IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

MISC. LABOUR APPLICATION NO 5 OF 2022

(Arising from the ruling of the Commission for Mediation and Arbitration at Tabora, Ref. CMA/TAB/NZG/MISC/08/2021 by Hon. Hillary N.J.)

SKYWARDS CONSTRUCTION

COMPANY LIMITED ..... APPLICANT

VERSUS

BARTHOLOMEO MASHENENE

AND 92 OTHERS ..... RESPONDENTS

RULING

Date of Last Order: 01/09/2023

Date of Delivery: 14/09/2023

MATUMA, J.

The applicant herein filed this application seeking for extension of time to file revision against the decision of the Commission for Mediation and Arbitration in CMA dispute with Reference no. CMA/TAB/NZG/MISC/08/2021. Brief facts leading to this application can be summarised as follows; the respondents were employees of the applicant but they were later terminated from their employment. The respondents then filed a dispute at CMA for unfair termination and the same was heard ex-parte. Aggrieved by the said ex-parte judgment, the applicant herein filed an application to set aside the ex-parte judgment but such application was dismissed by the trial Commission.

The Applicant was aggrieved by such ruling which denied her an order setting aside the ex-parte judgment but unfortunately couldn't file the Revision within the statutory prescribed time hence the instant application for extension of time to file revision against such ruling.

At the hearing of this application, the applicant was represented by Goodchance Lyimo learned advocate and the respondents were represented by Mr. Kelvin Lushiba a representative from TUICO.

Mr. Lyimo when took the flow adopted the affidavit sworn by Godwin Sauli Pallangyo the finance and administration manager of the Applicant. He then submitted that extension of time is a discretion of the Court which is exercisable upon good reason as stated in the case of ***Attorney General vs Mkonga Building and Civil Work Constructors Limited and Another, Civil Application No. 266/16 of 2019*** CAT at Dar es Salaam. He also added that sufficient cause is not defined by any hard and fast rule as stated in the case of ***Alliance Insurance Corporation vs Arusha Art Limited, Civil Application No. 512/2 of 2016***.

The learned advocate then addressed the major ground for their delay sailing this court to the contents of paragraphs 3,4 and 5 of the affidavit to the effect that the applicant was unaware of the deliverance of the impugned decision. He argued that the matter having been heard by the Commission it was scheduled for Ruling on 29/10/2021. That on such date the said Ruling was not delivered and the parties were not notified the further date for deliverance of such ruling.

He was of the further argument that the applicant knew of the existence of the impugned decision on 09/09/2022 in which she promptly

wrote to the Commission to request such ruling and was on the same date supplied with it. The ruling shows that it was delivered on 12/09/2022.

Mr. Lyimo argued that the period between 12/09/2022 to 07/10/2022 when this application was finally filed was a delay due to e-filing system at Tabora and the Judicial Administrative changes as they first filed their application online at the Labour Division of the High Court at Tabora but the Registrar rejected it and advised the same to be filed to the High Court at Tabora because there is no Labour Division at Tabora. And that is when they refiled this application.

The learned advocate further asserted that since the applicant was not aware of the delivery of the ruling, then the ruling itself is a nullity as it was stated in the case of ***Omary Shabani Nyambu vs DUWASA, Civil Appeal No. 303 of 2020.***

He also prayed for an extension of time for the reason that there is illegalities as per paragraph 6 of the affidavit to the effect that; *The impugned ruling was delivered without notice, the amount awarded was not proved to the standard required by law, the case was made as if it was a representative suit without leave, the matter/suit at CMA was entertained while it was time barred* and that *the respondents were held to have been employees of the applicant without concrete evidence to support such allegations.*

The learned advocate further argued that it is a well-founded law that once there is a plea of illegality, the Court has duty to extend time in order for that illegality to be addressed as seen in the case of ***The Principal Secretary Ministry of Defence and National Service vs Divram Valambia (1992) TLR 182.***

On the other hand, Mr. Lushiba a representative from TUICO who stood for the Respondents also prayed to adopt the counter affidavit sworn by Noel Nchimbi. He then averred that it was the duty of the applicant to make follow up of his case accordingly and that the applicant has not given sufficient cause for the delay.

He went on that both parties were informed by the Commission that after the hearing of the applicant's application to have the ex-parte judgment set aside, the ruling thereof would be delivered on 29/10/2021.

Mr. Lushiba further submitted that on the date of the ruling on 29/10/2021 the Applicant defaulted appearance hence missed the subsequent orders of the commission. That since the case was filed by applicant herself, it was her duty to make a follow up of the progress of the matter but instead she remained quiet until 19/09/2022 which shows that the applicant did not bother to make follow up of her own case.

Mr. Lushiba further argued that paragraph 5 of the applicant's affidavit is containing mere fabricated facts without any evidence. That there is no evidence to show that the applicant had reached at the CMA several times as alleged serve for 19/09/2022 when she was supplied with the ruling. He also argued that despite the fact that the applicant got the impugned ruling on 19/09/2022, she continued to relax up to the 07/10/2022 when this instant application was filed.The allegations that there was a system rejection of the application is without any proof as they could have extracted the evidence showing such rejection.

As regards to the issue of illegality as claimed by the applicant, Mr. Lushiba submitted that the ground that the judgment was delivered without notice it was the applicant's own fault to default appearance. He also faulted other alleged illegalities arguing that they are matters of fact

and evidence decided by the Commission on the strength of evidence and thus cannot be discussed in the instant matter which is merely for extension of time.

Mr. Lushiba also challenged the argument of the Applicant's advocate that the Respondents' suit at the trial Commission was time barred because the same was filed and heard after the respondents obtaining condonation.

In rejoinder, Mr. Lyimo contended that the applicant was not reluctant as she was active at all times and that is why she applied and prosecuted the application to set aside the exparte judgment and that it was the duty of CMA to notify the parties on the date of the ruling.

He also argued that the records show that both parties were absent on 29/09/2021 when the ruling was set for ruling but the applicant reached at the trial Commission on the same date though at late hours and he was notified that the date of the ruling would be communicated to the parties later.

The learned advocate further argued that even if this court finds out that they have not accounted for the delay, it has to grant extension of time so long as illegality is alleged so that the said illegalities are addressed in the proper forum.

Upon hearing the parties for and against this application and going through the records of the trial Commission (CMA), the only issue for determination is whether or not sufficient cause has been established by the applicant to warrant this Court exercise its discretion to grant the extension of time for her to file a revision application against the impugned ruling.

It is trite law that whoever applies for extension of time must account for each day of the delay. See; ***Lyamuya Construction Co. Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 Of 2010***.

The applicant's major grounds for the delay as addressed by Mr. Lyimo learned advocate can be condensed into two; **One,** *that the impugned ruling was delivered without notice to the parties and when they became aware of the ruling they were already out of time to take the requisite action,* and **two,** that the impugned ruling is tainted with illegalities.

First of all, I agree with both parties that the records of CMA shows that after the matter was heard interparties, the parties were ordered to appear before the commission for ruling on 29/10/2021. That was on 26/08/2021 and Mr. Goodchance Lyimo learned advocate for the applicant was present when the date of the ruling was set out.

It is as well on record that on the ruling date both parties defaulted appearance and the Commission fixed another date for ruling to be on 22/02/2022. On this date the parties were again absent. The commission then fixed another ruling date to be on 12/04/2022 when the ruling was finally delivered.

From such records it is obvious that both parties after having been heard for and against the applicant's application, they deserted the matter at the trial commission. They ought to have been making follow up of the ruling more so the applicant who had instituted the application whose ruling was being waited. Instead, the applicant applied and collected the copy of the impugned ruling on 12/09/2022 which is five months later after the delivery of the ruling while the respondents collected the same

on 19/04/2022 just seven days after its delivery. This is clearly showing that each party was supplied the ruling at the time he or she made a follow up of the same. In that respect had the Applicant made a deliberate effort to make follow up of the ruling she would have been supplied the same soon after its delivery as happened to the respondents. Except for the matter which has been heard ex-parte where the law provides specifically that the defendant (Respondent) be notified the date of judgment, when the matter is heard interparty the law does not provide that the court should trace the parties who defaults appearance on the scheduled date to notify them the subsequent orders made in their absence. It is for the parties to make follow up to find out what orders were issued to the parties at the time when they defaulted appearance.

I therefore agree with Mr. Lushiba that the applicant was reluctant and did not make follow up of the ruling at the CMA in the reasonable time taking into consideration that it was her who had instituted the application which resulted into the impugned ruling. It does not click a reasonable mind that the applicant who was present at the commission on 26/08/2021 and been informed of the ruling to be delivered on 29/10/2021 would stay mute for almost eleven months without making follow up of the ruling or even the subsequent date fixed for such ruling.

I do not agree with the argument of Mr. Lyimo that they attended on the commission on the date fixed for ruling but at late hours and been told that they will be notified the date of ruling and that having obtained the impugned ruling they promptly filed the application electronically but the same rejected which necessitated them to refile the instant application because all such averments are made without any backup affidavits of the officer at CMA who told the Applicant to relax without taking any

reasonable steps and that of the Deputy Registrar who rejected the first application which was allegedly filed immediate after receiving the impugned ruling. In the case of ***John Chuwa versus Anthony Ciza (1992) TLR 233*** the court of Appeal held that an affidavit of a person so material, has to be filed. In the instant matter the affidavit of the relevant officer at CMA who relaxed the applicant for eleven moths was so material to account for the delay from the first date fixed for ruling up to the date when the ruling was finally delivered and from the ruling date to when the applicant was finally informed of the ruling. Again the affidavit of the Deputy Registrar was so material to account for the delay as from the date when the applicant received the impugned ruling on 12/09/2022 to 07/10/2022 when this application was finally filed.

The Applicant has therefore failed to account for the period of the delay as from when the impugned ruling was delivered to the date when she received the said ruling. She has again failed to account for the delay from the date when she received the ruling to the date when she finally filed the instant application. The grounds purporting to account for such delay are hereby dismissed.

In respect of the alleged illegalities, I once again join hands with Mr. Lushiba that the alleged illegalities are matters of facts and evidence which were dealt by the trial commission and conclusively determined. The learned advocate for the applicant was trying to argue the revision itself in a disguised manner through the purported illegalities. In fact, the alleged illegalities are not specifically deposed in the Applicant's affidavit. They are averments raised at the hearing of this application. The only paragraph of the Applicant's affidavit purporting to raise issues of illegalities is paragraph 6 which does not in itself state any illegality but

makes reference to depositions made under paragraphs 4, 5, 6 and 8 of the Applicant's affidavit in support of her application at the commission for mediation and arbitration but such referred affidavit was not made annexure to the affidavit in the instant application.

Despite the fact that such affidavit is not annexed as stated supra, I have taken my time to peruse the same in the original records and found that paragraphs 4, 5, 6 and 8 are talking issues of none services to the Applicant by the respondent on the original suit which is far away to the impugned ruling at hand. Therefore even if such paragraphs would have been sufficiently raised such illegalities, they would have been illegalities for the purposes of setting aside the ex-parte judgment and not illegalities to fault the impugned ruling because by the time such affidavit was made the impugned ruling was not even foreseeable because the application resulting into such ruling was even yet to be filed. In law matters not properly pleaded which comes by way of submissions at the hearing stage are forbidden. See; ***Morandi versus Petro (1980) TLR 49.***

The Applicant is pressing that wherever illegality is alleged, extension of time has to be granted. That is misconception of the legal jurisprudence relating to illegalities as a ground for extension. The alleged illegality must be visible on the face of record and must be that which do not attract further arguments by the parties. If it is not apparent on the face of record and attracts further arguments, then that cannot be entertained as a ground for extension of time because by entertaining the arguments of the parties would prejudice the application which is intended to be filed. In the instant matter I don't see such illegality on the face of record unless I invite the parties to extensively argue and produce some evidence and documents. To that extent illegality in the instant matter has not been

established for the purposes of extending time for the Applicant to file an Application for Revision against the impugned ruling.

Before I rest this ground of illegality, I find it important to demonstrate on the trending tendency by litigants to use **"illegality"** as a fishing ground for extension of time. I once demonstrated it in the case of ***Yahaya Rashidi versus Hamisi Mussa, PC Civil Appeal no. 18 of 2021*** at the Hight Court - Kigoma. It has been a tendency of advocates and their clients in each application for extension of time to plead illegality against the judgment or ruling upon which extension of time is sought to be challenged. It has turned to be a fishing ground in every application of such nature and any appeal therefrom. Since the role of an applicant in an application for extension of time is to account for each day of the delay, he or she must discharge such role and should not abrogate the obligation by taking refuge into allegations of illegality. In no way illegality even if it is proved can be said to have caused such a delay. The illegality should not be entertained as a fishing ground to safeguard those who have no any sufficient cause for the delay. I thus find that this application has been brought without any sufficient cause and I accordingly dismiss it. Whoever aggrieved may take further steps to the Court of Appeal of Tanzania.

It is so ordered.

MATUMA

JUDGE

14/09/2023

COURT; Ruling delivered in the presence of advocate Erick Bitarolize for the applicant through virtual court and in the presence of Mr. Kelvin Lushiba for the respondents.

MATUMA

JUDGE

14/09/2023