

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

CONSOLIDATED REVISION NO. 956 AND 928 OF 2019

BETWEEN

AZZA BALTAZAR NGIREUAPPLICANT/RESPONDENT

AND

NATIONAL BANK OF COMMERCE LTD.....1ST RESPONDENT/APPLICANT

CONSOLIDATED HOLDING CORPORATION (CHC).....2ND RESPONDENT

THE TREASURY REGISTRAR.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Date of Last Order: 22/10/2021

Date of Judgment: 25/10/2021

B. E. K. MGANGA, J.

This is a judgment of two consolidated revisions. Brief facts of these applications are that; in 1971, the National Bank of Commerce (NBC), the 1st respondent in revision application No. 956 of 2019 and applicant in Revision application No. 928 of 2019 employed Azza Baltazar Ngireu, the applicant in revision No. 956 of 2019 and respondent in revision application No. 928 of 2019, as clerk. On 1st October 1997, National Bank of Commerce was spilt into three entities namely (i) National bank of Commerce Holding Corporation, (ii) National Microfinance Bank and (iii) National Bank of Commerce (1997). Due to the said spilt, Azza Baltazar

Ngireu was transferred to the National Bank of Commerce (1997). On 16th July 1998, Azza Baltazar Ngireu was suspended based on allegation of misappropriation of funds and negligence. She was thereafter charged with criminal offences but was discharged on 18th August 2009. At the time of trial of the said criminal case, Azza Baltazar Ngireu was out on bail. On 16th September 1998 Azza Baltazar Ngireu was summarily dismissed from employment.

On 13th March 2013, Azza Baltazar Ngireu filed CMA F.1 claiming for reinstatement, be paid TZS 80,340,000/= as salary for thirteen (13) years from 16th September 1998 to 16th September 2011, TZS 13,055,250/= as subsistence allowance equivalent to 16.5% of the aforementioned salaries, TZS 7,210,000/= as annual leave for 13 years , TZS 6,500,000/= as medical care service, salary of TZS 515,000/= other allowances arising therefrom starting from 17th September 2011 to the date of payment of his claims and general damages. In total Azza Baltazar Ngireu was claiming to be paid TZS 407,105,205/=. Azza Baltazar Ngireu signed the said CMA F.1 on 11th March 2013 indicating that the dispute arose on 6th May 2011 and that she was terminated on 16th September 1998. Together with CMA F.1, she applied for condonation. In her affidavit for condonation dated 11th March 2011, she deponed that in 2000 she was charged in criminal case No. 74 of 2000 at Kisumu Resident Magistrate Court and that she was

discharged on 18th August 2009. The she deponed further that, she was summarily terminated on 16th September 1998 and that in the same year she filed Civil suit No. 317 of 1998 at Kisumu Resident Magistrate Court but the same was struck out as the court lacked jurisdiction. The application at Commission for Mediation and Arbitration henceforth CMA was opposed as a result on 28th December 2012, Alfred Massay, Mediator delivered his ruling allowing the parties to proceed with adducing their evidence and that thereafter he will decided on whether application for condonation will be granted or not.

Having heard evidence of the said Azza Baltazar Ngireu (PW1), and that of Desmond Malyi (DW1) on behalf of the National Bank of Commerce, but in absence of evidence for the Attorney General and Consolidation Corporation holding, on 18th November 2019, Alfred Massay, arbitrator delivered his award in favour of Azza Baltazar Ngireu that she was unfairly terminated on substantive and procedure. The arbitrator rejected the prayer for reinstatement and awarded Azza Baltazar Ngireu to be paid TZS 30,900,000/= as salary for five years.

Azza Baltazar Ngireu, applicant in revision No. 956 of 2019 was aggrieved by the said award as a result on 23rd December 2019, she filed revision No. 956 of 2019 on grounds *inter-alia* that, the arbitrator made no consideration for loss of retirement benefits and that no reasons were

offered by the arbitrator or that the reasons offered in relation to the amount awarded, was vague.

On the other hand, the National Bank of Commerce Ltd, filed revision application No. 928 of 2019 on ground that CMA had no jurisdiction and that the arbitrator applied inapplicable law.

On 11th August 2021, I issued consolidation order and ordered the application to be argued by way of written submissions. Counsels of both parties complied with the order. At the time of composing my judgment, I found that parties did not submit on issue of whether CMA had jurisdiction and whether the arbitrator applied correct law. I therefore summoned them to submit on these two issues.

Submitting on whether CMA had jurisdiction and whether the arbitrator applied correct law, Rebeca Mtuli, advocate for Azza Baltazar Ngireu submitted that Azza Baltazar Ngireu filed the dispute at CMA on 15th December 2011 showing that the dispute arose on 6th May 2011. That, on 13th March 2011 she filed another CMA F.1 showing that the dispute arose on 6th May 2011 and that she was claiming *inter-alia* to be reinstated. Counsel submitted that CMA had jurisdiction in terms of section 42 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2010 that amended paragraph 13 of Third Schedule to the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. She argued that the said section clothed

jurisdiction to CMA over matters that occurred during the repealed law. When asked by the court as to when the dispute arose, counsel, submitted that according to the CMA F.1, it arose in 2011 and that at that period, the law in force was Employment and Labour Relations Act [Cap. 366 R.E. 2019]. As the claim is on termination, she conceded that Azza Baltazar Ngireu was supposed to refer the dispute to CMA within 30 days of termination and that she was out of time for 30 days. Counsel submitted that Azza Baltazar Ngireu was charged in criminal case No. 74 of 2000 and that trial proceeded while she was on bail. She went on that Azza Baltazar Ngireu was acquitted on 18th August 2009. Counsel argued that, Azza Baltazar Ngireu was summarily dismissed while criminal charges were going on contrary to section 37(5) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019].

On issue of condonation, counsel submitted that the same was granted on 28th December 2012, which is why, arbitrator proceeded to receive evidence of the parties. Counsel submitted that the Labour Commissioner wrote a letter to CMA on 27th September 2011 praying the dispute between the parties be referred to CMA. On the application of the law, counsel submitted that arbitrator applied a correct law. Counsel concluded by praying revision application No.956 of 2019 be allowed.

On her part, Selina Kapange, State Attorney for the Consolidated Holding Corporation (CHC), the Treasury Registrar and the Attorney General, the 2nd, 3rd and 4th respondents in revision No. 956 of 2019 joined hand with submissions by Mturi advocate for Azza Baltazar Ngireu, the applicant in Revision No. 956 of 2019 that CMA had jurisdiction and that arbitrator applied correct law. When asked by the court as to when employment of Azza Baltazar Ngireu was terminated, State Attorney submitted that it was in 1998. Still, State Attorney maintained that CMA had jurisdiction based on section 42 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2010 and that the dispute was filed at CMA on 13th March 2011 as it arose on 6th May 2011.

Submitting on behalf of the National Bank of Commerce, the applicant in revision No. 928 of 2019 and 1st respondent in revision No. 956 of 2019, Mr. Evody Mushi, advocate argued that Azza Baltazar Ngireu, was terminated by way of summary dismissal on 16th September 1998. That, in CMA F.1 Azza Baltazar Ngireu indicated that dispute arose on 6th May 2011. Counsel submitted that on 27th September 2011, Azza Baltazar Ngireu wrote a letter to the Commissioner for Labour praying the said Commissioner to refer the dispute to CMA stating that she was terminated on 16th September 1998. Mr. Mushi, submitted that the dispute arose in

1998 but it was referred to the Labour Commissioner on 27th September 2011 that is more than ten (10) years later. Counsel submitted that the dispute was not referred to CMA by the Labour Commissioner but by Azza Baltazar Ngireu who signed and filed CMA F.1. counsel argued that Azza Baltazar Ngireu cannot rely on section No. 42 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2010.

Counsel went on that, section 23(2) of the Security of Employment Act [cap. 387 R.E.2002] provided limitation of time to challenge summary dismissal as seven (7) days. Counsel argued that Azza Baltazar Ngireu was supposed to challenge her dismissal on or before 22nd September 1998. He went on that CMA had no jurisdiction as Azza Baltazar Ngireu wrote a letter to the Commissioner for Labour out of time for more than ten years. Counsel submitted that section No. 42 of the Written Laws (Miscellaneous Amendments) (No.2) Act, 2010 is a serving provision for the disputes that were filed within time, but they were not concluded until when the old law was repealed. He argued that the said section does not cover employees who were terminated and did not file the dispute in time thus were out of time at the repeal of the said old law.

Mr. Mushi submitted further that in application for condonation, Azza Baltazar Ngireu deponed that she had a Civil suit at Kisumu that was struck out and was asked to produce a ruling but she failed. He submitted that

arbitrator did not grant condonation but allowed the parties to be heard on ground that he will give reasons in the award. Mr. Mushi criticized the arbitrator that the award does not show that condonation was granted. He concluded that, the dispute was heard without condonation. Counsel submitted also that the Labour Commissioner did not have jurisdiction to refer the dispute at CMA as it was out of time. On application of law, counsel submitted that arbitrator applied the employment and Labour Relations Act [cap. 2019] instead of the Security of Employment Act [Cap 387 R.E. 2002] which was the applicable substantive law when the dispute arose in 1998. He concluded by praying CMA proceedings be quashed and the award set aside.

Replying to submissions of Mr. Mushi in revision No. 928 of 2019, Mturi, advocate for Azza Baltazar Ngireu, submitted that CMA had jurisdiction and that if the matter will be held that the dispute was time barred, the Azza Baltazar Ngireu will be denied right to be heard as that is technicalities forbidden under Article 107A(2)(e) of the United Republic of Tanzania Constitution.

In rejoinder, Mr. Mushi submitted briefly that time limitation is not an issue of technicality forbidden under Article 107A(2)(e) of the United Republic of Tanzania Constitution and that when the matter is out of time,

neither CMA nor the court had jurisdiction. He maintained that condonation was not granted.

From both submissions of the parties and CMA record, it is undisputed that Azza Baltazar Ngireu was summarily terminated on 16th September 1998. It is also undisputed that she filed the dispute at CMA on 13th March 2011 claiming *inter-alia* to be reinstated showing that the dispute arose on 6th May 2011 and filed an application for condonation. It was submitted by Mturi, for Azza Baltazar Ngireu and supported by Kapange, state Attorney for the 2nd, 3rd, and 4th respondent that condonation was granted, and that CMA had jurisdiction to entertain the matter. On the other hand, Mr. Mushi, counsel for the National Bank of Commerce Ltd, submitted to the contrary. On whether condonation was granted or not, I have carefully examined the ruling delivered on 28th December 2012 and find that condonation was not granted. In the said ruling, Alfred Massay, Mediator held:-

*"... Commission considered opinion the period upon which the complainant should refer the case of unfair dismissal start to run following the conclusion of the civil case instituted at Kisutu RM's Court – the court which both parties conceded that it did not have jurisdiction to entertain the matter...The matter at Kisutu was struck out after the preliminary objection was raised but could not tell when exactly the matter was struck out. Thereafter the respondent promised to bring the copy of the Ruling striking out the matter but chooses(sic) to abandon the matter altogether. **On the***

account of the limited information the Commission finds that this matter could be effectively disposed off after disposition of the evidence in terms of rule 23(9) of the Labour Institutions (mediation and Arbitration Guidelines) GN.No.67/2007. In terms that(sic) rule the Commission decide the preliminary points before proceedings with the arbitration or to conduct the arbitration and decide the preliminary point at the time of considering all the evidence in the matter. It is so decided. No order as to cost is made”.

It is clear from the above quoted paragraph of the ruling that no order for condonation was granted. The arbitrator proceeded to determine the dispute without condonation. The submission by both Mturi advocate Azza Baltazar Ngireu and that of Kapange, State Attorney for 2nd, 3rd and 4th respondents that condonation was granted on 28th December 2012, is great misdirection. I therefore agree with Mr. Mushi counsel for the National Bank of Commerce Ltd that the dispute was heard in absence of condonation. The arbitrator relied on rule 23(9) of the Labour Institutions (mediation and Arbitration Guidelines) Rules, 2007, GN.No.67of 2007 and heard evidence of the parties promising to determine the preliminary objection in the due course. I have examined the award and find that arbitrator did not resolve the issue of limitation of time. In my view, it was wrong for the arbitrator to rely on rule 23(9) of the Labour Institutions (mediation and Arbitration Guidelines) Rules, 2007, GN.No.67/2007 in the application before him as the jurisdiction of CMA was being challenged.

The said Rule can apply in any other preliminary objections other than the one relating to limitation of action as the later goes to the jurisdiction. Once found that a matter or dispute out of time, CMA lacks jurisdiction altogether.

It is undisputed that Azza Baltazar Ngireu, was summarily dismissed from employment by the National Bank of Commerce Ltd on 16th September 1998. Both Mturi, counsel for Azza Baltazar Ngireu and Kapange, state Attorney for 2nd, 3rd and 4th respondents were of the view that section 42 of Written Laws (Miscellaneous Amendments) (No.2) Act, 2010 clothed jurisdiction to CMA. Mr. Mushi, counsel for the National Bank of Commerce Ltd, was of a different view. The said section 42 of the Written Laws (Miscellaneous Amendment) (No.2) Act, No. 10 of 2010 amended paragraph 13 of Third Schedule to the Employment and Labour Relations Act [Cap. 366 R.E. 2019] by deleting the said paragraph 13 and inserting a new paragraph 13. The said new paragraph 13 provides:-

13.-(1) All disputes originating from the repealed laws shall be determined by the substantive laws applicable immediately before the commencement of this Act.

*(2) **All disputes pending** and all applications for executions filed arising from the decision of the Minister in the subordinate courts prior to the commencement of this Act shall proceed to be determined by such courts.*

*(3) **All disputes pending** -*

(a) revision of the defunct Industrial Court of Tanzania shall be determined by a panel of three Judges of the Labour court and

(b) hearing before the Industrial Court of Tanzania shall be determined by the Labour Court.

(4) All appeals and applications for judicial review originating from the Industrial Court of Tanzania pending in the High Court shall be determined by the High Court.

*(5) The Commission shall have powers to mediate and arbitrate all disputes originating from the repealed laws **brought before the Commission by the Labour Commissioner and all such disputes shall be deemed to have been duly instituted under section 86 of the Act.***

(6) All references pending decision of the Minister shall-

(a) in the case of references which were returned by the High Court to the Minister for retrial, be determined and finalized by the Minister; and

(b) in the case of references pending the decision of the Minister be forwarded together with their respective complete records to the Labour Court for determination.

(7) The date of the decision of the Minister shall be the date indicated in the prescribed form.

(8) Notwithstanding the provisions of any other written laws, for the purposes of computation of limitation of time, the period between the date of decision and the date of receipt of the decision shall be excluded.

*(9) The provisions of this paragraph of the Third Schedule **shall apply for a period of three years from the date of publication of this amendment in the Gazette** and, the Minister may, upon consultation with the Council and by notice published in the Gazette extend that period for an aggregate period not exceeding three years.*

I am in agreement with Mushi, counsel for the National bank of Commerce Ltd that the said paragraph 13 to the Employment and Labour Relations Act [Cap. 366 R.E.2019] did not cloth jurisdiction to CMA over

this matter. This is because Section 23(2) of the Security of Employment Act [cap. 387 R.E.2002] clearly provided that an employee desiring to challenge summary dismissal was supposed to do so within seven (7) days. It is undisputed that Azza Baltazar Ngireu was summarily dismissed on 16th September 1998 hence seven days elapsed on 23rd September 1998. By the time she filed the dispute at CMA on 13th March 2013, she was out of time. Ms. Mturi, counsel for Azza Baltazar Ngireu submitted that dismissing the application for being time barred is a technicality forbidden under article 107A(2)(e) of the United Republic of Tanzania Constitution as Azza Baltazar Ngireu will be deprived right to be heard. In my view, that submission is a misdirection. The said Article of the Constitution has not done away with the Law of Limitation as correctly submitted by Mr. Mushi. Azza Baltazar Ngireu had an ample time to file the dispute if at all she wanted to be heard prior to be barred by the law but she did not do so. She cannot sleep on her right and being caught by the law of Limitation now be heard claim that she will be denied right to be heard. The law always helps the vigilant and not those who are asleep. She slept on her right to be heard and when she woke up, she found the bus carrying that right has gone. She cannot complain that the driver and the bus left and denied right to travel. Justice cannot be done in the way she wishes as an individual, but it has to be done in accordance with the laws including the

law of Limitations. I therefore agree with Mr. Mushi, that limitation of time is not a technicality.

The Court of Appeal being alive that there has to be limit of time within which a party can institute proceedings, ***Barclays Bank Tanzania Limited vs. Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016, (unreported)***, 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."

Ms. Mturi, counsel argued that Azza Baltazar Ngireu was summarily dismissed while criminal charges were going on contrary to section 37(5) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. It is my

considered opinion that the section relied upon is not applicable in the circumstance of the application at hand. Reasons for inapplicability of that law is that Azza Baltazar Ngireu was dismissed on 16th September 1998 while the charges against her in criminal case No. 74 of 2000 at Kisumu Resident Magistrate Court was withdrawn and she was discharged on 18th August 2009. The said criminal case was filed in court in 2000 that is almost two years after her summary dismissal. In terms of section 23(1)(a) and (2) of the Security of Employment Act [cap. 387 R.E.2002] she was supposed to refer the dispute to the Conciliation Board within seven (7) days of the dismissal. The said seven (7) days expired on 23rd September 1998. She was not supposed to wait until conclusion of a criminal charges. In the application at hand, there is no proof, apart from criminal case No. 74 of 2000, that, there was another criminal case that was filed in court against Azza Baltazar Ngireu in 1998 before expiry of the said seven (7) days provided for under section 23(1)(a) and (2) of the Security of Employment Act[Cap. 387 R.E.2002]. No reasons were offered by Azza Baltazar Ngireu as to why she failed to file the dispute within seven (7) days available under Cap. 387 R.E 2002] in 1998. Her application for condonation at CMA lacked that vital information. What is clear is that charges were preferred in court in 2000 and that she was on bail.

On the other hand, I have noted that Azza Baltazar Ngireu was not acquitted. This is clear in her affidavit for condonation where she deponed in paragraph 4 as hereunder:

*4. Kwamba baada ya kesi ya **jinai kuondolewa mahakamani au kufutwa tarehe 18/08/2009** nilianza mara moja kufuatalia mwenendo wa kesi hiyo Pamoja na kupewa nakala ya hukumu shughuli ambayo ilinichukua zaidi yam waka mmoja pale mahakamani bila mafanikio na hivyo sikuweza kuendelea na taratibu za kufungua madai ya kupinga kufukuzwa kazi katika chombo chenye mamlaka yakusikiliza kilio change”.*

It is clear from the quoted paragraph that Azza Baltazar Ngireu was not acquitted for her to enjoy the provisions of section 29(1), (2) and (3) of the Security of Employment Act[Cap. 387 R.E 2002].

As pointed herein above, Azza Baltazar Ngireu indicated in the CMA F.1 that the dispute arose on 6th May 2011. In the case of **Barclays Bank(T) Ltd v Jacob Muro, Civil Appeal No.357 of 2017, CAT** (unreported) the Court of Appeal held that :-

“...in determining whether a referral to the CMA is made within time or not the date of termination indicated on the form would be the date of reckoning”.


I should add that, all other evidence relevant to establish as to when the cause of action arose should also be looked at and be considered. This is because there is also possibility of the complaints who, after noting that they are out of time, indicate a wrong date to serve their purpose. The court of Appeal was alert to that possibility, which is why, it insisted in the

Barclays Bank(T) Ltd case, supra, that it is an **obligation on part of the complainant to state accurately** the date of termination on the referral form so that CMA may determine whether the referral was made within the prescribed period or not. In the application at hand, the dispute arose on 16th July 1998 when she was summarily dismissed but for reasons best known to her, she willfully indicated in the CMA F. 1 that the dispute arose on 6th May 2011.

For all said herein above, the dispute was time barred and it was heard without an order for condonation. In short, the arbitrator had no jurisdiction to entertain the matter. All said and done, I hereby dismiss revision application No. 956 of 2019 filed by Azza Baltazar Ngireu and allow revision application No. 928 of 2019 filed by the National Bank of Commerce Ltd and quash the CMA proceedings and set aside the award arising therefrom.

It is so ordered.




B.E.K. Mganga
JUDGE
25/10/2021