

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

REVISION APPLICATION NO. 523 OF 2020

BETWEEN

JAPHET A. KIYEYEU..... APPLICANT

AND

KAMAKA COMPANY LIMITEDRESPONDENT

JUDGMENT

Date of last order : 16/9/2021

Date of judgment: 8/11/2021

B. E. K. Mganga, J

On 18th February 2011 respondent employed the Applicant as security guard. In December 2019 the relationship between the two went sour as it is alleged that applicant was accused that he stole property of the respondent. It is said that applicant was arrested, charged and detained in remand prison before securing bail. Applicant alleges that after release on bail, went back into office but was not allowed to enter. He was terminated on 3rd January 2020 and approached his advocate one Charles Lugaila who, while within time, filled and filed Referral of a Dispute to the Commission for Mediation and Arbitration Form (CMA F.1). When the said CMA F.1 was filed at CMA, it was discovered that counsel for applicant used an old CMA F.1 that was

not in force as it was repealed by the Employment and Labour Relations (General) Regulations, GN. No. 47 of 2017. The said advocate was informed that the dispute was not registered as the CMA F.1 he used was a repealed one. Having found in that situation, on 20th February 2020, applicant filed another CMA F.1 claiming (i) reinstatement without loss of remuneration, (ii) payment of compensation for unfair termination not less than 24 month's salary, and (iii) payment of punitive general damages of TZS 100,000,000/=. In the said CMA F.1 applicant indicated that the dispute arose on 3rd January 2020, which is the date of termination of employment. Applicant indicated further in the said CMA F.1 that there was no valid reason for termination and that the procedure for termination was not followed. In addition to that, he indicated in CMA F.1 that, the base of termination is misconduct namely, stealing from the employer and that he was terminated before criminal proceedings have been determined by the court.

Together with CMA F.1, on the same date, an application for condonation of late referral of a dispute to the Commission for Mediation and Arbitration (CMA F.2) and an affidavit of Charles G. Lugaila, advocate sworn on 19th February 2020 before Mr. Kaigi, Commissioner for Oaths were filed before the Commission for Mediation and arbitration hereinafter referred to as CMA. In the affidavit in support of the

application for condonation, Mr. Lugaila, advocate deponed that, applicant's employment was terminated on 3rd January 2020 and was arrested and taken to police custody for two weeks. That, when the applicant was released on bail, applicant approached him for legal advice and that he advised applicant to file a labour dispute to the commission for unfair termination and that, on 3rd February 2020 he (Mr. Lugaila) filed the dispute to the Commission. That, on 14th February 2020 Mr. Lugaila was informed that the dispute was not registered as he used an old form and that it was by mistake.

In opposing the application for condonation, respondent filed a counter affidavit affirmed by Bakari Juma, her advocate. In the counter affidavit, the deponent averred that applicant was not terminated but absconded for more than five working days. He noted contents of paragraph 4 relating to filing of the dispute and serving the respondent. He averred that, counsel for applicant was negligent to use the old form namely a repealed CMA F.1 and that being an officer of the court, counsel for applicant failed to exercise due diligence.

On 3rd November 2020, Mahiza, R.B, mediator, delivered a ruling dismissing an application for condonation on ground that counsel for applicant was negligent to use a repealed CMA F.1 hence no good ground advanced for granting condonation.

Applicant was aggrieved by the said ruling as a result he filed this application seeking the court to revise the said ruling. The notice of application is supported by an affidavit sworn by the applicant and contains two grounds namely:-

- " (i) That, the mediator erred in law and fact by holding that the applicant failed to adduce sufficient cause to enable CMA to condone the hearing of his complaint out of time; and
(ii) that, the mediator erred in law and fact by relying on the fabricated untrue facts deposed by respondent's counsel Mr. Juma Bakari who is not principal officer of the respondent capable to depose true facts to the commission.

When the application was called for hearing, Mr. Charles Lugaila, advocate combined the two grounds of revision to read; whether, applicant adduced sufficient cause at CMA to enable condonation. Mr. Lugaila, counsel for applicant submitted that applicant adduced sufficient grounds for condonation. That, on 3rd February 2020 while within time, applicant filed CMA F.1 but wrongly used a repealed Form. That, applicant was informed on 14th February 2020 and it took him six (6) days to file another application together with application for condonation. He submitted that the delay was technical. He cited the case of ***Benedict Shayo v. Consolidated Holdings Corporation , Civil Application No. 366/01 of 2017 , CAT*** (unreported) wherein the court of Appeal held that factors to be considered in extension of

time are such as length of the delay, reasons for delay, degree of prejudice the respondent stand to suffer if time is extended, whether applicant was diligent, whether there is point of law sufficient importance such as illegality of the decision sought to be challenged and an overall importance of complying with prescribed timelines. Counsel for applicant prayed the application be granted.

On his side, Mr. Bakari Juma, counsel for the respondent submitted that applicant used the old CMA form that is found in Employment and Labour Relations (Forms) Rules GN. No. 65 of 2007 that was repealed and replaced by the Employment and Labour Relations (general) Regulations, GN. No. 47 of 2017 which came in force on 24th February 2017. He went on that; applicant filed the application on 2nd February 2020, that is, three years after coming into force of the new CMA F.1 in GN. No. 47 of 2017. Counsel submitted that, applicant and his counsel ought to know that there was change of the law. In short, he submitted that both applicant and his counsel were negligent. He cited the case of ***Kambona Charles v. Elizabeth Charles, Civil Application No. 529/17 of 2019, CAT*** (unreported) wherein the Court of Appeal held that a mistake made by a party's advocate through negligence or lack of diligence cannot constitute a ground for condonation of delay. Counsel for the respondent submitted further that

the old CMA Forms were made under section 86(1) of the Employment and Labour Relation Act [cap.366 R.E.2019] while the new Forms under GN. No. 47 of 2017 were made under section 98(1) of same statute. When asked by the court as to whether the said CMA F.1 was repealed and re-enacted in identical terms, he readily conceded that it was.

It is undisputed that the applicant referred the dispute at CMA while in time, but he used a repealed CMA F. 1. He was informed that the dispute was not registered because he used a repealed CMA F.1 while already out of time as a result he applied for condonation. Both the respondent and the mediator took an issue that applicant was negligent as a result condonation was not granted. For that reason, the mediator found that, there was not good ground for granting condonation. Counsel for respondent has submitted that the new CMA F.1 were in force three years prior applicant filing the dispute and that both applicant and his counsel ought to have known that there is change of law. As they didn't, to him, this was negligence hence not entitled for condonation. In ***Kambona's case***, supra, the court of Appeal held :-

*"It is settled that a mistake made by a party's advocate through **negligence or lack of diligence** cannot constitute a ground for condonation of delay but a minor lapse committed in good faith can be ignored."* (emphasis is mine)

The Court of Appeal quoted its earlier decision in the case of ***Yusufu Same and Another v. Hadija Yusufu, Civil Appeal No.1 of 2002*** (unreported) that:-

*"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions...But there are times, depending on the circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate as was held by a single Judge of the Court (Mfalila, JA, as he then was) in ***Felix Tumbo Kisima v. TTCL Limited and Another*** - CAT Civil Application No.1 of 1997 (unreported)".*

Having quoted the case of ***Yusufu Same***, supra, the Court of Appeal quoted its decision in the case of ***Zuber Mussa v. Shinyanga Town Council, Civil Application No. 3 of 2007***, (unreported) where it held:-

"Advocates are human and they are bound to make mistakes sometimes in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. If, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But if he makes only a minor lapse or oversight only once and makes a different one next time that would not, in my view, amount to lack of diligence."
(emphasis is mine)

As pointed herein above, a mistake was made once by counsel for the applicant by referring the dispute at CMA using a repealed CMA F.1

and thereafter, filed a proper CMA F.1 with application for condonation. The background of the case and nature of the mistake does not show that counsel for applicant was grossly negligent or that he lacked diligence. An issue was taken that three years had passed after the repeal of the old CMA F.1 and, according to counsel for respondent, that was evidence that both applicant and his counsel were not diligent. With due respect, diligence cannot only be determined just by looking the number of years a statute has been in force. In my view, many factors have to be taken into consideration including but not limited to the nature of changes brought by the new law, whether it is such that any reasonable person could have noted the changes or the difference etc. In the application at hand, counsel for the respondent conceded that CMA F.1 was repealed and re-enacted in identical terms. In such a situation, it is difficult for a person to note that he /she is using a repealed or the new one. At any rate, it was wrong not to register the dispute filed by the applicant on sole ground that it was brought under a repealed CMA F.1 that has been reenacted in identical terms. There is no effect of using a repealed law, if the same has been re-enacted in identical terms. A similar position to the one I have taken was taken by Sir Ralph Windham, CJ in the case of ***Republic v. Indo Parsad Jamietram Dave [1963] EA 63*** where the respondent was charged

and convicted on plea of guilty to a re-enacted law and in identical terms to the repealed one, the court substituted the new law to the old law and sustained conviction as the offence was the same under both the old and new sections as no injustice resulted to the respondent from the mis-citation.

Guided by the above decision, I find that application for condonation filed by applicant was erroneously dismissed. I therefore allow the application, grant condonation and revised the ruling that dismissed the application for condonation and set it aside. I direct that parties should go back to CMA where the dispute will be heard on merit.



B.E.K. Mganga

JUDGE

08/11/2021