IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 502 OF 2021

BETWEEN

PAUL CHANDO ..... APPLICANT

AND

ICEALION GENERAL INSURANCE ..... RESPONDENT

RULING

Date of last order: 1/4/2022
Date of Ruling: 21/4/2022

B. E. K. Mganga, J.

Applicant was employed by the respondent as Filing Clerk. His employment was terminated on 21st September 2018. Aggrieved with termination, applicant filed the dispute before the Commission for Mediation and Arbitration (CMA). At CMA, the arbitrator found that applicant was unfairly terminated and awarded him to be paid one month salary as compensation. He filed an application for revision before this court. On 3rd November 2021, the court revised the award and ordered

the respondent to pay the applicant TZS 8,281,130/= being 12 months' salary compensation and one month salary in lieu of notice. On 16th November 2021, applicant filed a notice of review stating that he was dissatisfied with part of the decision in the said Revision application. On 20th December 2021, he filed the memorandum of revision containing two grounds namely:-

1. *The Honourable court erred I law for failure to order payment of Applicant's wages due, leave, and other benefits from the date of unfair termination to the date of final payment; in addition to twelve months compensation granted by this court thereby occasioning an error apparent on the face of record.*
2. *The Honourable court erred in law for failure to order reinstatement of the Applicant and payment of wages due, leave, and other benefits from the date of unfair termination to the date of final payment as the termination was adjudged unfair both substantively and procedurally.*

When the application was called for hearing, the applicant was represented by Mr. Richard Mwalingo, learned counsel while Mr. Peter Ngowi, learned counsel represented the respondent.

Before hearing the main application, Mr. Ngowi raised a preliminary objection that the application is time barred. He submitted that Rule 27(7)

of the Labour Court Rules, GN. No. 106 of 2007, requires the applicant to file memorandum of review within 15 days from the date he was aware or served with the decision. He submitted further that applicant was served with the decision on 02nd December 2021 but filed this application on 20th December 2021 while out of time for 4 days.

Responding to that submission, Mr. Mwalingo for the applicant submitted that, the application was filed online on 9th December 2021 and the hard copy was filed on 20th December 2021. He went on that, in terms of Rule 21(1) of the Electronic Filing Rules, GN. No. 148 of 2018, the date of submission is the filing date. He brought a printout showing that the application was submitted on 9th December 2021 at 09:19:42 and concluded that the application was filed within time.

During his submission, Mr. Mwalingo submitted that applicant signed the memorandum of review on 3rd December 2021 hence it was ready for filing on that date. He argued that GN. No. 148 of 2018 does not provide time within which applicant can file the hard copy after filing online. He was of the view that the hard copy must be filed within reasonable time.

In rejoinder, Mr. Ngowi submitted that respondent was served with the hard copy without e-filing printout. He argued that if at all the applicant

knew that he filed the application within time online, he was supposed to attach the e-filing print out. He therefore reiterated his submissions that the application is time barred.

I reserved my ruling and allowed the parties to argue the main application for review promising to consider the preliminary objection and the main application all together.

Submitting of the 1st ground of review, Mr. Mwalingo, learned counsel for the applicant, submitted that the Court erred for failure to order payment of applicant's wages, leave and other benefits from the date of termination to the date of final payment. He submitted that the Court ordered applicant to be paid 12 months compensation but did not order applicant to be paid salary from the date of termination to the date of judgment as provided for under section 40(2) of Employment and Labour Relations Act [Cap. 366 RE. 2019].

On 2nd ground, counsel for the applicant submitted that the Court erred for not ordering reinstatement because termination was unfair. He relied on section 40(3) of Cap. 366 RE. 2019 (supra) to argue that applicant was supposed to be reinstated. He went on that applicant was supposed to be paid TZS 24,843,390/= or be reinstated.

Resisting the application, Mr. Ngowi, learned counsel for the respondent, submitted that the Court did not error as it gave a proper remedy in terms of section 40(1)(c) of Cap. 366 RE. 2019 (supra). He submitted that in an application for revision, applicant did not show that he was claiming to be paid salary from the date of termination to the date of judgment. Counsel for the respondent went on that, in terms of section 40(1)(c) of Cap. 366 (supra) read together with Rule 32 of Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007, the Court have discretion to (i) reinstate, or (ii) reengage, or (iii) order compensation. Counsel for the respondent submitted further that the Court did not order reinstatement without loss of remuneration but compensation and that the court cannot order both compensation and reinstatement.

Mr. Ngowi submitted also that there is no error on face of the record in the judgment of this Court and that applicant has failed to show that there are clerical errors or omissions in the judgment. Counsel for the respondent went on that, applicant has prayed a different order that was not issued either by this Court or CMA. Counsel argued that applicant was supposed to appeal and not to file an application for review. Mr. Ngowi

concluded that if the orders sought will be granted, the entire judgment will change hence it will not be correction but a new judgment.

In rejoinder, Mr. Mwalingo, learned counsel for the applicant submitted that section 40(1)(c) of Cap. 366 (supra) relates to compensation while section 40(2) provides that an order for compensation is in addition to, and not a substitute for any other amount to which the employee may be entitled. Mr. Mwalingo submitted further that, Rule 27(2)(a) and (b) of the Labour Court Rules, GN. No. 106 of 2007, gives two options to applicant either to file an appeal or an application for review. Counsel for the applicant strongly submitted that under Rule 27 of GN. No. 106 of 2007 (supra), review is an alternative to an appeal and that applicant preferred review instead of an appeal to the Court of Appeal.

In this ruling I will start with the preliminary objection raised by respondent that the application is time barred. I have read the e-filing printout and find that it was submitted on 9th December 2021 after being supplied with a copy of judgment on 2nd December 2021. In terms of Rule 27(7) of GN. No. 106 of 2007 (supra), applicant had fifteen (15) days from 2nd December 2021 within which to file an application for review. He was

therefore within time. I therefore dismiss the preliminary objection raised by counsel for the applicant.

I should point out in a passing that the application was filed on 9th December 2021 electronically, but hard copy was submitted on 20th December 2021. It was argued by counsel for the applicant that GN. No. 148 of 2018 does not provide time within which a party who has submitted the application electronically should submit the hard copy. Counsel. For the applicant was of the view that hard copies should be submitted within reasonable time. From 9th December 2021 to 20th December 2021 is nine (9) days. There is no any reasonable explanation as to why applicant stayed with the hard copy for all these days without filing them in court. Since there is no time limit within which to file the hard copy, in my view, I think that five days is reasonable and not otherwise.

Now, turning to the main application of Review. It is clear that Applicant has brought this applicant under Rule 27(2)(a), (b) and (c) and 27(7) of GN. No. 106 of 2007 (supra). This Rule 27(2)(a), (b) and (c) provides: -

"27(2) Any person considering himself aggrieved by a judgment, decree or order from which-

(a) An appeal is allowed, but from which no appeal has been preferred; or

(b) No appeal is allowed, and who, from the discovery of any new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the judgment or decree was passed or order made, or ***on account of some mistake or error apparent on the face of the record****, or for any other sufficient reason, desires to obtain a review of the judgment, decree or order made against him,*

(c) may apply for a review of judgment, decree or order to the court.

The quoted Rule corresponds with Rule 1(1)(a) and (b) and (2) of Order XLII of the Civil Procedure Code [Cap. 33 R. E. 2019]. There is a litany of cases by both this court and the Court of Appeal that in order an application for review to be granted, there must be an error on the face of the record. One of those authorities is the case of ***Halmashauri ya Kiiji cha Vilima Vitatu and Another v Udaghwenga Bayay and 16 Others, Civil Application No. 16 of 2013*** (unreported) wherein the Court of Appeal held that:-

"Taking a leaf from case law, a manifest error for purposes of grounding an application for review must be an error that is obvious, self-evident, etc., but not something that can be established by a long-drawn process of learned argument: ***Chandrakant Joshughai Patel v. Republic,*** *[2004] TLR 218".*

The Court of Appeal quoted with approval the decision of the Court of Appeal of Kenya in ***National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*** wherein it was held that:-

> *"...A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.*
>
> *In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law,* ***it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law****. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."*

The Court of Appeal in the case of ***Charles Barnabas vs. Republic, Criminal Application No. 13 of 2009***, (unreported), held that:-

> *"...review is not to challenge the merits of a decision. A review is intended to address irregularities of a decision or proceedings which have caused*

injustice to a party..., a review is not an appeal. It is not "a second bite so to speak."

Reading the two grounds of revision and submissions by counsel for the applicant, it is clear in my mind that, these are grounds of appeal and not review. The argument that Rule 27 of GN. No. 106 of 2007 (supra) gives two options to applicant either to file an appeal or an application for review and that review is an alternative to an appeal, in my view, is not correct. As pointed hereinabove, the said Rule corresponds to Rule 1(1)(a), (b) and (2) of Order XLII of the Civil Procedure Code [Cap. 33 R. E. 2019] and at all times, this court and the court of Appeal has declined to hold that review is an alternative to appeal. The decision of the Court of Appeal in Halmashauri ***ya Kiiji cha Vilima Vitatu's case*** (supra) and ***Barnabas's case*** (supra) is clear. This application for review cannot be an alternative to appeal. If applicant was aggrieved by part of the decision of this court, he was supposed to file an appeal before the court of Appeal. I therefore agree with submissions by counsel for the respondents that applicant has brought grounds of appeal and not grounds for review. All what was submitted by counsel for the applicant are grounds that can be resolved after long drain arguments of the parties. So to speak, the

grounds advanced by the applicants cannot be regarded as apparent errors on the face of the record for the court to review its decision.

That said and done, I dismiss this application for want of merit.

Dated at Dar es Salaam this 21st April 2022

B.E.K. Mganga
JUDGE

Ruling delivered on this 21st day of April 2022 in the presence of Paul Chando, the applicant and Peter Ngowi, Advocate, for the respondent.

B.E.K. Mganga
JUDGE