

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 66 OF 2023

CRDB BANK PLCAPPLICANT

VERSUS

SYLVESTER SAMSON MBOJE RESPONDENT

RULING

19th July – 18th August, 2023

OPIYO, J

The respondent was employed by the applicant and worked in various positions from 01st November, 2015 until 21st September, 2022 when he was terminated for misconduct while serving the Applicant at the level of Branch Manager. Aggrieved, the respondent filed for a Labour Dispute at the Commission for Mediation and Arbitration having the registration No. CMA/DSM/ILA/673/2020/349 claiming for unfair termination. The matter was heard by hon. Mbeyale (Arbitrator) and the award was delivered on 21st September, 2022 in favour of the respondent. The order was for the applicant to pay the respondent TZS. 695,003,436/= being compensation

for unfair termination, subsistence allowances and damages. The arbitrator further concluded that subsistence allowance and remuneration compensation from the date of termination will be increasing at the rate of TZS 334, 364. 16 per day to the date applicant reinstate the respondent and to the date applicant transport respondent and his family from Mbozi to Dar Es Salaam and respondent be issued with certificate of service. Upon being dissatisfied the applicant filed for the revision application which was registered as No. 318 of 2020. On the 22nd November 2022, the Application was struck by the Court, Hon. Maghimbi J, for being incompetent without leave to re-file the competent one for reasons that the notice of intention to seek revision was signed by the Applicant's Advocate as well as affidavit in support of the application. Thereafter she filed an application for extension of time to file filed an application for an extension of time to file Revision out of time, Misc. Application No. 505 of 2022, which was also struck out for being incompetent for the reason that it was filed without being accompanied by the notice of intention to seek a revision. on 7/3/2023, Hon. Mlyambina J. The Court made a holding that before filing an application for an extension of time, it is important to file first the notice of intention to seek for revision. On 10th March 2023, the applicant allegedly proceeded to the notice of intention to seek revision.

Consequently on the same date filed this application for both an extension of time to file the notice of intention to file the revision application and extension of time to file the application for revision.

The application is supported by the applicant's affidavit sworn by Mgisha Mboneko, Applicant's Principal Officer on the ground as to whether the applicant has sufficient reason to be granted extension of time as prayed in the notice of application and chamber summons. The matter was heard by way of written submissions. Both parties were represented by Learned Counsels. Mr. Juvenalis Ngowi Dentons EALC East African Law Chambers represented the applicant and Mr. Roman S.L. Masumbuko from Roman Attorneys represented the respondent.

Before submitting in support of the application Mr. Ngowi prayed to abandon the prayer for an extension of time to file the notice of intention to file the revision application and remained only with the application for extension of time to file revision application. The reason for abandoning the first prayer is that, the same appears to be inadvertence following the determination of preliminary objections raised by the respondent in the instant application on 15th May 2023, Hon. Mganga, J. in respect of the


jurisdiction of this honourable Court to extend time to file the notice of intention to seek revision out of time. This honourable Court delivered a ruling holding to have the power to extend the time to file the notice out of time. Therefore, the application becomes inadvertence because in such determination, the said ruling of the court also confirmed that the notice of intention to seek revision had been filed prior to the filing of the instant application in compliance with the Ruling of this Court delivered on 7th March 2023, requiring for the notice of intention to seek a revision be filed prior to the filing of revision or application for extension of time.

Responding to the above contention, Mr. Masumbuko started by submitting that the applicant filed his written submission in chief out of time and without leave of the court. He argued that, written submission in chief was supposed to be filed on 29th June, 2023, but it was filed on 30th June, 2023, thus defiance of court's order. The same is as good as no submission has been filed, hence the application ought to be dismissed.

Mr. Masumbuko continued to submit that apart from that, abandoning the first prayer through counsel's submission is totally illegal as the prayer was subjected to the preliminary objections which were overruled by this court in its ruling dated 15th May, 2023 ruling that it had powers to entertain an

application for extension of time to file CMA form No. 10. Therefore, since there have never been any prior application to seek extension of time to file the said form, then abandoning that prayer is circumventing the objections raised. He argued that, the counsel for applicant is actually caught off side by the fact that, this court made remarks on the presence of the CMA form No. 10 which was not validly part of the record while there was still application for extension of time to file the form. Therefore, to him the proper remedy is for the whole application to be out, as the first application cannot be abandoned at this point. For him the applicant is wrong in the present application for filling the application of the same nature with the application that was struck out on 7/3/2023 attaching the CMA No. 10, if at all, without leave of the court.

Making rejoinder on the matter, Mr. Ngowi submitted that the respondent failed to respond to the reason demonstrated by the applicant for an extension of time. He stated that the counsel for the respondent instead raised preliminary objections contrary to the procedure. He continued that, he even invited this Court to decide on matters which had already been determined by this court in its previous ruling.



On the issue that the submissions in chief was filed out of time without seeking the Court's leave, he submitted that, it is true the Court ordered for the matter to be disposed of by way of written submissions and the written submissions supporting the application ought to have been filed on the 29th June, 2023. However the date mentioned fell on Eid El Adha, an event that prevented the filing of the submissions in chief as the Court's business was closed; hence, the application was filed to this Court on the 30th June 2023. Thus the application was filed within time as provided under section 60 (1) (h), (2) and section 19(6) of the Interpretation of Laws Act [CAP 1 R.E. 2019]. For that, he prayed for the court to take judicial note that as 29th June, 2023 was a public holiday, the filling date to be 30th June, 2023. He then backed up his point by citing section 59(1)(g) of the Law of Evidence [CAP. 6 R.E 2019].

On the issue of the applicant's prayer to abandon the prayer for extension of time to file a notice of intention to seek Revision, he submitted that the respondent's argument that since the prayer was subject to the preliminary objection that was overruled on 15th May, 2023 and since there has never been any application for extension of time to file CMA F10, then abandoning the prayer is circumventing the objection is misconceived. That



is because, by arguing that the counsel for the respondent argued that there is nothing on record showing that CMA F10 was filed as alleged in the Court's Ruling of 15th May, 2023 the respondent's counsel has invited this Court to make the decision on an issue which has already been determined on 15th May 2023. He added, the said Ruling was not challenged in any manner, and it remains valid until set aside by a court of competent jurisdiction. He then prayed to the Court to ignore the submission by the Respondent regarding the issue of CMA Form No. 10 since the same has already been determined by this same court. In his view, much as the prayer for this Court to extend the time to file CMA F.10 appears to be inadvertence on the application, abandoning the same is not fatal because there is no pending preliminary objection before this Court. He then prayed to the Court to proceed to consider the payer to extend the time to file revision out of time only.

Before determining the gist of the main application, it is pertinent to look at the issues raised by Mr. Masumbuko, counsel for respondent, as highlighted above. Regarding the issue that the submission in chief was filed out of time, I am not going to waste much energy on it after realizing from Mr. Ngowi's submission that the supposed date for filing their

submission in chief actually fell on public holiday for being Eid El Adha day, thus covered under section 60 (1) (h), (2) of the Interpretation of Laws Act (supra) to be excluded in calculating limitation period. Provided that the submissions were filed on the next working day after the said public holiday, it was filed within time. The point raised has no merits. It is dismissed.

I now turn to the issue of abandoning the prayer for extension of time to file notice of intention to file revision. In this issue Mr. Masumbuko argued that abandoning the first prayer through submission is illegal as the prayer was subjected to the preliminary objections which were overruled by this court in its ruling dated 15th May, 2023 by ruling that it had powers to entertain an application for extension of time to file CMA form No. 10. He argued that by holding, no CMA form No. 10 would be filed without this court extending time to file the same out of time. Therefore, by abandoning the prayer that could have led to validly filing the form out of time and remaining with the application similar to the one that was struck out on 7th March 2023 for lack of the said form, is irregular as it puts the remaining application to the same situation suffered by the one struck out. Responding to that, the Counsel for the applicant stated that the counsel

for the respondent raised the preliminary objections contrary to the procedure and asking court to what it had already determined.

It is a trite law that the court becomes *functus officio* upon determining the matter. It cannot re-determine the matter it has already determined. However for the principle to apply the court must be asked to re-determine the matter in the same context it has already did. In the case of **Michael son of Meshaka v. R.**, the Court of Appeal referred to **R. v. Sironga, [1918] E.A.L.R. 148** and **Suleman Ahmed v. R., [1922] E.A.L.R. 19** dealing with the matter at the stage of issuing order confirming a sentence did not prevent consideration of the sentence in the course of an appeal in the same case. In our case, this court overruled the objection that it lacked the jurisdiction to entertain the application for extension of time to file the CMA Form No. 10 by stating that:-

"In no way, CMA arbitrator could have determined that Application in the absence of a clear provision empowering him to do so. It is my view therefore that the issue of the second bite and Kabweza's case (supra) relied upon by the Counsel for the respondent, cannot apply in the circumstances of this application. The only room is open for this court. I, therefore, hold that; the court has jurisdiction to hear and determine an application for an extension of time to file CMA F10

... "

It court continued to hold at page 15-16 that:-

" For all what I have discussed hereinabove, I find that the two preliminary objections are not merited and proceed to dismiss them. I therefore order that the application should proceed for hearing on merits"

The question that ensure is, does the holding that the matter be heard on merits bars this court to determine point of law relating to the same point of filing CMA Form no 10? My considered view is that, by the court deciding that the application be allowed to proceed on merits after dealing with determination of that particular preliminary objection binds it in relation to the context it had dealt with. This court therefore, cannot re-determine whether it has jurisdiction to determine application for extension of time to file CMA Form No. 10 or not as it had already decided on that in determining the preliminary objection that it had jurisdiction to do so. However, if different context of the same objection comes up in a form of objection that may hinder determination of application on merits as the court had already held, the same court is mandated to deal with the new issue or new context although relating to the same matter (filing CMA form No 10) it had not determined in its previous decision.

In this case the court had opportunity of determining various points of objections including the following:-

1. That the present application is misconceived and incompetent for seeking extension of time against Labour Revision No. CMA/DSM/ILA/305/2020.
2. That the application is incompetent and bad in law for being omnibus application.
3. That the application is misconceived and bad in law for lack of jurisdiction to entertain the present application on extension of time to file the CMA Form No. 10
4. That the court is *functus officio* with regard to leave or extension of time to file the revision application as per the order in Labour Revision No. 318 of 2022.

In respect to the 3rd objection, which is a subject of the current re-discussion the court held at pg. 9 through 10 of its ruling dated 15th May, 2023 Mganga, J.

"I have examined court records and find that the said CMA F10 was filed at CMA on 10 March 2023 and that it is part of this application. Court normally decides matters based on what was filed by the

parties. Since the said document is part of the court, I hold that it was filed prior to filing revision."

At Pg 11 emphasizing the same point Hon. Mganga, J held that:

In Mboje's case (supra), an application for an extension of time that was filed by the Applicant herein was struck out because there was no notice to seek revision that was filed. In the application at hand, as correctly submitted by the counsel for the applicant, and as I have pointed out here above, the said (CMA F10) was filed and is part of the court record. It is my view that the applicant complied with what was held by this court in Mboje's case (supra)".

On the basis of the above holding of the court, the counsel for the applicant decided to abandon his prayer for extension of time to file notice of intention to file revision (CMA Form No.10) arguing that the same appears to be advertence as the above court decision confirmed that the notice of intention to seek revision had been filed prior to the filing of the instant application in compliance with the ruling of this court delivered on 7th March, 2023 requiring for notice of intention to seek a revision to be filed prior to filing revision or application for extension of time.



This in turn attracted Mr. Masumbuko's counter argument that by abandoning the prayer for extension of time to file the intention to file revision, the applicant is actually reconstructing the application in a manner that is illegal or contrary to the law. By the look of it, the concern by Mr. Masumbuko came as a reaction to what happened at the stage of filing written submission by abandoning the first prayer in applicant's submission in chief. The issue is whether Mr. Masumbuko's concern is in the same context that was already determined by this court at the stage of preliminary objection to make this court *functus officio*.

The answer is no because, at this stage Mr. Masumbuko by arguing that as there is no extension of time to file form No. 10 was entertained granting the applicant leave to file the same, there is no valid form No. 10 that could be filed is in essence challenging the validity of the CMA form No. 10 claimed to have been filed by the applicant on 10th March, 2023. The determination by this court in its ruling on the preliminary objections was limited to what was before it then. That is, the determination that this court has jurisdiction to determine extension of time or not. The court also extended to the issue of having seen the CMA form No. 10 in the file. In my considered view, this did not go to the extent of determining the

validity of filing the said form on 10th March 2023 which is the gist of our current determination. This court is therefore, not *functus officio* in relation to discussing validity of the said filed CMA form No. 10. The court previously only determined whether the form was filed or not, now, was it validly filed? This is the issue to be determined here before proceeding with the matter on merits.

This court was told that, the Misc. Labour Application No. 505/2022 was struck out for being incompetent due to lack of notice of intention to file revision (CMA Form No 10) on 7th March, 2023. By that time, the time to file CMA form No. 10 had already elapsed. It could no longer be filed without leave of the court extending time. The counsel for applicant submitted that, the CMA Form No. 10 was filed on 10th March 2023, just three days after the application No. 505/2022 was struck out. This was before obtaining the necessary leave of the court to file it out of time, I believe. It follows therefore that, this form was not validity filed on 10th March, 2023, for it cannot validly be filed before time to file it out of time was granted. I think this is the reason, apart from allegedly filing the same on 10th July still the counsel for application filed application for extension of



time to file the same CMA Form No 10, the prayer she has subsequently abandoned in her submission in chief in support of the application.

In my opinion, as the determination of the court in preliminary objection was that it is this court that has the mandate to provide that leave, failure to prove that there was any application for the leave to file the form No. 10 out of time before this court apart from the one abandoned makes it obvious that the CMA form No. 10 that this court was made to note to have been filed on 10/03/2023 was not validly filed.

Furthermore, it is on record that the abandoned application was filed together with prayer for extension of time to file revision. This application was similar to the one that was struck out on 7th/03/2023 (Appl. No 505/2022) for lack of CMA form No. 10. That means, as correctly argued by Masumbuko that, after failure to argue for extension of time to file CMA form No. 10, i.e. upon abandoning the prayer to that effect, the remaining application for extension of time to file revision is prone to the same consequences that befell the application that was struck out on 07/03/2023, for the same also being filed without validly filed CMA form No. 10. This is because when it was filed on 10/03/2023, no CMA form No. 10 was yet to be validly filed. It cannot therefore be validated by presence

of CMA form No. 10 that was invalidly filed without leave of the court as discussed above.

For the reasons, this application is consequently struck for being incompetent. I need not discuss the remaining points as this point sufficiently disposes the application. Being a labour matter, I make no order to costs.



A handwritten signature in blue ink, appearing to be 'M.P. Opiyo', written over a horizontal line.

M.P. OPIYO,

JUDGE

18/08/2023