IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLENOUS APPLICATION NO. 271 OF 2019

BETWEEN

MOHAMED MASHINA.....APPLICANT

AND

TANZANIA WOMEN BANK PLC.....1ST RESPONDENT

TPB BANK PLC.....2ND RESPONDENT

RULING

Date of Last Order: 28/09/2020

Date of Ruling: 13/10/2020

A. E. MWIPOPO, J

This is an application for extension of time to file Revision in this Court against the decision of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.497/18/457 delivered by Hon. Mbena M.S., Arbitrator, on 6th March, 2019. The applicant namely Mohamed Mashina is praying for the Court to grant extension of time to the Applicant to lodge an Application for Revision out of time against the arbitral award made by the Commission for Mediation and Arbitration [Hon. Mbena, M.S., Arbitrator] dated 15th March, 2019 in Labour Dispute No.

CMA/DSM/ILA/R.497/18/457. The Applicant is also praying for the Court to grant any other order that it may deem fit and just to grant.

The application is supported by affidavit of the Applicant Mohamed Mashina. In paragraph 11 of the affidavit, the Applicant demonstrated five grounds of the application as hereunder outlined:-

1. That, I was not informed of the date of the delivery of the award by the CMA nor from my Advocate and only discovered by chance that the award was issued when I made a follow up at the CMA after noticing that time was running. Therefore, I was prevented by sufficient and reasonable cause centering on lack of awareness of the issuance of the award.
2. That I have been diligent in following up my complaint at the CMA without failing and therefore my conduct was not dilatory at any time.
3. That immeadiately after being informed on the issuance of the award on the 10th April, 2019 I informed my previous lawyer Yohana Ayali to pick the award and was so picked on 15th April, 2019. I aver that upon picking the award I started to look for another advocate to assist me in applying for the revision on account of the previous

advocate being engaged and committed in other assignments. I further aver that on 13th May, 2019, I obtained the services of Mr. John Seka and immediately without further delay filed this application.

4. That the intended application for revision is meritious on account of illegality of the CMA award which wrongly assumed and proceeded on the ground that I am public servant while evidence available prove that I was not a public servant but rather an employee of an incorporated company.
5. That the intended application for revision is meritious on account of illegality of the CMA award which wrongly assumed and proceeded on the ground that my complaint to the CMA was prematurely filed on ground that I was not terminated while there is clear evidence in terms of Annex Muddy 1 which clearly/ by necessary implication proved that I was terminated and ordered to go home.

Both parties to the application were represented, Mr. John Seka, Advocate, appeared for the Applicant, whereas Mr. Emmanuel Mbuga, Advocate, appeared for the Respondent. The Court ordered hearing of the application to proceed by way of written submissions.

The background of the application in brief is that: the applicant was employed by the 1st Respondent as a driver from 1st September, 2009 until 06th April, 2018. on 06th day of April, 2018, the applicant was given a letter dated 6th April, 2018 with instructions to hand over to the Human Resources Department the car keys, office phone, and medical insurance cards. The Applicant did make an inquiry to the First Respondent's Human Resources Officer, as to the reason to hand over the employer's property and was verbally informed that from that day he was no longer an employee of the first respondent. Aggrieved by the decision the Applicant referred the dispute to the Commission for Mediation and Arbitration which delivered its award on 15th March, 2019 in favour of the Respondents. The Applicant was not satisfied with the Commission award and filed the present application for extension of time to file Revision Application.

Mr. John Seka submitted in support of the application that on 15th March, 2019, the CMA issued its award which aggrieved the applicant herein. The applicant was desirous to file a revision but discovered that his intended application for revision was out of time on account that the law requires that the application for revision to be filed within 42 days from the date of the award. Furthermore, the said 42 days of applying for revision ended on 27th day of April, 2019. The circumstances under which the Applicant failed to

apply for revision within time is that the CMA award was given on a day and time of which Applicant was not aware. Thus, the Applicant and his advocate could not attend as no summons was issued to notify them the day of delivering the award and the CMA records testify to that.

The applicant upon knowing that the award was given and it was not favourable to him, wanted to file a revision and the process was made difficult because, he couldn't find an advocate within the short time span of time who could help him to file Revision Application within time. It is on this account that by the time the Applicant engaged the services of John Seka, on legal aid basis, the time to apply for revision has elapsed.

The applicant argued that he lodged the application for extension of time believing that the same can be granted by the court upon demonstration of existence of sufficient cause to allow extension of time. This was the position of this Court in the case of **Zan Air Limited Vs. Othman Omary Mussa**, Misc. Application No. 285B of 2013, High Court, Labour Division at Dar Es Salaam; and in the case of **Alyson Peter Gilman Vs. A to Z Textile Mills Ltd**, Revision No. 6 of 2013, High Court Labour Division at Arusha. In the case at hand, the applicant delayed to lodge an application for revision due to Advocate seeking for legal representative and lack of awareness on time limitation. Therefore the court be pleased to grant

the leave to file the application for revision out of time because the termination is deemed to be substantive and procedurally unfair, unconstitutional and against labour practices. There were no genuine reason for employee termination and the Arbitrators award suffered from material irregularity or illegality in the exercise of his jurisdiction.

It was argued by the Applicant it is established in law that sufficient reason is pre condition for the Court to grant extension of time. Rule 56(1) of the Labour Court Rules 2007 provide that the court may extend or abridge any period prescribed by these rules on application and on good cause shown. Hence, the delay was not caused by dilatory conduct or lack of diligent of the applicant. The Counsel for the Applicant prayed for this Court to grant application for extension of time to lodge an application for revision out of time against arbitral award made by Commission for Mediation and Arbitration.

In reply, Mr. Emmanuel Mbuga, the Counsel for the Respondent submitted that the applicant has not shown sufficient reason for this Court to discharge its discretion. On the first ground which the Applicant states that he was not informed either by the Court nor his advocate on the date of ruling and he only discovered the same after his own effort in the CMA, he submitted that the applicant was represented by an advocate in the CMA,

in the hearing process and they even filed final submission. It was their duty to attend in the Commission to make following up of their matter. The applicant was negligent in following up of his matter not only to the court but also to his advocate. Several times this Court has held negligence on parties is not a sufficient reason for extension of time. To support the position the Respondent cited the case of **Director General – PCCB vs. Frank Ipyana**, Labour Revision No. 23 of 2009, High Court, Labour Division at Dar Es salaam, (Unreported).

The respondent submitted on the second ground that the applicant has been throwing blames to his former advocate as states in para 11(a) of his affidavit and also as in the submission the counsel mentioned the case of **Zan Air Ltd Vs. Othman Omary Mussa**, (Supra), to substantiate the point. The blames as to the advocate not informing the applicant on the date of award are unsubstantiated anywhere with proof. There is no any evidence or there was no any affidavit from the said advocate that he did not inform the applicant. Without the said affidavit this Court cannot rely on the said information. This position was held by the Court of Appeal in the case of **Guardian Limited & Another vs. Justin Nyari**, Civil Application No. 87 of 2011, the Court of Appeal of Tanzania, at DAR Es Salaam, (Unreported).

The applicant has stated in paragraph 11(c) of the Affidavit that he was informed on 10th April, 2019 that the CMA award has already been delivered and he informed the counsel on the same date to collect the said award of which he collected it on 15th April, 2019. Further form that date until 13th May, 2019 the applicant used the said time to find a legal representative until on 13th May, 2019 when he found his counsel whom the applicant states he filed this application. It has been held several times by the High Court and the Court of Appeal that the time looking for a legal counsel is not a sufficient reason to grant extension of time. The court cannot measure the degree of lateness due to the said search of counsels.

In the present circumstance, the Applicant who is in Dar es Salaam used a month to find a counsel. This cannot be true. The counsel engaged by the Applicant was supposed to swear an affidavit stating the same and the period he used in preparation of the said application. In support of the argument, the applicant cited the case of **Azizi Mohamed vs. The Republic**, Criminal Appl. No. 84/07 of 2019, Court of Appeal of Tanzania, at Mtwara, (Unreported).

The Respondent submitted further that the Applicant have not accounted for the delay from the period he became aware of the award on 10th April, 2019 where he informed his counsel on the same date to 15th

April, 2019 when the Counsel collected the said award. There is no any explanation from the said 10th April, 2019 to 15th April, 2019 of what the applicant or the advocate were doing. There is no any letter requesting for the award attached in the application. It is a trite law that for one who is requesting this honourable court to discharge its discretion in extending time has to provide sufficient reason that has to fit in each day of the delay. This was the position of the Court of Appeal in the case of **Abdu Issa Bano vs. Mauro Daolio**, Civil Application No. 563/02 of 2017, the Court of Appeal of Tanzania, at Arusha, (Unreported).

The Counsel for the Respondent submitted on the Applicant's third ground that the CMA award is tinted with illegalities that not all point of revision turns to be illegality. The applicant reasons of illegality is found in paragraph 11 (e) of Applicant's Affidavit. The Illegality is that the Arbitrator erred in law for ruling that the applicant was terminate and while there is evidence to prove that he was terminated. However, the Arbitrator did act according to the evidence tendered. There was no any termination letter to prove that the Applicant was terminated. The Applicant was required to submit the certificates and other documents of which he decided on his own will not to and lodged a claim in CMA. Even if the said illegality is present something which we strongly dispute, the applicant was required to explain

it sufficiently rather than stating the same in a passing way as shown in his affidavit and submission. To support the position the Respondent cited decisions of Court of Appeal in the case of **Moses Mchunguzi vs. Tanzania Cigarette Co. Ltd**, Civil Reference No. 3 of 2018, The Court of Appeal of Tanzania, at Bukoba, (Unreported); and in the case of **Abdu Issa Bano vs. Mauro Daolio**, Civil Application No. 563/02/2017, Court of Appeal of Tanzania, at Arusha, (Unreported).

Regarding the Applicant submission that the applicant was not aware of the time limit of lodging an application for revision, the Respondent submitted that this is a new ground which was not presented before in the affidavit. The Respondent is of the view that any ground intended to be place before this Court must be presented in the affidavit and not in the submission. The same was laid in the case of **TUICO at Mbeya Vs. Mbeya Cement Co. Ltd, TLR (2005)** at page 48. The reason that the applicant did not know the rules of procedure concerning time limit is not a sufficient reason to extend time. The Court of Appeal in the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis**, Civil Reference No. 8 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), held that:-

> *"It is trite law that ignorance of the law is not an excuse and hence, cannot stand as a good cause for delay".*

The Respondent then prayed for the application to be dismissed as no sufficient reasons were explained by the Applicant.

The Applicant did not file any rejoinder submission.

From the submissions, the issue for determination is whether the applicant have provided sufficient reasons for the Court to grant him extension of time to file the revision application out of the time prescribed by the law.

As it was submitted by the Counsels for both parties, the general principle is that it is a discretion of the Court to grant an application for extension of time upon a good cause shown. In the case of **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, (Unreported) the Court of Appeal held that:

> *".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."*

A good cause also may depends on the circumstances of each case as it was held in the case of **General Manager Tanroads Kagera vs. Ruaha Concrete Company Ltd**, Civil Application No. 96 of 2002, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), that, I quote:-

> *"What constitutes "sufficient reason" cannot be laid down by any hard and fast rule. This must be determined by reference to all the circumstances of each particular case."*

In the present case the applicant submitted that the delay in filing the application was for a main reason that the CMA award was given on a day and time of which the Applicant was not aware. The respondent is of the view that the Applicant who was represented during the hearing before the Commission were negligent to appear on the date of delivery of the ruling and failed to account for the delay.

The evidence available in the record shows that the Commission Award was delivered on 15th March, 2019 in favour of the Respondents. The present application was filed on 15th May, 2019. The Applicant stated that he was not aware of the date of the delivery of the award neither his Advocate and he became aware of the delivery of the Award on 10th April, 2019, where he informed his lawyer on the same date. The lawyer did pick the Award on 15th April, 2019. He did find another Advocate to take over the

application for revision and he was able to engage Mr. John Seka Advocate on 13th May, 2019 and the present application was extension of time was filed on 15th May, 2019.

The Employment and Labour Relations Act, 2004, provides in section 91 (1) (a) that any party to an arbitration award who alleges a defect in any arbitration proceedings before the CMA may apply to the Labour Court for a decision to set aside the arbitration award within six weeks of the date that the award was served on the applicant. In this application there is no evidence to support the Applicant's assertion and submission. There is no copy of the respective CMA award which was attached to the application to show as to when the Award was served to the Applicant. The applicant was supposed to prove that the Award was served in delay and there is nothing to prove that.

As it was submitted by the Respondent, the Applicant was represented by the Lawyer during the hearing of the dispute before the Commission. The Commission had no duty to serve the Applicant in person as he was represented. Also there is no evidence in record to show as to when that the CMA Award was delivered to the Applicant's Advocate. Therefore, the Applicant's allegation in the affidavit and submission has no proof.

In application for extension of time the Applicant has duty to account for every day of the delay. This was held by the Court of Appeal in the case of in the case of **Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another**, Civil Application No. 278/15 of 2016 (unreported) that;

> *"...any applicant seeking extension of time is required to account for each day of delay."*

The Court of Appeal was of the same position in the case of **Abdu Issa Bano Vs. Mauro Daolio**, (Supra).

The applicant in the present application did not account for the delay as submitted by the respondent. The Applicant stated that he became aware that the Commission have already delivered it's ruling on 10th April, 2019 and he informed his lawyer. The lawyer did went to pick the ruling on 15th April, 2019 which is five days later. There is no explanation at all for these five day delayed. Further, there is no explanation as to why it took the Applicant until 13th May, 2019, which is almost 28 days later for the Applicant to find another lawyer. The applicant was supposed to account for these delays and he failed to do so.

The applicants also relied on illegality as the ground for extension of time to file revision. He submitted that the CMA award is a tinted with

illegalities that not all point of revision turns to be illegality. The applicant reasons of illegality is found in paragraph 11 (e) of Applicant's Affidavit. The Illegality is that the Arbitrator erred in law for ruling that the applicant was not terminated while there is evidence to prove that he was terminated. The Applicant referred to attachment namely Annex Mudy to prove the allegation. However, not all points of law are illegalities. The same has to be important point of law apparent on the face of record of the impugned decision or illegality is on the jurisdiction of the court which deliver the impugned decision. This was the position of the Court of Appeal in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of** (supra), where it held that:

> *"Since every party intending to appeal seeks to challenge the decision either on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process"*

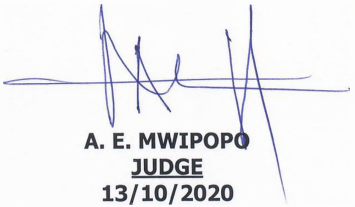
The same position was emphasized by the Court of Appeal in the case of **Omary Ally Nyamalege and 2 Others vs. Mwanza Engineering Works,** Civil Application No. 94/08 of 2017, Court of Appeal of Tanzania, at Mwanza, (unreported) where it was held that;

> *"... such point of law must be of sufficient importance and I would add that it 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"*

Unfortunately, in the present application the Applicant did not attach a copy of the CMA Award for the Court to see if there is important point of law apparent on the face of impugned Award. Even the alleged illegality appears to be a normal ground of revision as the Applicant challenges the decision of the Arbitrator who held that the Applicant was not terminated. The Applicant is of the view that there is evidence to prove that the Applicant was terminated and he referred to Annex Mudy 1. I'm of the view that this does not appear to be important point of law. Also, in absence of the Commission Award the Court is not in a position to know whether Annex Mudy 1 was tendered and formed part of the record. Thus, there is nothing at all to prove that there is point of illegality apparent in the face of record.

Therefore, I find that the application have failed in its totality to satisfy this Court to extend the time for filing revision application out of time.

Consequently, the application is hereby dismissed for want of merits. No order as to cost.



A. E. MWIPOPO
JUDGE
13/10/2020