

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION IN THE
LABOUR COURT ZONE CENTRE
AT KIGOMA
REVISION NO. 4 OF 2018**

**WILSON NTEMBEJE MACHUMU.....APPLICANT
VERSUS
BODI YA WADHAMINI YA MFUKO WA PENSHENI
KWA WATUMISHI WA UMMA (PSPF).....RESPONDENT**

JUDGEMENT

Date of Last Order: 18/04/2018

Date of Judgement: 20/04/2018

L.L.Mashaka, J

This judgement is in respect of application for revision filed by the applicant Wilson Ntembeje Machumu calls upon this Court to call for the record of proceedings in CMA/KIG/DISP/33/2015 which resulted into the impugned Ruling delivered on 04/12/2015 by Hon. Doris A. Wandiba Mediator and examine its compliance with the law and if the CMA exercised jurisdiction vested in it and if exercised its jurisdiction legally and with no material irregularity. The applicant prays to the Court to order CMA Kigoma to admit and determine the applicant's referral out of time. The application is made by Notice of application and chamber summons under Rule 24(1), 24(2)(a)(b)(c)(d)(e) and (f) 24 (3)(a)(b)(c)(d) and Rule 28(1)(b)(c)(d)(e) and (2) of the Labour Court Rules, Government Notice 106/2007,

supported by affidavit deponed by one Sadiki Aliko former Advocate of the applicant.

The applicant is represented by Mr. Michael Mwangati, Advocate and Ms. Ellen Rwijage, State Attorney appeared for the respondent assisted by Ms. Sukayna Farouk, Legal Officer of the respondent.

Submitting for the application Learned Counsel for the applicant informed the Court that the application for Revision No. 4 of 2018 was with 3 prayers as seen on the chamber summons and supported by affidavit of the deponent who was previous advocate for the applicant Mr. Sadik Aliko. He prayed to the Court to adopt the affidavit to form part of his submission. That the applicant is aggrieved with the decision by Hon. Doris Wandiba, Mediator at CMA Kigoma and has two reasons as seen at paragraph 9(i) and (ii) of the affidavit.

Submitting for the second reason for revision at paragraph 9(ii) of affidavit, that there is illegality and reasons for the termination of the said employment. That the same was stated in the applicant's application before the CMA but was not considered by Hon. Mediator when delivering her decision. Learned Counsel submitted that he would not go into details on these illegalities on procedures and reasons for termination because he will be preempting the main application. That they expected by adducing those 2 reasons, Hon. Mediator could have first to know the reasons and the illegalities which brought to the said labour dispute at the CMA. But

Hon. Mediator ended up striking out the labour dispute and application for condonation in CMA/KIG/DISP/33/2015.

On the issue of illegality to allow condonation, Learned Counsel argued that the same was well decided in the case of the **Principal Secretary, Ministry of Defense and National Service Vs. D.P. Valambhia (1992) TLR 185**, that *"when the point at issue is one alleging illegality of the decision being challenged, the Court has the duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established to take appropriate measures to put the matter and the record right."*

Based on the referred decision, Learned Counsel argued that they found there were very serious triable issues to be dealt by the Hon. Mediator on the said two illegalities on the reason and procedure for termination.

On the 2nd ground for this application as seen at paragraph 9(i) of affidavit, Learned Counsel submitted that, unfortunately the applicant engaged an advocate who was contesting to be a Member of Parliament. That on the reasons known to the advocate, he broke communication with the applicant and the applicant knew that his advocate was continuing with the dispute at the CMA. Learned Counsel argued that this should not be the reason for the applicant to be denied his right of fair hearing as provide under Article 13(6)(a) of the United Republic of Tanzania Constitution of 1977, henceforth the applicant decided to file this application for revision.

Based on the above submission, Learned Counsel prayed that this Honourable Court revise the ruling delivered in labour dispute CMA/KIG/DISP /33/2015 and allow condonation of the said application.

In reply, State Attorney Rwijage prayed to the Court to adopt the Counter affidavit and form part of their submission. Learned State Attorney argued that in the application for condonation which was filed at the CMA and registered as CMA/KIG/DISP/33/2015, Learned Counsel representing the applicant and deponed affidavit supporting this application before this Court did not state any reason for delay. That the reasons for delay that have been submitted by Learned Counsel for the applicant were merely stated in the written submission and not pleaded in the affidavit supporting the application at the CMA. That is why Hon. Mediator did not consider those two reasons in her ruling and those reasons are now stated and pleaded in the affidavit supporting this application before the Court. State Attorney submitted that is an afterthought.

She argued further that, the first referral at the CMA was referred within time but was struck out due to the preliminary objection which was raised at the CMA. That the applicant could not file a fresh application within time regardless of the leave granted to refile the same. That when they came back it was 63 days later from the date of the ruling, and had no reasons on why the applicant delayed on the 63 days. Rather the applicant filed with the same defects and prayed to withdraw the application so he can refile again. That the applicant was granted the prayer with leave to refile within the time limit provided by the law, that is

what the Ruling said. That all along the filing and withdrawal of all the applications before the CMA, time was already out as the matter was to be filed within 30 days from the date of termination of employment as provided under Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rule GN No. 64/2007.

State Attorney further contended the matter was late for 63 days and the matter was withdrawn, later the applicant filed a fresh application with condonation; this application had been delayed for another 58 days and there were no reasons as to why the matter was delayed, then this Ruling which is challenged before this Honourable Court. That the termination of employment of the applicant was on the 27th October 2014, time within which to file the labour dispute at the CMA started to run on the 27/10/2014. With all those applications which were filed and withdrawn at the CMA before, the application filed with condonation, the applicant had delayed for 180 days with no reasons for the delay.

State Attorney submitted that it was not true at all that Hon. Mediator who struck out the application for condonation was not eager as it was submitted to the Court to know the illegalities but rather she could not take new evidence from the bar as the reasons were not pleaded in the affidavit. She insisted that Hon. Mediator could not go into details and enquire from Learned Counsel who was representing the applicant the details of the arguable case but did not say there were illegalities as pleaded at paragraph 9(ii) of affidavit. That on their side, an arguable case is to have a cause of action against the respondent; and having a cause of

action does not necessarily have to be illegalities. That if the Honourable Mediator had gone further to know the arguable issues she could go to the root of the dispute as rightly submitted by Learned Counsel for the applicant. Therefore Hon. Mediator was right to decide what was before her and struck out the dispute.

It was further submitted that the application for condonation at the CMA are governed by Rule 31 of Government Notice No. 64 of 2007, which requires good cause for delay to be adduced. That before Honourable Mediator there was no good cause for the delay, therefore she could not exercise her discretionary powers to condone the matter. Learned State Attorney insisted that in so many cases this Hon. Court decided that parties should account for each day of their delay and the Court concentrates on the length of delay i.e numbers of day for delay. That the 180 days are so many days to say it was just a change of advocate due to the fact that the 1st advocate contested to be a Member of Parliament hence applicant did not know that he was no longer representing him to be a tangible reason for delay.

That the applicant as the party to the case had the duty to follow up his case and to say that he was blocked to communicate with his 1st Counsel is not a tangible reason. That the applicant had to go to his Advocate's office and enquire if he is doing his job and saying he was blocked means it is through telecommunication that he was blocked. She insisted that since Learned Counsel for the applicant did not say that the applicant was denied access to the office of the first Counsel who

contested for MP elections, then it means the applicant chose not to go to the Advocate's office because he was communicating through telephone calls.

Learned State Attorney submitted on the case referred by Learned Counsel for the applicant, **Principal Secretary, Ministry of Defence and National Service Vs. D.P Valambhia (1992) TLR 185** where the Court had this to say, *"when the point at issue is on alleging illegality of the decision being challenged, the Court has the duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established to take appropriate measures to put the matter and the record right."* That the case had been quote by the Court of Appeal of Tanzania in the case of **Joseph Paul Kyauka Njau & Anor Vs. Emmanuel Paul Kyauka Njau & Anor**, Civil Appl. No. 7/2015 of 2016 where the Court of Appeal of Tanzania sitting at Arusha when making its decision could not grant the application before it on the ground that, there was no illegality on the grounds raised before them did not contain any point of illegality.

Learned State Attorney submitted that, in that same case, the issue was on extension of time, and Learned Counsel for the applicant accounted for the each day of delay and the reasons for the delay to the satisfaction of the Court as stated at page 5 of the cited case. And that since the issue of illegality was never raised at the CMA by Learned Counsel for the applicant at the CMA and before this Hon. Court failed to account for each

day of their delay and failed to give reasons for those days they have delayed, then they have no reason for the delay.

Learned State Attorney contended that just saying there is illegality on the reasons and procedures for termination is not enough, though the illegalities on the reasons and procedures which they are alleging need to be mentioned without going into details so that this Honourable Court when making decision could see into them if they amount to illegalities. That failure to do so and coming with the reasons before the Honourable Court remains to be an afterthought. Thus Learned State Attorney prayed that this application be dismissed with costs for not having enough reasons for the Court to exercise its powers as prayed in the application.

In rebuttal, Learned Counsel for the applicant submitted that, the illegalities are well stipulated in the affidavit supporting the application for condonation at the CMA, but prayed to withdraw that line of submission. He prayed to refer page 5 on the "*majibu ya mjibu maombi juu ya hoja za mabishano ya maandishi za maombi kuleta rufaa nje ya muda*" filed on the 04th November 2015 at the CMA, again he prayed to drop the line of argument. Lastly Learned Counsel submitted that since the respondent had said they followed all the procedures and there were reasons for termination, they found that there were illegalities and Hon. Mediator should have condoned the application.

The issue for determination after hearing submissions by both parties and gone through Court records is whether or not Hon. Mediator erred in law and fact to dismiss the application for condonation. The acceptable

legal principle in dealing with application for condonation is "upon showing good cause" or "sufficient cause." In the case of **Felix Tumbo Kisima Vs. TTC Ltd and Another** [1997] TLR 57, Court of Appeal of Tanzania defined "sufficient cause" that, *"it should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary steps."*

The CMA in dealing with condonation, Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64/2007 requires thereto be *"on good cause"*.

Also Rule 11(3) of the GN No. 64/2007 provides that:

"11 (3). An application for condonation shall set out grounds for seeking condonation and shall include the referring party's submissions on the following:

- a) The degree of lateness;*
- b) The reasons for lateness;*
- c) Its prospects of succeeding with the dispute and obtaining the reliefs sought against other party;*
- d) Any prejudice to the other party; and*
- e) Any other relevant factor."*

On degree of lateness, under Rule 11(3)(a) of GN 64 of 2007, the applicant was terminated on 27/10/2014 as per Exhibit A at the CMA, and the application was firstly filed and registered at the CMA as CMA/KIG/DISP/62/2014 and struck out on 24/02/2015 for suing a wrong party and application was struck out. There was no leave granted to file proper application according to law. Another application was filed and registered as CMA/KIG/DISP/ 26/2015 and on 23/07/2015 the applicant prayed to withdraw the same. In the CMA Form No. 7 filed on 18/09/2015 the applicant showed degree of lateness to be eight months. The third application was registered as CMA/KIG/DISP/33/2015 whose ruling dismissed the application for condonation for lack of merit. From the records thereof the degree of lateness from when the applicant was terminated on 27/10/2014 till 18/09/2015, is almost eleven months, and the applicant has failed to account for the same as rightly submitted by Learned State Attorney, the applicant has failed to account for each day of delay.

In the case of **Bariki Israel Vs.The Republic**, Criminal Application No.4 of 2011, referred by the Court of Appeal of Tanzania in the case of **Sebastian Ndaula Vs. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014, CAT at Bukoba [unreported] His Lordship Juma, JA [as he then was] at page 8 held that:-

"The position of this Court has constantly been to the effect that in an application for extension of time, the applicant has to account for every day of the delay."

The need to account each day of the delays become even more important where matters subject to revision like this present case was delayed for 8 months as recorded on CMA Form No. 7 by the applicant himself. The applicant has failed to account on each day of delay after the first application was struck out on 24/02/2015, as an incompetent application is not application to properly move the CMA.

In the case of **Rutunda Masore Vs Moraf Ltd**, Revision No. 7 of 2014, HCLD at Mwanza, Hon. Nyerere,J [2015]LCCD1 at p33 quoting the case of **Said Ramadhani Vs Geita Gold Mining Ltd**, Misc Application No 29/2013 [unreported] held that: *"in deciding the aspect of extension of time the applicant is expected to account cause for delay of every day that passes beyond the prescribed period"*.

In the case of **Royal Insurance Tanzania Limited Vs. Kiwengwa Strand Hotel**, Civil Application No. 116 of 2008 (unreported) quote by His. Lordship Juma, JA in the case of **Sebastian Ndaula Vs. Grace Rwamafa, (supra)** at page 7 while considering an application for extension of time, the Court stated, *"it is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in good faith."*

On reason for delay, the law under Rule 11(4) of GN No. 64/2007 provides the mechanism on application for condonation that, *"the application for condonation shall be processed in accordance with Rule 29 of the Rule."*

And Rule 29^(d)(4) of GN No. 64/2007 provides that:

"29(4).The application shall be supported by an affidavit setting clearly and concisely the following-

a) ...

b)

c)

d) grounds for condonation in accordance with rule 10 where the application is filed out of time"

At the CMA the applicant's reason for delay in his affidavit filed on the 21st September 2015 at paragraphs 8 and 9 are that:

"8. Kwamba, shauri langu/malalamiko yangu ya msingi nina madai ya msingi dhidi ya mwajiri wangu kufuatia kuachishwa kazi bila ya kua na sababu za kisheria na bila ya kufuata taratibu stahiki."

9. Kwamba, ni kwa manufaa ya haki kuniridhia kuwasilisha rufaa yangu nje ya muda na endapo maombi yangu yatakataliwa nitaathirika kwa kiasi kikubwa kwani nitapoteza haki zangu kama mtumishi."

Honourable Mediator dismissed the application for condonation because the applicant failed to comply with the mandatory requirements set out under Rule 29(4) and Rule 11(3) of GN No. 64/2007. That during his submission the applicant advanced another reason for delay to be that his advocate travelled abruptly hence failing to file the application on time. The applicant failed to account on each of the days his advocate travelled as alleged, how expeditiously did he act in following his case in knowing his advocate was busy with MP elections and what steps did he take as the interested party to the dispute. There is no account of each day of the delays.

The applicant's reasons advanced in this application for delay as per paragraph 9(i) of affidavit is that "*he was delayed by the busy schedule and breakdown of communication of previous advocate*" while during hearing before the Court, Learned Counsel argued that the advocate went to contest for Parliamentary membership, the same was never pleaded in supporting affidavit as rightly submitted by Learned State Attorney for the respondent.

The applicant failed to show reason for delay in his affidavit at the CMA and the Hon Mediator was correct to dismiss the same.

The applicant has failed to show good cause for the delay for this Court to revise the decision of the CMA in denying grant of condonation.

The applicant despite failing to adduced good reason for delay, he has also failed to account for each day of the delays in filing the application

at the CMA within the prescribed time, of 30 days after termination of employment.

On time limit and timely filing of disputes, in the case of **Vodacom Foundation Vs Commissioner General(TRA)**, Civil Application No 107/20 of 2017, Court of Appeal of Tanzania at Dar Es Salaam [unreported] His Lordship Mwambegele, J.A at page 10, quoting the case of **Dr Ally Shabhay Vs Tanga Bohora Jamaat** [1997] TLR 305 at page 306, where the Court stated that:

"Those who come to courts of law must not show unnecessary delay in doing so; they must show great diligence".

It is the holding of this Court that Hon. Mediator did not err in law and fact in dismissing the application for condonation. Therefore the present application for revision is unmerited and is accordingly dismissed.

So ordered.



L.L.Mashaka

JUDGE

20/04/2018