IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
LABOUR DIVISION SHINYANGA

AT SHINYANGA

LABOUR REVISION NO. 11 OF 2021

(Originated from an award of the Commission for mediation and arbitration of Shinyanga CMA/SHY/50/2020 dated the 19th March, 2021)

IBAHIM JOSEPH MPANDUJI..... APPLICANT

VERSUS

BULYANHULU GOLD MINE LIMITED..... RESPONDENT

JUDGMENT

13th May & 3 June 2022

MKWIZU, J.:

The applicant is aggrieved by the ruling of the Commission for Mediation and Arbitration refusing him condonation to institute a labour dispute against the respondent. The averments in the affidavit in support of the application for condonation before the CMA tells that the applicant was employed by the respondents between 25/3/2008 to 31/8/2019 when his employment was terminated on medical ground. He was not happy with his employer's decision. He registered a Labour complaint before Commission for Mediation and Arbitration. According to CMA Form No 2, applicant was late for 141 days, so he filled application for condonation. The Application was at the end dismissed for want of merits hence this revision application seeking for the following orders.

1. *This court be pleased to exercise its revisional powers, authority, and jurisdiction to call and examine the original record of the CMA proceedings and its impugned ruling so as to ascertain to*

itself to whether the same are correct, proper, legal rational and regular.

2. *The court to quash the CMA proceedings, set aside and revise the impugned and unjust ruling in the manner it deems appropriate.*
3. *Any other reliefs including condonation of the delay as the Honorable court (of law, record, equity/justice, and mediation) may deem fit and just*

The application was supported the applicant's affidavit sworn on 23/4/2021 and was opposed by the respondent through a counter affidavit sworn on 17/6/2021 by Mwanaisha Mosha respondent's Human Resource officer. It was orally heard. Applicant was represented by Mr. Marwa Chacha Kisyeri, personal representative while the respondent had the services of Ms Kivuyo and Iman Mfuru all leaned advocates.

In support of his application, the applicant representative submitted that the ruling for condonation was issued by an arbitrator instead of a mediator contrary to Rule 22(1) (2) (a)-(e) of the Mediation and arbitration Guidelines Rules, GN No 67 of 2007 and Regulation No 34 of GN No 47 of 2007 and therefore a nullity.

Arguing in the alternative, Mr. Marwa Kisyeri, said, the arbitrator failed to properly resolve the reasons for the delay presented before him. He contended that, Applicant had complied with Rule 11 (1) (2) (3) (a) (b) (c) (d) and (e) of GN No. 64 of 2007, accounting for the delay adding to 141 days giving sufficient grounds for the delay, sickness being one of it. Citing the decisions of **Mbaya Wagome Minene V Mwanza Baptist**

Secondary School Convention of Tanzania (BTC), Revision No 93 of 2016 and **Jimson security Services V. Joseph Mdegela**, Civil appeal No 152 of 2019(All unreported), Applicant's representative said, the arbitrator was biased for not considering the medical chits, submissions and case laws cited by the applicant without justification. He also blamed the arbitrator's findings that the applicant was negligent saying that, that conclusion was without proof.

In opposition, Ms Kivuyo contended that, the claim that the decision by an arbitrator is a nullity is without substance. She said, all provisions of law cited by the applicant's representative cover arbitration powers in determining arbitration matters before the CMA and therefore not applicable. To her, application for condonation is governed by Rule 29 of the Labour Institution (Mediation and Arbitration) Rules, GN No. 64 of 2007 where the applicant who fails to file a complaint within time is supposed to seek and obtain an order of the CMA condoning the delay. And the said rule read to together with Rule 11 of GN No 64 provides for the procedure for filling condonation application. Ms Kivuyo submitted further that, Rule 2 of the same GN and section 2 of the Labour Institution Act, defines a Commission for Mediation and Arbitration to include Arbitrator and Mediator appointed by the Commission and that both arbitrator and Mediator have powers to preside over labour matters without any restrictions. She on that reason urged the court to find the applicant's arguments that the arbitrators had no power to preside over condonation application baseless. After all, added Ms Kivuyo, there is no prejudice on the party of the applicant because the proceedings to be

preside over by an arbitrator or mediator is not one of the grounds set for determining condonation application.

Responding to the alternative ground of revision Ms Kivuyo submitted that applicant failed to do what he was required to do by the law. He failed to account for the delay. She said, applicant's employment was terminated on 31/1/2019 for ill-health, he refused to receive the termination letter in view of consulting his relatives, but he never went back for collection of the said letter and that based on that date, the degree of lateness is 370 days reckoned from 31/1/2019 to 20/1/2020 when he filed condonation application. She added that, applicant did not also account for the 141 days he himself alleged to have been late.

Speaking of sickness as a ground for delay, Ms Kivuyo said, this ground was just a mention of ground without proof. There was no single attachment to the affidavit in support of the application at the CMA substantiating the ground and there was no explanation on how sickness if any, prevented the applicant from acting timely. Citing the decisions of **Malyuta Emmanuel V The Manager Busangi Gold Mines Limited**, Misc. Civil Application No 21 of 2020, **Deus Moris Alexander V Sandvik Mining and Construction (T) Ltd,** Revision No 14 of 2011 and **Nyanzo Road Works Limited B Giovan Guidon**, Civil Appeal No 75 of 2020 (all unreported), Ms Kivuyo insisted that, sickness ground was rightly refused by the arbitrator.

Submitting on the cases cited by the applicant's representative, Ms Kivuyo said they are all distinguishable. In **Gerson Security services** (Supra) she stated, there was sufficient evidence that applicant was sick in all days of the delay while in **Mbaya Wagome Mnenes** case (supra)negligence

was raised as a ground which was pleaded not to affect a party in condonation application.

Responding to the issue that arbitrator failed to consider applicants evidence, submissions and cases cited, Ms Kivuyo said, evidence attached to the submissions are not to be considered because submissions ought to cover only legal arguments. She on this, cited the case of **TUICO Mbeya V Mbeya Cement Co Limited** (2005) TLR 41 arguing that the arbitrator was not biased for the applicant failed to adduce sufficient grounds supporting condonation application.

Regarding the employers promise to pay as one of the grounds relied upon by the applicant, respondent's counsel was of the view that, was not a good ground for the applicant was referring to without prejudice discussions held by the parties during mediation of another case. Making reference to the case of **Ms P& O International Limited V Trustee of Tanzania National Parks (TANAPA)** Civil Appeal No 265 of 2020, Ms Kivuyo said, negotiation between parties could not cutoff time from running. She concluded that the applicant failed to pursue his legal rights timely and failed to demonstrate good cause for the delay.

The rejoinder submissions are more less a repetition of the submissions in chief

I have subjected the party's affidavit for and against the application, CMA's proceedings, and the party's submission to a fair scrutiny. The Applicant's revision essentially raises the two issues namely ;

1. *Whether CMA ruling is invalid for being issued by an arbitrator.*

2. Whether the application for condonation was with *sufficient reason(s)*

The first issue is an invitation by the applicant to see whether the CMA ruling is invalid for being issued by the arbitrator instead of a mediator. I have revisited the laws governing applications before the Commission. As correctly observed by Ms Kivuyo, the procedure to prefer applications before the CMA is regulated by Rule 29 of the Labour Institutions (Mediation and Arbitration) Rules, GN No 64 of 2007 reading:

> "Rule 29- (1) Subject to Rule 10, this Rule shall apply to any of the following-
>
> (a) condonation, joinder, substitution, variation or setting aside an award;
>
> (b) jurisdictional dispute;
>
> (c) other applications in terms of these Rules."

In the above rule, powers to determine condonation application is vested on the Commission who is defined under rule 2 of the same Rules as ***"the Commission for Mediation and Arbitrator established by section 12 of the Labour Institution Act and shall include mediator, or an arbitrator appointed by the commission***."

Plain construction of the above provision is that both Arbitrator and Mediators have powers to preside over condonation application. No restrictions. And sub rule 11 of Rule 29 of GN No 64 gives wide discretion to the Commission in dealing with the application. The rule instructs.

"Notwithstanding this rule, the Commission may determine an application in manner it deems proper."

The commission is therefore empowered to decide on how best to deal with applications, condonation applications being one of them. The above provisions read together give one conclusion that both Mediators and Arbitrators are part and parcel of the Commission and have powers to preside over any application brought before the Commission.

Rule 22(1) (2) (a)-(e) of the Mediation and arbitration Guidelines Rules, GN. No 67 of 2007 cited by the Applicant's representative are not applicable here as are only related to the arbitration procedures and not condonation application. The first issue is thus dismissed for lacking in merit.

The second issue is whether there were sufficient reasons to grant condonation by the Arbitrator. This issue will be considered taking into account the evidence contained in the condonation application placed before the arbitrator, the ruling issued, and the grounds of revision raised by the Applicant. The relevant legal principles to be applied in an application for condonation, are well established under Rule 11 of GN No 64 which was put to test by the Arbitrator. This Rule requires the applicant to among other things, set out the ground for condonation, submit on the degree of lateness, the reason thereof, and other relevant factors.

In terms of the CMA Form No 1 and 2 filed by the applicant at the CMA, his employment was terminated on 15/1/2019 and condonation Application was filed on 20/1/2020, after almost 370 days from the termination date. In **Tanzania Fish Processors Ltd v. Christopher Luhanga**, Civil Appeal No. 11 of 1994, the Court of Appeal observed:

"Limitation is materiäl point in the speedy administration of justice. Limitation is therefore to ensure that a party does not come to court as and when he wishes".

That is why the Court has consistently tasked the applicant in an application for condonation to among other things adduce sufficient cause for the delay and account for each day of delay.

According to CMA Form No 2, the applicant had delayed in filing his labour dispute for an aggregate period of 141 days and the reason for the delay given in the same form are "***a promise by the employer to effect life insurance, sickness and financial incapacity***". The affidavit in support of the condonation application expounded on two reasons, ***the promise by the employer to pay terminal benefits including medical insurance*** and ***illness*** omitting the financial incapacity. This is apparent in paragraphs 7, 8 and 9 of the affidavits in support of the condonation application stating that:

7. *"That, as the aforesaid labour dispute continued, on one of the mediation conferences the respondent proposed to discuss and settle the matter amicably at the respondent promises. So, we scheduled a meeting on 31st August 2019 while on discussion the respondent served me with the termination letter. And promised to immediately pay adequate termina l benefits and promised to register me with life insurance.*

8. *That, despite several follow ups and a lot of promises and the way she effected my termination of employment and taking into consideration I am still seriously suffering with occupational disease, the respondent very adamantly has failed to take any step for assistance. And did not allocate me with the light duties as required.*

9. *That, the delay as occasion as I believed the respondent will immediately facilitate me for further medication and that since then my health condition has been unpredictable as I failed to attend necessary clinic which the respondent was very responsible. Till now I have been under close look from my family and now no financial basis to attend clinic when the date falls due, all these has been caused by the respondent when effected termination."*

The CMA considered the reasons contained in that application and was satisfied that the promise by the employer to effect life insurance is not a sufficient ground for extension of time and that sickness claim was not established. I entirely agree with the arbitrator. The parties' negotiations or promises have never been regarded as sufficient ground for one's delay to take legal action. In **Ms P & O International Limited V Trustee of Tanzania National Parks (TANAPA)(Supra),** the Court stated that :

> *"Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time, "*

The first reason for the delay was for that reason rightly rejected.

The second reason for the delay is illness. I think this was as submitted by the respondent's counsel a mere mention reason without further details. There was no medical report presented to support the assertion and how it prevented the applicant from timely pursuing his rights. There

were no material facts upon which the application could be granted. In **Ludger Benard Nyoni V National Housing Corporation**, Civil Application No. 372/01 of 2018 (Unreported) Court of Appeal observed:

> *"Condonation is not to be had merely for the asking;* ***a full detailed and accurate account of causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to access the responsibility****" (Emphasis added).*

Worse enough, while raising sickness as the reason for the delay, paragraph six (6) and seven (7) of the applicant's affidavit in support of condonation application before the Commission show that applicant did in 2019 file a labour dispute against the respondent. Considering this fact, the Hon. Arbitrator said,

> *"That he was able to file the dispute of salary areas before this Commission is an indication that he was able to file the dispute of unfair termination within the period of limitation"*

I agree with the arbitrators' observations above. The inference drawn from these facts is that the alleged sickness if any, did not prevent applicant from pursuing his rights. This reason was brought before the Commission as an afterthought. Even assuming as claimed that applicant became aware of the termination on 31st August 2019 still, the application lacks explanation warranting the grant of the application for condonation filed on 20th January 2020. The applicant failed completely to adduce sufficient reasons and account for the delay.

There is yet another complaint in this revision that the arbitrator was biased for not considering the applicant's written submissions, attachment thereto and case laws cited. I have re-read and evaluated the written submissions complained of. It was indeed loaded with several authorities and medical reports on which applicant was craving the Commission's indulgence to consider them as evidence in support of the condonation application. I should state outrightly here that, the submissions were considered, and the arbitrator found the application was without sufficient cause as stated above. He found the illness ground without evidence.

Applicants' representative suggested that applicant's sickness was supported by evidence. With due respect, to Mr. Kisyeri, in terms of Rule 29 of GN No 64 of 2007, condonation application is filed by a notice of application supported by an affidavit setting out *inter alia* grounds for condonation. In that application, the affidavit was presented barely without even a single attachment to support any of its averments. The medical chits came later with the written submissions. I am aware of the Commissions power under Rule 29 (7) of GN No 64 of 2007 to order substitution of the affidavit by the written submissions. The provisions states:

> *" The Commission may permit the affidavit referred to in this rule to be substituted by a written statement"*

I have perused the entire proceedings before the CMA, there is no order made to that effect. An affidavit is a substitute for oral evidence and therefore applicant ought to have detailed his affidavit with all necessary information in respect of his reasons for the delay and not in the

submissions. In the case of **Tanzania Union of Industries And Commercial Workers (TUICO) at Mbeya Cement Co. Limited V Mbeya Cement Co Limited and Another (Supra),** there was attached several annexure to the written submissions introducing them as evidence in court. Considering the matter, Massati J (as he then was) held :

> *"It is now settled that a submission is a summary of arguments, it is not evidence and cannot be used to introduce evidence. In principle all annextures , except extract of judicial decisions or textbooks, have been regarded as evidence of facts and where there are such annextures to written submissions, they should be expunged from the submissions and totally disregarded*

Having carefully evaluated the affidavit and the parties' submissions made before the arbitrator, case laws and the law governing the point at issue, I find nothing to faulty the arborator's decision. The condonation application was rightly refused. This revision is without merit. It is hereby dismissed on its entirety. No order as to costs.

. **DATED** at **SHINYANGA** this **3rd** day of **June 2022.**

E. Y. MKWIZU
JUDGE
3/06/2022

COURT: Right of appeal explained.

E. Y. MKWIZU
JUDGE