

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT MOSHI
LABOUR REVISION NO. 25 OF 2022

(Arising from Labour Dispute No. CMA/KLM/MOS/M/69/2022).

JOHN KASOLE APPLICANT

VERSUS

MWENGE CATHOLIC UNIVERSITY (MWECAU).....RESPONDENT

RULING

2nd Feb. & 21st March, 2023

A.P.KILIMI, J.:

In this application, the applicant has moved this court under the section 91 (1) (a) and (b), (2) (a)(b))(c) section 94 (1) (a) (i) of the Employment and Labour Relations, Cap.366 R.E. 2019; and Rule 24 (1), (2) (a) (b) (d) (e) (f), 24 (3) (a) (b) (c) (d) and (e); and 28 (1) (a),(d) & (e) of Labour Court Rules, G.N. no. 106 of 2007 praying to this court, to call for and examine the proceedings and award of the Commission for Mediation and Arbitration for Moshi at Moshi (CMA) in Labour Dispute No. CMA/KLM/MOS/M/69/2022 in order to satisfy itself on the legality, propriety and correctness of the same and thereafter set aside CMA award dated 21st September 2022 which

dismissed the applicant's application for condonation and any other reliefs that may be deemed fit to grant.

The brief facts material to this application, as can be gleaned from the record, is that parties herein entered employment contract. The applicant was employed by the respondent as the Assistant Lecturer for three years fixed contract commencing from 9th April 2019 to 8th April 2022. Applicant claimed the said contract was breached on 30th August 2021 by the Respondent, then referred the dispute vide labour dispute No.CMA/KLM/ARB/62/2021. The said dispute succumbed by respondent's preliminary objection at arbitration stage, the commission on 18th January 2022 sustained the objection raised and struck out the application.

The applicant untried re- filed on 28th February 2022 being late for 9 days, he advanced the reason that he was struggling to look for new advocate after his advocate left the firm he worked with. Again, after filing the respondent raised another preliminary objection upon which the Commission sustained and struck out the application with leave to re-file on 5th May 2022.

It was then, the third application was re-filed on 9th May 2022 instead of 5th May 2022. The applicant advanced his reasons for delay was that, between 6th to 8th May he used for travel from Dodoma to Moshi, drafting this application and whereas other days fell on week days. The respondent vehemently objected to the effect that, the application should not be granted for two reasons in contravention with condonation principles, and he failed to account each day of delay, and lastly has no chances for success because he contradicted reliefs sought between unfair termination and breach of contract principles.

The applicant further therein pointed out that the applicant's affidavit contains lies for alleging to have attached the bus ticket which it was not. It was also pointed out that the applicant has not indicated in the CMA F1 whether the dispute is for essential services or not. This omission was argued to render CMAF1 incompetent in the eyes of law.

The Commission relied on principle that condonation can only be granted if the applicant proves sufficient cause for late referral to CMA as provided Rule 11(3) of the GN 42. Therefore, the commission observed that the applicant has successfully proven technical delay. That is duration between

18th January to 28th February and between 5th May to 9th May 2022. But further reasoned that the fact the applicant failed to prove that his first advocate left the firm, and also the purported to have attached to the affidavit with bus ticket as *annexture JK5* but in reality it was not, and later it was his advocate through his written submission said annexture was not attached because it was lost, The commission found that applicant's affidavits lacks good reason as to the allegations for delay. Further the commission found that the CMA F1 was incomplete because the applicant has not specified whether belongs to essential services, therefore the principle of prospects of success which is vital in the course of determining condonation Application, thus CMA F 1 being defective the said prospects of success are unlikely. Consequently, dismissed the application.

Dissatisfied with this dismissal, seeking for revision in this court, the applicant in his duly sworn affidavit averred at para 7 that the decision of the commission relied on illegality of failure of the applicant to account for each day he was late, while in other part acknowledged with the counsel for the applicant that reasons, he advanced that the delay was technical delay, hence reasonable.

Further the applicant at para 8 says, the commission misdirect in facts and law when believed that the affidavit was defective for having untruth information, he says even if the facts state could have been untruth, the remedy for the commission could have been to expunge the said para alleged so and proceed with other paras which are credible. The applicant added at para 9 that other reasons stated by the commission was that the CMA form 1 was incomplete, he avers the commission for attaining substantive justice ought to have ordered the same be amended so that the matter be heard on merit.

The applicant also in affidavit averred a total of 3 legal issues arising from material facts in the matter stated above dismissed by the commission. The legal issues are as follows: -

1. Whether the reasons for delay advanced by the applicant at the commission was not sufficient to enable him be granted the application sought.
2. Whether the reasons for dismissal stated by the commission were justifiable.
3. Whether the decision of disregarding the whole applicant affidavit was legal.

When this application came for hearing before me, the applicant stood himself, while the respondent enjoyed the services of Mr. Edwin Silayo learned advocate. This court acceded to their proposal of disposing this matter by way of written submission, the same was submitted as per scheduled order and I will refer to them whenever necessary to do so.

Arguing for the application, the applicant sought an adoption of the applicant's affidavit and its annexures thereto, thereafter reiterated what he averred at para 7 and added that the commission failed to understand that the reasons for delay was not his fault, but technical one and there was a legal issue to be decided since he was dismissed in his work without justified reasons. To bolster his argument, he prayed this court to consider the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Appeal No.2 of 2010 CAT at Arusha.

The applicant further reiterated facts he has averred at para 9 of his affidavit and prayed this to grant this application since he has advanced sufficient reasons to such effect.

In reply the counsel for respondent Silayo prayed to adopt his counter affidavit and contended that this is fourth attempt to file his application and former three application was dismissed for going contrary to the provisions of the law and in the last attempt he filed untruth affidavit which caused the commission to dismiss his application. The applicant further contended that the applicant on the last attempt failed to account for each day of delay and this was duly considered by the commission when it evaluated the reasons and referred the cases of **Daudi Haga v. Jenitha Abdan Machanju** Civil case No.1 of 200, **Tanzania Fishi processors Ltd v. Christopher Luhangula** civil appeal No. 161 of 1994. **Almran Investment Limited v. Printpark Tanzania Limited and Martin HC Shinyanga** Civil Case no. 125/1997 (both unreported).

The counsel for respondent further contended that another reason for dismissal considered by the commission was well stated at page 7 of the typed judgment that the applicant's affidavit stated that bus ticket was annexed as JK5 but in reality it was not the case. But later was explained by the applicant's advocate in written submission that the said annexure was not attached because it was lost which is contrary to the law. The commission ruled that the applicant committed falsehood when stated he

has attached said annexure while it was not. The Commission build his foundation of dismissing the application using the case of **Ignazio Messina v. Willow Investments SPRL** Civil Appeal. No. 21/2001 CAT at Dar es Salaam which held that the affidavit which is tainted with untruth is not an affidavit at all and cannot be relied upon to support an application.

Mr. Silayo further contended that the applicant averred he had chance of success when the application could have been granted but she continued to confess that CMA form no. 1 was defective in law. The counsel further added by the said form being as it is, prospects of success of his application obvious is unlikely. The counsel to fortify this argument reminded the applicant the old legal principle which says, he who goes to equity must go with clean hands.

In brief rejoinder, the applicant submitted that he delayed only for three days, the Judgement was delivered when is in Dodoma, on 6/5/2022 started journey to Arusha to contact his lawyer for preparation of the document to be filed on, but on 7/5/2022 and 8/5/2022 it was Saturday and Sunday respectively. He did file on Monday 9/5/2022, so the three days delay was having reasonable ground, the same cannot be said is inordinate. To bolster this assertion the applicant referred the case of **Vodacom Tanzania**

Public Limited Company (Formally Vodacom Tanzania Limited) v. Commissioner General Tanzania Revenue Authority Civil Application No. 101120 Ya 2021 CAT at Dodoma (Unreported).

The applicant further rejoined that the allegation that he has failed to account for 256 days of delay is baseless because the dispute was on commission on different process and the same when finished was ordered to be refiled. Furthermore, the applicant reiterated the issues of affidavit to be untruth and CMA form 1 as he averred in his affidavit and submission in chief, he also re-cited the case **Lyamuya Construction Company Ltd** (supra) and prayed this court to grant this application.

I have considered the entire record of this matter at the commission, and from the rival submissions of the parties, the kernel of the contest is the question whether the applicant's application for condonation dismissed by the commission was justifiable.

According to Rule 10 of Labour Institutions (Mediation and Arbitration) Guidelines Rules, G.N. No. 64 of 2007, provides for time limitation for referring a labour dispute to the CMA. The rule provides that the dispute about the fairness of an employee's termination of employment must be

referred to the Commission within thirty days from the date of termination or the date that the employer made a decision to terminate or uphold the decision to terminate. Nevertheless, the Commission for Mediation and Arbitration under Rule 31 have discretion to condone any failure to comply with time limitation when good cause is established.

The grounds for condonation are provided under rule 11 (3) of the G.N. No. 64 of 2007, which the commission have to look on the degree of lateness, the reason for lateness, prospect of succeeding with the dispute and obtaining the relief sought, any prejudice to other party and any other relevant factor.

To test the above requirements in my view cannot be laid down by any hard and fast rules. I think must be determined by considering to all the circumstances of each particular case. This means that the applicant must place before the Commission substance which will enable any reasonable person to allow the application sought.

Back home in this application, the evidence available in record shows that the applicant efforts to enter justice arena succumbed with objections, the first was on 18th January 2022 when the commission sustained the

objection raised and struck out the application. Seeking the same he refiled on 28th February 2022 being late for 9 days, again he suffered the same tune after preliminary objection filed by respondent sustained and struck out the application with leave to re-file on 5th May 2022. Once again, he was late and filed after 3 days which means he filed on 9th May 2022 instead of 5th May 2022 as usual he was stricken hence this revision application.

In view thereof, the fact that the respondent is saying that his delay is 256 days, in my view it is not true, this is because each level of delay he has struggled to enter into justice arena unsuccessful. Therefore, the fact it is undisputed that he was applying out of time, in my opinion the fact that his application was struck out, that was his penalty which suffice conclusively at that level, thus all days cannot be accumulated from his termination from employment to date. It is my settled view each step he took must be accounted afresh as if he starts struggle to enter into justice realm.

From the above, since the last step was, when his application was struck out and ordered to file on 5th May 2022 but filed on 9th May 2022 hence late for 3 days, then the next point for determination is whether the applicant has sufficient reasons to be condoned as per principles stated above. The applicant's affidavit filed at the CMA on 9th May 2022 in paragraph

12 and 13 amenably averred that when the ruling was delivered he was in Dodoma then he struggled to travel to Arusha to communicate with his advocate, also on 7th and 8th May 2022 were Saturday and Sunday respectively and according to the record he managed to file on 9th May 2022.

According to the circumstances above, and having taking regard order of CMA which required the filing to be instant and applicant being a lay person could not write himself. I am of considered opinion as per above circumstances the applicant filing on 9th May 2022 after weekend days was reasonable for prepare such an application and file it on Monday 9th May, 2022. However, the said 3 days are reasonable for such duty and filing the same at CMA. Basically, from above reasons, I find the applicant has accounted for the delay which I hold was not inordinate.

The next question to be answered is untruth of affidavit and defect in CMA form 1, I have considered the circumstances of this matter on how it was filed, and the fact that the documents was prepared by the lawyer and duly sworn by the applicant, I am of the view loss of attachments thereto might happen unluckily cannot be dumbfounded, nonetheless substantiate of it need to be done during the hearing of application and not in the affidavit itself which averred that the same was attached, because the applicant could

not re-write the affidavit prepared by his lawyer since he was already parted with him on the day of filing. Therefore, in my opinion it was wrong to generalize that the whole affidavit was defective for averring untruth, I think other paragraphs averred would have survived for attaining substantive justice sought. I wish to fortify my view by persuading case where Lord Bowen as he then was in the case of **Cropper v. Smith** (1884) 26 CL. D.700 at page 710 when he observed that: -

"...It is a well-established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy."

In respect to CMA form 1, I have passed through the form, it is true it was incomplete since the applicant has not specified whether belongs to essential services, and the form needed him just to put a tick. I have keenly thought of this anomaly, in my view this is a procedural issue that should not impede justice, taking regard in this matter the applicant has been struggling to be

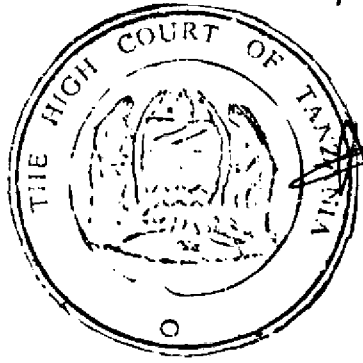
granted permission so that could enter the arena of substantive justice where his case will be held on merit.

Therefore, with the aid of the principle of overriding objective which basically requires courts to deal with cases justly, speedily and to have regard to substantive justice, the Commission could have invoked the said principle and allow the applicant to correct the identified anomaly by filing another form duly filled in accordance with the law. (See Article 107A (2) (e) of the **Constitution of the United Republic of Tanzania** of 1977, and the case of **Yakobo Magoiga Kichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, CAT at Mwanza. (Unreported).

In view thereof, and for the foregoing reasons, I find and hold that this revision is meritorious and consequently I hereby nullify the proceeding and ruling thereto in Labour Dispute No. CMA/KLM/MOS/M/69/2022 CMA at Moshi. The applicant to correct the said anomaly stated and the Labour dispute he dreamed now be filed at CMA Moshi within sixty days from the date of pronouncement of this Ruling. According to the nature of the case, no order as to costs granted.

It is so ordered.

DATED at MOSHI this 21st day of March 2023.



A. P. KILIMI
JUDGE
21/3/2023

Court: - Ruling delivered today on 21st day of March, 2023 in the presence of Silayo Edwin counsel for Respondent and Janet Urio Principal for Respondent. Applicants absent.

Sgd: A. P. KILIMI
JUDGE
21/3/2023

Court: - Right of Appeal explained.

Sgd: A. P. KILIMI
JUDGE
21/3/2023