

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 662 OF 2018

SERENGETI BREWERIES LIMITED.....APPLICANT

VERSUS

JEROME BOSHA NG'ITU..... RESPONDENT

JUDGMENT

Last Order: 25/08/2021

Date of Judgment: 10/09/2021

B.E.K. Mganga, J.

On 1st November 2014 the applicant employed the respondent as Communication Manager. On 5th October 2015 the respondent was informed verbally that he was promoted to the position of Government Relations and Regulatory Affairs Manager effective from 1st July 2016 and was promised to be issued with new identity card and change his salary to meet the new post. It happened that the respondent was not issued with a promotion letter; identity card and his salary were also not changed.

On 14th March 2018 the respondent filed to the Commission for Mediation and Arbitration, application for condonation of late referral of a

dispute to the Commission for Mediation and Arbitration Form dated 12th March 2018 (CMA F.2), referral of a dispute to the Commission for Mediation and Arbitration Form (CMA F.1) dated 12th March 2018 and annexed his affidavit sworn on 13th March 2018. In CMA F1, respondent indicated that the dispute arose on 1st September 2016 and that the nature of the dispute was discrimination (harassment). The application for condonation was opposed by the herein applicant who filed a counter affidavit of Gwandumi Mwangolome.

Having heard submissions of Frank Mvunjapori personal representative of the herein respondent and Luka Elingae Advocate for the herein applicant, on 19th June 2018, Mikidadi. A, Mediator gave a ruling for condonation in favour of the respondent. Aggrieved by the said ruling, the applicant filed this application for revision. In the notice of application, the applicant advanced four grounds namely:

- 1. That, erred in law and facts for failing to address the pre-conditions for the grant of condonation hence reached a wrongful decision*
- 2. That, mediator erred in law and facts for holding that the respondent showed sufficient reason for the delay while there was no such reason shown*
- 3. That, mediator erred in law and fact for holding that the respondent accounted for each day of delay while he failed to account for the delay*

4. That, mediator erred in law and fact in taking into consideration matters which were not relevant before the commission.

When the application was called for hearing on 20th August 2021, Mr. Juvenalis Ngowi, advocate for the applicant informed the court that the respondent was served on 27th June 2019 but he has not filed a counter affidavit. Mr. Dickison Matata counsel for the respondent conceded and prayed leave of the court to file a counter affidavit. The prayer was not opposed by counsel for the applicant. In interest of justice, leave was granted, and an order was issued for the respondent to file counter affidavit by 23rd August 2021. The application was scheduled for hearing on 25th August 2021. Without explanation, a counter affidavit was not filed by the respondent. On the 25th August 2021, the date the application was scheduled for hearing, only counsel for the applicant entered appearance. Counsel for the applicant prayed leave to proceed ex parte as a result the prayer was granted.

It was submitted by Mr. Ngowi on behalf of the applicant that on 12th March 2018, the respondent filed Labour dispute at CMA claiming salary arrears and general damages amounting to TZS 80,000,000/= based on the cause of action that arose on 1st September 2016. Counsel submitted that the said dispute was filed by the respondent 18 months from the date the cause of action arose while Rule 10(2) of Labour

Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 provides that, a dispute of that nature, is supposed to be filed within 60 days. Counsel for the applicant submitted that there were no reasons assigned by the respondent for the delay and further that respondent did not account for delay. Counsel for applicant cited the case of ***Finca (T) Limited v. Boniface Mwalukisa, Civil Application No. 589/12 of 2018***, CAT (unreported) to support his argument. He argued further that respondent did not demonstrate any act that prevented him to file the dispute at CMA within the time prescribed under the law. He cited the case of ***Zawadi Msemakweli v. NMB PLC, Revision No. 427 of 2016***, High Court (unreported) to bolster his argument that the respondent was supposed to demonstrate. He further cited the case of ***Paul Martin v. Bertha Anderson, Civil Application No. 7 of 2005***, CAT (unreported) to the effect that the delay was inordinate warranting condonation not to be granted. Counsel nailed his submission that extension of time or condonation should not be granted based on sympathy rather should be based on good cause. On this point he cited the decision of the Court of Appeal in the case of the ***Registered Trustees of the Archdiocese of Dar es salaam v. The Chairman Bunju Village Government and 11 others***, Civil Appeal No. 147 of 2006 (unreported). He concluded by submitting that even if it can be

assumed that there were negotiations between the parties, that cannot be taken as a base of extension of time. He cited the case of ***Leons Barango v. Sayona Drinks Ltd , Revision No. 182 of 2012***, High court, (unreported).

I have carefully considered submissions made on behalf of the applicant and both the affidavit and the counter affidavit of the applicant in this application and their respective counter affidavit and affidavit filed at CMA together with the ruling thereof and find that there was no sufficient material to justify granting of condonation to the respondent. It is true that the respondent did not account for each day of delay from 1st July 2016. In the ruling granting condonation, principles for extension of time or condonation pointed out in the above cited cases of Court of Appeal were well explained. Surprisingly, having cited those case laws, arbitrator/Mediator ignored them and concluded that sufficient grounds were given for condonation. The mediator was mindful that she has a discretion under Rule 11(3) of the Labour Institutions (Mediation and Arbitrations) Rules GN. No. 64 of 2007 to grant or not to grant condonation which is why she cited it. The said Rule sets out matters to be considered namely, the degree of lateness; reasons for the lateness; prospects of succeeding with the dispute and obtaining the relief sought

against the other party; any prejudice to the other party; and any other relevant factor. All these were ignored at the time of delivering a ruling for condonation. More so, in terms of Rule 29(4)(d) of GN. No. 64 of 2007,(supra), the application for condonation has to be supported by an affidavit setting clearly and concisely grounds for condonation. The affidavit of the respondent did not contain grounds for condonation apart from paragraph 19 in which he stated that he was praying for condonation. Mediator was supposed also to be guided by that Rule.

The court of Appeal has held several times that extension of time is a discretion of the court but the same has to be exercised judiciously. For example, in the case of ***MZA RTC Trading Company Limited v. Export Trading Company limited, Civil Application No. 12 of 2015*** (unreported), at page 6 the Court of Appeal held:-

" an application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law the court has to demonstrate however briefly, how that discretion has been exercised to reach, the decision it takes..."

Guided by the above cited cases and based on what is on CMA file, I hereby hold that there was nothing material before the mediator to justify exercise of judicial discretion in granting condonation. For the foregoing,

I allow the application, quash and set aside the ruling that granted condonation to the respondent.

It is so ordered



B.E.K. Mganga

JUDGE

10/09/2021