THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISC. LABOUR REVISION NO. 09 OF 2022.

(Originating from Labour Dispute No. CMA/NJ/AUG/25/2017, in the Commission for Mediation and Arbitration of Njombe, at Njombe).

MASU INTERTRADE LIMITED..... APPLICANT

AND

ABAS NUHU MBOSA..... RESPONDENT

RULING

18th August & 16th November, 2022

UTAMWA, J:

The applicant in this matter, **MASU INTERTRADE LIMITED** filed the present application seeking for the following orders:

i. That this honourable court be pleased to grant an extension of time for the applicant to file an application for revision against the award (impugned award) made by the Commission for

Mediation and Arbitration of Njombe (the Commission) in CMA/NJ/AUG/25/2017 on 18th November, 2021.

ii. Any other order this Honourable court may deem just and fit to grant.

The applicant's application is supported by the affidavit deponed to by Mr. Moses Ambindwile, the applicant's counsel. The affidavit essentially deposed that, the applicant was aggrieved by the impugned award made by the Commission. She thus, lodged her application for revision to this court. However, the said application was struck out. The affidavit also deponed that, the impugned award is tainted with illegalities and irregularities. It awarded huge amounts as subsistence allowances, it also amended the arbitral award without affording parties the right to be heard and changed names of respondent arbitrarily.

The respondent, ABAS NUHU MBOSA resisted the applicant's application by filing a counter affidavit deponed to by himself. He stated that, the applicant was aware of the rectified award as he was duly served with summons. The Commission rectified the award in accordance with the order of this court.

During the hearing of the application, the applicant was represented by her advocate mentioned above. The respondent enjoyed the services of Mr. Leonard Lazaro Sweke, learned advocate. The application was argued by way of written submissions.

In supporting the application, the advocate for the applicant submitted that, the cardinal issue to address is whether the applicant has advanced sufficient reasons for the court to grant this application. He added that an allegation of illegality in the challenged decision constitutes sufficient reasons for extension of time. He cited the **Principle Secretary Ministry of Defence and National Services v. Devram Valambhia (1992) TLR 185** to support his contention. He thus prayed for this court to adopt paragraph 7 of the applicant's affidavit which lists the illegalities contained in the impugned award.

The applicant's counsel also mentioned the illegalities contained in the impugned award which include a huge sum of subsistence allowances awarded without any reasons or evidence. He argued further that, for a court to grant a relief, there must be proof of the claim on the balance of probabilities as held in the case of **Barelia Karangirangi v. Asteria Nyalwambwa, Civil Case No. 237of 2017, Court of Appeal of Tanzania (CAT) at Mwanza (unreported)**.

Another illegality according to the applicant's counsel was that, the arbitrator amended the award without affording parties the right to be heard. That course violated the cardinal principle of the right to be heard. He cited the case of **Yazidi Kassim Mbakileki v. CRDB (1996) LTD and Another, Civil Reference No. 14/04 of 2018 CAT at Bukoba** to cement his argument. He added that, another illegality in the impugned award is that, the arbitrator changed the names of the parties contrary to the names appearing in the High Court Labour Application No. 19 of 2020.

That course caused unnecessary confusion in the identity of the respondent. Furthermore, the impugned award did not contain all facts and summary of evidence according to the Commission records. It was also made from the proceedings which were a nullity since the witness did not take oath. He supported the contention by the case of **Joseph Elisha v. Tanzania Postal Bank, Civil Appeal No. 157 of 2019, CAT at Iringa** (unreported).

The applicant's counsel also submitted that, another reason for this court to grant the application is the doctrine of technical delay. This is because, the application for revision was not determined on merits. To cement his argument, he cited the case of **William Shija v. Fortunatus Masha (1997) TLR 213.** He thus urged the court to grant the application for the interest of justice.

In his replying submissions, the respondent's counsel argued that, the application is vexatious, baseless and devoid of merit. This is because, it is used as a delaying tactic to hinder the application for execution (Application for execution No. 1 of 2022) which is pending before the court. The applicant seeks the extension of time to file an application for revision which was time barred. The application thus, deserves to be dismissed with costs. He also prayed the court to adopt the respondent's counter affidavit to form part of his submissions.

It was also the contention by the respondent's counsel that, the Commission did not make an award for the second time on 18th November, 2021. It only rectified the award dated 30th October 2017 following this

court's order. He also disputed that the applicant on 25th January 2022 obtained a copy of the award through an attachment. There is no dispute that the applicant's application was struck out by this court on 13th June, 2022 for being incompetent. The Commission was ordered to rectify the contradictions by this court; hence the award dated 18th November 2021. That award is thus, not a fresh award as alleged by the applicant.

Respondent's counsel further argued that, the applicant cannot seek for revision of the award since he was served with summons, but refused to appear before the Commission. On 15th November 2017 the applicant filed an application for setting aside the *ex-parte* award dated 30th October 2017 which was dismissed as the applicant had not shown sufficient reasons. He went on to state that the applicant then filed application for revision No. 3 of 2018 which was also dismissed for being time barred. The huge amount of subsistence allowance was not among the reasons for the applicant to seek revision. The allegation that the arbitral award was amended without affording the parties the right to be heard has nothing to do with the present application. This is because, the applicant was duly served with summons and on 16th November 2021 both parties entered appearance and the applicant was represented by one Innocent Kibadu. In his view this court did not direct the arbitrator to re-hear the matter. It only directed it to clear the contradictions in the award.

The respondent's counsel also contended that, the applicant's allegation that the arbitrator changed the names of the parties is vexatious, baseless and devoid of merits as the respondent used the said names in his

employment contract to termination. However, the arbitrator omitted the surname and that is among the issues that were required to be rectified. This slip cannot thus, be an illegality in the award. On the allegation that the arbitrator made an award which did not contain all facts and summary of evidence as per the records contrary to Rule 27(1), (2), (3), (a) – (f) of the Employment and Labour Relations Rules, GN No. 67 of 2007 the respondent's counsel argued that, the same is not applicable in the application at hand. This is because, the provisions cited by the applicant's counsel do not exist and the award delivered on 18th November, 2021 was not a fresh award, but a rectified award. Moreover, the application for revision was dismissed by this court for being time barred. The principle of technical delay does not thus, apply here. That principle can successfully apply only if the matter was not dismissed for being time barred. The **Joseph Elisha case** (supra) and **William Shija case** (supra) cited by the learned counsel are distinguishable from the matter at hand.

The respondent's counsel thus, urged the court to dismiss the application in its entirety with costs as per rule 51(2) of the Labour Court Rules, GN. No 106 of 2007 for being frivolous and vexatious. The applicant has failed to advance sufficient reasons as to why she failed to file application for revision No. 2 of 2022 in time.

By way of rejoinder submissions, the applicant's counsel reiterated the contents of his submissions in-chief. He added that, after the rectification of the award the former award ceased to operate automatically. Thus, the award deserves scrutiny through revision. Upon

the application for revision being struck out on 14th June 2022, on 15th June, 2022 he filed the present application. He has therefore, accounted for each day of delay from the time when the application for revision was struck out to the time when this application was filed.

It was also the submission by the applicant's counsel that, the respondent's argument that the applicant refused to enter appearance is misconceived as the arbitrator did not afford the parties the right to be heard. The court should disregard the submissions by the respondent referring to the *ex-parte* award dated 30th October 2017. This is because, what the applicant seeks to challenge is the application dated 18th November 2021. This court did not order the Commission to rectify the names of the parties.

Regarding the argument by the respondent on the non-existence of Rule 27(1), (2), (3), (a) - (f), the respondent's counsel argued that, this court should regard the same as slip of the pen and the correct citation should be Rule 27(1), (2), (3) (a) – (f) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No 67 of 2007. This court should ignore the wrong citation. Moreover, the respondent's contention that the revision was time barred is misconceived as there is no order to that effect. He also faulted the respondent's allegation that the **William Shija case** is not applicable in the case at hand. He urged the court to grant the application.

I have considered the rival submissions by both parties, the affidavit, the counter affidavit by the respondent, the records and the law. In my

view, since this is an application for extension of time, the branch of the law governing matters of this nature must be applicable. It is trite law that, granting an application for extension of time is in the discretion of the court which has to be exercised judiciously. Extension of time may only be granted where the applicant has adduced sufficient reasons or good cause. However, what constitutes sufficient cause has not been directly defined. Rather, it depends on various factors as deliberated in various cases. Some of the factors to be considered in an application of this nature were highlighted by the Court of Court of Appeal of Tanzania (The CAT) in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, **Civil Application No.2 of 2010** (unreported). In that precedent, the CAT listed such factors as including the following: to account for all period of delay, the delay should not be inordinate, the applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intend to take, and the existence of a point of law of sufficient importance such as the illegality of the decision sought to be appealed against. The same CAT underlined those factors in the cases of **Yusuph Same and Hawa Dada v. Hadija Yusuf**, **CAT at Dar es Salaam, Civil Appeal No. 1 of 2002** (unreported) and **Benedict Mumello v. Bank of Tanzania, Civil Appeal No. 12 of 2002, CAT at Dar es Salaam** (unreported).

In the matter under consideration therefore, the major issue for consideration is *whether the applicant in the matter at hand has adduced*

sufficient reasons for this court to grant the prayed extension of time. The grounds for the present application according to the affidavit of the applicant's counsel and his submissions can be categorised into two major categories. The first is that, there are illegalities in the impugned award, and the second category is related to the doctrine of technical delay.

I will start discussing the applicant's second reason of technical delay. This is because if this reason is found to be sufficient reason, it will have the effect of allowing the application. Indeed, the phrase "technical delay" itself is, in our law, a technical term. This is so because, it has its special legal meaning. The principle of "technical delay" therefore, essentially means and guides that; where a party timely files an appeal or any other matter in court, but the court terminates or strikes it out for incompetence, then there will be a sufficient reason for granting an extension of time to file a competent matter out of time for seeking the same orders or remedies that had been sought in the previous matter which was struck out, provided that, the affected party/applicant promptly moves the court for the extension of time upon the order for the termination or striking out the previous matter being made. The CAT has underscored the applicability of the above highlighted concept of technical delay in opportune circumstances. It did so through various precedents which include the following: **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd, Civil Reference No. 18 of 2006, CAT at Dar ss Salaam** (Unreported), **Yara Tanzania Limited v. DB Sharpriya and Co. Limited, Civil Application No. 498 of 2016, CAT at Dar es**

Salaam (unreported), **Zahara Kitindi and another v. Juma Swalehe and 9 others, Civil Application No. 4 of 2005 (unreported)** and **Bharya Engineering and Contracting Co. Ltd v. Hamoud Ahmad @ Nassor, Civil Application No. 342/01 of 2017, CAT, at Tabora** (unreported); see also the case of **Elly Peter Sanya v. Ester Nelson, Civil Appeal No. 151 of 2018, CAT at Mbeya** (unreported).

The sub-issue at this juncture is *whether the doctrine of technical delay applies in favour of the applicant in the matter at hand.* In my settled opinion, the circumstances of the case at hand attracts an affirmative answer. This is because, it is shown in the affidavit and submissions by the applicant's counsel that, the applicant was delayed by prosecuting the previous revision which ended by being struck out for being incompetent. After the revision was struck out on 10th June 2022, the applicant promptly instituted the present application on 16th June 2022. In my view the doctrine of technical delay applies in this matter in favour of the applicant, hence the affirmative answer to the sub-issue posed above.

Furthermore, I am of the settled opinion that, the applicant in the matter at hand is sheltered under section 21(2) of the Law of Limitation Act, Cap. 89 RE. 2022. These provisions guide on exclusion of time of proceedings bon fide in court without jurisdiction or for any other reason. Under these provisions, in computing time limitation the time spent for prosecuting other unsuccessful matters is excluded.

Owing to the above reasons, I determine the major issue posed above affirmatively that, the applicant in the matter at hand has adduced sufficient reasons for this court to grant the prayed extension of time.

The answer I have just provided for the major issue makes it needless to consider the other reasons for this application. This is because, the answer is capable of disposing of the entire application. Otherwise, doing so will be tantamount to performing a superfluous and academic exercise which is not a core objective of the process of adjudication. I therefore, grant the application by extending the time as prayed by the applicant. The applicant shall file the intended revision within 15 (fifteen) days from the date hereof so as to avoid delay of the matter. Each party shall bear its own costs since this is a labour matter. It is so ordered.

JHK UTAMWA

JUDGE

16/11/2022