IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 413 OF 2021

ATTORNEY GENERAL.....1ST APPLICANT

BOARD OF TRUSTEES OF PUBLIC SERVICES

SOCIAL SECURITY FUND .....2ND APPLICANT

VERSUS

YASSIN BASHIRI ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Ilala)

(Chengula : Arbitrator)

Dated 10th March, 2021

in

REF: CMA/DSM/ILA/905/2019

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RULING

05th April & 28th April 2022

Rwizile, J

This ruling originates from Miscellaneous Application filed by the applicants for extension of time to revise the ruling of the Commission for Mediation and Arbitration (CMA) in a Labour Dispute No. CMA/DSM/KIN/805/384/2020 dated 10th March, 2021.

Brief background of this case is; the respondent was employed by the 2nd applicant on 30th July, 2010 as records officer and was terminated due to disciplinary grounds on 08th October, 2015. On 20th November, 2019 the respondent filed a Labour Dispute No. CMA/DSM/ILA/905/2019 for unfair termination at CMA. The application was accompanied by an application for condonation which was struck out. On 16th March, 2020 he filed another application for condonation which was ultimately allowed. The applicant was aggrieved by the decision that granted the condonation, hence this application.

The application is supported by the affidavit of Jesca Shengena, Principal State Attorney from the office of solicitor General, whereas the respondent's counter affidavit was struck out for being filed out of time without leave of the court on 05th April 2022. For that reason, the application was heard exparte.

On perusal of the record, this court noted with concern that the application before this court, is for extension of time, to file an application to challenging the interlocutory order. Mr. Webiro, the learned State Attorney was asked to comment on whether this application should be entertained.

Submitting, he stated that the application for extension of time to file a revision is not aimed at challenging the interlocutory order. He argued that it aims at challenging the ruling of CMA which condoned the respondent to file a labour dispute out of time. When coaxed to comment about the dictates of Rule 50 of the Labour Court rules. He stated further that the application is not against Rule 50 of the Labour Court Rules as the matter was heard and finally determined. Supporting his submission, he cited the case of **Tanzania Posts Corporation v Germian Mwandi,** Civil Appeal No. 474/2020 at page 13 which according to him there are two tests to be applied, which are: -

1. What were the remedies that were sought or rights to be enforced from the Court?
2. Whether the rights were conclusively determined by the Court.

He stated that the remedy to the application for condonation were all obtained. The learned attorney was therefore convinced that the order to be challenged is not interlocutory as the matter was finally determined. Mr. Webiro finalised by stating that they are praying for the application to be allowed.

This court has to determine *whether the application for extension of time to file revision challenges the interlocutory order*

Before delving into the argument of the learned State Attorney, I find it wise to start with the definition of the term interlocutory. The case of **The Board of Trustees of National Social Security Fund (NSSF) v Pauline Matunda**, Labour Revision No. 514 of 2019, the court defined it to mean: -

> *"Order determining an intermediate issue, made in the course of a pending litigation which does not dispose of the case but abides further court action resolving the entire controversy. They are steps taken towards the final adjudication for assisting the parties at the prosecution of their case in pending proceedings."*

The case of **Peter Noel Kingamkono v Tropical Pesticides Research**, Civil Application No. 2 of 2009 elaborated more on this matter, that: -

> *"From the above, it is our view that an order or decision is final only when it finally disposes of the rights of the parties. That means the order or decision must be such that it could not bring back the matter to the same Court."*

Based on the wording of the law cited, it is apparent that condonation did not determine the rights of the parties. Rule 50 of the Labour Court Rules [G.N. No. 106 of 2007] provides that:

> *"No appeals, review or revision shall lie on interlocutory or incidental decisions or orders, unless such decisions have the effect of finally determining the dispute."*

In the case of **Generator Logic v Eli Mukuta**, Civil Appeal No. 272 of 2019, Court of Appeal of Tanzania at Dar es Salaam, it was stated: -

"We need not say more. It is our conclusion that the appeal attempts to challenge an interlocutory decision of the High Court against the dictates of Section 5(2)(d) of the AJA. It is therefore improperly before us so we strike it out, ..."

The case cited by the applicant is **Tanzania Posts Corporation v Germian Mwandi (supra)** at page 13, it was held

> *...Now back to the "the nature of the order test". That test requires answers to more or less two questions in the context of the matter before us; one, what were the remedies that were sought or the rights that the respondent was seeking to enforce or obtain from the High Court? And two, were all such rights or remedies*

conclusively determined by the High Court or there are certain matters in relation to the same rights that remained pending for determination at the High Court?

In terms of the "nature of order test", if the answer to question two is that everything at the High Court was finally and conclusively wound up, the decree in revision will be a final decree and the bar at section 5(2)(d) of the AJA will not apply. Conversely, if the decree in revision by the High Court left an issue or issues at the same court (the High Court) undetermined, then the decree in revision is an interlocutory order and this Court will not have jurisdiction to determine the present appeal in view of section 5(2)(d) of the AJA.

The above is the substance, in our view, of the "the nature of the order test" which has been applied in many decisions of this Court including ***Murtaza Ally Mangungu*** *(supra),* ***Seif Sharif Hamad*** *(supra),* ***Peter Noel Kingamkono*** *(supra) and* ***Augustino Masonda*** *(supra). Other relevant decisions in which the test was applied are* ***Vodacom Tanzania Public Limited Liability Company v. Planetel Communications Limited,*** *Civil Appeal No. 43 of 2018 and* ***MIC Tanzania Limited and Three Others v. Golden Globe International Services Limited,*** *Civil Application No. 1/16 of 2017 (both unreported)*

Apparently, before the CMA, there is a case pending hearing and determination of this application. This is because the applicant believes the rights of the parties were finally determined. In my view, the rights of the parties have not been fully determined. There is a dispute pending before the CMA and this court does not have jurisdiction to hear a dispute that is not determined to its finality before the CMA. Doing otherwise, would be as good as reading rule 50 of the rules of this court and the authorities cited above upside down. The learned State Attorney is aware of that, but has harden his heart in total disregard of the cardinal principal of law, that justice delayed is justice denied. He insists that granting an application for condonation determined the rights of the parties, as if condonation is a labour dispute. The situation would have been different if the application for condonation before the CMA was dismissed, because that closes doors through which the rights of the parties cannot be discussed. Based on the authorities referred above, that would have amount to a final decree worth revision.

This application therefore, cannot be granted because it is purposely designed to delay the hearing of the main case. After all, the applicant is not in place to know the out of the pending application before the CMA. Will he apply for revision if for instance, the respondent loses the dispute?

Definitely not. This application therefore is bound to fail, it is dismissed. I make no order as to costs.

A.K. Rwizile

JUDGE

28.04.2022