IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVIEW NO. 03 OF 2022

BETWEEN

BURTON MWAMBENE ..... APPLICANT

AND

MUHANGA SECONDARY SCHOOL ..... RESPONDENT

RULING

Date of Last Order: 16/06/2022
Date of Ruling: 27/06/2022

B.E.K. Mganga, J.

Brief facts giving rise of this review application are that applicant and respondent entered a fixed term contract. After expiration of the said contract, applicant filed Labour dispute No. CMA/DSM/ILA/R252/18 before the Commission for Mediation and Arbitration at Ilala claiming to be paid TZS 11,134,220/= being end of contract benefits. On 14th September 2020, Mhanika, J, arbitrator, awarded the applicant to be paid a total of TZS 51,000,000/= being end of contract benefits. Respondent was aggrieved with the said award hence filed Revision application No. 432 of 2020. On 11th March 2022, this court having

heard submissions of the parties issued a ruling that the dispute was filed at CMA out of time and was heard without condonation hence CMA had no jurisdiction. The court therefore nullified CMA proceedings, quash, and set aside the CMA award arising therefrom.

Based on that background, applicant has filed this application for review under Rule 27 (7) of the Labour Court Rules, GN. No. 106 of 2007. In his application, applicant has advanced the following grounds: -

1. *That, the order dismissing the Respondent's application for Revision, on the ground that the dispute was preferred to the Commission for Mediation and Arbitration out of time, was entered into by the Honorable Court unaware of the following fact;*
    i. *Despite the fact that the employment contract ended up on the 31st of December, 2017, there was no handling over immediately thereafter, between the parties.*
    ii. *In the first attempt, the handling over was planned on 06th January 2018, however, it failed as the Board Chairman and the Director were not present.*
    iii. *In the second attempt, the handling over was planned on the 12th of January, 2018, still it was adjourned, because the Board chairman and Headmaster were not informed.*
    iv. *On the 13th of January, 2018, Applicant herein sought intervention of the District Education officer, hence handling over was set for 21st January 2018 and was duly effected, however without Applicant being paid his dues.*
    v. *On 22nd January, 2018, Applicant wrote a letter to the Director of the Respondent's school, demanding his payments, lamentably, there was no response, until when he decided to invoke the*

Commission for mediation and Arbitration for his end of contract benefits, on the 06th of March, 2018.

2. *That, the honorable Court made its decision in this matter without appraising itself of the nature of cause of action, which was not in accordance to the date of end of contract, but rather on the date of final payments which were never paid, hence a letter dated, 22nd January, 2018 which was never responded to, and no payments were paid to the Applicant, the non-payment which prompted the cause of action.*

When the application was called for hearing, Mr. Adam Mwambene Advocate, appeared and argued for and on behalf of the applicant, while Mr. Hekima Mwasipu, Advocate appeared for and on behalf of the respondent.

Arguing the application on behalf of the applicant, Mr. Mwambene, Advocate, submitted that applicant has filed this application for review under Rule 27(7) of Labour Court Rules, GN. No. 106 of 2007. Submitting on the first ground, Mr. Mwambene argued that the order dismissing the application of the applicant on ground that the dispute was filed at CMA out of time was made by the Court being unaware of the fact that even though the contract ended on 31st December 2017, there was no handing over between the parties. He submitted further that; applicant was the headmaster of the respondent who was claiming end of contract benefit which was payable after handing over but the same was not paid. He went on that, at CMA, applicant was claiming

end of contract benefit because the contract ended on 31st December 2017. He conceded that applicant was supposed to file the dispute at CMA within 60 days and that he filed it on 06th March 2018. He added that, in the CMA F1, applicant indicated that the dispute arose on 06th January 2018. Counsel for the applicant insisted that according to the contract, payment of gratuity was after handing over and that is when the cause of action arose. He submitted further that, handing over was done on 21st January 2018. During his submissions, counsel for the applicant conceded that the dispute was time barred.

In rebuttal, Mr. Mwasipu, advocate for the respondent submitted that the Court has power to review its decision when there is an apparent error on face of the record and that an apparent error on record is an error that does not need reasoning. To support his submission, he cited the case of ***Salim Mohamed Marwa @ Komba & Another v. The Republic***, Criminal Appl. No. 1 of 2020, CAT (unreported). Counsel added that, submissions made on behalf of the applicant does not show any apparent error on the ruling of the court. Counsel for the respondent submitted further that the application was filed in abuse of Court process as the applicant was supposed to appeal against the court's decision. In addition, Counsel submitted that, the

memorandum of review is not in compliance with Rule 27(7) of the Labour Court Rules, GN. No. 106 of 2007 that prohibit narration or arguments in memorandum of review.

In rejoinder, Mr. Mwambene submitted that, applicant prayed the Court to review its decision based on the course of action. He conceded that the 1st ground of review is narrative hence in contravention of Rule 27(7) of GN. No. 106 of 2007 (supra) but the 2nd ground is complied with the provisions of Rule 27(7) of GN. No. 106 of 2007(supra).

I have considered submissions of both counsels in this application. There is no dispute that application for review in Labour matters is governed by the provisions of Rule 27 of the Labour Court Rules, GN. No. 106 of 2007. In terms of Rule 27(7) of GN. No. 106 of 2007(supra), applicant is required to file a concise memorandum of grounds of review without narration or arguments. The said Rule provides: -

> *"27(7) On receipt of a copy of the decision of the review, the applicant shall within fifteen days file a concise memorandum of review stating the grounds for the review sought without* ***narratives or arguments****."*

I have examined the first ground of the review and find that it violated the quoted Rule. I therefore agree with the submissions by Mr. Mwasipu counsel for the respondent in that aspect as it was also

conceded by Mr. Mwambene, counsel for the applicant. I have noted also that the quoted Rule was not properly drafted. In my view, the Rule was supposed to read "on receipt of a copy of the decision to be reviewed, the applicant shall within fifteen days file a concise memorandum of review stating the grounds for the review sought without narratives or arguments" and not as it is. I am of that view because, in my view, the phrase "on receipt of a copy of the decision of the review" appearing in the said Rule does not mean a copy of the decision to be reviewed rather, a copy of a decision of the court after review, which does not make any sense to the application.

It was submitted by Mr. Mwasipu, learned counsel for the respondent that the court has power to review its decision when there is an apparent error on face of the record and further that an apparent error on record is an error that does not need reasoning. Counsel submitted that applicant failed to show an error apparent on the face of the impugned ruling. Mr. Mwambene, counsel for the applicant submitted that the court dismissed the application of the applicant on ground that the dispute was filed at CMA out of time being unaware of the fact that even though the contract ended on 31st December 2017, there was no handing over between the parties. I have read the ruling

of the court that is the subject of this application and find that when both counsel for the applicant and the respondent were invited to submit on whether the dispute was filed at CMA within time or not, submitted that it was filed out of time. Luckily, Mr. Mwambene, learned counsel is the one who represented the applicant in revision application No. 432 of 2020 that gave rise of the impugned ruling. The record of Revision application No. 432 of 2020 where the impugned ruling emanates shows that, on 11th March 2022 when the court raised the jurisdictional issue as to whether the dispute was timely filed before CMA, parties were afforded right to be heard on that aspect. In fact, Mr. Adam Mwambene, learned counsel who appeared on behalf of the applicant conceded that the dispute was brought before CMA out of time prescribed by the law. The proceedings show as follows: -

> *"**Court.** When perusing the CMA file, I found one jurisdictional issue that was no raised in the grounds of revision, namely, whether the dispute was filed at CMA within time. Please address the court before you argue the grounds of revision.*
>
> ***Mwasipu- Advocate for the applicant:***
>
> *The respondent filed the dispute at CMA after expiry of the contract between the two on 31/12/2017. Respondent filed the dispute at CMA on 6/3/2018 that is more than 60 days provided for under Rule 10(2) of GN. No. 64 of 2007. CMA had no jurisdiction because the dispute was time barred. There was no application for condonation. I pray the application*

before this court and the dispute before CMA be struck out for being out of time.

Adam Mwambene- Advocate for the respondent:

I am in agreement with submission made by counsel for the applicant that in terms of Rule 10(2) OF GN. No. 64 of 2007 respondent was supposed to file the dispute at CMA within 60 days. ***The respondent filed the dispute at CMA after 64 days. The CMA had no jurisdiction to determine the dispute. I pray that the application be struck out".***

Based on the afore submissions, the court gave a ruling nullifying CMA proceeding, quashed, and set aside the award arising from those proceedings as CMA had no jurisdiction because the dispute was time barred and no application for condonation was granted. From the foregoing, the complaint that the court gave the impugned ruling without appraising itself of the nature of the cause of action lacks merit and it is an afterthought. If anything, counsel for the applicant was supposed to put the facts straight when he was asked by the court to submit whether, the dispute was filed within time or not, but he failed. Whatever the case, as the facts are, the dispute was filed at CMA out of time and CMA had no jurisdiction. If applicant upon second reflection felt that the court erred, the proper recourse was to file an appeal before the Court of Appeal and not to file review. I am of that view because, there is no apparent error on the face of the record.

My afore position is fortified by what was held the Court of Appeal in the case of ***National Bank of Commerce Ltd vs. Nurbano Abdallah Mulla,*** Civil Application No.207/12 of 2020 (unreported) and the case of **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218 as to what amounts to apparent error on the face of the record. In ***Chandrakant's case*** (supra) the court of Appeal held that: -

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions. But it is no ground for review that the judgment proceeds on an incorrect exposition of the law.... A mere error of law is not a ground for review... That a decision is erroneous in law is no ground for ordering review."*

A similar position was taken by the Court of Appeal in the case of ***Elia Kasalile & Others v. Institute of Social work,*** Civil Application No. 187 of 2018, CAT (unreported) wherein the court of Appeal sought inspirational from the case of ***National Bank of Kenya Limited Vs. Ndungu Njau*** [1997] ERLR, where 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...**If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review**. Otherwise, ... the learned Judge would be sitting in appeal on his own judgement which is not permissible in law..."*(emphasis is mine).

It is my firm opinion that, submissions that the Court dismissed Revision application No.452 of 2020 being unaware of the narrated facts lacks merit since they draw long arguments and, in my view, there is no apparent errors on face the of the record to justify review. As held above, if applicant was unhappy with the decision, the recourse was to appeal before the Court of Appeal and not to file an application for review. All said and done, I hereby dismiss this application for review for lack of merit.

Dated at Dar es Salaam this 27th June 2022.

B. E. K. Mganga
JUDGE

Ruling delivered on this 27th June 2022 in the presence of Adam Mwambene, Advocate for the applicant but in the absence of the respondent.

B. E. K. Mganga
JUDGE