

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 479 OF 2019

BETWEEN

PUSH OBSERVER LIMITED.....1ST APPLICANT

SIX TELECOMS COMPANY LIMITED.....2ND APPLICANT

AND

THOMAS KYALO.....RESPONDENT

RULING

Date of Last Order 11/02/2021

Date of Ruling 12/03/2021

A.E. MWIPOPO, J.

Thomas Kyalo, the Respondent herein, filed Notice of the Preliminary Objection (P.O) on 14th August, 2019 containing 8 points of law. On the basis of the P.O. the Respondent is praying for the Court to dismiss the application filed by Push Observer Ltd and Six Telecoms Ltd, the Applicants herein. The Court ordered hearing of the P.O. to proceed by way of written submissions.

The Respondents who was represented by Mr. Barnaba Luguwa, Advocate, abandoned 2 points of the objection and remained with 6 points of the P.O. The remaining points of law are as follows;

1. The Application is time barred since the Respondents were aware of the award since 2016.
2. The application is sub judice the same subject matter is in issue in Application for Revision No. 168 of 2018 between the parties hereto and is pending before this Court.
3. The court lacks jurisdiction to entertain this matter since the same is frivolous, incompetent, improper and misconceived by enjoining the applicant for allegedly procuring the award by fraud through collusion instead of pursuing claims for professional negligence and misconduct against the advocate whom the Respondents allege to have instructed but never made appearance, Alloys Bahebe and Counsel whom the Respondents allege was never instructed but acted, Hafsa Sasya all who are not parties to this application and cannot be brought before this Court but are answerable.
4. The application is incompetent for having not moved the Court properly in pursuance of an order made by this Court on 15th May, 2019 vide Revision Application No. 168 of 2018 that struck

out a purported application by applicant titled 'Judicial Notice' and ordered court be properly moved on the same within seven days.

5. The relief sought for nullification of the award on purported ground that the Counsel who handled the matter at the Commission for Mediation and Arbitration was not qualified is time bared and was to be sought within 6 weeks of being aware of the same in accordance with the provision of section 91(1) (b) of the Employment and Labour Relations Act, 2004.
6. Relief sought for nullification of the award on purported ground that counsel who handled the matter at the Commission for Mediation and Arbitration was not qualified is time barred and has been preferred without seeking extension of time to do so.

The Respondent Counsel submitted in support of the first point of P.O. that this Revision is preferred under section 91(1) (b) and 91(2) (b) of the Employment and Labour Relations Act, 2004. The sections states that any alleged defect involving procurement of an arbitration award is to be raised with the Labour Court within six weeks that an offended party becomes aware of such facts. Paragraph 1 and 2 of the Applicants Affidavit shows the fact that the award was improperly procured by fraud. Paragraph 2.6, 2.7 and 2.8 of the Affidavit contain

fact to the effect that Directors of the Applicant became aware of the award on 5th March, 2018. This facts is not true as the Applicants became aware of the award since 2016 when the award was made as they lodged on 13th October, 2016 an application to set aside the CMA decision before the Commission. Further they filed Miscellaneous Application No. 520 of 2016 on 15th November, 2016 for stay of execution No. 485 of 2016 between parties. Thus they were aware of the Commission award since 2016 and not on the year 2018 as they alleged.

The Counsel submitted further that the Applicant filed Revision No. 168 of 2018 between parties which was struck out for incompetence. More than a year elapsed before the Applicants filed the present application on 14th August, 2019. Thus the Application has to be outright dismissed as it was held in the case of **Agrey Spali vs. Mkuu wa Chuo MUST, Civil Appeal No. 153 of 2015, Court of Appeal of Tanzania, at Mbeya, (Unreported)**; and **Serengeti Breweries Limited vs. Joseph Boniface, Civil Appeal No. 150 of 2015, Court of Appeal of Tanzania, at Mbeya, (Unreported)**. He submitted further that even if the Applicants became aware that the award was improperly procured the Revision was supposed to be filled within 6

weeks from the date of being aware of the improperly procured award. The Applicant cited in support of the position the case of **Nkwabi P. Mdehwa and Another vs. Barrick Gold Mine Buzwagi, Revision No. 264 of 2016, High Court Labour Division; and Nyangoro Ongito vs. Kenya Kazi Security (T) Ltd, Revision No. 12 of 2020, High Court Labour Division.**

The Applicant's counsel namely Brayson Shayo strongly opposed the Respondent's submission on the first point of the P.O. that the application was filed out of time. The Counsel submitted that the Applicants on 5th March, 2018 discovered that the Commission award in dispute was obtained improperly and fraudulently. The Applicants immediately on 11th April, 2018 filed Revision Application No 168 of 2018 which is within six weeks provided by the law. The Applicants' counsel is of the view that this is a matter of fact which can be proved by way of pleadings.

In rejoinder, the Respondent counsel submitted that the P.O. consists of appoint of law which has been pleaded or which arises clear implication out of pleadings which if argued may dispose of the suit.

I agree with Respondent submission that the issue of time limitation has been pleaded by the parties herein and arises by clear

implication out of pleadings. If the issue of time limitation is argued as preliminary objection it may dispose of the suit. The case of **Mukisa Biscuit Manufacturing Co. Ltd vs. Westend Distributors, (1969) EA 696** is the authority on the issue. Therefore, this is a proper point of the P.O. which has to be determined before we proceed with the hearing of the application on merits.

In determination of the issue of time limitation for filing this application, the relevant law is Section 91(1) (b) and 91 (2) (b) of the Employment and Labour Relations Act, 2004. The section reads as follows, I quote:-

"91.-(1) Any party to an arbitration award made under section 8 8(8) who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award –

(a);

(b) if the alleged defect involves improper procurement, within six weeks of the date that the applicant discovers that fact.

(2) The Labour Court may set aside an arbitration award made under this Act on grounds that –

(a);

(b) the award was improperly procured."

The above mention section provides that where the aggrieved party found that the arbitration award before the Commission was improperly procured may apply for revision within six weeks of the date **the Applicant discovers that fact.**

In the present application the Applicants submitted that they discover that the award was improperly procured on 5th March, 2016 and they filed the Revision Application No. 168 of 2018. The said revision application was struck out for incompetence on 15th May, 2019 with the 7 days leave to file a proper application. Thereafter the Applicant filed the present Application on 21st May, 2019 which is within the 7 days granted by the Court. Thus, I find out that the present Revision application was filed within time. Hence, the 1st point of the P.O. has no merits and is rejected.

The Respondent jointly submitted on the point no 2 and 4 of the P.O. that the Revision No. 168 of 2018 has never been heard after the judicial notice in respective revision was struck out. The Revision No. 168 of 2018 was not struck out hence it was supposed to be heard on merits. What the Applicant was supposed to do is to add properly the ground for revision and not to file a fresh revision application.

Replying to the respective points of the P.O. the Applicant submitted that the Revision No. 168 of 2018 was struck out by the Court on 15th May, 2019 with leave to file a fresh Revision. Thus, the Revision No. 168 of 2018 is no longer in Court for determination after it was struck out and the current application for revision no. 479 of 2019 is not res subjudice.

I agree with the Applicant that the record shows that the Revision No. 168 of 2018 was struck out for incompetence and the Applicant was granted 7 days leave to file the matter. Thus, there is no revision no. 168 of 2018 in Court. Thus, point's no. 2 and 4 of P.O. have no merits and are disregarded.

The Respondent's counsel submission regarding point no. 3 of the P.O. is that the matter before the CMA was prosecuted by the Applicants without regards to how it was prosecuted. The issue of advocate misconduct has to be dealt with Advocates Committee according to section 14 of the Advocates Act, Cap. 341 of our laws.

The Applicant replied to the Respondent point of P.O. that the section 91(1) (b) of the Employment and Labour Relations Act gives this Court jurisdiction to entertain Revision where it is discovered that the arbitral award was improperly procured. And the present application was

filed within 6 weeks after the discovery that the award was improperly procured.

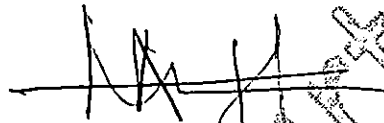
I agree with the Applicant that the Court has jurisdiction under section 91(1) (b) and 91(2) (b) of the Act to entertain the Revision where it is discovered that the Arbitral award was improperly procured. Whether there is proof for the alleged improper or fraudulent procurement of the arbitral award I believe it is the matter of evidence. Thus, the same has to be determined during determination of the main application. Therefore, I find this point of the P.O. to have no merits.

The Respondent submitted regarding point no. 5 and 6 of the P.O. that the relief sought by the Applicant for nullification of the award on purported ground that the Counsel who handled the matter at the Commission for Mediation and Arbitration was not qualified is time barred and was to be sought within 6 weeks of being aware of the same in accordance with the provision of section 91(1) (b) of the Employment and Labour Relations Act, 2004.

The Applicant strongly submitted in opposition that the application was filed soon after it was discovered that the Respondent's counsel before the Commission was not qualified.

As I have already held in the first point of the P.O. that this application was filed within time in accordance with section 91(1) (b) of the Act, then the respective points of the P.O. have no merits.

Therefore, I found all the points of the P.O. have no merits and they are dismissed accordingly. The Revision Application to proceed with determination on merits.



A.E. MWIPOPO

JUDGE

12/03/2021

Labour Court Z