

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT MWANZA
LABOUR REVISION No. 94 OF 2020
(Original CMA/MWZ/ILEM/220/2020)

AMOS NYAKYAGA -----APPLICANT

VERSUS

GRUMET FUND -----RESPONDENT

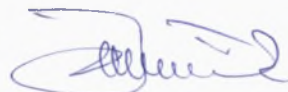
JUDGMENT

05th & 30th July, 2021

TIGANGA, J

In this matter the court has been moved under sections 91(1)(a) and (b), 91(2),(b) and 94(1)(b),(i) of the Employment and Labour Relations Act No. 6 of 2004, Rule 24(1),(2)(a),(b),(c),(d),(e),(f), and (3)(a),(b),(c) and (d), and Rule 28 (1),(b)(c),(d) and (e) of the Labour Court Rules, 2007 GN No.106 of 2007. The application has been preferred by a notice of application, notice of representation and chamber summons which was supported by the affidavit sworn by Amos Nyakyaga, the applicant.

The orders sought in the chamber summons are:



1. For this court to exercise its revisional jurisdiction and call for and examine, the records of the proceedings before the Commissioner for Mediation and Arbitration of Mwanza for purpose of satisfying itself on the correctness, legality, rationality, regularity and propriety of the ruling made by the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/MZ/ILEM/220/2020 dated 04/11/2020, on the ground that;

- (a) That the Arbitrator erred in law and in facts in making a finding that there was no good reason adduced by the applicant.
- (b) That the Arbitrator failed to evaluate properly the evidence deponed in the affidavit of the applicant hence reaching into a wrong conclusion that the applicant was free.
- (c) That the Arbitrator failed to condone the applicant the file his Labour Dispute out of the prescribed time while the applicant was facing a criminal charges.

2. That this honourable court be pleased to condone the applicant to file his dispute out of the prescribed time limit.

3. Any other relief(s) that the court may deem fit and just to grant.

As earlier on the chamber summons in which the prayers have been presented has been taken out at the instance of the applicant and supported by the grounds as set out of in the affidavit of the applicant.

The affidavit filed in support of the application over and above pointing out the historical background of the dispute, it raised five complaints regarding the ruling of the CMA, that it was irrational, incorrect and improper. On the part of the background, the applicant said he was employed by the respondent way back from 21st March 2002 up to 16th June 2019 when his employment was unfairly terminated on the ground of misconduct. That while working with the respondent, the respondent accused him and his fellow employee one Selemani Ally of the criminal offence and reported the matter to police station following of which they were arrested and latter arraigned before the District Court of Serengeti. However the prosecution decided to withdraw the case against them consequence of which they were discharged. However, while they were still around the court premises they were arrested and re arraigned at the

District Court of Musoma where they were facing the criminal charge which was still pending at the time when he filed this application. When his criminal case was pending, the respondent initiated the disciplinary proceedings which resulted into his termination without being given the right to be heard. He deposed that having discovered that he was terminated, he filed an application for condonation but the CMA did not consider the reasons for extension of time which was stated in the affidavit and the reasons adduced during the hearing. He prayed the application to be granted basing on the following issues;

- (a) Whether the arbitrator was right for not condoning the applicant to file his labour dispute out of time

He also asked for the following reliefs;

- (i) this honourable court to grant the applicant time to file his Labour dispute out of time,
- (ii) Any other relief this court may deem fit to grant.

The application was opposed by the respondent by filing the Notice of opposition, Notice of representation and the counter affidavit, sworn and filed by Godfrey Tesha, an Advocate instructed to represent the respondent. in the Notice of opposition, the court is asked to find that, the

application by the applicant has no merits as it is frivolous and vexatious and that therefore should be dismissed and make any further order it deems fit and just to grant.

In the counter affidavit, the counsel for the respondent admitted to the facts that the applicant was employed by the respondent until 16th June 2019 and the rest of the content is disputed as the issue as to whether the termination was fair or not is yet to be determined by the commission hence it is premature.

Further to that, he said the respondent terminated the applicant in accordance with the procedures and the applicant was afforded the opportunity to be heard but decided against attending the disciplinary hearing. He also deposed that the decision of the Commission for Mediation and Arbitration based on insufficient reason for delay which he gave. He insisted that the application be dismissed for lack of merits

Hearing of this application was by way of written submissions where parties filed their respective submissions as ordered by the court, applicant fended in person, unrepresented, while the respondent was represented by Mr. Godfrey Tesha, learned counsel.



In his submission in chief in support of the application, the applicant reiterated the background that he was employed on 2002 before he was arrested on 10/06/2019, and unreasonably terminated on 16/06/2019. That following his arrest he was charged before the District Court of Serengeti and later Musoma the fact which prevented him from challenging the termination. However on 14/04/2020 the applicant filed an application for condonation before the Commission for Mediation and Arbitration, but the same was dismissed. It is following that dismissal; the applicant filed the application for revision seeking this honorable court to revise and set aside the CMA ruling dated on 04/11/2020 and proceed to grant extension of time to the applicant. The Applicant filed an application for revision together with the affidavit sworn by the applicant on 17/12/2020 we pray to adopt the same to form part of these submission.

He submitted further that, he was terminated while he was in custody and the respondent is the one who initiated a criminal charge against him, and his fellow employee one Selemani Ally Warange. The said criminal case, at first was filed in the District Court of Serengeti and later on the prosecution dropped the charge on (*nolle prosequi*) but he was re-



arrested until when he was granted conditional bail and the said criminal case is still on going up to date.

He referred to section 37(5) of the Employment and Labour Relations, Act [Cap 366 R.E 2019] he submitted that the applicant was terminated without being given the right to be heard before he was terminated from his employment. As he was terminated when he was in remand custody facing a criminal charge, therefore he could not be allowed from custody to appear to the disciplinary hearing.

He submitted that the CMA dismissed the application for condonation without considering the applicant's reasons for condonation which constitutes good cause. Under rule 31 of the Labour Institutions (Mediation and Arbitration) Rules GN.No.64 of 2007. The requirement under this rule does not necessarily need applicant to account for each day of delay even under rule 11(3) of the Labour Institution (Mediation and Arbitration) it provides for the grounds which the party who seeks condonation to advance in his submission which includes the degree of lateness, the prospects of succeeding with the dispute and obtaining the reliefs sought against the other party, any prejudice to the other party and any other



relevant factors. According to him, these are the grounds which the applicant raised at the hearing of the condonation at the CMA.

He submitted that the Arbitrator erred to employ the test provides under the normal Civil Cases which requires the applicant to account for each day of delay in order to succeed in application for extension of time. He submitted that the requirement under labour law is that the applicant has to show good cause for his lateness and other grounds which are set out under rule 11(3) of GN. No. 64/2007. He submitted that the termination without being heard is a violation of the principle of Natural Justice.

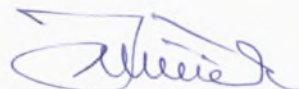
In reply, Mr. Godfrey Tesha Silas submitted that, procedure for termination was followed, as the applicant was summoned, and he managed to appear to the disciplinary hearing. He also failed to prove that he was in custody at any point in time as stated in the case of **Edgar Fabian vs Ultimate Security Group, (T) Ltd**, 2003 LCCD Pg 45 cited by the Arbitrator.

He said the applicant has never provided the evidence on the issue of being in custody or being discharged and has never accounted the days of delay that he was out of custody. He submitted that the applicant was

informed of and attended the disciplinary hearing on 16/06/2019 therefore it was not true that he was denied the right to be heard and did not explain why he failed to refer the matter when he was discharged if at all he was in remand custody something which has not been proved.

He said during hearing, the applicant said he was released on 10/08/2019 and rearrested on 30/08/2019 and released again on 10/03/2020. He failed to account 20 days from 10/08/2019 to 30/08/2019 as no reason was given as to why he did not file the Dispute before the CMA. Further more he failed to account for days from 10/03/2020 to 14/04/2020 when he failed the case which is about 34 days.

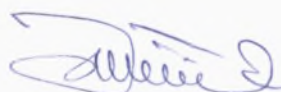
Regarding the applicability of the principle of normal civil court in civil case requiring the applicant to account all days delayed, as held in the case of **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.02 of 2010 (unreported), CAT and **VD Enterprises Ltd and 4 Others vs International Commercial Bank Ltd**, Misc. Commercial Case No. 65 of 2014 and many other cases in which it has been a principle that, in every extension of time the applicant must account each and every day delayed. He finally asked the court to find that the



Arbitrator, properly arrived at the proper conclusion, he prayed the application to be dismissed for lack of merits.

From the affidavit, counter affidavit, as well as the arguments given in support or opposition of the application, there is no dispute that, the applicant was employed by the respondent since on 2002 and was terminated on 16/06/2019. There is no dispute that his termination was after he was accused of a criminal offence and got charged in Economic Case No. 02 of 2020 in which he was charged together with two others.

The applicant complains that he was terminated without being afforded the right to be heard by the respondent as he was in remand custody, and following that state of affairs, he could not file in time a labour complaint to challenge his termination of employment. That it was after he was free when he filed an application for condonation asking for time to be extended for him to file a labour complaint to the CMA. In the ruling by CMA, although the commission acknowledged to have powers to condone the late referral of the dispute in terms of rule 31 of GN. No. 64 of 2007, upon justifiable reasons, the commission however dismissed the application for condonation on the ground that, the applicant failed to justifiably account for the delayed days especially days from 10/08/2019



when he was released from custody and 29/08/2019, before he was re arrested on 30/08/2019 and the period from 10/03/2020 to 13/04/2020 before he filed the application for condonation.

The applicant's complaint is that the Arbitrator erred to employ the test provided under the normal Civil Cases which requires the applicant to account of each day of delay in order to succeed in application for extension of time, as the requirement under labour laws is that the applicant has to show good cause for his lateness and other grounds which are set out under rule 11(3) of GN. No.64/2007.

To start with the provision of Rule 11(3) of the Labour Institutions Mediation and Arbitration Rule GN. No.64/2007 provides that,

"An application for condonation shall set out the grounds for seeking condonation and shall include the referring party submission on the followings;

- a. The degree of lateness*
- b. The reasons for lateness*
- c. Prospect of succeeding with the dispute and obtaining relief against the party,*
- d. Any Prejudice to the other party and*
- e. Any other relevant factors."*

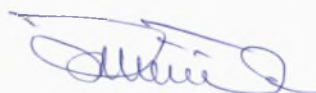


While rule 56(1) empowers the court to extend or abridge any period prescribed by the rules on application and on *good cause* shown unless the court is precluded from doing so by any written law.

Looking at the law, and the decision of the Labour Court in the case of **Oscar Mbwambo and Another vs M/S Tanga Cement Co. Ltd**, Labour, Tanga, Misc. Lab.Appl. No. 12 of 2014, Aboud, J. (reported in Labour Court Case Digest, Part I of 2015.)

It is an established principle of law that, sufficient reasons is a pre-condition for court to grant extension of time, Rule 56(1) of the Labour Court Rule, and what constitutes sufficient reasons or good cause has been defined by the Court of Appeal in the cases, of **John Mosses and Three Others vs The Republic**, Criminal Appeal No. 154 of 2006 when quoting the position of the Court in the case of **Elias Msonde vs Republic**, Criminal Appeal No. 93 of 2005 Mandia J, (as he then was).

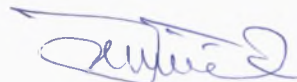
In defining good cause or sufficient cause, there is no different scales applying in the Labour cases, the definition of good cause or sufficient cause for purposes of extension of time or condonation in labour cases, applies across all types of cases which includes criminal cases, civil cases and even Labour cases, this is why my senior sister Hon. Aboud, J, in the



case of **Oscar Mbwambo and Another vs M/S Tanga Cement Co. Ltd**, adopted the definition of the terms from Criminal cases cited herein above. For that reasons, the arbitrator was justified by his findings that the applicant was supposed to account for all days delayed, which the applicant does not dispute that he failed to account especially the days he was not in remand custody.

That said, I find the Commission for Mediation and Arbitration to be justified to refuse the application for condonation following the failure of the applicant to give good cause for delay which according to the authority in the case of **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.02 of 2010 (unreported), CAT, as justifiably cited and relied on by the CMA in which among other factors which constitute good cause includes:- *(a) Accounting for all days of the delayed, (b) The delay should not be inordinate, (c) Showing diligence, and not apathy, negligence or sloppiness in prosecuting the action that he intends to take, and (d) The illegality of the decision sought to be challenged.*

Which the applicant did not show in the application for condonation, which had he shown and proved them, he would have been entitled as a

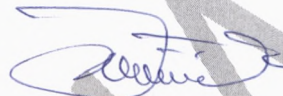


matter of right for the condonation. But since he did not do that, he was not entitled for condonation.

That said, the application is therefore dismissed for want of merits.

It is accordingly ordered.

DATED at MWANZA this 30th day of July, 2021


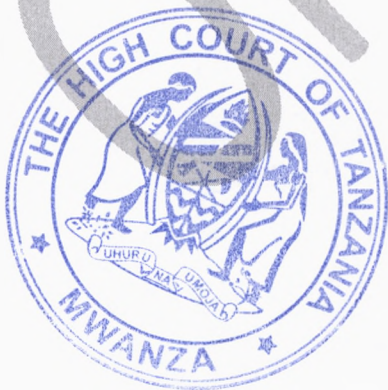


J.C. TIGANGA

JUDGE

30/07/2021

Judgment delivered in open chambers in the absence of the applicant online Mr. Godfrey Tesha, Advocate of the respondent through audio tele-conference.



J. C. TIGANGA

JUDGE

30/07/2021