IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

REVISION APPLICATION NO.103 OF 2020

(C/F Labour Dispute No.CMA/ARS/MED/504/19 at the Commission for Mediation and Arbitration at Arusha)

SENZIGHE TWAMZIHIRWA GIDION *(As Administrator of the Estate of the late Twamzihirwa Chaligha)*.....**1ST APPLICANT**

PETER MNGARA.....**2ND APPLICANT**

VS

MUKIDOMA SCHOLL COMPANY LIMITED.....**1ST RESPONDENT**

MARIADO SECONDARY SCHOOL.....**2ND RESPONDENT**

MATTO AND R. INVESTMENT.....**3RD RESPONDENT**

JUDGMENT

Date of last order:29-4-2022

Date of judgment:31-5-2022

B.K.PHILLIP,J

This application is made under the provisions of Rule 91 (1) (a), (2) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act No.6 of 2004 , Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) , 28 (1) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007. The applicants pray for the following orders;

i) This Honourable Court be pleased to call for and examine the records of the Ruling made on the 29th June , 2020, in Labour Dispute No. CMA/ARS/MED/504/2091,by the Honourable Mediator Lomayan Stephano for the purpose of satisfying itself as to the correctness , legality or propriety of the proceedings and orders made therein, revise and set aside the same, and allow the Applicants to file their labour dispute out of time as there are points of law need to be determined.

ii) That this Honourable Court be pleased to allow the Applicants to file their complaints before the Commission for Mediation and Arbitration at Arusha as in the application for condonation No. CMA/ARS/MED/504/ 2019, as there are points of law need to be determined thereto.

iii) That any other relief (s) this Honourable Court deems fit and just to grant

Each Applicant swore an affidavit in support of the application. The application is contested. All respondents filed counter affidavits in opposition to the application. A brief background to this application is that the applicants filed the aforementioned Labour Dispute No. CMA/ARS/MED/504/ 2019 at the Commission for Mediation and Arbitration at Arusha, (Henceforth " CMA") for claims for unpaid salaries together with an application for condonation since the time for filing their claims had already expired. The Arbitrator heard the application for Condonation and at the end of the day he dismissed it for lack of merit. Aggrieved by the

Arbitrator's decision, the Applicants lodged the instant application to challenge the same.

I ordered the application to be disposed of by way of written submissions.The applicants were represented by the learned Advocate Lecktony L. Ngeseyan. The learned Advocate Matuba Nyirembe appeared for the 1st respondent. The 2nd and 3rd respondents were represented by the learned Advocate Yoyo Asubuhi.

Mr. Lecktony starting his submission by adopting the contents of the applicants' affidavits.He went on submitting that in an application for extension of time the Court is supposed to consider three elements , to wit; accounting for each day of delay,the reasons for the delay and existence of a point of law which needs to be addressed, if any.He contended that in his decision the Arbitrator did not consider the third element. He made his decision basing on two elements only. Mr. Lecktony raised the following arguments;

One, that the Arbitrator did not consider the fact that the applicants' complaints were based on their constitutional rights for remuneration and that are entitled to be paid their remunerations by the respondents who are their ex-employers. He cited Article 23(1) (2) of the Constitution of the United Republic of Tanzania of 1977 (Henceforth "the Constitution") . The applicants have a right to be heard. By dismissing the application for condonation, the Arbitrator denied them their right to be heard. To Cement his argument he cited Article 13 (6) of the Constitution and numerous of cases which I cannot cite all of them here, among them are

;**Abbas Sherally and Another Vs Abdul Sultan Haji Mohamed Fazalboy, Civil Application No.33 of 2002,** (unreported), **Bank of Tanzania Vs Said A. Marinda and Others , Civil Application No. 74 of 1998 (CA)** (unreported) and **Kalunga and Company Advocates Vs National Bank of Commerce, Civil Application No. 124 of 2005** (unreported) .

Two, that the Arbitrator did not consider the fact that the applicants through their salaries were supposed to pay Government taxes, to wit; pay as you earn ("PAYE") which is government revenue. By dismissing the application for condonation the Arbitrator prevented the payment of the said tax. He cited the provisions of section 81(1) and paragraphs 1 and 4(a) of the Income Tax Act (Cap 332, R.E 2019).

Three, he pointed out that the respondents had issued cheques for payment of the applicants' salary arrears but the same were dishonoured.The Arbitrator failed to take into consideration that issuing cheques which end up being dishonoured is a criminal offence under the provisions of section 332B (3) of the Penal Code, Cap 16 R.E 2019.

In addition to the above, Mr. Lecktony contended that Mr. Yoyo Asubuhi participated in the mediation of the disputes between the parties before the same was referred to the CMA, hence he has conflict of interests. He referred this Court to Annextures " TP -3" (receipt for part payment of the applicants salaries) to the applicants' affidavit. He was of a strong view that Mr.Yoyo is not supposed to appear in this matter and the fact that he appeared at the CMA for the 2nd and 3rd respondents is a sufficient

ground for this Court to set aside the CMA's ruling. Moreover, he pointed out that the 2nd and 3rd respondents did not file a notice of opposition as required by the law.

In concluding his submission Mr. Lecktony insisted that if there is a point of law to be considered, extension of time has to be granted regardless of the applicants' failure to account for the days of delay.He cited the case of the **Principal Secretary, Ministry of Defence and National Service Vs Devram Valambhia (1992) TLR. 185** and **Mbatian Kibori Vs Mbaraka Idd , Misc. Land Case Application No.110 of 2017** (unreported) and prayed this application to be granted.

In rebuttal Mr. Nyirembe submitted as follows;That the points raised and discussed by Mr Lecktony in his submission were neither stated in the affidavits in support of this application nor in the application for condonation that was filed by the applicants at the CMA. The Arbitrator's decision cannot be faulted for not considering points/grounds which were not pleaded and tabled before him. Granting the application for condonation was within the Arbitrator's discretional powers.It is a trite principle of law that the applicant is required to account for each day of delay.Even a delay for a single day has to be accounted for. The applicants failed completely to account for 1140 days of delay. The applicants alleged that they were pursuing their claims before the District Commissioner's office (Henceforth " DC's offices) at Arumeru, but the document which they tendered before the CMA was not sufficient enough to prove their assertions. Even if the applicants would have proved that they were pursuing their claims before the DC's office, trying to settle a claim

through political forums/ avenues has never been a sufficient reason for extension of time.To bolster his arguments Mr. Nyirembe cited the case of **Bushiri Hassan Vs Latifa Lukio Mashayo , Civil Application No. 03 of 2007** (unreported), in which the Court held that;

"A delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken"

Moreover, Mr. Nyirembe argued that the Arbitrator took into consideration all the necessary factors required to be considered while dealing with an application for extension of time.He referred this Court to the case of **Mbogo and Another Vs Shah (1968) EA 93.**

Mr. Nyirembe was of the view that looking at the length of delay in the applicants' application for condonation, it is obvious that there was inordinate delay and the applicants did not exhibit any diligence in prosecuting their case.

In conclusion Mr. Nyirembe contended that the applicants were accorded their right to be heard .The cases cited by Mr. Lecktony in respect of the right to be heard are irrelevant. He urged this Court to dismiss this application.

On his part Mr. Yoyo submitted as follow;That the matters branded by Mr. lecktony as serious points of law were not brought to the attention of the Arbitrator, thus they cannot be raised and entertained at this stage. This Court cannot fault the decision of the Aribtrator basing on issues which he was never called upon to adjudicate. Even if this court opts to consider

the points of law raised by Mr.Lecktony, the same are devoid of merit. The claimed right to remuneration cannot be enforced without following the rules of procedure.The law provides for time limit for lodging claims be it for remuneration or others. At the CMA the applicants were accorded the right to be heard . The applicants claims were for payment of outstanding salary arrears, originaly payable by Mukidoma School and were transmitted to Mariado School after the transfer of the school in 2014. There was no claim concerning the right to be heard.The argument on none payment of tax is misplaced. The CMA does not deal with tax matters .The case cited by Mr. Lecktony are irrelevant in this matter and his arguments on the dishonoured cheques have been made out of context as the cheques have nothing to do with the delay of more than 1000 days in lodging the applicants' complaints at the CMA.

Mr. Yoyo contended that the Arbitrator exercised his discretion judiciously. He considered the explanations and material tabled before him.The applicants was supposed to bring before the Arbitrator sufficient explanations for the Arbitrator to exercise his discretion in their favour. To cement his arguments he cited the case of **Ratma Vs Cumarasamay and another (1964) 3 ALL ER 933** and **Mbogo Vs Shah (Supra).** It was Mr. Yoyo's contention that the applicants failed to account for the inordinate delay of more than 1000 days.

Moreover , Mr. Yoyo was emphatic that no any point of law that was raised at the CMA which could move the Arbitrator to grant the application for condonation. It is apparent on the records that the applicants alleged that the delay was prompted by the respondents' repeated

promises to pay them and there were pending proceedings before the DC's office in Arumeru in respect their claims.

Mr. Yoyo refuted Mr. Lecktony's assertion that he has conflicts of interests in this matter. He submitted that no document whatsoever was tendered at the CMA worth demonstrating that he has conflict of interests in this matter. The only document that was tendered at the CMA which bears his stamp as a commissioner for oaths is a receipt titled " Stakabadhi " . He signed that document in his capacity as Commissioner for oaths. He contended further that in the affidavit that was filed at the CMA he has been mentioned as the Company Secretary of the 2nd and 3rd respondents. Thus , he has the capacity to represent the 2nd and 3rd respondents in this matter and has no conflict of interest as presented by Mr. Lecktony.

With the regard to Mr. Lecktony's argument that the 2nd and 3rd respondents did not file the notice of opposition as required by the law, Mr. Yoyo submitted that the provisions of Rule 24(4) of the Labour Court Reules G.N. No. 106/2006 gives option to the respondent to file either notice of opposition or counter affidavit or both. In this case the 2nd and 3rd respondents filed a joint Counter Affidavit in compliance with the provisions of rule 24(4) G.N.No.106 of 2007. Mr. Yoyo implored this Court to dismiss this application.

In rejoinder, Mr. Lecktony reiterated his submission in chief and submitted that both Mr. Nyirembe and Mr. Yoyo failed to grasp the legal position that a point of law can be raised at any stage during the trial or

at appellate stage.He referred this Court to the case of **Wakt & Trust Commissioner (*as administrator of the estate of the late Zawadi Binti Said*) Vs Abbas Fadhili Abbas and Registrar of Documents , Civil Appeal No. 11 of 2001** and **Christina Alexander Ntonge Vs Limi Mbogo, PC Civil Appeal No. 11 of 2017** , (both unreported). He insisted that Mr .Yoyo has conflict of interests in this matter. The receipt which he accepted that it bears his stamp proves that he participated in the mediation of the dispute between the parties before the same was referred to the CMA. That receipt states clearly that it was for the payment of part of the salary arrears the respondents owe the applicants.

I have given due consideration to the submission made by the learned Advocates which are truly appreciated. It is a common ground that the period of delay is 1140 days. The reasons for delay adduced by the applicants at the CMA were; That the respondents kept on promising to pay them the claimed amount , thus they were awaiting for the respondents to full fill their promises, but in vain. They had presented their complaints before the DC's office in Arumeru where they were being assisted to resolve the dispute and that their case have overwhelming chances of success. In his ruling the Arbitrator ruled out that the applicants failed to give good cause for the delay.

It is noteworthy that in his submission Mr.Lecktony admitted that the points of law he has raised in this application were not raised at the CMA .However, he contended that points of law can be raised any time and at any stage , even at the appellate Court. Let me say outright here that I agree with Mr. Lecktony's contention that points of law can be raised at

any stage, but he missed an important aspect of the said position of the law that is, a point of law that can be raised at any stage should be on jurisdiction. (See the case of **Mwanaisha Rashid Vs Meri Dede and Odero Dede, PC Civil Appeal No.14 of 2021** (unreported). With due respect to Mr. Lecktony, none of the points of law he has raised is on jurisdiction and of course, being an advocate for the applicants he is not expected question the jurisdiction of the CMA. Thus, Mr.Lectony's arguments on the points of law is total misconceived.

I am alive that in an application for extension of time when there are issues alleging illegality of the decision intended to be challenged the Court may grant extension of time even when no good reasons for the delay have been adduced so as to give a room for rectification of the alleged illegality if any.However, the alleged illegality has to be apparent on the face of the record. With due respect to Mr. Lecktony, the above stated principle of law cannot be applicable in the instant application since at the CMA there was no any impugned decision on which the applicants could have alleged that there is an issue on illegality on the face of the record. The application for condonation cannot be equated to an application for extension of time to challenge a Judgment / Ruling or Court Order. Thus the case of **Principal Secretary , Ministry of Defence and National service** (Supra) has been referred to out of context. I entirely agree with Mr. Yoyo and Mr. Nyirembe that Mr. Lecktony's arguments on the right to be heard , none payment of government taxes and the cheques have been raised out of context.The applicants were accorded the right to be heard. They tendered all their documentary evidence and the

same were taken into consideration by the Arbitrator. So , the appellants cannot be heard now complaining that they were not heard. With due respect to Mr. Lecktony , his contention that by dismissing the application for condonation the Arbitrator denied the applicants their right to be heard is misconceived since it is not automatic that an application for condonation must be granted.That is why the applicant has a task of convincing the Arbitrator to grant the application by adducing good reasons for the delay. If the applicants fail to adduce good reasons for the delay the application for condonation cannot be granted. The applicants had a right to institute their complaints at the CMA , but they failed to file the same within the time prescribed by the law. In short, the right to be heard as provided in the Constitution and discussed in the cases cited by Mr. Lecktony in his submission cannot be applied in this case in a manner presented by Mr. Lecktony.

Likewise the issue on the none payment of taxes in the form of PAYE and the dishonored cheques cannot be dealt with in an application for condonation . The same would be dealt in the determination of the merit of the applicants' complaints if the application for condonation would have sailed through.

Mr. Lecktony did not challenge the findings of the Arbitrator that the applicants failed to account for 1140 days of delay. Indeed, in this matter there is inordinate delay and the reasons adduced for the delay are not good enough for granting the extension of time sought.

Moreover, upon perusing the CMA records I have not found any sufficient evidence to prove that Mr. Yoyo have a conflict of interest in this matter. Mr. Lecktony's contention that the 2nd and 3rd respondents did not contest the application on the reason that they did not file the notice of opposition has been raised as an afterthought and having in mind the findings I have made herein above, the same is not worth to be considered.

In the upshot, no sufficient reasons have been adduced to move this Court to revise the decision of the CMA. Thus, this Application is dismissed.

Dated this 31st day of May 2022

B.K.PHILLIP

JUDGE.