

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 917 OF 2019

BETWEEN

SALUMU MAULIDI SANGO.....APPLICANT

VERSUS

BEIJING NEW BUILDING MATERIAL (TANZANIA)

COMPANY LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 02/08/2021

Date of Judgment: 7/09/2021

B.E.K MGANGA, J.

This is revision application against the award issued by the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/R.128/17/362 which was delivered on 29th October 2019 by Hon. Kiangi, M., Arbitrator. Facts leading to this application are that in March 2014, by oral contract, the respondent employed the applicant. In September 2014, the respondent employed the applicant on a fixed contract of one year at a monthly remuneration of Four Hundred Thousand Tanzanian Shillings (TZS 400,000/=) as Marketing Manager. He continued to work for the uninterrupted

period until July 2016 when respondent noted that TZs 76,000,000/= were missing. It was alleged that the applicant who, was collecting money from customers of the respondent has failed to hand over the said amount to the respondent. A report was sent at police alleging that applicant has stolen the said amount of money. Based on that report, applicant was arrested, detained for some days and later on released on bail. On 30th November 2017 applicant filed labour dispute No. No. CMA/DSM/ILA/R.128/17/362 through CMA Form No. 1 in which he indicated that the dispute arose on 24 November 2017. On 29/10/2019 by Hon. Kiangi, M., Arbitrator, having heard evidence of the parties raised *suo moto* the issue of limitation of time and struck out the application by the applicant on ground that it was time-barred. Aggrieved by that decision, the applicant has filed this application seeking to revise the said award.

In the the affidavit in support of the Notice of Application, the applicant has raised three legal issues for determination as follows;

- i. Whether it was proper and legal for the Honorable arbitrator to strike out the complaint after a full hearing on an issue raised Suo motu to the effect that the applicant's complaint was time barred without according the parties an opportunity to be heard on the said issue.*

- ii. Whether right of action in a claim for continuously unpaid salaries starts to run on the day the latest salary was not paid or on the day the first month salary was not paid*
- iii. Whether a fresh cause of action starts upon no payment of salary for every respective consecutive month.*

At the hearing of the application, the applicant was represented by Mr. Nichoras Mugarura, Advocate, whereas the Respondent was represented by Mr. Rico Adolf Mzeru, Advocate. The application was disposed by way of written submission.

Submitting in support of the application, Mr. Nichoras Mugarura was of the view that the arbitrator erred in law and fact by raising the issue *Suo motu* and by holding that the applicant's claim for salary arrears was time barred as the applicant's complaints started in November 2016 and not November 2017. He stated that the issue raised by the arbitrator was never framed at CMA, for that reason he was of the view that parties were denied the right in arguing the said issue. Counsel for applicant submitted further that the issue raised by the arbitrator was already raised before Mediator but the same was not determined on merits for reasons that the same required proof. He went on that, had the same been brought to the attention of the

applicant, the Honorable arbitrator would have reached a different decision because the breach was continuing.

It was further argued that, even if the arbitrator was right to hold that the cause of action arose in November 2016 and therefore was to be filed within sixty (60) days, the immediate past two salaries due just before filing of the dispute on 30th November 2017, that is to say, salary for September 2017 and October 2017 in strength of the case of **Adam Azisack v. Willy Mlinga**, Labour Revision No. 433 of 2019, High Court, (unreported) revived the application as a result thereof it was within time. He submitted that time should be counted from the last two salaries of September 2017 and October 2017. That in so counting, the matter was filed within a time. He went on that the Law of Limitation does not apply in Labour matters. Counsel argued that the arbitrator failed to afford parties right to be heard on the issue hence occasioned gross injustice. To support his stand, he cited the cases of **Margwe Erro and 2 Others v. Moshi Bahalulu**, Civil Appeal No.111 of 2014, Court of Appeal of Tanzania, at Arusha (unreported), **Wegesa Nyamaisa v. Chacha Muhongo**, Civil Appeal No.161 of 2016, CAT (unreported) and **the Managing Director Kenya Commercial Bank (T) Limited and another v.**

Shadraka Ndege, Civil Appeal No. 232 of 2017, CAT

(unreported) and prayed for the application to be allowed.

Replying to the applicant's submission, the respondent Counsel submitted that the applicant was paid last salary in October 2016 as indicated at paragraph 3(d) of the applicant's affidavit, and that, his complaint was filed at CMA on 30th November 2017 as stated under paragraph 3(g) of the applicant's affidavit. He argued that the applicant's affidavit in support of the application shows clearly that the matter was time barred for being filed after 12 months, contrary to Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, G.N No. 64 of 2004. On the other hand, Counsel for the respondent submitted that parties were afforded right to be heard on their testimony as the applicant testified that his salary arrears started from October 2016. He went on that; this is evidenced by Exhibit P-2 (Salary payment). In such circumstances, it is not proper now the applicant to argue that he was not afforded right to be heard. Counsel for the respondent submitted further that the case of **Adam Azisack**, *supra*, is not in favour of the applicant.

It was further argued on behalf of the respondent that since the Law of Limitation does not apply to labour matters, the

applicant's allegation of continuously breaching lacks legal stance. In strengthening his argument, he referred this Court in the case of **Richard Julius Rukambura v. Isaack Ntwa Mwakajila and Tanzania Railways Corporation**, Misc Civil Appl. No. 03 of 2004, CAT, at Mwanza, (unreported).

Having considered parties submissions, CMA record, laws and practices applied, this Court is called upon to determine the following issues;-

- i) Whether it was right for the arbitrator to raise and determine the issue of limitation of time suo moto,
- ii) Whether the parties were afforded right to be heard, and
- iii) What are the reliefs the parties are entitled to.

Starting with the first issue as the applicant's claim relating to salary arrears, the relevant provision is Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2004.

The said Rule reads as follows; -

"Rule 10(2) All other dispute must be referred to the Commission within sixty days from the date when the dispute arised".

Having gone through the record, I noted that the issue of limitation of time was raised on 12th February 2018. On 20th February 2018, the respondent filed his written submissions in support of the

preliminary objection and on 9th March 2018 the applicant filled his written submissions praying the preliminary objection be overruled. On 11th May 2018 the preliminary objection was overruled by Mollel. B. L, Mediator. In the ruling overruling the preliminary objections, the Mediator relied on what the applicant filled in CMA Form No. 1. In the said ruling the mediator stated:-

*" the crucial issue for determination is whether the matter filed before the Commission was filed out of time. According to the CMA F1 shows that, **the dispute arose on 24th November, 2017 and filed to CMA on 30th November, 2017...**In the view of the above explosion, the point of preliminary objection raised therefore devoid (sic) of merit and dismissed".*

It is clear from the above that the mediator overruled the preliminary point of objection on the ground that the dispute arose on 24th November 207 and not before. In other words, the mediator was misled by what the applicant filled in CMA Form 1.

The applicant claims that he filed the dispute at CMA in November 2017 as he was waiting for finalization of a criminal case which ended in the same month and further that he waited a reply to the demand note exhibit P3 dated 10th November 2017. He has submitted also that the breach was continuous. On such basis, he is of the view that the matter was filed within a time. On other hand, the respondent maintained that the applicant's claim relating to salary

arrears was filed out of time contrary to Rule 10(2) (*Supra*). I have read CMA Form No. 1 and find that the dispute was filed at CMA on **30th November 2017**. This means the dispute was filed at CMA more than ten months out of time contrary to Sixty days available as provided for under Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2004. In his evidence, applicant (Pw1) stated that he was last paid salary in October 2016 as indicated in bank Statement (exhibit P2) and that his salary was TZS 400,000/= per month. He stated further that on 29th October 2016 he was detained at police on allegation that he stole money of the respondent and that he was released on bail on 4th November 2016. He testified further that he did not claim salary until conclusion of a criminal case against him and that on 10th November 2017 he wrote a demand letter (exhibit P3) claiming for the unpaid salaries from November 2016 to the date of the said demand letter. When under cross examination, he testified that he did not have proof that the said criminal case has been concluded. It is clear to me that he was out of bail since November 2016 and nothing prevented him to claim that salary or file an application before CMA. He strangely testified that he is unaware that the said criminal case has been concluded or

not. If he is unaware of that fact, nobody can be aware of the outcome that he was waiting for.

I am of the view that the applicant's allegation regarding the pending criminal case and demand note was a good ground of seeking extension of time at CMA before filing the dispute. That cannot be good ground in this revision application. It is clear therefore that, applicant filed the dispute at CMA out of 60 days provided for under the law and without condonation. The demand note (exhibit P3), in my view, cannot justify and cannot be taken as a date of counting time for the purposes of cause of action in the application at hand. The reason and logic are clear. Accepting the argument that time will start to run from the date of the demand note, is an invitation for person(s) who has not taken action for many years and try to circumvent the law of Limitation by sending a demand note. If that is allowed, there will be no end of litigation. In my view, that argument is barren of merit and stand to be dismissed. I, therefore, agree with the CMA finding that applicant referred the labour dispute out of time without proof that they applied first for and was granted condonation.

Failure to observe the prescribed time goes to the root of the case as the same relate to jurisdiction of the Court or Tribunal. This position was emphasized in the case of **Tanzania Fish Processors Ltd v. Christopher Luhangula**, Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania, at Mwanza, wherein 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...**"*


Both counsels for the applicant and respondent were of the view that the Law of Limitation Act [Cap. 89 R.E. 2019] does not apply in labour cases. With due respect, that is not a valid position of the law. In the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016** (unreported) the Court of Appeal held that the Law of Limitation Act, [Ca. 89 R.E. 2019] applies also in Labour cases unlike to the submissions of counsels in this application. In the **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni, supra** and **M/S. P & O international Ltd v. The Trustees of Tanzania National Parks (TANAPA), Civil Appeal No. 265 of 2020** (unreported) the

Court of Appeal held that a time-barred case of application has to be dismissed and not struck out.

In regard to the issue of the remedy in this application, as the answer to the first issue is in negative, then, the applicant herein cannot enjoy any remedy. From the above reasoning, I find the Application have no merits and it is dismissed in its entirety. I therefore uphold the CMA award.

It is so ordered.




B.E.K. Mganga
JUDGE
07/09/2021