

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(LABOUR DIVISION)**

**AT MBEYA**

**LABOUR REVISION NO. 19 OF 2022**

(Arising from the Complaint No. CMA/MBY/Mby/09/2022)

**NEEMA MWANTENDE.....APPLICANT**

**VERSUS**

**KYELA RESORT LTD.....RESPONDENT**

**JUDGMENT**

**Date of last order:** 14/02/2023

**Date of Judgment:** 28/04/2023

**NDUNGURU, J.**

The applicant one, Neema Mwantende, is before this Court armed with a chamber summons and notice of application which contains a number of prayers. In order to grasp the substance contained therein I find it necessary that the prayers should be quoted in full as hereunder;

1. That, the Honourable Court be pleased to call for the records delivered by Honourable Naomi Kimambo-Mediator in Labour Dispute No. CMA/MBY/Mby/09/2022.

2. That, this Honourable Court be pleased to call for and examine and revise the records, proceedings and ruling dated 22<sup>nd</sup> day of June 2022 in the Labour Dispute No. CMA/MBY/Mby/09/202 and satisfy itself as to the correctness, legality, regularity and propriety of the said ruling.

3. That, upon examining and revising the records, proceedings and ruling dated 22<sup>nd</sup> day of June 2022 in Labour Dispute No. CMA/MBY/Mby/09/202 before Honourable Naomi Kimambo-Mediator, this Honourable Court declare the said ruling a nullity for failure to analyze the evidence on record.

4. That, this Honourable Court may be pleased to quash and set aside the said ruling and issue any decision, directives, order, and or any relief it deem fit and just to grant,

The application is supported by the affidavit of Neema Mwantende, the applicant herein. On the other the respondent challenged the application

through the counter affidavit which was sworn by one, Grant Mwakatundu, the respondent's principal officer.

Briefly, the facts leading to the present application are that, the applicant was filed an application for condonation at the CMA for the purpose of lodging labour dispute for unfair termination against the respondent herein out of time. At the end of the hearing of the application, CMA refused to grant condonation to the applicant on the ground that, the application did not disclose the genuine reason for the delay.

Being aggrieved and dissatisfied, the applicant filed the present application for the Court to revise the award of CMA on three legal issues as follows:

- (a) Whether the said ruling delivered by Honourable Mediator was fair.
- (b) Whether the applicant provided sufficient grounds and evidence for failure to file the labour complaint for unfair termination against the respondent within time.
- (c) Whether the applicant is entitled for extension of time to file the labour complaint for unfair termination against the respondent.

When the application is called on for hearing, Mr. Ladislaus Rwekaza, learned advocate appeared for the applicant whereas Mr. Chapa Alfredy, learned advocate, appeared for the respondent. Upon request of the parties, this Court then allowed the application be argued by way of written submission and they complied with filing schedule.

Submitting in support of the application, Mr. Rwekaza commenced his submission by adopting the contents of the chamber summons, notice of application and affidavit to form part of his submission. He went on to submit that, the applicant advanced the genuine reason for the delay. He added that, the ground of sickness was supported with clinical cards showing the applicant regular attendance at Muhimbili National Hospital.

Again he cited the case of **Julieth d/o Shedrack Daudi Versus Abel s/o Laurent Lukimbili, Misc. Civil Application No. 09 of 2020, HC at Kigoma, Andrew John Mndeme Versus Serengeti Serena Safari Lodge, Labour Revision No. 39 of 2020, HC at Musoma** where the Court quoted the case of **Alasai Josiah (Suing by his Attorney Oscar Sawura) Versus Lotus Valley Ltd, Civil Application No. 488/12 of 2019** and **Emmanuel R. Maira Versus The District**

**Executive Director, Bunda District Council, Civil Application No. 66 of 2015, CAT at Dar es Salaam** (both unreported) to cement his argument to the effect that the ground of sickness is good cause for the delay.

Further, Mr. Rwekaza argued that, it is settled law that this Court has discretion to grant extension of time upon the applicant has shown sufficient grounds. To buttress his argument, Mr. Rwekaza referred the Court to consider the case of **Lyamuya Construction Company Limited Versus Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, CAT at Arusha** (unreported). In addition to that, Mr. Rwekaza submitted that, the applicant was able to account for each day of delay. In conclusion, the counsel for the applicant prayed that, this Court to call for and examine the CMA's records for Mbeya in Labour Dispute No. CMA/MBY/Mby/09/2022.

In replying, Mr. Chapa submitted that, prayed to adopt the contents of the counter affidavit filed by the respondent. Also, he contended that, the respondent herein opposing the present application because there was no sufficient proof on sickness for the CMA to grant extension of time. He

further stated that, it is true that sickness is good ground for extension but one must have sufficient proof for being hospitalized and that the said sickness incapacitated the applicant from doing any act. He cited the case of **Jasson Mwambola Versus Ahobokile Mwansasu, Misc. Land Appeal No. 18 of 2020, HC** and **Mgabo Yusuph Versus Chamriho, Civil Appeal No. 22 of 2019** (Both unreported) to bolster his submission.

He continued to submit that, the present application is inexcusable in law as the applicant totally failed to convince the CMA and consequently this Court on the cause of delay. Also, it was submitted by the counsel for the respondent that, the applicant failed to account on each day of delay particularly from 17<sup>th</sup> day of September 2021 to 24<sup>th</sup> day of January 2022. Reinforcing his argument, the counsel for the respondent invited this Court to consider the decision of this Court in the case of **Paskaria Steven Kakoroja Versus Nyanswe Mwita Tambara, Misc. Land Application No. 47 of 2021 (unreported)**.

The counsel for the respondent further contended that, the applicant purported clinical card attached in the affidavit in paragraph 12 before the CMA stated that, he attended to the hospital for 5 times only. Again, he

submitted that, the delay of even a single must be accounted. Additionally, Mr. Chapa argued that, the applicant totally failed to account for the remaining 125 days. To cement his contention, he cited the decision of the Court of Appeal of Tanzania in the case of **Osward Mruma Versus Mbeya City, Civil Application No. 100/06 of 2018** (unreported) where the Court quoted the case of **Bushiri Hassan Versus Latifa Mashayo, Civil Application No. 3 of 2007** (unreported).

Moreover, he stated that, the CMA or even this Court cannot deal with extraneous matters which have not been specifically pleaded in the affidavit. Also, it was submitted by the counsel for the respondent that, the delay of 130 days is inordinate and the purported annexure is revealed only 5 days for the applicant being in hospital. Finally, he prayed for the Court to dismiss the present application with costs for lack of merit.

In his rejoinder, Mr. Rwekaza reiterated his submission in chief. He went on to submit that, the applicant annexed the medical clinical card which proof her attendance at Muhimbili National Hospital and the counsel for the respondent conceded that sickness is a good ground for extension of time. He further submitted that, the applicant account 130 days of delay

because the applicant was admitted at Muhimbili National Hospital from 31<sup>st</sup> day of August 2021 when she was granted sick leave by the respondent herein and returned to the working station on 13<sup>th</sup> day of September 2021 is total of 130 days. And the period from 25<sup>th</sup> day of January to 31<sup>st</sup> day of January 2021 is a total of 7 days which the applicant spent in seeking legal service.

In relation to the case of **Jasson Mwambola Versus Ahobokile Mwansasu, Misc. Land Appeal No. 18 of 2020, HC** and **Mgabo Yusuph Versus Chamriho, Civil Appeal No. 22 of 2019** Mr. Rwekaza stated that, are not applicable in the present application because in the present application the applicant proved that she was sick. Further, he argued that, the delay was due to the result of sickness and not due to inordinate. Also he reiterated his prayer in chief.

Having carefully scanned the written submissions filed by the learned counsel for the parties, laws applicable, pleadings, and the record of the CMA; the issue calling for the determination is whether or not the applicant has managed to satisfy the CMA, she was delayed by good cause to lodge the labour dispute within the prescribe time.



Before I embark on the determination of the issue involved in this application, I feel obliged to discuss the defect appear in the applicant's notice of application. Going through the written submissions and pleadings filed by he learned counsel for the applicant, I have found the counsel for the applicant has termed the relief which supposed to appear in the notice of application as the grounds for the revision. As per Rule 24 (2) (c) of the Labour Court Rules, 2007 which provides that, the notice of application shall contain the relief sought and not the grounds for the revision. But, the said defect in the notice of application cannot affect the present application through the principle of overriding objective.

Turning to the merits of this application, I think in order for me to remain within a safe zone, I should begin my determination by quote Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007. Rule 31 provides that;

*"The Commission may condone any failure to comply with the time frame in these rules **on good cause**" (Emphasize added)*

Going by the above reproduced position of law, it is certainly clear that, the condonation within which to do something can be granted by the CMA if the applicant established good cause for delay. Further, it is must be noted that, it is trite law that extension of time must be for sufficient cause and that extension of time cannot be claimed as of right, that power to grant this concession is discretionary. See the case of **Abdon Pantaleo Msafiri Versus Tanzania Postal Bank, Misc. Labour Application No. 48 of 2020, HC** (unreported). However, the determination of what amount to a sufficient cause depends on the peculiarity of each case and the onus lies upon the applicant. It is also should be noted that, rule 10 (1) of the GN No. 64 of 2007 provides specifically that, the disputed on unfairness termination may be referred to the CMA within 30 days from the date of the termination of the employment contract.

Notably, at the CMA, the applicant gave two reasons in an attempt to demonstrate why she was delay to file labour dispute against the respondent. First, that she was sick from 17<sup>th</sup> day of September 2021 to 24<sup>th</sup> day of January 2022 and second, that period from 25<sup>th</sup> day of January to 31<sup>st</sup> day of January 2021 she was spent in seeking legal service. For

easy of reference, I see it is very crucial to reproduce the applicant's affidavit filed at the CMA specifically paragraph 10, 11 and 12 which form the basis of the arguments of the counsel for the applicant.

In paragraphs 10, 11, and 12 of her affidavit the applicant deposed that;

10. *That, at the time of receiving the said information I was in Dar es Salaam at Muhimbili National Hospital receiving medical treatment the act which bared me from filing labour complaint within.*

11. *That, the whole period from 17<sup>th</sup> day of September 2021 to 24<sup>th</sup> day of January 2022 the period of one hundred thirty days (130) I was in Dar es Salaam at Muhimbili National Hospital being hospitalized and receiving treatment on scalp swelling while others days I spent for wait MRI report attending various clinics and medical treatment at Muhimbili National Hospital.*

12. *That, the period from 25<sup>th</sup> day of January 2022 to 31<sup>st</sup> day of January 2022 the period of seven (7) days was spend for*

*looking legal service and preparing this application thus the delay is not deliberately but due the reasons and circumstances explained above.*

Starting with the ground of sickness, I agree with arguments advanced by the counsel for the parties that the sickness is good and sufficient cause of the extension of time but it must be proved. In the case of **Bertha Israel Behile Versus Zakaria Israel Kidava, Misc. Civil Application No. 12 of 2016** (unreported), this Court inter alia stated that;

*"Sickness or ill health may constitute sufficient cause for delay especially where the such person was the applicant in person"*

It is also trite law that, a person alleging existence of certain fact is duty bound to prove that fact exists, ground of sickness is proved by medical evidence. The same position is underscored by this Court in the case of **Willium Odemba Ater Versus Magreth Jonah, Misc. Land Application No. 60 of 2020**, (unreported) where the Court observed that;

*"Although the ground sickness is a good and sufficient cause for extension of time, it must be proved by medical evidence. The applicant must also demonstrate how the said sickness prevented him from taking the necessary measure within time"*

In the present application, the applicant annexed medical clinical card to prove that she was sick from 17<sup>th</sup> day of September 2021 to 24<sup>th</sup> day of January 2022. I am of the view that, this ground for the delay has doubts because first, in paragraph 9 of the applicant's affidavit filed at CMA, the applicant avers that on 17<sup>th</sup> day of September 2021 she denied to enter to the working premise, then she was called by the respondent's manager through phone that she no longer an employee of the respondent while in paragraph 11 thereof, the applicant avers that, the whole period from 17<sup>th</sup> day of September 2021 to 24<sup>th</sup> day of January 2022 she was in Dar es Salaam.

Secondly, the said clinic card reveals that, the applicant attended only five days at the Muhimbili National Hospital. On that regards, the card does not show that, the whole period of delay the applicant was waiting MRI report and attended various clinic and medical treatment at Muhimbili

National Hospital as alleged by the counsel for the applicant. Further, it is my view that, the medical clinic card by itself is not a sufficient proof that the applicant went to Muhimbili National Hospital. The similar stand is well elaborated in the case of **Maro Wambura Versus Chacha Nyamahemba, Misc. Land Application No. 25 of 2021**, (unreported) this Court inter alia observed that;

*"The outpatient card appended to the affidavit is by itself not sufficient to prove that the applicant went to KCMC Hospital. That document ought to have been supported by the medical document from the doctor or hospital."*

In absence of the medical evidence from the doctor which provides the sufficient details about the patient, I am of the view that, the period of 125 days of the delay, has not been evidently accounted for by the applicant and also it is not true the whole period from 17<sup>th</sup> day of September 2021 to 24<sup>th</sup> day of January 2022 the applicant was sick hence, the applicant had no reason prevent her from filing labour dispute at the CMA.

With regards to the second ground, my determination is that, as the applicant failed to account for the 125 days of the delay as demonstrated above, I see there is no need to deliberate on the second ground because it is the law in this jurisdiction founded upon prudence that every day of delay must be accounted for. See the case of **Bushiri Hassan Versus Latifa Lukio Mashayo, Civil Application No. 3 of 2007, CAT** (unreported). Therefore, I am satisfied and it is my finding that the applicant had failed to satisfy the CMA, she delayed by good cause to lodge the labour dispute within the prescribed time.

From the observation above, I see no any reason to interfere and revise the findings and decision which was given by the CMA. Further I hereby dismiss this application for being devoid of merit. Taking into consideration that the present application is labour matter, each party to bear own costs.

It is so ordered.



  
**D.B. NDUNGURU**

**JUDGE**

**19/04/2023**