IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 504 OF 2022

DIRA MEDIA GROUP.....APPLICANT

VERSUS

JOSEPH KUBEBEKA KULANGWA & 2 OTHERS..... RESPONDENTS

RULING

10th May – 16th May, 2023

OPIYO, J.

This application is for extension of time to file a revision application against the Commission for Mediation and Arbitration (CMA) award in the labour dispute No. CMA/DSM/KIN/393/19/373 dated on 10th December, 2020. In this matter labour dispute was taken to the CMA by the respondent claiming that they were unfairly terminated. The matter was heard and the award was in their favour. The applicant was not satisfied, and being out of time to file for revision against the said award, he opted for current application for extension of time.

The application was supported by the applicant's affidavit sworn by Alex Msama Mwita, Applicant's Principal Officer. The matter was heard orally. Only the applicant was represented by the Learned Advocate Mr. Augustino Kusalika. The respondents appeared in person.

In support of the application, Mr. Kusalika submitted that was not aware if the award was issued against her. That, the advocate who was in conduct of the matter did not inform her principal officer about it. He stated that the applicant got notice about the award when he was served with warrant of arrest during the execution process.

Mr. Kusalika continued to state that, the applicant also believes there are illegalities in the decision which justified grant. He submitted that there was no employment contract between the respondents and the applicant. And so, for him that is a legal issue that requires determination in revision. He then prayed for the application to be granted.

In reply the 1st respondent submitted that the application is baseless as the claim of the applicant that he was not aware of the CMA award is not true as he was represented by an advocate in the matter. He continued that the advocate knew about the grant of award on 10th December, 2020 as both sides were represented on that day and consequently availed with the

copies of the award as per records. For him, if the advocate did not take to the applicant the said copy is none of their business. It is their honest belief that the applicant received the same from her trusted advocate who received it.

He went on submitting that if the applicant was not satisfied, he could have filed for revision, but he never did so until when they applied for execution on 15/12/2022, that was two years later. For him, upon the award being granted, if the applicant did not have the intention of respecting court orders, he would have acted within those two years they stayed without execution proceeding. Ignoring court orders for all that long and reacting after execution had been filed is to him an abuse of court process.

He continued that, the advocate for the applicant statement that respondents had no contract with him is not true because the same was claimed at CMA and was defeated with evidence and award came in their favour. The evidences proved that they had agreement with applicant and they were paid monthly salaries. He was of the view that, one cannot be paying someone salary if he had no contract with him. Thus, to him the application is baseless and ought to be dismissed with costs.

The 2nd respondent adopted the submission by the 1st respondent and added that what the applicant is doing is to continue to torture them while they were her employees. That, the applicant never obeyed award by CMA for all that long and still holds their rights in her own hands while they are still toiling by attending court endlessly. He then insisted for the application to be dismissed. The 3rd Respondent adopted what his fellow respondents stated and supported their arguments.

In rejoinder Mr. Kusalika reiterated applicant's prayer and reasons for the same he had stated in this submission in chief. He also maintained that, the applicant was not aware of the award and that the award does not show who was present on the delivery date. He stated one cannot know if the applicant was represented on that date. He continued that the issue if there was contract or not between them is a contested fact that this court will have a chance to examine evidence for to see if the revision is filed, not in this application.

After perusal of parties' submission, the court has been given a task to determine whether the applicant has adduced sufficient reason to warrant grant of the application. The party who is not satisfied with the award

granted by the CMA has to file an application for revision within six weeks from the day he/she was served with the copy of the award. This is in accordance with section 91(1)(a) of the Employment and Labour Relations Act which provides: -

> *Any party to an arbitration award made under section 88(10) who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award-*
>
> *(a) Within six weeks of the date that the award was served on the applicant unless the alleged defect involved improper procurement;"*

The implication of the above provision was well elaborated in the case of **Serengeti Breweries Ltd vs Joseph Boniface, Civil Appeal No. 150/2015 CAT** at Mbeya where the court stated that:-

> *"The plain and clear meaning of Section 91(1) of the ELRA is that, the limitation period of six weeks begins to run against the applicant after the award is served on the applicant. The law is so couched because it is not open to the applicant to know if he is aggrieved with the award unless it is served to the applicant."*

In this application the award at CMA was pronounced on 10th December, 2020. His reason as stated in his submission is that, upon the award being issued, undeniably in the presence of his fully instructed counsel by then, the applicant was not notified of the outcome of the decision. The advocate for the applicant stated that the applicant became aware of the said award when he was served with warrant of arrest and that the advocate for the applicant at CMA did not inform her about the status of their case. Going through the attachments filed by the applicant there is neither arrest warrant nor any document proving that the applicant came to know of such award on such date. For this matter the court ought to believe that on the same date the award was pronounced, it is the same day both parties knew of its existence and so it was parties' duty in making sure that they receive the same. Thus, in my considered view, the above reason as to why he failed to present his revision against the impugned decision on time is far from being plausible. In fact, it does not hold water. This is because, the applicant had the obligation to make follow up of progress of her case. The same was held in the case of **Lim Han Yun and Another v. Lucy Theseas Kristensen**, Civil Appeal No. 219 of 2019, CAT. cited in the case of **Salome Kahamba vs Siril Augustine Mallya, Miscellaneous Civil Application No. 557 of 2021, HC at DSM** at page 9 that: -

"The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case."

The applicant filed this application on 29th November, 2022. From the date the award was pronounced (10th December, 2020) it took the applicant 718 days to file this application for extension of time. It is true that, the court may extend or abridge any period prescribed by law in cases where one finds himself late in filing the desired application, but that has to be done only upon the applicant showing good cause as already noted above. This has been a position in a good number of cases and provisions of law including the case of **Wambura N.J. Waryuba v. The Principal Secretary, Ministry for Finance and Another**, **Civil Application No. 320/01 of 2020**, it was held that: -

"... it is essential to reiterate here that the Court's power for extending time... is both wide-ranging and discretionary but it is exercisable judiciously upon cause being shown."

In as much as I agree to the common principle that, it is in the discretion of the Court to grant extension of time, but again the equally important principle is that such discretion is judicial and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrary (see the case of **Zaidi Baraka and 2 others versus Exim Bank (T) Limited, Misc. Commercial Cause No. 300 of 2015 at Dar Es Salaam** which quoted the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 at Arusha.**

It has to be noted that, in such cases not only soundness of the reason that counts. Apart from plausibility of the reason as noted above, in justifying grant of application for extension of time, the applicant is also obliged to account for each day of delay. It was held in the case of **Daudi Haga vs Jenitha Abdan Machanju**, Civil reference No. 19 of 2006, Court

of Appeal of Tabora, (unreported), among many cases of settling this position that:-

> *"A person seeking for an extension of time had to prove on every single day for delay to enable the Court to exercise its discretionary power."*

In the instant application it is shows that the applicant has delayed for more than 700 days to file an application for a revision. But in applicant's affidavit and advocate for the applicant submission no account of even a single day has been given justifying the wait for all that long for the information as to the progress of the case from an advocate for the matter presence of which was well-known by the applicant. The applicant did not plead being unaware of the pendency of the matter at CMA by then. He only pleaded being unaware of the outcome or award only. The period is horribly inordinate showing nothing rather that apathy and negligence on the party of the applicant. In the case of **Attorney General v. Tanzania Ports Authority & another**, Civil Application No. 87 of 2016 to mean: -

> *"Good cause includes whether the application has been brought promptly, in absence of any invalid explanation for the delay and negligence on the part of the applicant."*

The court is therefore, accustomed to look on the factors like length of delay, the reason for delay, the degree of prejudice to the other party and whether or not the applicant was diligent in taking up the matter (**Lyamuya Construction Company Limited (supra)**. It is unfortunate the applicant fulfills none of the above factors. Her delay which runs for over two years is obviously and extremely inordinate to convince any objective court to exercise its discretion. Someone buried in such inordinate delay to this extent can hardly pass the diligence test as the two tests runs parallel. Thus, the applicant who does not remember the important matter like this in which he fully engaged on at CMA for span of two years is apparently negligent and slovenly in eyes of the law. From the circumstances of this case the applicant miserably failed to persuade this court on the above reasons. With such inordinate delay granting of this application is highly prejudicial to the other side as it going against the general spirit of the law of timely justice to all. Court of Appeal in case of Mohamed Said Bakram vs. Gideon Mhewa & Another,[1997] TZCA 91, (Media Neutral Citation) in support of this common expectation from the outcome of the matter before the courts of law held that:-

> *"It is elementary that a decree holder should not unduly be denied to enjoy the fruits of his rights accruing from the judgment or decree*

passed in his favour... For that reason, even in deserving and warranting cases in which stay orders for execution are granted, such are nonetheless not meant to "be of a permanent nature'. In the instant case which, as already pointed out, has been in the court corridors for the last 17 years without the decree holders enjoying the fruits of their rights, the issuance of the stay order sought should be done with extreme diligence and caution. This is in order to avoid ***further injustice and delay****. In here, having regard to the circumstances and historical background of the case, I am satisfied that it is not in the interest of the justice of the case to issue a stay order for execution...In my view, and taking into account that the 1st Respondent has since 2020 been in and out of Court corridors without enjoying the fruits of his decree, which decree was obtained from a consent decision arrived at following a compromise of the parties, unless there are indeed cogent reasons well demonstrated,* ***allowing this application will be to condone injustice rather that meeting the ends of justice****..."*

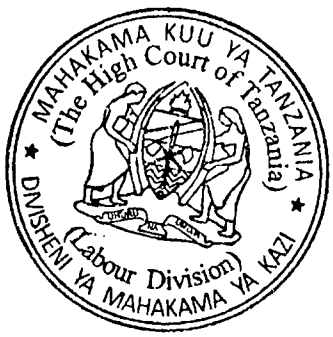
However, knowing that the categories of good cause are wide ranging, the applicant advocate brought in the issue of illegality. He argued that the impugned award contains illegality. The illegality mentioned is that respondents were not applicant's employee. The advocate for the applicant in rejoinder stated that the illegality stated cannot be discussed in this application as it will be seen in the hearing of the revision application upon time being extended as prayed and the same is accordingly filed. I am alive

to the fact that illegality is a good ground for extension of time, but in order to plead illegality successfully, it must be glaringly apparent on the face of the records. The case of **Finca (T) Ltd and Another vs Boniface Mwalukisa**, Civil Application No. 589/12 of 2018, well explained this requirement. In the application at hand, the advocate for the applicant stated himself that, illegality he pleaded cannot be seen in this application until extension of time is granted and the matter goes to revisionary stage. He gave no explanation at all about it. This proves that, the illegality pleaded by him is not glaringly on face of record. For that matter, the ground of illegality lacks the legal leg to stand on.

Not only that, but also keen examination of the applicants' principal officer affidavit in support of the application it is noted that, the ground of illegality was not clearly pleaded, then the applicant is precluded in relying on it as his reason for praying for grant of the application at hand. It is settled that, parties are bound by their pleadings and no one is allowed to present a case contrary to what he or she pleaded (see **Said Issa Ambunda versus Tanzania Harbours Authority (supra)** and also the case of **YARA Tanzania Limited vs. Charles Aloyce Msemwa and 2 others; Commercial case No5 of 2015 High Court Commercial**

Division DSM (unreported). Therefore, in as much as this court would have wished to give much weight on this ground, but, it hands are shortened by lack of clear pleading of this ground in the affidavit in support of the application.

In the end and for the foregoing reasons I find this application to be devoid of merit and the same is hereby dismissed. I make no order as to costs, this being a labour matter.



M.P. OPIYO,

JUDGE

16/05/2023