THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

MISC. APPLICATION NO. 02 OF 2020

(Originating from the Complaint Ref. CMA/MBY/130/2018 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)

JOSEPH MALELE & 10 OTHERS.....APPLICANT

VERSUS

MBEYA CITY COUNCIL.....RESPONDENT

RULING

Date of Last Order: 06/08/2020
Date of Ruling : 08/10/2020

MONGELLA, J.

This application is brought under Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) and (d), 55 (1) and 56 (1) and (3) of the Labour Court Rules, 2007, G.N. 106 of 2007. The applicant is seeking to be granted extension of time within which to file an application for revision against the decision of the Commission for Mediation and Arbitration (CMA) for Mbeya in Complaint with Reference No. CMA/MBY/130/2018. It is supported by the affidavits of the applicants, which were adopted to form part of their submission.

Both parties were represented whereby the applicants were represented by Ms. Mary Gatuna, learned advocate and the respondent was represented by Mr. Modest Siwavula, learned city solicitor. The application was argued by written submissions.

In the affidavits in support of the application as well as in the written submission filed by Ms. Gatuna, the applicants raised two main reasons for seeking extension of time. First, they were scattered in different regions within this country and could not meet to coordinate on the way forward. Second, there is an illegality in the impugned award. Submitting on the first reason, Ms. Gatuna argued that after the award was pronounced on 07th October 2019, the first applicant obtained a copy of it on 08th October 2019, being the second day. However, he failed to consult the rest of the applicants so that they could agree on the way forward. She said that the applicants managed to meet on 11th February 2020, whereby they agreed to search for an advocate to represent them in pursuing further remedy. The said advocate was found and instructed on 21st February 2020. In her view, this is a sufficient cause to warrant grant of extension of time as what transpired was beyond the power and control of the applicants.

Regarding the illegality in the impugned decision, Ms. Gatuna argued that the arbitrator misdirected himself in ruling that the termination was fair while at the same time ordered that the applicants were entitled to one month salary in lieu of notice. Elaborating further on the alleged illegality, Ms. Gatuna argued that under the law, that is, section 41 (1) (b) (ii) of the Employment and Labour Relations Act, 2004 (ELRA), employees on

monthly basis are to be given a notice of not less than 28 days before termination of the employment. Referring to exhibit "C3" on record, she submitted that the applicants were employed on monthly basis thus entitled to one month notice.

What I grasp from her arguments is that, in her view, the award of one month salary in lieu of notice can only be issued when termination is unfair. She was of the position that this is a serious triable issue warranting the grant of extension of time. To bolster her point she referred the court to the case of ***Chawe Transport Import and Export Co. Ltd v. Pan Construction Co. Ltd and 3 Others***, Civil Application No. 146 of 2005, in which the Court of Appeal granted extension of time on the ground that there was serious triable issue on point of law.

On his part, the respondent vehemently opposed the application. Responding to the first reason advanced by the applicant, Mr. Siwavula contended that it is an awkward statement in law to state that the applicants were scattered in different areas of the country searching for jobs, hence could not organise themselves to pursue their right for revision. He said that this reason does not amount to any good cause in the delay of more than 94 days as required under Rule 56 (1) of the Labour Court Rules, G.N. No. 106 of 2007. He added that the applicants were represented by the same advocate in the CMA thus they had a chance to consult her soon after the issuance of the award. He challenged the argument that the appellants were out of reach arguing that in the present world, one cannot be out of reach through a mobile phone for three consecutive months, thus the reason is feeble and baseless. Citing

the case of ***Joseph Ntogwisangu v. ALAF Company Limited***, Revision No 595 of 2017 (unreported), he argued that those coming to court must show great diligence and not unnecessary delay.

Regarding the illegality raised by the applicant, Mr. Siwavula argued that extension of time on the ground of illegality is not automatic. Referring to the case of ***Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 (unreported); ***Kalunga and Company Advocates v. National Bank of Commerce Ltd***, Civil Application No. 124 of 2005, ***Aruwaben Chagan Mistry v. Naushad Mohamed Hussein & 3 Others***, Civil Application No. 6 of 2016 and that of ***Jehangir Aziz Abubakar v. Balozi Ibrahim Abubakar & Another***, Civil Application No. 79 of 2016, he contended that it is trite law that the illegality raised must be of sufficient importance and must not involve a long drawn process or argument in its determination, and must be on face of record.

Basing on the above decisions, he argued that the applicants have misconstrued the order of payment in lieu of notice issued by the Hon. Arbitrator. He said that the Hon. Arbitrator ruled that the termination was fair both substantively and procedurally, only that the applicants were entitled to payment of one month salary in lieu of notice. He argued that payment in lieu of notice does not depend on unfairness of the termination because the employee is also obliged to pay such payment to the employer if he resigns earlier to the contractual period. On this basis he argued that the applicants were rightly terminated and there is no illegality in the CMA award.

After giving the submissions of both counsels due consideration, I am left with the major task of determining whether the reasons advanced by the applicants is sufficient to warrant extension of time by this Court.

Starting with the first reason that the applicants were scattered in different regions I must say from the outset that I am not convinced by this story. This is because first of all parties are obliged to make follow up of their cases in court. It also does not make any sense that a party in a case who knows that the hearing of the case has come to an end and judgment shall be issued any time soon can stay relaxed for four months without making any efforts to follow up on the outcome of the case. In addition, the applicants have just given mere narrations. There is nothing provided in evidence to back up their assertions that some of them obtained employment in different regions and placed in remote areas where there is no network. I find this reason very insufficient and I reject it accordingly.

With regard to the alleged illegality, I first of all agree with Ms. Gatuna that the same amounts to sufficient reason for extension of time. However, as argued by Mr. Siwavula, not every illegality is to be entertained by the court as sufficient reason in granting extension of time. The illegality must be on an error apparent on face of record, of sufficient importance, and not involving a long drawn process or argument. See: ***Lyamuya Construction*** (supra); ***Kalunga and Company Advocates*** (supra); ***Aruwaben Chagan*** (supra) and ***Jehangir Aziz Abubakar*** (supra). Considering the alleged illegality in the matter at hand, I am of the following view:

Issuance of notice of termination falls under the incidents of termination provided under section 41 of the ELRA. The non-adherence to it does not amount to unfair termination and is remedied by payment of one month salary in lieu of notice. This is to be paid by the employer upon termination as a package in terminal benefits, but where the employer has not paid the same, it shall be is included among the terminal benefits awarded by the court, in this case, the CMA. The issuance of notice or payment of one month salary in lieu of notice is an employee's entitlement regardless of whether the termination is fair or not.

In my settled view therefore, Ms. Gatuna has misconceived the application of the requirement to issue notice by arguing that it amounts to unfair procedure thus unfair termination. Unfair termination involves unfairness on the termination both substantive and procedural whereby the substantive part is on the reasons for termination and the procedural part is on the procedures followed to reach the decision to terminate the employee. The procedure thus depends on the reasons for termination which could be misconduct, incapacity, incompatibility, by agreement or on operational requirement. See section 37 of the ELRA and Part II of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, G.N. No. 42 of 2007.

In my settled view, the illegality alleged by the applicants and their advocate, Ms. Gatuna is totally misconceived. There is in fact no illegality advanced to warrant this Court to grant the extension of time. In conclusion, I am of the settled position that the applicants have failed to advance sufficient reasons to move this Court to grant their application.

Consequently, the application is dismissed. Being a labour matter, I make no orders as to costs.

Dated at Mbeya on this 08th day of October 2020.

L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 08th day of October 2020 in the presence of the applicants and their legal counsel, Ms. Mary Gatuna.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

L. M. MONGELLA

JUDGE