IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 460 OF 2022

(Arising from the Judgment and Decree of High Court dated 19/9/2022 by Hon. S.M. Maghimbi, J in Labour Revision No. 159 of 2021)

MABULA BEATUS LUSHINGE ..... APPLICANT

VERSUS

COMVIVA TECHNOLOGIES LIMITED ..... RESPONDENT

RULING

Date of last Order: 10/02/2023
Date of Ruling: 17/2/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 19th October 2015 respondent employed the applicant as senior Engineer. It happened that relationship between the two did not go well, as a result, on 31st January 2019, respondent terminated employment of the applicant on ground of poor performance. Aggrieved with the said termination, applicant filed the dispute before the Commission for Mediation and Arbitration (CMA) complaining that he was unfairly terminated. On 24th November 2020, the

Arbitrator having heard evidence and submissions of the parties, issued an award that termination of employment of the applicant was substantively fair but unfair procedurally. With those findings, the arbitrator awarded applicant to be paid TZS 2,258,403/= being three months salaries compensation calculated at basic wage of TZS 752,801.

Further aggrieved with the CMA award, applicant filed Revision application No. 159 of 2021 seeking the court to revise and set aside the said award on grounds *inter-alia* that, there was no valid reason for termination; Arbitrator did not properly analyze evidence adduced; and that; the arbitrator erred in law by awarding compensation of three months' salaries after finding that termination was unfair procedurally. On 19th September 2022, this Court(Hon. S.M. Maghimbi, J) having heard the parties and assessed evidence in the CMA record, delivered the judgment and decree that termination was fair both substantively and procedurally. Consequently, the court revised and set aside the CMA award and dismissed applicant's application.

On 18th November 2022, applicant filed this application seeking extension of time within which to file a Notice of Appeal to appeal to the Court of Appeal. In support of the Notice of Application, applicant filed his

affidavit he swore on 15th November 2022 before Winjaneth Lema, Commissioner for Oaths.

On the other hand, in resisting the application, respondent filed the Notice of Opposition and the Counter Affidavit of Adebole Olanrewaju Tayo.

When the application was called on for hearing, Mr. Makaki Masatu, learned Advocate appeared and argued for and on behalf of the applicant while Charles Kumila, learned Advocate appeared and argued for and on behalf of the respondent.

Arguing the application on behalf of the applicant, Mr. Masatu submitted that, in terms of Section 57 of the Labour Institutions [Cap. 300 R.E. 2019], applicant has a right to appeal to the Court of Appeal subject to issuance of a notice of appeal within 30 days from the date of the order appealed against as provided for by Rule 83(1) and (2) of the Court of Appeal Rules. He submitted further that, applicant was supposed to file the Notice of Appeal by 20th October 2022 but he did not manage, as a result, he filed this application on 18th November 2022. Counsel for the applicant went on that, in terms of Section 11(1) of the Appellate Jurisdiction Act [Cap. 141 RE. 2019], this Court has power to extend time within which

applicant can file the Notice of Appeal. Counsel for the applicant also submitted that the court should not only assess reasons for the delay but should also consider surrounding circumstances, the impugned decision itself and issues involved. To cement on his submissions, he cited the Court of Appeal decision in the case of ***Republic v. Yona Kaponda & 9 Others*** [1985] TLR 84. Counsel for the applicant went on that, in the application at hand, there was breach of natural justice principles and that serious allegations arising out of violation of breach of natural justice constitute a ground for extension of time. To support his submissions, he cited the case of ***Mary Mchome Mbwambo & Another v. Mbeya Cement Co. Ltd*** [2017] TLS R.L 277 .

Mr. Masatu submitted further that, applicant delayed to file the notice for 28 days and that he accounted for that delay and referred the court to paragraph 7, 8, 9 and 13 of the applicant's affidavit in support of the application. He added that, the delay was due to (i) the fact that on the date of judgment applicant was in Bukoba though he was represented and that (ii) he returned on 13th October 2022 and fell sick. Counsel for the applicant strongly submitted that, upon his return in Dar es Salaam, applicant fell sick and due to sickness, he could not manage to scrutinize

the judgment and get the required advice. Counsel went on that, applicant recovered on 29th October 2022 and that after recovery, he sought and obtained legal advice. Mr. Masatu submitted that sickness is a good ground for extension of time and cited the case of ***Emmanuel R. Maila v. The District Executive Director Bunda District Council***, Civil Application No. 66 of 2010 (CAT) to support his submissions. He also submitted that, counsel for the applicant spent 14 days to review and prepare this application. He argued that time spent in preparation of the application should be reckoned. To support that argument, he cited the case of ***Patrick Magologozi Mongella v. The Board of Trustees of the Public Service Pension Fund,*** Civil Application No. 199/18 of 2018, CAT (unreported).

In further accounting for the delay, counsel for the applicant submitted that the application was filed through e-filing system on 15th November 2022 but the same was returned for rectification on 16th November 2022. He added that, on 17th November 2022, applicant refiled the application after rectification, as a result, it was admitted on 18th November 2022. He further argued that time spent in the filing process

should be considered in favour of the applicant as it was held in **Magologozi's case** (supra).

In further imploring the court to grant the application, Mr. Masatu submitted that there is illegality on the impugned judgment. He argued that the alleged illegality is that the court set aside the partial award that is to say; the amount that applicant was awarded at CMA without affording him right to heard. He submitted further that, it is the applicant who applied for revision and not the respondent and that there was no cross revision hence it was improper for the court to set aside even the amount applicant was awarded at CMA. He went on that; parties were not heard on the partial award. Counsel argued further that, instead of dismissing the revision against the whole award, the Court was supposed to maintain the CMA award as there was no cross revision by the respondent. He strongly submitted that, failure to afford right to be heard is against natural justice principles hence a good ground for extension of time.

In resisting the application, Mr. Kumila, learned counsel for the respondent submitted that delay even a single day, must be accounted for. He cited the case of ***Uwenacho Salum v. Moshi Salum Ntankwa***, Misc. Civil Application No. 367 of 2021, HC (unreported) to support his

submissions. He argued that Applicant did not account for each day of delay. He submitted further that, the judgment was delivered in presence of Mr. Mchaki, applicant's counsel, which is good as if applicant was present in person. He added that, it is not a requirement of law that applicant was supposed to be present in person. Mr. Kumila learned counsel submitted further that Applicant had a total of six (6) days after his return from Bukoba within which to file the Notice but he did not do so. Counsel for the respondent submitted further that there is no date disclosed in the applicant's affidavit showing the date he became aware of the judgment and the date he became aggrieved by the said judgment.

On issue of sickness of the applicant, counsel for the respondent submitted that, applicant was exempted from duty for 3 days and light duty for 10 days. Counsel submitted that light duty does not require use of much energy. He went on that, there is no proof in the applicant's affidavit as to when he recovered but there are only assumptions based on calculations from the dates exempted from light duty. Counsel for the respondent submitted further that there is no date disclosed by the applicant in his affidavit showing the date he became aware of the judgment and the date he became aggrieved by the said judgment.

On time spent by applicant's counsel preparing the application, Mr. Kumila submitted that, a team of four counsel cannot spend long time from 30th October 2022 to 14th November 2022 studying and preparing this application. He however, upon being probed by the court, conceded that there is no minimum or maximum number of days set out under the law as time to be spent by a single advocate or a group of advocates to prepare an application like the one at hand.

Counsel for the respondent submitted further that, it is the discretion of the Court to grant extension of time but that discretion must be exercised judiciously. He added that, the delay itself must not be inordinate and applicant must account for the delay. In support of that submissions, counsel for applicant cited the case of ***Lyamuya Construction Company Ltd V. Board of Registered Trustee of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 CAT (unreported). Counsel for the respondent submitted further that, applicant was negligence.

On illegality, counsel for the respondent submitted that ***Mbeya Company Cement's case*** is not relevant because in the application at hand there is no fact stated in the affidavit in support of the application

relating to illegality of the impugned judgment. He argued that applicant was heard both at CMA and before this court hence no violation of natural justice principles. He added that, during hearing of the aforementioned revision application, all parties were present and were afforded right to be heard. He argued further that, the court has power to revise, quash or make any order as it deemed fit hence this application lacks merit. Counsel for the respondent concluded that there are no sufficient reasons to warrant extension of time and prayed the application be dismissed.

In rejoinder, Mr. Masatu, counsel for the applicant submitted that according to paragraph 6 and the annexture to the applicant's affidavit, applicant became aware on 19th September 2022 when the judgment was delivered. He further argued that applicant has accounted for the delay as shown in paragraphs 8, 10 and 13 of the affidavit in support of the application. He went on that, the six (6) days that applicant was in Dar es Salaam he was sick, which is why, he did not file the Notice of Appeal. Mr. Masatu submitted that; light duty depends on sickness of a person. On illegality, he maintained that there was no application for revision filed by the respondent to challenge 3 months' salary awarded to the applicant. He

maintained that the Court wrongly went ahead to quash the said 3 months' salaries awarded to the applicant.

I have examined both the affidavit and the counter affidavit filed by the parties and submissions made thereof by learned counsel. In disposing this application, I will start with a well settled position of the law as was correctly submitted by both counsel that, in an application for extension of time, the court is invited to exercise its discretion and that, that should only be done judiciously. In other words, I am called to exercise my judgment based on what is fair under the circumstances and guided by the rules and principles of law. See the case of ***Mza RTC Trading Company Limited vs Export Trading Company Limited***, Civil Application No.12 of 2015 [2016] TZCA 12.

In the application at hand, applicant has raised two reasons for extension of time namely sickness of the applicant and illegality of the impugned judgment.

In disposing this application, I will start with illegality as a ground for extension of time. It was submitted by counsel for the applicant that, the court did not afford applicant right to be heard at the time of setting aside the three months' salaries compensation that he was awarded by the

Arbitrator at CMA. It was also submission by counsel for the applicant that there was no cross revision filed by the respondent hence in quashing the three months' salaries compensation that applicant was award at CMA, the court acted illegally. On the other hand, counsel for the respondent submitted that there is no paragraph in the affidavit of the applicant relating to illegality.

I have examined the affidavit in support of the application and find that in paragraph 11, applicant stated that he was advised by his advocate one Makaki Masatu that there are legal issues to be determined by the court. One of the legal issues raised by the applicant in paragraph 11 is "whether unchallenged partial award of the Commission for Mediation and Arbitration can be revised without being challenged in Revision and affording a party to be affected a right to be heard". I should point outright that, that was an advice which might be correct or wrong and may not reflect what happened. It was correctly submitted by counsel for the respondent that applicant filed Revision No. 159 of 2021 before this court and that parties were afforded right to be heard hence there is no violation of natural justice principles. I have read the impugned judgment attached to the affidavit in support of the application and find that in the said

Revision, applicant raised six(6) ground of revision. The 4th ground that was raised by the applicant reads:-

> *"iv. That the trial Arbitrator erred in law by awarding the Applicant compensation of 3 month salary only after finding the termination was unfair on the ground of want of fair procedure".*

I have read the judgment of this court in the case of ***Mabula Beatus Lushinge Vs. COMVIVA Technologies Ltd*** (Revision Application 159 of 2021) [2022] TZHCLD 1024, the subject of this application and find that at page 5 to 6, Mr. Mchaki, learned counsel for the applicant made his submissions in relation to the above quoted ground of revision. That submission was responded to, by counsel for the respondent as reflected at page 16 of the judgment. It is my view that, the alleged violation of right to be heard does not exist. The argument by counsel for the applicant that there was no cross revision and that the court was not supposed to disturb the 3 months salaries compensation awarded to the applicant, in my view, does not qualify to be an illegality worth consideration to enlarge time to the applicant. I am of that view because, in appeal or revision, the court is not restricted to consider what was advanced by the appellant or the person who filed revision and hold in his favour. Once a person appeals or file revision, gives a room to the court

to consider legality and propriety of the whole judgment or order of the lower court. The court cannot turn itself blind if it feels that there is an error in the lower court's judgment. But, assuming that the court was not supposed to disturb the said 3 months salaries awarded, then, what was the reason for the applicant to raise the above quoted ground?. Whatever the case, from the foregoing discussions, there may be two divided opinions that need to be cleared. That in itself, does not make the alleged illegality to qualify as an illegality worth for extension of time. For illegality to be a ground for extension of time, it must be apparent on the face of record. There is a litany of case laws to that position. Some of those case laws are the case of ***African Marble Company Limited (AMC) vs Tanzania Saruji Corporation (TSC),*** Civil Application No. 8 of 2005 [2005] TZCA 87 and ***Chandrakant Joshubhai Patel v. Republic,*** [2004] TLR 218, ***Abdi Adam Chakuu vs Republic***, Criminal Application No. 2 of 2012 [2017] TZCA 138, ***Ansaar Muslim Youth Center vs Ilela Village Council & Another,*** Civil Application No. 310 of 2021 [2022] TZCA 615 to mention but a few. In Chandrakant's case (supra), the Court of Appeal held that:-

"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and

not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions...It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established…"

I therefore hold that there is no illegality apparent on the face of record to warrant extension of time.

It was deponed and submitted by counsel for the applicant that the judgment was delivered on the date applicant was in Bukoba. I have read the judgment in question and find that it was delivered in the presence of Mr. Mchaki, learned counsel for the applicant. Therefore, the judgment was delivered in the presence of the applicant as it was correctly submitted by counsel for the respondent. Since the judgment was delivered in presence of the advocate dully appointed by the applicant, then, the latter cannot be heard arguing that the judgment was delivered while he was in Bukoba. It was upon himself to communicate with his advocate and decide the way forward from the date of judgment.

It was submitted on behalf of the applicant that, upon his return from Bukoba, applicant fell sick and recovered on 29th October 2022. I have examined applicant's affidavit and find that he stated in paragraph 7 and 8 that he returned in Dar es Salaam on 13th October 2022 and fell sick as a result he remained at home while on medication up to 28th October 2022.

In paragraph 9 applicant stated that after recovery on 29th October, 2022 being aggrieved by the decision of the Court he sought legal advice of what measures to take to challenge the High Court decision.

It is undisputed as pointed out hereinabove that the judgment was delivered on 19th October 2022 in presence of counsel for the applicant. Therefore, applicant was aware of the judgment from that date and there was no need for him to wait until when he fell sick and recovered in order to seek legal advice from his lawyers. In my view, applicant was negligent. In the case of ***Nyanza Roads Works Limited vs Giovanni Guidon*** (Civil Appeal 75 of 2020) [2021] TZCA 396 the court of Appeal held:-

> *"…While there is no dispute on the respondent's heart complications which would ordinarily constitute good cause, the respondent did not satisfy the CMA that the delay was solely due to sickness. We think the learned advocates for the respondent's reference to* ***John David Kashekya v. The Attorney General*** *(supra)* ***can only be relevant where sickness is the sole reason for the delay and properly explained****. At any rate, even assuming the respondent's illness prevented him from referring his dispute within the prescribed time, there is no explanation why he delayed in applying for condonation for as long as more than two months reckoned from 13/06/2014. Unfortunately, the learned Judge directed his attention to the respondent's illness in the absence of evidence how was it material to not only the delay but also failure to lodge his application for condonation immediately after the lapse of 30 days."*

The bolded words in the above quoted decision of the Court of Appeal are clear and unambiguous.

In the application at hand, applicant attached to his affidavit a prescription Form from Arafa Highland Health Centre to show that he was sick. The said prescription form is dated 14th October 2022. In the said form it was recorded *inter-alia*:-

"Regards: Kindly exempt from duty for 3 days & light duty for 10 days"

Three days from 14th October 2022 ended on 16 or 17th October 2022. These are the dates he was exempted from duty. In my view, exemption from duty does not mean exemption also to communication or contact with lawyers over the phone. In my view, sickness is not the only reason for delay but applicant was negligent.

The quoted sentence is ambiguous. It is not clear whether after the 3 days he was exempted from duty, applicant was also exempted from light duty. But the correct interpretation of that sentence is that applicant was exempted from duty for 3 days and thereafter allowed to perform light duty for a period of 10 days. With that in mind, there is no reason as to why applicant did not contact his lawyers between 18th October 2022 and

28th October 2022. I therefore hold that applicant was not prevented by sickness to file the Notice of Appeal or file this Application.

That said and done, I hereby dismiss this application for lack of merit.

Dated in Dar es Salaam on this 17th February 2023.

B. E. K. Mganga
JUDGE

Ruling delivered on this 17th February 2023 in chambers in the presence of Kulwa Shilemba, Advocate for the Applicant and Charles Kumila, Advocate for the Respondent.

B. E. K. Mganga
JUDGE