

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DODOMA

LABOUR APPLICATION NO. 3 OF 2019

*(Arising from Labour Dispute No. **CMA/DOD/57/2018** in the Commission for Mediation and Arbitration Dodoma)*

NMB BANK PLC APPLICANT

VERSUS

SIMON GERVAS MINJA RESPONDENT

RULING

18th May, 2021 & 17th August, 2021

M.M. SIYANI, J:

Through the instant application, NMB Bank PLC is seeking an extension of time to initiate revision proceedings against a decision of the Commission for Mediation and Arbitration Dodoma in a labour dispute No. CMA/DOD/57/2018 and dated 4th January, 2019 which among others, ordered the respondent's reinstatement and payment of his salary arrears. In terms of section 91(1) (a) of the Employment and Labour Relations Act No. 6 of 2004, whoever is aggrieved by an award of the Commission for

Mediation and Arbitration, may apply to this Court for the same to be set aside but such application shall be done within six weeks of the date that the award was served on the applicant.

According to an affidavit sworn by one Sabas Shayo and filed to support the instant application, NMB Bank PLC was served with the award on 7th January, 2019. In accordance with the requirement of law above, they had six weeks within which to apply for revision. The applicant's affidavit indicates that on 15th February 2019, NMB Bank PLC filed an application for revision in this court which according to him, was however not registered as the applicant's counsel one Ezekiel Amon Mwakapeje felt sick and therefore could not make follow up of the filed documents. As such NMB had to present the instant application for extension of time.

At the hearing of the application, NMB Bank PLC enjoyed the legal services of counsel Shayo and the respondent on the other hand, was represented by FIBUCA Region Secretary one Mr. Ramadhan Walikuchombe and assisted by Augustine Masatu. Given a chance to address the court, counsel Shayo reiterated the reason for the delay as stated in his affidavit. He argued that

initially the applicant presented his application on 15th February, 2019 which was well within the time prescribed by law. However, one Ezekiel Mwakapeje who was supposed to make follow up of the said application could not do so as he felt sick from 16th February, 2019 to 22nd March, 2019 and so he was not aware that admission of the filed documents was rejected by the court due to verification and notice of representation defects. According to the learned counsel, the said Ezekiel Mwakapeje became aware of the rejection on 26th March, 2019 where the noted defects where corrected and then this application was refiled. Taking a leaf from the Court of Appeal of Tanzania decisions in **Emmanuel Maira Vs The District Executive Director, Bunda District Council**, Civil Application No. 66 of 2020 and **Richard Mlagala and 9 Others Vs Aikael Minja and 3 Others**, Civil Application No. 160 of 2015 and this court's decision in **Sadru Manalji Vs Abdul Aziz Lalani and 2 Others**, Misc. Commercial Application No. 126 of 2016, the learned counsel submitted that the delay to initiate revision proceedings, was due to sickness which amounts to a sufficient cause for extension of time.

It was further submitted that the impugned award by the Commission for Mediation and Arbitration, was tainted with illegality on the reason that the

parties were not accorded a chance to be heard in respect of orders for payment in lieu of reinstatement which was granted without being prayed for. Mr. Shayo referred the cases of **Mbeya Rukwa Auto parts Vs Christina George Mwakyoma** (2003) TLR 251 and **Juto Ally Vs Lucas Komba**, Civil Application No. 484/17 of 2017 and argued that illegality of the complained decision, is a sufficient ground for extension of time.

In response to counsel Shayo's submission, Mr. Wakulichombe argued that there was no evidence that Ezekiel Mwakapeje was sick neither has the applicant shown when he became aware of the rejection of the first application. He contended further that the fact that the court rejected the application has not been substantiated with an affidavit from the court's registry officer. With regard to the question of illegality, Mr. Wakulichombe submitted that there was no such illegality in the Commission's award because section 40 (3) of the Employment and Labour Relations Act (supra) allows an arbitrator to issue an order for payment of an employer's benefits in case of failure to reinstate him.

The above being the summary of what was submitted to me by the learned counsels, I will start by agreeing with counsel Shayo that both sickness and illegality raised by the applicant in this matter, can be good cause for extension of time as repeatedly observed by our apex court of land in the cases referred by him. In the instant matter there is a claim that one Ezekiel Mwakapeje who was assigned to make follow up of the application after lodging the same on 15th February, 2019, got sick and therefore the applicant was un aware of the rejection on the lodged documents.

In agreement with Mr. Wakulichombe, I will hasten to state that both facts as to rejection of the application and sickness of the said Ezekiel Mwakapeje required to be supported by sworn facts. There was however neither affidavit from Mr. Mwakapeje to prove that he felt sick immediately after lodging the application, nor is there proof that the same was rejected. While admittedly, advocates can swear affidavits in respect of the matters they represent their clients, but in my considered opinion, they can only do so for facts which are not hearsay. See **Arbogast C. Warioba Vs National Insurance Corporation (T) LTD and Consolidated Holding Corporation**, Civil Application No. 24 of 2011 (Unreported).

The above stated, counsel Shayo being the applicant's advocate was not a proper person to take an oath for Mr. Mwakapeje's sickness. I therefore hold that the fact that Ezekiel Mwakapeje was sick and the delay to know the fate of the application allegedly presented on 15th February 2019, were mere hearsay facts coming from a member of the bar.

As prior noted, the applicant had a claim of illegality. It is the law, that where there is such claim of an illegality courts of law should not wring their hands in desperation, but must give themselves an opportunity to look into the alleged illegality by extending time within which appeals or application can be filed. (See **Losindilo Zuberi Vs Ally Hamis**, Civil Application No. 5 of 1999, **Principal Secretary, Ministry of Defence and National Service Vs Devran Valambhia** (1992) TLR 185 and **VIP Engineering and Marketing Limited and 2 Others Vs Citibank Tanzania Limited** Consolidated Civil References No. 6, 7 and 8 of 2006).

The above notwithstanding, I am also keenly aware that for an illegality to a sufficient cause for such extension, the claimed illegality must be on the face of record and of sufficient importance. See **Mechmar Corporation**

(Malaysia) Berhard Vs VIP Engineering and Marketing Ltd, Civil Application No. 9 of 2011 (unreported). In respect of this matter, is a fact that the arbitrator issued an order for payment of employee's benefit in lieu of reinstatement without affording parties a chance to be heard. I agree with Mr. Wakulichombe that once it has been established that the termination was unfair, arbitrators just as it is for the courts of law, are mandated under section 40 (3) of the Employment and Labour Relations Act, to order payment of compensation of twelve months wages in addition to wages due and other benefits in case the employer does not wish to reinstate an employee. There was nothing of sufficient important or error on the face of record from what was submitted by counsel Shayo.

In the fine, extension of time is normally granted on the discretion of the court and for the court to exercise that discretion, the delay must be sufficiently accounted. See **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In this matter, the applicant has failed to account for his delay. The application is therefore bankrupt of merit and the same is consequently dismissed.

Considering that this is a labour matter, I order each party to bear its own costs. It is so ordered.

DATED at DODOMA this 17th August, 2021



M.M. SIYANI
JUDGE