should not be punished for mistakes committed by court. He also cited the authority in the case of **Jestina George Mwakyoma vs Mbeya**

Rukwa Autopart (2003) T.L.R 251 and asked the applicant to be given right to file revision.

Mr. Mushobozi, learned counsel submitted in opposition of the application that, the affidavit filed by the applicant did not give good reason for delay. He submitted that the evidence by Mr. Kinango as contained in paragraph 4 of the affidavit is that from 02/07/2020 to 05/07/2020, he was being trained on lodging application online, and so is paragraph 10 of the affidavit sworn by Mr. Antipas Lakam, he submitted that, on 02/07/2020 when the training is alleged to have been taken, the time for lodging application on line had already expired, which brings an impression that the application was not filed through electronic filing system. That since the same was not filed on time, the Registrar or the system cannot be blamed.

Further to that, using a person who had no knowledge of filing electronically is also negligence or recklessness, which cannot be the ground for extension of time. Also that although the Affidavit deposed that they approached the Registrar without saying which Registrar, and there is

no such affidavit of the Registrar to show that he was actually approached show that the applicant wants to hide something.

Further to that, there is no affidavit of the registry officer called Neema. He reminded the court that, where a person who is not a party to the case is mentioned to have done something in the affidavit, that person must file an affidavit to prove the allegation of what he is alleged to have done, which is missing. That said, he prayed the application to be dismissed for want of merit.

In rejoinder, counsel for the applicant submitted that the court has never given training to the Advocates on how to use or do electronic filing. He submitted that the application was lodged in time but since it disappeared in the system, the applicant cannot have evidence as it disappeared before it was admitted. He said that the evidence of Antipas Lakam in the affidavit has never been controverted. He in the end asked that the application be granted as prayed.

That marked the argument of both parties' Advocates. Now before going further, I find it important to point out that the matter of extension

of time is not a virgin ground in our jurisdiction, although statutory laws do not provide for criteria for the same to be granted or refused, case laws have done a lot in as far as guidelines of what is to be considered in granting or refusing extension of time is concerned.

From both, the case authorities and the law, one main ground has been made a requirement that, the applicant must show good cause for delay. In the decision of **Eliakim Swai and Frank Swai vs Thobias Karawa Shoo**, Civil Application No. 02/2016 - CAT - Arusha where it was held *inter alia*, that;

"Extension of time may only be granted upon the applicant showing good cause of delay. It is trite law that, such decision is entirely in the discretion of the court to grant or refuse it. It is also trite that such discretion is judicial and so it has to be exercised according to the rules of reason and justice and not according to the private opinion whimsical inclinations or arbitrary."

This position also forms part of the decision in the case of **Yusuph Same & Another vs Hadija Yusuph**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Limited vs Board of Registered Trustee of Young Women's Christian Association of Tanzania** Civil

Application No. 02 of 2010 in which the followings have been termed as good cause.

- a) The applicant must account all days of delay.*
- b) The delay should be inordinate.*
- c) The applicant must show diligence and not apathy, negligence or sloppiness in prosecuting the action that he intends to take.*
- d) Existence of point of law of sufficient importance such as illegality of the decision sought to be challenged.*

It is also important to note that in proving these depending on the nature of the case, the standard of proof must be that one attached to the parent case. In labour matters which are simply civil by nature, the standard of proof of the above criteria is in the balance of probabilities.

Now the issue is whether the applicant has shown good cause for the delay. As the requirement of the law, the reasons and grounds for delay must first be shown in the affidavit, filed in support of the application.

According to the affidavit, the award was delivered on 30/04/2020, the revision on line was lodged on 02/07/2020 that was after the hard copy filing had been refused by the court on the ground that hard copies are no

longer accepted but applications were supposed to be filed electronically, that was on 01/06/2020.

However, according to the affidavit, it seems when the hard copy was refused on 01/06/2020, Advocate Kinango engaged in what he called sophistication on how to lodge application in the court system for almost a month, from 01/06/2020, up to 02/07/2020, when he finally managed to file the application online. Thereafter he narrated a series of action done from 01/06/2020 up to 06th and 07th August, 2020 when Mr. Kinango after he had failed to lodge the application and after Mr. Antipas Lakam had failed to get proper information of what he was expecting from Mr. Kinango. It seems all these actions were involving the office of the Registrar of High Court, either the Deputy Registrar himself, the Registry officer called Neema and or the IT officer.

It is trite law as indicated by Mr. Mushobozi that if an affidavit used as evidence in court deposes by mentioning a name of a person to have done something in respect of the matter in dispute, then there must be a separate affidavit of that person to prove the fact. In this case there is no affidavit sworn by either the Deputy Registrar or any other Registry Officer



especially Neema. Lack of such important evidence from the officers who were mentioned to be involved in Mr. Kinango and Lakam's struggle to have the application filed, taints the authenticity of the information in the affidavits. However, on record, there seems to be two letters addressed to the office of the Registrar with the evidence of the stamp receiving the same. However, there is no answer replying to the said letter. The affidavit filed in support of the application alleges to have made follow up without success from that office.

Lack of Response from the office of the Registrar makes this court remain in suspense as to whether the counsel for the applicant are not speaking the truth. As earlier on pointed out that the criteria indicated in the above cited cases requires to be proved on the balance of probabilities as opposed to beyond reasonable doubt, the standard in criminal cases.

As there is allegation of the problems caused by the system and the office of the Deputy Registrar was informed by letter but did not respond, this court finds that it is more probable that there was a problem in the system than not.

I find so because looking at the affidavit and annexures, the delay occurred from when the documents had already been signed by the applicant's principal officer and had already been handed over to the Advocate, Mr. Joseph Kinango for filing. If any delay, it must have been caused either by the Advocate or by the court through its system which was by then newly being introduced. In my considered view, as the applicant has not in any way failed to do his part, and it is more probable that the delay was caused either by an Advocate or by court, and since there are some efforts made by the Advocate including writing letters to the Deputy Registrar which have not been responded to or the response has not been shown.

In terms of the decision in **Tanzania Revenue Authority vs Tango Transport Company Limited**, Civil Application No. 5/2006, this court should not punish the applicant for the mistakes done by others. For that reason, I find the applicant to have given good cause or sufficient cause for his delay to file the application for revision on time. In the interest of justice this application is hereby granted, the applicant is given 14 days from today to file the application for revision of the award of the

Tribunal in Labour Dispute No. (CMA/MUS/69/58/2019). As this is a labour matter, no order as to costs is made.

It is so ordered.

DATED at **MWANZA**, this 08th day of March, 2021



J. C. Tiganga

Judge

08/03/2021