

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LABOUR REVIEW NO. 01 OF 2022

(Arising from Misc. Labour Application No. 05 of 2022 HCT at Morogoro, Originating from Labour

Dispute CMA/MOR/05/2020 at CMA Morogoro)

DIDACE MAGESA TANGATYA APPLICANT

VERSUS

YAPI MERKEZI INSAAT VE

SANAYI ANONIM SIRKETI RESPONDENT

RULING

Hearing date on: 24/08/2023

Ruling date on: 30/08/2023

NGWEMBE, J.

This ruling is based on preliminary objection raised by the respondent against the application instituted by Mr. Didace Magesa Tangatya, the applicant. The applicant prayed to this court for review against the decision meted in Misc. Labour Application No. 05 of 2022. Further prayed to set aside the impugned decision with its subsequent orders, on the grounds stated in the memorandum of review.

After being served with the applicant's pleadings, the respondent filed a reply to memorandum of review strongly resisting the application and apart from that, filed a preliminary objection which is subject of this ruling.

Due to the nature of the matter itself, it serves coherence to give a brief background of the matter. The applicant who was the respondent's employee, filed an application for revision before this court as against the arbitral award of the Commission for Mediation and Arbitration of Morogoro (CMA), which seems to have upheld his termination of employment. It happened that the respondent raised a preliminary objection on the point of law that the application was time barred. The objection was sustained and the application was thus 'dismissed'.

Thereafter, the applicant filed an application for extension of time before this court so that, he would be allowed to file an application for revision out of time. He encountered the same fate of preliminary objection by the respondent, this time the respondent's counsel challenged the application for contravening the requirements of Rule 24 of **the Labour Court Rules** and sections 41 (a) and 56 (c) of the **Labour Institution Act, Cap 300 R.E 2019**, and that this court was *functus officio* for having dismissed the revision previously between same parties.

This court (Hon. Hassan, J) upheld the objection on the second ground that this court was *functus officio*. Proceeded to dismiss the application in such ruling which was delivered on 26/09/2022.

However, the applicant herein believes that, the decision of this court before judge Hassan was erroneous for misdirection of the law. He therefore duly filed notice of review on 06/10/2022. However, he did not file his memorandum of review until on 15/02/2023. This application again is encountered by a preliminary objection on point of law that; the application is bad in law for being supported by a memorandum of review which is filed out of time contrary to the provision of Rule 27 (7) of the **Labour Court Rules, GN. 106 of 2007**.

The respondent was represented by Ms. Seikunda Lyimo, learned advocate who represented the respondent even in previous proceedings. The applicant was unrepresented and thus appeared in person herein and the former proceedings.

As the rule requires, obviously when the objection is raised, the main case must halt and let the court pay attention to the points raised in the objection. The court must determine the objection first. It is only when the preliminary objection is unmerited or if merited does not make the main case collapse, that is when the main case can proceed. Otherwise, when the preliminary objection is sustained and the remedy applied properly, the main case may be dismissed, struck out or some other orders may be made. In the case of **R.S.A. Limited Vs. Hanspaul Automechs Limited & Another [2020] 1 T.L.R. 589 [CA]** where it was *inter alia* held: -

"It is settled law that, an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, it cannot be gainsaid that it has to be determined first before proceeding to determine the substantive matter"

This rule is based on the spirit of the procedural principle which requires the court to try and determine issues of law first followed by issues of fact. See also **Shahida Abdul Hassanal Kassam Vs. Mahedi Mohamed Gulamali Kanji, Civil Application No. 42 of 1999** and **Ally Rashid & Others Vs. Permanent Secretary, Ministry of Industry & Trade & Another (Civil Appeal 71 of 2018) [2021] TZCA 460.**

Adherent to the legal principle provided above, this court had to hear the parties on the objection brought by the respondent's learned advocate. The hearing of objection was conducted on 24/08/2023 when

the court invited both parties to address the point of law constituting the objection.

The learned advocate submitting in support of the objection, she based on rule 27 (7) of **The Labour Court Rules, GN 106 of 2007** which required the applicant to file his memorandum of review within 15 days from the date of the decision. But the applicant having received the decision on 06/10/2022, which he attached in his notice of review, filed on the same date, he failed to file his memorandum of review within 15 days as the law so requires. Instead, he filed it on 15/02/2023 more than 3 months after the receipt of the decision and yet he did not seek any condonation for filing the memorandum of review.

The learned advocate proceeded to argue that, when memorandum of review is filed out of time, it means there is no such memorandum before the court, as if it was never filed at all. She suggested that same be struck out of the record. Added that what remains is only notice of review. That being the case, the application is unmaintainable, same be dismissed.

When given the chance to reply, the applicant started by questioning the respondent's delayed service of the notice of preliminary objection. He argued that, the objection was filed on 22/02/2023 and served to him on 18/08/2023, why did the respondent's counsel delay to serve him, he asked.

Then advanced to replying against the objection. That there is a clear procedure of filing review under rule 27 of GN 106 of 2007. According to him the implementation of rule 27 (7) is in rule 27 (6) which requires the registrar to supply a certified copy of the decision sought. Complained that, the copies were not supplied to him in respect of the matter he seeks to review. That he faced the registrar on

18/10/2022, 13/02/2023 and 15/02/2023 without success. He prayed this court to consider the objection on the basis of article 107A of **The Constitution of the United Republic of Tanzania** and rule 55 (2) of GN 106. Rested by a prayer that the objection be overruled.

The learned counsel made a rejoinder that the applicant secured copies timely and there was no need to wait for what he calls certified copies. As the records speak, the applicant was required to seek for condonation, but he did not. The respondent's learned counsel prayed the objection be sustained and the application be dismissed.

From the arguments of both parties, and considering their records, it is not disputed the applicant secured copies on or before 06/10/2022. Likewise, undisputedly, the notice of review has the copy of ruling annexed as "DM1" and this notice was filed before the court on 06/10/2022. It is also undisputed fact that, the applicant's memorandum of review was filed in court on 15/02/2023. This was four months and nine days from the day of filing notice of review.

The applicant defends that, he was not supplied with the certified copies of the ruling, that is why he did not manage to file his memorandum of review in time. If I understood him well, he is arguing that even though he had the copy of the ruling, which he annexed in his notice filed early on 06/10/2022, he would not be able to prepare the memorandum of review without a certified copy.

This argument seems not to have convinced the learned counsel that is why she maintained her position that, the applicant was required to apply for condonation before filing his memorandum of review out of time.

This court agree with both parties that, among other requirements, procedures of applying for review in labour matters are

prescribed under the provisions of GN. 106 of 2007 and according to the parties, rule 27 is the guiding rule in the subject matter.

Under rule 27 (1), an aggrieved party is required to file a notice of intention to review the decision within 15 days from receiving the decision. Subrules 4 and 5 provide for prescribed form of the notice and service to the parties, while subrule 6 requires the registrar on receipt of a notice, to supply a certified copy of the decision sought as soon as possible. This is what the applicant based his argument on, though it seems the copies were availed to him before filing his notice of review. I think there is no legitimate point for the applicant blaming this court or the registrar as he attempted to. Then subrule 7 from which the respondent secures strength in raising this objection and based thereon entirely provides that: -

"On receipt of a copy of the decision of the review, the applicant shall within fifteen days file a concise memorandum of review stating the grounds for the review sought without narratives or arguments."

In this matter, as I observed earlier, the applicant received the copies earlier than 06/10/2022, but he filed the memorandum of review more than four months later. The requirement to file the memorandum within 15 days is couched in a mandatory term as the provision above reads. But the applicant did not comply with the time limit thereof, yet sought no extension of time.

The respondent's counsel correctly submitted that, the applicant had the avenue to apply for condonation before filing the memorandum of review. In respect of extension of time, rule 56 of **The Labour Court Rules, GN 106 of 2007** provides thus: -

Rule 56 (1) *"The Court may extend or abridge any period prescribed by these Rules on application and on good cause shown, unless the Court is precluded from doing so by any written law.*

(2) Where a party fails to comply with any notice or direction given subject to the provisions of these Rules, any interested party may apply on notice for an order that the notice or directive be complied with within a period that may be specified, and that failure to comply with the order, the party in default will not be entitled to any relief in the proceedings.

(3) The Court may, on good cause shown, condone non-compliance with the period prescribed by the Court."

This court's power to condone non-compliance under subrule 3 above, I perceive, is only when extension of time is sought and granted then the applicant fails to do the act within extra time which the court granted. When a party has not applied for any extension of time, this court is not empowered to condone the delay.

I took a serious note that the applicant complained on this court's delay to supply him with the copies of the ruling. If the court's delay to supply him with the copies was true, the applicant would deserve an automatic exclusion of the days spent in making follow ups to secure those copies. But it is not the case to the applicant and hence he does not deserve any such exclusion. I will accept the observation made by the respondent's counsel that, the applicant's application is incomplete for failure of the applicant to file memorandum of review within time, which makes the same be incompetent.

The applicant endeavoured to convince this court to consider article 107A of our Constitution and rule 55 (2) of GN 106. I paid due

consideration of those provisions. To start with, rule 55 provides that the court may adopt any procedure which is convenient to it, where there is a lacuna in the rules, or when procedures are not specifically provided for. It reads as hereunder: -

Rule 55 (1) *"Where a situation arises in proceedings or contemplated proceedings which these rules do not provide the Court may adopt any procedure that it deems appropriate in the circumstances.*

(2) In the exercise and performance of its powers and functions, or in any incidental matter, the Court may act in a manner that it considers expedient in the circumstances, to achieve the objects of the Act and, or the good ends of justice."

From the wording of the rule above, it is the opinion of this court that, rule 55 cannot save the applicant's application. This court is permitted to adopt its procedures only when there is no provision for the given proceeding. The requirements which the applicant contravened are specifically provided for in the rules, the applicant as well as this court, must therefore follow the rules as prescribed. Such requirements, in my thinking are part and parcel of justice. I do not think that following the requirements will in any way defeat the ends of justice, but contravention of the requirements will verily defeat the ends of justice. Article 107A of the constitution is irrelevant in this objection.

It follows therefore that under the circumstance, the applicant's plea for this court's leniency is misplaced since he defied the mandatory provisions of the governing law. The objection is merited and thus sustained, that the applicant's application is incompetent for being not

supported by a memorandum of review, correctly as the learned advocate argued.

As to the remedy, I take note that in cases like that of **Yordan Yohim Sanga Vs. The Governing Body of College of Business Education (Misc. Application No. 298 of 2020) [2021] TZHCLD 190** and **Mariam Enock Chacha Vs. Accacia Bulyanhulu Gold Mine (Misc. Labour Application 25 of 2018) [2020] TZHC 754** this court dismissed the application of this nature for being filed out of time. Likewise, in the case of **Barclays Bank Tanzania Limited Vs. Phylisiah Hussein Mcheni (Civil Appeal 19 of 2016) [2021] TZCA 202** the Court of Appeal having insisted on adherence to the law of limitation in labour disputes as the rules provide, guided that a case filed out of time should be dismissed instead of striking it out. The court thereby quashed and set aside the striking out order and lieu issued a dismissal order.


Understanding that, all the previous struggles of the applicant yielded nugatory for all were dismissed, I have considered that in this case the chamber summons was filed within time, save that the memorandum of review was filed out of time, hence making the application incompetent. Though the applicant must be adherent to the law of limitation, dismissal is not the proper remedy in this application. Mindful of the above precedents, I resolve that this case is slightly distinctive. The issue in this case at hand being one of incompetence, I find the case to be fit for striking out so that the applicant may apply for extension of time before filing the proper application.

Having so reasoned, this court proceed to strike out this application for review because it is incompetent. No order is made in regard to costs.

Order accordingly.

DATED at Morogoro this 30th day of August, 2023.




P. J. NGWEMBE,
JUDGE
30/08/2023

Court: Ruling delivered at Morogoro in Chambers on this 30th day of August, 2023 in the presence of the applicant and in absence of the respondent.

A. W. MMBANDO
DEPUTY REGISTRAR
30/08/2023

