

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
AT MOSHI**

LABOUR REVISION APPLICATION NO. 30 OF 2016

SERENGETI BREWERIES LTD APPLICANT

VERSUS

SIMON PISSY RESPONDENT

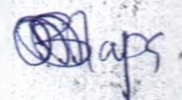
23rd December, 2020 & 5th March, 2021.

RULING

MKAPA, J.

The Applicant is seeking for a revision against the Award by Commission for Mediation and Arbitration (CMA) for Moshi delivered on 29th April 2016 in **Labour Dispute No. MOS/CMA/ARB/25/2015** by G.P. Migire (Arbitrator). The application is brought under **sections 91(1), 91 (1)(a), 91(2) (c), 91(4) (a), (b) and 94(1)(b)(i)** of the **Employment and Labour Relations Act**, No. 6 of 2004, Cap 366 (the ELRA) and **Rules 24 (1), 24(2) (a), (b), (c), (d), (f), 24(3) (a), (b), (c), (d), 28(1) (c), (d) and (e) of the Labour Court Rules, 2007** (Labour Court Rules).

The application is supported by an affidavit sworn by Ms. Lucia Minde applicant's Head of Legal and Corporate Security. The respondent disputed the application, filed a counter affidavit,




and preliminary objection to the effect that, the application is time barred.

At the hearing it was ordered that the same be heard by way of filing written submissions. The applicant was represented by Ms. Nuhu Mkumbukwa, learned advocate while the respondent had the representation of Mr. Jamael Ngowo from TUICO.

Submitting in support of the objection Mr. Ngowo submitted that, the present application is out of time contrary to the requirement under section 91 (1) (a) of the ELRA. That, as per the applicant's affidavit the application is late by 120 days, yet the applicant has not explained the reasons for the delay. Mr. Ngowo went on explaining that, since the issue of time limitation is critical in the smooth administration of justice, the same should not be taken lightly. To support his argument he cited the case of **Meis Industries Ltd and 2 Others V. Twiga Bank Corp, Misc. Commercial Cause No. 243 of 2015** (unreported) where this Court quoted the case of **Daphne Parry V. Murray Alexander Carson [1963] EA 546** that;

"Though the Court should no doubt give a liberal interpretation to the words 'sufficient cause' its interpretation must be in accordance with judicial principles. If the Appellant has a good case on merits but is out of time and has no valid excuse for the



delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred even at arisk of injustice and hardship to the Appellant”

Mr. Ngowo finally submitted that, since the applicant did not justify the delay, this Court should find his application extremely time barred and dismiss it with costs.

Disputing the objection raised, Ms. Nuhu contended that, immediately after the CMA delivered its Award on 29th April, 2016, the applicant filed before this Court a **Labour Revision No. 7 of 2016**. However, on 15th July, 2016 the same was struck out by **Mipawa J.** (as he then was) with liberty to refile within 30 days which they complied and on 9th August, 2016 they filed the current application, **Labour Revision No. 30 of 2016**

It was Ms. Nuhu's contention that this application is not time barred as alleged by the respondent and further that, the allegation that the contents of **Mipawa J.'s** order were not pleaded in the applicant's affidavit is a misconception since the said order is attached thereto. It was Ms Nuhu's further contention that this Court cannot disown its own order dated 15th July, 2016 which granted leave to refile this application. That, even if the contents were not pleaded, she urged this court to



take judicial notice of its orders as provided under **section 58 and 59 of the Evidence Act**, Cap 6 R.E. 2019.

Ms. Nuhu cited the case of **World Vision Tanzania V. Felician Rutwaza, Application for Labour Revision No. 8 of 2017, High Court Labour Division at Bukoba** where **Wambura J.** observed that, since the parties were aware of such order, failure to attach it does not render the application out of time. It however renders the application incompetent with a remedy for leave to refile.

Ms. Nuhu went on arguing that, the cited case by the respondent is distinguishable from the case at hand and the respondent is trying to mislead the court by acting as if is ignorant of the said order, a practice which should be condemned. Learned counsel also urged this Court to do away with technicalities and determine issues in dispute on merit which is the spirit behind the Oxygen principle. She also cited the case of **Gasper Peter V. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017 (unreported) where the Court of Appeal observed that, omission to include records of appeal arising from labour dispute is not a fatal irregularity considering the fact that both parties acknowledge the decision.

In the circumstances, Ms. Nuhu submitted that, a mere failure to plead in the affidavit on the order granting leave to refile is



an omission which is not fatal as it does not go to the root of the case and more so, does not occasion injustice to the respondent. Ms. Nuhu argued further that, for more than four years the respondent never raised an objection on time limitation thus by raising it now, he intends to mislead the court and obtain unlawful gain on the impugned Award of the CMA. She finally prayed that the objection be dismissed with costs as the same is frivolous, lacks merit and abuses court process.

In his brief rejoinder, Mr. Ngowo reiterated his earlier submission in chief and emphasized the fact that the applicant ought to have pleaded in the affidavit about the attached order in order to move the Court properly. Thus, failure to state in Chamber Summons, Notice of Application and in the affidavit, reasons for the delay on the assumption that each party is aware of such order, is a misconception which the applicant used to mislead the Court. He finally prayed for this Court to dismiss the entire application with costs.

After hearing the rival arguments from both parties, the only issue for determination is whether this application is time barred. Firstly, I find it pertinent to point out that, jurisdiction and time limitation are the first issues that any court has to consider prior to entertaining any matter before it. Thus, can be raised any time during Court's proceedings. In the matter at hand, what I gathered from the respondent's objection is the fact that, the

order which struck out the initial Application No. 7 of 2016 with liberty to refile was attached to the affidavit but the same was not pleaded thereto. Thus, the respondent alleges that, calculating the time from when the Award was delivered up until the current application was filed, 120 days have lapsed. That, since the applicant did not bother to account for each day of delay, this application is time barred. On the other hand, the applicant argued that since both parties were aware of the existence of such order, the application is not defective but rather is a mere irregularity which is curable by overriding objective principle.

It is settled that the rationale behind the Overriding Objective Principle is for courts and litigants to exonerate themselves from minor and unnecessary legal technicalities in order to decide cases on merits and reach just decisions. This legal position was underscored in the case of **Yakobo Magoiga Gichere V. Peninah Yusuph, Civil Appeal No. 55 of 2017**, (unreported) where the Court of Appeal observed;

"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT NO. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice; ..."




Applying the above principle to the instant case, I am satisfied that this is a fit case for applying the principle of overriding objective. Since both parties were aware of **Mipawa, J.**'s order, the only remedy would have been to order the applicant to file a supplementary affidavit to cure the irregularity. However, considering the fact that, **Nyerere, J.** (as she then was) had already declared this application incompetent and ordered on 30/05/2017 that the applicant to file proper application part of which states;

" ... The current application is incompetent for being supported by a defective affidavit which does not state whether deponent is known to the Attesting Officer or whether she was identified or introduced to him. Again it lacks proper citation of the enabling provision of Section 91 (2) and its relevant paragraph of the Employment and Labour Relations Act No. 6/2004. Also the relevant and enabling provisions of rule 24 (2) and (3) of the Labour Rules G.N. 106/2007 are not properly cited as rightly submitted by TUICO representative respondent. All these defects renders the application before this court to be incompetent and improperly before this court. The available remedy is for this court to struck out the incompetent application with leave to refile proper application. ... "

In view of the foregoing order of this court, the objection is overruled. However, the application is hereby struck out with liberty to refile a proper one within 21 days from the date of this ruling. The applicant is ordered to take serious note of all the defects which have led to the incompetence of his application and make sure the same are not repeated.



Dated and Delivered at Moshi this 5th day of March, 2021


S. B. MKAPA
Judge
05/03/2021