IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT IRINGA

REVISION NO. 24 OF 2018

OMARY HUSSEIN MGOBA ..... 1ST APPLICANT

GODLOVE R. KADUMA ..... 2ND APPLICANT

JEREMIAH K. MWAKIPESILE ..... RD APPLICANT

ERICK E. BEMBELEZA ..... 4TH APPLICANT

LILIAN P. MAGODA ..... 5TH APPLICANT

SALUM O. JABIRI ..... 6TH APPLICANT

GEORGE KIGODI ..... 7TH APPLICANT

GREGORY NG'ASI ..... 8TH APPLICANT

VERSUS

TANESCO LTD ..... RESPONDENT

Date of Last Order: *21/06/2020*
Date of Ruling: *04/06/2020*

RULING

MATOGOLO, J:

This ruling is in respect of an application by the applicants namely Omary Hussein Mgoba, Godlove R. Kaduma, Jeremiah K. Mwakipesile, Erick Bembeleza, Lilian P. Magoda, Salum O. Jabiri, George Kigodi and Gregory Ng'asi who were employees of the respondent TANESCO Limited, but whose employment was terminated.

The applicants were among the respondent's employees countrywide, who, as said were terminated from their employment in April, 2018 after the respondent had terminated some categories of its employees in all regions in Tanzania. The other employees from other regions, through the services of Mr. Jamhuri Johnson from Jamhuri and Co. Advocates managed to refer their disputes to the Commission for Mediation and Arbitration. However due to the facts that all employees countrywide employed Mr. Jamhuri Johnson to represent them, it happened that employees from Iringa did not file their dispute early as the results all disputes from different regions concerning the employees of the respondent who were terminated were consolidated and heard in Dar-es-Salaam as Dispute No. CMA/DSM/UBG/R.55/2018. So the dispute of Iringa was to be adjourned pending consolidation of the other disputes to be heard in Dar- es- Salaam.

At the time the present applicants filing the Labour dispute at the Commission for Mediation and Arbitration of Iringa, it was found to have been filed out of time. The same was struck out and applicants were told to file an application for condonation. The applicants have filed this application so that this court can call for and examine the proceedings and the subsequent ruling by the Commission for Mediation and Arbitration Iringa in Labour Dispute No. CMA/IR/36/2018 delivered on 24/10/2018, in order to satisfy itself on the appropriateness of the said ruling, revise and set it aside.

The application is both by notice of application and Chamber Summons and was made under Section 94(1)(e) of the Employment and Labour Relations Act No. 06 of 2004 as amended, Rule 24(1),

24(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d) 24(11)(c), Rule 28(1)(a)(c)(d)(e) and Rule 55(1)(1) and (2) of the Labour Court Rules, 2007.

The application is accompanied by an affidavit taken by Stella Simkoko Counsel for the applicants.

Before this court the applicants were represented by Stella Simkoko learned counsel and the respondent was represented by Mr. John Kyamani learned counsel. The application was argued by way of written submissions.

In her written submission, the learned counsel for the applicants gave a detailed explanation of the dispute that the applicants were retrenched from their employment. As the retrenchment exercise by the respondent to certain category of its employees was conducted countrywide, that is in different regions of Tanzania, all labour disputes involving the retrenched employees were consolidated and heard in Dar-es-Salaam Region in Labour Dispute No. CMA/DSM/UBG/R.55/2018 with the exception of the Labour Dispute by retrenched employees from Iringa Region for which applicants counsel adviced their representative one Omary Hussein Mgoba to seek for amendment of CMA F1.

However the learned counsel said her mobile phone was out of order for some days after 02/07/2018. She called the applicants representative to know the status of their case but the Mediator told them that their dispute was referred out of time and were given seven days to file an application for condonation. But their representative could not notify her of that status because she was not reachable by mobile phone and due to the fact that the applicants' representative was attending his sick uncle who was admitted in

the hospital, and who ultimately passed away on 02/08/2018 he could not inform her of the order of the mediator. She thought the dispute was still pending before the Commission. And she was aware that the dispute had been referred within the time specified for referring other disputes apart from the time for referring disputes on unfair termination. The applicants' counsel wrote a letter to the mediator on 29/07/2018 which she said was mistakenly written 09/07/2018 requesting for a date to appear before the said mediator but through the mobile phone of one of the applicants Jeremiah Mwakipesile she was informed that their dispute was dismissed way back on 02/07/2018 and that the applicants were granted leave to file an application for condonation within seven days as the dispute was referred out of time. She then lodged an application for extension of time which was dismissed on 24/10/2018. This was disclosed by the learned counsel in her affidavit in paragraphs 4, 5, 6, 7, 8, 9, 10, 12, 13, 15 and 16 and what the applicants counsel stated in her written submission.

The applicants argument is that the rationale for revisional jurisdiction is aimed at enabling the court to examine the proceedings before the Commission for Mediation and Arbitration in order to satisfy itself as to the correctness, legality or propriety of the decision, and supported her argument by citing the decision of ***Stanbic Bank Ltd vs. Kagera Sugar Ltd***, Civil Application No. 47 of 2007 CAT (unreported).

She further stated that revision ensures that justice must not merely be done, but must be seen to have been done especially where it appears that there has been an error material on the records of the court and cited

the Case of ***Zabron Pangamaleza vs. Joachim Kiwakara and Another (1987) TLR 140***.

On the issues as ground for revision, it is the argument by Stella Simkoko that the mediator erred in law by holding that the Labour Dispute No. CMA/IR/36/2018 lacks merit as the applicants demonstrated sufficient reasons warranting extension of time so that they can lodge an application for setting aside the order in the Labour Dispute No. CMA/IR/36/2018. Each reason was supported by evidence but was not considered.

She said the term "*sufficient reasons*" has been expounded in the case of ***Ratman vs. Cumarasamy and Another [1964] 3 ALLER 933***. Where Lord Guest said:-

> *"Sufficient reason ... must be determined by reference to all circumstances of the particular case ... which will move the court to exercise its jurisdictional discretion in order to extend the time limited by rules".*

It is the argument of the learned counsel relying on the decision in ***Lyamuya Construction Company Limited vs. Board of the Registered Trustees of Young Women's Christian Association of Tanzania*** Civil Application No. 02 of 2010 which was cited with approval in ***Benedictor S. B. Mahela vs. Tanzania Bureau of Standard,*** Misc. Application No. 632 of 2019 (unreported), that as a matter of general principle, it is in the discretion of the court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rule of reason and justice and not according to the private opinion and arbitrary.

The reasons which the learned counsel said advanced by were not considered that after advising the complainants to institute a claim at the Commission for Mediation and Arbitration, the applicants, counsel applied for the consolidation of their claims in Dar -es- Salaam which was exercised under Rule 26 of GN. No. 64 of 2007 but the matter was scheduled for hearing on 02/07/2018. She said the mediator erroneously struck out the application on the ground that it has been filed out of time. The reason that Omary Hussein Mgoba who was the representative of the applicants at Iringa attending his beloved uncle and his attendance at his burial ceremony resulted into failure to inform and/or instruct their advocate who reside in Dar -es- Salaam on the progress of the case amounts to sufficient reasons to warrant extension of time and supported her argument by the decision in the case of ***Rajabu Zahuya vs. Mkonge Hotel Ltd***, Revision No. 26 of 2013 High Court Labour Division at Tanga where the court stated sickness can justify condonation. But ignoring that amounts to judicial arbitrary.

The learned counsel submitted further that after being out of time the applicants acted immediately by lodging Labour Dispute No. CMA/IR/36/2018, which was dismissed for lack of merit.

The learned counsel referred this court to the case of ***Zan Air Limited vs. Othman Omar Musa,*** Misc. Application No. 285 of 2013 High Court Labour Division Dar – es- Salaam which was cited with approval in the case of ***Avit Kwareh vs. Serengeti Breweries Ltd*** to show that our jurisdiction had laid a jurisprudential guide when Mediator and Arbitrators exercising their discretionary power on extension of time in which it was held:-

"... sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons and causes which are outside the applicant's power to control or to influence resulting in delay in taking any necessary step".

In failure by the Arbitrator to assign reasons for her decision, it is the submission by the learned counsel that it is the requirement of the law that judgment ruling and orders must contain the following:-

(a) A concise statement of the case

(b) The points for determination

(c) The decision thereon, and

(d) The reasons for such decision.

She supported that position by the case of ***Fatma Idha Salum vs. Khalifa Khamis Said [2004] TLR 426***. The learned counsel therefore prayed to this court to examine the proceedings in the Commission for Mediation and Arbitration revise and set aside the orders with costs.

In his reply submission counsel for the respondent Mr. John Kyamani stated that the applicants counsel in her submission did not even consider grounds for revision as stated in paragraph 17 of the affidavit. It is his argument that the submission by the counsel for the applicants concentrated on new facts which not only were not argued at the Commission for Mediation and Arbitration but also are not facts verified in the affidavit supporting their application.

The learned counsel contended that the applicants have submitted something not on record. The order which aggrieved the applicants was made on 24th October, 2018.

He said the applicants counsel was supposed to submit on the areas where the Arbitrator acted illegally while dismissing their application for extension of time. He said at that time, an application for setting aside the order issued on 02/07/2018 not yet filed. He said the issue is whether applicants established sufficient reasons for the delay, which is the legal basis for one to be granted leave for extension of time. The learned counsel said the only ground for delay explained are two.

One that Omary Hussein who is the representative of the applicants was attending his sick uncle.

Two that for sometimes counsel for the applicants was unreachable due to the fact that her phone was out of service.

The learned counsel argued that sickness can justify extension of time where it is the applicant himself who was sick but not allegation that he was attending his uncle it was not disclosed for how long he was attending his uncle and at what place, was it in the hospital or at home. Even the issue that counsel for the applicant was unreachable through her phone all those reasons do not meet the test stipulated under rule 31 of GN. No. 64 of 2007.

The learned counsel for the respondent argued that the contention by applicants counsel that the Arbitrator did not give reasons for her decision is a misconception on her part as the reasons were given on which the

Arbitrator stated "*in the circumstances this Honourable Commission find the applicants prayer has no merit or legal basis, therefore this application is hereby dismissed*", contrary to what has been submitted by the counsel for the applicants. The respondent's counsel invited this court to dismiss the application with costs. The applicant's counsel did not file rejoinder.

Having carefully read the submissions by the learned counsel from both sides, and having gone through the court record, there are two questions to be resolved first before looking at the merits or otherwise of the present application:-

(i) Whether the complaint by the applicants at the CMA Iringa was lodged out of time or within time.

(ii) If it was filed out of time whether the applicants demonstrated sufficient cause of delay.

It is clear from the record of the Commission for Mediation and Arbitration that the applicants lodged their complaint in the Commission on 12/06/2018 claiming among other things terminal benefits and retrenchment payment. This was after the applicants were terminated from their employments on 20th – 25th April, 2018. According to rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 disputes about the fairness of employee's termination of employment must be referred to the Commission within 30 days from the date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate.

For all other disputes they must be referred to the Commission within 60 days from the date when the dispute arose. This is in accordance to rule 10(2) of the above cited Rules.

It is on record that the applicants while lodging their complaints at the Commission for Mediation and Arbitration filed CMA F1 which refers to Labour Dispute based on termination. This was also conceded by the applicants counsel who said the applicants mistakenly filled CMA F1.

That error or mistake if at all happened was not rectified until the Labour dispute was dismissed by the Arbitrator on the ground that it was lodged out of time without applying for condonation. It was agreed that the applicants in their complaint they filled CMA F1. The Arbitrator therefore struck out the complaint believing that it was for unfair termination.

However, this is not born out of the record because in the application for extension of time to set aside the order striking out the complaint Labour Dispute No. CMA/IR/36/2018 was argued by written submissions. The applicants disclosed in their submission that after they have failed to lodge their complaint for unfair termination on time, on 11/06/2018 they opted to refer the dispute to the Commission for Mediation and Arbitration for retrenchment payment and for terminal benefits. Even the Arbitrator appears to appreciate this in her ruling at page 1 last paragraph fourth line from the bottom where she stated:-

> *"... the employees referred the dispute before this honourable Commission on 12th June, 2018 claiming*

interlia among other things ***Termination Benefits and Retrenchment Payment***".

This shows that the Arbitrator knew that the complaint filed by the applicants was for terminal benefits and Retrenchment payment which do not fall under rule 10(1) but fall under "all other disputes" falling under rule 10(2) for which must be referred to the Commission within sixty days from the date the dispute arose.

The learned Arbitrator did not address her minds to that fact instead dismissed the application on the ground that the applicants did not show sufficient cause of delay.

In their submission through their advocate, the applicants contended that the complaint they lodged in the Commission for Mediation and Arbitration was made under rule 10(2) of the GN No. 64 of 2007 for which time limitation provided is sixty days and not 30 days as provided under rule 10(1).

The respondent's counsel did not counter this in his reply submission.

Given that fact it is crystal clear that the honourable Arbitrator erred to treat the complaint before her as filed under rule 10(1) instead of rule 10(2) of GN. No. 64 of 2007. Even if there was an error made by the applicants in their complaint form by selecting space for CMA F1 but that error was not fatal as it was disclosed to the Arbitrator what the applicants were up to, their complaint was for retrenchment payment and terminal benefit. They were not challenging the termination of their employment.

The Arbitrator therefore was not supposed to adhere to the strict compliance to the rules of procedure which are merely hand maiden. And more so taking into account that in Labour disputes rules of procedure are somehow relaxed as it was held in the case of ***Stephen Makungu and Others versus A/S NOREMCO***, Revision No.224 of 2013, High Court Labour Division Dar- es- Salaam (unreported).

The aim is to make sure that substantial justice is attained. The Labour Court as well as the Commission for Mediation and Arbitration being Courts of Law and Equity cannot be strictly hampered by technicalities as it was held in the case of ***National Bank of Commerce Ltd versus Ahmed Mkwepu***, Misc. Labour Application No. 195 of 2013 High Court Labour Division Dar-es-Salaam (Unreported).

As the time limit for lodging complaint in the Commission of Mediation and Arbitration for disputes on retrenchment payment and terminal benefits which under rule 10(2) of the Rules, is sixty days from the date of retrenchment, there was no need for the applicants to apply for condonation.

It was therefore wrong for the arbitrator to treat the complaint as filed out of time and to instruct them applying for condonation. The Arbitrator therefore acted illegally in striking out the complaint and ordering the applicants to apply for condonation while their complaint was lodged on 11/06/2018 which was only 41 days from 25/04/2018 when retrenchment was made thus not beyond 60 days. The complaint was therefore lodged on time.

Having resolved this, then it follows that even the dismissal of the application for extension of time seeking for restoration of the complaint which was struck out was erroneously reached. Without even considering other grounds for revision raised by the applicants, I find merit in this application, the same is granted. In exercise of powers conferred to this court I order that the finding and order of the Arbitrator striking out the Labour Dispute No. CMA/IR/36/208 before the Commission for Mediation and Arbitration Iringa and the Arbitrator decision in Labour Dispute No. CMA/IR/R.36/2015 dismissing the application for extension of time for the applicants on ground that they failed to show sufficient cause of delay are null and void. The same are quashed and set aside. I further order that the original record of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/IR/36/2018 be remitted back to the Commission for Mediation and Arbitration Iringa so that the Labour Dispute shall be determined on merit.

Order accordingly.

F. N. MATOGOLO

JUDGE

04/06/2020.

Date: 4/6/2020

Coram: Hon. F.N. Matogolo, J.

L/A: B. Mwenda

4th Applicant: Absent

5th Applicant: Absent

6th Applicant: Absent

7th Applicant: Present

8th Applicant: Present

Respondent: Frida Swalo - Advocate

C/C: Grace

Frida Swalo - Advocate:

My Lord, Iam appearing for the Respondent. The matter is for ruling, we are ready.

COURT:

Ruling delivered.

F.N. MATOGOLO

JUDGE

04/6/2020.