

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LABOUR APPLICATION NO. 53 OF 2020

(Original CMA/ARS/ARS/85/2020)

SHABANI ISSA SEMJAILA APPLICANT

Versus

HEAVEN PRE-PRIMARY SCHOOL RESPONDENT

RULING

02/09/2021 & 21/10/2021

D.C. KAMUZORA, J

This is an application for revision preferred under the provision of section 91(1)(a), (c) and 94(1)(b)(i) of the Employment and Labour Relations Act, No.6 of 2004 and Rule 28(1)(c), (d) and (e) of the Labour Court Rules of 2007, GN No. 106 of 2007. On the 13th Day of July 2020, the Commission for mediation and Arbitration (CMA) at Arusha, dismissed the application by Shabani Issa Semjaila seeking for condonation to refer his labour dispute to the CMA out of time. The applicant preferred this application which is brought by way of chamber summons supported by an affidavit deposed by the applicant seeking to revise the decision of the mediator that refused the extension of time.

During hearing of this application which proceeded orally, the applicant was represented by Mr. Emmanuel Antony, learned advocate while the respondent preferred the service of Mr. David Kahwa, learned advocate.

Arguing in support of the application Mr. Antony prayed for the affidavit in support of the application to be adopted and form part of the record. The counsel for the applicant urged this court to call for the records of the CMA and revise the application because it was issued illegally. He pointed out the illegality in the counter affidavit sworn by one David Kahwa in the proceedings before the CMA. He submitted that, the same advocate who deponed the affidavit also represented the respondent before the CMA thus violating Regulation 61 and 96 of the Advocates (Professional conduct and Etiquette) Regulations 2018 GN No. 118 of 2018. The other illegality pointed out is that, the counter affidavit filled before the CMA contravened rule 29(5) of the Labour Institution (mediation and Arbitration) Rules of 2007, GN. No 64 of 2007. He referred the case of **James Daniel Vs, CATS-NET Ltd, Revision No. 258 of 2017** where it was held that, failure of the affidavit to contain the mandatory contents under the law makes the affidavit defective.

Mr Antony thus prayed this court to consider that the CMA had not determined the matter judiciously for its failure to abide by the law thus rendering the whole proceedings a nullity. The counsel for the applicant was of the view that, since the counter affidavit was sworn by the same advocate, it was wrong and this court should therefore either grant the extension of time to file a labour dispute before CMA or order the application before the CMA to start afresh. The counsel for the applicant added that, even the applicant's application before the CMA was defective thus, he was of the view that the CMA records be nullified so as to put the records clear.

Contesting the application Mr. Kahwa prayed to adopt the counter affidavit and submitted that, the applicant has relied on the issue of legal technicalities and disregarded the gist of the application which was for the extension of time. He argued that, the applicant has not furnished sufficient reasons as to why he had not filed the application on time.

On the issue of the counter affidavit filled at the CMA, the counsel for the respondent submitted that, the advocate is allowed under the law to swear an affidavit on behalf of his client by stating the facts which are under his own knowledge and those facts which are supplied to him by his client and which he believes to be true. The case of **Lalago Cotton Gunnel and Oil Mill CO Ltd Vs the Loans and realisation Trust, Civil Application No. 80 of 2002** page 7 and 8 was cited to cement his submission.

He added that, before the CMA, the applicant did not raise a preliminary objection against the said counter affidavit and raising the same at this stage is to call this court to determine the legality of the affidavit filed before the CMA. He insisted that, the said objection cannot be made at this stage and he referred the case of in **Ramesh Rajput Vs Mr. Sunanda Rajiput**, TLR 1988 pg. 96 to support his submission.

Mr Kahwa went on to state that, under section 88 (4) (a)(b) of Employment and Labour Relations Act Cap 366 RE 2019, the CMA is allowed to deal with the substantial merit of the dispute with minimum legal formalities. That, the arbitrator has power to determine the dispute in a manner that he thinks fair and fit as the CMA is not bound by any legal formalities.

Mr. Kahwa contended that, the applicant had failed to establish good cause which made him to delay in filling his dispute before the CMA. That, the ground put forward by the applicant under paragraph 8 to 12 of the applicant's affidavit is unjustifiable. The claim by the applicant that the delay was because the applicant was processing an appeal after the disciplinary action is not a sufficient ground as the cause of action arose on the date the termination letter was issued which is 23/12/2019.

He went on to state that, the law does not provide that cause of action accrue after an appeal had been preferred. reference was made to the cases of, **Tanzania Mining Ltd Vs Andre Venta**, Revision No 276 of 2009 p 2, **Evody Kessy Vs Leopard Tours Ltd**, Revision No. 2 of 2017, **Bushiri Hassan Vs Latifa Lukio Mashao**, Civil Application No.3 of 2007, **Thornton & Turpin Ltd Vs NIC Ltd and another**, Commercial Case No 20 of 2002, all Unreported and a persuasive decision in ~~**Omben Msuya VS National insurance cooperation T Ltd and another, Revision No 367 of 2013**~~, page 7, to support the argument that, there must be sufficient reason for a party applying for extension of time. The counsel for the respondent was of the view that, the application is baseless and prayed the same to be dismissed for lack of merit.

In a brief rejoinder Mr. Antony admitted to the fact that his submission was based on legal technicalities in the proceedings of the CMA. He added that, if there was any good reason for extension of time, that reason cannot be determined based on illegalities. He insisted that, the overriding objective principle cannot be applied in violation of rules of procedure. That, as the contents of the affidavit or counter affidavit

are embodied in the rules of procedure, the affidavit that violates the law is illegal. The counsel insisted that, the fact that there was no objection raised before the CMA cannot bar this court from referring the correctness of the proceedings and correct the same where necessary.

On the case of Ramesh Rajput cited by the counsel for the respondent, the counsel for the applicant submitted that, the decision in that case is abrogated decision by the introduction of GN No.118 of 2018 which bars the advocates from swearing the affidavit and give evidence to the case he is representing. On the cited section 88 the counsel for the applicant stated that, it is not in records of the CMA if the arbitrator applied that provision. On the submission that the applicant failed to account each day of delay, the counsel for the applicant submitted that, it is not proper to pray for leave to file an application before CMA out of time while the documents used in the proceedings before CMA were incurably defective.

Mr. Antony insisted that, the applicant was unable to appeal to employment authority for he was not issued with hearing form despite being issued with a termination letter. He prayed for this court to see that there were good reasons stated for the extension of time before the CMA and that, accounting each day of delay is not the only reason that make the court to deny extension of time where there is other reason.

From the records of this case and the submission by the counsel for the parties, the pertinent issue is based on the prayer to revise the ruling which dismissed the application for extension of time at the CMA. The reasons put forward in the applicant's affidavit are that; after the applicant was summoned to appear to the disciplinary hearing, he was

not supplied with the copy of hearing form. The applicant believe that the hearing form was necessary to enable him to appeal to the higher authority in the respondent's machinery. That, the hearing form was supplied to the applicant 33 days after the hearing was conducted and on the same date, he filed an appeal. That, prior to the determination an appeal, he was issued with a termination latter by the respondent thus, forcing him to apply for condonation before the CMA. The applicant believes that the delay in filing an application was due to the respondent's illegal process in termination.

The other reason put forward by the applicant is that, the counter affidavit in opposition of the application before CMA was wrongly deponed by the Counsel who is representing the respondent. To him, that conduct contravened the provision of Regulation 61 of the Advocates (Professional Conduct and Etiquette) Regulations, 2018, GN No. 118 of 2018 which bars the advocate representing the party from deponing the affidavit which stands as evidence. To him, an advocate cannot depone an affidavit for the client he is representing in the same case.

The applicant's prayer is for an order of this court quashing the ruling passed by the CMA and the grant of extension of time to lodge the application before the CMA.

I will first deal with the submission based on the requirement under the Advocates (Professional Conduct and Etiquette) Regulations, 2018, GN No. 118 of 2018. I think the counsel for the applicant had misconceived the provision of Regulation 61 of GN No. 118 of 2018. For easy reference I would like to refer the said regulation;

"Subject to court rules and practice an advocate shall not be allowed to give evidence in a matter in which the advocate is involved as advocate, except in circumstances where it is permissible."

From the wording of the above provision, the advocate is not barred in any way from deposing the affidavit on behalf of his client in any application for the facts well known to him or supplied to him or which he believes to be true. The advocate is only barred to represent the client where the affidavit deposed by him warrant him to stand as a witness before the court to prove the same. For that reason, I find this argument wanting.

On the submission that the application before the CMA has defects which could entitle the same to be dismissed, I find this argument as an afterthought. If those defects existed, the same was supposed to be raised and determined by the CMA. I did not find anywhere in the CMA records where this issue was raised by the parties and deliberated upon by the CMA. That being the case, this is not the proper court to determine the objections against the pleadings before the CMA that not raised before the CMA for determination.

Now turning to the issue as to whether the CMA decision of denying the applicant the extension of time was wrongly passed, I find it important to first address the requirement under which the extension of time can be granted. It is a trite law that, the grant of extension of time is one of the discretions of the Court to grant or deny a party. However, such discretion should be exercised judiciously. The principles to be applied in assessing application for extension of time were well

enunciated by the Court of Appeal in the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported) where it was held that: -

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

Likewise, in the case of **Wambele Mtumwa Shahame vs Mohammed Hamis**, Civil reference No. 8 of 2010 CAT at Dar es Salaam (Unreported) It was held at page 5 and 6 that, *"there are no hard and fast rule as to what constitutes a good and sufficient cause it is always a question of fact to be determined by the court according to the peculiar circumstance of the case"*

Bearing in mind the requirement for extension of time, my concern is whether the applicant met those requirements in his application before the CMA. The CMA refused the application as the applicant was

unable to furnish good and sufficient reasons and be accountable for all days of delay as per the requirement of Rule 10(2) of GN No. 64 of 2007. While under paragraph 4 of the affidavit supporting the application for condonation at the CMA the applicant claimed that he was late to refer the matter to the CMA because he was seeking legal advice in processing his appeal, the CMA ruled that no evidence was submitted by the applicant to prove such a claim. I agree with the decision made by the CMA in all aspects. The records before the CMA shows that, nothing was presented by the applicant to show that his delay was due to the fact that he was seeking legal advice or that he had filed an appeal to the labour authority as so alleged.

It is clear that, the extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. The applicant was duty bound to account for the delay of the 26 days by accounting each day of delay in referring the complaint to the CMA. ~~The contention by the applicant that he was seeking legal advice is~~ unjustifiable as he was unable to show to the CMA, on what date he visited the law firm and what made him not obtain the intended advice for the whole period of 26 days.

On the claim for illegality, it is my considered view that, the illegality must be apparent from the face of record. It was necessary therefore for the applicant to specifically plead and prove illegality before the CMA for the same to be relied upon in granting the extension of time. Under paragraph 5 of the applicant's affidavit before the CMA, the applicant was applying for extension of time to lodge a labour dispute in a need to challenge unfair termination by the respondent and the claim for benefits associated with termination. There is no where he

pleaded or argued about the illegality of the termination process. That being the case, I find this argument baseless.

My conclusion is also guided by the case of **Elias Masija Nyang'oro & 2 others v Mwananchi Insurance Company Ltd**, Civil application No. 552/16 of 2019 p 6 & 7 to which it was held that,

"With respect, I wish to observe right away that having gone through the record, am not persuaded with the grounds of illegality raised by the applicants. The reason behind being that the claimed illegality is not apparent on the face of record and therefore does not meet the settled threshold. (See The Principal Secretary Ministry of Defence and National Service v. Devram Valambia [1991] TLR 387). Therefore, I find that the points of illegality raised by the applicants do not constitute good cause warranting extension of time sought."

The point of illegality which the applicants' counsel wants to move the court to exercise revision upon is not obvious and self-evident. It required elaborative arguments to establish the illegality. Reference is also made to the case of **Sabena Technics Dar Limited V Michael J. Luwunzu**, Civil Application No 45/18 of 2020 (Unreported) where the Court of Appeal cited with approval the case of **Iron and Steel Limited V Martin Kumaliya and 17 others**, Civil Application No. 292/18 of 2002 (Unreported) and held that,

"An illegality in the impugned decision will not be used to extend time in the circumstance of this case, for no room will be available to rectify it in the application for stay of execution intended to be filed. Illegality of the impugned decision is not a panacea for all

applications for extension of time. It is only one in situation where if the extension sought is granted that illegality will be addressed."

Since there was no valid reason presented by the applicant at the CMA to warrant extension of time, and since the illegality complained by the applicant was not reflected, this court finds that, the applicant has failed to convince this court that indeed there is a point of illegality.

From the above arguments and reasons there to, I see no grounds to exercise the discretion of this court to grant the application sought. The CMA rightly concluded that the applicant failed to advance good and sufficient reasons and be accountable for all days which he failed to refer the matter to the CMA. The application therefore lacks merit and it is hereby dismissed with no order for costs considering the nature of dispute.



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora", is written over a horizontal dotted line.

D.C KAMUZORA

JUDGE

21/10/2021