

THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 532 OF 2019

BETWEEN

JOHN P. KAHULO APPLICANT

VERSUS

MR. DIPER MAHENDRA PATEL.. RESPONDENT

JUDGMENT

Last order 06/10/2021
Date of Ruling 13/10/2021

B.E.K. Mganga, J

The applicant was an employee of the respondent. The relation between the two went bad as a result, on 1st January 2014, respondent terminated employment relationship with the applicant. On 15th January 2018 applicant signed CMA F.1. On 5th February 2018 applicant filed Labour dispute No. CMA/DSM/KIN/R.144/018 on ground that he was constructively terminated by the respondent. In the CMA F.1, applicant indicated that the dispute arose on 1st January 2014 and that he was claiming to be paid overtime. Together with the said CMA F.1, applicant signed and filed application for condonation of late referral of a dispute to the Commission for Mediation and Arbitration (CMA F.2). In CMA F.2, Applicant indicated that he was late for 3 years and 8 months. On reasons

of lateness, applicant indicated that he was being promised to be paid by the respondent. Applicant also filed an affidavit after being sworn on 1st February, 2018 before Lilian Apolinary Nyambibo advocate. The application was opposed by the respondent through the service of Catherine Peter, advocate. On 11th July 2018, Lemwely, D, Mediator/arbitrator dismissed the application for condonation that the period of 7 years of delay is inordinate comparing with sixty (60) days within which applicant was supposed to file the dispute to CMA and further that applicant was supposed to file an application at the time he was being promised to be paid by the respondent.

Applicant was aggrieved by the said ruling and opted to file this revision application so that the court can revise the said ruling and set it aside and order the dispute between the parties to be heard on merit. The notice of application is supported by an affidavit of the applicant. The application was resisted to, by the respondent who filed a counter affidavit.

When the application was called for hearing, the applicant enjoyed the service of Hamza Rajabu, his personal representative while respondent enjoyed the service of Esther Lukio Ambogo, Advocate. Before hearing started, Mr. Hamza, personal representative of the applicant

raised a preliminary objection that Esther Lukio Ambogo, advocate has no locus to address the court in this application as there is no notice of representation filed in terms of section 56(c) of the Labour Institutions Act [Cap. 300 R.E. 2019] and Rule 43(1) of the Labour Court Rules, GN. No. 106 of 2007. I sustained the objection and proceeded to hear the submission on behalf of the applicant.

In his submission, Mr. Hamza, the personal representative of the applicant, submitted that, applicant filed application at CMA on 05th February 2018 praying for condonation and that applicant's claims against the respondent was salary arrears and overtime. Mr. Hamza, gave two reasons that caused the applicant not to file the application at CMA within time as (i) promise from the respondent that he will be paid, and (ii) that applicant fell sick for one month from 22nd March 2014. Mr. Hamza cited the case of **Samwel Munsiro V. Chacha Mwikwabe**, Civil Appeal No. 539/08 of 2019, CAT (unreported) to stress a point that illegality is a good cause of delay and pressed unto me to use the said case that there is illegality in the application at hand. He cited also the case of **Marco Iseke V. Trustees of Dioceses of Victoria Nyanza**, Revision No. 65 of 2013, wherein this Court (S.A.N. Wambura, J as she then was) allowed the application as the applicant was spending time in Court corridors and argued that applicant spent time at CMA therefore the application should

be allowed. He however conceded that, the course of action arose in 2008 and that at the time the applicant filed the dispute and applied for condonation at CMA, he was out of time for seven (7) years. He maintained that since applicant once approached CMA and there are issues that need to be resolved by evidence, the application should be granted. He concluded by praying the application be allowed.

In an application for extension of time like the one at hand or condonation made by the applicant at CMA, is an application seeking the court or judicial making body to exercise its discretion. There is a litany of Court of Appeal decisions to the effect that, discretions always has to be exercised judiciously and not arbitrary. The Court of Appeal held so in the case of ***Zaidi Baraka and 2 others v. Exim Bank (T) Limited, Misc. Commercial cause No. 300 of 2015, CAT*** (unreported) and ***MZA RTC Trading Company Limited v. Export Trading Company limited, Civil Application No. 12 of 2015*** (unreported). In the ***MZA RTC*** case, supra, 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 ..."***

In the case of ***Regional Manager, Tanroads Kagera v. Ruaha Concrete Company Ltd, Civil Application No. 96 of 2007, CAT*** (unreported) the Court of Appeal held that in determination of an application for extension of time, the court has to satisfy as to whether the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted. In the case of ***Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010*** (Unreported) the Court of Appeal held that in application for extension of time, applicant has to account for all period of delay, the delay should not be inordinate, applicant must show diligence and not apathy, negligence or sloppiness in prosecution of the action that he intends to take and that the court can consider illegality of the decision sought to be challenged.

In the application at hand, the only reason advanced by the applicant is that he was being promised by the respondent that he will be paid. In my view, it is beyond imagination that the applicant has remained mute for good seven years while the law required him to file the dispute within sixty (60) days. This is inordinate delay.

Mr. Hamza argued that applicant fell sick for one month from 22nd March 2014 believing that it will help him. This argument fails as it is not born out of affidavital evidence filed by the applicant both at CMA and in this court hence lacks support. Be as it may, Mr. Hamza said nothing to the remaining 6 years and 11 months. Mr. Hamza solicited me to extend time based on illegality. With due respect to him, that issue is also not born in the affidavit of the applicant. In my considered view, that illegality has to be apparent on the face of record in order to amount to good reason for extension of time. Nothing has been advanced to me based on illegality that can be a trigger for me to exercise judicial discretion in extending time to the applicant. Applicant has failed to show good cause for the delay and further has failed to account for each day of the delay. In short, applicant has failed to meet conditions stated in ***Regional Manager, Tanroads Kagera*** (supra), and ***Lyamuya's case***, supra.

In the case of **Tanzania Fish Processors Ltd v. Christopher Luhangula**, Civil Appeal No. 161 of 1994, CAT (unreported) 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...**"*

Applicant chose to file the dispute at CMA when he found that it is convenience to him and has to bear with the route he took.

In the upshot and for the foregoing, this application stands to be dismissed.

It is so ordered.



B.E.K. Mganga

JUDGE

13/10/2021

Labour Court TZ.