IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVIEW NO. 496 OF 2019

BETWEEN

PUMA ENERGY (T) LIMITED..... APPLICANT

VERSUS

KHAMIS KHAMIS..... RESPONDENT

RULING

Date of Last Order: 20/05/2020

Date of Judgement: 29/05/2020

Aboud, J.

The Applicant, Puma Energy (T) Limited filed the present application seeking review of ruling by this Court dated 02/08/2019 which was struck out on Revision application number 323 of 2019 for being filed out of time. The application was made under the provisions of Rules 27 (2), 27 (2) (a) (c) 27 (7) of the Labour Court Rules, GN No. 106 of 2007 (herein the Rules).

The application emanates from the court's order on Revision No. 901 of 2018 which was to the effect that:-

> "In the circumstance of the case, the court grants leave to the applicant to file a fresh and proper application for the last time. The application is to be filed within seven days from this order".

Applicant filed fresh application which was registered as Revision No. 323 of 2019. It was timely barred. The objection was raised by the respondent to the effect that the application was time barred and conceded by the Applicant's Counsel. Hence the court proceeded to struck out the application. Dissatisfied by the Court's order on Revision No. 323 of 2019 the applicant filed the present application for the Court to review its decision.

The matter proceeded by way of written submissions. Both parties were represented by Learned Counsels; Mr. Gasper Nyika was for the applicant while Mr. Evold Paul Mushi was for the respondent. During hearing the applicant abandoned the second ground of review as it appears in the memorandum of review. He thus, only submitted on one ground to wit:-

(a) The Honourable Court erred in law and fact in holding that by filing the revision on 10th April, 2019, the applicant had

filed the revision outside the 7 days from the 3rd of April, 2019 as ordered by the Court. In particular the Court erred in failing to exclude the day on which the order was made as required by section 19 (1) of the Law of Limitation Act [CAP 189 R.E 2002].

Arguing in support of the application Mr. Nyika submitted that, there was a printing error that Rule 27 (b) alone cannot stand as a ground for review. He stated that Rule 27 (2) of the Rules is impari matiria with Order XLII Rule 1 (1) (a) and (b) of the Civil Procedure Code, [CAP 323 RE 2019] (herein the Code) Hence the Court should invoke its powers provided under Rule 55 (1) of the Rules to read and construe Rule 27 (a) and (b) as it appears in Order XLII Rule 1 (1) (a) and (b) of the Code.

He submitted that, it is clear from the record that the court made an order on 03rd April, 2019 that the applicant had to file an application for review within 7 days from that date. The application was filed on 10th April, 2019 which was not outside the time granted to do so. He argued that it is the requirement of the law under section 19 (1) of the Law of Limitation Act that in computing the

period of limitation for any proceedings, the day from which such period is to be computed shall be excluded.

The learned Counsel further submitted that, in the case at hand the date of the order 03/04/2019 should have been excluded, and if that day is excluded the seventh day fell on 10th April, 2019, the date when the applicant exactly filed his application for revision. He stated that both the Court and the parties concerned did not consider the exclusion provided under section 19 (1) of the law of Limitation Act, [CAP 89 R.E 2002] (herein the Limitation Act). To tighten his argument he cited the cases of **KEC International Limited Vs. Azania Bank Limited, Commercial Case No. 152 of 2015**, Dar es Salaam (unreported) and the case of **Ebrahim Haji Charitable Center vs. Mashaja Kawimba, Revision No. 264 of 2017**, Dar es Salaam (unreported).

He further submitted that, the matter was not within the knowledge of applicant's counsel who appeared on 16/07/2019, since on that particular date the matter was scheduled for mention with a view of fixing hearing date. Hence the counsel who appeared for the applicant was not well equipped to address the Court on the point which led to erroneous concession. He submitted after due diligent

research they discovered that their revision application was within time, therefore they decided to refer the matter to Court for review.

He argued that there is sufficient reason to grant the application because there was a pure mistake in the computation of days which led to miscarriage of justice. He therefore prayed for the application to be allowed.

In reply Mr. Mushi submitted that, it is undisputed fact that, the applicant via his advocate Mrs. Agapiti conceded to the preliminary objection raised by the respondent to the effect that the application was filed out of time contrary to the Court's order and she prayed for the application to be struck out as indicated at page 2 and 3 of the impugned order.

The learned Counsel strongly submitted that, the applicants ground for review falls within the ground of appeal. He argued that, when a fact is raised that a Court made an error on law or fact cannot move the same court to correct itself. To robust his argument he referred the Court of Appeal case of **Elia Kasalile & others Vs. Institute of Social work**, Civ. Appl. No. 187 of 2018 (unreported) which affirmed the position that misconstruing a statute or other provision of the law cannot be a ground of review.

He submitted that, on 03/04/2019 the court ordered the applicant to refile their application within seven days from the order. He argued that the seven (7) days granted were not provided by the Limitation Act but were only based on discretionary powers of the court. He said the seven days granted to the applicant was from 03/04/2019 and ended on 09/04/2019 as was clearly reflected by the court that, the date of the order was included. The learned Counsel submitted that Section 19 (1) of the Limitation Act does not apply on period not provided by it or any written law. He stated that the Law of Limitation Act and Interpretation of laws Act, [CAP 1 RE 2002] under section 60 (1) which referred by the application his submiss are for computation of time prescribed in written laws not on period granted by court while exercising its discretionary powers. He further argued that the case of **KEC International Limited** (supra) cited by the applicant signify how computation of time is applicable for time given under the written law and not the order of the Court based on its discretion it was in this matter.

With regards to the application of Rule XLII Rule 1 (1) (a) of the Code he submitted that, the decision which form basis of this application resulted from the applicant's admission to the preliminary

objection that the matter was indeed time barred. He argued that if an error made by the court the court made on its ruling it is not an error on face of record as the Court made a decision on implementation of its own order; such an error could only be a good ground for appeal not review. In conclusion the learned Counsel vehemently argued that the ground advanced by the applicant to be ground for review and the reason developed in his submission does not hold water to allow the application. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Nyika reiterated his submission in chief and insisted that in this case the Court made an error in computation of time for not excluding the day when the order was made. He stated that the Court never proceeded on incorrect exposition of the law as submitted by the respondent's Counsel.

The Learned Counsel submitted that the case of **Elia Kasalile and others** (supra) is totally distinguishable with this matter. That in the cited case, Court of Appeal dealt with what relief to grant following a finding of unfair termination by the Arbitrator or Judge of a High Court Labour Division, hence it was ruled that the exercise of discretionary power is not a ground of review.

The Learned Counsel argued that in this case he is not asking the Court to review its decision resulting from exercise of discretionary power but to review a decision finding that the application for revision was time barred.

On whether the law of limitation applies to written laws only and not court order he submitted that, section 19 of the Limitation Act applies to any proceedings that has been filed in any court hence the respondent's submission is misconceived. He stated that, court order also applies to the provision of the law. He therefore prayed for the application to be allowed.

Having gone through the argument of both parties, I believe this court is called upon to determine the following issues; whether the circumstances of this case empowers the Court to invoke Rule 55 (1) of the Court Rules and resort to the application of The Civil Procedure Code, secondly is whether the application at hand can be reviewed.

On the first issue the applicant urged this court to invoke the provision of Rule 55(1) of the Rules and apply the ground of review

provided under Order XLII Rule 1 (1) (a) (b) of the Code. Rule 55 (1) of the Rules is to the effect that:-

> "Where a situation arises in proceedings or contemplated proceedings which these Rules do not provide the Court may adopt any procedure that it may deem appropriate in the circumstances".

The applicant argued that, Rule 27 (a) of the Rules cannot stand alone. However the court noted that the applicant in his submission referred to this court on non existing provisions of the law. He referred to Rule 27 (a) 27 (b) which do not exist at all in the Rules. The proper citation would have been Rule 27 (2) (a) and Rule 27 (2) (b) of the Rules. Consequently this Court will not labour much to discuss his submission on that particular aspect as his arguments are from non-existing provisions.

The Court has considered the applicant's prayer of invoking Rule 55 (1) of the Rules in the present application. As cited above the relevant rule is applicable where the situation arises in proceeding or contemplated proceeding in which the Rules did not provide. In the situation at hand the grounds for review are provided under Rule

27 (2) of the Rules, hence this Court can not resort to the Code to a circumstance specifically provided in the Rules. Therefore the applicant ought to adhere to the stipulated provision of the Rules without any excuse.

On the second issue as to whether the application at hand can be reviewed. The applicant's ground of review is that the Court made an error in computing time on the basis of the Law of Limitation. Now the question to be addressed is does that error falls within the grounds for review? In the case of National Bank of Kenya Limited Vs. Ndungu Njau [1997] ERLR cited in the case of **Elia Kasalile & Others Vs. Institute of Social work** (supra) it was held that:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. **Nor can it be a ground for review that the court**

proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgement which is not permissible in law. An issue cannot be reviewed by the same court which had adjudicated upon it.

[Emphasis is mine]

In the matter at hand the applicant submitted that the court erred in computing time without considering the provision of the law of limitation Act. In my view as rightly submitted by the respondent

that is not a new fact discovered by the applicant. The applicant Counsel he is presumed to have knowledge of the existing of the Law of Limitation Act and he would have raised the point of exclusion of the date of the order instead of conceding to the preliminary objection. If the court did not consider such a provision of the law it is a good ground for appeal but not review. Review is defined in a legal dictionary to mean a judicial reexamination of the case in certain prescribed and specified circumstances, reconsideration by the same court often used to express what an appellate court does when it examines the record of the lower court. Going through the records the applicant did not submit on the Law of Limitation Act instead the Counsel conceded to the application, therefore inviting the court to compute time based on that law is nearly as inviting the court for retrial which cannot be done by this court.

Mr. Nyika also urged the Court to compute time as it is provided under section 19 (1) of Limitation. The relevant section is to the effect that:-

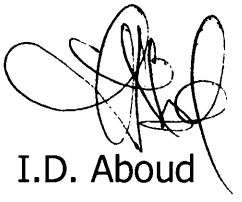
> "In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded".

As ruled above the matter can be determined through appeal therefore this court will not be Labour on the application of the Limitation Act. The record reveals that, it is true on 16/07/2019 revision application No. 323 of 2019 was scheduled for mention. On that particular date Mrs. Agapiti appeared as the applicant's counsel, she notified the Court that the respondent has raised two preliminary objections and when she was asked for her view on the objections raised she conceded that the application is time barred and therefore prayed for the same to be struck out. In my view the Counsel being a court officer reminded the court on the existence of the preliminary objection and she readily proceeded with hearing of the preliminary objection. In any case if she was not ready to argue the preliminary objection, she would have notified the Court and prayed for a hearing date but was not the case. Thus, the Court had no any other option than to decide the matter according to the governing labour laws.

On the basis of the above discussion the Court considers that, the application for review was not a proper remedy to the applicant following the order which struck out Revision application no 323 of 2019. It is in the regard that if the applicant was aggrieved by the court's order dated 02/08/2019 in Revision No. 323 of 2019 on the

grounds established in this application, he ought to have appeal instead of opting for a review. Hence the present application is dismissed for want of merit.

It is so ordered.



I.D. Aboud

JUDGE

29/05/2020