

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

REVISION APPLICATION NO. 276 OF 2021

(Originating from the Ruling of Hon. Ngalika, E, mediator, dated 10th July 2021 in Labour Dispute No.
CMA/DSM/TEM/427/2020 at Temeke)

BETWEEN

ZAHORO RASHID HANUNA APPLICANT

AND

ALISTAIR JAMES COMPANY LIMITED RESPONDENT

JUDGMENT

Date of last order: 28/03/2022
Date of Judgment: 29/4/2022

B. E. K. Mganga, J.

Historical background of this application is that, on 1st day November 2016, applicant was employed by the respondent as a driver. It happened that on 30th October 2017, respondent terminated employment of the applicant. Aggrieved with termination, on 29th November 2017 applicant filed Labour dispute No. CMA/DSM/TEM/669/2017 but on 28th December 2017 he prayed to withdraw it, as a result, Hon. Mikidadi, A, Mediator, marked it withdrawn because CMA F1 was defective. Applicant filed Labour

dispute No. CMA/DSM/TEM/702/17/21/18 against Alistair, but the same was struck out on 25th September 2019 by Hon. M. Batenga, arbitrator after sustaining a preliminary objection raised by the respondent that the name of the respondent was not correct. On 23rd October 2019, Applicant filed Labour dispute No. CMA/DSM/TEM/324/19 with an application for condonation. On 23rd March 2020, Hon. Ngalika, E, Mediator granted condonation after holding that there was technical delay. Thereafter, applicant filed Labour dispute No. CMA/DSM/488/2019/55/2020 but was marked withdrawn on 26th June 2020 after the prayer by Mr. Lusekelo Samson, the applicant's representative because he noted that applicant filled improperly the nature of the dispute and claims in the CMA F1. Applicant refiled Labour dispute No. CMA/DSM/TEM/328/2020. Respondent filed five preliminary objections that (i) the application is incurably defective for want of endorsement, (ii) CMA F2 is defectively filled in, (iii) the application is bad in law because the jurat of attestation is defective, (iv) the application is bad in law for want of date of verification and certification of facts, and (v) the application is (sic) functus officio. Sophia Lorya, counsel for the applicant conceded to the preliminary objection, as a result, Hon. Ngalika, E, Mediator, struck out the dispute on 21st September

2020. On 25th September 2020, applicant filed Labour dispute No. CMA/DSM/TEM/427/2020. In the CMA F1 applicant showed that he was claiming to be paid TZS 20,000,000/=. He showed further that, there was constructive termination based on breach of fixed terms of the contract and further that, there was discrimination and harassment. Applicant showed also that the dispute arose on 30th October 2017 at Kurasini Temeke. In the application for condonation Form (CMA F2), applicant showed that he was late for two years Nine months and Twenty-Two days and that the delay was due to defective Form No. 1. In the affidavit in support of the application for condonation, applicant narrated several disputes he filed at CMA. On the cause of delay, applicant stated that was due to typing errors and defectives in CMA F1.

Respondent filed the counter affidavit sworn by Doris Nchimbi resisting the application. In the counter affidavit, it was deponed that applicant had one-year fixed term contract that expired automatically and further that the delay was due to negligence on part of the applicant who filed several defective disputes.

On 10th June 2021, Ngalika, E, Mediator, delivered a ruling dismissing the application for condonation on ground that applicant failed to account

each day of delay and that applicant based his claims on three grounds namely, (i) constructive termination, (ii) breach of contract and (iii) discrimination as such his claims are not clear.

Further aggrieved with the said ruling dismissing his application for condonation, applicant has knocked the doors of this court seeking the said ruling to be revised. In the affidavit in support of the notice of application, applicant raised three grounds namely:-

- 1. That the arbitrator grossly erred in law and fact by failing to take into consideration the good cause for the delay raised by the applicant.*
- 2. That the arbitrator grossly erred in law and fact by failing to take into consideration the degree of lateness and clear and concise grounds for condonation raised by the applicant.*
- 3. That the arbitrator grossly erred in law and fact in deciding the application for condonation based on his prediction of the outcome of the main application.*

In her counter affidavit, Doris Nchimbi, stated that arbitrator considered all circumstances before deciding that applicant failed to satisfy the Commission on the reason for the delay.

During hearing the application, applicant enjoyed the service of Mr. Richard Ernest, learned counsel while respondent enjoyed the service of Mr. Ashery Stanley, also learned counsel.

Submitting on the 1st ground, Mr. Ernest, learned counsel for the Applicant criticized the arbitrator for failure to consider that there was technical delay since the initial dispute was filed within time. He submitted that the dispute occurred on 30th July 2017 because applicant resigned hence constructive termination. That, on 19th November 2017 applicant filed a dispute at CMA while within time but it was struck out on 29th September 2019 by Batenga, Arbitrator because of improper name of the respondent. He went on that on 23rd October 2019 applicant filed a new application with condonation and that this was 24 days after the initial dispute was struck out. That, on 23rd March 2020 Ngarika, Arbitrator allowed the application by the applicant to file the dispute out of time. Counsel went on that Applicant filed the dispute but on 26th June 2020 he prayed to withdraw it due to technicalities as a result it was withdrawn without leave to refile. On 3rd August 2020 applicant filed a new dispute by filing a new CMA F1, but counsel for the respondent raised objection that was sustained on 21st September 2020 by Ngarika, Arbitrator who struck out the dispute. Counsel went on that, on 25th September 2020 applicant filed an application for condonation but on 11th June 2021, the application was dismissed. Counsel argued that there was technical delay which is a

ground for extension of time and cited the case of ***Mshindo Mohamed & 10 Others V. Impala Terminals Tanzania Ltd, Misc. Labour Application No. 523 of 2019, Quality Laboratory Tanzania Ltd V. Shaban Hassan, Misc. Labour Application No. 11 of 2019, Yakobo Magoiga Gichere Vs. Peninah Yusuph, Civil Appeal No. 55 of 2017*** CAT (unreported) to support that argument.

On the 2nd ground, counsel for the applicant submitted that the arbitrator did not consider the degree of lateness. He submitted that Rule 11(3)(a) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007 requires the arbitrator to consider degree of lateness. Counsel argued that applicant delayed for four (4) days from 21st September 2020 to 25th September 2020. Counsel concluded his submission on this ground by submitting that applicant was in CMA corridors since 2017 and that he was not negligence.

On the 3rd ground, counsel for the applicant submitted that arbitrator erred by holding that there is no possibility of the applicant to win the dispute and that in so doing, he predetermined the main dispute. During submissions, counsel for the applicant conceded that on 26th June 2020 applicant prayed to withdraw the dispute and it was so marked but he

refiled it on 3rd August 2020 almost after 60 days without application for condonation.

Resisting the application, Mr. Stanley learned counsel for the respondent submitted that Rule 11(1) and (3) (a) to (e) of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007, the provides matters to be considered by the arbitrator when dealing with an application for condonation. That the complaint by the applicant is not justifiable because arbitrator considered reasons advanced in CMA F2 i.e., application for condonation in which applicant stated that the delay was due to filing defective Form (CMA F1). Counsel for respondent submitted that, in his view, filing defective CMA F1 is not a ground for delay but negligence on part of the applicant for not adhering to the law in filling CMA F1.

On the degree of delay, counsel for the respondent submitted that there was no technical delay that caused applicant to file the dispute out of time and that applicant did not act promptly after the dispute was struck out on 26th June 2020. He submitted that, from 26th June 2020, it took more than 38 days for the applicant to file the application for condonation. He submitted further that, in the affidavit at CMA, applicant did not

advance good cause for the delay and did not account for each day of delay. Counsel for the respondent cited the case ***Sebastian Ndaula V. Grace Rwamafa, Civil Application No. 4 of 2014 CAT*** (unreported) and ***Ngao Godwin Losero V. Julius Mwarabu, Civil Application No. 10 of 2015*** CAT (unreported) to support his submission that applicant was supposed to account for each day of delay even if it is a single day. Counsel argued further that, applicant was not active in pursuing his rights at CMA.

On the 3rd ground of revision wherein the arbitrator is criticized for predetermining the outcome of the dispute, counsel for the respondent submitted that the criticism is not proper, because, in terms of Rule 11(3)(c) of GN. No. 64 of 2007, (supra) the arbitrator is required to consider the possibility of chance of success of the dispute. Counsel argued that possibility of success is a precondition in extension of time and cited **Ngao's case** (supra). Counsel for the respondent went on that, on 25th September 2020 applicant filed another dispute with an application for condonation giving reasons for the delay as defectiveness of CMA F1. He argued that applicant was earlier on granted extension of time filed a

defective CMA F1. Counsel concluded that there was no good cause for delay and prayed the application to be dismissed.

In rejoinder, Mr. Ernest, counsel for the applicant submitted that initially the dispute was heard, and the applicant called witnesses from Zambia.

From the outset, I should point out that submissions in the rejoinder are not part of applicant's evidence in his affidavit. Nowhere in the applicant's affidavit he stated this. That submission is not reflected in the CMA record. I will therefore ignore that submission in this judgment.

It is undisputed by the parties that an application for condonation that was filed by the applicant was dismissed. There is a litany of authorities that in an application for condonation or extension of time, applicant is required to show sufficient cause for the delay and account for each day of delay. ***Ndaula,s case*** (supra) and ***Ngao's case*** (supra) are just few of those authorities. There is also a plethora of authorities that technical delay is a good ground for extension of time. Some of the cases to that position are ***Mshindo's case, Quality Laboratory Tanzania's case*** and ***Gichere's case*** (supra) cited by counsel for the applicant. But, in none of these cases it was held that if there is technical delay, the

requirement of accounting each day of delay ceases. In my view, even if there is technical delay, applicant is required to account for each day of delay. This must be done by evidence and not by submissions from the bar. I have examined the affidavit of the applicant and find that he did not count for each day of delay.

Counsel for the applicant criticized the mediator that he failed to consider the degree of lateness. Initially, counsel for the applicant submitted that applicant was late for four days only. But during submission, he conceded that on 26th June 2020 applicant prayed to withdraw the dispute and it was so marked but he refiled it on 3rd August 2020 almost after 60 days without application for condonation. These 60 days were not accounted for. This goes to the degree of lateness and not only four days as argued by counsel for the applicant.

It was submitted by counsel for the applicant that applicant was in CMA corridors since 2017 and that he was not negligence. With due respect to counsel for the applicant, occurrence of events as narrated hereinabove shows not only that applicant was negligent but was grossly negligent. I am alive that, error is human being, but the circumstances in the application at hand is beyond human error. Facts of the application as

narrated hereinabove makes me to conclude that there was gross negligence, which cannot be a ground for extension of time.

Mediator is criticized by the applicant that in holding that there is no possibility of the applicant to win the dispute predetermined the dispute between the parties. Counsel for the respondent countered that submission by citing Rule 11(1) and (3) (a) to (e) of GN. No. 64 of 2007(supra). I have read the said Rule, particularly, Rule 11(3)(c) and find that in application for condonation, applicant is required to show prospects of succeeding in the dispute and obtain the relief sought against the other party. If applicant is required by the law so to show, I see no logic for the arbitrator not to take it into consideration at the time of granting or dismissing application for condonation. Whatever the case, this was not the sole reason for dismissing applicant's application.

For the foregoing, I find that the application is devoid of merit and dismiss it.

Dated at Dar es Salaam this 29th April 2022.



B.E.K. Mganga
JUDGE

Judgment delivered today 29th April 2022 in the presence of Richard Ernest, Advocate for the applicant and Ashery Stanley, Advocate for the respondent.




B.E.K. Mganga
JUDGE

Labour Court TZ.