IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 04 OF 2020

BETWEEN

REVOCATUS A. KITOLE AND 420 OTHERS.....APPLICANT

AND

G4S SECURITY SOLUTIONS (T) LIMITED.....RESPONDENT

JUDGMENT

Date of Last Order: 06/08/2021

Date of Judgment: 27/08/2021

B. E. K. MGANGA, J.

It is alleged that the Applicants herein namely **REVOCATUS A. KITOLE AND 420 OTHERS** entered into fixed term contracts of five years with the Respondent. On 25th April 2016 they filed complaint No. CMA/DSM/ILA/R/371/16/886 to the Commission for Mediation and Arbitration henceforth CMA claiming for underpayment of basic salaries and overtime. On the date the complaint was scheduled for hearing, the respondent raised two preliminary objections, that is to say;

(i) that the complaint filed in the commission for mediation and Arbitration by the respondent is incurably defective and bad in law as it contravenes Rule 5(2) and (3) of the Labour Institutions GN. GN. No. 64/2007; and

(ii) *that, the complainant's claims for arrears and overtime payments are hopelessly time barred.*

Mr. Yahaya Mtete, the personal representative of the applicants conceded to the said preliminary objections and prayed complaint by the applicants be struck out so that they can rectify and file application for condonation. On 3rd May 2017, the Arbitrator sustained the objection, rejected the prayer of striking out the application to allow applicants to correct errors and apply for condonation, and proceeded to dismiss the complaint for being time barred. Aggrieved by that decision, applicants made this application praying the court to revise the said dismissal order. In paragraph 7 of the affidavit, the applicants have raised two legal issues to be considered by the court namely: -

(i) Whether the Arbitrator was right in dismissing the dispute with continuous breaches from 1st February, 2014 to 27/04/2016 the date of filing the dispute

(ii) Whether the Arbitrator was right to invoke to Labour Institutions (Mediation and Arbitration) GN. No. 64 of 2007 instead of Law of Limitation Act the time limits for referring dispute of continuous breaches and wrongs.

When the application was called for hearing, Ms. Agnes Ndanzi Advocate, appeared and argued for and on behalf of the Applicants. She submitted that, on 6th February 2014 applicants entered into fixed term contracts of five years ending on 31st January 2019. It was submitted that

applicants were entitled to be paid overtime as they worked beyond 195 hours instead of 180 hours monthly provided for under the Employment and Labour Relations Act, [Cap.366 R.E. 2019]. She further submitted that they are claiming for salary arrears because the respondent increased their salaries, but they were never paid. Reliance was made on the salary increment letters annexture ***RK4*** to the affidavit of the Applicant. Counsel also relied on paragraph 8(a) of the employment contract between the applicants and the respondent that is annexture RK3 to the affidavit to show that they were entitled for overtime allowance. The said paragraph 8(a) in the employment contact provides that basic hours are 195 hours. She thus prayed for the application to be allowed, and the CMA award to be revised.

On the other hand, the application was resisted to by Mr. Moses Kiondo Advocate for the respondent. Resisting the application, Mr. Kiondo submitted that the complaint at CMA was disposed by preliminary objection as it was in violation of Rule 5(2) and (3) of Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 64 of 2007 henceforth GN. No. 64 of 2007 relating to mandate of an employee to represent others at CMA, and Rule 10(2) of GN. No. 64 of 2007 for limitation of time. He submitted that, the personal representative of the applicants conceded to the preliminary

objections that were raised on behalf of the respondent as a result thereof, CMA dismissed their complaint. He submitted further that, applicants were supposed to file their complaint to CMA within sixty days in terms of Rule 10(1) and (2) of GN. No. 64 of 2007 as they were claiming for salary arrears, but they filed their complaint at CMA after one year. He concluded that, the arbitrator was right to dismiss their complaint. Counsel cited the case of ***Barclays Bank Tanzania Limited vs. Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016, (unreported)*** to the effect that, the law of limitation knows no equity and prayed that the application be dismissed as it was time-barred. He was of the view that, applicants were supposed to apply for condonation before filing the complaint to CMA. As there was no application for condonation and an order thereof, the Arbitrator was justified to dismiss the application, he submitted. He therefore prayed the application be dismissed.

In rejoinder, Counsel for the applicants conceded that, in terms of Rule 10(2) of GN. No. 64 of 2007 applicants were supposed to file their complaint before CMA within sixty days. She was however of the view that, the complaint that was filed out of time was supposed to be struck out instead of being dismissed. This, in her view, could have afforded the applicants a chance of being heard. On another bite, she submitted that,

at the time of filing the complaint at CMA, applicants were still working with the respondent and that the complained of breach was continuing and concluded that the complaint by the applicants were in time.

It is clear that both counsels are on the same page that applicants were required to file their complaint to CMA within sixty days in terms of Rule 10(2) of GN. No. 64 of 2007. While counsel for the respondent submitted that the complaint was filed out of time hence liable to be dismissed, counsel for the applicant had a view that it was in time. It was view of counsel for the applicant that even if the application was out of time, the consequence thereof was to strike it out and not to dismiss it.

I must point out here that, Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. No. 64 of 2007 provides disputes relating to fairness of termination of employee must be filed to the Commission within 30 days from the date of termination or date the employer made a final decision of termination. Rule 10(2) of the same GN. covers other situations other than termination and provides that the dispute mut be filed to the Commission within 60 days from the date when the dispute arose. Both Rule 10(1) and (2) provides only the time limit but not the consequences of none adherence to the said time. Which is why, counsels are battling as to whether it has to be struck out or dismissed in

accordance with the provisions of the Law of Limitation Act [Cap.89 R.E. 2019]. Undoubtedly, the issue whether a time-barred matter has to be dismissed or struck out was considered and resolved by the Court of Appeal in the case of ***Barclays Bank (supra).*** In the said Barclays case, that also originated from this Division of the High Court, the court of Appeal discussed the provisions of section 46 of the Law of Limitation (supra) and came to the conclusion that it applies to all proceedings with exceptions provided for under section 43 of the said Act. The Court of Appeal being alive that there has to be limit of time within which a party can institute proceedings, quoted with approval the decision of this court (Rweyemamu, J as she then was) in the case of ***Noordin Jella v. Mzumbe University***, complaint No. 47 of 2008 (unreported) that:-

> *"For one, economic development cannot be promoted by allowing labour disputes to remain unresolved for an undue long period, as that would keep both the employer and employee tied up in disputes instead of being productively engaged... To revert to the submission of counsel for the complainant, I stress that it is in regard to the nature of labour disputes that time limits for initiating actions must be provided."*

Having quoted the above paragraph with approval, the Court of Appeal added:-

> *"...it would be inequitable if we allow one party to an employment contract to disregard time in instituting a complaint against the other party. We think matters would not come to finality as required if a party who allows grass to grow under his*

feet and delays in instituting an action, would only be given an order to refile it. The object of the law of limitation would be defeated... we are settled that section 46 of the Act will defeat section 3(1) of the Act if a time-barred matter will be struck out with leave to refile, instead of being dismissed."

After a lengthy discussion, the Court of Appeal came to the conclusion that if the legislature had intended time-barred employment matters to be struck out, it would have expressly stated so. The Court of Appeal therefore held that a time-barred case or dispute has to be dismissed and not struck out.

In a second bite, counsel for the applicants submitted that, at the time of filing the application at CMA, applicants were still working with the respondent therefore breach was continuing. In so arguing, counsel was of the view that the complaint was not time-barred. Unfortunately, this issue was not covered by counsel for the respondent. In order to address the issue as to whether the breach was continuing or not, the affidavit in support of the notice of application has to be examined. The only paragraphs in the affidavit of the applicants that are relevant to this issue are paragraphs 4 to 6. I reproduce the said paragraphs though to the detriment of making this judgment long but for clarity of the issue raised and for resolving this matter properly.

"4. That, the applicants entered into fixed term employment contracts of 5 years commencing on 1st February 2014 to 31st January 2019 which required

applicants to work 195 hours instead of 180 hours per month as per Employment and labour Relations Act, of 2004. Due to this abnormal working 195 hours, applicants never reached target wherefore, the respondent never paid them monthly Basic salaries correctly continuously. Basic salaries changed month after month. Copy of employment contract are attached to form part of this affidavit and marked RK3 collectively.

5. That, applicants tried to discuss with the management to their level best regarding basic salary fluctuations they ended being given promises without solutions. But after two years the respondent issued salary increase letters dated 15/03/2016 showing former salary in TZS and New salary in TZS. It is from this point on 27th April 2016 the applicants filed a labour Dispute No. CMA/DSM/ILA/R.371/16/886. Copy of FORM No. 1 and Copies of salary slips and annual salary increment letters are attached to form part of this affidavit and marked RK 4 collectively.

6. that, this Labour dispute at CMA was dismissed..."

I have examined copies of the said fixed term employment contracts (**annexture RK3**) referred to in paragraph 4 above and find that, out of 420 applicants in this application, there is only fixed term contracts of ***Donald Alfred Kashindye and Mabrouck Rajabu Mohamed.*** Even the contract ***of Revocatus Kitole*** who was granted leave to represent the rest was not annexed to his affidavit. In absence of their contracts of employment, it cannot be established that (i) all applicants were employees of the respondent, (ii) all entered into fixed term contracts and dates of expiration, and (iii) they have any claim against the respondent. It cannot

further be established that there was continual underpay of salary for the Law of Limitation Act to apply in their favour. Therefore, according to **RK3**, the only persons who, it has been established that were engaged by the respondent for a fixed term contract running from 1st February 2014 to 31st January 2019 are ***Donald Alfred Kashindye*** and ***Mabrouck Rajabu Mohamed***. Names of the two applicants appears in the list of names filed at CMA. It is worth to note briefly that there was violation of Rule 5(3) of GN. No. 64 of 2007 as some of the employee did not sign to mandate the said ***Revocatus Kitole*** to file the application at CMA as discussed later in this judgment.

I have further examined annexture **RK4** referred to in paragraph 5 of the applicants' affidavit to establish whether the breach was continuing one or not. It is clear that on **25th April 2016,** Revocatus Kitole signed CMA Form 1 showing that **Revocatus Andrea Kitole and 419 others** are claiming underpayment of basic salaries and overtime **from 2014 to the date of signing CMA form 1 that is to say to 25th April 2016**. Salary slips were annexed to paragraph 5 as RK4 collectively to show the underpayment of basic salary and that the same was continuing. Unfortunately, only salary slips of fifteen (15) persons out of 420 were annexed to the affidavit to form part of evidence. More worse, copies of

salary slips of (i) eleven (11) persons were for the year 2014, (ii) One (1) person was for the year 2015, (iii) one (1) person was for January 2016, (iv) one (1) for **Omary Nyanga for February 2017**, and (v) one (1) for **Mabruck Mohamed for May 2017**. It is my settled view that, claims based on salary slips for the year 2014, 2015 and January 2016 are out of time in terms of Rule 10(2) of GN. No. 64 of 2007. I am also of settled mind that claims based on copies of salary slips for February 2017 and March 2017 were not placed before the arbitrator for consideration for reasons that by that time, applicants had not received their salaries taking into account that the complaint was filed at CMA **on 27th April 2016** after the said Revocatus A. Kitole has signed CMA Form No. 1 on 25th April 2016. It is clear also from the above, that no copies of salary slips for the months of February 2016 and March 2016 were annexed which would have shown that applicants were in time, in terms of Rule 10(2) of GN. No. 64 of 2007. Applicants, therefore, filed their application at CMA not within 60 days prescribed under Rule 10(2) of GN. No. 64 of 2007. In short, they were out of time. That said and done, I hold that, the Arbitrator rightly dismissed the time-barred complaint by the applicants and correctly rejected the prayer to struck it out.

It is also worth to point out that in CMA F1, that initiated Labour dispute at CMA, shows that the dispute is between **Revocatus Andrew Kitole and 423 others** (applicants) and G4S Secure Solutions (t) Ltd. Together with that form, the applicant forwarded a letter annexing the names of applicants who have authorized the said Revocatus Andrew Kitole to file the complaint on their behalf. On examination of the said annexture, two things came clear to me. One, the annexture contains only **408** of Applicants contrary to what **Revocatus Andrew Kitole** (the applicant) recorded in CMA F1 that they were **423** applicants. Two, **7** persons out **408** did not sign the said document. In short, consent of 7 people was no obtained to authorize the applicant to file Labour dispute in their behalf. The Labour dispute that is the subject of this application, was therefore heard and determined at CMA without consent of 7 people. This is illegal because the dispute was heard without their knowledge. They can therefore be affected positively or negatively without themselves being heard. In short, hearing the dispute without their knowledge and or consent is violation of cardinal principle of right to be heard. In such a situation, there are high possibility that one person or a group of few people, were waiting to take advantage from the award had it been decided in their favour. I am of that view because those who did not sign

were unaware of what was going on. In the revision application at hand, the applicant has indicated that he has filed this application on behalf of **420** others. Here they applicant has given a totally different number. It is my opinion that the arbitrator was supposed to verify the names of the persons who signed and consented in the list of names that was filed before him before taking any further steps. In so doing, he would have detected that the number of persons in the list is not 423 but 408 and further that only 401 persons signed and consented for Mr. Revocatus Kitole to file the application on their behalf. It is also not known how the number increased from 408 in the list to 420 in the application before me. It is my opinion that, in order to make sure that busy bodies or unintended applicants are not included in applications especially after noting that fruits are ripe, it is important that, every application to be filed either at CMA or in this court, it should be accompanied with the list of names of applicants who has duly signed the same and that failure will lead the application to be struck out.

It is also indicated in paragraph 5 of the affidavit of the applicant quoted above that, the respondent issued salary increase letters dated 15th March, 2016. Once again, only seven (7) copies of the said increment letters were annexed to the affidavit. The said letters reads:-

"...We are pleased to inform you that the management has approved your annual increment with effect from ***1st February 2016****...following the above, payroll Officer is advised to amend payroll records and* ***pay your new salary in March 2016 together with arrears for February 2016****..."*

As pointed above, no copy of salary slips for **March 2016** was annexed to the affidavit of the applicant or was placed before the Arbitrator for consideration. It is worth to point out here that, none of these letters relates to **Omary Nyanga** and **Mabrouck Mohamed** whose copies of salary of slips for February and May 2017 respectively were annexed to the affidavit with a view of convincing this court to hold that the breach was continuing as argued by counsel for the applicants. The only person who was established by evidence to be employee of the respondent as per RK3 as pointed out hereinabove, is **Mabrouck Mohamed.** But his letter showing that he was entitled to salary increment was not annexed. It is not known as to whether he also got the same letter or not. Salary increment was confidential to the recipient of the said letter as such, it cannot be assumed that everyone received the same. Defintely, there may be others who did not get salary increment. Had it that everyone got it, they would have all annexed it. Surprisingly, even Mr. Revocatus Kitole did not attach a letter to show that his salary was increased and that he is claiming for underpayment. Nonetheless, a copy of

salary slip of the said ***Mabrouck Mohamed*** is of no help to the applicants in this application as the same was not p'aced before Arbitrator for consideration as it was issued in May 2016 while the dispute was filed at CMA in April 2016. On the other hand, no proof that in 2016 before filing the complaint to CMA, ***Omary Nyanga***, was an employee of the respondent for this court to conclude that the breach was continuing. This is due to the absence of his contract of employment that could have shown as to when he was employed.

For the fore going, I hold that there was no proof that the breaching was continuing for the provisions of section 7 of the Law of Limitation to apply and consequently further hold that the Arbitrator cannot be faulted. In the upshot, I uphold the award of the Commission for Mediation and Arbitration and dismiss this application for want of merit.

It is so ordered.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

B.E.K. MGANGA
JUDGE
27/08/2021