

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

(LABOUR DIVISION)

AT BUKOBA

APPLICATION FOR REVISION NO. 05 OF 2022

(Arising from Labor Case No. CMA/MSNY/03/2021/ARB of the Commission for Mediation and Arbitration at Bukoba).

KAGERA SUGAR LIMITED..... APPLICANT

VERSUS

CONSTANTINE GEDALI..... RESPONDENT

RULING

Date of last Order: 01.08.2023

Date of Judgment: 04.08.2023

A.Y. Mwenda,J.

This application is brought under section 91(1)(a) and (b); Section 91(2)(b) and (c) of the Employment and Labor Relations Act, No. 6 of 2004, Rule 28(1)(b) (c) (d) and (e) and Rule 24(1),(2)(a) (b)(c)(d) (e) and (f) and 3(a)(b) (c) and (d) of the Labour Court's Rules 2007,GN.106 OF 2007.It is accompanied by affidavit sworn by RICHARD VICENT MZULE, the Applicant's legal officer. In the said Application the Applicant is seeking for the following orders to wit:

- 1) This Court be pleased to revise the arbitration proceedings and set aside the award of the Arbitrator Hon. MSUWAKOLLO.S dated 12th August 2022 in Labor dispute No.*

CMA/MSNY/03/2021/ARB of the Commission for Mediation and Arbitration at Bukoba by reasons that:

(i) The award is tainted by material irregularity and error material on the merits of the subject matter of the case thereby occasioning injustice.

(ii) The award is illogical or irrational.

2) Any other relief that this Honorable Court may deem just and fit to grant.

In reply to this Application, the respondent filed a notice of opposition accompanied by a notice of preliminary objection with two points. The said read as follows, that.

a) The notice of application is incurably defective for being filed hopelessly out of time without leave of this Honorable Court.

b) The notice of Application is incurably defective for being vexatious and frivolous as the same has been overtaken by events.

Being mindful of the principle that once a preliminary objection is raised, the same must be determined first before resorting to the substantive matter, this court fixed the hearing of the same. [See KHAJI ABUBAKAR ATHUMAN VERSUS DAUD LYAKUGILE T/A D.C. ALUMINIUM AND 1 ANOTHER, CIVIL APPEAL NO. 86 OF 2018 & BOT LTD vs DEVRAM P. VALAMBIA, CIVIL APPLICATION NO.15 OF 20029CAT)

(Unreported) just to mention a few. At the hearing, the Applicant was represented by Messrs. MOSES KALUA and RICHARD VICENT MZULE, learned Counsels while the respondent had the services of Mr. PROJESTUS PROSPER MULOKOZI, learned counsel.

In submission in chief, Mr. MULOKOZI dealt with the said points of objection in sequence. Regarding the 1st point of objection that the notice of application is incurably defective for being filed hopelessly out of time without leave of this Honorable Court, the learned counsel submitted that section 91(1) (a) of the Employment and Labor Relations Act, No. 6 of 2004, sets the time limit for application to challenge an award to six (6) weeks. According to him, the CMA's award was served to the respondent on 16th August 2022, the same date which the Applicant also received it. He said that by filing the present Application on 11/11/2022, the applicant was already time barred. Further to that he asserted that the award which was annexed to the applicant's affidavit indicates the date of the award to be 11/10/2022 which to him is a second award intended to show as if the present application was filed in time. The learned counsel wondered as to why the CMA would issue two awards on two different dates. He was then of the view that if this court is to going to consider the date of issue of the said awards, then the one dated 16/08/2022 should be considered as the correct one, which automatically make the present application time barred.

Regarding the second point of objection that the notice of Application is incurably defective for being vexatious and frivolous as the same has been overtaken by events, the learned counsel for the respondent submitted that in appendix ORBA-2 to the respondent's counter Affidavit, the respondent deponed that he was reinstated by the Applicant on 18/10/2022 after the termination letter was nullified on 24/7/2021. According to him, one of the reasons for his re instatement was the award of the Labor case No. CMA/MSNY/03/2021/ARB, the same award which is now prayed to be revised. The learned counsel was of the further view that re instatement of the respondent entail the present application is overtaken by event and an abuse of the court. Again, the learned Counsel for the respondent submitted that since the award by CMA was executed, this application cannot stand as it is overtaken by events and the consequence that may follow is to dismiss it. To buttress the point, the learned counsel cited the case of GODFREY EMMANUEL MALASSY CITY CHRISTIAN FELLOWSHIP Versus PROSPER RWEYENDERA, CIVIL APPLICATION NO. 163 OF 2016, CAT (Unreported). In conclusion, the learned counsel for the respondent prayed this application to be dismissed.

Responding to the submission by Mr. MULOKOZI, the learned counsel for the, one Mr. MOSES KALUA submitted that the points raised by the learned Counsel for the respondent are not points of law as they don't fall within the ambit of the Principal stated in the case of MUKISA BISCUITS MANUFACTURING CO. LIMITED Versus WEST END DISTRIBUTORS LIMITED [1969] EA.696 as they require evidence to

prove. The learned Counsel further submitted that the Applicant was served with an award on 11/10/2022 and filed the present Application on 11/11/2022 which is only one month after receipt the award. He stressed that the argument by Mr. MULOKOZI that there was another award issued earlier on requires evidence. The learned counsel for the Applicant went further by submitting that the learned counsel for the respondent is trying to impeach the court's record which is contrary to principles set in the case of HALFA SUDI V. ABIYEZA CHILI [1998] TLR No. 227 where it was held that court's records are serious document which should not be easily impeached. In further support to this point he cited the case of MOTO MATIKO MABAGA Versus OPHIR ENERGY PLC & 6 OTHERS, CIVIL APPEAL NO. 119 OF 2021 and SAMWEL NYALA NGHUNI & 5 OTHERS V. PATRIC OSOSRO NYAWANGAH, CIVIL REFERENCE NO 21 OF 2021, HC (unreported). He then prayed this point of objection to be overruled.

On the second point of objection that notice of Application is incurably defective for being vexatious and frivolous as the same has been overtaken by events, Mr. KALUA was of the view that this too is not a point of law as it requires evidence. While citing the case of PILI KISENGA V. THE ATTORNEY GENERAL, MISCELLANEOUS CIVIL CAUSE NO. 15 OF 2021, HC, (Unreported) the learned counsel for the Applicant submitted that frivolous is defined as matters which are baseless, groundless, without substance, fanciful while vexatious are matters which lacks manifest claim, hopeless or offensive. Again, the learned counsel

submitted that it is true that section 50 (7) (a) of CAP 300 RE 2019 speak about matters which are Vexatious and frivolous but the said are not defined. In conclusion to his submission, the learned Counsel for the Applicant prayed the said points to be overruled as they both, require evidence.

In rejoinder, Mr. Mulokozi submitted that the points of objection in question are matters of law. He said that time limitation is a matter of law touching jurisdiction of the court which is done through scrutiny of the records. Further to that he insisted that the award was received on 16/8/2022 as such the present application is time barred. Regarding the second award which the applicant is relying on, Mr. Mulokozi rejoindered that it is true that he too signed it although he did not append the signing date as he knew that there was the first award which was issued earlier on.

On the reply by Mr. KALUA that the respondent is trying to impeach the Court's record, Mr. Mulokozi rejoindered that that is not their intention as theirs is challenging the service and not the substantive record.

Regarding the definitions of frivolous and vexatious, MULOKOZI rejoindered that the learned counsel for the Applicant is in agreement that the same are points of law by citing section 50(7)(a) of CAP 300 RE.2019. According to him, even if this court proceeds with the hearing of the main application, the outcome will be awkward as the employer has already nullified the termination letter. He thus

concluded his rejoinder reiterating his prayers in the submission in chief that the said points of objection are meritorious and should be sustained.

Having considered the submissions by the learned counsels for the parties and the perusal of the records this court is now set to determine the fate of the matter. To do so the issue as to whether the points raised by the learned counsel for the respondent are fit to be referred to as points of law and are meritorious need to be answered.

Regarding the 1st point of objection on time limitation, the same has been discussed in several authorities. In such discussions, Courts have ruled out that time limitation is a point law because it touches the jurisdiction of the court. In the celebrated case of MUKISA BISCUIT MANUFACTURING CO.LTD V. WEST END DISTRIBUTORS LTD [1969] 1 EA 696(CAN), the Court held inter alia that:

*"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a **plea of limitation**, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute for arbitration.*
[Emphasis added]

Also, in a recent decision of the Court of Appeal of Tanzania in MOUNT MERU FLOWERS TANZANIA NLIMITED VERSUS BOX BOARD TANZANIA LIMITED, CIVIL

APPEAL NO. 260 2018, (Un reported) the Court, while citing with approval the case of KARATA ERNEST AND OTHERS Versus THE ATTORNEY GENERAL, CIVIL REVISION NO.10 OF 2010(unreported) enlisted more examples of preliminary objection as follows, that:

*"At the outset we showed that it is a trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only consists "of a point of law which has been pleaded, or which arise by clear implication out of pleadings". Obvious examples include, objection to the jurisdiction of the Court; a **plea of limitation**; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; **where an appeal has been lodged when there is no right of appeal**; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of decree appealed from etc."*

With the above principles in mind, time limitation is a point of law. However, in this matter, while making submissions in support to this point, the Court noted that the learned Counsel for the respondent was challenging the date of service of the CMA award. During his submission, Mr. Mulokozi tried to convince the Court that the correct award is the one dated 16/08/2022 and not the one dated

11/10/2022 relied by the Applicant. On that basis it is obvious that the question as to which award among the two is the correct one requires evidence to prove. That being the case the 1st point raised by the learned Counsel for Respondent does not fall in purview of points of law and as such it is hereby overruled.

Regarding the second point of objection that the notice of Application is incurably defective for being vexatious and frivolous as it is overtaken by event, the court went through various authorities which define it. In the case of WANGAI V. MUGUMBA & ANOTHER [2013]2 E.A 474,478 it was held that the petition is said to be frivolous when it is without substance, groundless or fanciful and vexatious when it lacks bona fide claim, it is hopeless or offensive and cause the opposite party unnecessarily anxiety trouble and expenses. Based on this definition it is my view that what is considered as frivolous and vexatious depends on what exactly a party has raised. In this matter however, since at paragraph four (4) of the respondent's counter Affidavit the Respondent deponed that he was re- instated, the fact, which is not controverted by the Applicant, then the same fall in purview of point of law. This is so because by complying with the CMA's order by re- instating the respondent having issued a letter nullifying the termination letter, that, by itself make the present application groundless.

In the same line the Court asked itself on what the applicant is intending to achieve by filing this application while the termination letter is already nullified, and the respondent is already re-instated? The answer to that would be "nothing" as the

foundation of the matter which is the termination letter have ceased to exist now from when it was nullified. In the case of MOUNT MERU FLOWERS TANZANIA LTD(Supra) it was also held inter alia that:

“...the foregoing definition even gives us an instance of a preliminary objection in our view, such as when the plaint does not disclose a cause of action to enable the plaintiff to state his claim and defense prepare his defense.”

Although the above holding is regarding suits, this court is of the view that the similar circumstances can apply in applications such as the present one.

In the upshot, this application is overtaken by event. On that basis this court finds substance in the 2nd point of objection, and it is sustained. This application is thus dismissed for being overtaken by event.

It is so ordered.




A.Y. Mwenda
Judge
04.08.2023

Ruling delivered in chamber under the seal of this court in the presence of Mr. Richard Mzule learned counsel for the applicant and in the presence of Mr. Costantine Gedalia the respondent.




A.Y. Mwenda
Judge
04.08.2023