IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

MISC APPLICATION NO. 67 OF 2022

(C/f Revision Application No. 95 of 2021 at the High court of Tanzania Labour Division, Originating from Labour Dispute No. CMA/ARS/507/19/212/19)

THE BOARD OF TRUSTEES, SOS

CHILDREN'S VILLAGE OF TANZANIA.....APPLICANT

Vs

ESTER JOHN MBENA..... RESPONDENT

RULING

Date of last order: 18-4-2023
Date of Ruling:8-6-2023

B.K.PHILLIP,J

This application is made under Rule 24 (1)(2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c) (d) and 56 (1) (3) of the Labour Court Rules GN. 106/2007. The applicant prays for the following orders;

(i) That this Honourable Court be pleased to extend time for the applicant to file an application for restoration of revision application no.95 of 2021, originating from employment dispute no. CMA/ARS/507/19/212/19 which was dismissed on 5/7/2022 by Hon. B.K Philip, J.

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

This application is supported by an affidavit sworn by Ms. Evelin Dilip, the applicant's Human Resources Officer. Respondent swore and filed a counter affidavit in opposition to this application. At the hearing of the application the applicant was represented by Mr. Moses Ambindulwe a

learned advocate whereas the learned advocate Slyvester Kahundukwa appeared for the respondent.

A brief background for this application is that the applicant was the respondent before Commission for Mediation and Arbitration ("CMA") where he was sued by respondent for unfair termination. The suit was heard on merit and the Arbitrator ruled in favour of respondent.He ordered the restatement of the respondent in her employment and payment of Tshs 17,435,950/= being salaries for the period the respondent was wrongly out of employment for a period of 25 months and payment of Tshs 697,438 every month from the date of the award to the actual date she will be restated in her employment.Aggrieved by the CMA's award aforesaid the applicant appealed to this Court vide Revision Application No. 95 of 2021 which was dismissed for want of prosecution on 5th July 2022 thus, the applicant filed the application at hand. This application was heard of viva voice.

Mr.Mosses started his submission by adopting the contents of the affidavit in support of this application to form part of his submission. He went on submitting that the CMA award was delivered in absence of the applicant. The advocate who was representing the applicant at the CMA made efforts to obtain the copy of the award and lodged an application in this court to challenge the CMA award without instructions from the applicant. On 5th July 2022 when the said application was called in court the advocate who filed that application did not enter appearance in court.

Moreover, he submitted that the advocate who filed the application for revision without being instructed by applicant did not inform the

applicant anything on the status of the application he filed in this court. On 1st November 2022 the applicant was served with summons for execution of the CMA award that is when she knew that the application for revision was dismissed. Mr. Moses contended that the applicant was not aware of the existence of the application for revision which was dismissed by this court.Upon being served with the summons for execution the applicant filed an application for extension of time for filing an application for revision. Later she realized that that there was an application for revision that was filed by her former advocate without her instruction which was dismissed thus, she was compelled to abandon her application for extension of time for filing an application for revision and had to file the application at hand.

Mr. Moses further submitted that there are irregularities in the CMA decision. That during the hearing at the CMA, the witnesses were not sworn. He insisted that the failure to make sure that the witnesses were sworn before giving their testimony is fatal and it is an illegality on the face of the CMA records. To support his argument, he cited the case of the **Principal Secretary Ministry of Defence Vs Devram Valambia (1992) TLR 182.**

In rebuttal, Mr. Kahundukwa adopted the contents of the counter affidavit to form part of his submission. He submitted that the major reason made by the applicant for failure to appear in the court is that she was not aware of the existence of the application for revision that was dismissed.He pointed out that in paragraph 7 of the affidavit in support of this application it is stated that the application for revision was supported by an affidavit sworn by the applicant's HRO. He further

contended that it is not true that the applicant was not aware of the existence of the application for revision which was dismissed. Moreover, Mr. Kahundukwa submitted that it was not stated in applicant's affidavit the action taken against the advocate allegedly to have filed the application for revision without being instructed by the applicant.

With regard with to the issue on illegality Mr Kahundukwa submitted that Mr. Mosses did not state the witnesses whose testimonies were taken without being sworn. He was of the view that even if it is assumed that witnesses testified without being sworn that does not constitute a good reason for extension of time. To cement his argument, he cited the case of **Tanzania Distillers Ltd Vs Bennetson Mishosho, Civil Appeal No.382 of 2019**, (unreported).In that case the Court of Appeal suspended the requirement for witnesses to be sworn before making their testimonies in the CMA and held that the failure of a witness to take oath before giving his/her evidence is curable,contended Mr. kahundukwa.

Moreover, Mr. Kahundukwa maintained that the rest of the points stipulated in paragraph 8 of the affidavit in support of this application do not amount to illegalities since they are not apparent on the face of the record. He further contended that the alleged illegalities are not reflected in the application for revision which is intended to be restored. He lamented that the applicant is raising new points/issues. He insisted that the allegation that the award was delivered in the absence of the applicant is irrelevant. The most important thing is that the advocate for the applicant has not accounted for the all days of delay as required under the law. He refuted the applicant's assertion that he was

not aware of the existence of the Revision Application which was dismissed by this court.The truth is that the applicant filed the application for revision and he did not make a follow up until it was dismissed, insisted Mr. kahundukwa. He contended that the applicant was relaxed until when he was served with the notice for execution that is when he rushed to this court to filed the instant application.

In addition to the above, Mr. Kahundukwa insisted that the applicant filed this application with bad intention because he was aware of the existence of Revision Application which was dismissed by this court.This is a frivolous application aimed at delaying the respondent to obtain her rights contended, Mr. Kahundukwa and prayed for the dismissal this application with costs.

In rejoinder, Mr. Moses submitted that Mr. kahundukwa's allegation that this application is made in bad faith is a serious allegation which goes to the integrity of the applicant and himself as an advocate for the applicant. He contended that Mr. Kahundukwa has not substantiated his allegation aforesaid and insisted that this application is not frivolous.

With regard to Mr Kahundukwa's contention that he did not account for each and every day of delay, Mr.Mosses submitted that upon being aware that there was an application for revision which was dismissed the applicant started the process for filing this application.He admitted that the Revision Application that was dismissed by this court was supported by an affidavit sworn by Mr.Peterson Joseph who is the applicant's employee at regional level in Arusha Region. However, he pointed out that at the national level the HRO is Evelyn Dilip who swore the affidavit in support this application. He insisted that the officers at

the national level were not aware of the application for revision that was dismissed. Also, he admitted that the affidavit in support this application does not state the action taken against the advocate who filed the application for revision without being instructed by the applicant. He contended the actions against that advocate and other persons who participated in the matter were taken later after filing the application at hand.

Furthermore, Mr. Mosses submitted that the holding in the case of **Tanzania Distillers Ltd** (supra) is only applicable if the other side has not been prejudiced. He contended that under the circumstance of this case the same is not applicable since the applicant was prejudiced.

With regard to Mr. Kahundukwa's argument that the allegation on illegalities in the CMA judgment are not reflected in the affidavit that was filed in support of the Revision Application which was dismissed, Mr. Mosses argued that the argument was raised prematurely because it is not proper to discuss the contents of Revision Application at this stage. He pointed out that in any case there is always a room for the amendment of the pleadings. He insisted that the applicant has not been negligent in handling this matter. He prayed this application to be granted.

After being granted leave by this Court to submit on the new argument raised by Mr. Moses in his rejoinder that the applicant took action against the advocate who purported to file application for revision which was dismissed for want of prosecution, Mr. kahundukwa submitted that the applicant knew very well that Mr. Peterson Joseph is the one who filed in court the application for revision but in her affidavit in support

of the application at hand the applicant did not say anything about the affidavit sworn by Peterson Joseph. He further argued that the advocate who filed the Revision Application is not an employee of the applicant. The applicant has no powers to impose any disciplinary action against him thus, he was of the view that the argument raised by Mr. Moses on the action taken against the advocate is not realistic because he did not say clearly which disciplinary body the complaints against the Advocate were lodged.

Having analyzed the competing arguments raised by the learned Advocates let me proceed with the determination of the merit of this application. I have carefully gone through the contents of applicant's affidavit, respondent's counter affidavit and the submissions made by learned advocates. My task in this application is to determine whether or not the applicant has adduced good cause for the delay in filing the application for restoration of Revision Application No. 95 of 2021.

It is 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. Even a single day of delay has to be accounted for. This Court has discretional powers to grant the extension of time or refuse to do so. However, that discretion has to be exercised judiciously. [**See the case of Lyamuya Construction Co. Ltd Vs Board of Trustee Young Women's Christian Association, Civil Application No.2 of 2010** (unreported)]

It is a common ground that Revision Application No.95 of 2021 was dismissed for want of prosecution on 5th July 2022 and this application was filed on 18th December 2022. Therefore the days of delay are

reckoned from 5th July 2022.The applicant has to account for about 150 days of delay. Going through the applicant's affidavit and his submission the major reason for the delay adduced by Mr. Moses is that the applicant was not aware of what was going on in court because their advocate who represented them at the CMA did not give the updates of the case/matter. Now, the pertinent question which arises here is; was the applicant taking seriously the case between him and the respondent herein? My answer to this question is "No". The applicant's assertion that she was not aware what was going on in the case proves that the applicant was negligent. Mr. Mosses did not give any reason on why the applicant did not make any communication with his advocate who was handling the matter or make a follow up himself.It is noteworthy that the position of law is that negligence of an advocate is not a good cause for delay. [See the case of **Umoja Garage Vs National Bank of Commerce (1997) T.L.R.109**].

The above aside, the applicant's assertion that he was not aware of the existence of Revision Application No.95 of 2021 leaves a lot to be desired because she admitted that the application was supported by an affidavit sworn by Mr. Peterson , the applicant's employee working at applicant's branch office in Arusha. It is incomprehensible to me that the applicant was not aware of all what was being done by his employee in her branch office in Arusha.

To cap it all, in his affidavit the applicant deponed that his was not aware of what was going on until when she was served with the application for execution of the CMA award. Thus, it means that the applicant had no plan to take any legal step to challenge the CMA

award. In other words , had it not been for the application for execution of the CMA award the applicant had no idea on what was going on in his case with the respondent.

From the foregoing, it is the finding of this court that the applicant has completely failed to account for the days of delay.

With regard to Mr. Mosse's argument that the CMA's proceedings are tainted with irregularities because the witnesses testified without being sworn, I wish to make it clear that I am alive that a point of illegality is sufficient to move this court to grant extension of time even if the applicant has failed to give good reason for the delay. However, I am inclined to agree with Mr. Kahundukwa that the alleged illegality is not on the face of record and cannot qualify to move this court to grant the extension sought in this application. It is trite law that the ground for illegality must be on the face of the record. It should not be farfetched. In the case of **Lyamuya Construction Co. Ltd** (supra), it was held as follows;

> *" The alleged illegality must be apparent on the face of the record such as the question of jurisdiction , not that would be discovered by long drawn argument or process"*

In the upshot, this application is dismissed for lack of merit. The costs of this application shall be borne by the applicant.

Dated this 8th of June 2023

B.K.PHILLIP

JUDGE