IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 312 OF 2021

TANZANIA REVENUE AUTHORITY ..... APPLICANT

VERSUS

MULAMUZI BYABUSHA ..... RESPONDENT

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

(Chacha: Arbitrator)

dated 09th July, 2021

in

REF: CMA/DSM/MISC/63/2020

JUDGEMENT

21st July & 26th August, 2022

Rwizile, J

In this application, **TANZANIA REVENUE AUTHORITY** asked this Court to call for the records, proceedings and Ruling of the Commission for Mediation and Arbitration (CMA) for the purposes of revising the same.

The facts of the case, can be stated that, the respondent was employed by the applicant on 09th May, 2008 until 23rd November, 2012 when he was terminated for gross misconduct. He was employed first as assistant customs officer and later re-categorized to an assistant legal counsel.

Upon termination, for gross misconduct, he was paid his terminal dues (including salary), notice and entitled leave days.

Aggrieved, the respondent filed a labour dispute at CMA. The matter was heard exparte and the award was in favour of the respondent. An order to be reinstated without loss of remuneration was made on 26th June, 2020.

The applicant filed the application to set aside the exparte award. It was struck out on technicality on 12th November, 2020. The application applied for extension of time to set aside an exparte award. It was also dismissed on 09th July, 2021. Aggrieved with the ruling dated 09th July, 202, this application was filed.

The application was supported by the applicant's affidavit sworn by MS Jacqueline Chunga, Legal Counsel of the applicant advancing grounds for revision as hereunder;

i. *The hon. Arbitrator erred in law and fact in holding that, the applicant was negligent in filing an application for extension of time within which an applicant can file an application to set side exparte order.*

ii. *The hon. Arbitrator erred in law and fact in holding that, the applicant did not justify the reason for delay from the 26th June, 2020 the date the applicant received the exparte order to 19th November, 2020 the date of application for extension of time to file an application to set aside.*

iii. *That hon. Arbitrator erred in law and facts in holding that the affidavit of the applicant does not disclose the reason for the delay rather than it is a sequence of events.*

iv. *The hon. Arbitrator erred in law and fact by ignoring the rejoinder made by the applicant that the grounds for the delay to be adduced during the hearing.*

v. *The hon. Arbitrator erred in law and fact by ignoring the submission by the applicant that the cause of delay is that, the matter was pending before the Commission for Mediation and Arbitration.*

MS Jackline Chunga, learned Advocate appeared for the applicant, whereas the respondent was represented by Mr. Francis Bantu, learned Advocate.

Ms Jackline argued on the issues raised generally and submitted that the contested decision was made on 05th August, 2019 and was served to

both of them on 26th June, 2020. She stated that the applicant had good reason for delay, as the matter was at CMA until it was struck out on 12th October, 2020. For her, the case was pending before CMA and so they had good reasons to file an application to set aside an exparte award on 09th July, 2020 as they were aware of it on 26th June, 2020.

She continued to argue that she had a sick child. She went on submitting that, the legal assistant from her office went to CMA and was informed that the summons was served on 14th February, 2019 at 3:14pm. She stated that it was not a sufficient time to prepare as it was a day before the hearing. In her view, it was a good reason to set aside the award. He referred me to the case of **Rajab Kidemwa and another v Idd Adam** [1991] TLR 38.

Ms Jackline continued to argue that, there were illegality as the applicant was not given a right to be heard.

To support her point, she cited cases of **Citibank Tanzania Limited v Tanzania Telecommunications Company Ltd and 4 others**, Misc. Commercial Case No. 202 of 2017, High Court at Dar es Salaam, **Tanga Cement Co. Ltd v Jumanne Masangwa**, Civil Application No. 6 of 2007 and **Benedicta Sabasi v Glory Mushi**, Miscellaneous Land Application No. 55 of 2017, High Court at Arusha.

The learned counsel was of the submission that the overriding objective principle be applied as stated in Act No. 8 of 2018. She said, the court needs to focus on rights and not technicalities as was held in the case of **Bruno Charles Matalu and another v Ndala Hospital,** Labour Application No. 20 of 2018, High Court at Tabora. She finally prayed for the CMA decision dated 09th July, 2021 be set aside.

In reply, Mr. Bantu submitted that the application had to have reasons for delay and also the applicant should account for each day delayed. He stated that the applicant delayed for 150 days and did not account for the same. To support his point, he cited the case of **Vedastus Raphael v Mwanza City Council and 2 others**, Civil Application No. 594/08 of 2021, Court of Appeal of Tanzania at Mwanza.

Arguing further, Mr. Bantu held the view that the applicant failed to show good cause for delay. He said, the reasons mentioned stated being a pending case, and that the summons was served late and that the advocate's child was sick do not amount to sufficient reasons. He elaborated that the pending case was dismissed and that is the proof that the applicant did not take care of the case. He supported his point by citing the case of **Paulo Mbogo v The Republic,** Criminal Application No. 111/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam.

On the issue of illegality, he submitted that in law illegality has to be on the face of the record. It was his submission that the right to be heard was provided to the applicant but did not enter appearance. That is why the matter was heard exparte. He cemented the submission by citing the case of **Magnet Construction Limited v Bruce Wallace Jones**, Civil Appeal No. 459 of 2020, Court of Appeal of Tanzania at Musoma, which held that *diligence and negligent are not reasons for extension of time,* and the case of **Paradise Holiday Resort Limited v Theodore N. Lyimo**, Civil Application No. 435/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam.

In a rejoinder, Ms Jackline stated that on the day the matter was heard exparte, they were told to wait until the decision was made. She then reiterated what she submitted in the submission in chief.

After hearing both parties, I find the pertinent issue to be determined is *whether there were reasons sufficient to warrant extension of time.*

Extension of time at CMA is governed by rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 which provides: -

> *"The Commission may condone any failure to comply with the time frame in these rules on good cause."*

It was also held in the case of **Wambura N.J. Waryuba v The Principal Secretary Ministry for Finance and Another**, Civil Application No. 320/01 of 2020, 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."

On that aspect the applicant ought to prove at the CMA by stating reasons for delay and account for each day delayed.

Facts narrated were that an application was heard exparte and the award was in favour of the respondent. The award is dated 05th August, 2019 and was served to the applicant on 26th June, 2020 through Hilda Kisaka. The applicant filed the application of extension of time on 09th July, 2020 through notice of application. She was supposed to prove reasons for delay and account for each day delayed from 26th June, 2019 to 09th July, 2020.

Under the Law of Limitation Act [CAP. 89 R.E. 2019] time to set aside an award is limited to thirty days. Under the cited provision of the law the applicant ought to file the application to set aside an award on 04th September, 2019. The law does not state that time should be accounted

from the day one was served with the award, unless he was not aware of the same. On that aspect days which ought to be counted were from 04th September, 2019 to the day the application for extension of time was filed which was on 09th July, 2020. In total, they are 309 days. In the case of **Juma Nassir Mtubwa v Namera Group of Industries Ltd**, Revision No. 251 of 2019, High Court at Dar es Salaam (unreported) it was held: -

"It is principle of law that, in any application for extension of time the applicant must account on each day of his delay..."

The advocate for the applicant stated that on the day of hearing her child was sick. Evidence shows that her child went to hospital on 15th February, 2019 and was discharged on the same day.

The proceedings shows that the matter was fixed for hearing on 06th February, 2019 but she did not appear. On the adjournment day (15th February, 2019) the advocate stated that her child was sick (which the evidence presented proves). But the Human Resource Officer stated they were just not ready to proceed with the hearing even though it was the second time, it was fixed for hearing. This means, the reasons for why there was no appearance on party of the applicant is stated in two different tongues. This in my view, shows, the applicant was negligence in handling the matter.

On the other point raised by the advocate for the applicant was that they were served with the summons one day before the hearing date and so could not get the time to prepare hearing. Going through records, it is evident that the summons dated 06th February, 2019, was on the 15th February, 2019 served to the applicant's advocate at 14:30. Whereas CMA proceedings in respect of the exparte hearing shows that: -

- On 28th October, 2018 the matter was adjourned to 06th February, 2019 for hearing. On that day, the applicant did not enter appearance and so the matter was adjourned.
- On 06th February, 2019 the matter was adjourned to 15th February, 2019. The applicant through Oresti Msuya (Human Resource Officer) stated that they were not ready to proceed as they were not ready due to being served with the summons late.

I believe that the applicant knew of the hearing since 28th October, 2018 and so was supposed to be prepared since then. Nevertheless, on the adjournment day (06th February, 2019) did not enter appearance. On 15th February, 2019 stated that they were not ready. All these events shows that the applicant was negligent in defending her case.

On the issue of illegality stated by the applicant that she was not given right to be heard lacks legal standing. This is so because it is evident that

the applicant was given a chance two times to defend her case but did not do so. This proves that the applicant was provided with enough time to defend her case but she sat on it.

Reasons stated by the applicant for her to be warranted extension of time showed that the applicant acted negligently when defending her case. As the case of **Hassan Latifa Lukio Mashayo**, Civil Application No. 03 of 2007 (unreported) which held that: -

> *"Dismissal of an application is the consequence befailling an applicant seeking an extension of time who fails to account for everyday of delay."*

For that matter, I found no reason to fault the arbitrators' findings. This application has no merit. It is dismissed and no order as to costs.

A.K. Rwizile

JUDGE

26.08.2022