

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LABOUR DIVISION)**

**AT MUSOMA**

**LABOUR REVISION NO 12 OF 2021**

*(Originated from Dispute Number CMA/MUS/52/2021)*

**ABDUL SALUM ABDALLAH AND 35 OTHERS .....APPLICANTS**

***VERSUS***

**CATA MINING COMPANY LTD .....RESPONDENT**

**JUDGMENT**

21<sup>st</sup> March and 5<sup>th</sup> May 2022

**F. H. MAHIMBALI, J.:**

The applicants through the legal services of Mr. Majogoro learned counsel as assisted by Mr. Mhagama both learned advocates have been aggrieved by the decision of the CMA – Musoma which refused to grant extension of time to file their labour dispute against the respondents. On that grievance have filed this labour revision before this court challenging the said decision and are praying that the same be revised and set aside as per law. This being a labour matter, the application is filed under section 91(1) (a) (b), 91(2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6/2004 (R.E 2019) and Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and

Rule 28 (1) (c) (d) (e) of the Labour Court Rules 2007.

During the hearing of the application, whereas Mr. Alhaji Majogoro and Mr. Mhagama learned advocates represented the applicants, Mr. John Nerei, learned advocate represented the respondent.

The facts of the case can be summarized this way. The applicants in this case were amongst the employees of the respondent employed in a contractual basis for a period of three years commencing from May 2016 to November, 2019. Unfortunately, just a month after their engagement, the respondent's business was closed allegedly by the Government in June 2016 for some legal issues and that the applicants were put on leave pay for indefinite period until November, 2019 when the respondent's business was released by the Government and reinstated only some of the employees. During the time of indefinite leave pay (in which time they were not paid anything by their employer), there appeared to be on going negotiations between them but in futile. However, after the resume of operation of the respondent's company (between November 2019 and 2020), the fate of the applicant's who are said to be still in paid leave and not reinstated was not known. That compelled the applicants to file an application for extension of time to file a labour dispute before CMA for them to register their legal complain on the unpaid salaries and other legal rights as per

labour laws and rules. Despite the respondent defaulting filing counter affidavit in opposition of the said application, yet the CMA denied the grant of the application for the extension of time. This has aggrieved the applicants, thus the basis of the current revision.

In support of the application, Mr. Alhaji Majogoro, learned counsel for the applicants submitted that as the respondent did not counter the said application for extension of time (See paragraph 13 of the Counter Affidavit of this application), the law is clear that where there is no Counter Affidavit filed it suggests nothing but acceptance of all facts. He drew reliance to the cases of **William Getari Kegege vs Equity Bank and Ultimate Auction Mart**, Civil Application No 24/8/2019, **Martin D. Kumaliya and 11 others vs Iron and steel Ltd**, Civil Application NO 70/18 of 2018. Both these cases talk of same position that failure to file Counter Affidavit amounts to acceptance of all the facts. He added that since an affidavit is evidence, then if not countered, it is considered as admitted. (See the case of **East Africa Cables (T) Limited vs Spencon Services Ltd**, Misc. Application Case No 61 of 2016 (at page 7)).

He added further that, as per current counter affidavit of the respondent in this Court, it is undisputed that the applicants were employees of the respondent, that the mining activities were closed, and

it is also undisputed that the applicants were given a leave pay. It is also undisputed that there was an on going on discussion between the said applicants and NUMET on the fate of their employment. Para 6 of the Counter affidavit is self-explanatory on this.

On these findings/submissions, it is the applicant's concern that they had valid reasons to be allowed to file their matter out of time. Considering also the spirit of Labour laws and Labour court as stated in the case of **Nyanjugu Sadiki Masudi vs Tanzania Mines, Energy, Construction and Allied Workers' Union (TAMKO)** Revision No 5 of 2013 at pages 4 – 5, the application is meritorious.

He concluded his submission by urging the Court to consider the application as there were sufficient reasons adduced by the applicants at CMA for the grant of extension of time. Thus, the decision by the CMA be varied and set aside as it arrived at wrong conclusion when it failed to apply the law to consider the grounds for extension of time dully argued.

In response to what has been submitted by Mr. Alhaji Majogoro learned counsel for the applicants, Mr. John Nerei learned counsel for the respondent briefly but concisely submitted that despite the fact that failure to file counter affidavit amounts to admission (referring the case

of East Africa Cable (T) Ltd at page 7), yet, what is deemed to be admitted is yet to be weighed by the court. Therefore, it is not automatic proof even if not countered.

He added that the spirit as per GN 64 of 2017, the applicants are supposed to file their applications within time. As in this matter, the dispute arose on 1<sup>st</sup> November, 2017, the application for extension of time was filed on 16<sup>th</sup> March, 2021. This is equivalent to 3 years of delay. An application for extension of time is about the law. The facts just assist. It is his opinion that as per facts of the current matter, the CMA was justified basing its decision in the case of **Auranus Ernest Wambura vs North Mara Gold Mine**, Revision No 24 of 2018. As per what was annexed by the applicants, the last communication was on 27/05/2019. The said application was then filed in March 2021 i.e two years later. In the absence of proof of what was going on in between, the said delay was not sufficiently explained as per law.

In the case of **Nyanza Road Works Limited vs Giovanni Guididon**, Civil Appeal no 75 of 2020, CAT at Dodoma (page 12), there must be Judicial consideration as opposed to capriciousness in exercising the court's discretion. It is his considered view that, the CMA was justified in reaching that verdict as per capriciousness. A delay of two years, in

anyway which time is not explained for, amounts to capriciousness. The legal rules are there to govern parties not to do what they want but what the law dictates. As they were asleep, the law is not on their favour but those aware "*Vigilantibus non dormientibus jura subveniunt*" Thus the arbitrator was justified in reaching that verdict as per law.

Having heard the rival arguments from both learned counsel, the vital question now is only one, whether the application for revision is meritorious for the Court to consider.

I am first thankful to both learned advocates with their respective rival arguments which certainly have contributed to the legal shape of this decision. There was sufficient decorum and each counsel established sufficient apprehension of the law.

That notwithstanding, the central issue for determination is only one; whether the application is meritoriously grantable.

The law is, there must be an account of each day of delay. Delay even of a single day, has to be accounted for (See **Charles Pantaleo Kingoka Vs. Abasa Musa Kitoi** – Civil Application no.71/76 of 2019), where the Court of Appeal said:

*"There must be an account of each day of delay. Delay even of a single day, has to be accounted for"*

In the case of **Selemani Juma Massala Vs. Sylvester Paul Mosha & Japhet Matiku Lyoba** – Civil Application no. 210 of/01 of 2017 – un reported, the Court of Appeal stated at page 11.

*"The settled position of the law is that, if there is a delay of any act, then each day of the delay has to be accounted for. Otherwise, there was no need of having such rules"*

All in all, guided by the minimal guidelines set by the court of Appeal in the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application no 19 of 2015, CAT at page 4 making reference to the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Civil Application No. 2/2010 – unreported) the Court of Appeal reiterated the following guidelines for the grant of extension of time.

- a) The applicant must account for all the period of delay.
- b) The delay should not be inordinate.
- c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he is intending to take.



d) If the court feels that there are other sufficient reasons such as existence of a point of law of sufficient importance; such as the illegality of the decisions ought to be challenged.

In reaching this verdict, I have dispassionately considered and weighed the rival arguments from parties through their respective counsel. For sure I am mindful that to refuse or grant this application is the court's discretion. However, to do so there must accounted reasons for that. In **Mbogo Vs. Shah** (1968) EA the defunct Court of Appeal for Eastern Africa held:

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time....."*

In the current case, the main reason why the decision of the CMA is being challenged by the applicants is simply because the application at the CMA remained unopposed by the respondent thus the arbitrator ought to have granted it as prayed. On this stance, reliance has been sought in the cases of **William Getari Kegege vs Equity Bank and Ultimate Auction Mart**, Civil Application No 24/8/2019, **Martin D. Kumaliya and 11 others vs Iron and steel Ltd**, Civil Application NO 70/18 of 2018 and **East Africa Cables (T) Limited vs Spenco Services Ltd**, Misc. Application Case No 61 of 2016. That where there



is no counter affidavit, the application will be considered as not opposed. Whereas I appreciate the legal principle as enunciated in the above cited cases, however I am aware that each case must be considered in its own facts. In the current case, though there was no counter affidavit filed, it did not mean that the respondent had admitted the truth of the application. He only defaulted filing the counter affidavit and proceeded to contest the same during the hearing of the application. The position would have been different had the respondent accepted the application in its perspective.

The issue for consideration now is whether there was accounted for each day of delay as per law for the said application to be worth of consideration. The law is, there must be an account of each day of delay. Delay even of a single day, has to be accounted for (See **Charles Pantaleo Kingoka Vs. Abasa Musa Kitoi** (supra)).

In digest to what the arbitrator had ruled at the CMA in consideration of this application, he differed with the applicants on the basis that there were days of delay unaccounted for by the applicants from 27<sup>th</sup> March 2019 to 15<sup>th</sup> March 2021 when the said application was then filed before the CMA. Secondly, he differed that there was no sufficient cause explained by the applicants. The reason that there were

negotiations between the parties going on in between, by itself is not a bar of filing a case in CMA/ Court. While agreeing with the arbitrator on this, I also agree with the reasoning in **Leons Barongo Vs. Sayona Drinks Ltd**, Labour Revision no. 182 Of 2012, that negotiations between parties does not amount to sufficient ground of delay. In my considered view, if that is to be taken into account, then it is equal to condoning sympathy which danger must be guarded against.

I find the revision application devoid of any merit. I agree with Mr. John Nerei John, learned counsel for the respondent that the applicants were drossy in pursuing of their rights and the law does not favour those asleep but the vigilant.

That said, the application hereby fails. This being a labour matter, each party shall bear its own costs.

DATED at MUSOMA this 5<sup>th</sup> day of May, 2022.



F.H. Mahimbali  
**JUDGE**