IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.176 OF 2017

BETWEEN

AVIT KWAREH.....APPLICANT

VERSUS

SERENGETI BREWERIES LTD.....RESPONDENT

JUDGMENT

Date of Last Order 29/03/2018

Date of Judgment 27/04/2018

NYERERE, J.

The application is made under section 91 (1) (a), 91(2) (c), as amended by section 14 of Written Laws (Misc amendment No. 3 Act No. 17 of 2010) and 94 (1) (b) (i) of the Employment and Labour Relations Act, No.6 of 2004, and Rule 24(1)(2)(a)(b)(c)(d)(e)(f) and Rule 24(3) (a)(b)(c)(d) and 28 (1) (c), (d) and (e) of the Labour Court Rules, G.N.106 of 2007. The applicant calls upon this court to set aside the whole award of the arbitrator; Commission for Mediation and Arbitration at Dar es Salaam in the dispute No. **CMA/DSM/TEM/596/2016.**

The applicant was an employee of the respondent, until on 3rd November 2014, when applicant was terminated due to health conditions, therefore applicant had to undergo treatment within the country and abroad; following the delay to file the complaint at the CMA, in which applicant filed an application for condonation to the Commission for Mediation and Arbitration while adducing reasons for failure to file within the prescribed time of thirty days. That despite adducing sufficient reasons to the CMA to be granted leave, Mediator dismissed the application, on ground that the applicant failed to adduce good reason for the delay to refer the labour dispute within the prescribed time limit in law.

At the hearing the applicant appeared in person while the respondent was represented by M/S Upendo Mmbaga , Advocate. The application was argued by way of written submission.

Arguing in support of the application, the applicant argued that a party is required to demonstrate good cause for the delay, that in assessing the causes for delay the court is to consider circumstances surrounding the case, and she cited the case of ZAN AIR LIMITED V. OTHMAN OMAR MUSSA, MISC APPLICATION NO. 285/2013. HIGH COURT

LABOUR DIVISION, AT DAR ES SALAAM (Unreported) , the court stressed that;

> **""…….Sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons and causes which are outside the applicant's power to control or to influence resulting in delay in taking any necessary step."**

Applicant argued further that the court ought to determine whether applicant had adduced good cause for delay at the CMA hence entitled to grant extension of time. It was applicant's argument that, at the CMA he demonstrated reasons for delay, that he was sick and tendered letter from hospital notifying his sickness from 03rd November, 2014. That at the CMA the application was dismissed because, on 3rd/11/2014 when applicant claimed was on treatment, he did sign termination by agreement on

4th /11/2014, citing the case of RAJABU ZAHUYA V. MKONGE HOTEL LTD, REVISION NO. 26 OF 2013, HIGH COURT LABOUR DIVISION, TANGA REGISTRY (Unreported), in which the court firmly stated that sickness can justify condonation.

Further applicant argued that, he was admitted at Muhimbili Hospital on 03/11/2014 for treatment, instead the CMA considered the 4th/11/2014 the day applicant signed termination letter agreement.

Applicant went on to argue that Mediator denied extending time basing on the evidence that Air tickets which were tendered as evidence were not acceptable because applicant traveled on 08/10/2014 and 19/10/2014, a year before termination, applicant's termination of employment was on 15/11/2015.

Applicant proceeded to argue that, Mediators failed to grasp the concept of the facts and evidence tendered, that applicant occasionally travelled for treatment to United States, a fact which Mediator failed to carefully evaluate the evidence to reach a finding that applicants tickets are justifiable, thus applicant asks the court to revise, quash and set aside the Mediators ruling for denial of right to be heard so that ends of justice are met.

In rebuttal M/S Upendo Mmbaga Counsel for respondent argued applicant was terminated by respondent on agreement (Separation Agreement) on 3rd November, 2014, a lawful termination under Rule

3(1)(a) of Employment and Labour Relations (Code of Good Practce)Rules, G.N No. 42 of 2007.

Counsel for respondent went on to argue that, it was applicants view that CMA ignored evidences adduced before it, in which led to a decision against applicant, applicant adduced reasons for delay that, he was sick .That applicant became sick after his termination, upon being served with a notice for termination.

Counsel for respondent in response to applicants arguments she submitted that applicants had tendered a letter from Muhimbili Hospital, stating that he was admitted to 3rd November, 2014. That the letter is doubtful, Counsel for respondent argued that the letter was procured just before filling condonation.

That the letter does not state the duration in which the applicant was admitted in that hospital, the letter only states that applicant was admitted on 3rd November, 2014.

Counsel for respondent went on to argued that, where was the applicant in all the remaining days, where are the proof of his whereabout. Counsel for respondent was of the view applicant has to account for each

and every day of delay in filling the matter to the CMA and cited the case of SAMWEL HERMAN MLUGE V. UNDER THE SAME SUN, LABOUR DIVISION NO. 274 OF 2010.

Counsel for respondent further argued the alleged period applicant was attending medical check ups in the USA does not account the duration of the delay, that there is no proof of medical records submitted in which to substantiate the delay of twenty five months.

Counsel for respondent proceeded to argue that the Air ticket tendered by applicant to prove his regular check ups abroad are contradictory, that the ticket do not substantiate travelling for medical treatments.

Counsel for respondent argued that, in the CMA records paragraph 1 of the applicants Counter – Affidavit Annexture SBL 1 indicate applicants relocation expenses Tsh. 101,871,000, for personal belongings. That applicant was living in the US before he was employed by respondent and was repatriated there.

Furthermore Counsel for respondent argued that at paragraph 3 and 4 of applicant's affidavit state that; applicant became sick after he was

served with a notice for termination thus rushed to Muhimbili Hospital, that this is contrary to the travelling tickets, tendered as evidence before the CMA, which show applicant travelled before termination. Counsel for respondent went on to remind the court that parties are bound by their pleadings, citing the decision of YARA TANZANIA LIMITED V. ALOYSE MSEMWA AND 2 OTHERS, COMMERCIAL CASE NO. 5 OF 2013 (unreported); BLAY V. POLLAND AND MORIS (1930) 1 K.B 682 .

Counsel for respondent was of the view CMA decided on what is on the records/pleadings. Therefore the grounds of applicant should fail and court to dismiss the application and uphold CMA findings.

In rejoinder applicant reiterated his submission in chief, and went on to argue applicant right to be heard is fundamental it is in the interest of justice for court to revise, quash and set aside the CMA ruling and allow justice on both sides.

Having gone through the court record and after examined parties submission and the applicable laws, the only issue to be determined is whether the Mediator properly decided that the applicant failed to adduce sufficient reason for the CMA to grant condonation.

It is an established principle in law that sufficient reason is a pre-condition for the CMA to grant extension of time. The law under Rule 31 of Labour Institutions (Mediation and Arbitration) Guidelines, GN. 64 of 2007 provide that;

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

And what constitute sufficient reason or good cause has been defined in the case of Tanga Cement Company Ltd vs. Jumanne Masangwa& Another, Civil Application No. 6 of 2001, HC, Dar es Salaam (unreported), where the court held that;

> "What amount to sufficient cause had been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, lack of diligent on part of the applicant"

The above position of the law has been confirmed by the Court of Appeal in the case of John Mosses and Three others vs. The Republic, Criminal Appeal No. 145 of 2006, when quoting the position of that court in

the case of Elias Msonde vs. Republic, Criminal Appeal No. 93 of 2005,Mandia, J.A (as he then was) held that:-

> "We need not belabor, the fact that it is now settled law that in applications for extension of time to do an act required by law, all that is expected of the applicant is to show that he was prevented by sufficient or reasonable or good cause and that the delay was not caused or contributed by dilatory conduct or lack of diligence on his part"

It is clear from the records that the applicant was terminated on 3/11/2014 However; he filed the condonation application on 28/12/2016 which was twenty five months (25) from the day of termination. The law provides that the complaint should be filed within thirty days from termination. The applicant was late for twenty five months according to the law that is Rule 10 (1) of GN. No.64/2007 which provides that, I quote;

> "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."

Basing on the reason adduced by the applicant at the CMA, paragraph 3, 4, of applicant's affidavit, that he became sick from the date he was served with a notice for termination, in that regard the delay was due to sickness causing applicant failure to institute labour claim as prescribed by law. It is a finding of this court find the Arbitrator rightly decided that the reason adduced by the applicant for the delay is not sufficient. It is clear that the applicant failed to explain his delay for twenty five months from the date of termination to the date of filling the condonation application.

From the facts of the case, it is my view that the applicant allege to have travelled abroad for treatment between 8/10/2014, 19/10/2014 and 15/11/2015, however applicant was terminated on 3/11/2014. It is without doubt, the alleged date's applicant travelled abroad, have no connection with the application at hand. The applicant was still an employee of the respondent on the dates above, thus irrelevant to the matter at hand.

In regard to applicant's letter from Muhimbili Hospital, that applicant was hospitalized on 3rd November, 2014. The letter adduced as evidence does not substantiate applicant's whereabouts, as it does not contain

information of the period the applicant was admitted in that hospital, thus failing to account for the applicant's delay in filling the matter to the CMA, as subscribed by the Court of Appeal of Tanzania in the case of Daudi Haga v. Jenitha Abdan Machanju, Civil reference No. 1/2000, and Tanzania Fish Processors Ltd v. Christopher Luhangangula, Civil Appeal No. 161/1994 where the court held that **"a person seeking for an extension of time had to prove on every single day for delay"** to enable the court to exercise its discretionary power

From the above observation, the applicant's reasons for delay does not constitute sufficient reason to warrant the court to exercise its discretionary powers to extend the time sought in the application. This is the position of the Court of Appeal in the case of Paul Martin v. Bertha Anderson, Civil Application No.7 of 2005 at Arusha (Unreported) where the Court held that;

> **"...the delay was a result of inaction and lack of diligence on the part of the applicant, the factors which does not constitute sufficient reason to warrant the court to exercise its discretionary powers to extend the time sought in the application."**

Having reasoned and decided basing on the records I am of the view that the applicant's delay to file the complaint within time was contributed by dilatory conduct on his part.

In the circumstance of this case, I find nothing to fault the decision of the CMA that the reason adduced by the applicant for his failure to file the complaint within prescribed time is not sufficient. Therefore the application has no merit.

In the end result the application is hereby dismissed.

Ordered accordingly.

A.C.NYERERE

JUDGE

27/04/2018