IN THE HIGH COURT OF THE UNITED REPULIC OF TANZANIA

(LABOUR DIVISION)
AT ARUSHA

REVISION APPLICATION NO. 27 OF 2020
(Originating from CMA/ARS/ARB/89/2018)

THE SMALL THINGS TANZANIA ..... APPLICANT

Versus

BLAIR ALEXANDER ..... RESPONDENT

RULING

23rd February & 23rd March, 2021

Masara, J.

The Applicant is applying for extension of time within which to file Revision against the award delivered by the Commission for Mediation and Arbitration for Arusha (CMA) in Labour Dispute No. CMA/ARS/ARB/89/2018 which was delivered on 31/5/2019. The application is supported by an affidavit affirmed by Rehema Mussa, a Principal Officer of the Applicant. The Respondent opposed the Application through the counter affidavit deponed by Emmanuel Sood, learned advocate for the Respondent.

Facts leading to the dispute and consequently this application can be summarized as follows: The Respondent was employed by the Applicant in the position of Operations Manager on 11/4/2013, at a salary of TZS 2,200,000/= per month. After a period of about five years, he was charged for poor performance and summoned before a disciplinary committee for a hearing on 30/1/2018. The disciplinary Committee found him guilty as charged. As a result, he was asked to choose between a reduced renumeration of TZS 1,500,000/= per month or to have his

employment terminated. The Respondent was given time to think. On 5/2/2018, there was prepared separation agreement which both parties signed signifying that the Respondent opted to end his employment with the Applicant. Thereafter, the Respondent filed a claim of unfair termination at the CMA.

On 31/5/2019, the CMA delivered its award holding that the Respondent was unfairly terminated. The Applicant was ordered to pay him compensation for unfair termination. The order included a twelve months salary compensation and other dues amounting to TZS 26,400,000/=. According to the Applicant's counsel, the day the award was orally read in his presence, the Commission decided in favour of the Applicant by dismissing the claims. But to his surprise, on 16/4/2020 he was served with execution showing that the CMA decided in favour of the Respondent. It is then that he was instructed to oppose the award, but time to file a revision had elapsed. Therefore they have preferred the instant application seeking extension of time to file his Revision in this Court.

At the hearing of this application, the Applicant was represented by Mr. Julius Karata, learned advocate while the Respondent engaged the services of Mr. Emmanuel Sood, learned advocate. The application was heard through filing of written submissions.

Mr. Karata adopted the affidavit in support of the application and sought to rely on the same. Submitting in support of the application, Mr. Karata contended that the typed copy of the award is substantively different from the award delivered orally by the same arbitrator on 31/5/2019 in his

presence. He named that as an illegality calling for this Court's intervention. Mr. Karata fortified that in the award delivered orally, the arbitrator had stated that after hearing the defence, she was at one with the Respondent that there was separation agreement between the employer and the employee to end the employment and that there was no unfair termination. The arbitrator further called upon them to make a follow up so as to be handled the typed judgment. On so hearing, Mr. Karata emailed the Applicants informing them of the outcomes. He went on to say that as the award was in their favour, the Applicant had no intention to challenge it and she did not make any efforts to secure the typed copy of judgment until 16/4/2020 when the Respondent served them with a copy of execution and the typed award attached thereto. Upon going through the typed award, it is when he realized that it is materially different from the orally delivered award. He exemplified that the oral award when reduced into writing must substantively be the same otherwise it prejudices the rights of the parties.

Mr. Karata further noted that the arbitrator interfered with the separation agreement between the Applicant and the Respondent with no lawful justification. Also, that the arbitrator was wrong to make a finding that there was a relationship between the disciplinary hearing and the separation agreement. In that regard, the learned advocate insisted that the above illegalities amount to sufficient cause for the Court to grant an extension. He cited the Court of Appeal decision in ***Kalunga and Company Advocates Vs. Nationa Bank of Commerce Limited*** [2006] TLR 234 to support his argument.

Contesting the application, Mr. Sood likewise adopted his counter affidavit. He averred that there was no proof that there existed an oral award, stating that the person in a better position to prove its existence was the arbitrator, through swearing an affidavit. According to Mr. Sood, the act of Mr. Karata is against the principle *'nemo judex in causa sua'* implying that a man cannot be a judge of his own cause. He cited this Court's decisions in ***Geita Gold Mining Vs. Mkaina Harun***, consolidated Revisions No. 105/2019 & 110/2019 (HC Labour Division) and ***E933 CPL Philimatus Fredrick Vs. IGP & AG***, Misc. Civil Cause No. 3 of 2019 (both unreported).

Mr. Sood also referred to the decision of ***Hamis Mohamed (as the Aministrator of the Estate of the late Risasi Ngaue) Vs. Mtumwa Moshi (as the Administratrix of the Estate of the late Moshi Abdaiiah)***, Civil Application No. 407/17 which cited the case of ***Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women Christian Association of Tanzania***, Civil Application No. 2 of 2010 (both unreported) on the need to provide sufficient reasons for the delay as a condition precedent for the grant of extension of time. He stated that in the light of the above decision, the Applicant delayed for more than 12 months, and he has not accounted for each day of delay. That Mr. Karata only stated that there is an illegality in the CMA award. He argued that the 12 months delay is inordinate since there are no convincing reasons provided. According to Mr. Sood, the email sent to the Applicant's members on 24/5/2019 shows that the Applicant's advocate was to procure a typed award and avail it to the Applicant but he did not bother to make any follow up. This, according to

Mr. Sood, amounts to recklessness on the Applicant's counsel part which cannot be condoned. The learned advocate while admitting that illegality is sufficient reason for extension of time, he was of the opinion that such illegality has to be apparent on the face of the record. To bolster his argument, he referred to the decision in ***Finca (T) Limited & Kipondongoro Auction Mart Vs. Boniface Mwaiukisa,*** Civil Application No. 589/12 of 2018 (unreported). Based on the above factors, Mr. Sood concluded that the Applicants' application has not met any of the factors upon which extension of time can be granted as enunciated in ***Lyamuya Construction*** (supra). He therefore called upon the Court to dismiss the application with costs.

After summarising the contents of the written submission, I have likewise dispassionately scrutinised the affidavits both in support and against the Application. The pertinent issue for determination in this case is whether the Applicant has adduced sufficient reasons for the delay to deserve the extension of time sought.

In order to succeed in an application for extension of time it has to be established sufficiently that the delay was with sufficient cause. The Courts are vested with discretionary powers to grant extension of time but such powers must be exercised judicially. Good cause for the delay is what will move the Court to exercise those powers. In ***Wankira Benteel Vs. Kaiku Foya***, Civil Reference No. 4 of 2000 (unreported), the Court of Appeal held:

> *"We are respectfully in agreement with the learned single judge on this. We only wish to emphasize that although Rule 8 of the Court Rules, 1979 gives a discretional power to the Court to extend time*

such discretion can only be used where there is sufficient reason. Generally, rules of procedure must be adhered to strictly unless justice clearly indicates that they should be relaxed."

According to the affidavit in support of the application, the main reasons for the delay in filing the intended Revision are covered under paragraphs 5, 6, 7, 8, 9, 10 and 11 of the Applicant's affidavit. Further, in his written submissions, the Applicants' counsel contends that on 31/5/2019 the Commission delivered an oral award which was in favour of the Applicant in his presence. They were told that they would be supplied with a typed copy later. But to his surprise, the Applicant's counsel was served with execution application containing the award which showed that the award delivered on 31/5/2019 was in favour of the Respondent. To prove that the oral award was in the Applicant's favour, Mr. Karata wrote an email to the Applicants notifying them that they won the case. The copy of the email was marked annexure A1.

It is unfortunate that, other than the statement of Mr. Karata regarding the contents of the award delivered orally, there is no other proof to augment the allegations. The affidavit of Mr. Karata stating that he was present when the award was delivered orally cannot be acted upon to contradict what is contained in the written award. There ought to be other proof. It is also intriguing to note that the emails (annexure A1) quoted by the learned counsel appear to have been written before the award was delivered. The record shows that the award was delivered on 31/5/2019. The email relied by Mr. Karata says:

"We just worn (sic) the case against Blair. I will send a copy of the typed judgment later."

That email was sent from Karata Valerian Mchau. It was sent on Friday, 24th May, 2019 at 2:34PM. It was subsequently replied by Bekka Ross Russel on 25th May, Terresa Walsh on 27th May, 2019 and Rehema Mussa on 30th May, 2019. The original email was therefore sent seven days before the award was delivered. It is thus incomprehensible how the learned advocate contemplated that they won the case without having the award delivered. I therefore do not agree with him that the email supports his version of what was orally delivered. Unless he can prove that the date of the award is incorrect. If he wanted to do so he was not smart enough as his own affidavit confirm that the oral judgment was delivered on 31st May, 2019.

The other reason sought to be relied for the application is that the arbitrator interfered with the separation agreement between the Applicant and the Respondent without lawful justification. Further, that she was also wrong to hold that there was a relationship between disciplinary hearing and the separation agreement. The counsel for the Applicant contended that those are illegalities that ought to be corrected by this Court. I do not agree with him as the illegality alleged is not apparent. The arbitrator was right to examine the separation agreement because it was the document that terminated the Respondent's employment. Also, as found by the arbitrator, the disciplinary hearing subjected the Respondent to the signing of the separation agreement. Therefore, the two are interrelated.

As rightly stated by Mr. Sood, where illegality is sought to be relied as a ground for extension of time, such illegality has to be apparent on the face of the record. There is a plethora of authorities to that effect. The

Court of Appeal decision in ***Samwel Munsiro Vs. Chacha Mwikwabe***, Civil Application No. 539/08 of 2019 (unreported) is one of such decisions where it was held:

> *"As often stressed by the Court, for this ground to stand,* ***the illegality of the decision subject of challenge must clearly be visible on the face of the record, and the illegality in focus must be that of sufficient importance.***" (emphasis added)

See also ***The Principal Secretary, Ministry of Defence& National Service Vs. Devram P. Valambhia*** [1992] TLR 185; ***Kalunga and Company Advocates Vs. National Bank of Commerce*** (supra) and ***Finca (T) Limited & Kipondongoro Auction Mart Vs. Boniface Mwalukisa*** (supra).

The illegality alleged by Mr. Karata is not apparent. It is the one to be discovered by a long-drawn argument or process. Even if I was to agree, for argument's sake, that the Applicant had proof of the two varying awards, I could only exempt the period between 31/5/2019 and 16/4/2020 when they became aware of a different version of the award. But the period between 17/4/2020 and 13/5/2020 when the application was filed is still not accounted for. In extension of time, the applicant must act promptly as soon as he discovers that he is out of time. Further, each day of the delay has to be accounted for. See ***Sebastian Ndauia Vs. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)***, Civil Application No. 4 of 2014; ***Tanzania Rent a Car Limited Versus Peter Kimuhu***, Civil Application No. 226/01 of 2017 and ***Bushiri Hassan Vs. Latifa Mashayo***, Civil Application No. 3 of 2007 (all unreported). It

follows therefore that the Applicant has failed to account for each day of delay.

On the above stated reasons, the Applicant has failed to advance good cause to justify extension of time sought. The Application is dismissed in its entirety. Since this is a labour dispute, I make no order as to costs.

Order accordingly.

Y. B. Masara
JUDGE
23rd March, 2021