IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 133 OF 2021

ROGATH M MKAKU.....APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Ilala)

(Fungo: Arbitrator)

Dated 3rd March, 2021

in

REF: CMA/ILA/810/20

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JUDGEMENT

14th April & 02nd June 2022

Rwizile, J

This judgement is based on the decision of the Commission for Mediation and Arbitration dated 3rd March 2021. The applicant applied for condonation but it was not granted on the ground that he did not have good and sufficient cause for delay. The facts that culminated into this application are as follows; according to the facts, the applicant was employed by the respondent as a Process Artisan on permanent contract of employment since 1st December 2014. Sometimes in 2020 there were

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structural changes which rendered some of the positions redundant. She therefore contemplated retrenchment.

The applicant among others was affected and so was retrenchment on 10th August 2020 and he was paid his retrenchment package. On 23rd October 2020, the applicant filed an application for condonation at the CMA. Hearing was conducted and on 03rd March 2021, the CMA dismissed the application for want of merit. The applicant failed to account for delay of 45 days. The applicant was therefore aggrieved, hence this application.

Mr.Elisalia J. Mosha of E. J. Mosha and Co. advocates appeared for the applicant. He raised four issues for determination at para 24 of the affidavit. On my perusal of the same, I am convinced that the same can be reduced into one issue; *whether the applicant demonstrated sufficient cause for delay to warrant condonation.*

The application was argued by written submissions, in his 19 pages submission, Mr. Mosha highlighted the historical background of the applicant. In material terms his submission hinged on the sickness as the reason for the delay. He asked this court to apply what was decided by the Court of Appeal in the case of **Addija Ramadhani (Binti Pazi) vs Sylvester W. Mkama** , Civil Application No. 13/17 of 2018, where it was held that granting or refusing an extension of time depends on resolving

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the following; the length of delay, the reason for delay, whether there is an arguable case such an issue of illegality on the decision to be challenged, and the degree of prejudice on the other party. To support the reasons for delay, the learned counsel stated that on 20th May 2019,10th August, 2020, 25th August, 1st September, and 1st October 2020, the applicant was in the hospital fight for his health. In the view of the learned counsel, the period between 1st September 2020 and 1st October 2020, which was a period he was attending the hospital should not be counted, as it is intrusive under Rule 10(1) of, GN 42 of 2007 and section 60 of the Law of Limitation Act.

On the issues of illegality, the learned counsel submitted at length on the viability of the dispute and dealt with how the applicant had a good case to argue.

Mr. Emma Lyamuya learned advocate of B & E Ako Law submitted in reply. He submitted that the applicant failed to account for 45 days of the delay. It was argued that based on the analysis in the ruling that rejected the application, it was clear that the applicant's annexures as C-J as stated under at page 8-11 of the ruling did not show the applicant was admitted in the hospital to extent of failing to file an application in time. it was his view that since the applicant was terminated on 10th August 2020 and filed

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an application for condonation on 23rd October 2020, which is the period of 75 days contrary to Rule 10 (1) of GN No. 42 of 2007, the applicant ought to have accounted for all days of delay. It was his submission that the documents attached in support are irrelevant and cannot support the delay. The learned counsel asked this court to refer to the case of **Juma Nassir Mtubwa vs Namera Group of Industries Ltd**, Revision No. 251 of 2019 and the case of **Sabibi Stephen vs Letshego Bank**, Civil Appeal No. 51 of 2019, that it was necessary for the applicant to prove he was admitted in the hospital and so could not file his application in time.

On the degree of lateness, the learned counsel submitted that the days of delay were inordinate. He referred to the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 02 of 2010 (Unreported), **John Dongo & Others vs Lepasi Mbokoso,** Civil Application No. 14/01 of 2018 **and Mohamed Salum Nahdi versus Elizabeth Jeremiah,** Civil Application No. 474/01 of 2016, in the Court of Appeal of Tanzania at Dar es Salaam (unreported)

Where it was insisted that the applicants are required to account for each day of delay within which they were supposed to file necessary pleadings.

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Mr. Emma was clear that the period of limitation as submitted by the applicant cannot be savaged under section 60 of the Law of Limitation Act, since the same counts from termination date which is 10th August 2020. In his view, the said 30 days are by any standard inordinate and there is no proof of sickness.

On the point of illegality, the learned advocate was fortified in his argument by the case of **MZA RTC Trading Company Limited vs Export Trading Company Limited,** Civil Application No. 12 of 2015, (Unreported), at page 7, where it was held: -

> *"The other reason advocates for extension of time is that the legality of the impugned decision, derived from lack of jurisdiction and misdirection on the point of burden of proof. I agree with Mr. Mutalemwa, that there is little merit in this ground. As I said in Lyamuya Construction Co. Ltd.'s case, not every point of law will necessarily carry the day in an application for extension of time. The point of law must be of such significance as to warrant the attention of the Court of Appeal"*

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In the view of the learned counsel, the arbitrator was right in rejecting the applicant. It is so, he added that the application was had to show good cause to be able to explore the discretion of the arbitrator to grant the application. In conclusion, the learned counsel was of the view that for the application for condonation to be granted, there must be solid reasons, which show the applicant was out of control and so could not file the application in time.

He referred me to the case of **Tanzania Fish Processors Ltd vs. Christopher Luhangula,** Civil Appeal No. 161 of 1994 (unreported) where it was held that;

> *"The questions of limitation of time is fundamental issue involving jurisdiction....it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of justice. Limitation is there to ensure that a party does not come to Court as when he chooses"*

In the rejoinder, Mr, Mosha materially, reiterated his submission in chief.

Having heard the parties' written arguments, this court as I have shown before, is to determine, if before the CMA, the applicant demonstrated

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good cause for his application. But before, I plunge into the merits, I have to clearly say, that the learned counsel in this application have referred me to Rule 10(1) of GN No. 42 of 2007. Clearly, GN. 42 of 2007, is Employment and Labour Relations (Code of Good Practice). The context stated in rule 10 of GN No. 42 is about probationary employees. It was therefore cited out of context. The relevant provision, I think, is Rule 10 (1) of Labour Institutions (Mediation and Arbitration) Rules, 2007, GN No. 64, this provides that time limit of 30 days for referring disputes of fairness of termination of an employee to the CMA.

Upon so stating, I think I have to therefore proceed to determine the application in its merits. In that I have to point out that the applicant does not dispute a delay of 45 days. He only pleads sickness as the reason for delay. In principle, this area has been sufficiently delt with by courts. Authorities in this respect are not in short supply. Basically, although applying the basic principles I will soon show, each case has been decided on its own merit. This is because, what amount to sufficient cause cannot fetch a single definition. All what courts are required to do, is to see if there are reasonable cause to grant such application. I think, the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of**

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Tanzania (supra) sufficiently dealt with principles applied in the situation under consideration. In the case three main principles were stated that the applicant shows that, **one,** that delay was not be inordinate, **second**, the applicant should show diligence and that he was not negligent or sloppy in prosecuting the case and, **third**, which is the feeling that there are other sufficient reasons such as the existence of a point of law of sufficient importance. This may be an issue of illegality of the decision to be impugned.

Further, in the case of **Joel Silomba vs The Republic,** Criminal Application No. 5 of 2012, CA, (Unreported), the court made more elaborations on the three principles and added the fourth point to consider apart from the *the length of the delay.* Here the court considers, if the delay was shockingly inordinate or was just excusable. **Second** on *the reason for the delay:* whether it was caused or contributed by the dilatory conduct of the applicant. **third**, the court has to investigate if there may be an arguable case, such as, whether there is a point of law or the illegality or otherwise of the decision sought to be challenged. **Lastly**, the court has to see if there is a degree of prejudice to the opposite party if the application is granted.

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Having restated the guiding principles, I think, I have to visit the material presented. The applicant as submitted by the defence here and before the CMA, procured documents that are not directly relating to his sickness after termination. This in the eyes of the law shows the applicant was not negligent in prosecuting the application.

Going by the records, there is no dispute that the applicant was employed by the respondent on 1st December 2014 as a Process Artisan. Definitely his health was good because there was no such complaint from the respondent. Confirmation to the post was done on 29th October 2015. He was terminated by retrenchment on 10th August 2020. It can also be gathered that on the day he was retrenchment, a medical board at Muhimbili National Hospital made a report that the applicant worked as the Process Artisan Electrical Engineer of the respondent. From the report it is crystal clear, that the applicant had chest problems reported to the hospital since 2018, when he is alleged to have inhaled at the work place fumes. He was therefore diagnosed with reactive airway dystruction Syndrome (Acute Irritant Induced Asthma). This report is dated 24th August 2020.

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It follows therefore the applicant's health had been at stake days before his retrenchment. There are several comminutions between the applicant, OSHA, the Ministry responsible for health and the respondent about the working environment of the applicant. These facts are in a way not related with delay, but are directly connected to it.

In principle, the applicant has not accounted for each day of delay. But the record shows, based on the nature of the sickness he had and the situation he has been going through since 2018, it is sufficient to hold that, it does not need the applicant to be hospitalized for him to delay filing the application.

In my considered view, the CMA had to doubt the retrenchment itself. If it was done for genuine reasons or it was aiming at doing away with the applicant who it was proved beyond doubt that he was no longer performing. As the reports show, he got sickness from at the work place.

This, in my view, is sufficient to apply my discretion to grant condonation. That is, the CMA had to consider allowing the application for the reason of sickness in order to hear whether there were reasons apart from sickness of the applicant as the cause of retrenchment.

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For the foregoing reasons, this application is granted. The ruling of the CMA denying a condonation is quashed and all resultant orders set aside.

A.K. Rwizile

JUDGE

02.06.2022

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