IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

MISC.LABOUR APPLICATION NO. 117 OF 2021

BETWEEN

HALFAN B. JUMAA & 37 OTHERS.....APPLICANT

AND

TANZANIA ZAMBIA RAILWAY AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last order: 26/01/2022
Date of Ruling: 11/02/2022

B.E.K. Mganga, J.

Applicants were employees of the 1st respondent. They retired on different dates and years between 2001 and 2009. On their retirement, applicants were paid regular retirement benefits for unionized workers. In 2017, they filed labour dispute No. CMA/DSM/TEM/346/2016/59/2017 before the Commission for Mediation and arbitration henceforth CMA at

Temeke claiming to be paid by the 1st respondent (i) one-off retirement package and (ii) long service gratuity allegedly payable to Management staff as substantive special retirement benefits for management staff according to circular No. TZR/C/16/VOL.IV dated 20th August 2002. On 27th October 2017, M. Batenga, arbitrator, issued an exparte award dismissing their claims. Applicants once again, filed labour dispute No. CMA/DSM/TEM/257/18/02/19 at CMA Temeke for the same claims. On 17th September 2019, Kokusiima, L, arbitrator, delivered a ruling upholding the preliminary objection raised by the 1st respondent that the dispute was *res judicata*. On 20th April 2021, they filed this application seeking extension of time within which to file an application to revise the award issued on 27th October 2017, by M. Batenga, arbitrator, and not the ruling delivered on 17th September 2019, by Kokusiima, L, arbitrator.

The notice of application is supported by an affidavit affirmed by Halfani Bakari Jumaa. In the said affidavit, the deponent deponed that he was one of the former employees of the 1st respondent and that he was appointed to represent his 37 fellow applicants who are also former employees of the respondent. In paragraph 16 of the affidavit in support of the application, the deponent stated that, this application of extension

of time has been brought on the grounds of illegalities and seriously triable points of law namely, (i) other 33 applicants were denied their right to be heard/ to prove their cases and (ii) that the trial arbitrator erred in assuming that all the complainants (sic) were being testified for by Haflfani(sic) Bakari Jumaa, Juma Halfani Said, Mohamed Katembo Mwiru and Alfred Isack Kileo while each of the complainants ought to have testified to prove his case.

In opposing the application, the respondents filed the notice of opposition together with the counter affidavit sworn by Beatrice Nyangomas Mutembei, Principal officer of the 1st respondent.

When the application was called on for hearing, counsels for both sides prayed the application to be argued by way of written submission as a result an order was issued to that effect.

In the written submissions, Mr. Odhiambo Kobas, advocate for the applicants, submitted that applicants were denied their right to be heard after the arbitrator had assumed that all were being testified for by Halfani Bakari Jumaa, Juma Halfan Said, Mohamed Katembo Mwiru and Alfred Isack Kileo, while each of them ought to have testified to prove his case. Mr. Kobas submitted that the arbitrator in denying the

applicants right to be heard by not reminding them or not drawing their attention to their right to testify, constitutes a sufficient ground of extension of time. Counsel for the applicants submitted further that, the mistake if any, in not leading each applicant to testify, was done by their advocate or representatives and not themselves. Counsel argued that it is unjust to impute the advocate's mistake into the applicants. To bolster his argument, Counsel cited the case of ***Bahati Mussa Hamis Mtopa v. Salum Rashid***, Civil Application No.112/07 of 2018, CAT (unreported).

Mr. Kobas, counsel for the applicant cited the case of ***National Agriculture and Food Corporation v. Mulbadaw Village Council and Another*** [1985] T.L.R.88 and submitted that in a representative suit, each of the applicants was required to prove his case. He submitted that each applicant failed to prove his case due to mistake or error of their counsel who failed to call each one of them to testify and the arbitrator who failed to remind them to testify. Counsel for the applicant submitted further that, the denial of right to be heard is an illegality which has been held in a number of cases that once shown and advanced, by itself, constitutes a sufficient ground of extension of time.

To support that position, he cited the case of ***Mary Rwabizi T/A Amuga Enterprises v. National Microfinance Plc,*** Civil Application No. 378/01 of 2019, CAT (unreported).

Responding to the applicant's contentions, Ms. Lightness Godwin Msuya, State Attorney, for the respondents, contended that, applicants, upon retirement were paid retirement benefits according to the 1st respondent's staff Regulation. She submitted that the allegation that they were supposed to be paid substantive special benefit retirement for management staff is unfounded as circular No. TZR/C/16/VOL.IV dated 20th August 2002 was never approved by the board of the 1st respondent.

Ms. Msuya, State Attorney, submitted that, applicants are seeking extension of time so that they can file an application to revise the award issued by Ho. Batenga, arbitrator, on 27th October 2017. Msuya, State Attorney, submitted that 13 months after Ho. Batenga had issued the award that is the subject of this application, applicants who were represented at CMA by Steven Toya, advocate, instead of filing application for revision before this court, filed a new dispute at CMA. State Attorney submitted further that, applicants filed this application on

20th April 2021 after lapse of three years and four months while section 91(1)(a) of the Employment and Labour Relations Act [Cap.366 R.E. 2019] provides that application for revision has to be filed within six weeks. Ms. Msuya, State Attorney, submitted that applicants have failed to account for each day of delay and further that the delay is inordinate. To support her arguments, Ms. Msuya, State Attorney cited the case of ***Aziz Mohamed v. Republic***, Criminal Appeal No. 84/07 of 2019, CAT(Unreported) and ***Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,*** Civil Application No. 2 of 2020, CAT(Unreported). State Attorney submitted further that, applicants have exhibited lack of diligence and have shown that they were negligent or sloppiness in the matter, and that they made this application as an afterthought, which is why, instead of filing application for revision, they filed a new dispute at CMA and waited for more than three (3) years to file this application as an afterthought. State Attorney submitted that ***Mulbadaw's case*** (sura) is distinguishable and inapplicable in the circumstances of this application.

On the allegation that applicants were denied right to be heard by the arbitrator and that the same amounts to illegality, State Attorney submitted that, at CMA, applicants were represented by an advocate and that the dispute was heard exparte. It was the wisdom of the advocate that four applicants sufficiently proved the application, close the case and made closing submissions thereof. Ms. Msuya, State Attorney, distinguished ***Mtopa case,*** (supra), in which there were bonafide mistake and procedural error unlike the present application.

I have carefully considered submissions of the parties and I should point from the outset that, I will not deal with the submissions relating to whether applicants were entitled to be paid substantive special benefit retirement for management staff or not, as the prayer in the application is extension of time and not revision. Therefore, this being application for extension of time, I have been called to exercise my discretion whether to grant it or not. I am mindful that this discretion has to be exercised judiciously as it was held by the Court of Appeal in the case of Court of Appeal in the case of ***Zaidi Baraka and 2 others v. Exim Bank (T)*** Limited, Misc. Commercial cause No. 300 of 2015, CAT (unreported) and ***MZA RTC Trading Company Limited v.***

Export Trading Company limited, Civil Application No. 12 of 2015 (unreported). In the ***MZA RTC case***(supra), the Court of Appeal held: -

> *"an application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court* ***based on what is fair, under the circumstances and guided by the rules and principles of law ..."***

In the case of ***Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Ltd***, Civil Application No. 96 of 2007, CAT (unreported), the Court of Appeal held that in determination of an application for extension of time, the court has to satisfy as to whether, the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted. In fact, in terms of Rule 56 (1) of the Labour Court Rules, GN No. 106 of 2007, applicants are required to show in their application that there was good cause that prevented them to file an application for revision within a prescribed period of 42 days in order this court to grant their application of extension of time. This has to be shown in the affidavit supporting the notice of application and not in their submissions, as the latter is not evidence.

I have read the affidavit in support of the application and find that, there is no even a single paragraph in which the deponent gave reasons that prevented them to file revision application before this court within 42 days after delivery of the award on 27th October 2017. The only paragraph relating to extension of time is paragraph 16 in which the deponent stated that applicants were denied right to be heard. In my view, it will be unfair to the respondents if I grant this application while applicants have disclosed no good cause for the delay. In other words, granting the application in these circumstances, will be misuse of discretionary powers of the court.

It was submitted by counsel for the applicants that they were denied right to be heard by the arbitrator who, according to them, was supposed to inform them all to testify and not to allow only four out of 37 to testify. These submissions were countered, correctly in my view, by the State Attorney, for the respondents that, applicants were represented by learned counsel at CMA and that in the wisdom of the learned counsel, found that four applicants who testified proved their case. With due respect to counsel for the applicants, reminding the parties as to the number of witness to testify is not amongst the duties

of the arbitrator. As correctly submitted by State Attorney and reflected in the award, the dispute was heard exparte while applicants being represented by Steven Tonya, advocate. The mere fact that the said Steven Tonya failed to advise all applicant to testify, in my view, does not amount to denial of right to be heard. Reasons for this conclusion are not far. The said Steven Tonya was brought to CMA by the applicants and whatever was done by the said Steven Tonya in proceedings were done on behalf of the applicants. Therefore, the alleged denial of right to be heard, if any, in my view, was done by the said counsel and not by the arbitrator. In other words, the number of persons to testify was made by the applicants themselves. They cannot be heard complaining about their own decision. From where I am standing, the alleged denial of right to be heard was a result of poor choice or bad decision by the applicants themselves and their advocate. In my view, that can be a mistake by an advocate or incompetence of an advocate. It is my view therefore, that the failure of an advocate to call a witness is not an illegality but a matter of choice whether right or bad.

It was alleged that; applicants were denied right to be heard at CMA as only 4 out of 37 applicants testified. In reading the affidavit in support of the application, I have found that it was affirmed by Halfani Bakari Jumaa only, and that, there is no order of the court to the effect that he was permitted to represent the rest of the applicants. Legally speaking, there is only an application by the said Halfani Bakari Jumaa who, in his affidavit did not even disclose the names of 37 others. From the foregoing, (i) there is no proof that the said Halfani Bakari Jumaa was mandated by 37 others to file this application and (ii) applicants wants the court to grant a blanket extension of time to unknown 37 applicants. In my view, this is not proper. The names of the applicants has to be clearly disclosed to the court and the other party otherwise the order of the court will be uncertain as to who it will be issued.

From what I have discussed hereinabove, the alleged illegality fails to meet the test required for it to be a ground of extension of time. In the case of ***Hamis Mohamed v. Mtumwa Moshi,*** Civil Application No. 407 of 2019 (unreported) the Court of Appeal quoted the cases of ***Lyamuya*** (supra) and held that:-

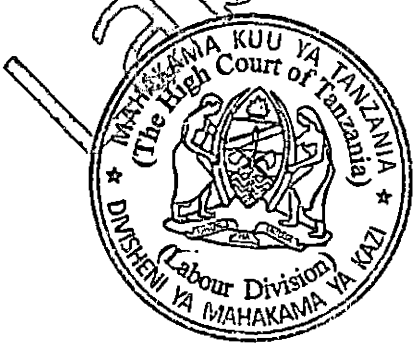
"It follows then that an allegation of illegality by itself suffices for an extension of time. However, such an allegation of illegality ***"must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process".***

The alleged illegality in my view is not apparent on record hence that ground fails.

From what I have demonstrated hereinabove, applicants failed to show good cause for the delay and failed also to account for each day of delay. The delay itself is inordinate as the application was filed after three years.

For all explained hereinabove, I hereby dismiss this application for lack of merit.

Dated at Dar es Salaam this 11th February 2022.



B.E.K. Mganga
JUDGE