IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR APPLICATION NO. 9 OF 2022

(Arising from the award of Commission for Mediation and Arbitration of Kilimanjaro at Moshi in Labour Dispute No. CMA/KLM/MOS/ARB/70/2021 dated 19th day of August, 2022)

PANONE & COMPANY LIMITED ..... APPLICANT

VERSUS

YUSUPH MSIKE ..... RESPONDENT

RULING

19th July & 14th August, 2023

A.P.KILIMI, J.:

The respondent mentioned hereinabove was an employee of the applicant above, he successfully filed a labour dispute at Commission for Mediation and Arbitration "CMA" of Kilimanjaro at Moshi, therein CMA held that the respondent was terminated unfairly and awarded Tshs. 2,666,664/= equivalent to twelve months respondent' salaries. It seems the applicant being aggrieved by the said award, and being late has resolved to file this application praying the following orders; -

i.) That, this court be pleased to extend the time within which the applicant can apply for revision of the award of the Commission for Mediation and

Arbitration of Kilimanjaro at Moshi in respect of Labour Dispute No. CMA/KLM/MOS/ARB/70/2021 delivered on the 19th day of August, 2022 and revise the same accordingly.

ii.) Any other order(s) and relief(s) this court may deem fit and just to grant.

The applicant, has moved this court by way of chamber summons under rules 24(1), (2)(a), (b), (c), (d), (e), (f) and 24(3)(a), (b), (c), (d), 28(1)(b), (c) and (e); rule 55 (1) and rule 56(1) and (3) of the Labour Court Rules, GN. No. 106 of 2007. This application is supported by an affidavit of one Nasru Juma Ndama, Principal Officer of the applicant.

In that affidavit, the principal officer maintained at paragraph 6, 7 and 8 that, the Arbitral Award was improperly procured as it was tainted with material irregularity and illegality; that, there was misconduct on the part of the Arbitrator herself by not consider that, the internal dispute resolution was not exhausted by respondent herein, thus the award was unlawful, illogical and irrational; and also that, there was misconduct on the part of the Arbitrator herself by not consider that, there was absenteeism on the part of respondent herein and indeed the termination was in accordance with procedures. The respondent's counter affidavit disputed all claims.

When this matter was placed for hearing before me, Mr. Englbert Boniface learned counsel appeared for the applicant while Mr. Mdinda Justine appeared as Personal representative for the respondent.

Submitting to support the application, Mr. Englbert Boniphace averred, the reasons to be granted this application is because CMA award is tainted with material illegalities which are seen on the face of record, there are seen on the award itself at page 6, in paragraph four, where in cross examination therein respondent conceded that, it is true that he was out of work for 5 days without permission of the employer. But also, respondent agreed that on the process of disposing the matter, he was given right to be heard, but in the form of disciplinary proceeding, he was told his right to appeal to the Higher Authority of the company, but he did not appeal to that Higher Authority, this is reflected at page 7 of the Award of CMA, so he conceded that he did not appeal.

Mr. Boniphace further submitted that, according to rule 4 (12) of Guidelines for Disciplinary Incapacity and incompatibility policy and procedure Rules GN No. 42 of 2017, need employee, if is aggrieved by Disciplinary committee need to appeal at Higher level Authority of the

Employer, therefore this means the dispute went to CMA premature without exhausting local remedies.

Another illegality which is on the face of record alleged by the counsel for applicant submitted that, is on nature of the offence committed by the Respondent by being absent from duty for 5 or more days warrant summary dismissed, in the face record the Respondent agreed that he did not inform employer his absenteeism, also Respondent agreed that exhibits 41 and 42 brought to prove disease, he got them after filing dispute at CMA and not time he was on duty, and since the said exhibits does not show between 11/8/2021 and 18/8/2021 was in Hospital at the treatment. Thus, is illegality for CMA failure to evaluate those exhibits, thus entertained the dispute which was premature, therefore it had not jurisdiction.

In respect to account each and every day of delay, Mr. Engelbert contended that he is aware of it, but in the face of record where it is shown that there are illegalities sufficient to grant the prayer for the extension of time on which applicant can file a revision, the counsel insisted exhausting legal remedies before instituting the matter to the CMA is mandatory, to buttress his stance he referred the case of **Delight**

Aminel Mushi vs. Equity for Tanzania Limited (EFTA) Labour Revision No. 1 of 2022,HC at Moshi.

Responding to the above, Mr. Mdinda contended that, the award was issued by CMA on 19/8/2022, then the applicant was having 42 days to file revision but he did nothing and no reasons stated, the applicant merely regarded on illegality. Mr. Mdinda further added that, according to rule 56 (1) of Labour Court Rules GN 106 of 2007 the rule direct if one applies to this court for extension of time must have good cause. To fortify his point Mr. Mdinda invited me to consider the case of **Constantine Victor John vs. Muhimbili National Hospital** Civil Application No. 218/18 of 2020. Therefore, in his view the applicant did not account for each and every day of delay. He was required to file on 30/8/2022, but he filed application on 29/9/2022, and has failed totally to account for those delayed days.

In brief rejoinder, Mr. Engelbert submitted that, the respondent has failed to say whether the case of **Muhimbili National Hospital** (supra) said accounting for every day of delay is only the reason the court should consider in extension of time. The counsel pointed out that at page 8 the same case used the case of **VIP Engineering and Marketing Limited** (Civil Reference No. 6 & 7 & 8 of 2006 unreported) and relied on illegality

and said is good cause for extension of time which means it is not mandatory to account each and every day of delay. Therefore, the court emphasized that illegality on point of law constitute sufficient cause, that is enough for extension of time.

I have considered the rival submissions above, I wish to point out that, it is a trite law, the power envisaged to this court to grant extension of time, is entirely exercised on the discretion of the court, but the same must be exercised judicially. (See the cases of **Yusufu Same & Hawa Dada vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Royal Insurance Ltd vs. Kiwengwa Strand Hotel Ltd**, Civil Application No. Ill of 2009 and **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (both unreported). Therefore, it is my settled view, this power is executed upon regarding the circumstances of each matter.

In this matter at hand, the counsel for applicant opted only to argue for illegality as a sole reason for this court to grant this application, he has said nothing in respect to days delayed to file this application, though the

same was raised by his opponent that he has failed to account for each day of delay.

It is settled law a person seeking extension of time, must demonstrate that he was prevented by causes beyond his control in taking the required legal steps within the prescribed time. (See **Attorney General vs. Twiga Paper Products Limited, Civil Application No. 128 of 2008, Court of Appeal of Tanzania (unreported).** In my view, I think the issue of accounting reasons for delay in time is also necessary.

Be it as it may, the next point to be considered is whether the said illegality raised by the applicant has triggered good cause for granting this application. It is a trite law, for illegality to ground for extension of time, it must be apparent on the face of record. (See the cases of **Chandrakant Joshubhai Patel vs. Republic**, [2004] TLR 218; **African Marble Company Limited (AMC) vs. Tanzania Saruji Corporation (TSC),** Civil Application No. 8 of 2005; and **Ansaar Muslim Youth Center vs. Ilela Village Council & Another**, Civil Application No. 310 of 2021 (unreported) to mention a few. In **Chandrakant's case** (supra), the Court of Appeal observed that: -

" An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions...It can be said of an error that is apparent on the face of the record when it is obvious and self- evident and does not require an elaborate argument to be established..."

The counsel for applicant made the foundation of illegality when he contended that the respondent was told his right to appeal to the Higher Authority of the company, but he did not. He then relied on rule 4 (12) of Guidelines for Disciplinary Incapacity and incompatibility policy and procedure Rules GN. No. 42 of 2017, which require employee if is aggrieved by Disciplinary committee should appeal at Higher level Authority of the Employer, therefore this means the dispute went to CMA premature without exhausting local remedies.

I have considered the law cited above, to my view it provides for duty and obligation to each party in order the appeal to the Higher Authority be executed. It is undisputed that the said Guidelines are part of Employment and Labour Relations (Code of Good Practice) Rules,

Government Notice no. 42 published on 16th February 2007. Which provides that any Disciplinary action should be recorded on the prescribed form. Then the chairperson of the Disciplinary Committee is bound to provide the outcome of Hearing to the employee. According to the said guidelines immediately after guideline 14 there is PART 1 which is hearing form, PART II to be filled by applicant wishes to appeal and PART III to be filled by Senior Manager hearing the appeal. The requirement of filling this form and given to the employee is provided under Guideline No 4(12) of the Guidelines (supra) which provides:

> *"An employee **may appeal** against the outcome of a hearing by **completing the appropriate part of the copy of the disciplinary form** and give it to the chairperson within five working days of being disciplined, together with any written representations the employee may wish to make.*
> *The chairperson must within five working days refer the matter to the more senior level of management, with a written report summarizing reasons for the disciplinary action imposed, the appealing employee must be given a copy of this report. "*
>
> [Emphasis supplied]

According to this law, first, the employee to appeal is optional, since it is not couched in mandatory terms, therefore to my view, the respondent act of not appealing, he did not offend any law.

Second, if he chooses to appeal, in view of the above, as I said there is also an obligation for the employer to complete part one of the said form, nevertheless, in his affidavit, the Principal Officer of the applicant did not evidence this, he merely deponed at paragraph seven that there was misconduct on the part of the Arbitrator herself by not consider that, the internal dispute resolution was not exhausted by respondent herein, thus the award was unlawful, illogical and irrational.

In my view all of the above requirements which also give obligation to the applicant as employer was not ascertained in the said affidavit, rather, others were submissions from the bar, which are not evidence in law. (See **Dr. A Nkini & Associates Limited vs. National Housing Corporation,** Civil Appeal No 75/2015, **Republic vs. Donatus Dominic @ Ishengoma & 6 Others,** Criminal Appeal No. 262 of 2018, **Morandi Rutakyamirwa vs. Petro Joseph** [1990] T.L.R 49] and **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman**

Bunju Village Government, Civil Appeal No. 147 of 2006. (Both unreported).

Having discussed above, it therefore my settled opinion, since the said illegality the applicant is alleging was not ascertained in the affidavit, is that which can be established by long process, or by evidence, in order to satisfy that the process was followed for alleged appeal to take off, thus is not self-evident, being so it does not reach the standard stated above, that illegality to ground for extension of time it must be apparent on the face of record. Therefore, I am settled, the raised illegality did not meet this test of being apparent on the f record.

In respect to another illegality which was claimed by the applicant, is that, the nature of the offence committed by the Respondent by being absent from duty for 5 or more days warrant summary dismissal, and exhibits 41 and 42 brought to prove disease of the respondent, does not show between 11/8/2021 and 18/8/2021 was in Hospital for treatment. Therefore, the counsel is saying this is illegality in part of CMA failure to evaluate those exhibits.

I have considered this alleged illegality; it is my opinion the same succumb to the position stated above, which mean is also not apparent on the face of record, rather than raising issues that are to be dealt when considering substantiative matter on revision or appeal for whatsoever sustained. It is a trite law, in hearing application of this kind, court should restrain from considering substantive issues that are to be dealt with by the appellate/ revisionary Court. (See **Regional Manager- TANROADS Lindi vs. D. B Shapriya and Company Limited,** Civil Application No. 29 of 2012 (Unreported).

In the premises above, I find no reasons for extending time to the applicant to file revision, since he has failed to adduce sufficient reasons for this court to grant the application. Consequently, the application is hereby dismissed. In the circumstances no costs granted.

It is so ordered.

DATED at **MOSHI** this 14th day of August, 2023.

A. P. KILIMI
JUDGE
14/8/2023