IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 409 OF 2020

BETWEEN

AYOUB M. MWEDIMAGE.....1ST APPLICANT

ERASTO MWAKYUSA.....2ND APPLIANT

AND

CHINA-TANZANIA SECURITY COMPANY LIMITED.....RESPONDENT

JUDGMENT

Date of last order 29/10/2021
Date of judgment 1/11/2021

B. E. K. Mganga, J

Applicants were employed by the respondent as security guards. Their employment was terminated in 2019. On 3rd March 2020 they referred Labour disputeNo. CMA/DSM/KIN/178/2020 to the Commission for Mediation and Arbitration (CMA) claiming to be paid TZS 42,480,000/= being salary from 30th June 2016, leave, overtime allowances, unfair termination benefits and severance pay for two years. In the CMA F.1 they indicated that the dispute arose on 12th July 2019. They further indicated that, they were only paid half of their monthly salary each month of their employment and promised by the respondent to clear the arrears in the near future during employment. They also

indicated that the dispute is for unfair termination as the respondent breached the rules of natural justice by not conducting disciplinary proceedings that could have enabled them to be heard.

Together with the CMA F.1, they filed an application for condonation of late referral of a Dispute to the Commission for Mediation and Arbitration -CMA F.2 in which they indicated reasons of delay that:-

> *"applicants attempted to resolve the matter amicably with the respondent but failed after several attempts which took much of the time."*

Both CMA F.1 and CMA F.2 were signed by Ayoub M. Mwedimage on 14th February 2020**.** In the affidavit in support for condonation, Ayoub Mwedimage deponed that on 30th May 2016, he was employed by the respondent on permanent terms and that his employment was terminated in July 2019. That, the contract was orally made with anticipation of signing the written contract and that his salary was TZS 300,000/= monthly.

On 20th March 2020, respondent filed a counter affidavit of Betty Gabriel to oppose the application. On 10th September 2020, M. Chengula, Nediator, delivered her ruling dismissing the application for

condonation on ground that applicant failed to adduce sufficient cause for the delay and that they failed to account for each day of delay.

Aggrieved by that decision, 12th October 2020 applicants filed this application seeking the court to revise the said ruling. Each applicant filed his own affidavit in support of the application. In paragraph 12,13 and 14 of the affidavit of Ayoub M. Mwedimage and Erasto Mwakyusa they deponed:-

*"12. That, immediately after the dismissal being aggrieved and eager to prosecute the matter the 2nd applicant with myself went to seek service of **Advocate Sued Hussein of Sama Attorneys**. However in October and due to certain circumstances beyond the Applicants control the learned counsel did not institute the complaint and upon such misfortune we further sought the service of **Advocate Nestory wandiba of Mkono Advocates (by then)** who also for reasons beyond the Applicants' control failed to pursue the matter. Hence in January, 2020 we sought the legal aid from the Tanganyika law Society (TLS) under a pro bono scheme of the TLS.*

13. That, the Applicants made efforts to find the said counsel in paragraph 12 to procure their Affidavit for the purpose of stating what transpired for them to fail to referred (sic) the matter timely to the Commission, but the efforts ended up in vain.

14. That, for 201 days of the delay, it was because of reasons beyond the Applicants control as stated in paragraph 12 hereinabove causing lateness in referring the matter to the Honourable Commission immediately after the unfair termination."

The application was resisted by the respondent who fronted the counter affidavit of Betty Gabriel, her principal officer. In the said counter affidavit, she deponed that applicants were negligent and that they have no good cause for the delay.

Arguing the application by way of written submission on behalf of the applicants, Muganyizi Shubi, submitted that there is illegality as applicants were not given notice of termination, right to defend their case, reasons for termination, right to appeal nor any benefit delived from their years of service contrary to section 41(1)(b)(ii) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and that due process of the law was bypassed impending the applicants' rights. Counsel for applicants cited the case of ***Andrew Athuman Ntandu and Another v Dustan Peter Rima, Civil Application No. 551/01 of 2019,*** CAT (unreported) that illegality is a sufficient ground to extend time. It was argued that applicants were not heard hence denial to be heard by the respondent is an illegality sufficient to warrant extension of time.

Counsel for the applicant cited the case of ***Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017*** and invited the court to invoke the Overriding objective principle and went

on that technicalities should not be relied upon to surpass substantive justice. It was also submitted that hearing of the parties at CMA will not prejudice the respondent. Counsel for the applicant criticized the arbitrator that she failed to exercise judiciously her powers as by not recording all proceedings and arguments by counsel for the applicants. Reliance was made under Rule 32(2) and (3) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN. No. 67 of 2007 that requires an arbitrator to summarize evidence and arguments submitted by parties and record all key issues relating to the dispute. Counsel submitted that failure of the arbitrator to record key arguments is the same as denying the applicants right to be heard. Arguments of counsel for the applicants are centered on absence of oral submissions made on behalf of the applicants. The case of ***Judge i/c High Court, Arusha an Another v. N.I.N. Nguni, Civil Appeal No. 45 of 1998, CAT*** was cited to the effect that right to be heard extend to adequate hearing. Counsel submitted that partial recording of submissions made foron behalf of the applicants is violation of the principal of natural justice as the right to be heard was not sufficiently accorded to them. Counsel for applicants the case of ***Yusuf Mpini and Others v. Juma Y. Mkinga and Others, Civil Appeal No. 1 of 2017, CAT*** (unreported) that grant of condonation is discretion that has to be exercised judiciously

and that arbitrary use of discretion renders the decision a nullity. Counsel argued that condonation was arbitrary refused and prayed the application be granted so that parties can be heard on merit at CMA.

On the other hand, Paschal Temba, the personal Representative of the Respondent submitted that, illegality, if established, is a ground for extension of time. He submitted that applicants were afforded right to be heard but their ground for delay were rejected. Illegality alleged by the applicants were termination without adhering to legal procedures. This, according to respondent's representative, is not illegality as it is unfair termination of which applicants were supposed to refer the dispute to CMA within 30 days and the claim of salary was supposed to be referred to CMA within 60 days. The personal representative for the respondent submitted that ***Ntandu's case*** (supra) and ***Munuo's case*** (supra) are distinguishable and not applicable in the circumstances of the application at hand. It was submitted on behalf of the respondent that, what was before the Mediator was ground for condonation and that Mediator recorded all arguments of the parties and found grounds advanced by applicants lacking merit and dismissed the application. Mr. Temba submitted that the application lacks merit and prayed it be dismissed.

In rejoinder, counsel for applicant submitted that once illegality is established, no need to account for each day of delay and reiterated his submissions in chief.

Having heard submissions made on behalf of both parties, the main issue before me is whether applicants advanced good grounds for the delay and whether the mediator exercised her judicial power judiciously.

It has been held several times by the Court of Appeal that in application for extension of time or condonation a judicial officer or a quasi-judicial officer is being asked to exercise discretion and discretion has to be exercise judiciously. some of the cases held so are that 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, 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 application at hand, in application for condonation of late referral of a Dispute to the Commission for Mediation and Arbitration -CMA F.2 applicants indicated that the dispute arose on 12th July 2019. As to the reasons of delay they indicated that **"***applicants attempted to resolve the matter amicably with the respondent but failed after several attempts which took much of the time***.**" In the affidavit in support for condonation, Ayoub Mwedimage deponed that on 12th November 2019 he was served with termination letter. In their respective affidavits in application for condonation, the relevant paragraphs that gave reasons for delay are paragraph 12 and 11 of the affidavit of Ayoub M. Mwedimage and Erasto Mwakyusa respectively wherein they each deponed "***that efforts to settle the matter amicably have delayed the applicant in bringing this matter to this Honourable Commission timely"***.

In my view, any criticism against the mediator should be based on what the parties deponed in their affidavit and counter affidavit and not otherwise. I should point out that, the issue of illegality is not born out of the affidavits of the applicants at CMA. Since the same was not raised at CMA, cannot be a base of criticism against the mediator at the revisional stage. Parties are bound by their pleadings at CMA and cannot change them now. It is my considered opinion that since illegality was not pleaded, the mediator cannot be said that she did not exercise her judicial power judiciously in rejecting application for condonation. Her decision was based on what is fair under the circumstances i.e., depending on evidence that was put before her.

In the application at hand, it was submitted on behalf of the applicants that there is illegality as applicants were not given notice of termination, right to defend their case, reasons for termination, right to appeal nor any benefit delived from their years of service contrary to section 41(1)(b)(ii) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and that due process of the law was bypassed impending the applicants' rights. These, in my view, were matters that were supposed to be contained in affidavits of the applicants at CMA to enable the Mediator to exercise her discretion. It will be unjustifiable to

bring these issues at this stage seeking to revise the decision of the Mediator. They were not put before her, as such, she cannot be criticized as there is nothing to revise on that point. It is my considered opinion that the cases cited on behalf of the applicants are distinguishable hence inapplicable in the circumstance of this application. In ***Ntandu's case*** (supra), the judge raised an issue suo motto without affording parties right to be heard while in ***Munuo's case,*** (supra), he was suspended without being heard. In the application at hand, applicants were heard by the mediator on the application for condonation, but their application was dismissed as the mediator found that applicants failed to adduce good grounds for delay. In short, there were no sufficient grounds to enable the mediator to exercise her judicial discretion. Applicant's counsel raised these issues in submission hoping that it will help the applicants. In my view, that is wrong. Because cases are decided based on evidence and not submissions. A party to the case who does not bring good evidence to support his or her case hoping to rely on final submissions is bound to lose. Submissions are there to clarify issues raised and evidence adduced, and not a base of decision. This court and the Court of Appeal has held several times that submissions are not evidence as such cannot be a base of decisions. See ***The Registered Trustees of the***

Archdiocese of Dar e Salaam v. The Chairman, Bunju Village Government & 11 Others, Civil Appeal No. 147 of 2006, and ***Bruno Wenceslaus Nyalifa v. The Permanent Secretary, Ministry of Home Affairs & another***, Civil Appeal No. 82 of 2017 (both unreported). In ***Nyalifa's case*** (supra),the court of Appeal quoted its earlier decision in ***The Registered Trustees of the Archdiocese of Dar e Salaam case*** (supra), that:-

> *", . . submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence".*

The Mediator therefore, was bound to make a decision based on both affidavits by the applicants and counter affidavit by the respondent. My position that submissions are not evidence is further fortified by the Court of Appeal decision in the case of ***Khalid Mwisongo V. M/S Unitrans (T) Ltd, Civil Appeal No. 56 of 2011***, wherein it was held:-

> *"We are constrained to agree with the appellant.* ***One, the purpose of filing a written submission is to enable the Court to better understand the nature of the appeal, the issues involved, and ultimately adjudicate upon and determine the appeal properly****. After filing a written submission, the respondent would also file a reply thereto. By failing to file a written submission, the appellant waived his opportunity to state his appeal to the Court. Such omission*

does not prejudice the case of the other parties, here the respondent company. As the failure to file a written submission did not prejudice the case of either party…' (emphasis is mine).

I have carefully read the CMA record and find that all what is stated in paragraphs 12, 13 and 14 of the affidavit of Ayoub M. Mwedimage and Erasto Mwakyusa in this application, were not deponed to in the affidavit filed at CMA, rather, they were part of applicants' submissions. They are not evidence and the Mediator cannot be faulted.

Applicants were supposed to account for each day of delay at CMA but they did not. 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.

It is clear that applicants were terminated on **12th July 2019** and their claim is for salary from 30th June 2016, leave and overtime allowances and unfair termination benefits and severance pay for two

years. It is also clear that, they referred the dispute to CMA on **3rd March 2020**. The dispute was referred to CMA 235 days after termination while being late for 205 days. Applicants were supposed to account for each day of delay for all these days. They didn't. In my view, this delay is inordinate.

It was argued by counsel for the applicants that once illegality is pleaded, no need to account for each day of delay. That submission is not correct. In the case of ***Mekafaso Madali & 8 Others v. the Registered Trustee of the Archdiocese of Dar es Salaam, Civil NO. 397/17 OF 2019***, the Court of Appeal held that:-

> *"…**In a fit case,** allegations of existence of illegalities or irregularities **may** attract the Court to find good cause in an application for extension of time…". (emphasis is mine)*

The Court of Appeal in the afore cited case, did not lay as a rule, that every illegality constitutes good cause of extension of time. What the Court of Appeal held is that, in a fit case, illegality may constitute good cause. This will depend on circumstances of each case and the nature of the alleged illegality. The Court of Appeal was cautious with people taking illegality as a blank cheque for extension of time, which is

why, it stated that illegality has to be apparent on the face of record. In ***Mekafaso's case***, supra, the Court of Appeal held:-

> *"it is crucial to point out however, that for this ground to stand, the illegality of the said assailed decision must clearly be visible on the face of the record,… such point of law must be that of sufficient importance... since every party intending to appeal seeks to challenge a decision on either points of law or facts, it cannot in my view, be said that in Valambhia's case the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, (but) not one that would be discovered by a long drawn argument or process".*

For all said hereinabove, I find that the application is devoid of merit and I hereby dismiss it.

B.E.K. Mganga
JUDGE
01/11/2021