IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)
AT ARUSHA

REVISION APPLICATION NO. 37 OF 2019
(Originating from CMA/ARS/ARB/72/2010)

EDSON MUGANYIZI BALONGO ..... 1st APPLICANT
EVARIST RENATUS KIFARU ..... 2nd APPLICANT
EPHATA ZACHARIA URIO ..... 3rd APPLICANT
FESTO SABINO TILYA ..... 4th APPLICANT
ANDREW NGERESAI KAAYA ..... 5th APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED ..... RESPONDENT

JUDGMENT

21st April & 11th August, 2020

Masara, J.

Edson Muganyizi Balongo and **4 Others** (the Applicants) were employees of the Respondent, **Tanzania Breweries Ltd (TBL),** in various positions. On 31st May, 2010, the Applicants were terminated from employment on a Voluntary Agreement basis (retrenchment) following what was described by the Respondent as restructuring of its technical department. Following the retrenchment, the Applicants filed claims for statutory payments before the CMA in 2010. On the 1st March, 2012 the CMA delivered a judgment awarding them a total sum of Tshs. 1,146,919,984.28 being compensation for leave allowances, cash in lieu of

leave, transport & housing allowances and daily subsistence allowances for each Applicant and his family members. The Respondent was aggrieved by that decision. They filed Labour Revision No. 85 of 2013 before this Court. The said Application was dismissed for being time barred. The Respondent then filed Misc. Labour Application No. 79 of 2014 seeking for extension of time to file Revision against the ruling of the CMA in CMA/ARS/ARB/72/2010, but the same was dismissed for being time barred as well. The Respondent again filed Misc. Labour Application No. 81 of 2014 and the same was dismissed for want of prosecution. The Respondent intended to appeal against the dismissal order of this Court in Misc. Labour Application No. 81 of 2014 but they were out of time. They filed Civil Applications No. 107 and 108 of 2014 before the Court of Appeal asking the Court of Appeal to call for records and examine the proceedings and rulings of the High Court in Misc. Labour Applications No. 79 and 81 of 2014 and revise them. The two applications were struck out by the Court of Appeal. As a result, they filed Misc. Labour Application No. 298 of 2014 seeking for extension of time to lodge a Notice of Appeal to the Court of Appeal out of time but it was dismissed for failure to adduce good cause for the delay. The Respondent was still unsatisfied.

The Applicants, on their part, had filed an application for execution of the award (Execution No. 43 of 2012) in this Court and a Garnishee Order Absolute was issued on 23rd April, 2014. That order was stayed by Civil Application No. 107 filed in the Court of Appeal by the Respondent and after the application was heard and determined, the Court of Appeal

ordered Execution to proceed in its ruling delivered on the 16th December, 2014. The Applicants were ultimately paid their dues on 23rd December, 2014. After they were paid, the Applicants again approached the CMA vide Labour Dispute No. CMA/ARS/MED/422/2015 moving the Commission to allow them to file a referral in the Commission out of time (condonation) claiming for family allowances (statutory payments) from the date the award was delivered in 2012 to the date of full payment. On 10th December, 2015 the Commission dismissed the Application on the grounds that the Applicants failed to demonstrate good cause for a delay of more than 183 weeks. They filed Labour Revision No. 57 of 2017 before this Court seeking to challenge the decision of the Commission but the same was struck out with leave to re-file on 21st May, 2019. The Applicants then filed this Application on 7th June, 2019 seeking to challenge the CMA ruling which refused to condone them. The Applicants are asking this Court to revise the records and the proceedings of the CMA on grounds stated in their joint affidavit.

In the joint affidavit, the Applicants contend that they delayed in filing their referral in the Commission due to numerous applications the Respondent kept on filing in both the High Court and the Court of Appeal seeking to challenge the execution of the CMA award. They thus claim for an extension of time to file their referral in the Commission in order that the Respondent pays family allowances to them necessitated by the delay to receive their payments occasioned by the Respondent. The Respondent contests the application contending that the Applicants have not accounted

for the delay, as having pending matters in courts does not amount to good cause for the delay. The application is supported by a joint affidavit deposed by all the Applicants. The Respondent opposed the application by filing a counter affidavit deposed by Mr. Huruma Ntahena, a Principal Officer and Secretary of the Respondent. At the hearing, the Applicants were represented by Ms Neema Mtayangulwa and Simon Katunzi, learned advocates, while the Respondent was represented by Mr. Ndanu Emmanuel, learned advocate. The application was heard *viva voce*.

Submitting on behalf of the Applicants, Ms. Mtayangulwa, at the outset, adopted and relied on the joint affidavit deponed by the Applicants. The said affidavit provides a chronological order of various applications filed by the Respondent after the award of the Commission in CMA/ARS/ARB/72/2010. She reiterated that after the award given in favour of the Applicants on 21st March, 2012, the Respondent did not honour it and that the Respondent kept on filing various applications until December, 2014 when the Applicants received their payments. She stated that for all that period family allowances were accruing necessitating the claim they intend to file with the CMA once condoned. It was Ms Mtayangulwa's further contention that the claims for family allowances are provided for under the Voluntary Retrenchment Agreement entered between the Respondent and the Applicants in October 2009, specifically clause 3.7 thereof. The allowances which were in terms of per diems are to be paid for all days and they were not paid when the dispute persisted. Ms Mtayangulwa faulted the CMA's decision refusing to condone the Applicants

because, as per paragraph 4 of the counter affidavit, the Respondent does not seem to deny opening cases against the Award. She stressed that these facts are the same with those submitted before the CMA and, to her, they constitute good cause for condonation. Ms Mtayangulwa also challenged the CMA's decision in that while determining the application for condonation, the Commission went to the merits of the matter by deciding that the matter before it was *res judicata* before hearing the parties. In her opinion, that conclusion was erroneous as CMA's mandate was restricted to reasons for granting or refusing condonation.

Countering the Applicants' submissions, Mr. Ndanu did not encounter the fact that the first CMA award was delivered on 1st March, 2012, but pointed out that there was nothing of substance that constrained the Applicants from filing their claims in case they were dissatisfied. Mr. Ndanu supported the decision of the CMA that there were no good grounds for condonation as, according to him, the Applicants failed to account for the delay after the decision of the Court of Appeal and the payments. In his view, the delay of 45 (sic) days was inordinate as no credible explanation was given for such delay. To cement his arguments, he referred to decisions in ***Bora Industries Ltd Versus Mohamed Ally and 18 Others***, Misc. Application No. 46 of 2015 and ***Wambele Mtumwa Shahame Versus Mohamed Hamis***, Civil Reference No. 8 of 2016 (both unreported). With regard to the alleged admission of claims, it was Mr. Ndanu's contention that there is no law cited by the Applicant's counsel to the effect that once a party concedes to a fact that concession constitutes a ground for

extension of time. On the issue whether the application is *res judicata*, Mr. Ndanu was of the view that litigations have to come to an end and that since the Applicants knew their claims against the Respondent, including the family allowances, once the matter was decided in their favour, they cannot at any rate bring the same claims in line of their previous claim before the same judicial body as that amounts to abuse of the court process. To bolster his argument, he cited the decision of the Court of Appeal in ***Mwita Masabo Versus Republic***, Criminal Application No. 3 of 2005. The counsel for the Respondent concluded his submission by asking the Court not to condone the Applicants' intended application as the Applicants had no sufficient reasons nor did they account for the delay as was held by the CMA.

On a brief rejoinder, Ms Mtayangulwa reiterated her earlier submissions. On *res judicata*, she implored the Court to hold that the CMA should not have raised it as parties had no opportunity to address on it. On the issue of admission by the Respondent, the learned advocate referred the Court to Rule 11(3) of GN. 64 of 2007 which cites prospects of success as one of the grounds for condonation, and thus the Respondent's admission constitutes a ground for prospects of success.

After recapping the submissions of the advocates representing the parties and the respective affidavits, the central issues to determine in this Application is whether the CMA erred in not condoning the Applicants application and whether this Court should condone the Applicants'

application. As rightly stated by the Ms Mtayangulwa, an application for condonation is governed by Rule 11(3) of Labour Institutions (Mediation and Arbitration) Rules, GN No. 74 of 2007. The provision sets out criteria to be established in applications for condonation. Such factors are *the degree of lateness, the reasons for lateness, prospects of success, any prejudice to the other party and any other relevant factors.*

As earlier stated, the award of the CMA was delivered on 1st March, 2012. The Applicants' application seeking condonation was filed on 30th October, 2015. The Applicants' reasons for the delay are stated in paragraphs 8 to 21 of their joint affidavit. They contend that at all material time between 1st March, 2012 when the CMA award was delivered and 18th September, 2015, the Respondent was busy filing various applications in the High Court (Labour Division) and the Court of Appeal challenging the award of the Commission. These were the same reasons the Applicants advanced before the CMA while pursuing the condonation, as shown on paragraphs 7 to 19 of the joint affidavit filed at the CMA.

The question is whether the series of cases filed by the Respondent inhibited the Applicants from filing their claims. The answer to this question lies on the prevailing circumstance of the case at hand. It is noted that the Applicants filed for execution and a garnishee order absolute was granted on 23rd April, 2012. To this effect, the Applicants were keen to have the award of the CMA honoured. The Respondent challenged both the decision and sought to stay the garnishee order against them. The Respondent's

action, including the filing of Applications, led to the delay in payments. Payments were ultimately made on 23rd December, 2014. That is about 33 months after the CMA's award. Reasonably, one would not have expected the Applicants to initiate any application seeking for payments as they were not sure whether the CMA award was to be sustained or reversed. On that basis, any delay attributable to the Applicants has to be counted after the last decision of the Court of Appeal; that is 16th December, 2014.

Going by the factors specified under sub rule 3 of Rule 11 of GN 64 cited above, the first factor to consider is the degree of lateness. The Applicants did not file their claims immediately after the Court of Appeal decision dated 16th December, 2014 or after they received payment on 23rd December, 2014. Paragraphs 19 and 20 of the Applicants' joint affidavit are to the effect that the Respondent had filed before this Court Application No. 298 of 2014 seeking for extension of time to lodge a Notice of Appeal to the Court of Appeal and that the said Application was dismissed on 18th September, 2015. The Application before the CMA was filed on 30th October, 2015. That is 42 days after the final decision of this Court.

The law is not very stringent to a party who is prevented from taking a course of action due to technical grounds. The Applicants' main ground for delay is what we refer to in law as technical delay which has been held to be sufficient ground for extension of time. The Court of Appeal in the case of ***Bank M. (Tanzania) Limited Versus Enock Mwakyusa,*** Civil Application No. 520/18 of 2017 quoted a series of decisions on the subject

in affirmation. These are such as ***Fortunatus Masha Versus William Shija and Another*** [1997] TLR 154 and ***Salvand K. A. Rwegasira Versus China Henan International Group Co. Ltd.***, Civil Reference No. 18 of 2006, ***Zahara Kitindi & Another Versus Juma Swalehe & 9 others,*** Civil Application No. 4/05 of 2017, ***Yara Tanzania Limited Versus DB Shapriya and Co. Limited,*** Civil Application No. 498/16 of 2016, and ***Samwel Kobelo Muhulo Versus National Housing Corporation,*** Civil Application No. 302/17 of 2017 (all unreported), to mention but a few. In ***Salvand Rwegasira*** (supra), for instance, the Court quoted the holding and subscribed to the position taken by a single Justice of the Court in **Fortunatus Masha** (supra), which held:

> *"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

It is therefore this Court's finding that, up to the time of the last decision of this Court, the Applicants were prevented from filing the Application for condonation before the CMA to allow them to apply for payment of the allowances due to technical reasons which are explainable and excusable. It is only prudent that the days that the Applicants were made to attend the Courts responding to various applications by the Respondent be exempted from the computation of days of delay.

The remaining question is whether the delay of 42 days that remain unaccountable is inordinate. The law is settled that as soon as one becomes aware of the claim intended to be pursued, he has to hasten to knock the court doors or else a detailed reason for the delay has to be substantiated. The Court of Appeal in ***Royal Insurance Tanzania Ltd Versus Kiwengwa Strand Hotel Ltd,*** Civil Application No. 116 of 2008 (Unreported) held thus:

> *"It is trite law that an Applicant before the court must satisfy the court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in a good faith."*

The Applicants herein have not shown why it took them 42 days after the High Court decision dated 18th September, 2015 to apply for condonation. As reasons for lateness is one of the grounds to be considered when determining an application for condonation, it is this Court's finding that both in the joint affidavit and the submissions in Court the Applicants have not justified the 42 days' delay.

The other two factors; namely, prospects of succeeding on the relief sought and the prejudice to the other party were partly adequately addressed by the Mediator. There is no doubt that new family allowance claims against the Respondent will highly prejudice the Respondent. On the issue of prospect of success, the Counsel for the Applicants appear to believe that admission by the Respondent about legality of the family allowance claim is sufficient to show that the Applicants stand great chance of succeeding in their claims. The record shows that family allowances

were claimed by the Applicants and were awarded to each Applicant in the award of March 2012. Having gone through the award and CMA Form No. 1 which the Applicants narrated their claim, it does not show whether the Applicants claimed family allowances from the time the Respondent defaulted paying them to the time of full settlement. The allowances were for a fixed duration. Allowing a new claim to stand may lead to endless litigation as Applicants are likely to file new claims after every payment is made. This is not to say, as the Mediator stated in his ruling, that such claims would be *res judicata. Res judicata* as a principle has been amplified in a number of decisions including the Court of Appeal decision in ***Ester Ignas Luambano Versus Adriano Gedam Kipalile,*** Civil Appeal No. 94 of 2014 (unreported). In this case, the court cited in affirmation the decision in ***Kamunye and others Versus The Pioneer General Assurance Society Limited*** (1971) EA 263 where it was stated thus:

> *"The test whether or not a suit is barred by res judicata seems to me to be - is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which* ***he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon****. If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time -* ***Greenhalgh Mallard*** *(1947) 2 ALL ER 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply-****Jadva Karsan Harnam Singh Bhoga*** *(1953),20 EACA 74."* [Emphasis Added]

The objective and public policy behind the doctrine of *res judicata* is to ensure finality of litigation. As the claims intended to be lodged by the Applicants involved a different time frame from those that were claimed in the CMA award, it was not justified to term the intended application as *res judicata*. The Mediator should only have limited his observations to the prospect of success based on CMA Form No.1 and No. 7 before him.

It is regrettable to state, however, that the Applicants had to wait for over two years to get payments. In an appropriate case, this Court might have condemned the Respondents to pay costs to the Applicants if satisfied that such applications were vexatious. This is essentially due to the fact that the Applicants must have spent a fortune defending endless applications by the Respondent up to September 2015. Unfortunately, I cannot redo what my colleagues did not do, sympathetic as I may be.

In the event and for the foregoing reasons, the Application for condonation fails and is dismissed in its entirety. The refusal by the CMA to condone the Applicants' application is hereby upheld. I make no orders as to costs, this being a Labour dispute.

It is so ordered.

HIGH COURT OF TANZANIA

Y. B. Masara

JUDGE

11th August, 2020.