

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

MISCELLANEOUS APPLICATION NO. 350 OF 2021

KIKONGO TRANSPORT LIMITED APPLICANT

VERSUS

GASPER JUVENALI NYAMBO RESPONDENT

RULING

25th April & 20th May 2022

Rwizile, J

This application is for extension of time. The applicant is applying for time to file an application for revision of the proceedings, judgement and award of the Commission for Mediation and Arbitration (CMA) for Labour Dispute No. CMA/DSM/ILA/603/19/28 dated on 7th October 2020.

Factually, the respondent was employed by the applicant in January 2016 until on 23rd July, 2019 when he resigned voluntarily. Thereafter respondent instituted a complaint on account of constructive termination at CMA. The award was in favour of the respondent where re-engaged was ordered. The applicant was aggrieved but was late to file an application to challenge the CMA award. This application therefore is for extension.

The application was supported by the affidavit of Robert Mushi, Principal Officer of the applicant, while the counter-affidavit of Michael Nyambo, the respondent's advocate opposed the application.

Legal issues which were raised by the applicants were: -

- a) That, the Hon. Arbitrator erred in law in acting with apparent illegality and irregularity to wit;
 - i. Making an order for re-engagement which is inappropriate in dispute pertaining constructive termination;*
 - ii. Ordering re-engagement despite the fact that the respondent resigned voluntarily.*
 - iii. Granting Suo Moto the remedy of re-engagement which was not prayed by the respondent.**
- b) That, the Hon. Arbitrator erred in law and in fact in exercising jurisdiction not conferred on him.*
- c) That, the Hon. Arbitrator erred in law and in fact in making an impractical and unjust award.*

The hearing of this application was by way of oral submission. The applicant was represented by Evodia Beyanga Nino, learned Advocate whereas the respondent was represented by Michael J. Nyambo, learned Advocate.

Supporting the application Miss Beyanga submitted that the reasons for delay were, the application for revision No. 459 of 2020 filed by the respondent, which was withdrawn in May 2020, as well, there were execution proceedings filed by the respondent on 24th May 2021.

Miss Beyanga continued to state that then they discovered that the decision of CMA had illegalities and for that she stated the award cannot be executed. It was her argument that the CMA had no power to order re-engagement as the respondent resigned voluntarily and also the same was not his prayer.

Supporting her submission, she cited the case of **Principal Secretary Ministry of Defence v Valambhia** [1992] TLR 183 and **Dismas S/O Bunyerere v The Republic**, Criminal Application No.42/08 of 2017 at page 8. She therefore prayed; the application be granted.

Opposing the application, Mr. Nyambo submitted that in the application filed by the respondent, the applicant also could have filed a cross application to challenge it and also, he did not plead in the affidavit. The learned counsel

argued that the order of re-engagement is not re-engagement as the applicant did not prove so.

He stated further that if the applicant could not agree with the award, then he would have challenged it. He continued to state that; the point of illegality could suit the application for revision as it is not on the face of the award.

Mr. Nyambo submitted that the facts pleaded are not good enough to warrant extension. That the applicant did not account for the days delayed and that he is looking for court's mercy. He prayed for the application to be dismissed.

In rejoinder, Miss Beyanga submitted that at page 7 and 8 of the award, it is shown that the respondent resigned and so it was not fair for him to be re-engaged. Other points were reiterated from the submission in chief.

Going through the submissions of the parties, I discovered that I was called to determine *whether the applicant has advanced sufficient grounds to justify the delay.*

It is, I think, important to start by citing the law. Section 91(1)(a) of the Employment and Labour Relation Act [CAP. 366 R.E. 2019] provides for Revision of arbitration award. It states that: -

"91(1) Any party to an arbitration award made under section 88(10) 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) Within six weeks of the date the award was served on the applicant unless the alleged defect involves improper procurement;"

As the law clearly shows, the application to challenge the CMA award, has to be filed within six weeks. The applicant intends to challenge the award dated 07th October, 2020. This application as the record puts it, was filed on 15th September, 2021. It means, it took over eleven months to file this application seeking for extension of time. The applicant has advanced two reasons as the cause for delay. *First*, it is filing of the revision application and an execution proceeding by the respondent, *second*, illegality of the award procured.

Rule 56(1) of Labour Court Rules [G.N. No. 106 of 2007] provides as follows:

"The Court may extend or abridge any period prescribed by these Rules on application and on good cause shown, unless the Court is precluded from doing so by any written law."

This was also stated in the case of **Wambura N.J. Waryuba v The Principal Secretary Ministry for Finance and Another**, Civil Application No. 320/01 of 2020, it was held that: -

"... it is essential to reiterate here that the Court's power for extending time... is both wide-ranging and discretionary but it is exercisable judiciously upon cause being shown."

In yet another case, accounting for days of delay, and illegality inter-alia are stated as good reasons for delay. This was held in the celebrated case of **Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) where it was also added that delay should not be inordinate and that the applicant should show diligence and not apathy,

negligence or sloppiness in the prosecution of the action that he intends to take.

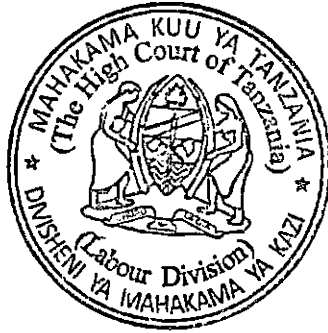
The two reasons advanced by the applicant are in the first place not supported by factual situations on the ground. To an aggrieved person does it need to wait for over 11 months to prefer an application. Second, filing of the applications by the respondent did not prevent the applicant from challenging the award. Third, the so-called illegality, has not been shown. The applicant simply argued that the respondent resigned and re-engagement was ordered. This in my view does not seem to be an illegality on the face of the record or that which is of sufficient importance for the court to discuss.

In the case of **Finca (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018, it was held that: -

"It was held that illegality is a good ground for extension of time. But in order to plead illegality successfully, it must be glaringly apparent on the face of the record"

Based on the above finding, it is sufficient to hold and join hands with the respondent that this illegality has not be shown and that time taken to file

this application is, unpardonably and appallingly inordinate. The application is therefore dismissed. I make no order as to costs.




A.K. Rwizile

JUDGE

20.05.2022

Labour Court TZ.