IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

LABOUR REVISION NO. 13 OF 2022

(Originating from Labour Dispute No. CMA/KLM/MOS/M/26/2022 of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi.)

SYLIVANUS P. KACHUMA..... 1ST APPLICANT

AMOS HAMADI SAIDI ..... 2ND APPLICANT

EMMANUEL JULIUS MAGEMA ..... 3RD APPLICANT

MANINGI ALEX KWAMPANGA..... 4TH APPLICANT

VERSUS

YOLK OF CAREEL AND SUCCESS (YCS).....RESPONDENT

JUDGMENT

24/05/2023 & 26/6/2023

SIMFUKWE, J.

The Applicants herein filed the instant application after being aggrieved with the ruling of the Commission for Mediation and Arbitration (CMA) of Moshi in Labour Dispute No. CMA/KLM/MOS/M/26/2022 dated 13th April,2022. The application was filed under **section 91 (1)(a)(b), section 91 (2)(b)** and **section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019;** read together with **Rule 24 (1) (2)(b) (c) (d) (e) and (f), 24(3) (a) (b) (c)** and **(d)** and **Rule 28 (1) (a) (c) (d) and (e)** of the **Labour Court**

Rules, GN No. 106 of 2007 and any other enabling provisions of the law. The Applicants prayed for the following orders:

1. *That this Honourable Court be pleased to call for and revise the proceedings of the Commission for Mediation and Arbitration of Moshi in CMA/KLM/MOS/M/26/2022.*
2. *This Honourable Court to order the Commission for Mediation and Arbitration (CMA) to determine the matter on merit since the matter concerns claim of salary arrears of the applicants.*

The application was supported by an affidavit sworn by the first Applicant Sylivanus P. Kachuma which was contested by the counter affidavit sworn by Emanuel Pascal Karia, learned counsel for the Respondent.

Briefly, the genesis of this application is that the applicants were employed as teachers by the respondent on different dates. They are claiming for salary arrears. As they did not manage to resolve the issue and being out of time, the applicants instituted an application for condonation for late referral of their dispute to the Commission. However, the same was dismissed. Aggrieved with the ruling of the CMA, the applicants filed this application for revision on the following grounds which are in Kiswahili:

a) *Kwamba Tume haikuwa sahihi kulifuta shauri hili bila kuzingatia kwamba mgogoro huu ni wa maslahi na unahusu mishahara na sio vinginevyo.*
b) *Kwamba Tume katika uamuzi wake haikuzingatia kwamba kuchelewa kwa muda wote kumetokana na walalamikaji kuwepo kwenye ajira kwa kipindi chote.*
c) *Kwamba tume haikuwa sahihi katika uamuzi wake na haikuzingatia kwamba walalamikaji walikuwepo kwenye ajira na kwamba kwa*

wakati huo wangefungua shauri wakiwa kwenye ajira wangehatarisha usalama wa ajira zao.

d) Kwamba Tume ili kariri katika maamuzi yake bila kujali kwamba walalamikaji walikuwa wanafanya kazi bila kulipwa mishahara yao.

The hearing was conducted *viva voce*. The applicants were represented by Mr. Manase Gideon, personal representative, while the respondent was represented by Mr. Emmanuel Karia, learned counsel.

Mr. Manase for the applicants prayed to adopt the affidavit in support of the application to form part of his submission. Mr. Manase submitted among other things that; the applicants were employed as teachers by the respondent on different dates. They had their claims of salary arrears which their employer promised to pay them while still working and they were urged to proceed with work on promise to be paid. He explained that the applicants have different claims whereas the first applicant claims Tshs 1,885,000/-, the second applicant claims Tshs 1,150,000/=, the third applicant claims Tshs 3,560,000/= and the fourth applicant claims Tshs 1,700,000/=.

Elaborating the reason for the delay to file the matter, Mr. Manase told this court that the applicants could not file their claims within 60 days as prescribed by the law because they were still on employment. Also, whenever they claimed their salary arrears, their employer used to give them an encouraging reply that they would be paid. That, after waiting for so long and their persistent claiming annoyed the respondent who on 10/01/2022 decided to terminate their employment. He averred that the applicants were terminated from employment without observing the

prescribed procedures. Thus, the applicants referred the dispute to the CMA where the same was dismissed.

Mr. Manase submitted further that they are before this court as they were aggrieved by the decision of the CMA which did not consider the rights of the applicants of being paid salaries as their basic right. He was of the view that the CMA erred by dismissing the dispute because the applicants were still employees. That, the applicants' delay to refer the dispute to the CMA was not caused by negligence. That, the applicants and the respondent were in good terms thus they had legitimate expectations to be paid. He opined that dismissing the dispute without according the applicants right to be heard prejudiced them and denied them their right which they had worked for.

In his conclusion, Mr. Manase prayed the court to quash and set aside the decision of the Commission and order the matter to be heard on merit for justice to be seen to have been done and the applicants be paid their claims.

In his reply, Mr. Karia for the respondent adopted his counter affidavit to form part of his submission. He submitted to the effect that the decision of the CMA was justified since the applicants had failed to account for each day of delay. He referred to **Rule 31 of GN 64 of 2007** which provides for degree of delay and reasons for lateness. He submitted further that pursuant to the forms which the applicants filled before the CMA, Alex Kwapanga was late for 240 days; Emmanuel Magema was late for four years, Amos Hamadi Said was late for 270 days and Sylvanus Kachuma delayed for one year. He argued that all of them did not account for their delay. Also, the applicants delayed to file their dispute after being

terminated for 15 days contrary to **rule 10(1) and (2) of GN. No. 64 of 2007** which prescribes 30 days for filing disputes against termination.

Mr. Karia was of the view that the CMA could have granted the application if the applicants had advanced good reasons for their delay.

Furthermore, Mr. Karia contended that time limitation has been emphasised several times by this court and the Court of Appeal to the effect that parties should file their disputes within time as prescribed by the law. He made reference to the case of **DIT vs Lameck Makuyu and 19 Others, Labour Revision No. 215 of 2013** in which the court referred to the decision of **Loswaki Village Council and Another vs Shibeshi Abebe, Civil Appeal No. 23 of 1997**, CAT at Arusha which held that:

> *"Those who seek the aid of law by instituting proceedings in a court of justice, must institute such proceedings within the period prescribed by the law. And that those who seek the protection of the law in the court of justice must demonstrate diligence."*

The learned counsel also referred to the case of **Tanzania Fish Processors vs Christopher Luhangula, Civil Application No. 161 of 1994** in which the Court of Appeal held that:

> *"Limitation is a material point in the speed administration of justice. Limitation is therefore to ensure that the party does not come to court as and when he chooses."*

In the instant matter, the learned advocate argued that according to the records of the CMA, all the applicants did not consider the prescribed time

for filing their application. Thus, they slept on their rights for the reasons known to them.

Responding to the reason that the applicants were still employees of the respondent that's why they could not refer their dispute to the CMA, Mr. Karia submitted that the said reason has no merit. He stressed that since the applicants failed to account for each day of delay, the CMA was correct to reach at its decision.

In addition, Mr. Karia contended that the applicants failed to prove that the respondent was promising to pay them that is why they failed to file their dispute in time. He prayed this court to dismiss this application.

In rejoinder, Mr. Manase insisted that the applicants had proved that they were still employed by the respondent.

On the issue of termination from employment, Mr. Manase stated that the applicants were terminated from employment on 10/01/2022 and filed their dispute on 25/01/2022. Therefore, it was not true as stated by Mr. Karia that the applicants delayed for 15 days to file the dispute of unfair termination as the law prescribes 60 days for filing other disputes. He was of the opinion that 60 days were to be reached on 10/03/2022. He reiterated that the CMA erred by dismissing the application of the applicants.

I have considered the rival submissions of both parties, their affidavits as well as the CMA record. The issue for determination is ***whether the applicants had advanced sufficient reasons for the CMA to grant application for condonation.***

On the outset, I support the principles and the laws advanced by Mr. Karia that in an application for condonation, the applicants must advance sufficient reasons and should account for each day of delay. I also agree with the authorities cited by Mr. Karia.

As far as condonation is concerned the law is very clear, and I hereby quote the respective law for ease reference. **Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 o f2007** provides that:

> *"The commission may condone any failure to comply with the time frame in these rules* ***on good cause****."* Emphasis added

Much as I agree with Mr. Karia's contention, I wish to state that each case should be decided basing on its own facts and circumstances.

Before the CMA, the applicants' reasons for delay under paragraph 5 of their affidavit is that the respondent promised them to pay their salary arrears and they were still employees of the respondent. Mr. Manase submitted that the parties were in good terms in that particular time.

While discussing these reasons, the CMA had this to say at page 7 of its Award:

> "…pia waleta maombi wameileza Tume kuwa walikuwa katika ajira na ndio sababu iliyopelekea kushindwa kuwasilisha madai yao kwa wakati, Tume inaona kuwa hii sio sababu ya msingi kwani sheria imeelekeza kuwa mtu yeyote mwenye madai ya kisheria anapaswa kuyawasilisha

mbele ya Tume kwa wakati na haijalishi kuwa mtu huyo yupo katika ajira au la."

With due respect to the Mediator, as I said before, each case should be determined based on its own facts and circumstances. I am aware with the principle of accounting for each day of delay as explained by Mr. Karia. However, the circumstances of this matter make me find otherwise. The applicants were still employees of the respondent at the time when the claims of salary arrears arose and they informed this court that they were in good terms with their employer until when they were terminated from employment. In their grounds of revision, the applicants stated inter alia that instituting a dispute against their employer could have endangered their employment. Apart from salary arrears, the applicants complained that they were unfairly terminated from their employment. On that basis, I am of considered opinion that it was in the interest of justice to grant condonation to the applicant. I am very much persuaded by the case of **Karibuel J. Mola vs Tanzania Zambia Railway Authority (Labour Revision No. 780 of 2019) [2020] TZHCLD 1794** which held that:

> *"I have careful (sic) examined the Record and I am of the view that, counting on each day of delay should not be imposed as a mathematical calculation.* ***All what is required is for the Applicant to prove before the court that, he was prevented by a serious event or act to initiate the matter at the required time****."*
> [Emphasis added]

I am aware that promise to settle the matter amicably by the employer is not a good cause to extend time. However, for the same to be ground of

extension, I am of the view that the applicant should establish material enough to show that such a possibility of settling the matter amicably existed. This was stated by this court in the case of **Messi Rogers Kimei Vs. Motel Sea View, Revision case No. 14 of 2013 (HC) Labour Division**, at Dar Es Salaam (unreported) that:

> *"Second, a party cannot justify delay by merely alleging possibility of amicable settlement without showing any basis that such a possibility existed.* ***Without facts indicating basis for entertaining belief in such possibility*** *the time of limitation remains to be that provided by law….*" [Emphasis Added]

In the case at hand, since the applicants were still employees of the applicant at the time when they were claiming salary arrears, on balance of probabilities, there was a possibility of amicable settlement.

I am convinced that the respondent will not be prejudiced if time will be extended for the matter to be heard on merit. In the case of **Essanji and Another v. Solanki [1968] EA 224** his Lordship Georges CJ (as he then was) held that:

> *"The principle which guides the court in the administration of justice when adjudicating on any dispute is that* ***where possible disputes should be heard on their own merit.*** *The spirit o f the law is that as far as possible in the exercise of judicial discretion,* ***the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for not to do so."***
> Emphasis supplied

In the circumstances, I am strongly convinced that the Mediator overlooked the applicants' complaints and reasons for the delay and dismissed their application for condonation. Consequently, I revise the findings of the CMA and grant 21 days to the Applicants to institute their dispute before the CMA, from the date of being supplied with the copy of this judgment. For the interest of justice, let the dispute be handled by another Mediator. This being a labour dispute, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 26th day of June 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

26/06/2023