IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LABOUR APPLICATION NO. 22 OF 2020

KIRIBO LIMITED .....APPLICANT

VERSUS

SIMON MWITA MLAGANI .....1ST RESPONDENT

MANG'ENG'I MONATA .....2ND RESPONDENT

(Arising from Labour Revision No. 11 of 2020 in the High Court of (T) Musoma)

RULING

31st May & 17th August, 2021

Kahyoza, J.

KIRIBO Ltd (the Company) applied to this Court to set aside its *ex-parte* ruling. **Simon Mwita Mlagani** (Mlagani) and **Mang'engi Manota** (Manota), (the respondents) opposed the application contending that the Company has no good ground to account for her absence. The respondents also raised a preliminary objection that the application was hopelessly out of time.

The issue, this Court has to determine, is whether the Company's application seeking to set aside the *ex-parte* ruling was time barred.

A brief background is that Mlagani and Manota filed an application for revision against the award of the Commission for Mediation and Arbitration (the **CMA**) to this Court. The company engaged an advocate who filed a

counter affidavit. After several adjournments, the Court fixed the hearing date of the application for revision on the 5th August, 2020. Mlagoni and Manota notified the Company through **Chacha Ihande Maki**. On the 5th August, 2020, Mlagani and Manota and their advocate entered appearance while the Company's advocate dully informed of the hearing date did not appear. The record reads that the company's representative was absent with leave. On that day, the deputy registrar adjourned the matter as the judge having the conduct of the matter, was absence.

The hearing of the application was adjourned to 9th September, 2020. On that day, the Company was absent while Mlagani and Manota and their advocate were present. On the 9th September, 2020, the matter was adjourned to 10th November, 2020. When the application came for hearing on the 10th November, 2020, the company's advocate was again absent. Mr. Mboje, the advocate, who appeared for Mlagani and Manota prayed the matter to proceed in the absence of the Company's advocate who was served and neglected to enter appearance. The matter proceeded *ex-parte* and the Court delivered its ruling on the 26th November, 2020.

The *ex-parte* judgment did not amuse the Company. The Company applied to this Court to set aside the *ex-parte* judgment and entertain the application for revision *inter partes.*

The application was supported by the affidavit of Chacha Ihande, the Company's Principal Human Resource Manager and Ms. Happiness Robert, the advocate who was representing the Company.

Mr. Chacha Ihande and Ms. Happiness Robert deponed briefly that two days before the hearing, the latter got news that her grandmother had

passed away, she notified the former. She went to attend the burial ceremonies and requested Mr. Chacha Ihande to attend the hearing. Unfortunately, Mr. Chacha Ihande felt sick on the date fixed hearing day, hence unable to attend.

Mlangani and Manota filed the joint counter affidavit refusing the averment in the affidavits supporting the application. In short, they deponed that there was no reason for this Court to set aside its decision.

Before the application was heard on merit, Mlangani and Manota raised a preliminary objection that the application seeking to set aside the *ex-parte* hearing was filed out of time. To support the application Mr. Stephen, the advocate who represented Mlagani and Manota submitted that the Company was required to file the application within 15 days from the *ex-parte* ruling was delivered. To bolster his argument, he cited rule 38 (1) and (2) of the **Labour Court Rules**, G.N. No. 106/2007. He submitted that paragraph 4 of Chacha Ihande's affidavit and paragraph 9 of Happiness Robert's affidavit showed that the deponents knew that the application was fixed for hearing on the 10th November, 2020. He contended that the matter proceeded *ex-parte* on the 10th November, 2020 and on the 26th November, 2020 the Court delivered its ruling. He added that the company/applicant filed the current application on the 18/12/2020, that is 38 days from the date the matter proceeded *ex-parte* or 22 days from the date of delivery of the *ex-parte* ruling.

Mr. Stephen advocate prayed the application filed out of time to be dismissed. To support his argument, he cited the case of **Steven Masato Wasira v. Joseph Sinde Warioba & the AG** [1999] TLR 334.

Mr. Frank, the Principal officer of the Company appeared on behalf of the Company. He replied that the law stated that an application to set aside an *ex-parte* award should be filed 15 days from the date of acquiring the knowledge of the *ex-parte* ruling and not from the date of delivery of the ruling. He added that the point of law was not a pure point of law as it required further evidence. He further submitted that rule 38 (2) of G.N. No. 106/2007 requires evidence to establish the date when the Company became aware of the *ex-parte* award.

Mr. Frank further contended that it was true that the Company, the applicant was aware of the hearing date but they were not aware of the date delivery of the ruling. He referred this Court to the provisions of S. 101 of the **Evidence Act**, [Cap. 6 R.E. 2019] that if a person is bound to prove the existence of the fact, the burden lies on him to establish that fact. He cited the case of **Abdul Karim Haji V. Ramond Nchimbi Aloys & Another** Civ. Appeal No. 29/2004 where it was alleged that he who alleges must proved.

Mr. Frank submitted that since the preliminary objection required evidence, the same falls short of the preliminary objection and that the same be overruled and the matter heard *inter partes*.

In his rejoinder, Mr. Stephen contended that the preliminary objection was based on the facts stated in the affidavit the same does not require any proof. He added that the applicant was aware that the application for revision was fixed for hearing on the 10/11/2020. For that reason, she had a duty to make follow up to know what took place on that date.

He added that since the applicant knew the date the application was fixed for hearing she must be considered to know the date of the ruling.

In addition, Mr. Stephen advocate submitted that if the company/applicant did not like to be considered that she knew the date of *ex-parte* ruling, she was required to disclose the date she knew that the *ex-parte* ruling was delivered.

Is the application time barred?

Given the rival submissions, it is not disputed that the applicant filed the application 22 days after the delivery of the *ex-parte* ruling or 38 days after hearing the application *ex-parte*.

It is also not disputed that the applicant was aware of the date the application for revision was fixed for hearing, despite her absence. It is also not disputed that an application to set aside an *ex-parte* ruling has to be filed within 15 days from the day the applicant acquired knowledge of *ex-parte* ruling. Rule 38 (2) of the **Labour Court Rule**, G.N. No. 106/2007 states that –

> *"(2) Subject to the provisions of sub rule (1), any affected party or person may, within fifteen days after acquiring knowledge of an order or default judgment granted in the absence of that party, apply on notice to all interested parties to set aside, vary or rescind the order or default judgment and the Court may, upon good cause shown, make such orders as it deems fit."*

It is obvious from the above rule that 15 days starts counting from the date the affected party acquired knowledge of an *ex-parte* ruling. The

applicant did not state the date when she acquired knowledge of an *ex-parte* ruling. It is the company's contention that this Court cannot sustain the preliminary objection as there was no proof as to when she acquired knowledge of the *ex-parte* ruling. On the other hand, Mr. Stephen contended that since the Company knew the date of hearing and she must be considered to know the date of delivery of the *ex-parte* ruling.

I passionately considered the rival arguments, to say the least I was not moved by the company's argument. The company knew that the matter was fixed for hearing on the 10th November, 2020. She had a duty to make follow up to know what transpired on that date. If the company made follow up then she knew that the application was heard *ex-parte* and the ruling fixed on the 26/11/2020. If the company did not make follow up then she was not diligent to defend the application. She must suffer the consequences.

The Company was aware of the fact that to set aside the *ex-parte* ruling, she was required to apply within 15 days from the date she acquired knowledge of the existence of the *ex-parte* ruling. Given that fact at the time of instituting the current application 22 days had expired from the date the *ex-parte* ruling was delivered, she had a legal duty to depone facts, which revitalized her application. She had to disclose to the Court the day she acquired knowledge of the *ex-parte* ruling.

In the absence of the facts which give the application legal life, which is otherwise time barred, I am compelled to hold that the application is time barred. I find inspiration in the holding of the Court of Appeal **that a party who seeks to rely on exemption from time limitation has an**

obligation to plead grounds for such exemption. The Court of Appeal while interpreting rule 6 order VII of the CPC in the case of **M/S. P & O International Ltd V. The Trustees of Tanzania National Parks** (TANAPA) Civ. Appeal No. 265/2020 (CAT Unreported) noted with approval the decision in the case of **Alphons Mohamed Chilimba V. Dar es Salaam Small Industries Co-operative Society** (1986) T. L. R 91 thus-

> *"Order 7 rule 6 CPC provides that where the suit is instituted other the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. In other words."*

Reverting to the present case, the company knew that it was required to file an application to set aside the *ex-parte* ruling within 15 days from date she acquired knowledge of the ruling. As a general, it is presumed that parties are aware of the existence of the ruling on the date it is delivered. Applying that general rule, the company is presumed that she knew the existence of the *ex-parte* ruling on 26th November, 2020 when it was delivered. If the applicant had facts to rebate the general rule, it was her legal duty to depone those facts in the affidavits supporting the application.

It is my considered view that the Company acquired knowledge of day of delivery of the *ex-parte* ruling from the date it was delivered on the ground that she knew the hearing date, she ought to have known the ruling date. Furthermore, I find that the application is time barred as Company failed to depone facts proving that she acquired knowledge of

the existence of the *ex-parte* ruling on the date other than the date of its delivery. Consequently, I uphold the preliminary objection and hold that the application was file out of time. I dismiss the application on the inspiration of section 3(1) of the **Law of Limitation Act**, [Cap. 89 R.E.2019] and the decision of the Court of Appeal in **Ali Shaban and 48 Others V. Tanzania National Road Agency** (TANROADS) and Another, Civ. Appeal No. 261 of 2020 (CAT unreported) where it held that-

> *"As the suit was time barred, the only order was to dismiss it under section 3(1) of the LLA. Accordingly, we find no merit in ground 2 and dismiss it."*

It is ordered accordingly.

J. R. Kahyoza
JUDGE
17/8/2021

Court: Ruling delivered in the presence of Mr. Frank Lawrence, the principal officer of the applicant and the respondents in person. B/C Mr. Makunja Present.

J. R. Kahyoza
JUDGE
17/8/2021