

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

APPLICATION FOR REVISION NO. 519 OF 2019

BETWEEN

HEMEDI KAPUNGA & ANOTHER.....APPLICANTS

VERSUS

KIMANI MINERALS LTD.....RESPONDENT

(From the ruling Commission for Mediation & Arbitration of DSM at Ilala)

(Masaua: Mediator) Dated 18th August 2016 in Labour Dispute

No. CMA/DSM/ILA/R. 1110/16)

JUDGEMENT

K. T. R. MTEULE, J.

11th April 2022 & 12th April 2022

This Revision application originates from the ruling of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/R.1110/16 issued by Masaua, A., the Mediator, on 05th December 2016. **HEMEDI KAPUNGA & NICOLAUS SIMBA**, the Applicants herein, are praying for orders of this Court in the following terms:-

1. That this Honorable Court may be pleased to call for the record from the Commission in Labour Dispute No. CMA/DSM/ILA/R.1110/16 and set aside the proceedings and ruling issued by the Commission on 05th December 2017 in

which the application for condonation of late referral was dismissed.

2. That this Honorable Court may be pleased to condone the applicants so that their Dispute of unfair termination of employment can be heard by the Commission out of time prescribed by the rules.
3. That this Honorable Court may be pleased to grant any other relief as it may think fit.

A brief sequence of facts which triggered this application are traced from CMA record, affidavit and counter affidavit filed by the parties as well as the submissions as stated hereunder. The Applicants were employed by the respondent as Security Guards. The dispute between the Applicants and the Respondent started on 19th March 2016 when they were terminated for an alleged misconduct. Aggrieved by the decision, the applicants filed Labour Disputes No. CMA/DSM/ILA/R.241/16/398 and CMA/DSM/ILA/R. 242/16. Both applications were struck out on 18th August 2016 with a leave to refile.

On 26th August 2016 the complainants in the CMA filed another Labour Dispute No. CMA/DSM/ILA/R. 813/16. This application was

struck out for being incompetent for missing CMA Form No. 7 to support application for condonation. Thereafter, another Labour Dispute No. CMA/DSM/ILA/R.1110/16 was filed 18th November 2016. This application was dismissed on 05th December 2017 for want of good cause for delay in filing the matter.

Aggrieved by the decision of 5th December 2017, the applicants filed the present application which was preceded by several applications filed by the applicants before this Court which did not bear fruits. Along with the Chamber summons, the applicants filed a joint affidavit in which after explaining the chronological facts leading to this application as already stated above, the applicants alleged that, after being terminated on 19th March 2016, they have been busy in Court corridors fighting for their right to be heard. They are of the view that the delay surrounding this matter was technical and not actual in real sense.

The application was challenged through counter affidavit sworn by Pili Seleman who is the Respondent's Principal Officer. The deponent in the counter affidavit vehemently disputed the applicants' allegations.

The application was disposed of by a way of written Submissions where the Applicants were represented by **Mr. Joseph Basheka,**

Personal Representative whereas the Respondent was represented by Mr. Saulo Kusakalah, Advocate. I appreciate their rival submissions which will be considered in deciding this application.

In disposing this application, the issue for determination is whether the applicants have provided sufficient cause for this Court to revise the CMA ruling regarding extension of time to file the labour dispute on unfair termination.

At the CMA the mediator did not grant extension of time on the ground that the applicant failed to account for each day of the delay. In addressing the framed issue, one question needs to be resolved. The question is "*was the mediator correct in finding that the applicants failed to account each day of the delay and thus can't get extension of time?*" I find worth to direct myself to the general principle that, it is a discretion of the Court to grant an application for extension of time upon a good cause shown. (See **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001, Court of Appeal of Tanzania, (Unreported)). In this case it was held:-

"...an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered

discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."

In further legal jurisprudence, the Court of Appeal developed some principles in granting extension of time. In the case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), their Lordships set the following conditions to be considered in granting extension of time:-

- i. The applicant must account for all the period of delay.*
- ii. The delay should not be inordinate.*
- iii. The applicant must show diligence and*

- iv. reasons, such as the existence of a point of law of sufficient importance not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take; and*
- v. Other sufficient grounds the court feels appropriate such as the illegality of the decision sought to be challenged."*

From the above provision, it is apparent that for someone to be granted an extension of time, he/she must comply with the principles developed in **Lyamusa's** case (supra) and other jurisprudence as well as Rule 11 (3) of the Labour Institutions (Mediation and Arbitration) GN. No. 64 of 2007.

The question before this court is whether the applicant accounted for all the days of delay? In accounting for the days delayed, the applicants pleaded to have been in court corridors throughout the lifespan of their dispute. It is apparent from the record and the affidavit that the applicants were terminated on 19th March 2016. After being terminated two disputes were filed which was Labour Dispute No. CMA/DSM/ILA/R.241/16/398 and CMA/DSM/ILA/R. 242/16. Both Applications were struck out on 18th August 2016 with a

leave to refile. On 26th August 2016 the complainants filed another Labour Dispute No. CMA/DSM/ILA/R. 813/16 which was struck out for being incompetent for lacking CMA Form No. 7 to support application for condonation, and the last one was filed on 18th November 2016. On the last application the applicants neither attached nor filed a copy of the alleged struck out application which was filed on 26th August 2016. As a result, the CMA could not ascertain the timeliness of the matter as it was not known when the previous application was struck out to lead the time to start the counting. Consequently, the mediator assumed and counted the delay from the date when the previous application was filed, hence establish the delay of 3 months and according to his findings it was contrary to Rule 10 (1) of GN. No. 64 of 2007 which directs disputes of unfair termination to be filed within 30 days from the date of termination and not otherwise.

From the foregoing, the arbitrator counted the days of delay from the date when the previous application was filed instead of the date when the matter was decided. This was caused by lack of sufficient information of the date of decision which ought to have been provided by the Applicants.

I agree with the mediator that it is the duty of the applicants to adduce evidence of what they were alleging. "*He who alleges must prove*" (**Section 110 of the Law of Evidence Act, Cap 6 of RE 2019**). However, the information as to when the previous application (**Labour Dispute No. CMA/DSM/ILA/R. 813/16**) was decided is in the court record. The arbitrator could find this information in the court registry by perusing what was in the case file and take judicial notice of what transpired.

In that respect, I set aside the decision in Labour Dispute No. CMA/DSM/ILA/R. 1110/16 and remit the matter back to the CMA with the direction that Labour Dispute No. CMA/DSM/ILA/R.1110/16 be determined afresh before another arbitrator who shall ascertain the existence of the **Labour Dispute No. CMA/DSM/ILA/R. 813/16** and the date it was decided to see if 30 days as per law requirement were accounted by the applicants or otherwise. It is so ordered.

Dated at Dar es Salaam this 12th Day of April, 2022,




KATARINA T. REVOCATI MTEULE

JUDGE

12/04/2022