

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISC. APPLICATION NO. 143 OF 2020

BETWEEN

KMS TRANSPORT LTD.....APPLICANT

AND

ZAINAB H. MOHAMED.....RESPONDENT

RULING

Date of Last Order: 08/03/2021

Date of Ruling: 07/05/2021

A. E. MWIPOPO, J.

This is an application for extension of time to file Revision Application against Commission for Mediation and Arbitration (CMA) award in Labour Dispute No. CMA/PWN/MKR/07/2019. The Applicant namely KMS Transport Ltd prays for the order of the Court in the following terms:-

1. That, this Court be pleased to grant extension of time to file a revision out of time.
2. Any other order that this Honourable Court may deem fit to grant.

The application was accompanied with Chamber Summons supported by the affidavit affirmed by Applicant's Advocate namely Nasra

Hamisi. The Respondent namely Zainab Hassan Mohamed filed Counter Affidavit in opposition to the application.

The brief background of the dispute is that: The Applicant filed an application for extension of time before the Commission for Mediation and Arbitration to set aside Commission *ex parte* award. The application was dismissed in toto following decision of the Commission dated 20th January, 2020 to uphold the preliminary objection which was raised by the Respondent. The Applicant was not satisfied with the Commission decision and filed the present application for extension of time on 22nd April, 2020.

The Applicant was represented by Ms. Nasra Hamisi, Advocate, whereas the Respondent was represented by Mr. Deogratius Mwarabu, Advocate. The hearing proceeded by way of written submissions following prayer by the parties herein which was granted by the Court.

Submitting in support of the application, the Applicant's Counsel stated that the Applicant filed the application to set aside the *ex parte* arbitral award which was struck out by the Commission for its affidavit being defective. The Applicant filed another application to set aside the Commission *ex parte* award but the second application was also struck out for defective affidavit. The Applicant filed another application which was

determined and finalized by Hon. M. Batenga, Mediator, on 20th January, 2020. The Application was also struck out *in toto* for the reason that the affidavit in support of the application verified unknown paragraphs. The Applicant obtained the copy of the respective ruling on 27th January, 2020. On the 5th March, 2020 the Applicant filed revision application online through Judicial Case Management System (JSDS2) and the application was admitted on 6th March, 2020. The Applicant submitted the hard copy to the Court where it was found that parties in the online admitted application and in the hardcopy differs. Then, the Applicant decided to file the application for extension of time on 22nd April, 2020 as by that time the time limits for filing revision application has already lapsed.

The Applicant's Counsel averred that lack of knowledge to use the newly introduced online system was the reason for the Applicant's Counsel to delay in filing the respective revision. She is of the opinion that this is a good cause for the Court to grant leave to file application for revision out of time. In support of the position he cited the case of **Alfazi Nyatega and 3 Others vs. Caspian Mining Ltd, Civil Application 44/08 of 2017, (Unreported)**.

The Applicant Counsel averred that there is point of illegality in the respective arbitration *ex parte* award. She submitted that the respective

illegality is the act of the Mediator dismissing the application in *toto* while the remedy for defective affidavit is to strike out the pleading. Also, the reason used to dismiss the application cannot justify dismissal of the application since the defective paragraph of the affidavit cannot in itself render the affidavit defective. Hence, the decision is illegal. The Counsel cited in support of the position the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia, [1992], TLR, 185**. The Counsel is of the opinion that the respective illegalities amount to good cause to justify the extension of time. The Applicant Counsel prayed for the application be granted.

In reply to the Applicant's submission, the Respondent's Counsel submitted that the delay of filing the intended application for revision has been caused by illiteracy, laxity and ignorance of the Applicant's Counsel. The same should not be tolerated by the Court. It is a trite law that ignorance is not a good cause for extension of time as it was heard in the case of **Ngao Godwin Losero vs. Julius Mwarabu, Civil Application No. 10 of 2015, Court of Appeal of Tanzania, at Arusha, (Unreported)**. The Respondent is of the view that the Applicant is abusing Court process intentionally knowing that she is not subject to the

cost. The Applicant is negligent since he filed three consecutive defective affidavits. This portrays laxity and ignorance at high level.

The Respondent Counsel submitted further that the award was proper and there is no illegality in the award as an alleged illegality should not be one that would be discovered by a long drawn argument or process as it was held in the case of **Ngao Godwin Losero vs. Julius Mwarabu, (supra)**. The Respondent prayed for the Court not to grant extension of time in this application.

The Applicant did not file any rejoinder submission.

From the submissions, the issue for determination is whether the Applicant has 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 a general principle, it is a discretion of the Court to grant an application for extension of time upon a good cause shown, [See. **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, (Unreported); and **Praygod Mbaga V. Government of Kenya Criminal Investigation**

Department and Another, Civil Reference No 4 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported)].

Further, the word reasonable cause or good cause has been interpreted in several decisions of the Court to be a relative one dependent upon party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion [see. **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd**, Civil Application No. 13 of 2010, Court of Appeal of Tanzania, (Unreported). The good cause must be determined by reference to all the circumstances of each particular case.

The Court of Appeal observed in **Dar Es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), that:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly. The absence of any explanation for delay lack of diligence on the part of the applicant."

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, at Dar Es Salaam, (Unreported), the Court set the following principles in determination for the application for extension of time:-

- i. " The applicant must account for all period of delay;
- ii. The delay should not be inordinate;
- iii. The applicant must show diligence and
- iv. reasons, such as the existence of a point of law of sufficient importance not apathy negligence or sloppiness in the prosecution of the action that he intends to take; and
- v. If the court feels that there are other sufficient grounds such as the illegality of the decision sought to be challenged."

The Court of Appeal had similar position in the case of **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, (Supra), 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 case the Applicant submitted that the delay in filing the application was for the reason of lack of knowledge to use the newly introduced online system. The Applicant alleged that he filed revision application online through Judicial Case Management System (JSMS) on the 5th March, 2020 which was within time. The application was admitted on 6th March, 2020 only to find out that parties in the online admitted application and in the hardcopy differs. The Applicant decided to file the

application for extension of time on 22nd April, 2020 as by that time the time limits for filing revision application has already lapsed.

I'm of the opinion that the act of the Applicant to file online the application which contains different parties to the impugned CMA decision and the respective hard copy prove that the Applicant was negligent in handling the matter. This has nothing to do with being new in using the online filing system of the judiciary since he filed the application on time but the application filed contained wrong names of the parties.

Further, there is nothing on record to show as to when the Applicant discovered that the online admitted application and hard copy differs. This will assist the Court to see for how long the Applicant delayed to file the application. The evidence available in record shows that the 6 weeks for filing revision application in this Court lapsed on 10th March, 2018. The present application was filed on 22nd April, 2018 which means it was delayed for 42 days. The Applicant was supposed to account for each day delayed as it was held in the case of **Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another, Civil Application No. 278/15 of 2016, the Court of Appeal of Tanzania, (unreported)**. In the present case the Applicant did not account for the each day delayed at all.

Further, the Applicant submitted that there is point of illegalities in the respective Commission decision. I agree that the point of illegalities is sufficient ground for extension of time. However, the respective illegality has to be sufficient in content and apparent on the face of record as it was held in the case of **Stephen B.K. Mhauka vs. The District Executive Director Morogoro District Council and two Others, Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported)**. The question of illegality does not need to be discovered by a long drawn argument or process as it was held in the case of Ngao **Godwin Losero vs. Julius Mwarabu, (Supra)** and in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women’s Christian Association of Tanzania, (Supra)**.

In the present application the Applicant explain the illegalities alleged to be in the Commission decision is the act of the Mediator dismissing the application in *toto* while the remedy for defective affidavit is to strike out the pleading. Also, the reason used to dismiss the application cannot justify dismissal of the application since the defective paragraph of the affidavit cannot in itself render the affidavit defective.

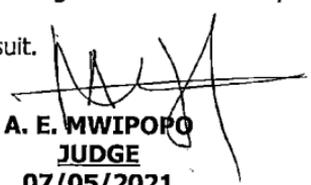
The Respondent is of the opinion that the alleged Illegalties does not qualify as they are not apparent on the face of records.

I will determine at first the Applicant's second point of illegality that the reason used to dismiss the application cannot justify dismissal of the application since the defective paragraph of the affidavit cannot in itself render the affidavit defective. This point does not qualify to be a point of law of great importance apparent in the face of record. The reason is that it needs a long drawn argument or process to be discovered. Thus, it is not apparent on the face of record. The Court need to see the respective affidavit in dispute which is not part of the record.

Regarding the Applicant's first point of the illegality that the Mediator dismissed the application in *toto* while the remedy for defective affidavit is to strike out the pleading, I have read the respective ruling of the Commission. It is very clear that the Commission delivered the ruling dated 20th January, 2020 following preliminary objection which was raised by the Respondent. The Commission upheld the preliminary objection and dismissed the application in *toto*. This is apparent error since it is a settled principle that when the matter is disposed of on preliminary objection it means that it was not determined on merits hence it has to be struck out. The matter is dismissed when it is determined on merits (see. **Yahaya**

Khamis vs. Hamida Haji Idd and 2 Others, Civil Appeal No. 225 of 2018, Court of Appeal of Tanzania, at Bukoba). And the remedies when the matter is dismissed is to appeal or file application for revision where there is no right to appeal, while, when the matter is struck out the remedy is to file a fresh application (**see. Tanzania Breweries Ltd vs. Edson Muganyizi Barongo and 7 Others, Misc. Labour Application No. 79 of 2014, High Court Labour Division, at Dar Es Salaam**). However, in the present application the Commission dismissed the matter for incompetence while it was not determined on merits. Thus, I find this is illegality apparent on the record.

Therefore, I find the Applicant succeeded to provide sufficient cause for the Court to extend time to file the intended revision application out of time on the point of illegality. Consequently, the Applicant is granted leave to file revision application against the ruling of the Commission for Mediation and Arbitration dated 20th January, 2020 in labour dispute no. CMA/PWN/MKR/07/2019. The Applicant has to file the intended revision application within 21 days starting to Count from today. Each party to take care of its own cost of the suit.



A. E. MWIPOPO
JUDGE
07/05/2021