

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 322 OF 2021**

**JAMES LAWRENCE ALVA ..... APPLICANT**  
**VERSUS**  
**SCI TANZANIA LIMITED ..... RESPONDENT**

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

(Chuwa: Arbitrator)

Dated 30<sup>th</sup> June 2021

in

**CMA/DSM/KIN/88/21**

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**JUDGEMENT**

30<sup>th</sup> June & 11<sup>th</sup> August 2022

**Rwizile, J**

In this application the applicant is challenging the ruling of the Commission of Mediation and Arbitration (CMA) delivered by Hon. P.M. Chuwa, Arbitrator on 30<sup>th</sup> June 2021 in labour dispute No. CMA/DSM/KIN/88/21. Before embarking into the merits of this application I find it important to narrate albeit briefly, facts leading to this application. The applicant was employed by the respondent on 04<sup>th</sup> April 2018 in the position of Head of Sales Operations in a fixed term contract of two years. On 05<sup>th</sup> February 2020, the applicant tendered the notice of resignation from his employment with effect from 01<sup>st</sup> March 2020.

Upon acceptance of resignation, the respondent informed the applicant that his last date of employment will be on 28<sup>th</sup> February 2020. Thereafter, on 28<sup>th</sup> April 2020 the applicant referred the dispute of unfair termination to the CMA which was registered as labour dispute No. CMA/DSM/ILA/345/2020/250. In response to the application, the respondent raised a preliminary objection stating, the application was filed out of time without an application for condonation. The Arbitrator's order in that application was to the following effect:-

*"Hivyo shauri hili la mlalamikaji linaondolewa mbele ya Tume kwa kufunguliwa nje ya muda bila kufuata utaratibu."*

As the order states above, after considering the submissions of the parties the CMA struck out labour complaint No. CMA/DSM/ILA/345/2020/250. After the referred labour complaint was struck out the applicant went back to the CMA on 11<sup>th</sup> February 2021 and filed another complaint registered as labour dispute No. CMA/DSM/KIN/88/21 which was accompanied with the application for condonation.

Again, in the second dispute the respondent raised a preliminary objection to the effect that the CMA is barred to entertain the matter for want of jurisdiction. Once again, the CMA dismissed the application for being previously filed out of time without an application for condonation.

Aggrieved by the decision in Labour dispute No. CMA/DSM/KIN/88/21 the applicant filed the present application on the following grounds: -

- i. That, the Commission for Mediation and Arbitration blatantly denied the applicant the right to be heard by pronouncing ambiguous award thus rendering the whole proceedings nugatory.*
- ii. That, the Arbitrator barely and intentionally disregarded the applicant's plea herein to decide the dispute on merits.*
- iii. That, the award discloses that the Arbitrator misdirected herself in deciding that the dispute was previously dismissed instead of being struck out.*
- iv. That the Honourable Arbitrator solemnly disregarded the mandatory provisions of Rule 12 and other necessary provisions of the Employment and Labour Relations (Code of Good Practice) Rules GN. 42/2007.*

The application was heard orally. Before this court the applicant was represented by Mr. Ndaki Charles, learned Counsel whereas Mr. David Ndossi, Learned Counsel appeared for the respondent.

Arguing in support of the application Mr. Ndaki adopted the applicant's affidavit to form part of his submission. In his submission, he opted to

submit specifically on what is deponed under paragraph 5 of the applicant's affidavit. The relevant paragraph reads as follows:-

*"That, the applicant was aggrieved with the decision thus filed a labour dispute before CMA- Dar es salaam Zone, whereby the CMA award did not pronounce award in his favour instead it delivered an ambiguous award to the effect that, I quote: **"shauri limeondolewa"** literally translated to mean **"the dispute has been struck out"** for being preferred out of time yet unsupported with condonation form, thereafter, the applicant refiled the dispute along with condonation form on 11<sup>th</sup> February, 2021 knowing the remedy for striking out the dispute or application is to refile the same properly."*

Submitting in support of the above paragraph Mr. Ndika argued that as a matter of law the case which has not been heard on merit can only be struck out and not to be dismissed. To support his argument, he referred the court to the case of **Dora Muhoni (Legal representative of the late Lucy Mkwema) v Finca Tanzania Ltd and 4 others** Misc. Land Case Application No. 199 of 2020.

The counsel went on to submit that there was a preliminary objection thus, the matter was not determined on merit. He insisted that the

arbitrator was not correct to dismiss the application therefore this court has to revise the ruling of the CMA and then allow parties to be heard on merit. To support his submission, he cited the case of **Yahya Khamis v Hamida Haji Idd, and 2 others**, Civil Appeal No. 225 of 2018.

In response to the application Mr. David prayed to adopt the respondent's counter affidavit to be part of his submission. He submitted that the CMA ruling is being challenged for a dismissal order instead of striking out order. He submitted that the CMA held that, since the previous application was dismissed then this application ought to be dismissed. To support his submission, he cited the case of **Neema Nanyai v Richard Samata Swika**, Civil Appeal No. 239 of 2019 and the case of **MM Wordwide Trading Company Limited and 2 Others v National Bank of Commerce Limited**, Civil Appeal. No. 258/2017. He further submitted that the remedy for timely barred application is dismissal and not striking out as prayed by Mr. Ndaki. He added that the cases referred by the applicant are distinguishable to the circumstance of this case. He therefore urged the court to dismiss the application.

In rejoinder Mr. Charles reiterated his submission in chief. He added that the application before this court is to answer the question whether the case was dismissed or struck out and to answer whether it was proper to

dismiss it when it was not heard on merits. The counsel insisted that the cases cited are proper in this application.

After considering brief submissions of the parties, I believe the court is called upon to determine whether the Arbitrator was right to dismiss Labour dispute No. CMA/DSM/KIN/88/21. In his submissions as reflected above Mr. Ndaki is alleging that the Arbitrator wrongly dismissed the application which was not heard on merit.

I need not be laboured with this point, the effect of filing a complaint out of time without leave of the court has been addressed in the case of **Barclays Bank Tanzania Limited v Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016. In the referred case the respondent felt to have been unfairly terminated from employment by his employer who was the appellant in the cited case. She therefore filed a labour complaint at the Labour Court to challenge the alleged unfair termination. Responding to the application the applicant raised a preliminary objection that the complaint was time barred.

The respondent's counsel conceded to the raised preliminary objection at the labour court. The Learned Judge proceeded to struck out the complaint for being filed out of time. Aggrieved by the order striking out the application filed out of time, the applicant filed an appeal to the Court

of Appeal challenging the same. On its finding, the Court of Appeal made the following decision: -

*Finally, therefore, there was no basis for the learned High Court Judge to strike out the complaint that had been presented in court after expiration of 60 days, In a similar situation in the case of **Hezron M. Nyachiya v. Tanzania Union of Industrial and Commercial Workers and Another**, Civil Appeal No. 79 of 2001 (unreported), cited to us by the appellant's counsel, this Court held that, although the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance set the time limit for instituting actions to be six months, but did not provide for the consequences of filing a matter out of time, section 3 of the Act was applicable in dismissing the petition. In view of that position of the law, it is our conclusion that the learned High Court Judge should have resorted to section 3 (1) of the Act to dismiss the complaint instead of striking it out as she did.*

*Accordingly, we allow the appeal, quash and set aside the order of striking out the complaint with leave to refile, and replace it with an order of dismissal.*

In line with the above binding decision of the Court of Appeal, I find the circumstances in the cited case similar to this case. The complaint was filed out of time without leave of the CMA therefore an order dismissing it was rightly placed by the Arbitrator. I appreciate the cited Court of appeal decisions cited by Mr. Ndaki, but with due respect, the same are distinguishable. As stated earlier the effect of time barred complaint is dismissal as held by the court of appeal.

In the final result, I find this application to have no merit for the reasons stated above. Thus, the Arbitrator's order of dismissal in labour dispute No. CMA/DSM/KIN/88/21 is hereby upheld. The application is accordingly dismissed with no order as to costs.



  
A. K. Rwizile

**JUDGE**

11.08.2022