

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
(HIGH COURT LABOUR DIVISION)**

AT SHINYANGA

**CONSOLIDATED REVISION APPLICATION NO. 24,25,26,27,28,29
,30,31,32,33,34,35,36,37,38,39 OF 2020**

*(Arising from the Labour dispute Decision No. CMA/SHY/259,258,261 263 of 2017 &
CMA/SHY/7, 16, 18, 20, 25, 27, 28, 30, 32, 37, 39/ 2018 by the Commission for
Mediation & Arbitration of Shinyanga)*

ALEXANDER AUGUSTINO TENDWA & 15 OTHERS.....APPLICANTS

VERSUS

BULYANHULU GOLD MINE LIMITED.....RESPONDENT

JUDGMENT

Date of the last Order: 23th JUNE, 2020

Date of the Judgement: 14th AUGUST, 2020

MKWIZU, J.:

The applicants who were the complainants before the Commission for Mediation and Arbitration challenged termination of their employment done by the respondent on the reason that they participated on unlawful strike that it was unfair. Applicants delayed in filing their dispute with the CMA for about 530 weeks which is about 10 years. They for that reason had to first seek condonation before the commission. They filed separate applications.

The reasons for the delay were that:

1. Respondent did not notify them of their right to refer their dispute to the CMA contrary to Rule 13(10) of GN No 42 of 2007.
2. That, applicants were misled by TAMICO branch Secretary that he has filed a case on their behalf at the CMA Tabora.
3. That applicants were not notified of the chief justice's instruction given in May 2016. They learnt of the said instruction between November 2017 and January 2018.

Having heard the applicants, Commission for Mediation and Arbitration dismissed the applications on the ground that no sufficient reasons were adduced to justify the delay. Applicants were not happy; they have now come to this court challenging the above decisions.

They filed separately, applications for revision of the CMA's award. All the applications were made by chamber summons brought under Section 91 (1) (a) & 91 (2)(a) (b) (c) and section 94 (10 (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by section 14 (b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 , Rules 24 (1),

(2) , (3) and Rule 28 (1), (c) (d) & (e) of the Labour Court Rules 2007 of GN. 106/2007 .

Respondent opposed all the applications by his counter affidavit in each of the above application.

When the applications came for hearing on 29/6/2020 counsel for the parties applied for the consolidation of Revision Nos 24, 25,26,27,28,29,30, 31, 32, 33, 34, 35, 36, 37, 38, 39 of 2020 arguing that they are all of the same nature, arising from the same cause of action which is unfair termination of employments and have all presented same reliefs against the respondent, their former employer, **Bulyanhulu Gold Mine Ltd.** The prayer for consolidation was predicated under the provisions of Rule 47 (1) of the Labour Court Rules No. 106 of 2007. The prayer was granted and all 16 applications were consolidated hence this decision.

Mr. Benjamine Dotto appeared for all the applicants whereas Mr. Faustine Malongo represented the respondent. Arguing the applications Mr, Dotto called upon this court to determine two major issues;

1. Whether it was proper for Mnembuka (Mediator) to hold that applicants had no good cause, or sufficient reasons for their delayed applications.
2. Whether the applicants have good cause for their delay in filling their disputes.

Submitting in support of the application Mr. Dotto said, the employer, respondent failed to discharge his obligation that is why applicants failed to refer their dispute on time. He argued that, respondent did not inform applicants of their right to refer the matter to the Commission as required under section 13 (10) of Government Notice No. 42 of 2007. He complained further that the Mediator failed to consider this ground.

On his second ground, Mr. Dotto contended that, the applicants were misled by the TAMICO secretary that he had filed a labour on their behalf at Tabora. He explained further that, in CMA FORM NO. 1 dated 1/11/2007 which is an annexure to the applications, one Nicodemus Kajungu TAMICO secretary, Bulyanhulu Branch, filed a labour dispute at CMA Tabora which was determined in DSM Vide Dispute No. CMA/TAB/DISP/248/2007. Mr. Dotto

said, parties filed two revisions against the decision in the above matter, Revisions Application No 250 of 2010 and 226 of 2010 by Nicodemus Kajungu and 1374 others and the second one by the respondent herein respectively. High Court struck out all the revisions on 16/9/2011 on the ground that CMA had no jurisdiction to determine the matter.

After the above decision, Mr. Dotto narrated further that Nicodemus Kajungu filed another application, this is Msc. Application No 48 of 2012 which was also struck out by the High court on 29th October 2012 for jurisdictional issue. On appeal to the Court of Appeal in civil appeal No 116 of 2012 the Court of Appeal on 8th April 2015 struck out the same for incompetence. From there, the Secretary TAMICO wrote a letter to his lordship Chief Justice where he was advised that applicants should file their appeal according to the law. All along, said Mr. Dotto, applicants believed to be party to the above-mentioned proceedings.

Thirdly, stated Mr. Dotto, after the instruction from His lordship, The Chief Justice, applicants were not notified until November and January 2018 when they filed the application for condonation. So between May 2006 to January,

2018 applicants believed that they have the matter before the court. He faulted the Mediator for rejecting their explanation contrary to rule 31 of GN No 64 of 2007 which requires applicant in an application for condonation to adduce good cause which they did. He cited the case of **Zan Air Ltd V Othman Omary Musa**, Civil application No. 285 B of 2013 at page 3 and the south African case No 22984/20214 between **Executive Council Health and social development Gauteng Province V. Mthimkulu, Daphne Busisine** where factors to take into consideration in an application for condonation were underlined.

Mr. Dotto concluded that if the application is not granted applicants will suffer unemployment and lose their rights to work and their rights to life. He prayed to have revision allowed.

Mr. Malongo opposed the revision. He said, applicants adduced no good cause for the delay, On the reason that applicant were not informed of their rights to refer their dispute to CMA, Mr. Malongo said, it contradicts other reasons giving at the CMA. Mr Malongo clarified further that in paragraphs 11,12,13,14 of the applicants affidavits at the CMA, all applicants said they

pursued their rights at the CMA through TAMICO so it is not true that applicants were not aware of their rights.

On the issue that applicants were misled by TAMICO secretary, Mr. Malongo was of the view that it is not true. Why? he said, the case that was filed at Tabora was not filed by TAMICO but by Nicodemus Kajungu and 1374 others, parties in that case were individually responsible, as such, each of the said 1374 employees was supposed to follow-up the matter and timely take necessary measures insisted Mr. Malongo. Applicant were negligent and therefore it was right for the CMA to refuse condonation.

On the last ground, Mr. Malongo said, at the CMA, applicants did not attach any decision in relation to the dispute that was filed at TABORA or the High Court Dar es salaam. As such there was no material presented at the CMA that could have enabled the Mediator to agree on this assertion. He cited the case **Dar es salaam city council Vs S. Group security Co ltd**, Civil application No. 234 of 2015 CAT and **Alison Xerox Silas V. Tanzania Harbour Authority**, Civil reference No. 14 of 1998 Court of Appeal (All

unreported) stressing that because applicants failed to account each day of the delay, then mediator was justified to reject their application for condonation.

In his rejoinder, Mr. Dotto reiterated his submission in chief

It is a settled law that a person who seeks condonation must give plausible explanation for the delay, short of that the application is bound to fail. In the applications at the CMA, the applicants delayed in filing their dispute for a period of 10 years. The issue for my determination after hearing submissions by both parties and gone through CMA's records is whether or not Hon. Mediator erred in law and fact to refuse applicants' applications for condonation. It is Pertinent to note here that, in an application for condonation, the CMA is governed by Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64/2007 the rule provides:

"The commission may condon and failure to comply with the time frame in these rules on good cause"

Again, Rule 11(3) of the GN No. 64/2007 provides that:

"11 (3). An application for condonation shall set out grounds for seeking condonation and shall include the referring party's submissions on the following:

- a) The degree of lateness;*
- b) The reasons for lateness;*
- c) Its prospects of succeeding with the dispute and obtaining the reliefs sought against other party;*
- d) Any prejudice to the other party; and*
- e) Any other relevant factor."*

On the reasons for the delay, applicants gave three reasons, that they were not informed of their rights to refer the matter to the Commission that, they were misled by the Secretary of TAMICO that he filed a suit on their behalf and lastly that, they were not promptly informed of the Chief Justices' instructions that they should appeal in accordance to the law . A close scrutiny of the cause for the delay by applicants one would discover that they defeat each other. While in the first grounds applicant are alleging to have not been aware of their rights to file a dispute against the respondent, on the second ground which is similar to the third ground they claim to have believed that TAMICO has filed a suit on their behalf of which they kept

on waiting since 2007 to the year 2017, November and January, 2018 to be told that they are not parties to the said case. The question that arises is how did they manage to pursue even wrongly, their right via the said case that was said to have been filed by TAMICO if they were not aware of their rights to sue? These grounds are an afterthought.

Again, the records shows that at the CMA, though applicants had alleged that they believed that they were parties to CMA/TAB/DISP/248/2007 none of them had attached a copy of a decision on that dispute so as to convince the CMA that they were parties or otherwise. As stated above, applicants were late for good 10 years, in the case of **Tanzania Fish Processors Ltd V Christopher Luhangula**, Civil Appeal No 161/1994 Court of Appeal of Tanzania, at Mwanza registry held that:

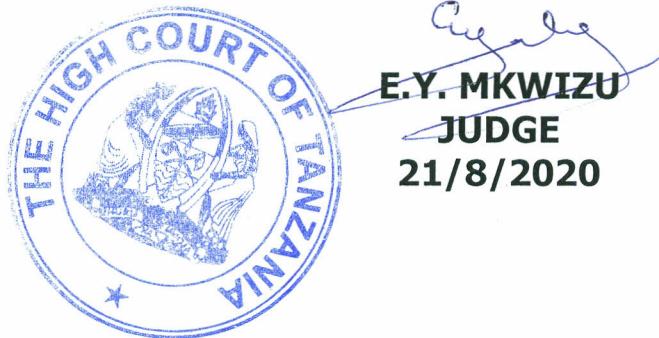
"The question of Limitation of time is fundamental issue involving jurisdiction ...it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to Court as and when he chooses."

The applicant's employment was terminated in the year 2007, they approached the Commission for Mediation and Arbitration for condonation in November 2017 and January 2018. Ten (10) years delay is not ordinary, it needs plausible explanation to warrant the commission or whatever court for that matter to exercise the discretion to allow condonation. Applicants reasons are not convincing so to say. It should be stressed here that it is the duty of a person seeking condonation to give an adequate and satisfactory explanation for the delay. In a decision of the Supreme Court of South Africa in **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292 (SCA) the court said:

"Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility."

Applicants failed not only to give sufficient cause for the delay but also failed to account for the period of 10 years delay. This being the position, I find nothing to fault Hon Mediator's decision. This revision lacks merit. It is thus dismissed.

DATED at **SHINYANGA** this 21st day of **AUGUST** 2020



Eugene
E.Y. MKWIZU
JUDGE
21/8/2020