

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

REVISION APPLICATION NO. 298 OF 2021

BETWEEN

TANZANIA ZAMBIA RAILWAY AUTHORITY (TAZARA) APPLICANT

AND

AYASI SOLANO MBONDE & 471 OTHERS..... RESPONDENTS

JUDGMENT

Date of last order: 03/03/2022
Date of judgment 13/5/2022

B. E. K. Mganga, J.

On 1st October 2020, Aya Mbonde, Solanus Msongamwanjwa, Felician Amsifu Nchimbi and Charles David, the respondents, filed Labour dispute No. CMA/DSM/TMK/442/2020 before the commission for Mediation and Arbitration henceforth CMA at Temeke. In the said CMA F1, they showed that there are 411 other applicants. Describing the nature of the dispute in the said CMA F1, they indicated that it relates to "non-payment of terminal benefits such as severance pay etc.". They indicated further that, the dispute arose on 8th June 2020 and further that they were claiming to be paid TZS 65,858,898,558/=. Being alert that they were out of time, they filed an application for condonation (CMA F2) in which they maintained that

the dispute arose on 8th July 2020 and that they were late for three weeks. In the said CMA F2, they showed that they retired premature and were not paid severance pay and other terminal benefits. In the joint affidavit filed by Ayasi Mbonde, Solanus Msongamwanjwa, Felician Amsifu Nchimbi and Charles David, they deponed *inter-alia* that they were employed by the applicant on different dates and different capacities and that between May 2005 and December 2009 they were terminated from employment after reaching 55 years of compulsory retirement. They stated further that there were several communications relating to payment of their terminal benefits but later they were informed that they are not entitled.

Respondent filed the counter affidavit sworn by Marco M.N.S. Mabala, the Corporation Secretary of the applicant to oppose the application.

Having heard submissions from both sides, on 24th June 2021, Hon. Ngalika, E, Mediator delivered the ruling granting condonation to the respondents.

Aggrieved by the said ruling granting condonation to the respondents, applicant filed this application seeking the court to revise it. In the affidavit of Kause K. Izina, in support of the application, applicant advanced five grounds of revision. On the other hand, respondents filed the counter affidavit affirmed by Ayasi Mbonde to oppose the application.

When the application was called for hearing, Ms. Kause Kilonzo, State Attorney appeared and argued for and on behalf of the applicant while Mr. Alpha Mchaki, Advocate, and Godwin Ndonde, the personal representative, appeared and argued for and on behalf of the respondents.

On the grounds of application, Ms. Kilonzo State Attorney submitted that, respondents were granted condonation at CMA and that the same is not interlocutory. She went on that; the order is not interlocutory because the order finalized the application that was filed at CMA. She referred the court to the case of ***Tanzania Posts Corporation v. Jeremiah Mwandji, Civil Appeal No. 474 of 2020*** CAT (unreported) wherein it was held that the court should examine the nature of the order to see whether it finalizes the matter or not, for it to be interlocutory or not.

Ms. Kilonzo went on that, in the application for condonation at CMA, the issue was whether, applicants adduced sufficient reason for condonation or not. In terms of Rule 11(3) of GN. No. 64 of 2007, arbitrator had power to grant condonation after applicants have adduced sufficient evidence. At CMA, respondents submitted that the delay was due to communications that were going on between them and other government institutions as per paragraph 3 of their affidavit that was filed at CMA. State Attorney submitted that, negotiations and administrative matters cannot be a good ground for extension of time and cited the case

of ***Makamba Kigome and Another vs. Ubungo Farm Implements Limited Civil Case No. 109 of 2005***, HC (unreported) to support her arguments.

Ms. Kilonzo submitted further that, the dispute occurred between 2005 and 2009, but application for condonation was filed at CMA on 12th December 2020, more than 10 (ten) years thereafter. She argued that respondents were supposed to file the dispute at CMA within 60 days from the date the dispute arose, but they have filed after 10 years. She went that, the arbitrator regarded the delay by applicants as a technicality and granted the application for condonation. She strongly submitted that, there was no good cause for the delay.

Ms. Kilonzo submitted further that; respondents were supposed to count each day of the delay, but they didn't. She cited the case of ***Lodger Bernard Nyoni v. National Housing Corporation, civil Application No. 372/01 of 2018, Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 20210*** CAT (all unreported) to support that position. She further submitted that, the arbitrator used extraneous matters in granting the application as reflected at page 7 and 8 of the Ruling and that the arbitrator looked on merit of the dispute and not good grounds for condonation. She went on that, though

CMA arbitrator exercised his discretion, this court has power to intervene and cited the case of ***EDPB Construction Company Limited and 2 others v. CRDB Bank PLC, Civil reference No. 3 of 2016***, CAT, (unreported) to bolster her submission.

Before she penned down her submission, asked her to address to issues that I found important to be addressed by the parties namely, (i) competence of the affidavit that was filed at CMA by the respondents in support of the application for condonation and (ii) whether both CMA and this Court have jurisdiction over the dispute between the parties.

On competence of the application for condonation, Ms. Kilonzo submitted that there were two applications namely, (i) Elias Sikila and 55 others and (ii) Ayasi Mbonde, Salamus Msongamwanja, Felician Amsifu, Charles David and 411 others. She went on that, in the application filed by Elias Sikila and 55 others, the affidavit was signed by Elias Sikila and January Kigawa alone, and in the application by Ayasi Mbonde and 414 others, the affidavit was signed by Ayasi Mbonde, Selamus Msongamwanja, Felician Amsifu and Charles David Charles alone. She submitted further that, there was no application for representation at CMA, therefore, all applicants were supposed to sign those affidavits. She went on that Respondents filed a mandatory signing document under Rule (1), (2) and (3) of GN. No. 64 of 2007, but there was no order of the arbitrator in

relation to representation. She submitted further that, there is no paragraph in the affidavit that was filed at CMA showing that those who signed the affidavit, were mandated by others. She submitted further that, the CMA F2 was signed by four applicants alone and that the notice of application was signed by Ayasi Mbonde, Salamus Msongamwanja, Felician Amsifu and Charles David showing that the application includes 468 others who did not sign.

On the issue whether CMA had jurisdiction over the dispute between the parties, Ms. Kilonzo submitted that, respondents were employed on permanent and pensionable terms and that their employment commenced on divers' dates and that they retired on different dates upon reaching compulsory retirement ages. She submitted further that, respondents filed the dispute at CMA claiming arrears of terminal benefits and some were claiming that their retirement was premature.

State Attorney submitted further that; CMA had no jurisdiction to deal with complaints by the respondents because they were Public Servants. She went on that; respondents were supposed to refer the matter to the Public Service Commission, but they did not. She cited the case of ***Tanzania Posts Corporation V. Dominic A. Kalangi, Civil Appeal No. 12 of 2022***, CAT (unreported) to support her argument that both this Court and CMA had no jurisdiction over matters involving Public Servants.

She submitted further that applicant is governed by laws of two countries namely Tanzania and Zambia. Respondents filed the complaint at CMA on 1st October 2020 using Tanzania laws. She therefore prayed the application be granted.

Responding to the submissions made on behalf of the applicant, Mr. Mchaki, Learned counsel for the respondents submitted that, the order granting condonation is interlocutory. Counsel submitted that the word, "interlocutory" is defined in Legal Dictionary by S. L Swain and U.N Narang, 25th ed. 2015 to mean the order determining an immediate issue made in course of pending litigation which does not dispose of the case but abet further action dissolving the entire controversy. They are steps taken towards final adjudication to assisting the parties at the prosecution of their case in the pending proceedings. With that definition, counsel for the respondents submitted that the ruling granting condonation is interlocutory not subject to revision or appeal. He cited the case of the ***Board of Trustee of National Social Security Fund (NSSF) v. Pauline Matunda, Labour Revision No. 514 of 2019***, to support his argument that the order is interlocutory unless it affects final determination of the dispute. He submitted further that in the case of ***Tanzania Post's case*** (supra), it was held that in order the order not to be interlocutory, it should dispose of the right of the parties. Counsel for the respondents further

cited Rule 50 of the Labour Court Rules, GN. No. 106 of 2007, and submitted that the same provides that no appeal, revision shall lie unless such decision finally determines the dispute. He concluded that the CMA decision did not determine the dispute to its finality.

On his part, Mr. Ndonde, the personal representative of the respondents, submitted that the affidavit in support of the application for condonation contained good reason for condonation hence the arbitrator did not error. He went on that, communication between respondents and various government institutions were to the effect that respondents had valid claims. He went on that applicant conceded to that effect, but she had no fund and promised to pay. He, therefore, maintained that those communications and correspondences were good grounds for condonation.

Mr. Ndonde went on that Arbitrator acted properly in terms of Rule 10 of the Labour Institutions (Mediation and Arbitrations) Rules, GN. No. 64 of 2007. He went on that; the dispute was on other claims in terms of Rule 10(2) of GN. No. No. 64 of 2007(supra) and that the dispute arose on 2nd July 2020. When asked by the court to clarify the nature of the dispute, Mr. Ndonde, submitted that the claims of the respondents are that they were retrenched between 2005 and 2009 but that the dispute arose on 2nd July 2020 when the Labour Commissioner informed the respondents that they have no genuine claims and advised them to take further action.

Mr. Ndonde submitted further that, respondents obtained mandates from others in terms of Rule 5 of GN. No. 64 of 2007, and thereafter filed application for condonation. He conceded that the document referred to Rule 5 is CMA F1 and maintained that the list was attached. He conceded further that in the said CMA F1, it was not shown that the list of the names of other complainants was attached. He also conceded that the list was not attached to CMA F2. He was however quick to respondent that the arbitrator found that Rule 5 of GN. No. 64 of 2007 (supra) was complied with, and that the affidavit in support of the application for condonation was properly signed and filed at CMA, and further that, respondents were mandated to file the application for condonation as indicated in paragraph 20 of the affidavit.

Mr. Ndonde went on that, respondents were paid eight installments prior the decision of the Labour Commissioner, who was not party to the dispute, to claim that respondents had no valid claims. He went on that, after the letter of the Labour Commissioner, respondents did not go to the applicant to have more discussions, but they filed the dispute to CMA. He cited the case of ***Avit Kwareh v. Serengeti Breweries Limited, Revision No. 176 of 2017*** to illustrate his point that sufficient cause should be broadly interpreted to include the cause that are outside the powers or control of the applicant. He further cited the case of ***Legal and***

Human Rights Centre v. Shilinde Yusuph Nyahula, Revision No 50 of 2019 to support his argument that the order granting condonation is interlocutory hence not subject to revision and prayed the application be dismissed.

He went on that respondent were within time because applicant was paying the respondents, but stopped in 2017, then, they started to enter negotiations. Counsel submitted that the dispute was filed at CMA on 1st October 2020 with application for condonation that is the subject of this revision. He submitted further that; the application involves a total of 472 respondents. He conceded that there is no record in the CMA record, showing dates of retirement of each of the 472 respondents. He conceded further that, in the affidavit in support of the application for condonation, it is not indicated the dates of retirement of each respondent, but he was quick to submit that Rule 5 of GN. No. 64 of 2007(supra) does not require respondents to show dates of retirements/ or particulars. He conceded further that without particulars of retirement of each respondent, the court cannot prove the number of days of delay and the cause thereof. Counsel was quick to submit that there was promise from the applicant that they will be paid.

On the jurisdiction of both CMA and this court, Mr. Mchaki, learned counsel for the respondents submitted that, the Court has no jurisdiction

because the applicant sought to revise an interlocutory order barred by Rule 50 of the Labour Court Rules GN. No. 106 of 2007 (supra). During submissions Counsel for the respondents conceded that respondents were Public Servant. That, some of the respondents retired between 2005 and 2009 prior to amendment of the Public Service Act in 2016.

In rejoinder, Ms. Kilonzo, state Attorney submitted that, application for condonation is governed by CMA F2 while the dispute is governed by CMA F.1. Application for condonation was finally determined when it was granted.

I have passionately examined the affidavit and counter affidavit and submissions of the parties made at CMA, the affidavit and counter affidavit and submissions made thereof before this case and considered case laws cited by the parties in this application. As pointed herein above, both in the CMA F1 and the application for condonation (CMA F2), respondents showed that the dispute arose on 8th June 2020 and that respondents were late for three weeks. It is my view therefore that these are the pleadings that were filed by the respondent at CMA and therefore, in this judgment, I will confine myself in these pleadings and not submissions made on behalf of the parties as to when did the dispute arose. This is because, from where I am standing, there is no any other pleading in the CMA record filed by the respondents showing that the

dispute did not arise on that date. I am mindful further that, parties are bound by their own pleadings. In fact, it is a cardinal principle of law that parties are bound by their pleadings, and they are not allowed to depart as it was held by the Court of Appeal in the case of ***The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic), Civil Appeal No. 2 of 2020***, CAT (unreported). and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited, Civil Appeal No. 8 of 2015***, CAT (unreported). In the ***IPC's case***, supra, the Court of Appeal held that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

Guided by the above Court of Appeal decisions, I will confine myself to the pleadings in both CMA F1 and CMA F2 that the dispute arose on 8th June 2020 as pointed hereinabove.

Having confined myself on the pleadings of the parties that the dispute arose on 8th June 2020, then, I have decided to deal first with the jurisdictional issue namely whether; CMA had jurisdiction over the dispute between the parties or not.

Responding to the jurisdictional issue raised by the court, Ms. Kilonzo, state Attorney submitted that CMA had no jurisdiction to deal with complaints by the respondents because they were Public Servants. She submitted that prior to filing the dispute to CMA, they were supposed to refer the matter to the Public Service Commission. On the other hand, counsel for the respondents submitted that CMA had jurisdiction. From the submissions of the parties, it is undisputed that respondents were public servants. It is clear also that respondents, prior to filing the dispute before CMA did not exhaust remedies provided for under the public Service Act. The issue whether CMA and or this Court had jurisdiction to determine disputes involving public servants was discussed and determined by the Court of Appeal in ***Kalangi's case*** (supra) wherein it was held that: -

"...it is unambiguous clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the President...CMA has no jurisdiction to adjudicate upon such matters."

The position in Kalangi's case is loud and clear. The Court of Appeal reached that decision after considering amendments of the Public Service Act that 2016 that added section 32A in 2016 in the said Act. The said amendment came into operation in November 2016. The said section 32A provided: -

"Public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act"

As pointed hereinabove, in the CMA F1 and CMA F2, respondents showed that the dispute arose on 8th June 2020 and since parties are bound by their own pleadings and the court cannot depart from those pleadings, and since it is not disputed that prior to filing the dispute at CMA, respondents did not exhaust remedies provided for under the Public Service Act, I hold that CMA had no jurisdiction. I therefore nullify CMA proceedings, quash, and set aside the ruling arising therefrom.

Since the jurisdictional issue raised by the court has disposed the whole revision, I will not consider other grounds and submissions made by the parties.

Dated at Dar es Salaam this 13th May 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 13th May 2022 in the presence of Ms. Kause Kilonzo, State Attorney for the applicant and Godwin Ndonde, the personal representative of the respondents.



B. E. K. Mganga
JUDGE

Labour Court TZ