IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 18 OF 2021

CI GROUP MARKETING SOLUTION .....APPELLANT

VERSUS

SIJAONA KOBA ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Wambura, J.)

dated the 14th day of August, 2020

in

Revision No. 355 of 2019

.....

JUDGMENT OF THE COURT

22nd August & 8th September, 2023

MURUKE, J. A:

Sijaona Koba, the respondent, filed a complaint against the appellant in the Commission for Mediation and Arbitration (CMA) of Dar es Salaam–Temeke. The said application was heard exparte, thus, an exparte award against the appellant dated 18th August, 2017, for a total sum of Tzs. 6,770,769, covering the followings;

(a) TZS 180,000, One month's salary in lieu of notice.

(b) TZS 1,800,000, ten month's wages.

(c) TZS 4,320,000, Compensation for 24 months.

(d) TZS 180,000, Annual leave dues.

(e) TZS 290,769 – Severance pay for 6 years.

Aggrieved by the exparte award, the appellant on 6th September, 2017 filed an application seeking to set it aside. However, that application ended being dismissed on 20th April, 2018. Unsatisfied with the decision of the CMA, refusing to set aside the exparte award, the appellant, on 28th May, 2018 filed Revision No. 279 of 2018 in the High Court of Tanzania (Labour Division), but the same was struck out on a technical defect, with leave to refile within seven days. The appellant complied with the order, by filing Revision No. 355 of 2019, that was however dismissed for want of merits.

Being aggrieved by the decision of the High court, the appellant filed the present appeal raising six grounds namely:

1. *That the High Court (Labour Division) at Dar es Salaam (hereinafter also called 'the Hlgh Court') erred in law to hold to the effect that evidentiary documents in the form of death certificate and funeral permit of the Deceased sister of a litigant's representative in Court and travel documents of the representative who failed to appear in Court on account of attending the funeral of that relative are mandatory requirements to prove that the relative died and the representative was attending her funeral in order to get an order*

setting aside the award obtained exparte on account of that absence;

2. *That the High Court erred in law to hold to the effect that in an application for setting aside an award made exparte on account of absence of an applicant when the case came for hearing the Court is to consider absence of the Applicant on other occasions which did not resuit into the exparte hearing giving rise to the award.*
3. *That the High Court erred in law for holding to the effect that an exparte hearing can be heard to continue and continue on a day different from the one on which the condemned party has committed the absence which has given rise to the exparte hearing, and eventually the exparte award.*
4. *That the High Court erred in law to impose such high standard of proof of absence on just an application to set aside the exparte award so that both sides can be heard on the matter;*
5. *That the High Court erred in law for not set aside the exparte award or even quashing the proceedings and award of the CMA on account of the established position on record that the Respondent (the Complainant there) had filed the complaint in the CMA out of time with neither an order of condonation nor an application for condonation.*
6. *That the High Court erred in law not to set aside the exparte award and direct hearing to proceed exparte even if the explanation for the delay was found not to be satisfactory on the following grounds:*
   (a) *The record contained an established position that the complaint was filed out of time and there is no order for condonation on record;*

(b) *The TMA never resolved the issue as to who terminated the contract, one of the parties having alleged that the same was terminated by the employee by abscondment and the other by the employer unfairly;*

(c) *The CMA had ordered compensation for 24 months, twice higher than the statutory guidance, without any special circumstances supporting that sum of compensation;*

(d) *The CMA proceeded exparte per the while there was an opening statement by the Appellant opposing every material contention of the Respondent which was not considered at all:*

On the hearing date, Mr. Audax Kahendaguza Vedasto learned advocate represented the appellant, while the respondent was present in person not represented. Both parties had complied with Rule 106(1) and (7) of the Tanzania Court of Appeal Rules 2009 (herein-after the Rules), by filing their submissions for and against the appeal. When prompted by the Court to clarify their submissions if any, the appellant's counsel said he had nothing to say; he only requested the Court to receive three copies of the authorities in support of the issue of condemnation as reflected at page 40 of records, a prayer that was not contested by the respondent.

For the reasons to be given later, we will first deal with ground five of the appeal that raises the issue, as to whether or not the respondent's complaint at the CMA was filed within time.

The appellant's counsel submitted on ground five that, the record of the CMA, which the High Court was called upon to examine their legality, propriety and regularity included an application for condonation in the CMA which was applied for by the Respondent as attested by the documents appearing at pages 15-41 of the records. At page 40 of the records is a ruling by the CMA in *Mgogoro wa Kikazi Na.* ***CMA/DSM/TEM/209/2015,*** which is attached as Annexture SK5 to the application for condonation in terms of para 9 of the supporting affidavit (pg.20 of the record). In that Ruling of 17.12.2015, the Mediator (at page 40) noted:

> *"Mgogoro huu (CMA/DSM/TEM/209/2015) ... umefunguliwa nje ya muda...*
> *Kwakuwa mgogoro uko nje ya muda na hakuna maombi yaliyowasilishwa mbele ya Tume hii, na kwamba kwa kutokuwepo maombi hayo, kunaifanya Tume hii ikose mamlaka ya kuusikiliza.*
> *Hivyo ni amri ya Tume hii kuwa mgogoro huu unafutwa (struck out) kwa kutokidhi vigezo..."*

In the light of the above decision, it was insisted that, it is a clear admission that the whole case that eventually went to the High court was misconceived and it ought to have been dismissed.

If there is anything clearer than any other thing in this country is the consequence of a proceeding filed out of time. Section 3(1) of the Law of Limitation Act, Cap. 89, directs that such a proceeding "**shall be dismissed**". The mandatory nature of the dismissal is emphasized by adding that it "**shall be dismissed whether or not limitation has been set up as a defence.**" (See **Hashim Madongo vs Minister for Industry and Trade & Others**, Civil Appeal No. 27 of 2003(unreported) and **Stephen Masato Wasira vs Joseph Warioba (1999) TLR 334).**

With the above submission, Mr. Audax Kahendaguza, prayed for, **one**, allowing the appeal, and setting aside the Judgment and decree of the High court which dismissed Revision No. 355/2019 between the parties therein. **Two**, an order granting Revision No. 355/2019 in the High court Labour Division and setting aside the exparte award made by the CMA on 18/08/2017 in Dispute No. CMA/DSM/TEM/170/2016. **Three**, an order dismissing Dispute Number CMA/DSM/TEM/170/2016 in the CMA in its entirety and declaring that the employment dispute between the parties is over since it was filed out of time and without any application for condonation.

On the other hand, the respondent, submitted that **one**, no blame can be directed to the Mediator for striking out the referral filed out of time instead of dismissing it, because the Mediator was confined to the law that govern employment matters and was not bound by the undue technicalities enshrined in other written laws like the Law of Limitation Act, Cap. 89 of the Revised Laws as referred by the appellant's counsel. **Two**, dismissal or striking out the matter by an umpire is a discretionary power of the respective umpire. **Three**, interpretation of rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 should be differentiated from the requirement of section 3(1) of the **Law of Limitation Act, Cap. 89** since Rule 10(1) governs the mediation proceedings in which the utmost intention of the mediators is to settle the disputes amicably, and what was done by the Mediator, in this case was to assist the party to comply with the rule. **Four**, even if the line of argument of the Appellant were true, the same should be disregarded for being contrary to the current position of the overriding objective as enshrined under the provisions of article 107(2)(b) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time which noticeably states:-

"In delivering decisions in matters of civil and criminal matters in accordance with the laws, the Court shall observe the following principles, that is to say: -

(a) .....

(b) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice."

In view of the above arguments, the respondent pressed for dismissal of the appeal.

We have gone through the submission by both parties on ground five of the appeal. The issue for determination on this ground is whether, the applicant's complaint at the CMA was filed within time.

The records from page 29-35, consists of Referral of a Dispute to a Commission Form, **CMA F1**. This is a form that refers the dispute to the Commission. The nature of the complaint by the respondent, the, then applicant, was on Termination of Employment, as seen at page 32 and 35 of the record, that reads;

"Procedure for termination from employment as provided by the Labour Laws, 2004 have

not been complied and no reason for termination."

The time limit for referring a dispute of fairness or otherwise of termination is provided by Rule 10(1), (2) of Labour Institution (Mediation and Arbitration) Rules, 2007 GN 64 of 2007 that reads;

10 (1) Dispute about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that employment made a final decision to terminate or uphold the decision to terminate.

(2) All other disputes must be referred to the Commission within sixty days from the date when the dispute arised.

Equally so, once an application is out of time, Rule 11(1)(2) of the Labour Institution Mediation and Arbitration Rules 2007 provides for the procedure to be followed as hereunder reproduced.

11 (1) This Rule applies to any dispute referral documents or application delivered outside the applicable time prescribed in the Act or these rules.

(2) A party shall apply for condonation, by completing and delivering the prescribed condonation form when delivering the document as application to the Commission. This form must be served on all parties to the dispute.

Looking at page 40 of the records of appeal, the respondent filed his complaint at the CMA (reference number CMA/DSM/TEM/209/2015), that was struck out after being out of time. To clarify, the order (AMRI) reads as follows:

"Mgogoro huu uliletwa kwangu kwa hatua ya Usuluhishi lakini kabla haujaanza, ***ikabainika kuwa umefunguliwa nje ya muda na haukufuata utaratibu wa kuwasilisha maombi kwa Mujibu wa Kanuni ya 11 (2) ya Kanuni za Usuluhishi na Uamuzi Tangazo la Serikali Na. 64/2007.*** *Kwa kuwa mgogoro uko nje ya muda na hakuna maombi yaliyowasilishwa mbele ya Tume hii, na kwamba kwa kutokuwepo maombi hayo, kunaifanya Tume hii ikose mamlaka ya kuusikiliza. Hivyo ni AMRI ya Tume hii kuwa mgogoro huu unafutwa (struck out) kwa*

kutokidhi vigezo. Kama mlalamikaji anayo nia ya kuendelea na mgogoro wake, anaweza kufungua upya ndani ya muda wa siku kumi nan ne kuanzia tarehe ya amri hii."

From the ruling (Uamuzi) reproduced above, it is clear that, the respondent's first application at the CMA was filed out of time as found out by the mediator, but it was struck out.

The argument by the appellant's counsel, in respect of ground five of appeal is that, the complaint ought to have been dismissed and not struck out. Indeed, that is the right position. Section 3(1) of the Law of Limitation Act provides clearly that, any matter filed out of time ought to be dismissed.

This Court was confronted with a similar issue arising from a Labour dispute as to whether the Law of Limitation Act is applicable in Labour disputes, in the case of **Barclay's Bank Tanzania Limited vs Phylisiah Hussein Mcheni,** Civil Appeal No. 19/2016(unreported) where it was held;

"Finally, therefore there was no basis for the learned High Court Judge to strike out the complaint that had been presented in Court

after expiration of 60 days. In a similar situation in the case of Hezron M. Nyachiya v. Tanzania Union Industrial and Commercial Workers and Another, Civil Appeal No. 79 of 2001 (unreported), cited to us by the appellant's counsel, this Court held that, although Law Reform Fatal Accident and Miscellaneous Provisions Ordinance) set the limit for the instituting actions to be six months, but did not provide for the consequences of filing a matter out of time, Section 3 of the Act was applicable in dismissing the petition. In view of the position of the law, it is our conclusion that the High court judge should have resorted to Section 3 (1) of the Act to dismiss the complaint instead of striking out as she did."

It was further said at page 12-13 of the same Judgment that,

"... it would be inequitable if we allowed one party to an employment contract to disregard time in instituting a complaint against the other party. We think matters would come to finality as required if a party who allows grass to grow under his feet and delays in instituting an action, would only be

given an order to refile it. The very object of the Law of Limitation would be defeated."

From the argument advanced by the appellant's counsel and the case law cited above, the respondent's contention that the Law of Limitation Act does not apply to labour cases is a serious misconception. More so, limitation is not a matter of technicality at all. It is a serious issue that goes to the root of the dispute. Without the law of limitation, the Court would have endless litigations at the whims of the parties.

The second and third arguments by the respondent that, striking out instead of dismissing the matter was in the discretion of mediator, is also a serious misconception on the part of the respondent. Limitation on labour disputes being set out by law, is a matter on which a mediator cannot exercise discretionary powers for that would be to defeat the meaning and intention of Section 3(1) of the Law of Limitation Act.

Fourth, is the arguments by the respondent that by dismissing the dispute filed out of time, it would be to circumvent the provision of Article 107(2)(b) of the Constitution of the United Republic of Tanzania, 1977, that insists on the need when delivering decisions in matters of a civil and criminal nature in accordance with the laws, the courts to observe

dispensation of justice without being tied up with legal technicalities which may obstruct dispensation of justice.

From the submission, the respondent sought to invite this Court to invoke the provisions of Article 107(2)(b) of the Constitution of United Republic of Tanzania to cover the omission. However, it is our firm view that the provisions of Article 107(2)(b) cannot be used by the respondent in the circumstances of this case. As stated earlier, the issue of filing a Labour complaint out of time at the CMA is not an issue of technicality as to fall under Article 107(2) (b) of the Constitution. Rule 10(1) of the Labour Institution Mediation and Arbitration Rules 2007 sets the time limit for filing disputes arising out of employment. None compliance with the same is to contravene the law. It is an issue that goes to the root of the matter. By no stretch of imagination, can it be termed as technicalities to be covered under Article 107(2) of the Constitution.

From what has been demonstrated at page 40 of the record of appeal regarding the ruling of the mediator, it is clear that, the complaint by the respondent then applicant was filed out of time without a condonation application. Therefore, there is no option other than an order for dismissal of all that came later. In other words, the mediator erred in

striking out complaint no. CMA/DSM/TEM/209/2015. The same complaint ought to have been dismissed.

The argument by the respondent that the mediator was bound by the employment law not to be tied up by technicalities, is a misconception. Labour laws do not allow complainants to sit idle and file disputes as and when they deem it fit. That is why Rule 10(1)(2) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN No. 64 of 2007 sets a time limit for filing claims on termination.

We are supported in that view by the decision of this Court as cited by the appellant's counsel on a remedy for a dispute filed out of time; that is the case of **Hashim v. Minister for Industry and Trade and Others,** Civil Appeal No. 27 of 2003 (unreported) where the Court observed that;

> *"Under Section 3 of the Law of Limitation Act, a proceeding which is instituted after the prescribed period has to be dismissed. Therefore... it occurs to us that Kalegeya, J. ought to have dismissed the application after he was satisfied that it was time barred. It was not open to him to strike out the application as it happened in this case."*

Equally so, is in the case of **Stephen Masato Wasira v. Joseph Warioba** (1999) TLR 334 also cited by the appellant's counsel where this Court held:

> *"(ii) Having held that the application before it was time barred, the High Court had, under section 3(1) of the Law of Limitation Act 1971, only the power to dismiss it and not to strike it out, as happened in this case."*

In the end, we allow ground five of the Appeal which disposes this appeal. We find no need of dealing with other grounds as that would be an academic exercise. Accordingly, this appeal is allowed.

We hold that Dispute No. CMA/DSM/TEM/170/2015 which was filed out of time ought to have been dismissed, instead of being struck out. It follows therefore, that the subsequently filed Dispute No. CMA/DSM/TEM/170/2016 was untenable. The exparte award of TZS 6,770,769.00 was, for this reason, wrongly awarded. We thus hereby set it aside. Consequently, the decree of the High court in Revision No. 355 of 2019, rejecting the application for setting aside the CMA award in the subsequently filed dispute is also set aside.

Since the appeal originated from a labour dispute, we make no order as to costs.

DATED at **DAR ES SALAAM** this 7th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The judgment delivered this 8th day of September, 2023 in the presence of Mr. Joseph Rugambwa, learned counsel for the Appellant and Mr. Sijaona Koba, the respondent present in person, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL