

IN THE UNITED OF THE UNITED REPUBLIC OF TANZANIA

HIGH COURT LABOUR DIVISION

AT MWANZA

MISC. LABOUR APPLICATION NO. 26104 OF 2023

(Arising from the award of the commission for mediation and arbitration at Mwanza in MA/MZA/NYAM/144/2021/79/2021 dated 28th October 2022 before Hon. Msuwakolo, Arb.)

LAKE OIL LIMITED APPLICANT

VERSUS

KHERDIN MOHAMED SHAFIQ RESPONDENT

RULING

16th & 17th May, 2024

A. MATUMA, J.

The applicant herein, under various provisions of the Labour Laws is seeking extension of time to apply for Revision against the CMA award in labour dispute No. CMA/MZA/NYAM/144/2021/79/2021 dated 28th October 2022. The application which has been brought under the Notice of Application and Chamber Summons is supported by an affidavit sworn by one Kasamajera Alphonse Kasasila the Applicant's Principal Officer.

At the hearing of this application, the applicant was represented by M/S Rosemary Makori learned advocate while the Respondent had the service of Mr. Akram Adam learned advocate.

The applicant's counsel advanced several grounds as causative reasons for why they delayed to challenge the arbitration award herein above mentioned upon which extension is sought to have it challenged through Labour Revision Application.

The learned counsel submitted that the respondent was an employee of the Applicant as an Internal Auditor but he was terminated for misconducts. That the said respondent having been terminated it seems he instituted the herein above-named labour dispute without the Applicant's knowledge. The said suit was heard and determined ex parte on 28/10/2022 without the knowledge of the Applicant.

She went on submitting that the Applicant became aware of the adverse award in favour of the applicant when she was served with the notice of execution on 21/02/2023. That, they took all necessary steps to have the execution stayed and later instituted an application to the Commission for condonation so that to apply for setting aside the ex parte award but her application was dismissed. She further argued that the condonation application having been dismissed they felt that the remedy available was to lodge an application for Revision against the Arbitration Award supra but could not do so because they are out of time hence this application.

The learned advocate stated the grounds upon which to be considered as good grounds for the delay to warrant the extension of time. These are;

1. ***That, the applicant was not aware of the ex-parte proceedings and its subsequent award until when she was served with the notice for execution on 21/02/2023.***
2. ***That, from 10/04/2023 up to 18/07/2023 the applicant was prosecuting Misc. Labour application no. 4 of 2023 in this court which was for stay of execution.***
3. ***That, from 05/04/2023 up to 03/11/2023 the applicant was also prosecuting application for condonation to apply for setting aside the ex-parte award.***
4. ***That, from 03/11/2023 up 13/11/2023 the applicant was waiting for the ruling of the commission which denied her the condonation.***

The learned advocate added that apart from such reasons for delay, they are also armed with illegalities in the arbitration award as a ground for this application to be granted. She pointed such illegalities to be;

- (a). ***That, the trial commission wrongly held that the applicant failed to produce witnesses.***
- (b). ***That the commission did not issue summons for the Applicant's witnesses***
- (c). ***That the commission wrongly believed mere words of a person who purported to be the Applicant's representative while he was actually not, when such purported representative informed the Commission that the Applicant does not cooperate with him.***

(d). That the commission wrongly closed the applicant's defence

With all these, the applicant's counsel argued this court to allow this application and extend the time for the applicant to lodge Revision Application against the Exparte award.

Responding against this application Mr. Akram Adam learned advocate submitted that this application is opposed because all what has been submitted by the Applicant's learned advocate is not true. He submitted that the applicant was fully aware of the proceedings at the trial commission and the award itself as it was delivered and served to the Applicant's Legal Officer one Safiel Manongi on the same day of its delivery i.e 28/10/2022 as exhibited by the Applicant's own annexure to the affidavit which is the impugned award.

He further argued that the applicant has not disputed Safiel Manongi as her legal officer and to have taken the award on the same day of its delivery and thus the applicant has not accounted for the delay from 28/10/2022 up to the time when they allege to have been served with the notice of execution on 21/02/2023 the date which they allege to become aware of the award.

About the time spent to prosecute an application for stay of execution, Mr. Akram argued that the same was not a bar for them to file Revision

application and therefore the applicant cannot benefit with that time. Again, on the time spent to prosecute the condonation application at the commission the learned advocate argued that even if such time is excused including the period alleged to have been used to await the ruling, there are two weeks from when they stated to have received the ruling denying them condonation on 13/11/2023 up to 27/11/2023 when they filed the instant application which has not been accounted for.

In relation to summoning witnesses, the learned advocate of the respondent argued that it is the duty of the party in the suit to apply for summons for his or her witness failure of which the Commission (CMA) is not to blame. To that effect, he cited section 20 of the Labour Institutions Act and rule 33 (1) of the Mediation and Arbitration Rules, GN no. 64 of 2007.

About the representation of the Applicant by John Paul Kaunara, the learned advocate submitted that the said person is an advocate who entered appearance for the Applicant who filed relevant documents including exhibits to be relied upon by the Applicant and thus the current denial of his representation is an afterthought. The learned advocate cited case of ***Security Group (T) Ltd v. Nsanya Mwashia and Another, Lab. Div. DSM. Revision no. 173 of 2013*** dated 30/06/2015 to the

effect that when representation is by advocate there is no need to file a Notice of representation. On this the learned advocate concluded that since at the commission the applicant was represented by an advocate, there was no need to file notice of representation.

The Respondent's counsel finally argued that the applicant has not accounted for each day of the delay and therefore this application be dismissed.

The parties are not at issue that in an application of this nature, only what is required is for the applicant to account for each day of delay by adducing sufficient cause for such delay.

In the present matter, the major ground set out by the applicant for the said delay is the lack of knowledge that the respondent had instituted a suit against them until when they became aware of it when they were served with the notice of execution on 21/02/2023. On my part, I join hands with Mr. Akram Adam learned advocate that this assertion is not true and the same has been brought as an afterthought. It is on record that the applicant was dully represented by John Paul Kaunara who was an advocate but it seems the applicant was not giving him the requisite cooperation to defend the suit. It at all they did not instruct such advocate there are available remedies against him but for the purposes of this

application there is no tangible fact or evidence to establish that the said representative moved himself suo motto to represent the applicant at the trial commission.

Even if we could have agreed that the said representative was not instructed, that would not be helpful to the applicant for the purposes of this application because the same is all about awareness of the proceedings at the trial commission up to the date when the impugned decision was given. Such period needs no any accounting.

The relevant period to account for is between the date when the impugned decision was given to when an action was taken against such decision. In that respect the applicant is required to account from 28/10/2022 to 27/11/2023 when this application was filed the period of which does not concern with such representative.

The applicant's counsel has argued that the impugned award was as well delivered in their absence and they became aware of it on 21/02/2023 when they were served with the notice of execution. This assertion is as well not true. As rightly submitted by Mr. Akram learned advocate the applicant's own annexure BEA1 which is the impugned arbitration award, one Safiel Manongi (legal Officer) of the Applicant received the said award on the same day of its delivery. He or she signed

the award to acknowledge service on such date 28/10/2022 in the meaning that the applicant became aware of the adverse award on the same day of its delivery. The applicant neither in her affidavit accompanying this application nor in her oral submission through her advocate Rosemary Makori denied to recognise the said Safiel Manongi as her legal Officer. She only purported to deny her at the rejoinder time after having been bombed by the respondent's counsel. Such denial at that stage is nothing but mere words from the bar and an afterthought. The same is hereby rejected and I find that the applicant is not excused the period from when the impugned decision was made up to when they were served with the notice of execution. They thus ought to account for such period but they did not.

To cut a story short, let me assume that the period upon which the applicant was prosecuting the application for stay of execution in this court and that which she spent in prosecuting the Condonation application at the trial commission is excused as a technical delay.

The applicant's counsel argued that the ruling denying them condonation was given on 03/11/2023 but were supplied a copy on 13/11/2023 but filed this application on 27/11/2023. First of all, if at all there should be any excuse it is from when such application was instituted

to the date when the ruling was delivered on 03/11/2023. Thereafter the applicant ought to have taken the requisite step without necessarily waiting for such ruling as it was not for any useful purpose because they did not choose to challenge it and have taken no action against it. Even in the instant matter such ruling is not annexed. But let us proceed to cut a story short by assuming that such period is as well excused. That being done it remains two weeks' time from when the applicant received the said ruling on 13/11/2023 up to 27/11/2023 when the instant application was filed. This period has not been accounted for any how despite the clear principle that each day of the delay has to be accounted for.

In that regard as far as accounting for each day of the delay, I rule out that the applicant has not accounted for the whole period of the delay serve for some few when she was prosecuting some applications as stated supra.

That takes me to the alleged illegalities. I find none. There is no any apparent illegality because all alleged illegalities are matters of fact serve for the alleged closure of the defence case. It is a fact that the applicant did not produce her witness for defence hearing, therefore the trial commission to rule that the applicant failed to produce her witness was a fact and no illegality in such statement.

About failure to issue summons to the witnesses of the applicant, it is as well a fact that no summons was issued because the applicant deserted her case and there is no complaint that the applicant sought summons for her witnesses in accordance with section 20 of the Labour Institutions Act supra and rule 33 (1) of the Mediation and Arbitration Rules supra but was denied. The trial commission was not duty bound to stand up and go meandering in streets with summons at hand tracing the applicant's witnesses. No any illegality as such.

About the commission believing a fake representative, that has already ruled out supra. The person who appeared in the trial commission to represent the applicant is a reputable public officer as an advocate. The applicant if at all did not send him for representation, she should take the requisite steps against him which will definitely accord him opportunity to defend himself against the allegation that he was not instructed to act in the applicant's behalf.

On the allegation that the trial commission closed the defence case, I stand wondering of this complaint. If the matter proceeded exparte after the applicant had deserted the case, which defence case was closed by the commission. Does the applicant mean the trial commission having been recorded the evidence of the respondent who was the complainant

by then, should have not gone further to deliver the award until when the applicant will at her own pressure appear to enter her defence? That is awkward. There was no defence case and as such there can't be a closure of a none existing case. This ground is rejected.

This application therefore fails in its totality and it is accordingly dismissed. Since neither party contended for costs, I grant no costs to either party.

It is so ordered.



A. Matuma

Judge

17/05/2024