

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
LABOUR DIVISION
AT ARUSHA**

REVISION NO. 47 OF 2021

(Originating from Commission for Mediation and Arbitration Application No.
CMA/ARS/ARS/111/2021)

SETH ODWUOR OKOTH.....APPLICANT

VERSUS

WELL WORTH HOTELS AND LODGES LTD.....RESPONDENT

JUDGMENT

21/03/2022 & 11/4/2022

GWAE, J

I am asked to determine correctness, propriety or legality of the decision of the Commission for Mediation and Arbitration of Arusha at Arusha (Commission) which dismissed the applicant's application for condonation on the ground that, he outrageously failed to meet the threshold required under Rule 11 (3) (a)-(e) of the Labour Institutions, (Mediation and Arbitration) G.N.64 OF 2007 including his failure to account for delay of 42 days.

In his application for enlargement of time to file a dispute against the respondent Well Worth Hotels and Lodge Ltd, the applicant who, was employed by the respondent since 23rd July 2020 and terminated on the 29th January 2021 for his failure to renew his work permit, stated that his

decree of lateness was nine days and reasons for the delay being layperson and endless promises as well as prospects of success.

The applicant is now before this court seriously challenging the verdict of the Commission delivered on the 31st May 2021 on the grounds that; the mediator miserably considered the respondent's reply to the applicant's written submission in support of his application for the sought condonation that was either not filed at all or filed outside the Commission scheduling order, that the mediator ignored the evidence or reasons given in support of the application for extension of time and failure to consider points of illegalities.

As was the case before the Commission, the applicant's application was disposed of by way of written submission after the court had granted the leave to the parties' advocates, namely; Mr. Jeff George and Mr. Yoyo Asubuhi who appeared for the applicant and respondent respectively. I shall however take into consideration of the parties' written submission in the course of determining this application by confining myself in the following issues

1. Whether the mediator was justified in relying to the respondent's written submission opposing the applicant's application for condition

2. Whether the applicant 's reasons for the delay constituted good cause justifying the Commission to condone the dispute

In **the first issue**, the applicant's counsel is found vigorously attacking the act of the mediator to rely on the respondent's written submission which was not filed nor was the copy of it served to the applicant. He embraced his argument by citing cases of **Haleko vs. Harry Mwasaijala**, DC, Civil Appeal No. 16 of 2000 (unreported) where it was held that a failure to file written submission inside the time prescribed by the court order was inexcusable. He finally argued this court to consider that the applicant's application for condonation went unopposed since he did not even file his counter affidavit. In this first issue the respondent did not respond to it, thus he skipped it either negligently or intentionally.

Examining the Commission records, it is glaringly clear that on the 9th April 2021, the matter was placed before the mediator who granted leave for the application to argued by way of written submission and made clear scheduling orders, that, the applicant was to file his written submission on 15/4/2021 whereas the respondent's written submission was to be filed on the 19th April 2021 and not 21st April 2021 as per the submission by the applicant's counsel which the date fixed for filing a rejoinder.

However, the record reveals that on 23rd April 2021, the respondent filed a letter requiring extension of time within which to file a reply to the applicant's written submission followed by the respondent's reply to the applicant's written submission dated 4th May 2021.

My careful scrutiny of the records of the Commission, envisages that the Commission never granted leave for the respondent to file his reply to the applicant's written submission outside the period set forth for filing the respondent's reply nor record whatsoever in file. The respondent's reply to the applicant's written submission was therefore wrongly filed as no leave of the Commission that was granted. I am alive of the principle that failure to file written submission is equal to failure to prosecute an appeal or application as was rightly stressed in **Hidaya Zuberi vs. Bongwe Mbwana** PC. Civil No. 98 of 2003 where this court at Dar es salaam held;

"The practice of filing submission is equivalent to schedule for hearing. Therefore, failure to file submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant's consequence of failure to file written submission are similar to those of failure to appear and prosecute or defend as the case may".

In our case, the filing of the respondent's written submission on 4th May 2021 was not in compliance with the Commission schedule dated 9th April 2021 nor is there any proof as to the grant of leave to file outside the previously scheduling order which was not vacated. For the reason explained herein above, Hon. mediator ought not to have considered it as the same was to be expunged as I hereby do. It follows therefore, the mediator wrongly relied on the respondent's reply filed outside the prescribed period by the Commission. Hence, the mediator ought to have looked at the applicant's written submission to thoroughly ascertain if he had advanced sufficient cause for his delay without considering the respondent's reply.

I nevertheless find that the applicant's assertion that the respondent did not file notice of opposition and his counter affidavit to be unfounded since the same is evidently seen to have been filed on the 12th March 2021 as ordered.

Turning to **the 2nd issue**, whether the applicant's reasons for the delay constitute good cause justifying the Commission to condone the dispute, from outset, I find the mediator wrongly held that the decree of lateness was 42 days (See page 9 of the typed ruling) as opposed to applicant's indication of 9 days delay. I am holding so simply because it is vividly clear that the applicant's application for condonation was filed on

the 12th March 2021 whereas termination was of 29th January 2021. It follows that, the time to file the dispute started from 30/1/2021 to 11th March 2021, hence, there are forty-one (41) days from the date of termination to the date of filing of the application for condonation but 30 days must not be considered as days of delay. Delay of delay must be outside the statutory days within which to do act or take an action. As per Rule 10 (1) (2) of the GN. 64 of 2007, the applicant was to refer his dispute within 30 days from the date of termination to the date of reference. Therefore, dates of delay started to commence from 1/3/2021 and not on the 12th January 2021. In my considered view, a day of delay starts immediately after expiry or lapse of the statutory period or court order fixing a date for doing an act. The delay of 11 days to my best understanding is not inordinate. Therefore, had the mediator properly directed his mind by excluding the prescribed period within which to refer the dispute to the Commission, he would have not held that the delay was of 42 days which in his considered opinion was fatal and unjustified.

I have however agreed with the Hon. Mediator that, the reason advanced by the applicant of being layperson or ignorance of the law does not constitute sufficient cause. Moreover, mere assertions that there were promises by an employer does not warrant the Court or Commission to extend time unless proved and or forming part of an acknowledgment of

the claims (See 27 & 28 section of the Law of Limitation Act, Cap 89, R. E. 2019) but there are promises if proved, they may constitute good cause for condonation.

I am alive of the decision in **Fidelis Fernandes vs. National Insurance Corporation (T) Ltd and PRRC**, Civil Case No. 26 of 2006 as quoted also in where it was stated by this court that plaintiff's suit will be barred by limitation notwithstanding that the defendant betrayed him into permitting the time to elapse on fruitless negotiation and the fact that promises or negotiations out of the court cannot be regarded as good cause as was correctly emphasized in **Leons barongo vs. Sayon Drinks Ltd**, Lab. Division, 182 of 2012 3/5/2013. The applicant's assertions that, the respondent kept promising to pay the applicant but since then he had not paid his due and taking into account of the said what sup conversations with the respondent's Director one Mihail through his number (See page 3 of the typed ruling.

I am further of the considered opinion that, even by holding that the applicant did not advance any sufficient reason for unfair termination yet it is undoubtful if the claim of arrears (6000 USD) was out of time (See Referral Form No. 1 and para.6 of the applicant's application for condonation where he claimed to have not been fully his salary for December 2020 and not paid at all for January 2021 salary). The claimed

of arrears really requires ascertainment of the asserted facts during arbitration taking into account the claim of arrears follow under category other disputes which may be filed within sixty days.

I am similarly of the considered view that, the applicant's written submissions before this court or in the Commission cannot form part of evidence capable of being relied and acted upon. I am holding so merely for; the applicant did not state issue of illegality in affidavit duly filed in the Commission except in his written submission to this court. That is wrong in law. I would like to subscribe my holding in **Hotel Travertine Limited and two Others vs. National Bank of Commerce Limited** [2006] TLR 133 where the Court stated that;


"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."

I am not unsound of the fact that I am bound by a chain of judicial decisions such as **Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 185, **TanESCO & 2 others v. Salum Kabora and Mbogo vs. Shah** (1968) EA, referred by the applicant's counsel, however I find that I am not supposed to be curtailed by this point since it was not pleaded in the applicant's affidavit before the Commission as well as to this court.

Basing on the foregoing reasons, this application is granted, the decision of the Commission is hereby quashed and set aside, for interest of justice, the applicant's dispute is condoned, the same be filed within **fourteen (14)** days from the date of this judgment. Each party to bear its costs

It is so ordered




M. R. GWAE,
JUDGE
11/04/2022