**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 854 OF 2019**

**BETWEEN**

**ROSEMARY MWAKITWANGE..... APPLICANT**

**VERSUS**

**ALOSCO GROUP LTD.....1ST RESPONDENT**

**AFRICA LOGISTICS SOLUTIONS LTD.....2ND RESPONDENT**

**JUDGMENT**

*Date of last order: 11/06/2020*

*Date of Judgment: 17/07/2020*

**A. E. MWIPOPO, J**

The applicant namely **ROSEMARY MWAKITWANGE** filed this application for revision seeking court order to call for record and order of the Commission for Mediation and Arbitration [CMA] at Dar Es Salaam dated 28TH November, 2017 by Hon. Kalinga, C. Mediator in Labour Dispute No. CMA/DSM/ ILA/R.843/17, revise them, set aside the Commission decision and make order that the dispute be mediated and arbitrated by the Commission. The applicant is praying for the following orders:

a. That, the Honourable Court be pleased to call for the record of Mediation proceedings and Order made on 28th November, 2017 by Hon. C. Kalinga, Mediator of the Commission for Mediation and Arbitration at Dar Es Salaam Zone in complaint No. CMA/DSM/ILA/R.843/17, revise them, set aside the order.

b. That, this Court be pleased to order that the dispute be mediated and arbitrated by the Commission according to law.

c. That, this Court be pleased to make any such orders as to meet the good ends of justice.

The history of the dispute in brief is that the applicant alleges that she was employed as Managing Director of both respondents namely ALOSCO GROUP LTD and Africa Logistics Solutions Ltd from 01/04/2014 at a starting salary of USD 10,000/= per month which was by then rate at Tshs. 17,000,000/= per month. She was terminated from employment through e - mail on 02/06/2014 while she was in Brazil for 7 days leave vacation. The applicant referred the dispute which was out of time to the Commission for Mediation and Arbitration on 07/10/2014 where she applied for condonation. The Mediator dismissed the dispute for applicant's failure to show sufficient cause for the delay and for her failure to account for each day of the delay.

The applicant was aggrieved by the Commission decision and lodged the present application for revision against CMA decision.

At the hearing, the applicant was represented by Mr. Gaudine Rwekaza Advocate whereas Mr. Ibrahimu Shinen Advocate appeared for the respondent. With the leave of this Court, hearing of the revision was disposed of by way of written submissions.

In supporting this application, the applicants submitted several reasons for the delay to file dispute before the Commission within prescribed time. It was submitted that the applicant could not rush to file a complaint in the CMA without ascertaining whether her service was not required by the respondents. On 26/08/2014 she served both respondents with demand notice which was not answered by the respondents. The applicant is of the view that the Mediator did not consider this evidence at all. She is of the view that the cause of action did arise on 12/09/2014 when the demand notice expired. Counting from 12/09/2014 when the demand Notice expired to 07/10/2014 when the dispute was referred to CMA means the matter was filed on time as provided under 10(2) of G.N No. 64 of 2007. To support this argument she referred this Court to the case of **John G. Wambura Vs. Mikopo Finance Ltd,** Rev. No. 551 of 2016.

Another reason for the delay averred by the applicant is that she had a prospect of winning, she has the right to be heard and also the application for extension of time is granted for the purpose of enabling the Court to ascertain the existence of illegality or otherwise.

The third reason for the delay as submitted by the applicant is that the mediator was biased as she made one side ruling by considering irrelevant matters. It was submitted that the Mediator did disregard the case of **Stephan Milanzi Vs. Dr. Mkisi,** Misc. Appl. No. 8 of 2009, which observe the right of representation. This was clearly stated at page 8 on 1st paragraph where the applicant was having dialogue with the respondent, and at page 10 of the CMA's ruling where it was stated that the respondent failed to prove that she travelled out of the country after obtaining respondents permission. She is of the view that the Mediator was deciding the case on merits while the matter was for condonation.

It was submitted by the applicant that the counter affidavit is tainted with untruth since the Deponent in the counter affidavit does not reveal his or her position in the employment of both respondents. Further, the deponent does not state whether or not she was present at the time of engagement or dismissal of the applicant. Thus, the counter affidavit is unreliable and was improperly verified. In support of the position she cited

the case of **Ignazio Messina v. Willow Investment (SPRL), Civil Application No. 21 of 2001, Court of Appeal of Tanzania at Dar Es Salaam, (Unreported).**The applicant prayed for the CMA's ruling to be quashed.

In opposition, Mr. Ibrahim Shineni submitted on each of the issue raised by the applicant. In response to issue of demand notice, it was submitted that the said demand letter has never been served by the applicant to respondents and nothing was attached in the affidavit of the applicant evidencing that the demand letter was served or being sent and received by the respondent. The respondent is of the view that preparing that demand letter was one of the way to cub legal requirement of Rule 10 of G.N No. 64 of 2007. Hence filing of the matter on 07/10/2014 was extremely out of time and the application for condonation was not supported by sufficient cause.

On the other reasons advanced by the applicant to warrant condonation of delay, the respondent submitted that the Court in exercising its power to condone is duty bound to follow available rules and procedures. It was argued that the relevant cases in granting condonation is the case of **Samweli Herman Mluge v. Under the Same Sun**, Lab. Rev. No. 274 of 2010. In the present matter the applicant failed to account for each day of

the delay and was wrongly advised by her Personal Representative to write a demand letter instead of referring the dispute to the CMA.

On the issue of biasness, he argued that the arbitrator was right in his decision as the complainant failed to account for each and every day in which she failed to refer her dispute to the Commission. The applicant has no sufficient cause to condone her application as it was heard by the Commission. To support his argument he referred to the case of **Felix Tumbo Kisima Vs. TTCL Ltd and Another** (1997) TLR 57(CAT).

Regarding the allegation that the affidavit is tainted with untruth, the respondent argued the submission by the applicant is not true. The person who affirmed the counter affidavit is the principal officer of the respondent who is acquainted with each and every fact of the case as she is working with the respondents. Thus, the deponent was the right person to swear an affidavit on behalf of the respondents. He further argued that the applicant relied on e-mails to be referred as the evidence contrary to Section 18(4) of the Electronic Transaction Act of 2015. Since the attached e-mail fail to attain evidential value therefore should be disregarded. The respondents prayed for the application to be dismissed.

In rejoinder the applicant reiterated his submission in chief.

From the above submissions the main issue for determination is whether the applicant have shown sufficient or a good cause of condonation for delay before the Commission for Mediation and Arbitration.

Rule 10 of Labour Institutions (Mediation and Arbitration) Guidelines, G.N. No. 64 of 2007 provides for limitation for reffering the dispute to the respondent. Rule 10(1) provide 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."***

However, the Commission for Mediation and Arbitration have discretion to condone any failure to comply with time limitation which is provided by the Rules. The law provides in Rule 31 of Labour Institutions (Mediation and Arbitration) Guidelines, GN. 64 of 2007 that;

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

It is a trite law that in application for condonation the Commission has discretion to grant or refuse it. The extension of time may only be granted where it has been sufficiently established that the delay was with sufficient or a good cause. (See **Samwel Kobelo Muhulo v. National Housing Corporation**, Civil Application No. 302 of 2017, Court Of Appeal of Tanzania at Dar Es Salaam). And what amount to sufficient cause was discussed by the Court of Appeal of Tanzania sitting at Dar Es Salaam in the case of **Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002. Addressing the issue of what amounts to sufficient cause, the court of appeal quoted the decision of the court in **Tanga cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda** Civil Application No.6 of 2001, Court of Appeal of Tanzania, at Tanga, (unreported) where it was held that;

> ***"What amounts to sufficient cause has not 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 diligence on the part of the applicant."***

It is clear from the records that the applicant was terminated through e - mail on 02/06/2014. However, she filed the application for condonation before the Commission for Mediation and Arbitration on 07/10/2014. The law provides that the complaint should be filed within thirty days from termination. The applicant was late for almost three months from the day of termination.

The applicant submitted that his factors for extension of time is that the respondent did not respond to demand notice given by the applicant, there is illegalities, there is biasness in the CMA decision and counter affidavit of the respondent is tainted with untruth.

It was submitted by the applicant that after termination she could not rush to file a complaint in the CMA without ascertaining if she was really terminated. Thus on 26/08/2014 she served both respondents with demand notice which was not answered by the respondents. The applicant is of the view that the Mediator was supposed to consider this evidence and find out that the cause of action did arise on 12/09/2014 when the demand notice expired. This could means that the matter was filed on time as provided under 10(1) of G.N No. 64 of 2007. In contest the respondents submitted that the said demand letter has never been served to respondents and the

demand letter was one of the way to cub legal requirement of Rule 10 of G.N No. 64 of 2007.

As submitted by both parties, the respondents terminated the applicant on 02/06/2014. According to rule 10 (1) of G.N. No. 64 of 2007 the applicant was supposed to refer the complaints to CMA within 30 days from termination. The submission that the counting of termination date was supposed to start from 12/09/2014 when the demand notice expired has no basis. As rightly held by the Commission there was no need for the applicant to wait for confirmation or to write a demand notice to the respondent before referring the dispute to the Commission. It is not a requirement of the law for the complainant to ascertain the terminated or to send the demand notice to the employer before referring the dispute to the Commission. Further, there is no evidence tendered by the applicant to prove that after receiving an email terminating her employment on 2nd June 2016 she continued to render service to the respondents. The applicant waited until 26/08/2014 to write demand letter to the respondent on her own will and under wrong advice of her adviser instead of referring the dispute to the Commission within prescribed time. Therefore, I find this reason to be insufficient.

The applicant second ground for the application is that the Mediator confined herself to the delay and counting of days without considering other

reasons for condonation of the delay. The other available reasons for condonation includes serious points of law (illegality), presence of prospect of winning, the right of applicant to be to heard and also the application for extension of time is granted for the purpose of enabling the Court to ascertain the existence of illegality or otherwise. Unfortunately, the applicant did not provide any evidence to support this submission. The Commission have discretion to condone for the delay when it is satisfied that the applicant have sufficient cause. Right of the applicant to be heard is subject to the procedure of referring the dispute within time. In the case of **Tanzania Fish Processors Ltd v. Christopher Luhangula**, Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania, at Mwanza, it was held that:

> ***"The question of Limitation of time is fundamental issue involving jurisdiction ...it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to Court as and when he chooses..."***

And in case of delay to file the complaint within time the applicant have duty to provide sufficient cause for delay including accounting for each day

of the delay. The Court of Appeal of Tanzania in the case of **Daudi Haga v. Jenitha Abdan Machanju**, Civil reference No. 1 of 2000 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. Therefore the Commission rightly held that the in application for condonation for delay the applicant have to account for each day of the delay.

The third reason for the delay as submitted by the applicant is that the mediator was bias as she made one side ruling by considering irrelevant matters. She referred to page no. 8 on 1st paragraph of the CMA's ruling where it was stated that the applicant was having dialogue with the respondents, and at page 10 of the CMA's ruling where it was stated that the applicant failed to prove that she travelled out of the country after obtaining respondents permission. She is of the view that the Mediator was deciding the case on merits while the matter was for condonation. I have read the Commission decision on the relevant pages and found that in page 8 the Mediator was discussing the act of the applicant delaying to file the complaint within time for the reason that the applicant did write to the respondent a demand letter but it was not answered. The Mediator was of the view that the Communication between the applicant and the respondents should not be a bar for referring the dispute to the Commission. There is no

biasness in the Commission holding. In page 10 of the Commission decision the Mediator was discussing the duty of the applicant to account for each day of the delay hence the same could not be termed as the biasness. This reason for condonation for delay also have no merits.

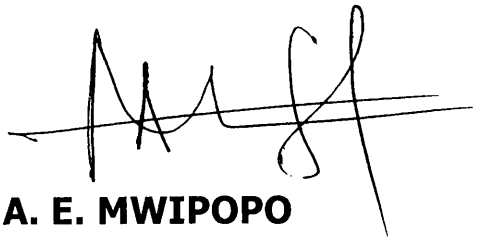
The applicant submitted that the respondent's counter affidavit is tainted with untruth since the Deponent in the counter affidavit does not reveal his or her position in the employment of both respondents. Further, the deponent does not state whether or not she was present at the time of engagement or dismissal of the applicant. Thus, the counter affidavit is unreliable and was improperly verified. The respondent disputed the submission by the applicant and stated that the person who affirmed the counter affidavit is the principal officer of the respondents who is acquainted with each and every fact of the case. Thus, the deponent was the right person to affirm an affidavit on behalf of the respondents.

I do agree with respondent submission that the Counter Affidavit affirmed by Fauzia Hussein states clearly that the deponent is principal officer of the respondents and she is conversant with the facts. The deponent stated that she is acquainted with each and every fact of the case as she is working with the respondents. There was no need for the deponent to state exactly position she was holding, what is important is that she is the person

who is conversant to depose the Counter affidavit on their behalf. Thus, the deponent was the right person to swear an affidavit on behalf of the respondents. The deponent verified all the facts she stated in the Counter affidavit. The deponent was not supposed to state facts which are not in her knowledge. Thus, the submission that the counter affidavit is defective have no merits.

Therefore, I find no need to fault the ruling of the Mediator as the applicant have failed to show good cause to be granted leave for condonation for the delay to refer the complaints to the CMA and I hereby dismiss the application. The CMA decision is upheld.

It is so ordered.



**A. E. MWIPOPO**
**JUDGE**
**17/07/2020**