IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 287 OF 2021

BETWEEN

AFRICAN NURSERY AND PRIMARY SCHOOL ..... APPLICANT

VERSUS

IDDI MTALI ..... RESPONDENT

RULING

S.M. MAGHIMBI, J:

On the 26th of October, 2021, the respondent herein lodged a Labour Dispute No. CMA /DSM/TEM/193/2021 ("the dispute") at the Commission for Mediation and Arbitration for Ilala (CMA) against the applicant herein. Along with his CMA Form No.1 which initiates a dispute at the CMA, the respondent also filed a CMA Form No. 2 seeking for condonation of time, supported by an affidavit of the respondent herein. The subsequent condonation form was filled as required under clause 7 of the form. The CMA heard the parties and was satisfied with the reason for the delay and proceeded to grant the condonation ordering the dispute to subsequently proceed on the 01st day of March, 2022. The applicant herein seems to have not been amused by findings and order of the CMA and has lodged this revision under the provisions of Section 91(1)(a), 91(2)(c) 94(1)(e) of the Employment and

Labour Relations Act No. 6 of 2004, Rule 24(1), 24(2)(a)(b)(c)(d)(e) & (f) and 24(3) (a)(b)(c) & (d) and 28(1)(c),(d) and (e) and Rule 50 of the Labour Court Rules GN. No. 106 of 2007 and Section 51 and 52(1) of the Labour Institution Act, No. 7 of 2004, seeking for the following orders:

1. That this Honourable Court be pleased to call for and examine the records of the proceedings and a Ruling of the Commission for Mediation and Arbitration (Hon. Ngalika, E) dated 09th February, 2022 in Labour Dispute No. CMA /DSM/TEM/193/2021, for the purpose of satisfying itself as to the correctness, legality or propriety of the said decision and revise the same accordingly.
2. Any other Orders that this Honourable Court may deem fit and just to grant.

On the 20th day of April, 2022 when the matter came for mention, I asked the parties to address the court on the propriety or otherwise of of their application pursuant to Rule 50 of the Labor Court Rules, GN. No. 106/2007 ("the Rules"). Mr. Joshua Webiro, learned State Attorney represented the applicant and the respondent was represented by Mr. Thomas Brashi, learned Counsel.

In his submissions to support the application, Mr. Webiro maintained that the application is competent and is not in contravention of Rule 50 of the Rules. His argument was that the ruling and order sought to be challenged is not an interlocutory order while Rule 50 bars revision on interlocutory orders but the one they seek to challenge is a final order. He supported his submissions by citing the decision of the Court of Appeal in a case of **Tanzania Posts Corporation vs Jeremiah Mwandi (Civil Appeal 474 of 2020) [2021] TZCA 311 (16 July 2021)** whereby in that decision at page 40, the Court provided for the test to be applied in order to ascertain whether the order to be challenged is final or an interlocutory one. He went on submitting that this test is the nature of the order test and is divided into two limbs, the first one is what were the remedies or reliefs being sought in the subordinate Court and the second test is whether all such rights a remedies concludingly determined.

Mr. Webiro then pointed out that in the matter beforehand, the reliefs sought by the respondent was condonation of time, however, as per CMA Form No. 1, the reliefs sought included payment of all terminal benefits. That in the CMA Form No. 2, the relief sought was for condonation of time. He

hence argued that the order being challenged is final because as per his understanding, all the reliefs sought by applicant therein were granted.

His conclusion was that by nature of order test, the remedies/reliefs sought by applicant were already granted conclusively and that because the respondent was praying for condonation and the ruling delivered by the CMA granted it, then the order being challenged is not interlocutory but rather final. That the application before this Court is competent and not in contravention of Rule 50 of the Rules.

In reply, Mr. Brashi submitted that the application is incompetent before this Hon. Court in the spirit of Rule 50 of the Rules. That the Rule bars any appeal, review or revision on interlocutory matters. That the ruling that is challenged by the applicant is in regard to the application for condonation of time which was filed along with the CMA form No. 1 and the ruling in itself did not result to the finality of the matter. He argued that in any case, under that rule, there is no loser as it did not result to a decree capable of being executed in any way. He went on submitting that for several times this Court has made so many decision in regard to the application of this nature, he then cited the decisions of this Court sitting at Mwanza **in Labour Revision No. 62/2019 between Equity Bank (T) Ltd Vs.**

AbuHussein J. Mvungi (unreported) whereby Hon. Tiganga, J, in deciding on application against a ruling for condonation held that the application for revision on a ruling for condonation of time is barred by law and practice of the Court. He further cited the case of **Board of Trustees of NSSF Vs. Pauline Matunda, Rev. No. 514/2019** in which again, this Court after considering many decisions including decisions of the Court of Appeal, held that application for revision against an and or interlocutory matter has no space in this Court or any other Court.

Mr. Brashi submitted further that in the decision cited, this Court had a comment that the general rule under provision of Rule 50 of the Rules can only be dispensed with where it has been discovered that there was miscarriage of justice on the ruling in question. He argued that it is very unfortunate there is no such allegation; the applicants are only aggrieved by the ruling in its totality on a not that the CMA was not entitled to make a ruling in favour of the respondent.

On the last point of Mr. Webiro's submissions that the ruling on condonation had a finality effect, Mr. Brashi replied that in the two cases that he referred, the court had good time to define what amounts to interlocutory matter and that Form No. 2 was not filed in isolation of Form

No. 1 and the respondent did not go to the CMA in deponent of Form No. 2. That instead, it is Form No.2 which depended on Form No. 1 and on that basis there was no right of parties determined in Form No. 2 except the extension of time. For that regard, he argued that it cannot be said the application for condonation was a final determination of the dispute between the applicant and the respondent. He then quoted the content of the last para of the ruling which is challenged, at page 6:

> *"Hivyo bila kujali muda alichelewa lakini kwa kuzingatia sababu ya kuchelewa na uzito wa suala lenyewe. Tume inayakubali maombi haya na shauri hili litaendelea kusikilizwa kwa hatua ya usuluhishi tarehe 01/3/2022 saa 5 asubuhi".*

Mr. Brashi then submitted that taking the conclusion of the CMA that *"shauri litaendelea",* it means a continuation of proceedings so it cannot be said there is a final determination of the matter. He concluded by praying that this application be dismissed and that the court use discretionary power to issue costs if it is pleased.

In rejoinder, Mr. Webiro reiterated his position that the ruling/decision being challenged is not interlocutory but a final decision. On Mr. Brashi's submission that CMA Form No. 2 was depending on CMA Form No. 1, his

submission was that the two forms are separate and they don't depend on each other. That if we are to take Mr. Brashi's argument, then it is CMA No. 1 which depends on CMA No. 2 cause without condoning time, then the CMA cannot proceed to determine reliefs sought in the CMA Form No. 1 it can only proceed with CMA Form No. 1 after determining reliefs sought in CMA No. 2. That once condonation is sought, one has to file both CMA F1 & F.2 and the CMA No. 1 will depend on the out came of CMA No. 2. I consider them as two separate forms.

On the cited decision of this court by Mr. Brashi, Mr. Webiro's submission was that the decisions are just persuasive and not binding to me. That the decision of the Court of Appeal cited was delivered on 16/07/2021 arguing that if this decision was out by the time the Court delivered their decision, then the position of this Court would have been different by applying the nature of the order test which is a new development advanced by the Court of Appeal. He then reiterated his submission in chief that the application before me is competent and not in contravention of Rule 50 of the Rules.

Having heard the parties' submissions; for the reasons I shall elaborate; I will start by agreeing with Mr. Brashi that the application

beforehand emanates from an interlocutory order of the CMA hence incompetent. I have noted Mr. Webiro's submission in line with the decision of the Court of Appeal in the case of **Tanzania Posts Corporation Vs Jeremiah Mwandi (Civil Appeal 474 of 2020) [2021] TZCA 311 (16 July 2021)** whereby the Court provided for the nature of order test to be applied in order to ascertain whether the order to be challenged is final or an interlocutory one. That the test is divided into two limbs, one; the remedies or reliefs being sought in the subordinate Court and two; is whether all such rights and were remedies conclusively determined. Mr. Webiro's argument was that in the current case, the reliefs sought by respondent was condonation of time. When I asked him to address me on the reliefs sought under CMA Form No. 1 which initiates the proceedings at the CMA, his reply was that the reliefs sought included payment of all terminal benefits. He was however quick to point out that the CMA Form No. 2 filled by the applicant was for condonation of time, arguing that the order being challenged is final because as per his understanding, all the reliefs sought by applicant were granted conclusively.

In reply, Mr. Brashi argued that Form No. 2 was not filed in isolation of Form No. 1 and the respondent did not go to the CMA in deponent of

Form No. 2. That instead, it is Form No.2 which depended on Form No. 1 and on that base there was no right of parties determined in Form No. 2 except the extension of time. For that regard, he argued that it cannot be said that the application for condonation was a final determination of the dispute between the applicant and the respondent.

I had asked Mr. Webiro to address me on the reliefs sought in CMA Form No. 1 because pursuant to Section 86 of the Act, disputes referred to the Commission shall be in the prescribed form. The form that initiates a dispute at the CMA is provided for under Rule 34.-(1) of the Employment and Labour Relations (General) Regulations, 2017 ("the Regulations") which prescribes that the forms set out in the Third Schedule to the Regulations shall be used in all matters to which they refer on. It is on the same Regulations that the third Schedule to the Regulations under the heading referral of a dispute to the commission for mediation and arbitration, that the CMA form No.1 is prescribed. Therefore what determines the nature of the dispute and the reliefs one seeks for at the CMA where issues of termination of employment and benefits are concerned, is the CMA Form No. 1.

Going to the records of the CMA, the nature of the dispute that was lodged at the CMA by the Form No. 1 is non-payment of terminal benefits such as severance pay, NIC balance etc. What would form the final determination of the matter will be only two issues, whether the respondent is entitled to the reliefs claimed or whether the dispute is non-meritious. Therefore despite the tests prescribed by the Court of Appeal in the cited case of **Tanzania Posts Corporation** (Supra) which I fully subscribe to, however, with respect to Mr. Webiro, the case is not applicable in our case at hand. Even if we were to apply the tests, the application at hand would still fail the tests prescribed therein by the Court of Appeal. For the sake of clarity, going with the cited case, the Court of Appeal prescribed two tests. Starting with the first test, it is the remedies or reliefs being sought in the subordinate Court, as I have elaborated, at the CMA, the applicant lodged a dispute claiming to be paid his unpaid terminal benefits such as severance pay, NIC balance etc. These are the orders that determine the finality of dispute, and since these had not been determined, the rights of the parties were not determined.

As for the second test, whether all such rights and were remedies conclusively determined, Mr. Webiro is attempting to convince the court that

by granting condonation, the rights of the parties were conclusively determined. With respect, I find the learned State Attorney to have misled himself. What rights of parties are determined by order extending time? As per the **Board of Trustees of NSSF** case cited (Supra), an order extending time only open doors for the parties to come and table their case for determination. It occurs when by reasons which have to convince the court (in this case the CMA), the party was barred by limitation of time to bring the dispute and hence had to apply for the condonation. In no way the order finally determined the rights of the parties, it is just an interlocutory order. Had the CMA made a finding that no sufficient reason were adduced for condonation and proceeded to dismiss the dispute, then in that case, there would have been a finality on determination of the rights of the parties and only then would the right to file revision arose.

Mr. Webiro attempted to separate the two CMA Form No.1 and CMA Form No. 2 so as to establish that these are two different matters and the ruling finally determined the rights of the parties. On this point, I am in agreement with Mr. Brashi that Form No. 2 was not filed in isolation of Form No. 1 and the respondent did not go to the CMA in deponent of Form No. 2. There is no situation where one may file a dispute via CMA Form No. 2. It is

rather incidental to the CMA Form No.1 where the party thinks the dispute has been filed outside the prescribed time. Therefore, unless the condonation is dismissed, where the applicant's right would finally be barred from determination, granting of the condonation is nothing but an interlocutory order falling under the prohibition provided for under Rule 50 of the Rules.

That said, the application before me is incompetent as it is barred by Rule 50 of the Rules, having emanated from an interlocutory order of the CMA. Consequently, this application is hereby struck out with an order that the parties go back to the CMA to proceed with mediation.

Dated at Dar es Salaam this 27th day of April, 2022.

.....

S.M. MAGHIMBI
JUDGE