

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 640 OF 2019

SINO CIGARETTE COMPANY LIMITED.....APPLICANT

VERSUS

YONA MWAIGOMOLE RESPONDENT

RULING

Date of Last Order: 02/06/2021

Date of Ruling : 09/06/2021

Z.G.Muruke, J.

Yona Mwaigomole (respondent) was employed by applicant as sale supervisor under two years renewable contract on 12th December, 2017. He was terminated on 21st March, 2018, having worked for three months only. He was dissatisfied by termination, thus filed labour dispute with reference number CMA/DSM/TEM/213/2018 on 28th March, 2018. Upon hearing both sides, Commission for Mediation and Arbitration (CMA) decided in favour of respondent, then applicant, and awarded salaries for the contract, together with certificate of service. Same it, thus, filed present revision raising two grounds

: award of the arbitrator is improperly procured hence ly.

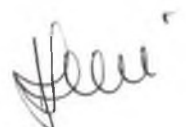
e arbitrator erred in law by accepting that there was termination and accept the prayers of the respondent.



Respondent filed counter affidavit sworn by Winfrida Magai an advocate, together with notice of preliminary objection that Revision application is time barred. On the date set for hearing of preliminary objection Anuary Katekweba represented applicant, while Moses Gumbo represented respondent.

Respondent counsel submitted that it is on records that, present revision application was filed 31st July, 2019, against an award issued on 17th June, 2019. Time provided by Section 91(1)(a) of ELRA, Cap 366 RE 2019 is 42 days. The law is clear, it states from the date the party is served. Affidavit filed in support of application sworn by Janerose Mutalitinya Human Resource Manager, at paragraph 7 it is said award was delivered on 17th June, 2019. There is no clause in the affidavit that says any other date that applicant was served with an award. Thus, the application filed on 31st July is out of time for 2 days. Therefore this court has no jurisdiction to entertain application filed out of time, without extension sought and given by the court, application should be dismissed for being filed out of time.

In response applicant counsel submitted that, applicant became aware of the case on 25th June, 2019 after receiving e-mail from the lawyer by then presiding over the matter at CMA. Section 91(1) of the ELRA provides for 42 days. The fact that the former lawyer for the applicant received the award on 17th June, 2019, but submitted to client on 25th June, 2019, entail clear negligence on former lawyer, thus applicant should not be punished as is not her fault, more so, he will be denied right to be

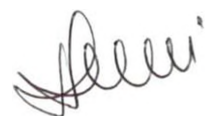


heard. In the case of **Nokia Solution & Network Tanzania Limited Vs. Montesa Lusinde** Misc. Application 500/2019, court insisted on the right to be heard and mistakes of an advocate should not be taken to punish the client.

It was further submitted that preliminary objection raised is contrary to principles in **Mikusa Biscuit Manufacturing Company Ltd Vs. West End Distributors** 1969 E.A 696, as it calls for evidence. Thus preliminary objection should to be dismissed and application be heard on merits.

This court having gone through the records,(CMA) there is no dispute that applicant was served with an award 17 June, 2019 through his counsel Mr. Omega Steven Myeya on the date decision issued by CMA. Time start to run after service and not on the very day of service. The above position get support from the decision of Court of Appeal in the case of **Serengeti Breweries Ltd Vs. Joseph Boniface**, Civil Appeal No. 150 of 2015 at Mbeya Mugasha, JA held that;

"...The plain and clear meaning of Section 91(1) of the ELRA is that, the limitation period of six weeks begins to run against applicant after the award is served on the applicant. The law is so couched because it is not open to the applicant to know if he is aggrieved with the award unless it is served to the applicant. Therefore, what the Labour Court concluded in its decision appearing at page 517 of the record that the time to file an application begins to run after the award is issued is a clear misinterpretation of the law... we wish to reiterate that, there is no ambiguity in section 91(1) (a) and it has to be invoked as stated."



According to interpretation of laws Act Part VIII on computation of time, in particular Section 60(1) read as follows:

- (a) **Where a period of time is expressed to be at, on, or with a specified day, that day shall be included in the period;**
- (b) **Where a period of time is expressed to be reckoned from, or after, a specified day, that day shall not be included in the period;**

Argument by applicant counsel that former applicant counsel submitted copy of decision 25th June, 2019, thus time should start to run from the time his client received a copy of decision cannot be accepted on the following reasons.

One; There is no any averment in the affidavit in that point. What is in paragraph 7 of affidavit sworn by Janerose Mtalitinga applicant Human Resource Manager is that award was delivered on 17th June, 2019. Issue of former applicant counsel delaying to submit copy of the award is new issue not part of the pleadings.

Two; Communication between applicant and her counsel is internal affair of their business, neither respondent nor the court is to be bound.

Three; If issue of former counsel delay to submit award were to be taken seriously, then, should have been reasons for extension of time by applicant where relevant communications will be attached.

Four; Assuming without accepting that former counsel, forwarded the award to applicant on 25/06/2019, yet, applicant had 36 days left before filing the revision application, but failed to do so within that time.

Applicant raised issue that, preliminary objection raised issue not point of law, as it requires evidence citing famous case of Mikusa Biscuit (Supra). With due respect, Mr. Katekweba has misleded himself on the case cited. At page 700 of Mukisa Biscuit case (supra) it was held that;

So far as I am aware, a preliminary objection consists of a point which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of time limitation, or a submission that the parties are bound by the contract giving to the suit to refer the dispute to arbitration.

Equally so, in the case of Shahida Abdul Hassanali Kasam Vs. Mahed Mohamed Gulamali Kanji, Civil application No. 42 of 1999 (unreported), Court of Appeal expressed view on the point in similar terms when it said.

The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily.

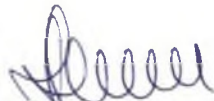
Preliminary objection raised is on time limitation, it is point of law, that does not need evidence to prove. Therefore, argument by applicant counsel is a misconception. It is worth insisting that, limitation of time in dispute controls litigants as to the time limit within which to file certain dispute without law of limitation court will have endless litigation at the whims of the parties.

Court of Appeal of Tanzania in the case of Hezron M.Nyachiya Vs. Tanzania Union of Industrial and Commercial Workers and Organization of Tanzania workers union, Civil Appeal No. 79/2001, held that:-

"Generally speaking, the law of limitation plays many roles including the following:-**One;** to set time limit within which to institute proceedings in a court of law. **Two;** to prescribe the consequences where proceedings are instituted out of time without leave of the court. Where the period of limitation for any proceedings is prescribed by any other written law, the provisions of the law of limitation apply as if such period of limitation had been prescribed by the law of limitation Act."

According to the copy of the award issued on 17th June, 2019 at page 9, applicant advocate by then and respondent both signed to have received the copy of the decision. From 17th June, 2019 -31st July, 2019 when this application for revision was filed it is a period of 44 days, while the law Section 91(1)(a) of the employment and Labour Relations Act prescribes for 42 days. Thus, revision is out of time for 2 days. Case of **Nokia Solution & Network Tanzania Limited Vs. Montesa Lusinde** Misc. Application 500/2019, is not relevant to the facts of this case as correctly submitted by respondent counsel.

Preliminary objection raised by respondent counsel Moses Gumbo is meritorious. Same is upheld, thus Revision application number 640/2019 is dismissed for being time barred.



Z.G.Mũruke

JUDGE

09/06/2021

Ruling delivered in the presence of Anuary Katekwebwa, Counsel for the applicant and Moses Gumbo, Counsel for the respondent. Copies of Ruling, Proceedings and Decree are all ready for collection.



Z.G.Muruke

JUDGE

09/06/2021

Labour Court TZ.