IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

MISC APPLICATION NO. 39 OF 2022

(C/f Labour Dispute No. CMA/ARS/157/20)

PENDO ELIAS MADUHU ..... APPLICANT

Vs

THE REGISTERED BOARD OF TRUSTEES EVANGELICAL LUTHERAN CHURCH OF TANZANIA NORTH CENTRAL DIOCESE ARUSHA DISTRICT NJIRO PARISH..... RESPONDENT

RULING

Date of last Order:11-1-2023

Date of Ruling:17-2-2023

B.K.PHILLIP,J

Before me is an application for extension of time for filing an application for revision against the Award made by the Commission for Mediation and Arbitration of Arusha at Arusha ("CMA") in labour dispute no. CMA/ARS/ARS 157/20.

The application is made under Section 14 (1) of the Law of Limitation Act, (Cap 89 RE 2019), Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f) (3) (a) (b) (c)(d) and Rule 56 of the Labour Court Rules GN 106/2007. The applicant is praying for the following orders:

i) That this Honourable Court be pleased to extend time within which to file an application for revision against the decision of the Commission for Mediation and Arbitration in labour dispute No. CMA/ARS/ARS/157/20.

ii) Any other orders that this Honourable Court deems fit and just to grant.

The application is supported by an affidavit sworn by the applicant. Mr. Arnold Ernest Molla, the respondent's principal officer filed a Counter affidavit in opposition to the application. I ordered the application to be heard by way of written submissions. The Applicant was represented by Mr. Kenneth Samwel Ochina, her personal representative whereas the respondent was represented by the learned Advocate Sabato Ngogo.

Before going into the arguments raised by the applicant's representative and Mr. Ngogo, let me give a background to this application, albeit briefly.

The Applicant was aggrieved by the decision made by arbitrator in labour dispute No. CMA/ARS/ARS/157/20, delivered on 9/7/2021, in which the Arbitrator dismissed her complaint against the respondent herein, her former employer. She lodged an application for revision in this Court to challenge the same. Her application for revision indicated that it was drawn and filed by Mr. Kenneth Ochina of Mofulu Advocates, a law firm based in Arusha. Upon being served with application, the learned Advocate Ngogo who appeared for the respondent raised a point of preliminary objection that Mr. Kenneth Ochina is not an advocate, thus the application was filed by unqualified person contrary to section 41(1) of the Advocate Act (Cap 341 R.E.2019). Mr. Kenneth conceded to the aforesaid point of preliminary objection. Consequently, the application for revision was struck out on 24th May 2022 because it was commenced by unqualified person contrary to section 41(1) of the Advocates Act (Cap 341.RE. 2019). On 24th June 2022 the applicant lodged the instant application. In the instant application Mr. Kenneth Ochina appears as the applicant's personal representative.

Back to the application in hand, Mr. Kenneth's submission in support of the application was as follows; That following the striking out of Application No. 71 of 2021, the applicant made a follow up of the copy of the Court's order. She obtained it in June 2022 and thereafter she filed the instant application. The delay in filing this application is not due to laxity, negligence or intentional but has been prompted by this Honourable Court by striking out the previous labour revision No. 71 of 2021 on 24th May 2022. To cement his argument, he cited the case of **Emmanuel Eliazry Vs Nyabakari, Land Appeal No. 56 of 2018 HC at Dar es salaam,** (unreported).

Further, he argued that this application should be allowed to give a room for the applicant to file her application for revision against the impugned decision because the same is tainted with illegalities. He contended that the Arbitrator did not take into consideration the fact that the applicant was not accorded her right to be heard and proceeded to dismiss her complaint. To bolster his argument, he cited the case of **John Tilito Kisoka Vs Aloyce Abdul Minja, Civil Application No. 3 of 2008** (unreported) **and Principal Secretary Ministry of Defence and National Service Vs Devram Valambhia (1992) TLR 387.**

Moreover, Mr. Kenneth argued that this Court is vested with powers to grant extension of time sought in this application. He insisted that the applicant has adduced sufficient cause for the delay in filling the application for revision.He prayed this application to be allowed.

In rebuttal, Mr. Sabato Ngogo started by his submission by adopting the contents of the counter affidavit to form part of his submission. He

went on submitting that granting an application for extension of time or otherwise is purely based on the Court's discretion and the same has to be exercised judiciously having regarding to the circumstances of each case. To cement his argument, he cited the case of **Shah Hermraj Bharmal and Brothers vs Santash Kumira w/o J.N. Bhola (1962) EA 679 and** Rule 56 of Labour Court Rules GN No. 106 of 2007.

Mr. Ngogo pointed out that in his arguments in support of this application, Mr.Kenneth gave two reasons for the delay in filing the application for revision, to wit; One, the Court struck out first application for revision (Revision No. 71 of 2021), which was filed by the applicant. Thereafter the applicant requested to be supplied with the Court order but was not supplied with the same timely. She obtained the Court order in June 2022 despite the follow up for the same. Two, the impugned decision is tainted with illegality. Mr. Ngongo contended that the applicant's previous application for revision was struck out on 24th May 2022 and the instant application was filed on 24th June 2022 almost a month later after her first application for revision was struck out. The first reason for the delay stated by Mr.Kenneth is not reflected in the applicant's affidavit. It is just a statement from the bar. He invited this Court not to take into consideration mere statements made by Mr. Kenneth in his submission. Moreover, Mr. Ngogo argued that the applicant did not annex to her affidavit any copy of a letter to prove that she requested to be supplied with the copy of the Court order promptly substantiate what has been alleged in the submission made by her representative. Mr. Ngogo was emphatic that what have been submitted by Mr. Kenneth are mere statements from the bar and the

same should not be accepted or entertained. He maintained that the applicant failed to account for each day of delay from 24th May 2022 when her application for revision was struck out to 24th June 2022 when she filed the instant application which makes total of 30 days. The applicant has exhibited negligence and laxity in handling the matter.

On the ground of illegality, Mr. Ngogo submitted that in order for the applicant to rely on the reasons of illegality, the alleged illegality must be apparent on the face of the records. The Court should not be required to embark on scrutiny of the Court's records looking for the same. He contended that the alleged illegality, to wit; that is the applicant was not heard is not apparent on the face of the record. He was of the view that the case, **John Tilito** (supra) and **the Principle Secretary Ministry of Defence** (supra) are distinguishable from the facts of the application in hand.

In his rejoinder, Mr. Kenneth reiterated his submission in chief and added that the delay in obtaining the copy of the Court Order was also caused by the fact that once the Court makes any order the same is sent to the typing pool for typing it and it is not possible for the Court order to come out on the very day or week it was made due to numerous files to be attended the typing pool.

Having dispassionately analyzed the submissions made by applicant's personal representative and the learned Advocate Ngogo, perused the contents of the applicant's affidavit as well as the respondent's counter affidavit, let me proceed with the determination of the merit of this application.

It is a trite law that in an application for extension of time like the instant application, the applicant has to account for the days of delay by giving sufficient cause for the delay. The granting or refusal to grant the extension of time is within the Court's discretion. However, the said discretion has to be exercised judiciously. There is no hard and fast rule on what amounts to sufficient cause, but our Courts have laid down some factors which are normally taken into consideration when making a determination of an application for extension of time. These factors include the following; one, whether the applicant accounted for delay. Two, the delay must not be inordinate. Three, whether the applicant acted diligently, without negligence or sloppiness in the prosecution of the action he intends to take. [See the case of **Lyamuya Construction Co. Limited vs Board of Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2020].**

In this application, it is a common ground that on the 24th May 2022 this Court struck out the application for revision (Application No.71 of 2021) which was filed by the applicant herein. The instant application was filed on 24th June 2022, that is, thirty two days (32) after the said application No.71 of 2021 was struck out. As correctly submitted by Mr. Ngogo, the applicant has not annexed any letter to this application to prove that she requested to be supplied with the copy of the Court Order promptly so as to substantiate the contention made by her personal representative that she was supplied with the Court order belatedly. Not only that, as correctly submitted by Mr.Ngogo the applicant did not state in her affidavit that she was supplied with the Court order belatedly. It has to be noted that submission made by the

parties in support of their applications have to be based what is deponed in their affidavit. So, Mr. Kenneth's argument that applicant was not supplied with the Court order timely is his own creation and a pure afterthought which cannot be entertained by this Court.

The above aside, Mr. Kenneth's contention made in his rejoinder that the Court order was not supplied to the applicant timely because the same had to be taken to a typing pool where there are numerous files to be attended is not correct. No wonder Mr.Kenneth failed to state the exact day the applicant was supplied with the said Court Order and the date she applied to be supplied with the same. The Court's records reveal that the Court order in question is one page and half only. It was issued on 24th May 2022 and signed on the same day. To say the least, Mr. Kenneth's contention aforesaid is not true and highly misleading. In short the applicant failed to account for the 32 days of delay. For avoidance of doubts, I wish to point out that I am alive that our Courts have held several times that there is a difference between technical delay and actual delay. [see the case of **Fortunatus Masha Vs William Shija and another (1997) TLR.154**]. Having in mind the above position of the law, in my analysis of the days of delay, I have excluded all the days from the date of the impugned decision to the date when application for revision No. 71 of 2022 was struck out. While granting the application for extension of time in the case of **Fortunatus Masha** (supra) the Court of Appeal said the following;

"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In

the present case ***the applicant had acted immediately*** *after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

(Emphasis is added)

On the strength of the decision of the Court of Appeal in the case of **Fortunatus Masha** (supra), I can safely say that even in cases involving a technical delay the applicant has to act promptly in taking the necessary steps. It is noteworthy that in this application the applicant has failed to demonstrate that she acted without negligence or sloppiness in pursuing her case. She did not take the necessary steps immediately after her application was struck out.

On the issue of illegalities, I am inclined to agree with Mr. Ngogo that the alleged illegalities are not apparent on the face of the record. Thus, this Court cannot rely on the same in making its decision. The case of **John Tilito Kisoka** (supra) is distinguishable from this case since in that case it was apparent on the face of the record that judgment of the High Court was based on a ground raised by the Court *suo motto* and the parties were not accorded opportunity to address the Court on that issue. The facts in instant application are different. In the upshot, it is the finding of this Court that applicant has failed to account for the days of delay. This application is dismissed.

Dated this 17th day of February 2023.

B.K.PHILLIP

JUDGE.