

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

REVISION APPLICATION NO. 863 OF 2018

BETWEEN

ABAS ABDUL WAHABU.....APPLICANT

AND

HAMZA R. SAID.....1ST RESPONDENT

JUDGMENT

Date of Last Order: 18/09/2020

Date of Ruling: 30/10/2020

A.E. MWIPOPO, J

The Commission for Mediation and Arbitration delivered an ex-parte ruling in favour of Respondent namely Hamza R. Said in Labour Dispute No. CMA/DSM/TEM/365/2016, on 3rd July, 2018, before Hon. Mbena, Arbitrator. The dispute was referred to the Commission by the Respondent following the act of the Applicant namely Abas Abdul Wahabu to terminate the employment of the Respondent on 15th November, 2017. The dispute was heard in *Exparte* following the failure of the Applicant to appear before the Commission. The Applicant was served with the *Exparte* Arbitral Award on

5th July, 2018, and on 5th August, 2018, the Applicant was served with Execution application No. 412 of 2018. Aggrieved by the Commission *Exparte* Award the Applicant filed the application to set aside the *Exparte* Award before the Commission on 13th September, 2018. The Commission delivered its ruling on 26th October, 2018, where the application was dismissed for being filed out of time. Dissatisfied by the Commission Ruling the Applicant filed the present revision application.

The Applicant prayer is for the Court to be pleased to call for and examine, revise and set aside ruling made by the Commission for Mediation and Arbitration by Hon. Mbena, M.S., Arbitrator, dated 26th October, 2018, in Labour Dispute No. CMA/DSM/ILA/R.1242/17/62. The application is accompanied by Chamber Summons and affidavit affirmed by the Applicant. There are two grounds of revision contained in paragraph 24 of the affidavit. The grounds are as follows:-

1. That the Arbitrator erred in law and fact by holding that there was no reason for the delay while there was ample evidence proving that the Applicant's father was sick and was admitted at Agha Khan Hospital. The patient needed a close care and the Applicant being

the only person to take care of him and the Respondent admitted and acknowledged to know the Applicant's father being sick.

2. That the Arbitrator erred in law and fact in failing to grant an extension of time to the Applicant while the Applicant had alleged illegalities and irregularities in the said *Exparte* arbitral award and one of them being determination of the said matter was based solely on hearsay evidence from Respondent's witnesses.

The Applicant in this application was represented by Mr. Richard Madibi, Advocate, whereas the Respondent represented himself. The Court ordered hearing of the application to proceed by way of written submissions.

The Counsel for the Applicant submitted on the 1st ground of revision that the Arbitrator erred in holding that there were no sufficient reasons for extension of time while the Applicant advanced sufficient reasons on record which was even admitted by the Respondent that the Applicant's father was sick. The extension of time is discretion of Court upon Applicant's showing good reasons for the same. The Applicant was taking care of his sick father at Agha Khan Hospital, Dar Es Salaam as evidenced in receipt for various medical treatment on various dates in 2018. The Applicant lacked time to handle other business including attending cases or filing application as the

patient was in coma. Sickness is sufficient reason for extension of time as it was held in **John David Kashekya vs. The Attorney General**, Civil Application No. 1 of 2012, Court of Appeal of Tanzania, (Unreported); **Emmanuel Maira vs. The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported); and **Fatuma Msagha vs. Rajabu Shabani and Another**, Misc. Criminal Application No. 29 of 2019, High Court of Tanzania, Dodoma Registry, (Unreported).

Then, the Applicant submitted on the second ground of revision that the Arbitrator erred in not extending time and setting arbitral award as the same is tainted with illegality and irregularities. The evidence adduced was hearsay and the award in page 3 based much on the hearsay evidence. The second and the third witnesses evidence was hearsay evidence. With such illegality and irregularity, it was reasonable for the Arbitrator to extend time to file application for setting aside *ex parte* CMA award. To support the position the Applicant cited the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia**, [1992] TLR 185; **VIP Engineering and Marketing Limited and 2 others vs. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7, and 8 of 2006,

(Unreported); and **Jehangir Aziz Abdulrasul vs. Balozi Ibrahim Abubakar and Another**, Civil Application No. 79 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported). The Applicant prayed for the Court to grant the application and to set aside the arbitral award.

In contention, the Respondent submitted that the Applicant was negligent to say that he was not aware of the existence of *ex parte* award delivered by the Commission. The Applicant was supposed to make follow up on what was going on before the Commission as he attended mediation sessions and ignored to appear in arbitration stage. The Applicant decided to remain quiet until he was served with the CMA *ex parte* award. This prove that the Applicant was not interested with the case. Rule 14 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007 gives authority to the Mediator to decide the complaint if the other party fails to attend mediation hearing. The Applicant was duly informed that the complaint was filed and he decided not to appear in arbitration stage. Thus, he cannot try to fault a judicious decision of the Commission. Under section 87(5) (b) of the Employment and Labour Relations Act, 2004, the Commission has powers to reverse a decision made in *ex parte* if is satisfied that there are good grounds for failing to attend the hearing. The

Respondent is of the opinion that the Applicant is wasting the precious time of the Court and jeopardize the interest of justice. The Respondent prayed for the application to be dismissed.

In rejoinder the Applicant retaliated his submission in chief and emphasized that he was not negligent but he was not aware of what was going on arbitration stage and that the Commission did not issue summons to the Applicant to attend the delivery of the award.

The issue for determination in this application is whether the applicant have sufficient cause for the Court to grant him extension of time to file the application to set aside CMA *Exparte* Award out of the time prescribed by the law. However, before determination of the issue I find it pertinent to revisit the CMA ruling dated 26th October, 2018, on Applicant's application to set aside the *exparte* award. The Arbitrator dismissed the Applicant's application to set aside the CMA *exparte* award for the reason that it was filed out of 14 days from the date the Applicant became aware of the arbitration award. The Arbitrator held that the Applicant did not give reasons at all for failure to file application to set aside the *exparte* award within time.

Back to the determination of the issue in dispute, it is a discretion of the Court to grant an application for extension of time upon a good cause shown. In **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302 of 2017, Court Of Appeal of Tanzania at Dar Es Salaam, (Unreported), it was held that the extension of time may only be granted where it has been sufficiently established that the delay was with sufficient or a good cause.

And what amount to sufficient cause was discussed by the Court of Appeal of Tanzania in the case of **Tanga Cement Company vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, at Tanga (Unreported) where it 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.”

In the present application, the Applicant have submitted that there are two grounds in support of the application for the extension of time to set aside CMA ex parte award. The first grounds is that the delay was caused by sickness of the Applicant's father who needed a close care from the Applicant; and the second ground is that there is illegalities and irregularities in the said Ex parte arbitral award that the award was based solely on hearsay evidence from Respondent's witnesses. The applicant in his submission stated additional ground that he was not served with summons to appear especially on the date of the delivery of the award.

The evidence available in records shows that when the dispute came before the Commission for mediation on 8th January, 2018, on 23rd January, 2018 and on 20th February, 2018, the Applicant appeared in person. But when the matter proceeded with Arbitration, the Applicant did not appear at all. The record shows that the Applicant was served with notice to attend (summons) for hearing on 8th March, 2018, and on 27th March, 2018, but he did not attend. It is in the record at page 9 of CMA typed proceedings that the Applicant admitted when submitting on his application for condonation

to set aside exparte award that he received summons after mediation failed. But, whenever he attended to the Commission on scheduled dates he arrived late to find the matter has already been adjourned to another date. This is sufficient evidence to prove that the Applicant was aware that the dispute was proceeding before the Commission.

The record shows that the Commission delivered its exparte award on 3rd July, 2018, and it was served to the Applicant on 5th July, 2018. The application for condonation and to set aside CMA exparte award was filed to the Commission on 13th September, 2018. The Labour Institutions (Mediation and arbitration) Rules, G.N. No. 64 of 2007, provides in rule 30(1) that, I quote:-

“An application by a party to correct or set aside an arbitration award in terms of section 90 of the Employment and Labour Relations Act shall be made within 14 days from the date on which the applicant became aware of the arbitration award.”

In the present case, the Applicant was served with the award on 5th July, 2018, but he filed the application for condonation to set aside the exparte award on 13th September, 2018, which is out of 14 days from the date he became aware of the award as provided by the law. In the application before the Commission, the Applicant did not provide any reason for the delay to

file the application. He provided reasons for his non-appearance before the Commission during arbitration stage. Therefore, the Commission rightly dismissed the application for condonation as there was no reason adduced by the Applicant for delay in filing application to set aside Commission *ex parte* award.

The Applicant submitted that there is illegalities in the Commission *ex parte* award that the award was based solely on hearsay evidence from Respondent's witnesses. Illegality is one of the good or sufficient cause for granting application for extension of time. In the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**, Court of Appeal of Tanzania, (Unreported), it was held that:

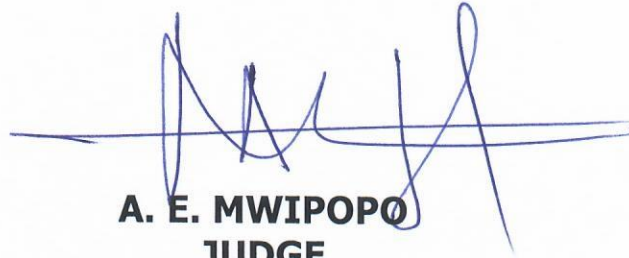
"Since every party intending to appeal seeks to challenge the decision either on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, 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"

From the decision the Court may grant an application for extension of time if there is illegality. However, such a point of law must be of sufficient importance and must also be apparent on the face of the record such as question of jurisdiction, not the point which its discovery will be drawn through a long argument or process.

In the present application the Applicant's point of illegality is that the award was based solely on hearsay evidence from Respondent's witnesses. However, reading the Commission exparte award it is clear that the award did not base its decision in the hearsay evidence. The Arbitrator held that the Respondent was Applicant's employee for the reason that there is no evidence to prove that the Respondent was not Applicant's employee. The evidence from Respondent and his witnesses proved that he was employed by the Applicant. The testimony of Hija Abas – PW2 and Francis Mtende – PW3 shows that they were seeing Respondent working in Applicant premises. This is not a hearsay evidence. The Arbitrator was of the opinion that the evidence of the Respondent and the witnesses proved that the Respondent was employed by the Applicant. Therefore, there is no point of law of sufficient importance and which is also apparent on the face of the

record in the application. Thus, it is my finding that the issue of illegality was not proved.

Therefore, I find that the applicant have failed entirely to show a good cause for the Court to grant him an extension of time to file application to set aside CMA exparte award. Consequently, the application is hereby dismissed and the CMA award is upheld. Each party to handle its own cost of the suit.

A handwritten signature in blue ink, appearing to read 'A. E. Mwiipo', written over a horizontal line.

A. E. MWIPOPO
JUDGE
30/10/2020