

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

MISCELLANEOUS LABOUR APPLICATION NO. 10 OF 2021

VIETTEL TANZANIA PLC.....APPLICANT

AND

SHABAN .M. SEMWENDA.....RESPONDENT

RULING

Date of Last Order: 5/08/2021

Date of Judgment: 20/08/2021

B. E. K. MGANGA, J.

The applicant has filed this application seeking extension of time within which to file application to revise an award issued by Mwabeza N.L, Arbitrator at the Commission for Mediation and Arbitration henceforth CMA issued on 13th November 2020 in Labour dispute No. CMA/DSM/KIN/518/2020/294. The application is supported by an affidavit of Samuel Said Nyari, the advocate of the applicant. The founding affidavit of the applicant has seven (7) paragraphs of which five (5) are substantive. In the substantive paragraph 3 of the affidavit, applicant averred that she was supposed to file an application for revision before 3rd January, 2021 and that on 31st December 2020 he filed the application electronically but

failed to file hard copy as it was festival season and for reasons beyond his control. In paragraph 4 of the affidavit it was averred that he failed to file application for revision on time as negotiation to settle the matter out of court was going on but came to no avail on 22nd December 2021. It is averred in paragraph 7 of the affidavit that the deponent fell sick from 26th December 2020 to 29th December 2020 and that he underwent treatment for malaria for a dose of three days and injection for five days. In paragraphs 5 and 6 the deponent averred:-

"5. That further that the applicant became aware of the failure of negotiations and went on to bonafidely per sue (sic) justice in terms of revision on 23rd December 2020 but due to the ongoing seasons the same had been stalled. By then time had already lapsed considerably against the applicant.

6. That the applicant did not sleep and went on to bonafidely persue (sic) justice in terms of revision to file the application electronically on 31st December 2020 but the same was struck out on the 4th of January 2021 for want of proper law to move the court."

The application was resisted by the respondent who preferred a counter affidavit affirmed by Bakari Ndeke, the personal representative of the respondent. In the counter affidavit, the deponent averred in paragraph 4(i) and (ii) that 42 days within which the applicant was supposed to file Revision Application expired on 25th December 2020 and that the applicant was negligent as she has a team of lawyers and further

that had capacity to hire external lawyers. In paragraph (v) the deponent averred that electronic copy was filed on 7th January 2021. In paragraph 5(ii) of the counter affidavit, it was averred that there were no negotiations between the parties.

On 14th June 2021, the court issued an order for the application to be disposed by way of written submissions. In his written submission, counsel for the applicant gave two reasons for delay. First, due to unstable court online filing system for the whole week before 30th December 2020 as the system was down as a result, he tried to file an application online several times, but he failed. That on 31st December 2020, a day after deadline managed to file but without feedback but tried to refile on 4th January 2021 without success for the same reason. That he successfully filed online on 6th January 2021 and that the application was admitted on 7th January 2021. Second, due to the fact that counsel for the applicant fell sick on 26th December 2020 up to 29th December 2021 hence beyond his control and that it was Christmas and New year festival season. He therefore cited the cases of ***James Anthon Ifanda vs. Hamis Alawi, Civil Application No. 482/14 of 2019, CAT***, (unreported), ***Gabriel Mathias Michael and another v. Halima Feruzi & 2 others, Civil Application No.***

588/17 of 2019, CAT ,(unreported), Dar es salaam and **Ngao Godwin Losero v. Julius Mwarabu, Civil Application No. 10 of 2015, CAT** (unreported) in which the Court of Appeal held that in extension of time, the court has to consider length of delay, reasons for the delay, arguable points on appeal and degree of prejudice to the respondent if time is extended. **Ifanda's case** and **Michael's case**, supra were also cited to the effect that illegality is a ground for the court to extend time.

On the other hand, in his written submission, counsel for the respondent submitted that for extension of time to be granted, the applicant has to adduce good cause of delay, he was diligence in dealing with the matter, has to show that there is illegality in the impugned decision, public interest/element involved in the matter, lengthy of delay and account for each day of delay. He cited the case of **Cosmas Faustine v. Republic, Criminal Application No. 76/04 of 2019, CAT**, (unreported), Bukoba, to that effect. He argued that the applicant has failed to account for each and every day of delay and has introduced untrue statements to mislead the court. He went on that the applicant is out of time for 14 days and not a single day as alleged and that there is no proof that there was a technical problem in JSDS2 system. It was

submitted further that the applicant has more than one employee and have also external advocates who attended this application and application No.13/2021 for execution and No. 34/2021 for stay of execution both before Tengwa, C.M Deputy Registrar. He concluded this part arguing that even if counsel was sick, it was for three days only from 26th - 29th December 2020 and that time lapsed on 25th December 2020, but the application was filed on 7th January 2021.

Upon reading submissions of the parties, I have found that one of their contention is number of days of delay. The applicant is of the view that he was out for single day while the respondent submitted that it was 14 or 11 days. I am therefore duty bound to clear this confusion first before I make a final decision. In terms section 91(1) and 94(1)(b)(i) both of the Employment and Labour Relations Act [Cap.366 R.E. 2019) a party who is aggrieved by the award and intends the same to be revised, has to make an application within **Six weeks (42 days) of the date the award was served upon him**. In the application at hand, both parties are in agreement based on the award they annexed to the affidavit and counter affidavit that, the award, the subject of this application, was issued on 13/11/2020 and was collected on **18/11/2020 by Shaban M.**

Semwenda (the respondent) and Stevin Mhando, (advocate for and on behalf of the respondent) who, both wrote their names and signed as an acknowledgement. Therefore, time started to run against the applicant from 18/11/2020. Counting from there, 42 days elapsed on **29/12/2020** and not 25/12/2020 as submitted by the respondent. It is equally not true that the applicant was supposed to file the application before 3rd January 2021 as stated in paragraph 3 of the affidavit sworn by Samwel Said Nyari. As pointed out, he was supposed to file the application before 29/12/2020 and not otherwise. Therefore, the argument in his submission that she is out of time for a single day is rejected.

In paragraphs 3 and 6 of the affidavit, the deponent averred that he filed the application electronically on 31st December 2020 and that the same was struck out. In his written submission, applicant argued that, the court online filing system was unstable which is why, on 31st December 2020, a day after deadline, managed to file but without feedback as a result tried to refile on 4th January 2021 without success also for the same reason. That he successfully filed online on 6th January 2021. I have carefully considered these arguments and come to the conclusion that; they are nothing but fabrications. Reasons for this conclusion is found in

the affidavit of **Samwel Said Nyari** who affirmed the affidavit, the base of this application. The verification clause reads:-

" I SAMWEL SAID NYARI DO HEREBY VERIFY THAT all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 are true to the best of my own knowledge.

Dated at Dar es Salaam this 6 day of Jan 2021

Sgd

SAMWEL SAID NYARI

The date and month i.e., **6** and **Jan** were inserted by a blue ink pen. The jurat also shows that the affidavit was **attested on 6th January 2021** before Allan Emily Kabitina, Commissioner for oath after the deponent was identified to the said Commissioner for oath by Juvinali Fusi. The issue is how did he file the application electronically on the alleged date even before the affidavit being signed by himself and attested to by the commissioner for oaths. It is my view that, documents filed in court electronically has to be similar to the one presented in hard copy otherwise it will be meaningless to require parties to file electronically and bring a different hard copy. As the hard copy affidavit in support of the application was attested on 6th January 2021, I safely conclude that, there was no attempt by the applicant in filing the application in court before 6th January

2021. It is worth also to point out that, copy of a printout showing that there was the alleged attempt was not annexed to the affidavit. Instead, unreadable copy of the electronic filing was annexed to the written submission. In my view, that annexure to the written submission is of no use because submissions and annexures thereof are not evidence. I further hold that, what is contained in paragraphs 3, 5 and 6 of the affidavit in support of the application relating to attempts made by the applicant in filing the application electronically is naked lies. Yet the deponent of the affidavit in support of the application has verified that the information contained in the said paragraphs is true.

The court of Appeal and this court has held several times that affidavit and counter affidavits are substitutes of oral evidence. The cases of ***Phantom Modern Transport 1985 Ltd vs. D.T. Dobie (T)***, Civil Reference.No. 15 of 2001 and 3 of 2002, CAT, (unreported) Dar es salaam and ***Chadhā and company Advocates vs. Arunaben Chaggan Chhita Mistry and 2 others***, Civil Application No. 25 of 2013, CAT, (unreported), Arusha are amongst. In the ***Chadha*** case, supra, the Court of Appeal quoted the decision in the case of ***Uganda v. Commissioner of Prisons Exparte Matovu [1966] EA 514*** in which it was held:

"As a general rule of practice and procedure an affidavit for use in court, being a substitute for oral evidence, should only contain statements of fact and circumstances to which the witness deposes either of his own knowledge...such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion"

That position covers both affidavit and counter affidavit. Deponents of both the affidavit and counter affidavit are witnesses so to speak. The Court of Appeal in the case of **Patrick Sanga v. Republic, Criminal Appeal No. 213 of 2008** (unreported) quoted its decision in the case of **Goodluck Kyando v Republic, Criminal Appeal No. 118 of 2003** that:

"every witness is entitled to credence and must be believed and his testimony accepted unless there are good and acceptable reasons for not believing a witness"

The Court of Appeal in Sanga' case supra, went on that:

"... there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishment than facts; the witness has exhibited clear partiality in order to deceive or achieve certain ends, etc."

In the application at hand, the applicant has told lies as pointed out herein above hence worth not to be believed.

It was averred by the applicant that there were negotiations between the parties and that the same failed on 22nd December, 2020. He took it as a ground for delay. On the other hand, the respondent averred in his affidavit that there was no negotiation that was going on between the parties on the stated dates. In my view, whether there were negotiations or not, the applicant was supposed to observe time limitation. At any rate, during the alleged dates of negotiations, the applicant was in time and was supposed to foresee the possibility of the negotiation to fail and prepare himself for the application within time. This argument also fails.

It was submitted by the applicant that the deponent of the affidavit fell sick which is why he failed to file application in time. This reason also fails as the deponent is not the only lawyer of the applicant. The applicant annexed a medical chit to show that he was sick. As correctly submitted by the respondent, there is no proof of payment for treatment the deponent received. It is my view that, that evidence is crucial on ground that every government or private hospital and dispensary issue receipt as evidence of treatment a patient received. This ground is also rejected for another reason. The deponent is not the only lawyer of the applicant to make an application. Reason for this is also found in the annexure to the affidavit of

the applicant. The award that was annexed to the affidavit as annexure VTZ-1 shows that it was collected on **18/11/2020 by Shaban M. Semwenda (the respondent) and Stevin Mhando, (advocate for and on behalf of the respondent)**. Nothing was mention in the affidavit or submission as to why the said Stevin Mhando, advocate who was trusted to collect the award, could not be trusted to file application within time especially after one lawyer fell sick. Of course, the applicant might have her own choice or preference as who among the lawyers at her disposal to be used in a particular case. She has that option, but this court cannot sit and wait until when the applicant makes a decision as to who should file a case in court. The option available to the applicant has to be used within the ambit of the law including the law of Limitation of time.

The *Ifanda's case* and *Michael's case*, supra were cited to the effect that illegality is a ground for the court to extend time. I have no dispute with that. It suffices to point out that the issue of illegality was not raised/ pleaded in the affidavit. It came out during submission as an afterthought. Therefore, this ground fails too.

For all what is pointed out herein, I hereby dismiss the application for want of merit.

It is so ordered.




B.E.K. MGANGA
JUDGE
20/08/2021