

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION NO. 60 OF 2021

*(Originating from Commission for Mediation and arbitration No. CMA/ARS/ARS/
164/2021)*

CAROLINA PEMBA APPLICANT

VERSUS

POLYFOAM COMPANY LTDRESPONDENT

JUDGMENT

17/02/2022 & 28/02/2022

KAMUZORA, J.

This application was brought under the provision of section 91(1)(a) or (b) and (2)(a) or (b) or (c), 94(1)(b)(i) of the Employment and Labour Relations Act No 6 of 2004 and Rule 24(1)(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), 28(1)(a)(b)(c)(d)(e) of the Labour Court Rules, 2007, GN No. 106 of 2007. The Applicant in this application is seeking for the revision of the proceedings of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARS/164/2021 which dismissed the application for extension of time.

The brief background of the matter as may be depicted from CMA record is such that, the Applicant was employed by the Respondent and as per termination letter, she consented to her termination of employment due to health issues. Her claim against the Respondent is for unfair calculation of her terminal benefit including payment in lieu of notice, leave, severance pay and salary arrears all making the total claim of Tshs 443,000/=.

Before the CMA the Applicant filed CMA F1 showing her claims against the Respondent and CMA F2 praying for condonation of the late referral of a dispute to the Commission for Mediation and Arbitration. She also filed an affidavit stating the reasons of her lateness to refer her dispute on time.

When the matter was placed before the mediator, he directed for the counter affidavit to be filed as well as the reply to the counter affidavit. He also ordered for the filing of written submissions and a date for ruling was fixed. However, it was only the Respondent who filed the submission. The CMA made a decision in consideration of facts deposed in the Applicant's affidavit and what he referred to as final submission by the Respondent. In referring the Court of Appeal decision in **Daud Haga V Jenitha Abdan Machangu, Civil Case No. 1 of 2000**, the

CMA proceeded on dismissing the application on the ground that the Applicant failed to demonstrate the common principles in an application for extension of time.

The present application aims at examining the proceedings and ruling issued by the CMA which denied the Applicant's prayer and see if there was good reason to deny the Applicant the condonation of late referral of the dispute.

When the matter was due for hearing, it was the parties' prayers, and the court acceded that hearing of the application be by way of written submissions. As a matter of legal representation, the Applicant appeared in person while the Respondent enjoyed the service of Mr. Sindato Alphey Shao, learned advocate. Both parties filed their submissions as scheduled save that, the Applicant did not prefer to file a rejoinder submission.

Arguing in support of the revision application, the Applicant submitted that the CMA erred in law and fact by failing to give a consideration on the evidence, grounds and reasons presented before the CMA hence it held that there was no employment relationship between the Respondent and the Applicant.

Before I proceed with other part of the Applicant's submission, it is important that I respond to the above argument. What the Applicant has submitted is not what transpired at the CMA. The application before the CMA was for condonation of late referral of the dispute to the CMA. At no time the CMA issued a ruling that there was no employment relationship between the Applicant and the Respondent hence this line of argument is misconceived and will not be regarded by this court in reaching its decision.

Turning back to the submission by the Applicant in support of the application, it was argued that the CMA erred in relying on the aspect of degree of lateness and on the reason that the Applicant failed to account for each day of delay. The Applicant cited Rule 11(3) of the Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2007 which provides for 5 elements to be considered in application for condonation.

The Applicant went on and submitted that, it was impossible for her to account for each day of delay since she was never settled after the unfair termination. She explained that, on 10/11/2021 she went to seek for help at the labour office as well as at TUICO offices with no success. The other reason for her lateness is that she used a lot of time

and energy trying to settle the matter amicably. She cited the case of **Kabiruel J Mola Vs. Tanzania Zambia Railway**, Labour Revision No. 780/2019, **North Mara Gold Mine Limited vs. Wandiba Justus Sungura**, Labour Revision No. 10/2021 to support the argument that she had several reasons that prevented her from pursuing her right on time.

The Applicant submitted further that, the power to extend time is discretionary and the same should be exercised while in consideration of the natural justice which is the right to be heard enshrined under Article 13(6)(a) of the Constitution. She cited the case of **Mbeya Rukwa Auto Parts and Transport Ltd v Jestina George Mwakyoma**, Civil Appeal No. 45/2000 and **Sadiki Athuman v The Republic** [1986] TLR 235 to support the argument on the right to be heard.

The Applicant also submitted that the mediator erred by holding that the Applicant failed to demonstrate that she has overwhelming chances of success without hearing the matter on merit. That, the mediator failed to consider that the Applicant has genuine and undisputable claim against the Respondent which require his discretion to condone the matter first in order to open the door for the application to be heard on merit and determine the chances of success of the

Applicant. The Applicant insisted that, she was unfairly terminated because after being diagnosed with chest problems and Anaemia she was moved to another department which she could not be able to work due to her health condition.

The Applicant finalised by submitting that, since the proper procedure was not followed during her termination as contained under section 44 of the Employment and Labour Relations Act Cap 366 R.E 2019, then this application be allowed.

Responding to the submission by the Applicant Mr. Sindato submitted that, the Applicant was late to make her application at CMA for over 120 days and that is why she made an application for condonation. He submitted that, Rule 11(3) of GN No. 64 of 2007 provides for the requirement to be fulfilled for an application for condonation to be granted.

Mr. Sindato submitted that, the Applicant failed to prove the reason for her lateness as one of the requirements for late filing as there is no evidence presented. To buttress his submission, he cited the case of **Ezekiel Kiango v Lake Oil Co. Ltd**, Labour Revision No 369 of 2019.

On the degree of lateness Mr. Sindato submitted that, the Applicant was late for 120 days and had to account for each day of delay which the Applicant failed to do so. To cement on his submission, he cited the case of **Dar es Salaam City Council v S. Group Security Co. Ltd**, Civil Application No. 234 of 2015(Unreported)

On the issue of natural justice Mr. Sindato replied that, the Applicant filed an application for condonation at the CMA and parties were ordered to file their closing submission the Applicant never filed her submission. The counsel was of the view that the Applicant forfeited her right to be heard and therefore pray for the CMA award to be upheld.

Having considered the arguments made by the parties for and against the application, I now turn to the determination of the merit of this application. The law gives discretion for the court to grant any order or prayer sought if in the opinion of the court, it was necessary that the order be granted. Rule 11 (3) of the Labour Institution (Mediation and Arbitration) Rules GN No. 64 of 2007 requires a person seeking for condonation for referral of the dispute to CMA to set out the grounds for seeking condonation.

"An application for condonation shall set out the grounds for seeking condonation and shall include the referring party's submissions on the following-

- (a) the degree of lateness;*
- (b) the reasons for the lateness;*
- (c) its prospects of succeeding the dispute and obtaining the relief sought against the other party;*
- (d) any prejudice to the other party; and*
- (e) any other relevant factors."*

Before the CMA the applicant indicated 120 days as degree of lateness and pleaded ignorance of law and chances of success as grounds for seeking condonation. In my view, the law does not only require a party to plead those grounds but also to prove their existence. The condonation being sought is similar to applying for extending the time within which to refer the dispute to CMA out of time set by the law.

In **Mbogo Vs. Shah** [1968] EA 93, the court highlighted factor likely similar to those under Rule 11 (3) as above cited to assist the court in deciding to either grant or refuse to grant extension of time. It was held: -

"all relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay/ whether there is an

arguable case on the appeal and the degree of prejudice to the defendant if time is extended".

The Court of Appeal of Tanzania also formulated the guidelines to be considered in granting the extension of time in the case of **Lyamuya Construction Company Limited V Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported). The court held that: -

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged"*

Being guided by the above cited authorities, I have revisited the records of the CMA to satisfy myself whether the Applicant had advanced sufficient reason for the grant of the prayer sought.

The Applicant was late in referring the dispute to CMA for almost 120 days. That period in labour dispute is long period and the Applicant

was duty bound to explain the reason for such a delay as per the above cited cases.

Before the CMA, the Applicant stated various reasons as the cause of her delay in making referral to the CMA. The reasons as contained under CMA F2, the affidavit in support of the application and reply to counter affidavit are ignorance of law as she did not know what she was entitled to be paid, sickness as stated under paragraph 4 of the reply to the counter affidavit and that she was busy seeking assistance from TUICO office and labour offices.

On the ignorance of law as a reason for lateness to make an application before the CMA I agree with the finding by the CMA that, it is not a sound reason under the law. The Court of Appeal of Tanzania at Arusha in the case of **Tumaini Meng'oru V Israel Meilari**, Civil Application No. 126/17 of 2017 cited with approval the case of **Ngao Godwin Losero V. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), where the Court had this to say: -

"It has been held times out of number, ignorance of law has never featured as a good cause for extension of time (see, for instance, the unreported ARS. Criminal Application No. 4 of 2011 -Bariki Israel Vs. The Republic; and MZA. Criminal Application No. 3 of 2011 - Charles Salugi Vs. The Republic.) To say the least, a diligent and prudent party who is not properly seized of the

applicable procedure will always ask to be appraised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness."

For that, I need not to add any point but rather to insist on the holding that ignorance of law is not an excuse at all. Thus, the claim that the Applicant did not know of what she was entitled to be paid is baseless. The law under Rule 10 of the Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2007 requires a party aggrieved with unfair termination to institute the dispute within 30 days and any other dispute to be instituted within 60 days. The applicant had ample time and could have made follow up to know her rights and pursue the same before the lapse of that time.

On the reason for sickness, I understand that sickness if proved can be a ground for the court to exercise its discretion in granting the application. In this I refer the case of **Pimark Profesyonel Mutatack Limited Sirket V Pimak Tanzania Ltd & Another**, Misc. Commercial Case No. 55/2018 HC at Dar es Salam and the Court of Appeal decision in the Case of **John David Kasheka V the Attorney General**, Civil Application No 1/2012 (Unreported).

In my perusal to the record, I did not see if the ground for sickness was among the grounds raised in CMA F 2 before the CMA. The

Applicant at the CMA raised the issue of sickness in her reply to counter affidavit but no evidence or medical chit that was attached supporting the Applicant's sickness. I therefore find this argument baseless.

On the claim that the Applicant was making various follow ups at TUICO and Labour offices, I agree with the CMA that this reason is also unproved. There is no supporting evidence showing that maybe she wrote a letter to TUICO for assistance thus was unable to refer the dispute waiting for TUICO response. What is in record is a mere assertion which this court cannot rely upon to exercise its discretionary powers.

The Applicant in her submission before this court has touched on the fundamental right, a right to be heard under the Constitution of the United Republic of Tanzania. As rightly submitted by Mr. Sindato, counsel for the Respondent, the Applicant was given a right to be heard. After she had filed her condonation application through CMA F2, through a procedure adopted by the CMA, the Applicant filed the affidavit in support of condonation and the CMA ordered for filing of the counter affidavit and reply to counter affidavit and an order for submission by the parties. Apart from CMA F2, the Applicant deponed her reasons in the counter affidavit and reply to counter affidavit. She was also given

chance to file the submission but did not do so. However, the CMA considered the reasons put forward in the Applicant's affidavit and counter affidavit in deciding if they constituted good reasons warranting condonation. In that regard I do not see if the Applicant was denied any right to be heard.

I therefore find that the Applicant did not adduce sufficient reasons for the CMA to invoke its discretionary powers to allow the condonation for late referral of the dispute to CMA. The CMA decision is therefore sustained. This Revision application have no merit hence dismissed with no order as to costs.

DATED at **ARUSHA** this 28th day of February 2022.



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora".

D.C. KAMUZORA

JUDGE

