

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**MISCELLANEOUS LABOUR APPLICATION NO. 712 OF 2019**

**BETWEEN**

**ACE DISTRIBUTORS (T) LIMITED.....APPLICANT**

**VERSUS**

**GABRIEL KIMWAGA.....RESPONDENT**

**RULING**

Date of Last Order: 27/10/2020

Date of Judgment: 10/11/2020

**Z.G. Muruke, J.**

Respondent Gabriel Kimwaga was an employee of the applicant, until retired on 25<sup>th</sup> November after attending 60 years old. He was paid all his dues on the same year 2016, however, referred dispute to CMA on 9<sup>th</sup> January 2017, claiming payments of 36 months' salary for unfair termination. The award was delivered on 4<sup>th</sup> April, 2018 in favour of the respondent. Applicant was not served with an award timely, thus filed an application for extension of time to file revision that was granted by this court, and given (twenty one) 21 days to file intended revision. Applicant failed to meet the time granted by this court, thus filed present application for extension of time for the second time.

Application is supported by an affidavit sworn by Issa Abdallah Chundo, applicant counsel. Respondent filed counter affidavit sworn by himself in opposition. Hearing was by way of written submission. Applicant was represented by advocate Issa Chundo and Melania Mashaguri represented respondent. Applicant submitted along lines affidavit in support of the application. In essence he submits that, extension sought is to correct irregularities in the award delivered in a dispute that was filed out of time. To the applicant there are legal issues to be discussed namely:-

- (i) **The proceedings of dispute CMA/DSM/ILA/R. 28/17/132 was time barred without being supported by condonation. According to page 1 of the award the dispute arose on 26<sup>th</sup> November 2016, and complaint filed on 9<sup>th</sup> January 2017 almost 45 days from the date of dispute while according to Rule 10 (1) of the Mediation and Arbitration Rules GN. 64/2007 require dispute concerning unfair termination to be filed within 30 days from the date of dispute.**
- (ii) **The Commission for Mediation and Arbitration had no jurisdiction to entertain and deliver award in dispute Number CMA/DSM/ILA/R. 28/17/132.**

Applicant counsel maintained that, plea of illegality as shown above is sufficient ground to extend time, referring **Etienes Hotel Vs. National Housing Corporation, Civil Reference No. 32/2005 CA DSM** (unreported) and **Kalunga and Company, Advocates Versus National**

**Bank of Commerce 2006 TLR 235.** In totality applicant counsel requested this court to grant application.

Respondent counsel on the other hand submitted that for an application like the one at hand to be granted following issue need to be taken into consideration.

- (i) **Whether the application has counsel for each day of delay.**
- (ii) **Whether applicant was diligent.**
- (iii) **Whether there is an illegality apparent on the face of record in the decision sought to be challenged.**
- (iv) **Whom between the parties stands to be prejudiced if time is extended.**
- (v) **Whether the applicant has provided sufficient reasons for delay.**

Ms. Melania Mashaguri for the respondent maintained that the applicant counsel admits on paragraph 12 of the affidavit, that they successfully prosecuted an application for extension of time and were granted 21 days to file an application for revision against the award in Labour Dispute No. CMA/DSM/ILA/R. 28/17 and failed to file within time granted by this court. The deponent, Advocate Issa Chundo further admits in paragraph 14 of his affidavit that, another Advocate from his office, one Hassan Twarah, was the one in conduct of the previous granted application, since its inception to its finality. And knowing that Mr. Chundo

had an emergency to attend to, he slept through and took no initiative in lodging the application within the granted time. The applicant waited and delayed for more than 75 days to file this application for extension of time even though the applicant was fully aware that they had slept through the time granted by this Court. Applicant only woken up by a summons for the execution of the CMA award as stated in paragraph 23 of the applicants affidavit hence resulting to an inordinate delay.

The applicant was informed that his application had been rejected on the 16<sup>th</sup> of August 2019, as per paragraph 21 of the affidavit, present application was filed on the 4<sup>th</sup> of November 2019, almost 3 months late. The Court of Appeal sitting at Dar es Salaam through **Ludger Benard Nyoni Vs. National Housing Corporation in Civil Application No. 372/01/2018** (unreported) had dismissed the application of a similar nature on grounds that, the applicant had failed to account for each and every day of delay. The same position has been taken by the Court of Appeal sitting at Mwanza in **Tanzania Fish Processors Limited Vs. Eusto K. Ntagalinda** through **Civil Application No. 41/08 of 2018** (unreported) insisted respondent counsel.

There are no correspondences between the advocate and their client to show that they took all measures to file the application for revision within the granted time to show diligence in prosecuting their case. Not even an affidavit from the said Advocate Twarah was lodged to fill in the gaps left visible by the deponent in instant application as stated in **Ramadhani J. Kihwani Vs. TAZARA, Civil Application No. 401/18 of**

**2018** specifically at pages 7, 8 and 9 of its decision. The same position had been taken by the Court of Appeal (Lubuva, J.A.) back in 2005 in **Paul Martin Vs. Bertha Anderson in Civil Application No. 7 of 2005** (unreported) at pages 6 to 8 of its decision holding that lack of diligence is not acceptable in granting an application for extension of time, submitted respondent counsel.

Having heard both parties submission, issue is whether applicant has advanced sufficient cause to warrant extension sought. Applicant counsel has all along narrated series of misfortunes that proved the saying that misfortune does not come **singular**. More so, he has not attached an affidavit of Advocate Hassan Twarah who was asked by applicant counsel to assist in filing revision on his behalf but failed. Affidavit is sworn evidence in writings, evidence to prove any averment is necessary. One would expect affidavit of Advocate Hassah Twarah to be part of evidence in the affidavit in support of the application, sworn by Issa Abdallah Chundo, but there is none.

This court granted applicant (21) twenty one days to file intended revision on 15<sup>th</sup> July 2019, but applicant failed to comply with court order. Court orders has to be complied with. None compliance, not only is a disrespect but create chaos on entire administration of justice. That cannot be left to happen.

Respondent counsel Melania Mashaguri correctly submitted that:- Applicant has not counted for each day of delay, Applicant counsel was not

diligent enough, applicant has not provided sufficient reasons for delay. I correctly hold so. Indeed, it is my view that applicant case does not only demonstrate lack of seriousness and diligence, but also gross negligence on the part of the counsel for the applicant in handling the affairs of her client. In the case of **William Shija Vs. Fortunatus Masha 1997 TLR 213** the Court of Appeal held that negligence on the part of the counsel who caused the delay cannot constitute sufficient reason.

In Misc. Civil reference No. 14 of 1998 between Alison Xerox Sila Vs. Tanzania Harbours Authority, Court of Appeal (unreported) held that:

**"Lapses, inaction or negligence on the part of the applicant seeking extension of time, does not constitute sufficient cause to warrant extension of time under Section 14 (1) of the Law of Limitation Act Cap 89 RE 2002."**

Again, the Court of Appeal in the case of **Dr. Ally Shabhay Vs. Tanga Bohora Jamaat [1997] TLR 305** had this to say:

*"Those who came to court must not show unnecessary delay in doing so. They must show great diligence".*

Unfortunately it is the acts and omission of the applicant that has delayed the wheels of justice. Respondent should not be unfairly treated because of applicant counsel's negligence. To permit the applicant, another application would neither be just, expeditious, economical, nor in the

interests of justice. From the records it is clear that the respondent is prejudiced by applicant conducts.

To the best of my understanding, the relief that the applicant is seeking is equitable in nature. Therefore, this court should **consider also the clean hands Doctrine** in determining the merit of the applicant's flawed applications. The clean hands Doctrine **precludes a party who is seeking equitable relief from taking advantages of his/her own wrongs.**

Applicant has failed to adduce sufficient cause, thus application is dismissed.



Z.G. Muruke

**JUDGE**

10/11/2020

Ruling delivered in presence of Issa Chundo for the Applicant and Melania Mashaguri for the Respondent.



Z.G. Muruke

**JUDGE**

10/11/2020