

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 443 OF 2022

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 11th day of November 2022 in Labour Dispute No. CMA/DSM/ILA/286/2022/211/22 by (Abdallah: Arbitrator)

SARAH CHAMBO..... APPLICANT

VERSUS

MARCIUS STEVEN.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

02nd May 2023 & 9th May 2023

This Revision application emanates from the ruling of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) in **Labour Dispute No. CMA/DSM/ILA/286/2022/211/22**. The prayers contained in the Chamber summons are: -

1. That this Honorable Court be pleased to call for the record of the Commission for Mediation and Arbitration at Dar es Salaam, in Labour Dispute No. CMA/DSM/ILA/286/2022/211/22, delivered on 11th Day of November 2022 and revise it on the ground that there has been an error material to the merit of the subject matter involving injustice.

2. Any other necessary orders the Court may deem just and fit to grant.

The applicant was an employee of the Respondent. They encountered misunderstanding which culminated into a labour dispute which was lodged in the Commission for Mediation and Arbitration on **27th May 2022** where the applicant was claiming for unfair termination by the employer alleging it to have been done on **23rd December 2021**. Being out of time, the Applicant lodged the complaint in the CMA with an application for condonation. The condonation application was determined by the Arbitrator who dismissed it on the reason that there was no good cause adduced by the applicant for the matter to be condoned. Aggrieved by the ruling issued by the Commission on **11th November 2022**, the applicant filed the present application for revision.

The application is supported by the applicant's affidavit in which the Applicant explained some facts which she thinks might constitute reasons which caused the delay in lodging the complaint in the CMA. She traced the beginning of tension which led to the dispute from January 2020 alleging it to be the time when the Respondent started not to pay her salaries. She explained further that due to that alleged non-payment of salary, the matter was reported to the Labour Officer

whereby the Compliance Order was issued to the respondent to pay the salaries whereby till **June 2020** few employees were paid, excluding herself. It was further alleged in the applicant's affidavit that she was not paid her salaries for two years, as she waited for the fulfilment of the Respondent's promise to pay which was done by the Managing Director, Marcius Steven basing on reason that there was no money to pay by that time. According to the Affidavit, in **May 2022** the Applicant was told by the respondent not to disturb him which prompted the applicant to lodge the complaint in the CMA on **27th May 2022** claiming for unfair termination done on **23rd December 2021**.

The affidavit has raised three legal issues which are: -

- i. Whether the arbitrator erred for failure to take into consideration that non-payment of salaries and terminal benefits as a sufficient reason to grant condonation.
- ii. Whether the arbitrator erred for failure to take into consideration that promise to pay is one of the sufficient reasons of granting condonation.

- iii. Whether the arbitrator erred for failure to take into consideration that by not granting condonation the applicant's right will be prejudiced.

This application was disposed of by way of written submission, whereby applicant drew and filed her own submissions, while Advocate Roman Selasini Lamwai drew and filed the respondent's submissions.

In her submission, the applicant having adopted the affidavit in support of the application to form part of her submission, started to argue the first ground as to **whether the arbitrator erred for failure to take into consideration non-payment of salaries and terminal benefits as a sufficient reason to grant condonation.** She submitted that non-payment of salaries amounts to violation of law (illegality) which is a sufficient reason for granting of extension of time. She added that the act of the respondent of not paying her salary is contrary to **Section 27 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019** which makes it mandatory for an employer to pay terminal benefits to an employee the moment the employment contract is terminated.

The Applicant further submitted that in this matter the respondent did not pay the applicant's salaries for almost two years including

terminal benefits of her termination something which in her view justifies illegality which attracts extension of time. Supporting his assertion, he cited the case of **Joy L. Chidosa versus DAWASCO, Revision No. 377 of 2018, High Court of Tanzania, at Dar es salaam (unreported)** and the case of **Salma Mohamed and 12 others versus Fidahusseini & Company Misc. Labour Application No. 116 of 2011 High Court of Tanzania, at Dar es salaam (unreported)** and **Transport Equipment versus Valambia and A.G (1993) TLR 91.**

On the second ground as to whether the arbitrator erred for failure to take into consideration that promise to pay is one of the sufficient reasons for granting condonation the Applicant submitted that the employment relationship is based on "mutual trust and confidence" where all parties to the contract of employment are supposed to be honest and to trust each other. She is of the view that in such relationship the Applicant was right to trust her employer that she will be paid and the same warranted extension of time.

As to whether the arbitrator erred for failure to take into consideration that by not granting condonation the Applicant's right will be prejudiced, the Applicant stated that she is the one who will be prejudiced if extension of the time (condonation) is not

granted, because if extension is refused, she will lose her two years salaries and terminal benefits, which she was promised to be paid by the Respondent when he gets money. She thus prayed for the CMA award to be revised.

In reply to the first issue as to whether the arbitrator erred for failure to take into consideration non-payment of salaries and terminal benefits as a sufficient reason to grant condonation, Mr. Lamwai challenged the raising of this ground at this stage of revision. He submitted that illegality has never been listed as a reason for late filing of the labour dispute before the arbitrator. He stated that according to CMA F2 which is the application form for condonation, the reason for delay seems to be a technical delay where the employer at all times was promising the applicant to hold the claim, as she will be paid soon. According to Advocate Lamwai, the reason of illegality was not presented as submitted in this application.

Mr. Lamwai disputed the averment that non-payment of remuneration constitute illegality to warrant extension of time. In his view, it rather constitutes a claim (cause of action) against the Respondent which ought to be filed within the specified time provided by the law.

According to him, **Valambi's Case** (*supra*) cited by the applicant is distinguishable in the present circumstance, as before the CMA when the applicant herein made the application there was no any decision being challenged as stated in the case of VALMBIAN'S, where there was an award issued by the Commission. He is of the view that the errors of the law should be clear on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process. He added that invoking section 27 (1) and 44(1) of the Employment and Labour Relations Act, is not appropriate as it requires evidence to prove as to whether the applicant was employed by the Respondent and if yes whether she was paid or not paid the salaries and benefits. In his view, the existence of such long argument contravenes the principle developed in VALAMBI'S CASE.

Elaborating on the application of illegality, Advocate Lamwai cited the case of **Lyamuya Construction Company Ltd V. Board of Registered Trustee Of Young Women's Christian Association Of Tanzania, Civil Application No. 2 of 2010 Court of Appeal of Tanzania at Arusha (unreported)**. According to him, for technical delay to stand as a ground for extension of time, there must be an original appeal lodged in time but subsequently terminated on

account of incompetence or other grounds. He cited the case of **D.N Bahram Logistics Ltd and Another versus National Bank of Commerce Ltd and Another**, Civil Reference No. 10 OF 2017 CAT Dar es Salaam (unreported). He added that the arbitrator was right in his findings because the applicant's CMA F1 was factored by negligence on his party which cannot amount to sufficient reason to warrant an order for extension of time contrary to **Rule 11 (1) and (2) of the Labour Institutions (mediation and Arbitration) rules G.N 64 of 2007**.

On the second issue regarding promise to pay, Advocate Lamwai submitted that for this to constitute sufficient reason, there should be such a proof of the employer's promise to pay something which the applicant failed to prove. Without proof he is of the view that this ground of revision lacks merits.

On the third ground as to whether the arbitrator erred for failure to take into consideration that by not granting condonation applicant's right will be prejudiced, Advocate Lamwai insisted that discretion of the court to grant extension of time should be exercised judiciously as per the cited case of ***Lyamuya Construction (supra)***. According to him, the case has established a guidance for judicious exercise of this court discretion for extension of time which requires

consideration of such factors as: the Applicant must account for all the period of delay, the delay should not be inordinate, the Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and that if the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged. According to Advocate Lamwai, the issue of applicant being prejudiced is not among the listed factors for consideration in granting extension of time. In his view the present matter does not fit to factors in LYAMUYA'S CASE.

Having considered the parties submissions and their sworn statements, I now consider the merit of the application. I have gone through the case laws cited by the parties and find the principles cited there in to be relevant in this matter. I am grateful for the research well done by both parties.

In the first issue, the Applicant called nonpayment of salary and terminal benefits as matters which constitute illegality which justifies extension of time. I agree with the Applicant that payment of salaries and terminal benefits constitute the subject matter of the cause of action which should be only competent in court upon extension of

time sought. It cannot form a ground for granting of extension of time.

Regarding the second ground on failure to take into consideration the employer's promise to pay, the Applicant's assertion is that employment contract is based on mutual trust and confidence. On the other side, the applicant is of the view that, there should be a proof to establish that there was such a promise. None of the parties submitted any authority to support her contention. However, I am borrowing a leaf from my leaned sister the late Hon. Rweyemamu J as she then was in the case of **Nyanjugu Sadiki Masudi vs. Tanzania Mines, Energy, Construction and Allied Workers Union (TAMICO) [2013] LCCD 185** where she held;

"In view of my said position, I find decisions relied on by the Mediator to be distinguishable and decide that in the circumstances of labour practice the Mediator's decision was contrary to law. It is my conclusion that, in labour law and good practice, parties' efforts for amicable settlement of disputes are encouraged and recognized, as such, such efforts constitute good cause for delay for the period the parties were engaged in such endeavor."

From the above authority, promise to pay may constitute ground for condonation in some instances.

In this matter, I have read the Applicant's affidavit filed in the CMA to support the application for condonation. The affidavit clearly indicates that the Applicant was promised by the Respondent that she will be paid with her salaries and terminal benefits something which she believed and continued to make follow up on, until when she discovered that the promises were not real. In my view, an affidavit constitutes evidence. I could not find any counter affidavit in the CMA to negate the allegations in the affidavit and the arbitrator did not make any comment on this affidavit rather than stating that the Applicant did not prove existence of promise to pay. In my view, the arbitrator had to analyse the evidence deponed in the affidavit before demanding documentary evidence.

As well in the affidavit in support of this application, paragraph 3.4 specifies the date on which the promise to pay was made, which is **23/12/2021** and clearly mentioned the name of the Managing Director who made the promise. To counter it, the deponent of the counter affidavit made a general denial of such kind of arrangement but challenged it for not having been proved in the hearing as the matter did not go on merit in the CMA. Proving this fact by deponing

an affidavit specifying the exact date and name of the responsible person should be a proof for the purpose of justifying extension of time. Further evidence may be required when the dispute is heard on merit but for the purpose of evidence to justify condonation, I have view that the information deponed in the affidavit is sufficient.

The Applicant claimed in both affidavits in the CMA and the affidavit in this Application at paragraph 3.5 that in **May 2021** she discovered that the promises were not real when the Managing Director told her not to disturb him anymore. This fact is not specifically countered by the Applicant. It was within the same **May 2021** when the labour dispute was lodged. In my view, the applicant took action timely after discovering that the employer's promises were not real. Taking into account the above said, it is my view that, to the extent of a prove required for granting of condonation, the affidavit sworn by the Applicant has sufficiently demonstrated how promise to pay caused the delay to lodge the matter in the CMA. It is my considered opinion that this is a fit case to allow condonation basing on the ground of promise to pay as a cause of delay. I therefore differ with the arbitrator's holding that there were no sufficient grounds to condone the late filing of the Labour Dispute in the CMA.

The above said creates a sufficient reason to answer affirmatively the issue as to whether there are sufficient grounds to revise and set aside the ruling of the CMA. Consequently, I quash and set aside the CMA Ruling in **Labour Dispute No. CMA/DSM/ILA/286/2022/211/22** and allow condonation of late filing of the said labour dispute. I make an order that the record be reverted to the CMA for the said **Labour Dispute No. CMA/DSM/ILA/286/2022/211/22** to proceed with hearing on merit before the arbitrator. The application has merit, and it is allowed. Each party to bear its own cost. It is so ordered.

Dated at Dar es Salaam this 09th day of May 2023.



KATARINA REVOCATI MTEULE

JUDGE

09/05/2023