

**THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 449 OF 2020**

**BETWEEN**

**MWESIGA CHRISTIAN MICHAEL..... APPLICANT**

**VERSUS**

**FEZA GIRLS SECONDARY SCHOOL ..... RESPONDENT**

**JUDGMENT**

Date of last order: 21/10/2021

Dated of judgment: 8/11/2021

**B.E.K Mganga, J**

Applicant has filed this revision application after being aggrieved by the Ruling of Mwabeza. N. L., Arbitrator, in Labour dispute No. CMA/DSM/KIN/144/2020 dated 15<sup>th</sup> October 2020 wherein application for condonation filed by the applicant was dismissed for want of merit. Background of the application is that, on 1<sup>st</sup> January 2018 applicant secured employment orally from the respondent as a teacher, but he was terminated on 3<sup>rd</sup> April 2018 while on probation. After the said termination, on different dates, applicant filed five different Labour disputes before the Commission for Mediation and Arbitration henceforth CMA but the same were struck out for being incompetent. He finally filed the aforementioned Labour dispute claiming 12 months' salary compensation based on unfair

labour practice relating to probation period. In the Referral Form i.e., CMA F.1 he indicated that the dispute arose on 3<sup>rd</sup> April 2018. Together with the said CMA F.1, applicant filed Application for Condonation of Late Referral of a Dispute to the Commission for Mediation and Arbitration (CMA F.2). On 15<sup>th</sup> October 2020, Mwabeza, N.L, Mediator dismissed the application on ground that applicant failed to adduce good cause for delay.

As pointed above, applicant was aggrieved by the said ruling and has brought this application for revision. The Notice of application is supported by an affidavit of the applicant, Mwesiga Christian Michael. The affidavit in support of the application contains three legal grounds namely:-

- "(1) That, the Honorable Mediator erred in law, she (isc) didn't say either the case sited(sic) ZUENA NASSOR VS. PHOENIX OF TANZANIA ASSURANCE CO. LTD, REVISION NO. 419 OF 2018 AND SECURITY GROUP (T) LTD VS. HURUMAKIMAMBO, MISCELLANEOUS LABOUR APPLICATION NO. 614 OF 2019 helps my application or not.*
- (2) That, the Honorable Mediator misinterpreted the legal notions of (sic) **technical delay** and **illegality** because she didn't pay attention to the cases presented by the applicant during submission.*
- (3) That, the Honorable Mediator erred in law; her ruling is in contradiction with other rulings of the commission because she didn't peruse attentively (sic) the file to know all incidents about my applications of which she blames the applicant."*

Respondent filed the counter affidavit sworn by Gasper Mwakanyemba, her counsel, averring that mediator did not err.

When the application was called for hearing, applicant appeared in person while the respondent was represented by Ashiru Hussein Lugwisa, Advocate.

Mwesiga Christian Michael, applicant submitted that he applied for condonation, but his prayer was rejected not on good ground. He submitted that there was technical delay and illegality, but the arbitrator did not consider them and that she did not consider grounds for the delay. He submitted that the mediator failed to understand the meaning of technical delay and illegality. He went on that it was technical delay as he filed the application within time, but the respondent kept raising objections that led him to be out of time. He submitted that the circumstance of the application is different from other delay whereby an applicant is required to account for every day of delay. Applicant submitted that, in technical delay, no need to account for every single day of delay because all the time he was in court seeking for his right.

Applicant submitted further that he was denied right to be heard of which initially was granted in CMA/DSM/KIN/563/2019 whereby CMA heard both sides but during arbitration, there was confusion of the name of the

Respondent i.e., Feza Schools and Director Feza Schools. Due to that confusion, the parties agreed that the said application be withdrawn and that is what happened on 27<sup>th</sup> January 2020. That, it was after that decision, he filed the dispute, the subject of this revision application. He submitted that three times the dispute was struck out. He therefore prayed the application be granted on ground that there was technical delay.

On his part, Ashiru Hussein Lugwisa, counsel for the respondent, submitted that, applicant is challenging the award of Mwabeza in CMA/KIN/144/2020 issued on 15<sup>th</sup> October 2020 where the applicant was applying for extension of time within which to file a complaint at CMA and that he (applicant) gave two reasons i.e., (i) technical delay and (ii) illegality.

Counsel submitted that circumstances of the applicant at hand cannot warrant condonation to be granted based on technical delay. Counsel submitted that not every technical delay can entitled a party to extension of time as sometimes the Courts including the Court of Appeal reject technical delay in extension of time. Counsel submitted applicant's applications were being struck out. Counsel cited the case ***Maro Machange Maro vs. Augustino Katikilo and 2 others, Civil Appeal***

**No. 18 of 2019** that technical was found not to be good ground for extension of time as a result the same was rejected . Counsel cited the case of **Bank of Tanzania vs. Said A. Marinde and 30 others, CAT** (unreported) where it was held that ignorance of law or mistake of counsel cannot be an excuse for delay. Counsel went on that; applicant didn't account for delay of which he was supposed to. To strengthen his argument that applicant was supposed to account for the delay, he cited the case of **Kundani Singh Construction Company Limited vs. Peter Ngugi Kaman Miscellaneous Labour application No. 11 of 2013** (unreported). On illegality, counsel submitted that has no merit as there was no any illegality. He therefore prayed the application be dismissed.

In rejoinder, applicant maintained that in technical delay, a person is not required to account for delay.

I have considered submissions of both parties in this application in order to arrive at the just decision. Applicant submitted that he applied for condonation, but his prayer was rejected not on good ground while there was technical delay and illegality, which the arbitrator failed to understand its meaning and did not consider. Counsel for the respondent submitted that both technical delay and illegality were considered and rejected by the mediator. On my part, I have examined the ruling, the subject of this

application, and find that the mediator considered both technical delay and illegality and rejected them. On technical delay, at page 7 of the ruling the mediator said:-

*" Tume inatambua kanuni ya 'technical delay' na ieleweke wazi kwamba kanuni hiyo haikuja kwa ajili ya kuwasaidia watu wazembe bali wale walioonesha umakini katika ufunguaji wa mashauri. Ni rai ya Tume hii kwamba endapo 'technical delay' itaruhusiwa kuwasaidia watu wazembe katika mashauri itakuwa kuweka 'bad precedent' kwa kuwa wadaawa watafanya uzembe kwa kukosea kufungua mashauri mara nyingi kama mlalamikaji alivyofanya na kisha aje akubaliwe kuongezewa muda wa kusikilizwa madai ya msingi..."*

At the same page of the ruling, the mediator found correctly, in my view, that applicant was negligent as he repeated the same mistake i.e., defective of the jurat of attestation three times. A person who is diligent cannot do as the applicant did. This is better explained herein below this judgment when examining the occurrence of events.

It is undisputed both at CMA and before this court that on 1<sup>st</sup> January 2018 applicant secured employment from the respondent and that he was terminated on 3<sup>rd</sup> April 2018 while on probation. This is clearly indicated in CMA F.1 and affidavit of the applicant both before this court and at CMA in application for condonation. Both CMA F.1 and application for condonation (CMA F.2) were received on 18<sup>th</sup> February 2020. As pointed above, in CMA F.1, applicant was claiming for 12 months' salary compensation based on

unfair labour practice relating to probation period. In application for condonation of late referral of a dispute to the Commission for Mediation and Arbitration (CMA F.2), applicant indicated that the dispute was filed late because it has met a lot of preliminary objections from the employer and other legal factors. He indicated further that, the degree of lateness is 84 weeks. In an Affidavit in support of condonation, applicant deponed in part that :-

"2. That on 1<sup>st</sup> January 2018 he secured employment from the respondent and that he was terminated on 3<sup>rd</sup> April 2018 while on probation.

3. That on 20<sup>th</sup> July 2018 filed Labour dispute No. **CMA/DSM/KIN/R.438/2018** that was struck out on 4<sup>th</sup> July 2018 and attached the ruling as CM-1.

4. That on 20<sup>th</sup> July 2018 he filed labour dispute **No. CMA/DSM/ILA/R.778/2018** that was struck out on 1<sup>st</sup> November 2018 and attached the ruling as CM-2.

5. That on 5<sup>th</sup> November 2018 he filed a third dispute **No. CMA/DSM/KIN/1038/18** that was also struck out on 28<sup>th</sup> January 2019 and attached a ruling as CM-3.

6. That on 4<sup>th</sup> February 2019 he filed a fourth labour dispute **No. CMA/DSM/KIN/100/2009** that was struck out on 17<sup>th</sup> July 2019 and attached its ruling marked as CM-4.

7. That on 19<sup>th</sup> July 2019 he filed the fifth labour dispute **No. CMA/KIN/563/2019** that was also struck out on 7<sup>th</sup> February 2020 as CMA F.1 was not properly filled and attached the ruling as CM-5."

In short, applicant was pleading that the delay is technical one.

In opposing the application for condonation, respondent filed a counter affidavit sworn by Ashiru Hussein Lugwisa, his counsel. In the counter affidavit, Lugwisa admitted the contents of paragraph 1,3,4,5,6 and 7 of the applicant's affidavit. In disputing the content of paragraph 2 of the applicant, Mr. Lugwisa deponed:-

*"4 Maelezo ya Mwesiga katika aya ya 2 katika kiapo chake si ya kweli, Mwesiga aliachishwa kazi kwa kuwa hakufikia kiwango alichokuwa anatakiwa kufikia na muajiri wake, FEZA".*

In paragraph 5 of the counter affidavit Ashiru Hussein Lugwisa, deponed that applicant was negligent in drafting his applications which is why, he not comply with the law and was wasting court's time. But in the verification clause, Mr. Lugwisa verified that all facts are to the best of his knowledge.

In the first place, the said counter affidavit was defective liable to be struck out as the verification clause was defective. Mr.Lugwisa, being an advocate and nowhere in the said counter affidavit he indicated that he was part of the respondent's administration, or that he participated in assessing performance of the applicant, the information that applicant did not reach the performance standard of the respondent, cannot be in the domain of his own knowledge. In my view, it was wrong for him to verify that all facts are best to his knowledge including paragraph 4 quoted above. Without further information which were supplied to CMA, it is not



correct for counsel to depone that applicant was terminated as his performance was below the standard prescribed or required by the respondent. This cannot, at any rate, be within his knowledge. Verification clause was therefore defective rendering the whole counter affidavit defective. Therefore, there was no evidence of the respondent.

Though legally speaking there was no evidence by the respondent opposing an application for condonation, the mediator was entitled to scrutinize the evidence (affidavit) of the applicant to see whether there were good grounds for delay or not. It is clear from the affidavit by the applicant filed at CMA in application for condonation that he filed five labour disputes and that all were struck out at different dates.

It is clear that, on 20<sup>th</sup> July 2018 applicant filed Labour dispute No. **CMA/DSM/KIN/R.438/2018** claiming for unfair termination. The said dispute was struck out on 4<sup>th</sup> July 2018 as the arbitrator found that applicant was under probation and has only worked for two and half months with the respondent hence cannot benefit with provisions relating to unfair termination as it is clearly shown in his ruling attached to the application as CM-1. At that time, applicant was enjoying legal service of Mr. Alfred Mbago, advocate. If he was aggrieved by that decision, he was supposed to file an application for revision before this court, but he didn't.

It is worth to note that the said complaint was filed within Kinondoni district. On the same date i.e., 20<sup>th</sup> July 2018 applicant filed labour dispute **No. CMA/DSM/ILA/R.778/2018** at Ilala within Ilala district. This is a different area from the area within which a dispute arose. In terms of Rule 8(1) of Labour Institutions (Mediation and Arbitration) Rules, GN. No.64 of 2007, a party is required to file the dispute at the head office of CMA or in the area where the dispute arose. The dispute arose within Kinondoni district where, on 20<sup>th</sup> July 2018, applicant filed Labour dispute No. **CMA/DSM/KIN/R.438/2018**, the dispute which, was struck out on 1<sup>st</sup> November 2018. In my opinion, applicant went to file Labour **CMA/DSM/ILA/R.778/2018** on 20<sup>th</sup> July 2018 as try and error. At first place, he was not supposed to do so. In the later application, on **1<sup>st</sup> November 2018**, Lemwely D, Mediator, upheld a preliminary point of objection that the affidavit was incurably defective in the jurat. He further found that the application for condonation was in violation of Rule 29(2) and (3) of Labour Institutions (Mediation and Arbitration) Rules, GN. No.64 of 2007. He therefore, struck it out and gave an option to applicant to file a fresh application for condonation if so wished as it is clearly shown in his ruling attached to the application as CM-2.

After the said labour dispute No. **CMA/DSM/ILA/R.778/2018** was struck out, on 1<sup>st</sup> November 2019, instead of filing a proper application in the same district as was advised by CMA Ilala, on 5<sup>th</sup> November 2018 applicant filed a third dispute **No. CMA/DSM/KIN/1038/18** at Kinondoni District. The respondent did not file a counter affidavit but raised a preliminary objection that jurat of attestation is defective. On **28<sup>th</sup> January 2019** Simba, G, Mediator upheld the preliminary objection and struck out the application and gave a last chance to the applicant to file a proper application as it is clearly shown in his ruling attached to the application as CM-3.

On 4<sup>th</sup> February 2019 applicant filed a fourth labour dispute **No. CMA/DSM/KIN/100/2009** at Kinondoni District. On **17<sup>th</sup> July 2019** Mahindi, P.P, Mediator upheld a preliminary objection that the affidavit is incurably defective in the jurat of attestation. The mediator struck out the application and gave parties right to seek for revision before this court as it is clearly shown in his ruling attached to the application as CM-4.

On 19<sup>th</sup> July 2019 applicant filed the fifth labour dispute **No. CMA/KIN/563/2019** that he withdrew on 27<sup>th</sup> January 2020 as Mpapasingo B, arbitrator found that applicant indicated in CMA F.1 that the employer was Feza Schools but in CMA F.8 he indicated that the employer

was Director, Feza Schools. Applicant was directed to follow procedure in referring disputes at CMA as indicated in the ruling of the said **Mpapasingo, B**, arbitrator attached to the application as CM 5.

Having given occurrence of events as stated above, the issue is whether the applicant can be granted condonation based on technical delay. The Court of Appeal had an advantage of discussing technical delay as reason for extension of time in the case of **Hamis Mohamed v. Mtumwa Moshi, Civil Application No. 407 of 2009** (unreported). After quoting its earlier decisions, the Court of Appeal found that technical delay is a good ground for extension of time. The Court of Appeal however held that applicant has to be diligent all along in pursuing his right and not negligent or sloppy. In the case of **Zuber Mussa v. Shinyanga Town Council, Civil Application No. 3 of 2007**, (unreported) the Court of Appeal was confronted with an issue as whether a mistake done by an advocate can be a ground for extension of time or not. In due course of determination of that issue, circumstances at which an advocate or a person can be said to have been not diligent were given out. The Court of Appeal 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."*

It is my opinion that, from what I have observed above, applicant was negligent, not attentive and slopy. I don't see reason as to why he repeated filing an application supported by affidavit with a defect jurat of attestation three times even after being given the last chance. As pointed out hereinabove, applicant repeated the same mistake more than once. It is my view that applicant was gross negligent and lacked diligence. The argument by the applicant that once there is technical delay no need to count for delay, in my view, is not correct. That argument may attract endless litigation between the parties.

On the issue of illegality, mediator held at page 8 and 9 of the ruling that illegality alone cannot be a ground for extension of time. In his view, illegality as ground for extension of time is a defeat of the intent and purpose of the law of Limitation. With due respect to him, there is a litany of authorities by the Court of Appeal and this court that illegality is a good

ground for extension of time. The Court of Appeal has insisted that for illegality to be a ground for extension of time, it has to be apparent on the face of record. In the case of **Hamis Mohamed**, supra, the Court of appeal held that:-

*"It follows then that an allegation of illegality by itself suffices for an extension of time. However, such an allegation of illegality "must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process..."*

It was not correct to hold that extension of time based on illegality defeats the law of Limitation Act.

It was submitted by the Applicant that he was denied right to be heard of which initially was granted in CMA/DSM/KIN/563/2019 whereby CMA heard both sides but during arbitration, there was a confusion of the name of the Respondent i.e., Feza Schools and Director Feza Schools. I have examined the CMA record and find that parties were heard on the application for condonation. His argument that he has been denied right to be heard in the labour dispute relating to his claim against the respondent, in my view, cannot be valid, as he had that chance, but he did not exploit it properly until when he was caught by the Law of Limitation. Acceptance of his argument means that, we should put aside the Law of Limitation. That, in my view, cannot be accepted. He was afforded right to refile the

application several times and advised to abide by the law but he did not. He cannot now be heard complaining that he was not afforded right to be heard.

For all said hereinabove, I hereby dismiss this revision application for lack of merit.

It is so ordered.



B.E.K. Mganga

**JUDGE**

08/11/2021

Labour Court-TV.