IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 375 OF 2021

BETWEEN

POLYCUP RACHNYO..... APPLICANT

AND

SIMBA LOGISTIC EQUIPMENT SUPPLY LTD.....RESPONDENT

RULING

Date of Last Order: 17/02/2022
Date of Judgement: 22/02/2022

B.E.K. Mganga, J.

On 30th March 2021, respondent terminated employment of the Applicant. Being aggrieved by termination, applicant filed a dispute before the Commission for Mediation and Arbitration (CMA). At CMA, the arbitrator issued an order striking out the dispute as he found that CMA F1 was incomplete. Applicant filed this application seeking the court to revise that order. On 20th October 2021, Mr. Lwigiso Ndelwa, counsel for the respondent raised four preliminary objections namely: -

1. That the application is hopelessly time bared

2. *That application is incompetent for being predicated upon an interlocutory order.*

3. *That the affidavit is incurably defective for being sworn by an incompetent person*

4. *That the affidavit is incurably defective for containing a defective verification clause.*

This ruling emanates from these preliminary objections.

At the hearing of the preliminary objections, Mr. Ndelwa, upon reflection, withdrew the 3rd and 4th grounds and argued only the 1st and 2nd grounds. Submitting on the 1st ground that related to limitation of time, Mr. Ndelwa, argued that the application is time barred as the award was issued on 06th August 2021 and collected by parties on the same date. He argued that applicant filed this application on 30th September 2021 being 13 days out of time prescribed under Section 91(1) of Employment and Labour Relations Act, (Cap. 366 R.E. 2019).

On the 2nd ground, Mr. Ndelwa contended that, the order of striking out the CMA F1 and automatically the whole dispute filed by the applicant, was an interlocutory order which is not appealable. He submitted that applicant is seeking to challenge an interlocutory order contrary to Rule 50 of the Labour Court Rules GN. No. 106 of 2007 as that order did not finalize the matter to its finality. To bolster his

argument, counsel for the respondent, referred the court to the case of ***Trustees of National Social Security Fund (NSSF) v. Pauline Matunda,*** Rev. No. 514 of 2019, High court (unreported) and ***Pardeep Singh Hans v. Merey Ally Saleh & 3 Others***, Civil Application No.422/01 of 2018, CAT (unreported). He thus prayed the application be dismissed.

Responding to the submissions on behalf of the respondent, Mr. Joshua Reuben, counsel for the applicant, refuted submissions by the respondent's counsel and argued that the application is not time barred as it was filed electronically on 15th September 2021. To substantiate his argument, he tendered a copy of e-filling printout.

On the 2nd ground, Mr. Reuben argued that the application is not an interlocutory because the CMA's order finalized the dispute. Counsel for the applicant submitted that CMA issued an order striking out the dispute because CMA F1 was not signed by the applicant. When asked by the court as to whether the order striking out the dispute barred applicant to bring a new CMA F 1, he readily conceded that it didn't. When he was further asked by the court as to whether the CMA F1 that was lacking signature of the applicant was legally proper before the CMA, he conceded that absence of signature made the CMA F1

defective. He further admitted that nothing prevented the applicant to file a new CMA F1 duly signed. With all these, counsel for applicant remained adamant maintaining that the arbitrator erred to struck out the CMA F1 and automatically of course the dispute filed by applicant.

To start with the 1st limb of preliminary objection that the application is time barred, a printout of e-filling was tendered by counsel for the applicant indicating that the application was filed electronically on 15th September 2021, but the hard copies were filed in court on 30th September 2021. In terms of Rule 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules, GN. No. 148 of 2018, a document is considered to have been filed if it is submitted through the electronic filing system before midnight East African time, on the date it is submitted, unless a specific time is set by the court or it is rejected. Reading the e-filing print out, I have found that the application was filed within 42 days prescribed under Section 91(1), supra, hence the first limb of the preliminary objection fails.

I would point in a passing that, counsel for the applicant had the e-filing print out and did not bother to disclose at the time the court asked the parties before hearing of the preliminary objection. Had he disclosed, counsel for the respondent would have withdrawn this

preliminary objection as he did to the 3rd and 4th preliminary objection. This would have served time both of the court and the parties to deal with an obvious issue which has no merit and reserve that precious time to important issues for determination. For courtesy to the court and the other party and legal professionalism, counsel for the applicant was duty bound to disclose but he didn't. I advise counsel that at all time should try to be professional and serve time of the court and the parties.

On the 2nd point of objection, Mr. Ndelwa, counsel for respondent, argued that the order challenged is interlocutory in nature and prohibited under Rule 50 of the Labour Court Rules GN. No.106 of 2007. On his part, Mr. Reuben, counsel for the applicant insisted that the impugned ruling determined the matter to its finality. Rule 50 of GN. No.106 of 2007, supra, provides: -

> *"No appeal, review or revision shall lie on interlocutory or incidental decisions or orders, unless such decision has the effect of* ***finally determining the dispute.*** *" (emphasis is mine)*

In his submission, Mr. Reuben, counsel for applicant, conceded that the order complained of, did not barred applicant to bring a new CMA F 1. Now the issue is whether, the order was interlocutory or not. This is not a novel issue in our jurisdiction. In fact, there is a plethora of cases by this court and the Court of Appeal as to what amounts to

interlocutory. For instance, in the case of ***Vodacom Tanzania Public Limited Company v. Planetel Communications Limited,*** Civil Appeal No. 43 of 2018 (unreported), quoted with approval the test in the case of ***Bozson v. Artincham Urban District Council*** (1903) 1 KB 547 wherein Lord Alverston stated as follows:-

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order; as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not, it is then, in my opinion, an interlocutory order."*

The Court of Appeal in ***Pardeep's case,*** (supra), held at page 8 that:

> *"The phrase 'finally determining the suit' has been defined to mean a decision or order which has an effect of finally determining the rights and liabilities of the parties".*

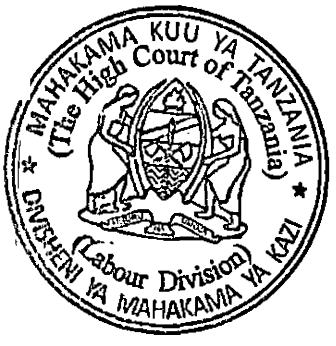
Since the order to strike out the unsigned CMA F1 and as there was no order barring applicant to file a duly filed CMA F1, it cannot be said that the order was final. In fact, the order did not finally determine rights and liabilities of the parties. The arbitrator only ordered the application be struck out for want of the applicant's signature. The order was interlocutory in nature not subject to revision in terms of Rule 50 of GN. No. 106 of 2007, (supra). I therefore uphold this preliminary objection.

I should comment albert briefly that Mr. Reuben, counsel for the applicant, who represented applicant in this application and at CMA, acted unprofessionally and his acts may cause applicant to lose his rights. I am of that view because, CMA F1 initiates proceedings at CMA. After the order of striking out the CMA F1 that was unsigned, it was open to counsel for the applicant either on the same day or next, to call the applicant and cause him to sign a new CMA F1 and file it ready for the dispute to be heard. The root taken by counsel for the applicant by filing this application for revision has (i) wasted time of the parties and has prolonged the matter and (ii) put applicant into legal technicalities because, if applicant is still interested to pursue his rights, has to file application for condonation, which may be granted by the arbitrator or dismissed. If the application will be dismissed, applicant will be required to file another application before this court to revise the said order. Depending on the evidence that will be contained in both affidavit and counter affidavit, the court may allow or dismiss the application. Whatever will be the outcome, applicant will be affected in one way or another. I once cordially advise learned brothers on the bar to be professional bearing in mind that they are dealing with rights of their clients and that they have a duty to assist the court in the process of delivering justice. The cases they are handling is not theirs. They should

try as much as possible to make sure that justice is done rather than engaging in academic issues.

For said and done, I hereby dismiss this application.

Dated at Dar es Salaam this 22nd February 2022.



B.E.K. Mganga
JUDGE