

IN THE HIGH COURT OF TANZANIA

**LABOUR DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS APPLICATION NO. 149 OF 2023

(Arising from an Award issued on 16/01/2023 by Hon. Wilbard, G.M, Arbitrator in Labour dispute No. CMA/DSM/KIN/35/2022 at Kinondoni)

CROWN SECONDARY SCHOOL.....APPLICANT

VERSUS

RAUCE KISONGA.....RESPONDENT

RULING

*Date of last order: 05/07/2023
Date of Ruling: 11/08/2023*

B. E. K. Mganga, J.

Brief facts of this application are that, on 01st January 2021 applicant employed the respondent as School Manager. On 17th December 2021, applicant terminated employment of the respondent allegedly due to absenteeism. Respondent was unhappy with termination of her employment, as a result, she filed Labour dispute No. CMA/DSM/KIN/35/2022 before the Commission for Mediation and Arbitration (CMA) at Kinondoni. On 16th January 2023, Hon. Wilbard, G.M, Arbitrator having heard evidence and submissions of the parties, issued an award in favour of the respondent that termination was unfair and awarded respondent to be paid TZS 43,200,000/= as compensation.

Applicant was aggrieved with the said award, hence on 01st June 2023, while being out of time, filed this application seeking the court to extend time within which to file an Application for Revision. In support of the application, applicant filed the affidavit sworn by Frumence Joachim Shirima, her Managing Director. In his affidavit in support of the application, Mr. Frumence Joachim Shirima stated that, the award was issued on 6th January 2023 in absence of the parties and that the copy of the award was collected on 16th January 2023 by Precious Ahmad advocate on behalf of the applicant after the said advocate was directed by applicant's advocate. The deponent stated further that, on 19th February 2023, Precious Ahmad advocate submitted the copy of the award to applicant's advocate after the latter has travelled back from Moshi, Kilimanjaro Region. That, on 25th February 2023, applicant filed Revision application before this court but was told by the Registrar to rectify and that, applicant's counsel went to inquire before the court as what was the problem, but he was directed to refile. It was stated further that on 9th March 2023 applicant filed an application that was admitted but at that time, applicant was out of time because time elapsed on 28th February 2023. It was also stated that, after noticing that she is out of time, on 10th March 2023, applicant filed Miscellaneous Application No. 78 of 2023 but the same was struck out on 17th May 2023 for being incompetent as it was supported by a defective affidavit.

The deponent stated further that, on 26th May 2023 applicant filed this application electronically in the e-filing system and further that, the CMA award contains illegalities, and that CMA had no jurisdiction.

In opposing the application, respondent filed both the Notice of Opposition and the Counter Affidavit sworn by Sosten Mbedule, her Advocate. In the counter affidavit, the deponent stated that, applicant has failed to adduce good reason that prevented her to lodge application for Revision within prescribed time. In the counter affidavit, it was further deposed that, applicant was served with the award on 6th February 2023 and that, applicant had time up to 20th March within which to file revision application, but she didn't.

When the application was called on for hearing, Mr. Johnstone Fulgence, learned Advocate, appeared and argued for and on behalf of the applicant while Mr. Sosten Mbedule and Ms. Hellen Ngelime, learned Advocates, appeared and argued for and on behalf of the respondent.

Arguing in support of the application, Mr. Fulgence, learned counsel for the applicant submitted that, applicant filed this application for extension of time to file revision against the CMA award issued on 16th January 2023 by Hon. Wilbard G.M, arbitrator. Counsel submitted further that, applicant was served with a copy of the award on 06th February 2023, and on 25th February 2023, she filed Revision, but she was informed that the application was filed in a wrong Court. He went

on that, on 09th March 2023, the application was admitted in the system after several rectifications. He added that, on 19th March 2023, counsel for the applicant received notification that the application was admitted on 09th March 2023. Counsel for the applicant further submitted that, on 09th March 2023, applicant was within time to file revision application. Counsel for the applicant submitted further that, applicant filed Misc. Application No. 178 of 2023 but the same was struck out on 17th May 2023 for being incompetent. Counsel for the applicant went on that, on 24th May 2023, applicant prayed to be supplied with the court order and the same was supplied to the applicant on the same date and filed this application on 26th May 2023.

Counsel for the applicant submitted further that, from 06th February 2023 when applicant was served with the award to 22nd March 2023 when Miscellaneous Application No. 178 of 2023 was filed, it is 44 days hence applicant delayed for two days. Counsel went on that, from 17th May 2023 when Miscellaneous Application No. 178 of 2023 was struck out to 01st June 2023 when applicant filed this application, applicant delayed for 13 days. Mr. Fulgence learned counsel for the applicant submitted further that, applicant delayed in those days because she was preparing a new application and was waiting to be served with the order that struck out the said application. Counsel for the applicant added that, the delay by 13 is not inordinate and cited the

case of ***University of Dar es Salaam v. Dorothy Phumbwe***, Misc. Labour Application No. 348 of 2020, HC (unreported) to support his submissions and implore the court to grant the application. He further cited the case of ***Grumet Reserve Company Ltd v. Morice Akiri***, Misc. Labour Application No. 29 of 2021, HC (unreported), arguing that the Court found 45 days of delay to be reasonable and granted extension of time.

Counsel for the applicant submitted that, in the application at hand, CMA issued an award based on the amended CMA F1 that was defective because respondent indicated that the dispute was on breach of contract but also filled Part B that relates to termination only. He argued that, illegality is a ground for extension of time and cited the the case of ***Amour Habib Salim v. Hussein Bafagi***, Civil Application N. 52 of 2009, CAT (unreported) to bolster his submissions and prayed that the application be allowed.

Resisting the application, Mr. Mbedule learned counsel for the respondent submitted that, applicant was served with the award on 06th February 2023 and that, in terms of Section 91(1)(a) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], she was supposed to file an application for revision within 6 weeks from the date she was served with the award. He added that, applicant had time up to 20th March 2023 to file revision, but she did not, instead, applicant filed an

application for extension of time on 22nd March 2023 that was signed on 12th March 2023. Counsel for the respondent submitted further that, from 12th March 2023 applicant was busy with drafting documents to file Miscellaneous Application for extension of time while at that time, she was in time. Based on that, Mr. Mbedule strongly submitted that, there is no reason disclosed as to why applicant opted to file extension of time while she had time to file revision.

Mr. Mbedule submitted that, at paragraph 3(xxxv) of the applicant's affidavit, applicant deponed that her counsel was sick but there is no medical report to that effect. He added that, at paragraph 3(xvii), applicant deponed that her advocate travelled to Kilimanjaro attending Court Session but there is no proof. Counsel went on that, no causelist was attached to that effect. Counsel prayed the Court to draw adverse inference against the applicant for failure to attach those documents because she is aware that they were against her favour. Counsel cited the case of ***Nyanza Road Works Ltd V. Giovanni Guidon***, Civil Appeal No. 75 of 2020 CAT (unreported) to bolster his submissions that a person who alleges that he was sick, must show how that sickness prevented him to act. He further argued that, applicant slept on her rights.

Counsel for the respondent submitted that, applicant has not accounted for each day of the delay and that, she was not diligent. To

bolster his submissions, he cited the case of ***Stephano Mluge v. 21st Century Textiles Ltd***, Revision No. 59 of 2020, HC (unreported). Counsel for the respondent submitted further that, applicant did not account for the delay from 17th May 2023 to 30th May 2023.

On reason for the delay, counsel for the respondent submitted that, in paragraphs 3(xxiv), xxv and xxvi, applicant stated that the delay was due to Court's system inefficiency but that is not true. Mr. Mbedule submitted that, there is no affidavit showing that there was network failure and further that, there is no affidavit by the Deputy Registrar to that effect. He cited the case of ***Vietel Tanzania Limited v. ASA General Supplies & Construction Co. Ltd***, Civil Application No. 126/08 of 2021, CAT (unreported) to support his submissions that, it was necessary to attach the affidavit of the Court Officer and the name of the said court was supposed to be disclosed. He concluded that, in the application at hand, that was not complied with.

On illegality as a ground for extension of time and the case cited to that effect by counsel for the applicant, Mr. Mbedule argued that, there is no illegality in the award. He argued further that, the affidavit in support of the application does not disclose the alleged illegality. He added that, applicant filed this application as an afterthought after respondent has filed application for execution. He went on that; the application is intended to block execution process. He concluded that

litigation must come to an end and prayed the court to dismiss the application for want of merit.

In rejoinder, Mr. Fulgence, learned counsel for the applicant conceded that, on 12th March 2023, Frugence Joachim Shirima on behalf of the applicant swore his affidavit before Fredrick Joseph Ododa, Commissioner for Oaths and Notary Public in support of Miscellaneous Application No. 78 of 2023 and filed in court on 22nd March 2023. He conceded further that, applicant was served with the award on 06th February 2023 and that, 42 days within which to file revision application were expiring on 20th March 2023. He submitted that, the Court should only consider that, even if that affidavit was sworn while time has not expired, the documents were filed while time has expired. Counsel for the applicant submitted further that, he misconstrued Section 91(1)(a) of Cap. 366 R.E. 2019(supra) to mean that time started to run from the date the award was issued. He added that, misinterpretation of the law by an Advocate is a good ground for extension of time.

On sickness mentioned in paragraph 3(xxxv) of the applicant's affidavit, Mr. Fulgence submitted that, he was the one who was sick and conceded that he did not attach his affidavit to show that he was sick. He stated further that, he travelled to Kilimanjaro and conceded that he did not file his affidavit to that effect. He reiterated that, there is

illegality on the award and concluded that applicant accounted for each day of the delay.

In disposing this application, I should point out that, this being an application for extension of time, the court is called upon to exercise its discretion and that, the discretion must be exercised judiciously. See [Mza RTC Trading Company Limited vs Export Trading Company Limited](#), Civil Application No.12 of 2015 [2016] TZCA 12 and [Cashsales Stores Ltd vs. Damas Njowi & Another](#) (Rev. Appl 197 of 2022) [2022] TZHCLD 970. I should also point out that, for the court to exercise its discretion properly, applicant must adduce sufficient grounds for the delay. In other words, applicant must provide relevant material to move the court to exercise its discretion. See the case of [Victoria Real Estate Development Ltd vs Tanzania Investment Bank & Others](#) (Civil Application 225 of 2014) [2015] TZCA 354, [Rose Irene Mbwete vs Phoebe Martin Kyomo](#) (Civil Application 70 of 2019) [2023] TZCA 111, [Omary Shaban Nyambu vs Dodoma Water & Sewerage Authority](#) (Civil Application 146 of 2016) [2016] TZCA 892, and ***Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd***, Civil Application No. 13 of 2010, CAT(unreported) to mention but a few. In fact, Rule 56(1) of the Labour Court Rules, GN. No. 106 of 2007, requires an applicant to show good cause for the delay for the court to extend time.

It is undisputed by the parties that, applicant was served with the copy of the award on 06th February 2023 and that, 42 days within which to file revision application were expiring on 20th March 2023. It is also undisputed by the parties that, applicant, instead of filing revision, on 22nd March 2023, she filed Miscellaneous Application No. 78 of 2023 for extension of time. In imploring the court to grant this application, it was submitted by counsel for the applicant that, the Court should consider that, even though the affidavit in support of Miscellaneous Application No. 78 of 2023 for extension of time was sworn while time to file revision has not expire, the said miscellaneous application was filed in court while time to file revision has expired. With due respect to counsel for the applicant, the mere fact that Miscellaneous Application No. 78 of 2023 was filed in court on 22nd March 2023 while the days available to file revision expired on 20th March 2023 cannot be a ground for granting this application.

It is undisputed that on 12th March 2023, when Frugence Joachim Shirima sworn his affidavit before Fredrick Joseph Ododa, Commissioner for Oaths and Notary Public in support of Miscellaneous Application No. 78 of 2023, time available for the applicant to file revision had not expired. Instead of filing revision application, applicant filed an application for extension of time. The argument by counsel for the applicant that he misconstrued Section 91(1)(a) of Cap. 366 R.E.

2019(supra) to mean that time started to run from the date the award was issued and that, misinterpretation of the law by an Advocate is a good ground for extension of time, in my view, cannot be valid. If that argument is accepted by the court, then, every counsel or party who lost his case and had no intention of challenging the decision, may, after lapse of time, come to court with a similar argument of misinterpretation or misconstruction of the law as a ground for extension of time. In my view, that will open a floodgate of endless litigations and the well settled principle that litigations must come to an end will have no use. The end resultant thereof will be chaos. By and large, misinterpretation or misconstruing the law cannot be a ground for extension of time. In submitting that counsel misinterpreted or misconstrued the law, in my view, is an indirect admission by counsel for the applicant that he was not well conversant with the law. In my view, that cannot be a ground for extension of time. In fact, there is a plethora of case law that incompetent, ignorance of the law or negligence has never been a ground for extension of time. See the case of [*Farida F. Mbarak & Another vs Domina Kagaruki & Others*](#), Civil Reference No.14 of 2019 [2021] TZCA 600, [*Vedastus Raphael vs Mwanza City Council & Others*](#), (Civil Application 594 of 2021) [2021] TZCA 696, [*Wambele Mtumwa Shahame vs Mohamed Hamis*](#), Civil Reference No. 8 of 2016 [2018] TZCA 39, [*Mussa S. Msangi & Another vs Anna Peter*](#)

Mkomea (Civil Application 188 of 2019) [2021] TZCA 315, case of **Jubilee Insurance Company (T) Ltd vs Mohamed Sameer Khan** (Civil Application No. 439 of 2020) [2022] TZCA 623 and **Ally forodha & 1673 Others vs The Permanent Secretary Ministry of Finance and Attorney General** (Misc. Application No. 421 of 2022) [2022] TZHCLD 1096. In **Mkomea's case** (supra), it was held by the Court of Appeal inter-alia that:-

"...It is also a considered view of the Court that the attempt by the applicants to throw the blame on their former advocate cannot be accepted and it does not relieve them from being held responsible for whatever snag their wish to challenge the High Court decision is encountering. Ignorance by an advocate of what procedure needed to be followed and the changing of hands of a case between different advocates does not constitute a good case for extension of time..." (Emphasis is mine).

In **Khan's case** (supra) the Court of Appeal quoted its decision in the case of **Exim bank v. Jacquilene A. Kweka**, Civil Application No. 348 of 2020 wherein it stated that: -

" ... firms are manned by lawyers who ought to know court procedures. In fact, failure of the advocate to act within the detect of law cannot constitute a good cause for enlargement of time".

In **Forodha's case** (supra), this court held: -

"If I may be permitted to add, the reason and logic behind that position is that, the said advocate was chosen by the applicants themselves. Therefore, if the said advocate was negligent or incompetent, the court or the other part, is less concerned because that is poor choice of the applicants themselves and nobody forced them to select the said advocate. More so, extension of time based on incompetency of an advocate chosen

by the applicants, will be an invitation for whoever a case is decided against her/his favour, to come up with a similar application, that s/he lost his case because the advocate was incompetent and that, s/he depended on expertism of the advocate believing that the latter is competent. In my view, that will open a flood gate for swarms of bees and Tsetse flies to go through altogether, but at the end, the intended harvest of honey in the name of justice, will be adulterated by swarms of Tsetse flies. That will make litigations to be endless. That cannot be accepted. The least I can say is that, failure to get one case correct or getting it correct, is not a conclusive proof of incompetence or competence. After all, all of us are striving to be competent because there is no one who is competent 100 %. Sometimes we get it correct and sometimes not."

In paragraph 3(xvii) and 3(xviii) of the affidavit in support of the application, the deponent stated that, on 4th February 2023 counsel for the applicant travelled to Moshi Kilimanjaro and on the same date directed Precious Ahmad, advocate to collect the award and that, the latter collected the award on 19th February 2023. I have examined a copy of the award attached to the applicant's affidavit and find that the award was collected by the said Precious Ahmad, advocate on 6th February 2023. There is no reason disclosed as to why the unnamed advocate who directed Precious Ahmed Advocate to collect the award from CMA did not direct the said Precious Ahmed advocate to file revision. More so, there is no reason disclosed as to why, applicant after being aware that the said unnamed advocate has travelled to Moshi Kilimanjaro, failed to follow upon Precious Ahmed advocate who, after all collected the award from CMA, and direct him to file revision. It is my

view that, whatever choice applicant made, cannot be heard complaining after being out of time.

In addition to the foregoing, there is one disturbing issue namely, none disclosure of the advocate of the applicant in the affidavit in support of the application. In the said affidavit, applicant disclosed only the name of Precious Ahmed as an advocate who collected the award from CMA after being instructed by undisclosed advocate. In my view, the none disclosure leaves much to be desired. During hearing, Mr. Johnstone Fulgence, learned Advocate, submitted that he is the one who travelled to Moshi Kilimanjaro and was the one referred to in the affidavit and that he was sick on the dates mentioned in the affidavit. With due respect to counsel for the applicant, there is nothing in the affidavit to prove that he is the one that was being referred to by the deponent. The argument by Mr. Johnstone Fulgence, learned Advocate, that he is the one referred to in the affidavit in support of the application has no evidential value because, it is submission from the bar. See the case of [*Rosemary Stella Chambejairo vs David Kitundu Jairo*](#), Civil Reference 6 of 2018) [2021] TZCA 442, ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others***, Civil Appeal No. 147 of 2006, [*A. Nkini & Associates Limited vs National Housing Corporation*](#), Civil Appeal No.72 of 2015) [2021] TZCA 564, [*Shadrack Balinago vs Fikir*](#)

Mohamed @ Hamza & Others, Civil Application No. 25 of 2019 [2021] TZCA 45 and *Ramadhani J. Kihwani vs Tazara* (Civil Application No. 401 of 2018) [2019] TZCA 171 to mention but a few. Failure to disclose the name of the said advocate in the applicant's affidavit, gives a possibility that the deponent was referring to another advocate. If anything, Mr. Johnstone Fulgence was supposed to file his affidavit to support what was stated by Frugence Joachim Shirima in the affidavit in support of this application as it was correctly submitted by Mr. Mbedule, the learned counsel for the respondent. In absence of his affidavit or affidavits of persons mentioned in the affidavit in support of the application, all what was deponed by Frugence Joachim Shirima becomes hearsay and cannot be acted upon.

It was submitted by counsel for the respondent that, applicant did not account for each day of the delay. On the other hand, counsel for the applicant submitted that applicant accounted for the delay. With due respect to counsel for the applicant, in the affidavit in support of the application, there is no account each day of the delay. Applicant did not account for the delay from 17th May 2023 to 30th May 2023 as it was correctly submitted by counsel for the respondent. There is a plethora of case laws that, in an application for extension of time, applicant must account for each day of the delay. See the case of **Sebastian Ndaula**

vs. Grace Lwamafa, Civil Application No. 4 of 2014, CAT (unreported), [Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another](#), Civil Application No. 278/15 of 2016, CAT, (unreported), [Finca T. Limited & Another vs Boniface Mwalukisa](#), Civil Application No. 589 of 2018) [2019] TZCA 56, [Zawadi Msemakweli vs. NMB PLC](#), Civil Application No. 221/18/2018 CAT (unreported), [Elias Kahimba Tibendalana vs. Inspector General of Police & Attorney General](#), Civil Application No. 388/01 of 2020 CAT (unreported), [Omari R. Ibrahim vs Ndege Commercial Services Ltd](#) (Civil Application 83 of 2020) [2021] TZCA 64, [CRDB Bank Ltd PLC vs Victoria General Supply Co. Ltd](#) (Civil Application 319 of 2019) [2019] TZCA 457 and ***Bushiri Hassan vs. Latifa Lukio Mashayo***, Civil Application No. 3 of 2007, CAT (unreported) to mention but a few. In ***Mashayo's case*** (supra), the Court of Appeal held *inter-alia* that: -

"...the delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken."

It was submitted by counsel for the applicant that, there is illegality on the award and implored the court to grant extension of time. It is a settled principle that, illegality may be a sufficient ground for extension of time, but for it to be a sufficient ground, it must be apparent on the face of record. See the case of [Jubilee Insurance](#)

Company (T) Ltd vs Mohamed Sameer Khan (Civil Application No. 439 of 2020) [2022] TZCA 623, *Omary Ally Nyamalege, Administrator of the Estate of the Late Seleman Ally Nyamalege & Others vs Mwanza Engineering Works*, Civil Application No. 94 of 2017 [2018] TZCA 230, *Lyamuya Construction Co. Ltd vs Board of Registered Trustee of Young Women's Christian Association of Tanzania*, Civil Application No. 2 of 2010 [2011] TZCA 4. As to what amounts to apparent on the face of record, has been discussed by the Court of Appeal on numerous cases. See for example the case of *African Marble Company Limited (AMC) vs Tanzania Saruji Corporation (TSC)*, Civil Application No. 8 of 2005 [2005] TZCA 87 and *Chandrakant Joshubhai Patel v. Republic*, [2004] TLR 218, *Abdi Adam Chakuu vs Republic*, Criminal Application No. 2 of 2012 [2017] TZCA 138, *Ansaar Muslim Youth Center vs Ilela Village Council & Another*, Civil Application No. 310 of 2021 [2022] TZCA 615 to mention but a few. 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...It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established..."

I have examined the alleged error in the application at hand and find that, it is not apparent on the face of record. In my view, the ground of illegality fails to meet the test.

For all what I have discussed hereinabove, I hold that the application is not merited and dismiss it.

Dated at Dar es Salaam on this 11th August 2023.



B. E. K. Mganga
JUDGE

Ruling delivered on 11th August 2023 in chambers in the presence of Johnstone Fulgence, Advocate for the Applicant but in the absence of the Respondent.



B. E. K. Mganga
JUDGE