

THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 485 OF 2020

BETWEEN

OSCAR JOHN GUGAMWA..... APPLICANT

AND

CAR & GENERAL TRADING LTD..... RESPONDENT

RULING

Last order 24/02/2022
Date of Ruling 11/03/2022

B. E. K. Mganga, J

On 18th June 2020, Oscar John Gugamwa, the applicant, filed a Labour dispute before the Commission for Mediation and Arbitration hereinafter referred to as CMA against Car & General trading Ltd. In the CMA F1, applicant indicated that he was claiming salary arrears from February 2020 to the date of termination namely; 1st June 2020 amounting to TZS 29,967,400/=, unpaid NSSF contribution amounting to TZS 8,455,510/= and twelve months salary for unfair termination.

On 6th August 2020, respondent filed a notice containing two preliminary objections namely, (i) that the claim of salary arrears from 2010 is hopelessly time barred and (ii) that the honorable Commission

has no jurisdiction to deal with NSSF contribution claims. On 19th October 2020, Hilary N. J, Mediator, deliver a ruling upholding the two preliminary objections.

Applicant was aggrieved by the said ruling hence this application for revision. In the affidavit in support of the notice of application applicant raised three grounds namely:-

- 1. That the Commission having found the Applicant's claim for salary arrears time barred erred in law in dismissing the same.*
- 2. That, the Commission erred in law in failing to comprehend time limitation in progressive breach of contract as provided under the Law of Limitation Act Cap 89.*
- 3. That, the Commission having found the salary arrears time barred, erred in law to dismiss the whole referral dispute which had claims for unfair termination filed within the prescribed time.*

Respondent filed both the notice of opposition and a counter affidavit sworn by Emmanuel William Kessy, her advocate.

When the application was called for hearing, by consensus, parties agreed to argue this application by way of written submissions.

Arguing the 1st ground of revision on behalf of the applicant, Mr. Moses Gumbah, learned counsel, submitted that having found that the claims for salary arrears was time barred, the arbitrator erred to dismiss

the claim because dismissal emanates from proceedings heard on merit. Counsel submitted that the arbitrator was supposed to strike it out and not to dismiss it. Counsel for the applicant cited the case of **Thomas David Kirumbuyo and Another Tanzania Telecommunication Co. Ltd, Civil Application No. 1 of 2005**, CAT (unreported) to support his argument.

On the 2nd ground, counsel for the applicant submitted that arbitrator erred in law to dismiss the applicant's claim as breach was continuous and time accrued to 1st June 2020, when his employment was terminated. Counsel concluded that the dispute was filed within time.

On 3rd ground, counsel for the applicant submitted that in the CMA F1, he indicated that his claims were based on; (i) salary arrears and (ii) unfair termination of employment. Counsel submitted that arbitrator having found that claims for salary arrears was time barred, was supposed to proceed with hearing of the dispute on the claim of unfair termination, which was within time, but the arbitrator dismissed both. Counsel submitted that employment contract of the applicant was terminated on 1st June 2020, and that the dispute was filed on 18th June 2020. Counsel for the applicant cited the case of **Thomas Ngawaiya V.**

Attorney General and 3 Others, Civil Case No. 177 of 2013

(Unreported) wherein this Court (Ndyasobera, J) held that if the suit combined more than one claim based on different cause of actions, if one of them is found to be time barred but the other being within time, it is not proper to dismiss the whole suit. Counsel for the applicant submitted that the arbitrator's ruling is illogical and irrational and prayed that the same be revised.

Responding to the 1st ground of revision, Mr. John Kisyungu, learned counsel for the respondent, submitted that the case that is time barred, is liable to be dismissed and not struck out. Counsel for the respondent was of the firm view that the arbitrator did not error in his ruling for dismissing the claim by the applicant.

Arguing the 2nd ground, counsel for the respondent relied on Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 and submitted that applicant was supposed to file the dispute within 60 days. Counsel for the respondent went on that, time accrued on the date respondent stopped to pay the said claimed salary. Counsel cited this court's decision in the case of ***Pee Pee (T) Limited v. Shaban Juma Omari***, Labour Revision No. 33 of 2013 (unreported). Counsel for the respondent submitted further that, the Law of Limitation

Act [Cap. 89 R. E. 2019] cannot apply in the circumstances of the application as there is specific provision on limitation of time as per section 43 of Cap. 89. R. E. 2019(supra).

On the 3rd ground, counsel for the respondent submitted that the arbitrator did not error in dismissing the whole dispute as the dispute was improperly filed by combining two complaints which rendered it defective.

I should point out that, no rejoinder submission was filed by the applicant.

Having heard submissions from both counsels and carefully examined evidence in CMA record, I have opted to deal with the issues in the respective order as they were argued by the parties.

It was submitted by counsel for the applicant that arbitrator error in dismissing claims of salary arrears that were found to be time barred as the arbitrator was supposed to struck out these claims instead of dismissing it. Counsel for applicant cited *Kirumbuyo's case*, (supra), to that position. On the other hand, counsel for the respondent submitted that, a time barred matter is liable to be dismissed and not struck out. With due respect to counsel for the applicant, the position that a time

barred matter has to be struck out is not correct. The court of Appeal has vacated from the position it took in ***Kirumbuyo's case*** (supra). The current position of the law is that a time barred matter is liable to be dismissed as it was held by the Court of Appeal in the case of ***Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni, Civil Appeal No. 19 of 2016*** (unreported) and not struck out. I therefore dismiss the 1st ground.

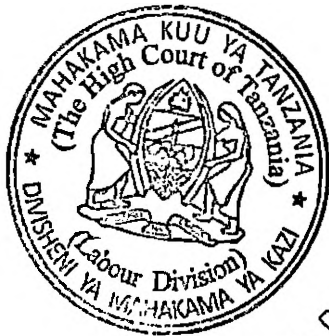
It was argued by counsel for the applicant in the 2nd ground that there was continuous breach and that time accrued to 1st June 2020 when applicant's employment was terminated. Counsel for the applicant relied on the Law of Limitation Act [Cap. 89 R. E 2019] that, when the alleged breach is continuous, then, time will accrue from the last breach. This argument was countered by counsel for the respondent that, in terms of section 43 of that Law of Limitation Act [Cap. 89 R. E. 2019], that law cannot apply in the circumstances of the application as there is specific provision prescribing time within which an action has to be take. Counsel for the applicant cited Rule 10(2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that requires a matter like that of the applicant to be filed within 60 days. I agree with counsel for the respondent that in the application at hand, applicant was

supposed to abide by the provision of Rule 10(2) of GN. 64 of 2007 (supra). Based on the CMA F1, it was not easy for the arbitrator to know which claim is within time or out of time. It was open to the applicant before filing the dispute to choose which to prefer and which one to leave. In my view, the claim of salary arrears was improperly filed and the arbitrator cannot be faulted. This ground also fails.

In the 3rd ground, it was submitted by counsel for the applicant that in the CMA F1, he indicated that, he was complaining against termination of his employment. Counsel for the applicant submitted that employment contract of the applicant was terminated on 1st June 2020, and that the dispute was filed on 18th June 2020 well within time and that arbitrator erred to dismiss this claim. On the other hand, counsel for the respondent submitted that arbitrator correctly dismissed the whole dispute. With due respect to counsel for the respondent, that is not correct. I have examined CMA F1 and find that applicant indicated that his employment was terminated on 1st June 2020. The said CMA F1 was received on 18th June 2020, that is to say; 17 days after termination. In the said CMA F1, applicant indicated that there was no valid reason for termination and further that the procedure for termination was not followed. There is no doubt that a complaint relating to fairness of

termination of the applicant's employment was filed within time. Therefore, it was an error on part of the arbitrator to dismiss that complaint. I therefore allow this ground and revise the award to that extent. I direct that, CMA record should be remitted to CMA for the dispute on fairness of termination of employment of the respondent to be heard on merit without delay. It is so ordered.

Dated at Dar es Salaam this 11th March 2022.



B.E.K. Mganga
JUDGE

Labour