

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

REVISION NO. 964 OF 2018

(Originating from CMA in Labour Dispute No. CMA/DSM/R.498/18)

BETWEEN

MOHAMED MAREKANI.....APPLICANT

VERSUS

AURIC AIR SERVICES LIMITED.....RESPONDENT

JUDGMENT

Date of Last Orders: 01/04/2020

Date of Judgment: 29/05/2020

A. E. MWIPOPO, J

The Applicant in this application namely **MOHAMED MAREKANI** was aggrieved by the decision of the Commission for Mediation and Arbitration in labour dispute no. CMA/DSM/ILA/R.498/18 dated 23/11/2018 before Hon. Mollé, B. L. Mediator. The applicant is praying for the following:

- i. This Honourable Court be pleased to revise and set aside the ruling of the Commission in the matter CMA/DSM/ILA/R.498/18 before Hon. Mollel, B.L. Mediator dated 23/11/2018.
- ii. This Honourable Court be pleased to make an order to extend time and direct the Commission to hear and determine on merits.
- iii. Any other relief(s) and order(s) this Honourable Court deems fit to grant.

Background of the dispute in brief is that the applicant was employed by the respondent as driver on 1st April, 2016 and was terminated from the employment with effects from 15th March, 2018. The applicant was not satisfied by the respondent decision and decided to refer the dispute to the Commission for Mediation and Arbitration. As he was out of 30 days' time limitation for referring the disputes about the fairness of the termination of employment contract to the Commission from the date of termination, he filled application for condonation. Before the application was heard, the respondent raised preliminary objection which was dismissed for not being pure points of law and the application for condonation was heard on merits. After hearing both parties the mediator dismissed the application for condonation for want of merits. Aggrieved by the CMA decision the applicant instituted the present revision application.

When the matter came for hearing on 01/04/2020 the Applicant prayed for the hearing to proceed by way of written submissions and the respondent did no object to the prayer. The Court granted the prayer and ordered the hearing to proceed by way of written submissions. Both parties filed their submissions within time.

In support of his application the applicant submitted that he is seeking before this Honourable Court to revise and set aside the ruling of the Mediator, Hon. B. L Mollel been delivered on 23rd November, 2018. The reason for the prayer is that the said Mediator had already delivered her ruling in favour of the Applicant since 1st August, 2018. The arbitrator stated in the decision dated August 1, 2018, that she found both grounds of preliminary objection meritless and were dismissed. Accordingly, the said Mediator had purportedly adjourned the case for hearing on 3rd day of August, 2018. After that, she delivered another ruling in contradiction of her prior verdict of the same preliminary objection.

It is in record that, the Applicant was employed by the Respondent on the 2nd December, 2014 as a driver up to 15th March, 2018, when he was unlawfully sacked. He could not institute the Labour Dispute within the prescribed 30 days because of having been attacked by chronic bronchitis with rheumatic fever to the extent of being admitted at the Amana Regional

Referral Hospital till on 23rd April, 2018, when he was discharged but kept on medication accordingly and regularly for six weeks to recover. He indeed filed the case on 4th May, 2018, after lapse of 19 days. A copy of a letter from the said hospital is herein furnished as part of this submission. This evidence proved his serious sickness by supplying the letter from the Government Hospital which stated having been a patient suffering from chronic bronchitis with rheumatic fever. As a result, the nature of his health could not enable him to file the case within 30 days from the date of summary dismissal from employment. It is from the foregoing that the applicant beseech this Honourable Court to order the labour dispute before the CMA be heard de novo.

The respondent have submitted in contention that the application for revision at issue is not legally tenable and has been preferred by the applicant without merit at all. The records of CMA shows that, the applicant's employment was terminated on ground of misconduct on 15th March, 2018, consequently on 04th May, 2018, the applicant referred a dispute for unfair termination and this was after the lapse of 49 days from the date of termination. The dispute was referred to the CMA together with the application for condonation supported with the affidavit of the applicant as per the law requirement.

The reasons for late referral of the dispute to the CMA as being advanced by the applicant both during the hearing of the application and in the affidavit was not supported by cogent evidence as it appears on the records hence did not constitute good cause, sufficient enough to convince the Honorable Commission to embark on its discretionary powers to condone time as being prayed for the applicant.

The respondent submitted that this application has been sought on the ground that, the decision of the CMA not to grant the application for condonation was illogical. He is of the view that the affidavit in support of the application per contents of paragraph No. 1 to 10 inclusive does not state at all the facts to support the alleged illogical factors to warrant this court to set aside the decision made thereto by the honourable Mediator. He argue that the applicant failed not only to account for every single day of delay, but also to prove the advanced reasons that was alleged to have caused the delay of 49 days of referring the dispute to the CMA.

In the case of **Tanzania Ports Authority Vs. Pembe Flour Mills Ltd, Civil Application No. 49 of 2009**, the Court of Appeal of Tanzania at Dar es Salaam (Copy Annexed) held inter alia that, the applicant was duty bound in law to account for the delay of filing the application for extension

of time. Since the delays were not accounted for, the Court of Appeal dismissed the application.

The respondent submitted further that the reason that was advanced to justify the delay to file the dispute before the Commission by the applicant was sickness. But the document that was brought before the Commission to prove the alleged sickness was a medical report from Amana Hospital dated 23rd April, 2018 and revealed that, the applicant attended to the hospital since 21st March, 2018. It is evident on the face of record that, the termination of the applicant's employment was with effect from 15th March, 2018 while the application for condonation was sought lately on 3rd May, 2018. It is the requirement of the law that in applying for condonation, the applicant should account for the day from the date of termination to the date of filing the application. The applicant failed to account for each day of delay including the six days before the day that the applicant alleges to have been hospitalized and get treated at Amana hospital.

The fact that the applicant got sick one day before his employment was terminated is a new and was not pleaded in the affidavit supporting the application for condonation or rather submitted during the hearing of the application. The applicant failed to prove to that effect by providing supportive medical evidence such as bills and medical receipts.

He argued that Rule 11(3) of the Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2004, requires the applicant to set out the grounds for condonation and submit on the degree of lateness, the reasons for the lateness, its prospect of succeeding with the dispute and obtaining the relief sought against the other party and other relevant factors. In this case, the only ground that was raised for late referral of the dispute to CMA was sickness.

In the case of **Topical Air (TZ) Limited vs. Godson ELiona Moshi**, Civil Application No. 9 of 2017, the Court of Appeal of Tanzania at Arusha, at page 9 and 10 the Court of Appeal set guidance on factors to be considered for good cause to extend time, this factors are:

1. The applicant must account for all period of delay
2. The delay should be not inordinate
3. The applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intends to take.
4. If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

The applicant failed to account for each day of delay and that the applicant was negligent to refer the dispute on time before the CMA.

However, the documentary evidence that was tendered to prove the alleged applicant's sickness, to wit, the medical report was not sufficient enough to warrant the honorable Commission to embark its discretionary powers for condonation.

He further submitted that there is no any prospect of success even if the Commission would have granted the application since the respondent followed proper procedures on terminating the applicant's employment and the respondent did pay the applicant his terminal benefits hence has nothing to claim before the Commission. The medical report that was tendered as it is revealed on the records was an afterthought since was procured on 23rd April, 2018 after the lapse of 30 days from the date of termination that ended on 14th April, 2018.

The applicant's submission that the honorable Arbitrator delivered contradictory decision in the ruling that was delivered on 1st November, 2008 and that decision for the preliminary objection have no basis. The preliminary objection was dismissed on the ground that the objection was not pure point of law but issues of facts that needed to be proved. During the hearing for application for condonation and at page 2, 3rd paragraph, the CMA Ruling, held inter alia that, the issue of limitation and reasons for delay can only be dealt with the commission at the time of hearing of the application for

condonation and upon hearing of the application was found being time barred and hence not contradicting decision. Therefore the honourable Mediator did not procure contradicting decisions to warrant this honourable Court to revise CMA decision. The honorable Mediator, was well guided by the law and principles when exercising her judicial discretionary power and came into the decision of not to grant the applicant's application for condonation. He then prayed for the application be dismissed with costs for being meritless.

In rejoinder submission the applicant retaliated his submission in chief. In addition he stated that the applicant is not seeking for extension of time since Mediator ruling of 1st day August, 2018 had dismissed the preliminary objection.

From above submissions there are two main issues for determination in this application. The issues are as following:

- i. Whether the mediator was not supposed to determine the application for condonation on merits after dismissing the Preliminary Objection raised by the respondent before the Commission.

- ii. Whether the applicant provided sufficient reason for the Mediator to embark its discretionary powers to grant application for condonation.

Regarding the first issue, the applicant have submitted that the Mediator rulings dated 23rd November, 2018 that dismissed the application for condonation was illogical for contradicting another ruling of the Mediator in favour of the Applicant dated 1st August, 2018. The mediator in the decision dated 1st August, 2018, found both grounds of preliminary objection meritless and dismissed them. After that, she delivered another ruling dated 23rd November, 2018 in contradiction to the prior verdict of the same preliminary objection. In opposition the respondent submitted that the preliminary objection was dismissed on the ground that the objection was not pure point of law but issues of facts that needed to be proved. During the hearing for application for condonation the Mediator held that the issue of limitation and reasons for delay can only be dealt with the commission at the time of hearing of the application for condonation and upon hearing of the application was found being time barred and hence not contradicting decision.

In perusal of the file, I read the ruling of the Mediator dated 3rd August, 2018 on the Preliminary Objection on points of law which was raised by the

respondent. The respondent raised two points of P.O. during hearing for the application for condonation which was filed by the applicant. The first point of objection was that the application's claims are implausible, contrived and bad in law for failure to attach any evidence to prove that he was sick. The second objection was that the applicant has been paid his claims he deserved according to the law. The P.O. was dismissed for the reason that the grounds are not pure points of law but rather issues of facts. The Mediator was of the opinion that the issue of limitation and reasons for delay can be dealt with during hearing for condonation. The record of proceedings at page 3 and 4 of the typed proceedings shows that after the ruling of the Mediator the application for condonation was heard on merits.

Therefore, I'm of the same opinion with the respondent that the Preliminary Objections were dismissed for the reason that the grounds are not pure points of law but rather issues of facts. Thus, the P.O. was not held on merits. The Mediator made it clear that the issue of limitation and reasons for delay can be dealt with during hearing for condonation. The same was done whereby both parties submitted on the issue of condonation and the Mediator decided to dismiss the application for condonation for want of merits. Therefore, the Mediator rightly proceeded to determine the

application for condonation on merits after dismissing the P.O. raised by the respondent. Thus, the answer to the first issue is negative.

The second issue is whether the applicant provided sufficient reason for the Mediator to embark its discretionary powers to grant application for condonation. The applicant have submitted on the issue that he could not institute the Labour Dispute within the prescribed 30 days because of having been attacked by chronic bronchitis with rheumatic fever to the extent of being admitted at the Amana Regional Referral Hospital till on 23rd April, 2018, when he was discharged but kept on medication accordingly and regularly for six weeks to recover. He indeed filed the case on 4th May, 2018, after lapse of 19 days. He furnished a copy of the letter from the said hospital as evidence.

In contention the respondent submitted that the document that was brought before the Commission to prove the alleged sickness was a medical report from Amana Hospital dated 23rd April, 2018. The law requires that in applying for condonation the applicant should account for the day from the date of termination to the date of filing the application. The applicant failed to account for each day of delay including the six days before the day that the applicant alleges to have been hospitalized and get treated at Amana hospital.

As both parties submitted, the applicant reason for the delay is that he was sick. The evidence relied by the applicant is the letter from the Medical Officer, Amana Regional Referral Hospital dated 23rd of April, 2018. The letter states that the applicant was admitted to the hospital from 21st March, 2018 up to 23rd April, 2018. The letter state further that the applicant was diagnosed to have chronic bronchitis with rheumatic fever and was kept on medications for six weeks to recover. Further, the letter state that due to the illness the patient was unable to attend his daily activities actively and regularly as far as concerned. From the content of the letter, it is my opinion that the applicant was sick and was on medication, due to the sickness the applicant was unable to attend his daily activities actively. This means after 23rd of April, 2018 the applicant was able to attend his daily activities actively.

The applicant was terminated from employment with effect from 15th March, 2018. The application for condonation was referred to the Commission on 3rd May, 2018. According to rule 10(1) of the G.N. No. 64 of 2007 the disputes about the fairness of the termination of employment contract must be referred to the Commission within 30 days from the date of termination. Since the date of termination is 15th March, 2018 then the dispute was supposed to be referred to the Commission by 14th April, 2018. However, the dispute was referred to the Commission on 3rd May, 2018

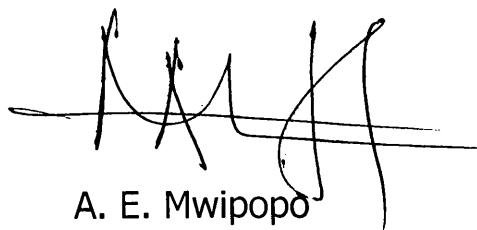
which is almost delayed for 19 days. The applicant was supposed to show that the delay to refer the dispute to the Commission was caused by a reason of sickness.

The letter of the Medical Officer, Amana Regional Referral Hospital dated 23rd of April, 2018 shows that the applicant was sick from 21st March, 2018 up to 23rd April, 2018 and was on medication. Due to the sickness the applicant was unable to attend his daily activities actively. After 23rd of April, 2018 the applicant was able to attend to his daily activities actively. By this time the delay was only for 9 days and this time was covered well by the said letter of the Medical Officer for Amana Regional Referral Hospital. From 24th April, 2018 onward up to 3rd May, 2018 which is almost 10 days there is no explanation for the delay. In the cited case of **Tanzania Ports Authority vs. Pembe Flour Mills Ltd, (supra)**, the Court of Appeal of Tanzania held that the applicant was duty bound in law to account for the delay of filing the application for extension of time. Also in the case of **AZIZI MOHAMED vs. THE REPUBLIC, CRIMINAL APPLICATION NO. 84/07 OF 2019, CAT at Mtwara**, (Unreported), the Court of Appeal held that, I quote;

Assuming there was any valid reason for the delay, has the applicant accounted for each day

of delay? I have already held that the delay was, by any standard inordinate but that that does not necessarily preclude the Court from exercising its discretion if the applicant succeeds in accounting for each day of the delay.

In the present application the applicant have failed to account for each day of the delay from 24th April, 2018 the day he was able to attend to his daily activities actively according to the Medical Officer of Amana Hospital letter up to 3rd May, 2018 when the applicant filed the application for condonation. The time delayed is almost 10 days and there is no explanation for this time delayed. In the circumstances, I agree with both the Mediator and the respondent that the application has no basis for failure of the applicant to account for each day of the delay. Therefore, the answer to the second issue is also negative. As result the application is dismissed in it's entirety for want of merits. The CMA Award is hereby upheld. Each party to bear his own cost.



A. E. Mwipopo

JUDGE

29/05/2020