

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO SUB-REGISTRY

REVISION NO. 60 OF 2019

BETWEEN

AUGUSTINO A. SHOO.....APPLICANT

VERSUS

NEW KIMAMBA FIBRES LTD. KILOSA.....RESPONDENT

JUDGEMENT

Date of Last Order: 02/07/2020

Date of Ruling: 08/07/2020

Aboud, J.

This is an application to set aside the decision of the Commission for Mediation and Arbitration (herein referred as CMA) delivered on 28/02/2018 by Hon. Kiobya, Z. Arbitrator in Labour Dispute No. RF/CMA/MOR/111/2016/APP/10/2016. The applicant filed this application under the provisions of Section 91 (1) (a), 91 (2) (a) (b) 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) Rule 24 (1), 2 (a), (b), (c), (d), (e), (f), 3 (a), (b), (c) and (d) and Rule 28 (1) (a) (b) (c), (d) and

(e) of the Labour Court Rules, 2007 GN No. 106 of 2007 (herein the Labour Court Rules).

The application is supported by the applicant affidavit. The respondent bitterly challenged the application through the counter affidavit of Innocent Emmanuel Mwaipopo, respondent's Principal Officer.

Whereas the applicant was represented by Mr. Hamisi Salum, representative from the Trade Union, TASIWU, the respondent was represented by Mr. Benjamini Jonas, Learned Counsel. Hearing of this application proceeded orally.

Submitting in support of the application Mr. Hamisi Salum prayed to adopt the applicants' affidavit in support of application to form part of his submission. He submitted that, the applicant was employed by the respondent for two (2) years, which is from 01/05/2015 to 01/05/2017. He said the applicant's employment was terminated on 27/06/2016 and he complained at the CMA where his matter was dismissed for non-appearance. Mr. Hamisi Salum stated that, the applicant unsuccessfully applied for restoration of his complaint because was dismissed for the reason that, there was no

good reason to justify the CMA to set aside its decision and restore the same.

Mr. Hamisi Salum further submitted that, the Arbitrator did not consider applicant's reason for his failure to prosecute the relevant matter before CMA. That, the applicant had ill health and he tendered all evidence to prove that fact during the time the matter was set for arbitration proceedings. He therefore prayed for this application to be allowed to avail the applicant chances to prosecute his complaint at CMA.

In reply Mr. Benjamin Jonas submitted that, the applicants' submission in court as well as his affidavit has no any good reason to justify restoration of the complaint which was dismissed before the CMA.

Mr. Benjamin Jonas argued that, CMA's decision on this matter was based on two main reasons, that the application was not proper before CMA because the provision that gives powers or jurisdiction to the Commission was not cited by the applicant. The Learned Counsel stated that, the applicant omitted to cite section 87 (5) (a) and 87 (5) (b) of the Act. He argued that non-citation of proper provision is a

defect which renders the application incompetent. To support his argument he referred the case of **Hamisi Malebo vs. Geita Goldmines**, 2015 Labour Court Case Digest (LLCD).

Mr. Benjamin Jonas went on to submit that, the second reason for the dismissal of the application was that, the applicant did not comply with the CMA Ruling in Dispute No. RF/CMA/MOR/111/2016/APP/10/2016/2017, which granted him leave to re-file his application within seven (7) days.

Mr. Benjamin Jonas further submitted that, the application No. RF/CMA/MOR/111/2016 was dismissed on 23/09/2016 for non-appearance of the applicant/complaint at the CMA. The Learned Counsel stated that, the application for restoration was filed on 18/10/2016 and according to the evidence on record, the applicant was discharged from the hospital on 20/09/2016, thus on 23/09/2016 when his application was dismissed he was not in admission at the hospital as he alleged.

Mr. Benjamin Jonas strongly argued that the applicant did not appear on 23/09/2016 and no reason was advanced before the CMA

as to why he failed to do so. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Hamisi Salum reiterated his submission in chief. He strongly argued that, the applicant failed to appear on 23/09/2016 because he was sick. Mr. Hamisi Salum admitted that it is true the applicant was discharge on 20/09/2016 but he told the Arbitrator that he was still unwell so was unable to appear before the CMA. He therefore prayed for the application to be allowed.

After consideration of parties' submissions, court record, the relevant applicable Labour Laws and practice, I found the issue for determination in this matter is; whether the applicant advanced good cause for restoration of his application at CMA.

I have gathered the following from this application, it emanates from the application which was dismissed on 23/09/2016 for non appearance of the applicant before arbitration proceeding. On 26/09/2016 Hamis Salum, applicant's personal representative received a copy of the relevant dismissal order. Thereafter the applicant filed his first application for restoration on 18/10/2016 which was struck out on 03/10/2017 for being accompanied by

defective affidavit. Again on 10/10/2017 the applicant refilled his application for restoration which was dismissed on 28/02/2018 after the Arbitrator found that the applicant had no good cause for non appearance.

Mr. Benjamin Jonas argued that the restoration application was dismissed at CMA for two main reasons. First is that the applicant did not adduce sufficient reasons for the grant of the application sought and second is because the applicant omitted to cite section 87 (5) (a) (b) of the Act. I have carefully examined the impugned ruling and observed that the second reason of Mr. Benjamin Jonas was not determined for the reason to be reflected in this judgement.

However, as analyzed above, the record reveals that the applicant made two applications for restoration before CMA. It is in the first application where Mr. Benjamin Jonas raised an objection that the applicant did not cite proper provision of the law. The Arbitrator in the decision dated 03/10/2017 overruled such an objection. Therefore it was wrong for the Learned Counsel to submit on the objection which was finally determined. Moreover for academic purposes the provision of section 87 (5) (a) (b) of the Act

does not apply to the application at hand. The relevant provision applies to an application which was struck out at mediation stage; to the contrary the matter at hand was dismissed during arbitration proceeding. Thus, the cited provision and the case cited by Mr. Benjamin Jonas of **Hamis Malebo** (supra) are irrelevant and of no significance in this application.

As to the second reason of good cause, it is a trite law that there must be sufficient reasons for the Court and CMA to exercise their discretionary powers of setting aside the order made thereon. The Court or CMA must satisfy itself that the applicant has been prevented by a sufficient or good cause from appearing at the court when the matter was scheduled for hearing. At the CMA level this position of the law is provided under Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 (herein Mediation and Arbitration Rules) which provides that;

“The Commission may condone any failure to comply with the time frame in these rules on good cause”.

At the Court level the position is clearly provided under Rule 56 (1) of the Labour Court Rules, I quote:-

“56 - (1) The Court may extend or a bridge any period prescribed by these Rules on application and on good cause shown, unless the Court is precluded from doing so by any written law.”

What amounts to “sufficient/good cause” has not been specifically defined. However, from decided cases number of factors have to be taken into account, including whether or not the application has been brought promptly, in the absence of any invalid explanation for the delay, and lack of diligence on the part of the applicant. This is also the position cited in the Court of Appeal 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. The Republic, Criminal Appeal No. 93 of 2005**

In the application at hand the applicants’ reason for non appearance at arbitration hearing is because he was admitted at Shalom Medical Center. At the CMA the applicant tendered hospital

discharge certificates (Exhibit KJ-1 and KJ-2) to prove that he was sick and admitted at hospital when the matter was scheduled for arbitration hearing. The relevant exhibit indicates that the applicant was admitted twice at Shalom Medical Center from 23/08/2016 to 26/08/2016 and thereafter on 09/09/2016 to 20/09/2016.

Admittedly sickness of a party is a reasonable ground, if it is proved by producing a medical report this was held in the case of **K.V. Construction Ltd. vs. Mwananchi Engineering and Constructions**, Civil Application No. 50 of 2004 (Unreported).

Therefore, in the present application it is my view that it is unfortunate that the applicant and his representative did not communicate with CMA about the applicant's health condition. As analyzed above the applicants' sickness was proved. Exhibit KJ2-2 indicated that even after being discharged the applicant was required to report back to hospital on 23/10/2016. This proves that his health condition was not stable. However his representative acted negligently and did not attend at arbitration proceeding. Thus it is my view that, the applicant should not be punished for negligent act committed by his representative while it is proved that he was sick.

The applicant took initiatives to restore his application before CMA which cannot be ignored by this Court. And from that time to date he had been knocking the court doors to achieve the right to be heard.

In the circumstance of this application as discussion above, I have no hesitation to say that the Applicant adduced sufficient reasons for failure to attend arbitration hearing. In the result I find the application has merit and the contested Arbitrator's ruling is hereby revised and set aside. The applicant's application is restored and should be remitted back to the CMA to be entertained by another competent Arbitrator.

It so ordered.

A handwritten signature in black ink, appearing to read 'I.D. Aboud', with a long horizontal stroke extending to the left.

I.D. Aboud

JUDGE

08/07/2020