IN THE HIGH COURT OF TANZANIA

AT MOSHI

REVISION NO. 24 05 2020

(Arising from Labour Dispute MCA/KLM/M/166/2019)

BETWEEN

MAMA CLEMENTINA FOUNDATION.....APPLICANT

VERSUS

JOSEPH GABRIEL SASSI.....RESPONDENT

JUDGMENT

06/10/2020 & 20/11/2020

MWENEMPAZI, J

The applicant is praying to this court to calls the record of the Commission for Mediation and Arbitration, revise and set aside the ruling of the Commission for Mediation and Arbitration on Labour Dispute No. MCA/KLM/M/166/2019 delivered by Hon. G.P Migire, Arbitrator.The application is accompanying an affidavit sworn by Davit Shilatu, the advocate for the applicant.

This matter had a long history. Briefly sometimes in 2011, the respondent was recruited by the applicant as a teacher from Dodoma. Then on September 2012, he was appointed as Headmaster and Coordinator of education. On 15th January 2016, he resigned from that post and asked to continue as an ordinary teacher. The applicant's Board of Trustees held a meeting and decided not to renew the respondent's contract to continue to work as an ordinary teacher. Thus to his surprise, on 25/02/2016 the Board approved his resignation letter from the post as headmaster but he was given one month to make handover. Then on 04/03/2016, the respondent received a termination letter, one month's salary in lieu of notice and severance pay. The respondent was aggrieved and referred his dispute to CMA which was registered as Labour Dispute No. MOS/CMA/ARB/52/2016 where the arbitrator found the termination was unfair. The Arbitrator awarded the respondent a total of Tshs 19,876,500/= being his remaining salaries, transport allowance to his place of recruitment and certificate of service. The applicant was aggrieved and referred the matter to this court where their application was dismissed. Thus the applicant decided to pay the respondent as an award by CMA.

Thereafter the Respondent emerged again before the CMA with the application for condonation of late referral (CMA F.1) together with the referral of dispute CMA (CMA F.1) seeking to be paid by the applicant daily subsistence allowances from the date of his termination of the contract to the date when he was paid transporting allowance to return to the place of recruitment. When the application was served to the applicant he raised a preliminary objection on point of law that the application was *res judicata*. The preliminary objection was heard but overruled on the ground that the claim of subsistence expenses was never raised nor determined in the previous case.

When the application for condonation was called upon for hearing, the applicant raised another preliminary objection that the application was time-barred. The Arbitrator overruled the preliminary objection on the ground that it was prematurely raised because there was an application for condonation which was not yet determined. The application for condonation was heard and on 07/02/2020 the application was granted. The applicant was aggrieved and mounted this application to this court.

At the hearing the applicant was represented by Mr. David Shilatu, Advocate while the respondent had the service of Mr. Manase Gideon, a

personal representative. Parties were granted leave to argue the application by way of written submissions.

In the applicant's written submission, Mr. Shilatu submitted that this is one of the very interesting cases in which the Arbitrator for reasons best known to himself and having already discharged his duties of the office, decided to re-open the matter he has concluded of the same cause of action. He contended that the component ought to have been heard on the previous matter but out of either ignorance or negligence on the side of the respondent that aspect was never raised. He submitted that after the applicant executed the payment in previous orders of the CMA they were shocked to learn that the respondent lodged a fresh application before CMA claiming for daily subsistence pay and the matter was again before the same Arbitrator. The counsel submitted that daily subsistence allowance shall never be claimed alone in labour matters but it will always be claimed by an employee in a cause of action that calls for termination of employment of service and not otherwise. Mr. Shilatu submitted that the present application was *res judicata* on the ground that it was directly and substantially the same with Labour dispute No. MOS/CMA/ARB/52/2016 which was adjudicated by the same Arbitrator.

On that basis, he contended that the arbitrator was *functus officio* which he admitted in his ruling.

The counsel pointed out that any attempt by Commission to reopen up the matter would have been tantamount to rewriting the pleading. In support of his argument he cited the case of **James Funke Ngwagilo vs. A.G (2004) TLR 161.**

Mr. Shilatu further submitted that the respondent ought to have amended his pleadings in the previous dispute to include the current claim of subsistence pay so he would have been in a position to argue on that aspect and not this new CMA case.

On issues of condonation, the counsel submitted that the excuse that there was revision going on before the High Court hence a delay in filling subsistence allowance pay does not hold water. He cited the case of **Said Yasin & 9 Others vs. A.T.T.T Ltd, Revision No. 16 of 2012 TZHC Labour Division at Tabora registry** (unreported) where Wambura, J held *that*

> *"matters cannot be left to be filed "separately" for simple reasons that there is no provision under the labour laws that disbarred situation like that."*

He submitted that the CMA should dismiss the respondent's application for being out of time for three years which is an abuse of the Commission process.

Finally, he prays for this court to use its revisional powers to call upon the arbitrator and to disallow him to proceed with a matter that has been overtaken by time because in allowing this matter to proceed it will lead to serious injustice to the applicant and certainly it will open a series of pandora's box much to the detriments of the court itself and all litigants in the country.

In response, the respondent submitted that this revision is prematurely filed before this court as what has been determined at CMA is a condonation and not the dispute. Therefore, he prayed for this application to be dismissed and to order the matter to be remitted to CMA to continue with the determination of the claim.

In rejoinder, the applicant reiterated his submission in chief and prays for this court to use its revisional power to counter the abuse of the court process.

I have considered this application together with the record at CMA. I have further considered the written submissions filed on behalf of the parties. Having done so, the issues arising for determination, in my

opinion, are whether there was a sufficient reason for condonation and whether the claim of subsistence pay is *res judicata*.

In answering the first issue, it is an established principle in law that sufficient reason is a precondition for the CMA to grant an extension of time. That is provided for under Rule 31 of GN. 64 of 2007 which states;

"The Commission may condone any failure to comply with the time frame in these rules on a good cause."

Then what constitutes sufficient reason or good cause has been defined in the case of **Tanga Cement Company Ltd vs. Jumanne Masangwa & Another, Civil Application No. 6 of 2001, HC, Dar es Salaam (unreported),** where the court held that;

"What amount to sufficient cause had been defined. From decided cases, a number of factors have to be taken into account including whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, lack of diligent on part of the applicant"

The record shows the respondent cause of action arose on 04/03/2016 when he was terminated from the employment. The law provides that the complaint must be filed within thirty days from termination as provided under Rule 10 (1) of GN. NO.64 of 2007 which I quote;

"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 the employer made a decision to terminate or uphold the decision to terminate."

That means any complaint refers to CMA must contain all the relief that the claimant claims. In our present situation, the respondent did not claim for subsistence pay by that time. His reasons for the delay were due to pending of revision application No. 16 of 2017 before this court and decided to wait for the completion of that revision and the payment which he was awarded. The Arbitrator found that was justifiable reasons and grant the application. In my view, the arbitrator was wrong to grant the said application. Section 43(1)(c) of ELRA provides that:-

"pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, ***between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment****."*

Therefore, since the cause of action arose from the date of termination then the respondent ought to have claimed when he filed his dispute for the first time in 2016. Simply because subsistence expense/ allowance are

among the terminal benefit which ought to have been prayed with other benefits immediately after termination. Thus the respondent ought to have accounted for each day of delay from the time when he was terminated from employment to the time of lodging the application for condonation. By the time his revision was pending in this court, he was already time-barred in terms of Rule 10 (1) of GN No. 64 of 2007. Therefore such argument cannot be a sufficient reason for the arbitrator to extend time. In the case of ***Mvomero District Council vs. Thobias Liwongwe and 6 Others*, Revision No. 26 of 2019 TZHC Labour Division at Morogoro**, (www.tanzlii.org) the Court was faced with similar situation and held that:-

> *"I note that CMA condoned the filing of the matter. But can the arbitrator grant claims which were inordinately delayed as claimed by the respondents? I believe the arbitrator could not, and so this was a misconception on the part of the arbitrator. This Court can revise the same as was held in the cases of* ***Suresh Ramaya vs. Asha Migoko Juma*** *Rev. No. 207 of 2015 and Rev. No. 72 of 2013 between* ***Athumani Koisenge & 9 Others Vs. Ranger Safari Limited.*** *The respondents should have acted diligently as stated in*

the case of ***Dr. Ally Shabhay vs. Tanga Bohora Jamaat*** *[1997] TLR 305 CAT that:-*

"Those who came to court must not show unnecessary delay in doing so. They must show great diligence"

The Court went further and stated that:-

"One should not be left to come to court when one wishes to as was held in the case of ***Tanzania Fish Processors Ltd Vs. Christopher Luhangula,*** *Civil Appeal No 161/1994 Court of Appeal of Tanzania, at Mwanza registry that:-*

"The question of Limitation of time is a 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..."

From the above facts and the authorities that I have cited, it is my view that the delay was a result of inaction and lack of diligence on the part of the respondent. The respondent should blame himself for his failure to account for each day of delay from the day he was terminated. Thus his argument that there was a pending revision that alone does not constitute sufficient reason to warrant the court to exercise its discretionary powers

to extend the time sought in the CMA F.2. It has been an emphasis in many decisions that even if the respondent has a good case but is out of time the court should dismiss the application and guard itself against the danger of being led away by sympathy.

Having found so, I do not need to belabour on the other issues framed as the same depending on the outcome of the first issue. In the circumstance of this matter, I allow the application and set aside the decision of Arbitrator for condonation on the reasons that there was no sufficient reason to extend time. The application for condonation is dismissed.

It is so ordered.

T. MWENEMPAZI

JUDGE

16/11/2020