THE HIGH COURT OF THE UNITED REPUBLIC OF TANZ ANIA

[IN THE ARUSHA DISTRICT REGISTRY]

AT ARUSHA

LABOUR REVISION No. 41 OF 2022

(Originating from Labour Dispute No. CMA/ARS/61/2022)

VIKAS MAHAJAN.....APPLICANT

AND

CROWN PAINTS TANZANIA LTD.....RESPONDENT

JUDGMENT

03rd November & 08th December, 2022

TIGANGA, J.

This is an application for revision filed by the applicant challenging the decision of the Commission for Mediation and Arbitration of Arusha at Arusha herein to be referred to as the "CMA" given in an application for condonation No. CMA/ARS/61/2022. In that application the CMA refused the condonation sought by the applicant in labour dispute involving the applicant and the respondent.

The cause of action for which condonation was sought was the breach of contract of employment and the applicant was seeking for condonation to file his dispute on that base. As earlier on pointed out, before the CMA his application was dismissed for lack of good and sufficient cause to warrant the grant of the condonation. Following that dismissal, the applicant filed this application moving

this court to revise the decision which dismissed the application for condonation. This application was filed under Section 91(1)(a), 91(2)(b), (c), 91(4)(a) and Section and 94(1)(b)(i) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019] and rules 24(1), 24(2)(a), (b), (c), (d), (e), (f), 24(3)(a), (b), (c), 28(1)(b), (c), (d), (e) and 28(2) of the Labour Court Rules GN No. 106 of 2007,

To appreciate the facts which triggered this application, I find it apposite to point out albeit briefly, the background of the matter which goes as follows. The applicant was employed by the respondent for two years fixed term contract as the head of corporate affairs. The contract started on 04th January, 2021 and it was expected to end up on 04th January, 2023. When it reached on 12th November, 2021 the applicant was suspended basing on allegations of misconduct pending investigation of the matter. On 17th November, 2021 while in suspension, the applicant was required to answer the charges of gross negligence composed of eight counts. After that, on 23rd November, 2022 the applicant was served with the notice to appear before the disciplinary committee for hearing. At the hearing, the disciplinary committee found him guilt of the first count. Consequent to that verdict, the applicant was terminated from the employment on 24th November, 2021.

Following such termination, the applicant was determined to challenge the termination, but before filing the matter to the CMA he realised that he was out of time. He, as a matter of law, was and actually applied to the CMA for condonation as he was already late for filing the employment dispute for about 23 days. The condonation application was filed on 15th February 2022. After hearing on merit the CMA found the applicant to have failed to shown good cause for granting condonation and therefore the application was dismissed for want of merit.

The order which dismissed the application aggrieved the applicant. He filed this revision application seeking for this court to call for the records of the said proceedings from the CMA so as to satisfy itself on the legality, correctness and propriety of the ruling dated 22nd April 2022 and accordingly set aside the same.

The application was opposed by the respondent by filing the counter affidavit sworn by Elisaria Makivao who introduced himself as a principal officer of the respondent. The base of the opposition is that, there is nothing to revise as the CMA was justified on what it ruled. Together with the counter affidavit the respondent also filed the Notice of opposition, Notice of representation introducing Mr. Malik J Seif, Mr. Shehzada Walli, Ms. Winjaneth Lema Advocates as well as all other Advocates working in a law firm styled as **Stallion Attorneys Limited.**

On 29th June, 2022, the respondent also filed a Notice of preliminary objection which contained two points of objection to wit;

i. The application is bad in law as it contravenes Rule 50 of the Labour Court Rules G.N No. 106 of 2007

ii. That the application is bad in law for seeking ordered of revising a CMA award while on the face of record there was no award.

Looking at the nature of the preliminary objection raised, it was directed that for expeditious disposal of the matter, the preliminary objection be argued simultaneously with the application. With leave of the Court and consent of the parties, this application was argued by way of written submission. At the hearing, the applicant was represented by Mr. Mashaka Ngole, learned Advocate whereas the respondent had the service of Mr. Maliki J. Seif of Stallion Attorneys Limited. Both Advocates adopted their respective affidavits to form part of their submissions.

As expected, the respondent argued the said preliminary objections in his reply submission and the applicant followed suit by filing the reply to the same in rejoinder submission. Despite the facts that the preliminary objection was argued together with the application but as a matter of law and practice, basing on the

authority in the case of **Ms. Safia Ahmed Okash (As Administratrix of the Late Ahmed Okash) Versus Ms. Sikudhani Amiri & 82 Others,** Civil Application No. 138 of 2016 CAT at Arusha (unreported) in which it was instructively held inter alia that:

> *"As is ordinarily the practice of the Court, once a preliminary objection is raised, the Court would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. In this matter, however, we directed Mr. Elvaison Maro and Mr. Eliufoo Loomu Ojare, learned counsel for the appellant and the respondents respectively, to argue the preliminary objection first and then address us on the merits of the appeal. That course was meant to expedite the proceedings and disposal of the matter. It was agreed that if the Court is to uphold the preliminary objection, it would then proceed to dismiss the appeal and that would be the end of the matter. However, if the said preliminary objection fails, then the Court will go ahead to consider and determine the appeal on the merits. As directed, both learned counsels took turns to address us on the preliminary objection and thereafter on the merits of the appeal."*

This court has to determine the preliminary objection first before the main application for revision. Now, basing on what the parties have submitted in respect of the preliminary objection, the issue for determination is whether the preliminary objections raised are maintainable in law.

The respondent argued in support of both preliminary objections that, the decision given by CMA is interlocutory. Therefore, by virtue of rule 50 of the Labour Court Rules, GN No. 106 of 2007 it can not be revised by this Court. In his view, the decision does not finally determine the dispute. He argued further that, the decision or order is final and subject to revision only when it determines the rights of the parties to the finality. To him, the refusal of condonation did not determine the complained of breach of contract the decision which could have resulted into the award subject of being revised. Therefore, refusal of condoning the application does not finally determine the rights of the parties, he said. To fortify the argument Mr. Seif cited the cases of **Equity Bank (T) Limited versus Abuhussen J. Mvungi,** Labour Revision No. 62 of 2019 and **MIC Tanzania Ltd versus Peter S. Mhando**, Revision No. 431 of 2022 (both unreported). Thus, no award the subject of this application could be, the counsel submitted.

Replying on them, Mr. Ngole was of the contention that both preliminary objections do not meet the test and legal standard set by the defunct Court of East Africa in the case of **Mukisa Biscuit Manufacturing Co. LTD versus West end Distributors Ltd** [1969] EA 696 which held that, preliminary objections should be raised on pure points of law. He said, the objection requiring ascertainment of facts suffers disqualification of being preliminary objection. To him, the raised objections do not pass such threshold set in the above cited authority because they are directly linked or forming material substance of the subject matter of the application and therefore do not suffice to be preliminary objections. In support, the case of **Yakobo Magoiga Gichere versus Peninah Yusuph,** Civil Appeal No. 55 of 2017 on substantive justice rather than dealing with technical issues was cited.

Lastly the Advocate argued that, the argument by Mr. Seif that the ruling was interlocutory is misleading and immaterial. Also that it is distinguishable in the circumstances of rule 50 of GN No. 107 of 2007 (supra). That the decision of CMA is revisable by this Court.

After going into both submissions of the Advocates, I think it is proper at the outset to state that, the argument by Mr. Ngole that the preliminary objection on interlocutory decision does not pass the test set

forth in the case of **Mukusa Biscuit Manufacturing Co. Ltd** (supra) is misconceived. Seeking revision on interlocutory order is purely a point of law to be accommodated within the meaning given in the above cited case law. In order to appreciate such misconception, I would like to be guided by the same case as far as the interpretation of what amounts to preliminary objection. It provides that:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is the exercise of judicial discretion."*

Commenting on what constitutes preliminary objection, the Court of Appeal in the case of **Olais Loth (Suing as Administrator of the Estate of the late Loth Kalama) versus Moshono Village Council**, Civil Appeal No. 95 of 2012 observed that:

> *"...a pure point of law does not arise if there are contentions of facts which are yet to be ascertained in a trial by furnishing evidence."*

In my view, it is vividly apparent that a person cannot apply for revision in interlocutory decision because it does not finally conclude the matter within the meaning of rule 50 of the Labour Court Rules, GN No.

107 of 2007. However, as rightly argue by Mr. Ngole the dismissal order given on condonation application does not fall within the ambit of interlocutory order. The reason is very obvious that it finally concluded the matter in the CMA. This means that, the right of the applicant from going to the following stage of filing the labour dispute against the respondent is completely curtailed by the order of CMA dismissing the application for condonation which could be revived via application for revision only. Had it been that the application for condonation was granted, in my view this would have amounted to interlocutory decision because it does not curtail the right of the parties to go to the next stage. In my considered view, the first point of preliminary objection was raised out of context and it was totally misconceived.

It might be awkward treating the matter which has been completely dismissed before the CMA for being filed out of time without good cause as interlocutory because once it was dismissed from the registry of the CMA at Arusha nothing pending remained thereat and therefore the only remedy available to the applicant is to file an application for revision. As it is more than often said, for the matter to fall within rule 50 of GN. No. 107 of 2007 (supra) it must have the effect of finally determining the dispute. In my opinion, the application for condonation which has been

dismissed for lack of good and sufficient cause, stands as such. Further more, it is worthy to note that, the application for revision which depends on the application for condonation to be granted first, is consequential as it depends on the grant of condonation for the same to be filed. Further to that, these two applications are filed through two different procedures. While revision application is preferred through CMA Form No. 1, condonation is filed through CMA Form 2. It can therefore not be termed as interlocutory for the same bearing different number from that of the application for revision. In my view, the cited case of **Equity Bank (T) Limited versus Abuhussein J. Mvungi** (supra) cited by the Advocate for the respondent is distinguishable in the circumstances of this case because, in the instant case the application for condonation was dismissed while in the cited case the application for condonation was granted. Therefore, there was a pending labour dispute in the CMA to determine the rights of the parties. In the event therefore, this preliminary objection must fail. It is hereby overruled.

The second preliminary objection was on the absence of award. That, what was given by CMA was not an award and therefore it does no qualify being revised. In essence, Mr. seif is arguing that revision can be made on an award and not any other orders while Mr. Ngole disputes

such argument. Unfortunately, Mr. Seif has not said what law or any principle contained in any precedent by the court of record which has been violated. No case law has been cited to backup the point raised in order to fortify the preliminary objection. Thus, the second preliminary objection also lacks merit. It is dismissed.

After determination of the preliminary objections, it opens the way out to go to the discourse of the main application. The applicant says that, the reason for the granting condonation before CMA was sufficient and constituted the good cause. Therefore, it was wrong for the CMA to dismiss it. The agued good cause is envisaged under paragraph 2.10 of the affidavit sworn by applicant himself which was adopted to form part of the application by Mr. Ngole. The paragraph reads:

> *"That, the mediator ignored the evidence that immediately after termination of my employment I suffered from depression (sonona) and diabetes, and received treatment at Agha Khan Health Center, and during my sickness I had sleepless and loss of memory symptoms* ***copy of the document to that effect is hereto attached as annexture MK-10****."*

That the delay of 23 days was ordinate which was caused by the applicant's sickness. To buttress the argument, Mr. Ngole cited the case

of **Richard Mlangala & 9 Others versus Aikael Minja & 3 Others,** Civil Application No. 160 of 2015 whereby the application for extension of time was granted on the ground of sickness and termed it to be a good cause.

Arguing against the application and in support of the CMA decision, Mr. Seif was of the view that, the applicant did not advance good cause before the CMA in order to convince it exercise its power of allowing the application for condonation. He is arguing that the two affidavits, one of the applicant's and the other of Herode Bilyamtwe gave two contradictory reasons for the delay. While that of the applicant was stating the reason for the delay to be caused by him being attending at Arusha Central Police, that of Mr. Herode Bilyamutwe was stating the reason to be caused by sickness. Also, that the notice of application for condonation which clearly states that the affidavit of the applicant shall be used in support of the application. Thus, that of Mr. Bilyamutwe was an afterthought. That, surprisingly, during CMA hearing the applicant argued the ground of sickness as the cause of delay instead of that appearing on the notice of application and which was not deponed in the adopted affidavit. That, in this application, the applicant does not provide explanatory facts as to the ground of sickness for lack

of documentary backup. To this, the cases of **Shenbilu Shefaya versus Omary Ally** (1992) TLR 245, **Edgar Fabian versus Ultimate Security Group Ltd** (2013) LCCD 45 and **Tanzania Postal Bank Dar es Salaam versus Thomas Edward Gambo** (2013) LCCD were cited.

On failure to account for each day of delay, Mr. Seif argued that it is a trite law that the applicant must account for even a single day of delay to the satisfaction of the court. Failure to account for even a single day of delay is considered to be fatal. To cement on the contention, he cited the cases of **Bushiri Hassan versus Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 CAT at DSM (unreported) and **Elifazi Nyatega & 3 Others versus Caspian Mining Ltd**, Civil Application No. 44/08 of 2017 CAT at Arusha (both unreported).

In rejoinder Mr. Ngole reiterated that according to the contents of paragraph 2.10 of the applicant's affidavit the reason for delay is sufficient. Therefore, he prayed this court to consider the ground of illness evidenced by annexure MK-10 as good cause to warrant granting of condonation. Also, he said that, the term good cause is relative depending on the circumstances of each individual case. To fortify his position, he cited the case of **Oswald Masatu Mwizarubi versus**

Tanzania Fish Processors Ltd, Civil Application No. 13 of 2010 (Unreported).

I have taken into consideration the submissions of both Advocates in support of and against the application. As correctly put by the applicant's Advocate the issue for determination is whether the applicant had good and sufficient cause for warranting condonation which would have been considered by the CMA. It is crystal clear that, the aground for condonation is seen under paragraph 2.10 of the affidavit sworn by the applicant. For easy reference the said paragraph is hereby reproduced. It provides:

> *"That, the mediator ignored the evidence that immediately after termination of my employment I suffered from depression (sonona) and diabetes, and received treatment at Agha Kan Health Center, and during my sickness I had sleepless and loss of memory symptoms* ***Copy of the document to that effect is hereto attached as annexure MK-10"***

The sworn cause of delay as manifestly taken me to the impugned ruling of the CMA in order to see what was considered to be the reason for delay advanced by the applicant in the CMA. At page 5 paragraph 2 of the challenged ruling the reason for delay was put as hereunder:

"In CMA F2 the applicant reason for delay is because he was attending at central police regarding allegations reported by the employer against him."

I also considered important to revisit the said CMA F.2. The said CMA F.2 at the part which requires the applicant to give reasons as to why the dispute was referred late the applicant wrote;

"Attending at central police regarding allegations reported by the employer against me."

However, in the case at hand, although the applicant pleaded the reasons for his delay to be criminal accusation which was facing him at the police station where he was forced to be reporting. He attached the application with medical chit which show that he suffered some diseases some of them being sleepless. During the hearing he asked the court to rely on the exhibit Vikas 2 which gives the reasons for delay was that he was He said

"Sababu za kuchelewa zimechangiwa na mwajiri aliyefanya applicant kuwa katika hali kutokumbuka vitu kwa wakati ikiwa ni pamoja na tarehe ya aliyoachishwa kazi....Tume ipitie kielelezo Vikas 2, na apewe nafasi"

Which when literally translated means that,

"The reasons for delay was contributed by his employer who caused the applicant to be in a state of forgetfulness including the date of termination.....I pray the Commission to pass through and rely on exhibit (annexture) Vikas 2 so that it can allow him chance to file his dispute."

Now the issue here is whether the applicant with no service of Advocate can be served by the good reasons not pleaded in the affidavit but the documents on it attached thereat and explained in the submission. In my considered view, as said, in this case, the applicant did not plead in the affidavit the ground of sickness. However, he annexed to the affidavit sworn and filed by Mr. Herode Bilyamutwe personal representative the medical chit with information proving that on 05th February 2022 and 12th February 2022 he was indeed sick and he was checked at Agha Khan Hospital and the report indicates as such. He was among other reasons, found to have acute stress which developed the state of forgetfulness.

It is a trite law that, sickness, if proved by evidence, stands as good cause for extension of time. See the case of **Charles Mkoloma vrs The Minister for Labour and 3 others,** Civil Reference No. 19 of 2004 CAT at DSM (Unreported). The evidence proved that, the applicant

was a foreigner who had no legal representation but was represented by the personal representative of own choice who according to CMAF2 chipped in after the application has been filed.

Then given the fact that he was alien to the legal system and without the legal representation and considering the nature of application, he was deserving in the interest of justice to be given the benefit of doubt and be allowed to file his labour disputes so that his case can be heard on merits.

All said and done, especially basing on the proof of sickness presented in the affidavit filed with the CMA, I find this application to be meritorious. It is hereby allowed for the reasons stipulated herein above. The applicant is hereby given 14 days within which to file his labour complaint before the CMA. This being a labour matter, I order no costs.

It is accordingly ordered.

DATED at **ARUSHA** on this 08th day of December 2022.

J.C. TIGANGA

JUDGE