

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 177 OF 2022

BETWEEN

PHILIPO OMBELA APPLICANT

AND

PETER JOHN KAYANDA1st RESPONDENT

HAMIS NGWAO2nd RESPONDENT

RULING

Date of last Order: 13/07/2022

Date of Ruling: 29/07/2022

B. E. K. Mganga, J.

Applicant filed this application seeking the court to extend time within which he can file an application for revision against the award that was issued on 27th August 2021. Brief facts of this application are that, on 16th March 2021, Peter John Kayanda, the 1st respondent filed labour dispute No. CMA/DSM/KIN/192/21 before the Commission for Mediation and Arbitration hereinafter referred to as CMA at Kinondoni against Peter Ombela, the applicant and Hamis Ngwao, the 2nd respondent. At CMA, Peter John Kayanda, the 1st respondent alleged that he was employed by Peter Ombela, the applicant and Hamis

Ngwao, the 2nd respondent as a driver but the two terminated his employment unfairly. It is undisputed fact that the 2nd respondent was dully served with summons to appear at CMA but did not enter appearance. On the other hand, ehe applicant alleges that he was not served with summons to appear at CMA. Both the applicant and the 2nd respondent failed to enter appearance, as a result, on 27th August 2021 Hon. Mollel B.L, Mediator, issued an exparte award ordering both the applicant and the 2nd respondent to pay the 1st respondent TZS 2,700,000/= for unfair termination. Having the award on his side, the 1st respondent filed Execution Application No. 528 of 2021 before this court to enforce the said Exparte award. It is further undisputed fact that, the 2nd respondent was dully served but the applicant alleges that he was not served with summons to appear in the said Execution Application. Again, both the applicant and the 2nd respondent having failed to enter appearance, Hon Deputy Registrar issued an order for attachment of vehicle No. T. 160 AEC make SCANIA which is said to be the property of the applicant. It is alleged by the applicant that he became aware of both the CMA award and Execution Application on 27th April 2022 after being served with the warrant of attachment.

Both the 1st respondent and the 2nd respondent filed their counter affidavit showing that 2nd respondent was dully served and further that applicant was notified through the 2nd respondent of existence of labour dispute filed by the 1st respondent at CMA, but applicant failed to enter appearance.

When the matter was scheduled for hearing, applicant was represented by Ms. Blanka Ligema, learned Advocate. Arguing the application, Ms. Ligema submitted that applicant was not served with summons to appear at CMA and that there is no proof of service. She went on that it is only the 2nd respondent who was served. Ligema submitted that applicant rented the abovementioned motor vehicle to the 2nd respondent who employed the 1st respondent and that upon termination of his employment, the 1st respondent filed the dispute of unfair termination against both the applicant and 2nd respondent. She maintained that the dispute was heard exparte without proof that applicant was served.

Ms. Ligema submitted further that on 01st December 2021, the 1st respondent filed Execution Application No. 528 of 2021 that is pending before Hon. S. Fimbo, the Deputy Registrar but applicant was not served until on 27th April 2022 when he was served with the order of the

attachment of motor vehicle No. T. 160 AEC make Scania. She argued that, it is on this date when applicant became aware that an ex parte award was issued at CMA against him and the 2nd respondent. Counsel argued that there is procedural illegality in CMA award because applicant was denied right to be heard. She went on that, illegality is a sufficient ground for extension of time and cited the case of **Mary Rwabizi t/a Amuga Enterprises V. National Microfinance Plc**, Civil Application No. 378/01 of 2019, CAT(unreported) and **Juto Ally V. Lukas Komba & Another**, Civil Application No. 484/17 of 2019, CAT(unreported) to cement on her submissions. Counsel for the applicant submitted further that, failure to serve the applicant with summons is a good ground for extension of time and cited the case of **William Nusu V. Respurces International (T) Ltd**, Misc. Application No. 178 of 2019, HC (unreported). She argued that the summons attached to the counter affidavit proves that applicant was not served with summons.

On the other hand, both the 1st and 2nd respondents were represented by Mr. Francis Mwakibinga, Personal representative. Mr. Mwakibinga submitted that applicant was aware of the dispute that was filed at CMA because in his counter affidavit, the 2nd respondent deponed that he was informing the applicant. Mwakibinga went on that

the 2nd respondent was supervising the 1st respondent on behalf of the applicant. In his submissions, Mr. Mwakibinga conceded that there is no proof that applicant was served with the summons to appear at CMA. He conceded further that though served, 2nd respondent did not enter appearance at CMA even though the summons mentioned his name.

It was submission of Mr. Mwakibinga that applicant has not disclosed the degree of delay and has failed to account for the delay. He argued that applicant was supposed to account for each day of the delay and adduce sufficient cause for the delay and cited the case of ***Philemon Mwanganda Mwelangombe V. Namera Group of Industries (T) Ltd***, Misc. Application No. 658 of 2018, HC(unreported) to support his arguments.

In rejoinder, Ms. Ligema, learned counsel submitted that if two persons are joined in the suit, each must be served and not only one as it happened in the matter at hand. She maintained that applicant became aware of the matter after attachment of his property.

Having considered the rival submissions of the parties and the affidavits for and against this application, I should point albeit briefly that submissions by Ms. Ligema learned counsel for the applicant that applicant hired the said motor vehicle to the 2nd respondent is neither in

the affidavit of the applicant nor reflected in the CMA award hence it is mere submissions from the bar that I will not consider. Again, submissions by Mr. Mwakibinga, the personal representative of the respondents that the 2nd respondent was supervising the 1st respondent on behalf of the applicant is neither reflected in the counter affidavits of the respondents nor in the CMA award hence it is submissions from the bar that is not evidence hence cannot be considered.

Now, back to the merit or demerit of the application. This being an application for extension of time, the only issue that I am called upon to determine is whether applicant has adduced sufficient reasons to suffice extension of time. It is a well settled law that for the court to exercise its discretionary power of extending time, applicant must establish sufficient reasons for the delay. In labour law, this is clearly provided under Rule 56(1) of the Labour Court Rules, GN. No. 106 of 2007, which reads: -

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

In the matter at hand, the only reason advanced by the applicant as a reason for extension of time is illegality based on denial of the right

to be heard on ground that he was not served with summons to appear at CMA. From both the affidavit of the applicant and the counter affidavits of the respondents, it is undisputed that applicant was not served with summons to appear at CMA. Both the affidavit and counter affidavits shows that the person who was served is the 2nd respondent. Based on this evidence, in my view, there is illegality. It has been constantly held by both this court and the court of appeal that illegality is a good ground for extension of time. Some case laws to that position are the ***Rwabiti's case*** and ***Juto's case*** (supra) cited by counsel for the applicant.

As pointed hereinabove, summons was served to the 2nd respondent alone. It was correctly, in my view, submitted by counsel for the applicant that summons was supposed to be served to both the applicant and the 2nd respondent because the dispute at CMA was filed against them. I take that position because 2nd respondent was not representing the applicant, rather, the complaint was against both, which is why, the award was not issued only against the applicant. I have read the provisions of Rule 6(1) and 7(1) both of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 and find that arguments of counsel for the applicant are merited.

For the foregoing, I find that there are good reasons for extension of time and consequently allow this application. I hereby grant applicant fourteen (14) days within which to file revision application before this court.

Dated at Dar es Salaam this 29th July 2022.



B. E. K. Mganga
JUDGE

Ruling delivered on this 29th July 2022 in the presence of Blanca Ligema, Advocate for the applicant and Francis Mwakibinga, Personal Representative of the respondents.



B. E. K. Mganga
JUDGE

