

IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT DAR ES SALAAM
MISC LABOUR APPLICATION NO. 219 of 2019

BETWEEN

AHOBOKILE MWANJOKA.....APPLICANT

VERSUS

TANZANIA POSTAL BANK.....RESPONDENT

RULING

Date of the last order 31/03/2020

Date of the ruling 29/05/2020

A. E. MWIPOPO, J

Before this Court is an application for extension of time to file application for Revision against the CMA Award delivered on 26th October 2018, before Hon. MASSAWE Arbitrator, in dispute No. CMA/DSM/ILA/R.729/16/813, out of time. The applicant namely **AHOBOKILE MWANJOKA** was aggrieved by the award of the Commission for Mediation and Arbitration (CMA) where, upon establishing that Applicant was unfairly terminated, the Arbitrator proceeded to award to the Applicant, payment of twelve months compensation only, without additional salaries

during the period he had remained unfairly terminated. However, Applicant is out of time to challenge the said CMA award, hence the present application.

When the application came for hearing on 31/03/2020 the Court ordered the hearing of the application to proceed by way of written submissions. Both parties complied with the court order and filed their submission within the time fixed by the Court.

The applicant have submitted in his written submission that the fact that Applicant is out of time to file the intended application for Revision has not at any rate prompted by any negligence act on the part of the Applicant, but rather it was due the circumstances beyond the Applicant control. The delay was due to terminal illness and ultimately death of his Advocate, the late Delphina Kimbori Advocate (deceased), and the terminal illness and ultimately death of Applicant's biological mother the late Eva Ndetele Mwasomola (Deceased). The events happened in a very short span period and consecutively thus it affected the necessary steps that would have been taken by the Applicant to apply for the Revision of the CMA award in time.

Paragraph 3.5 of the Applicant's affidavit shows that ten days before deadline for applying for revision of the CMA award, the Applicant

approached the late Advocate Kimbori (deceased) for legal assistance and consultation including to draw the necessary pleadings related to the intended application for Revision. Spontaneously while the relevant documents were in the course of being drafted, Applicant's biological Mother, the late Eva Ndetele Mwasomola (deceased), fell sick and the Applicant had to take her to Muhimbili National Hospital where she was admitted and hospitalized for some time. Upon advice of medical experts from Muhimbili National Hospital the applicant did take her back to her Village, Mwankenja village, in Kiwila area of Rungwe District, Mbeya Region, where her health went on worsening day after day until she passed away on 30th day of March 2019.

The applicant submitted further that while he was taking care of his sick mother, he strongly believed that his application for Revision was being properly taken care by his counsel the late Kimbori Advocate. On the 19th December 2018, he called the late Kimbori Advocate (deceased), to find out what was going on with his application, he was informed that he should not worry as he will receive a text message from the High Court of Tanzania, (Labour Division), confirming that his application was duly registered by the Registry. He made a further follow up on the 18th January 2019, when he

called again his Counsel, the late Advocate Kimbori (deceased), only to be informed that she was hospitalized at Muhimbili National Hospital.

The applicant state further that his biological mother passed away on 30th March 2019, and it was only after completion of the burial and associated services, that Applicant came back to Dar Es Salaam on the 11th day of April 2019. He submitted that his efforts to call his counsel the late Advocate Kimbori (deceased) in order to be updated with the status for the Application for Revision was in vain, as her cell phone was nor reachable, until he decided to make physical follow up visit to her office, only to learn that his Advocate had passed away. Thereafter, he rushed to the Registry of this High Court personally to make enquiries on the where about and the status of his Application, only to find that nothing was indeed filed as he had believed and the person entrusted to do so had passed away. Thus the applicant decided to file this Application for purpose of knocking the doors of justice to this Honorable Court with the view that he could be heard in his intended application for Revision out of time.

Applicant submits that he is well aware of the renowned established principle of law that sufficient cause should be the ground for the court to determine in granting application for extension of time, and though there is no hard and first rule, but its determination should depend on the case to

case approach. He cited the case of **CRDB (1996) Limited Vs. George Kilindu, Civil Application No. 162 of 2006**, (Unreported), and the case of **Felix Tumbo Kiima Vs. TTCL & Another [1997] TLR 57**, to support his position.

The Applicant states that he has been outside of Dar Es Salaam following sickness of her biological mother, who was in critical conditions hence Applicant could not travel back to Dar Es Salaam, until after her mother passed away. But before departing from Dar Es salaam he had instructed the late Advocate Kimbori (deceased) who had started working on the intended application for Revision, but before effecting it to the High Court Registry for filling, she also fell sick and passed away earlier than the Applicant's mother. In such circumstances, the applicant submits that such grounds or reasons were beyond the Applicant's control, hence preventing him from taking the necessary steps to prefer the Application for Revision in time.

Accordingly, the Applicant submitted that the coincidental deaths of both the Applicant's advocate and his biological mother concurrently be taken unto considerations by this Honorable Court as justification for granting the extension of time within which the Applicant could file his intended application for Revision out of time.

Furthermore, the applicant submitted that in the intended Application for Revision the Applicant is seeking to challenge on the apparent errors on the face of records, of the CMA awards, as per paragraph 3.2 and 3.11 of the Applicant's Affidavit, which occasioned by the Arbitrator's omission to award in addition to compensation, payment of the salaries during the whole period Applicant remained unfairly terminated, after its findings that the Applicant (the Complainant) was unfair terminated. The applicant argue that this is a fit case for this Court to grant the Application for extension of time, so as the mischief noted which can only be cured through the intended for Application for Revision. The applicant is of the opinion that the Respondent in the present application will not be prejudiced at any rate by granting the application for extension of time.

Replying to the applicant's submission, the respondent didn't accept all what have been alleged as the reasons for delay. The respondent is of the view that the applicant acted negligently as he was supposed to act immediately after the CMA Award was delivered. There is no reasons adduced as to why the Applicant failed to act diligently to file his Revision. The Respondent submitted that the delay was caused by the Applicant negligence as he should have acted fast to file Revision after the Award was delivered.

The respondent argue that the Applicant claims that he was informed on 19th December, 2018 by the late Advocate Kimbori (deceased) that he will be notified through text message from the High Court of Tanzania confirming registration of his revision while he was taking care of his sick mother. Para 3.8 of the applicants Affidavit states that on 18th January, 2019 the applicant was informed that the learned advocate Kimboli was hospitalized. Counting days from the date the CMA Award was delivered on 26th October, 2018 to 18th January, 2019 it was almost 82 days had elapsed, so at this point the Applicant was already out of time to file the Revision. Thus the allegations adduced at this point are baseless and cannot hold water.

The respondent argued further that the Applicant claims that his mother passed away on 30th March, 2019 but again on the date mentioned the Applicant was already out of time to file Revision for almost five months. There is no evidence which was tendered by the applicant to support all the allegations and due to that it is the Respondents submissions that all the reasons adduced by the Applicant have been fabricated/manufactured. The Applicant decided to mention the late Senior Counsel Delphina Kimbori because she is no longer with us hence she cannot come before this court

to prove all what have been alleged. During the hearing of the dispute at the CMA the Applicant was not represented by the Late advocate Kimbori.

The respondent submitted further that the Law is very clear that for the Court to grant extension of time the applicant must adduce sufficient reasons for his delay. Also the Law requires the Applicant to Account for each and every day of delay for the court to grant extension of time. He cited the case of **Bruno Wenceslaus Nyalifa Vs. The Permanent Secretary of Home Affairs & The Honorable Attorney General, Court of Appeal, Civil Appeal No. 82 Of 2017**, the Court of Appeal of Tanzania, (Unreported), to support his position where it was held in page 12 of the Judgment that "the Requirement of accounting for every day of delay has been emphasized by the court in a number of cases". The Court referred to the case of **Bushiri Hassan Vs. Latifa Lukio, Mashayo, Civil Application No. 3 of 2017**, Where the court stated that "Delay of even a single day has to be accounted for otherwise there would be no proof of having rules prescribing periods within which certain steps have to be taken"

The respondent averred that the applicant in his submission cited the case of **CRDB (196) Limited vs. George Kilindu**, (Unreported) which stated that the applicant is supposed to prove that he acted promptly, valid

explanation for delay and lack of negligence on his part. Using the same case the Applicant failed to show the requirements mentioned by the court.

The respondent is of the view that the Applicant failed to act promptly as the Application for extension of time was filed on 23rd April, 2019 which is almost six months had already lapsed from the date the CMA Award was delivered on 26th October, 2018. The Applicant acted negligently because he failed to make sure that his Application was properly filed within time, the case is his and not the Advocate, and he should have acted with diligence to ensure that the revision was filed within time. The Applicant failed to adduced valid reasons for his delay as there is no evidence provided before this court to support all his reasons, there is no evidence to prove that he instructed the late Advocate Kimbori to file his revision and there is no proof tendered to show that his mother passed away on the dates mentioned in the submission and Affidavit.

Concerning the issue of illegality, the respondent submitted that the Applicant failed to establish the illegality in the CMA Award which he intends to challenge. In support of his submission he cited the case **of Principal Secretary, Ministry of Defence and National Service Vs. Evram Valambhia [1992] TLR 182** where it was stated that "in our view when the point at issue is one alleging illegality of the decision being challenged,

the court has duty, even if it means extending time the purpose to ascertain the point and if the alleged illegality be established to take appropriate measures to put the matter and record right”.

The respondent is of the opinion that the Applicant failed to pursue his right diligently, the delay is inexcusable and inordinate. There is no single day of delay which have been accounted for by the Applicant as per the mandatory requirements of the law and there are no evidence tendered prove the reasons adduced by the Applicant as causes for delay. The respondent prays for the Application to be dismissed for being devoid of merits.

In rejoinder the applicant retaliated his submission in chief.

From the submissions from both parties the issue for determination is whether the applicant have provided sufficient cause to be granted extension of time to file the revision application out of the time prescribed by the law.

It is a trite law that it is a discretion of the Court to grant an application for extension of time upon a good cause shown. The Court of Appeal in the case of **Tanga Cement Company vs. Ajaumanne D. Masangwa and Another, Civil Application no. 6 of 2001, Court of Appeal of Tanzania** (Unreported) the Court of Appeal held that:

".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."

From above decision what amount to a good cause depends on the circumstances of each case. (See also the case of **Oswald Masatu Mwizarubi v. Tanzania Fish Processors Ltd, Civil Application no. 13 of 2010, Court of Appeal**).

The evidence available shows that the CMA Award was delivered on 26th October, 2018. The present application for extension of time was filed on 23rd April, 2019. According to section 91(1) of the Employment and Labour Relations Act, 2004 the party aggrieved by CMA Award was supposed

to file revision application in the Labour Court within 6 weeks of the date that the award was served on the applicant. The said six weeks expired on 8th December, 2018.

The applicant have submitted that ten days before the deadline (which is on 29th November, 2018 according to paragraph 3.5 of applicant's affidavit) he instructed Ms. Delphina Kimbori Advocate to draw necessary documents and file the application for revision on his behalf. The applicant have stated that from 3rd of December, 2018 up to 30th March, 2019 he was taking care of his sick Mother, the late Eva Ndetele Mwasomola (deceased). The Applicant had to take her from **Muhimbili National Hospital** where she was admitted and hospitalized for some time back to her Village, Mwankenja village, in Kiwila area of Rungwe District, Mbeya Region following the advice of medical experts from Muhimbili National Hospital.

The applicant states that during the time he was taking care of her sick mother he did make a follow up on the intended revision by calling Ms. Kimbori Advocate on the 19th December 2018 where he was informed that his application was duly registered by the High Court Labour Division Registry and that he will receive a text message from the High Court of Tanzania, Labour Division, confirming that his application was duly registered. But the applicant never received that text message. By that time the application was

late for more than ten days. The applicant made another follow up on the 18th January 2019 only to be informed that Advocate Kimbori was hospitalized at Muhimbili National Hospital. By that time still there was no text message received by the applicant from the High Court confirming the registration of his application. The applicant did not make any follow up until he returned back to Dar Es Salaam on 11th April, 2019 after the burial of his mother. The applicant, upon returning to Dar Es Salaam, tried to call Advocate Kimbori without getting any response and on 12th April, 2019 he visited her office to learn that she passed away since 26th January, 2019.

Paragraph 3.10 of applicant's affidavit shows that the applicant went to the High Court on 15th April, 2019 to inquire about his application only to find out that there was none in the registry. The applicant did not give explanation as to why after finding that his Advocate have passed away he took two days to go to the High Court to enquiry about his intended application. Further there is no explanation from the applicant for the delay from 15th April, 2019 when he became aware that there is no application filed in the Court by his late counsel up to 23rd of April, 2019 when the present application for extension of time to file revision application out of time was filed in Court. The applicant was supposed to account for each day of the delay from the time limitation prescribed by the law.

I'm of the opinion that the explanation given by the applicant that he was taking care of his sick mother is a good reason. Also the assertion that the delay was caused by the negligence of his late Advocate Kimbore to file the application within time and her death shows that the late Advocate contributed to the delay. The applicant also attached copies of referral form of his mother to Muhimbili National Hospital, payment receipt to Muhimbili National Hospital, Burial certificate of his deceased mother and a copy of bus ticket showing that he travelled from Tukuyu to Dar Es Salaam on 11th April, 2019. These attachments support applicant's assertion that his mother was sick and that she passed away on 30th March, 2019. The ticket proves that the applicant travelled from Tukuyu to Dar Es Salaam on 11th April, 2019. These evidence support the submission by the applicant.

However, as I have already discussed herein above there are some gaps in applicant's submissions which shows that the applicant was partly negligent. The applicant was told by his Advocate the late Ms. Kimbore on 18th December, 2018 that he will receive the text message from the High Court confirming that his application was registered but after failure to receive any text message he was supposed to be in alert and to make a close follow up on the matter. The applicant made another follow up on 18th January, 2019 but he was informed that his advocate was sick. From there

the applicant never made any follow up until he returned to Dar Es Salaam on 11th April, 2019 when he tried to call Advocate Kimbori without getting any response. Further, the applicant asserted that on 12th April, 2019 he visited Kimbori's office to learn that she passed away since 26th January, 2019. From 12th April, 2019 the applicant waited for two days before he went to make an enquiry about the application at the High Court. There is no explanation from the applicant for the two days delayed. Furthermore, there is no explanation from the applicant for the delay of 7 days from 15th April, 2019 when he became aware that there is no application filed in the Court by his late counsel up to 23rd of April, 2019 when the present application for extension of time to file revision application out of time was filed in Court.

It is a trite law in the application for extension of time that the delay of even a single day has to be accounted for. See **Bruno Wenceslaus Nyalifa vs. The Permanent Secretary of Home Affairs & The Honorable Attorney General, Court of Appeal, Civil Appeal No. 82 Of 2017, Court of Appeal of Tanzania, (Unreported)** and **Bushiri Hassan Vs. Latifa Lukio, Mashayo, Civil Application No. 3 of 2017, Court of Appeal of Tanzania, (Unreported)**. In the present case the applicant have failed to account for each day of the delay.

The applicant submitted that there is issue of illegality since there is apparent errors on the face of records, of the CMA awards, which was occasioned by the Arbitrator's omission to award in addition to compensation, payment of the salaries during the whole period Applicant remained unfairly terminated, after its findings that the Applicant (the Complainant) was unfairly terminated. The applicant argued that this is a fit case for this Court to grant the Application for extension of time, so as the mischief noted can be cured through the intended Application for Revision. In contention, the respondent submitted that the Applicant failed to establish the illegality in the CMA Award which he intends to challenge.

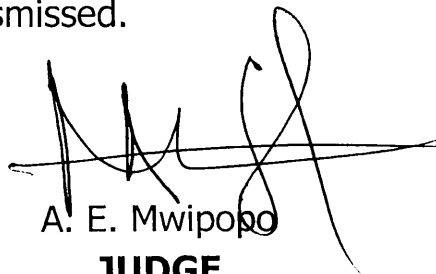
I have read the part of the award which the applicant asserted that there is apparent errors on the face of records, in the CMA awards. The trial arbitrator stated in the Commission award that the applicant was terminated for the misconduct which was not proved to be gross misconduct. Therefore, there was misconduct by the applicant but the misconduct was no gross to warrant termination of applicant's employment. For that reason the trial arbitrator decided that the applicant have to be compensated for 15 months salaries instead of re-instatement. The assertion that the Arbitrator was supposed to order the payment of the salaries during the whole period Applicant remained unfairly terminated in addition to compensation is not

apparent on the record. The trial arbitrator have given the reason for ordering payment of 15 month's salary as compensation for unfair termination and severance allowance instead of ordering for re-instatement or payment of the salaries during the whole period Applicant remained unfairly terminated. In order to find the alleged error the Court have to go through the evidence and the reasoning of the trial arbitrator in awarding the applicant 15 month's salary compensation. The Court of Appeal in the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**, (Unreported), held that:

"Since every party intending to appeal seeks to challenge the decision either on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add

that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process”

The applicant assertion of illegality in the CMA award findings does not appear to be apparent on the face of record. The alleged illegalities and errors requires a long process to discuss and untangle the trial arbitrator decision not to award the applicant with salaries from the time he was terminated up to the date of the CMA award and the interpretation of the law. Therefore, it is my finding that the issue of illegality was not apparent on the face of record. As result I find that the applicant have failed entirely to show a sufficient cause for the Court to grant him an extension of time. The application is hereby dismissed.



A. E. Mwipopo

JUDGE

29/05/2020