

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

REVISION NO. 23 OF 2017

(C/F Labour Dispute No. MOS/CMA/M/93/2015)

VERONICA JOHN KOWERO APPLICANT

VERSUS

EUNICE E MSHOMI, t/a EBEN CATERERS RESPONDENT

Date of last order: 10/12/2019

Date of Ruling: 05/03/2020

RULING

MKAPA, J:

The applicant Veronica John Kiwero has filed the present application seeking revision of the Ruling of the Commission for Mediation and Arbitration of Moshi (the CMA) delivered by Hon T.S Malekela - Arbitrator on 15/9/2016 in favour of the respondent. The application is supported by sworn affidavit of applicant which the respondent disputed and filed a counter affidavit.

Briefly, the facts are that In June, 2000 applicant was employed as a cook by respondent. Both the applicant and the respondent agreed on terms of employment and signed employment contract, which ended on 17th September, 2010 when the applicant resigned.

Upon resignation, the respondent filed complaint at CMA on 10th June, 2015, for non-payment of her terminal benefits as per section 44(1) and (2) of Employment and Labor Relations Act, 2004 (the ELRA) and NSSF deductions payable through NSSF account. Four years had passed since the dispute arose thus the applicant filed her complaint together with application for condonation, alleging that the delay in filing the application was caused by promises made by the respondent, which never came true.

At the hearing at the CMA both parties agreed on one issue for determination namely; whether complainant had established sufficient reasons for late referral of her application. The Arbitrator ruled out that the application had no merits as the complainant had failed to establish sufficient reasons for the delayed referral of the application, and further that the reasons adduced were not true, thus the Tribunal proceeded to dismiss the application. Aggrieved, the applicant preferred this application faulting arbitrator's decision and seeking this court to revise the CMA decision.

By consent of the parties this court made an order for the application be argued by filing written submissions. The applicant acquired legal assistance of Mr. Alfred Sindato, learned advocate while Mr. Ralph Njau, also learned advocate represented the respondent.

In support of the application, Mr. Sindato submitted to the effect that, the applicant was employed by the respondent as a cook from 12th July, 2000 and the contract ended on 17th September, 2010. After the end of their employment relation the respondent was supposed to pay the applicant her terminal benefits as required by the ELRA and NSSF deductions, to the tune of shillings 5,390,000/=.

Mr. Sindato submitted further that, the respondent did not fulfil his endless promises despite regular follow up by the applicant. On 10th July, 2015 the applicant filed the complaint, and application for condonation at the CMA in Moshi. Mr. Sindato pointed out that, the respondent filed counter affidavit on 18th July 2016 without leave of the court (almost 40 days) contrary to Rule 24(4) (a) of the Labour Court Rules, 2007. (Labour Court Rules). Furthering his argument Mr. Sindato cited the case of **Metal Products Limited V Richard Kasese** Revision No. 126 of 2008.

It was his argument that the said irregularity was sufficient respondent's affidavit to be disregarded by the CMA, and the arbitrator allow the application for the extension of time. Mr. Sindato went on arguing that, in cause of adducing evidence the applicant demonstrated good cause to warrant condonation at the CMA, but CMA disregarded it, and dismissed the application. In

support of his argument he cited the case of **John Mosses and three Others V R, Criminal Appeal, No. 145 of 2006**, and the case of **Elias Msonde V R**, Criminal appeal No. 93 of 2015, which defined what constitutes good cause as follows;

"...we need not be belabor; the fact that it is settled law that in an application for extension of time to do an act required by law, all that is expected of the applicant is to show that he was prevented by sufficient or reasonable or good cause and that delay was or caused or contributed by dilatory conduct or lack of diligence on his part"

To cement his argument, Mr. Sindato reproduced part of the ruling of the CMA relating to analysis of evidence adduced by the applicant during the trial and contended that the applicant adduced sufficient reasons to be condoned. He finally submitted that, the arbitrator ought to have strike out the application instead of dismissing the same. Thus, he prayed that the decision be revised and the applicant be extended time to lodge her application.

Responding to the counsel for the applicant, Mr. Njau contended that, the respondent filed her claims at CMA after four years since the cause of action arose. Upon given a chance to show cause as to why she should be granted extension of time, ~~she~~ she failed to

establish the reason satisfactory to the CMA. Consequently the application was dismissed, thus there is no any fault on the part of the CMA which warrant revision of CMA ruling.

Mr. Njau explained further that, the applicants' counsel conceded the fact that, the applicant was required to give reasons for lodging her claim out of time but she failed. He cited the case of **Lyamuya Construction Co Ltd. Versus Board of Registered Trustees of Young Women Christia Association of Tanzania Civil Application No. 2/2010(unreported)**, which enumerate principle to be considered in granting or refuse to grant extension of time, including;

- i. The applicant must account for all the period of delay.
- ii. The delay should not be ordinate;
- iii. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that intends to take; and
- iv. If the court feels that there are other sufficient reasons, such as the existence of point of sufficient importance, such as the illegality of the decision sought to be challenged.

Mr. Njau went on submitting that, considering the above principles, the argument that the applicant's delay was caused by

respondents' promises cannot stand, because there was no proof of the same as he who alleges must prove. Secondly, believing in a promise that will mature one day is unreasonable, (even if made).

Mr. Njau argued further that the reason that the applicant was attending her sick father, who later died and the applicant lodged her claim one year later after the demise of her father is not sufficient ground. In summing up his submission, Mr. Njau prayed for the application to be dismissed with cost.

After a thorough perusal of the CMA's proceedings, submissions by parties, parties' affidavits and applicable labour laws, I find it paramount to first address the issue of delay in filing of counter affidavit by the respondent at CMA. The law provides under **rule 29 (3) (e) and (5) (a) of the Labor Institutions (Mediation and Arbitration Guidelines)** G.N. No. 64/2007, the time frame for filing defence (counter affidavit and notice of opposition) as hereunder:

(29).

(3)(e) That any party that intends to oppose the matter shall deliver a notice of opposition and an affidavit within fourteen days after the application has been delivered to it.

(5) Any party opposing the application may deliver-

(a) a notice of opposition and counter affidavit within fourteen days from the day on which the application was served on that party.

(11) Notwithstanding this rule, the Commission may determine an application in any manner it deems proper.

Rule; 31. The commission may condone any failure to comply with the time frame in these rules on good cause.

It is clear from the foregoing provisions that, CMA erred in law by considering defense by the respondent to the effect that it was filed fourteen days late contrary to what is prescribed by the GN No. 64/2007 without leave been sought by the respondent showing good cause for extension of time. See rule 31, of GN No 64/2007 as quoted above.

I am of the settled view that this irregularity is not fatal as it is not mandatory for the respondent to file defence, as couched under the provisions of rule 29(5)(a) of the GN No. 64/2007, the word "may" connotes non-mandatory. More so, CMA has the power to dispense with the requirement of any rule as it deem fit. See rule 29(11), of GN No. 64/2007. Therefore CMA could have proceeded to make its findings on the application brought by the respondent without considering the defence of the respondent.

As to the revision at hand, the issue for determination think is whether the grounds adduced in the applicant's affidavit and the submission in support of the application constitutes sufficient cause for extension of time.

It is trite principle of the law that, sufficient reason is a pre-condition for court to grant extension of time. The case of **Tanga Cement Company Ltd V. Jumanne Masangwe & Another** Civil Application No.6 of 2009 is informative on the fact, where the court held that;

"... sufficient reason is a pre-condition for the court to grant extension of time, and what constitutes sufficient reason a number of factors have to be taken into account including whether or not the application has been brought promptly, valid explanation for the delay, application must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take"

The applicant has submitted that the delay was occasioned by the fact that she was taking care of her father but yet she referred her matter to CMA a year after her father's demise. I am satisfied that the delay was caused by her own making and negligence.

The applicant's assertion that she was taking care of her sick father as a reason for her late referral of the matter for four years does not hold water. Even if it does, she lodged her complaint one year after her father passed away. This demonstrates the degree of negligence showed by the applicant in prosecuting her case. The court in the case of **Royal Insurance Ltd v. Kiwengwa Strand Hotel Ltd**, Civil Application No. 116 of 2008 (unreported) observed:

*"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 **acted very expeditiously** and that the application has been brought in good faith" (emphasis mine)*

Let alone the fact that, her allegations are not material enough to warrant condonation, also there is no any evidence adduced by the applicant to show that she was taking care of her sick father, or any evidence that the respondent promises caused her delay. In the case of **Oscar Mbwambo and Another versus M/S Tanga Cement Co. LTD (2015) LCCD, 26**, the court held that;

"According to the law the duty to prove the allegations lies with the applicant. In the result the applicants failed

to adduce sufficient reason for delay"

Considering the fact that, the respondent denied to have not engaged in any negotiations with the applicant, the applicant had to prove that fact. See in **Leons Barongo V Sayona Drinks Ltd** Labor Div. (2013) LCCD, 45 which held that;

"The question for limitation of time is fundamental issue involving jurisdiction. Though the court can grant an extension, the applicant is required to adduce sufficient grounds for the delay. I believe the reason that the applicant who negotiating with the respondent does not amount to sufficient ground for the delay, moreso because the respondent have denied to be engaged in such negotiaons."

For the reasons discussed, I am satisfied that, no sufficient reasons have been established for the delay for this court to grant the application sought to revise CMA decision. Accordingly, I dismiss this application in its entirety.

DATED and DELIVERED at Moshi this 5th day of March, 2020.




S.B. MKAPA
JUDGE
05/03/2020