IN THE HIGH COURT OF TH E UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LABOUR APPLICATION NO. 101 OF 2020

(Originating from CMA/ARS/ARB/137/2020)

ELIAS GRAYSON MSHANA.....APPLICANT

VERSUS

UNIVERSITY OF ARUSHA.....RESPONDENT

JUDGMENT

16/08/2021 & 25/10/2021

GWAE, J

I am asked to determine as to whether the Commission for Mediation and Arbitration (Commission) through its ruling in CMA/ARS/ARS/137/2020 dismissing the applicant's application for condonation for late referral of his dispute was, in the circumstances and reasons for delay thereof, justifiable.

The applicant was desirous to lodge a dispute in the Commission against the respondent on the following complaints, that, the respondent unjustifiably withheld the applicant's terminal benefits, arrears of unpaid salaries, transport allowance, subsistence allowance from August 2019 to March 2020 (which will be accumulating up to the date of full payment).

Through the applicant's application for enlargement of time accompanied by CMA Form No. 2, a sworn affidavit of one Anna Mnzava, the learned advocate and

annextures therein, it is plainly revealed that, the applicant was employed by the respondent as a lecturer since the year 2000 to 30th day of September 2018 when he formally retired and whereas the applicant's application on the 19th March 2020 and that the degree of lateness was 473 days. It is further evident that, the applicant in the course of ensuring that he was paid his retirement benefits, he orally and in writing made follow ups vide his letter dated 15th October 2019 and another dated 19th November 2019.

The applicant's application for condonation in the Commission was resisted by the respondent and consequently, it was argued by mode of written submission and finally, the Commission ruled out that, the application is devoid of merit since he had failed to adduce sufficient reason for the delay and therefore, he could not benefit an exercise of discretion by the Commission provided under Rule 31 of G.N No. 64 of 2007. The CMA's ruling dated 24th day of September 2020 aggrieved the applicant who referred this application for revision on the 6th November 2020 advancing six grounds, to wit;

i. That, the Commission erred in law and facts by its failure to record and analyze properly the evidence before it
ii. That, the mediator erred in law and fact by holding that the applicant failed to establish a sufficient cause for filing the dispute out of time
iii. That, the Commission erred in law and facts by not considering all four criteria of granting an application for condonation

iv. That, the Commission erred in law and fact by dismissing the application and holding that it is baseless while the applicant showed a good cause

v. That, the Commission erred in law and fact by not considering the applicant's claim is on fundamental required by the law

vi. That, the ruling does not reflect the proceedings of the case

As it was in the Commission, the applicant and respondent were represented by the learned counsel namely; Ms. Anna Mnzava and Mr. Asubuhi John Yoyo respectively. Equally, the parties' advocates argued this application by way of written submission. In her written submission, Ms. Anna abandoned ground iii and vi for the application depicted herein above. In that premises, I am now going to consider the remaining four grounds of this application. Nevertheless, she jointly argued the remaining grounds.

Supporting this application, the applicant's learned advocate argued that the applicant's delay for 473 days was associated with correspondences between the applicant and respondent and that the respondent had a tendency of monthly paying the applicant until 2019 in the installments, the 1st one being paid in November 2018 and 2nd installment was paid in 2019, July when the applicant realized that, the respondent had refused or neglected to complete paying him his terminal benefits though there were also communications going on between the parties.

The learned counsel for the applicant further argued that, there is an issue of illegality since the applicant has been deprived of his statutory rights namely; terminal benefits, salary arrears, transport allowance and subsistence allowance. Strengthening her arguments, the applicant's counsel cited a decision of this court (Sehel, J as she then now JA) in the case of **Citibank Tanzania Limited v. Tanzania Telecommunications Company Ltd and 4 others**, Misc. Commercial Application No. 2012 of 2017 with approval of the decision of the Court of Appeal of Tanzania in **VIP Engineering Ltd and 2 others vs. Citibank Tanzania Limited**, Consolidated References No. 6, 7 and 8 of 2006 (unreported -CAT)

Praying for an order dismissing this application, Mr. Asubuhi seriously argued that, the alleged or raised respondent's promises were not substantiated by any tangible evidence and that, the issue of illegality as raised by the applicant did not meet the threshold required by the law as was rightly decided and reasoned by the Commission. He added that the alleged communications did not exist, if it was so, yet, the same did not preclude the applicant from taking necessary steps.

Strongly bolstering his submission, the respondent's urged this court to make a reference to courts' decisions in **Reginal Manager TANROAD vs. Arusha Concrete Co. Ltd,** Civil Application No. 96 of 2007 (unreported) and **Ratma vs. Cumarasamay and another** (1964) 3 ALL ER 933 where in both

precedents' it was emphasized that, there must be material fact on which the court can exercise judicial discretion to condone a dispute or an appeal or application and that shot of that, it will defeat the purpose of rule which provides time table for conducting litigation.

He finally argued the length of delay leaves a lot to be desired. He also stated that, chances of success were not demonstrated by the applicant adding that the applicant ought to have sued the Registered Trustees of Seventh Day Adventist and not the respondent and that, there was higher degree of prejudice on the part of the respondent who was not directly liable for the employees under church terms.

Examining the parties' arguments, the impugned ruling and records, I find that, there are two issues for the court's consideration as correctly raised by the parties' counsel, these are, whether the applicant had given sufficient cause for the delay of 473 days and whether the raised issue of illegality had been demonstrated or capable of justifying this court to grant the sought extension of time.

Regard to the issue on whether the applicant had given sufficient cause for the delay of 473 days.

It is undisputed fact that the applicant's delay is of more than 470 days, which is very long period requiring sufficiently valid reason. The applicant had been

asserting communications between them being the causal factor for her delay nevertheless If I were to rely on the alleged communications as per the said letters yet, the same are unilateral, they are written by the applicant and no reply to those his letters whatsoever on the part of the respondent. This court had however dealt with similar situation in the case of **Seraphine Lyimo v. The Schools of St. Judith,** Labour Revision No. 94 of 2017 (unreported) where I held;

> **(A2)** which was replied vide respondent's letter dated 18th February 2016 ("Please support your claim with clauses in the appropriate labour laws"). I don't not find if these words constitute promise to wait for preparation or computation of the claims as repeatedly argued by the applicant. "I have also considered other correspondences/communications through emails (**A1**) which were from the applicant addressed to the respondent however nowhere there is a piece of evidence establishing that the same were replied by the respondent and that there was promise to wait for the payment of the applicant's Claims"

(Aboud, J) in **Juliana Mguzi v. Four days security Revision No 43 of 2015** (yet to be reported).

In our instant matter, had the applicant been able to clearly substantiate his assertions that, there were communications with the respondent's promises by producing respondent's documents/letters promising him that he should wait for the payment of his terminal benefits and reason (s) for the respondent's failure to

timely pay were stated, the applicant's assertions would have been judiciously considered to be credible.

Moreover, even if the communications were considered by the Commission yet the applicant had hopelessly failed to account for the days of delay from July 2019 to 8th March 2020 when he filed the application for condonation.

It is trite principle that in an application for extension of time that, the applicant has to account for each day of delay. The applicant was therefore duty bound to account for each of delay in his affidavit. This position has consistently been stressed in a numerous courts' decisions for instance **Bushiri Hassan v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 it was rightly held;

> "Delay of even a single day has to be accounted for otherwise there would be proof of having prescribing periods within which certain steps must be taken".

See also a decision in the case of **Sebastian Ndaula v. Grace Rwamafa,** Civil Application No. 4 of 2014 and **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** Civil Application No. 536 of 2016 (both unreported-CAT).

As the applicant is found to have failed to account each day of delay as required by the law and above all the alleged communications without proof

remain mere assertions not backed with tangible evidence and above all the delay is quite inordinate. Therefore, this ground is found to have been misplaced.

In the 2nd issue as whether the raised issue of illegality had been demonstrated.

The applicant is found complaining that, upon his retirement he was not paid his terminal benefits and that he is entitled to repatriation costs. In my view, these are mere assertions as the issue of illegality must be pertinently important and it should be apparent on the face of the impugned decision or order. Issues of unpaid terminal benefits and repatriation entitlement were yet to be determined by a competent judicial body, they thus remain nothing but mere complaints bearing nothing like material error on the face of the record or decision or illegality (See **Finca (T) Limited and another vs. Boniface Mwalukisa**, Civil Application No. 589 /12/ of 2018 (unreported-CAT).

I have also looked at the degree of prejudice to either party and come up with an observation that, if this application is granted it will be prejudicial to the respondent since he is not a party or not an employer of the applicant except the Board of Registered Trustees, Seventh-Day Adventist Church (See A1, a letter written by Seventh-Day Adventist Church and addressed to the applicant). An Issue of suing a person who has locus standi is very relevant in civil litigation since by suing a person who has no locus standi or who is a dead person may render a

decree ineffectual or inexecutable (see **Lujuna Shubi Balonzi, Senir vs. Registered Trustee of Chama Cha Mapinduzi, CCM** (1996) TLR 203 and **Oysterbay properties** and **another v. Kinondoni Municipal Council and others,** (2011) 2 EA 315 –CAT).

In the event, this application is devoid of merit. Consequently, I dismiss it and proceed upholding the decision of the Commission. Each party shall bear his costs.

It is so ordered.

M. R. GWAE
JUDGE
25/10/2021