

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 09 OF 2022

*(Arising from the Ruling delivered on 13th May 2021 by Hon. Fungo E.J, Mediator in Labour dispute
No. CMA/DSM/ILA/015/21 at Ilala)*

BETWEEN

LIBERATUS ROBERT.....APPLICANT

AND

TUSIIME HOLDINGS (T) LTD.....RESPONDENT

JUDGMENT

*Date of last Order: 11/05/2022
Date of Judgment: 07/06/2022*

B. E. K. Mganga, J.

Employment relationship between the applicant and the respondent commenced in 2014 when the applicant was employed by the respondent as a teacher. Their relationship came to an end on 16th March 2020 when the respondent terminated employment of the applicant on ground of operational requirements. Dissatisfied with termination, on 11th January 2021, applicant knocked the CMA's doors and filed CMA F2 initiating an application for condonation to file the claim of unfair termination out of time.

Upon determination of the application, on 13th May 2021, Fungo E.J, mediator, issued a ruling dismissing the application for want of sufficient cause and failure to account for each day of the delay. Aggrieved by ruling dismissing his application for condonation, applicant filed this application seeking the court to revise the said ruling.

In the affidavit in support of the application, applicant raised three grounds namely: -

- 1. That; applicant's claim against the respondent have not been addressed hence for unconditional enlargement of the time.*
- 2. That; applicant has never been afforded right to be heard hence denial of the principles of natural justice.*
- 3. That; it was wrong for the respondent to have denied the applicant his rights of claims by employing unnecessary technicalities and fully lying to the courts.*

In resisting the application, respondent filed the counter affidavit sworn by James Albert Katagila, her principal officer.

By consent of the parties, the application was argued by way of written submission.

In his written submission in support of the application, applicant submitted that he timely filed a dispute before CMA, but the same was dismissed as he sued a wrong party. He argued that, suing a wrong person is not a ground to dismiss the matter, and that, the arbitrator

was supposed to allow change of names by inserting the correct name and hear the matter on merit. He went on that, the arbitrator who dismissed the labour complaint he filed, was supposed to go into merit to know if applicant filed the dispute against a wrong person or not. He submitted further that, in the dispute that was dismissed, he sued the Director instead of the herein respondent. Applicant argued that illegality of the first arbitrator was a sufficient ground to grant application for condonation, which is the subject of this application. He concluded that there is illegality and prayed this application be allowed.

In his written submission, Mr. Lwijiso Ndelwa, Advocate for the respondent, submitted that the arbitrator was right to dismiss the application for condonation because applicant failed to disclose sufficient cause for the delay, and did not account for each day of the delay. He cited Rule 31 of the Labour Institution (Mediation and Arbitration) Rules, GN. No. 64 of 2007 and the case of ***Mbagala Spiritual Centre v. Francis Hyayuma*** [2013] LCCD 54 and went to submit that, showing good cause for the delay is a precondition for granting the application for condonation. He submitted further that, in application for extension

of time, applicant must account for each day of the delay and that applicant did not account for his seven (7) months delay.

Counsel for the respondent submitted further that, applicant filed labour dispute No. CMA/ILA/ 273/2020 against Albert Katagila, the Director of the respondent, but the same was dismissed on 20th November 2020 for want of merit. He went on that, applicant was served with the award on the same date namely, 20th November 2020, but filed an application for condonation on 11th January 2021. Counsel submitted further that; applicant did not state in his affidavit what led him from filling the dispute at CMA after 53 days from the date of dismissal. To strengthen his submission, counsel for the respondent cited the case of ***Wambura N.J. Waryuba v. The Principal Secretary Ministry of Finance and Another***, Civil Application, No. 225/01/2019, CAT (unreported). Citing the case of ***Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010, CAT (unreported), counsel for the respondent insisted that, applicant showed negligence, sloppiness and submitted that the delay was inordinate.

Counsel for the respondent submitted that, time limitation is there to ensure speedy administration of justice and ensure that a party does not come to court when he chooses. To support his submissions, he cited the case of ***Commercial Bank of Africa (T) Ltd v. Agness Mgongo***, [2015] LCCD 145. He further submitted that, applicant's contention that suing a wrong person is not a ground for dismissal of the matter because the arbitrator was supposed to allow changes by inserting the correct name, should be disregarded. Mr. Ndelwa took that view arguing that, the said argument is not reflected in the applicant's affidavit hence an afterthought.

In rejoinder, applicant submitted that he filed the dispute against the Director of the respondent in his personal capacity because there was no employment contract that was executed between him (applicant) and the respondent. He reiterated that the delay was due to illegality of the arbitrator who failed to amend the name of the respondent, instead, dismissed the application hence the delay. He cited the case of ***Omari Ally Nyamalenge (as the Administrator of the estate of the late Seleman Ally Nyamalenge) & Others v. Mwanza Engineering Works***, Civil Application No. 94/08 of 2017, CAT (unreported) to bolster

his argument that illegality is one of sufficient reasons for extension of time.

I have examined the CMA record, the affidavit in support of the application and the counter affidavit resisting the application and considered submissions of the parties together with case laws cited. From the CMA record, affidavit by the applicant and counter by the respondent, it is clear to me that, applicant filed labour dispute No. CMA/DSM/ILA/273/2020/202/20 before the Commission for Mediation and Arbitration (CMA) against Mr. Albert Katagila complaining that his employment was unfairly terminated. On 20th November 2020, Hon. Mourice Egbert Sekabila, arbitrator, having heard evidence of both sides, issued an award dismissing the dispute for lack of merit. The said award was annexed to the counter affidavit filed on behalf of the respondent as annexure ILA-2 resisting this application. Not only that but also, the said award was annexed to the affidavit filed by the applicant as annexure "AA" to the affidavit he filed at CMA in an application for condonation. In the award, the arbitrator found that there was no employee and employer relationship between the applicant and the said

Albert Katagila and that, since May 2017, applicant was an employee UDSM-DUCE hence a public servant.

In his submissions, applicant has attacked the arbitrator who dismissed the dispute that he filed against Albert Katagila that, instead of dismissing the dispute, the arbitrator was supposed to allow change of names by inserting the correct name and hear the matter on merit. As pointed out hereinabove, the dispute applicant is referring that was dismissed before being heard on merit, was in fact, heard on merit. In the said dispute, applicant called three witnesses namely, (i) Erasto Mhando (DW1), (ii) Atulokole Luhala (DW2) and (iii) Liberatus Robert (DW3) while Albert Katagila testified as PW1. From the foregoing, if applicant was aggrieved by the said award, he was supposed to file an application for revision. In my view, the issue of suing the wrong party namely the Director of the respondent instead of the respondent could have been resolved by the court using the Doctrine of finger litigation or misnomer. The said doctrine was used by the court of Appeal in the case of ***Christina Mrimi v. Coca Cola Kwanza Bottlers Ltd***, Civil Application No. 113 of 2011, CAT (unreported) wherein the Court of Appeal endorsed the holding in the case of ***Evans Construction Co.***

Ltd. versus Charrington & Co. Ltd. and Another (1983) 1 All E R

310 where it was held: -

"...As the mistake in this case which led to using the wrong name of the current landlords did not mislead the Bass Holdings Ltd., and as in my view there can be no reasonable doubt as to the true identity of the person intended to be sued...it would be just to correct the name of the respondent"

Applying the said Doctrine of finger litigation or misnomer in ***Christina's case***, (supra) the Court of Appeal held: -

"We are satisfied that it is just to correct the name of the Respondent from Coca Cola Kwanza Bottlers Ltd. to Coca Cola Kwanza Ltd".

Applicant has submitted that the delay was due to illegality that was caused by the arbitrator who failed to amend the name of the respondent but dismissed the application. With due respect to the applicant, in the ruling of Hon. Fungo E.J, mediator, dated 13th May 2021, the subject of this application, there is nothing relating to amendment of names of the parties or dismissal based on what applicant has submitted. In short, in the said ruling there is nothing that can be regarded as illegality. The issue of illegality and the case he cited

inviting the court to allow this application cannot apply in the circumstance of this application. It is hereby rejected.

It was submitted by Mr. Ndelwa, counsel for the respondent that applicant was served with the award on 20th November 2020 but filed an application for condonation on 11th January 2021 after 53 days. It was further submitted by counsel for the respondent that applicant has failed to account for each day of delay, that he was negligent and that the delay was inordinate; that no reason was advanced for the delay for 53 days from the date of the award. I agree with counsel for the applicant that there were no good reasons advanced by the applicant for the application for condonation to be granted.

It was argued by the applicant that the order dismissing his application for condonation has denied him his right to be heard. With due respect to the applicant, that right cannot be available for a person who chose not to abide by the law relating to limitation of time. In other words, applicant denied himself that right when he failed to abide the law. He cannot therefore be heard complaining that he was denied right to be heard. It should be recalled that, applicant was heard on merit in the first dispute he filed and decided on merit by Hon. Mourice Egbert

Sekabila, arbitrator who issued the award on 20th November 2020 dismissing the dispute for want of merit. As pointed out hereinabove, it was open to the applicant to file an application for revision if he was aggrieved by that decision for the court *inter-alia* to apply the doctrine of finger litigation or misnomer. Since he chose the other route that happened not to be safe to him, he cannot complaint at this stage that he has been denied right to be heard due to his poor choice. I find that complaint also without substance and dismiss it.

For the foregoing, I hereby uphold the CMA Ruling and dismiss the application.

Dated at Dar es Salaam this 7th June 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 7th June 2022 in the presence of Reginald Lema, Advocate for the Respondent but in the absence of the applicant.



B. E. K. Mganga
JUDGE