

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 102 OF 2022

*(From the Ruling of the Commission for Mediation & Arbitration of DSM at Temeke
(Ngalika, E: Mediator) Dated 14th January 2022 in Labour Dispute No.
CMA/DSM/TMK/228/2021)*

ALEX JORAM LWAMBINAAPPLICANT

VERSUS

CONTINENTAL RELIABLE CLEARINGRESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

18th October 2022 & 21st October 2022

This Revision application originates from the ruling of the Commission for Mediation and Arbitration of Dar es Salaam at Temeke (CMA) in Labour Dispute No. CMA/DSM/TMK/228/2021 issued on 19th January 2022 by Ngalika, E., the Mediator. The Applicant herein, **ALEX JORAM LWAMBINA** is praying for the orders of the Court in the following terms: -

1. That this Honorable Court be pleased to call and examine the records of the CMA award made on 14th January 2022, in Labour Dispute No. CMA/DSM/TMK/228/2021, by Honourable Ngalika E. for purpose of satisfying itself as to the correctness,

legality or propriety of the proceedings and orders made therein and revise and set aside the same.

2. Condone the late reference of the original dispute at CMA.
3. Order the CMA to hear the main application and determine it on its merits.
4. That this Honorable Court grants any other relief as it deems just, fair and fit to be granted.

A brief background of facts which triggered this application are traced from the CMA record, affidavit and counter affidavit filed by the parties. The Applicant was employed by the respondent as a Health Safety Manager for unspecified period. Their relationship ended due to misconduct allegations against the applicant culminating to a dispute which was referred to the CMA vide the **Labour Dispute No. CMA/DSM/TMK/228/2021**. In the CMA, the dispute was accompanied by an application for condonation for having been filed out of the prescribed time. According to the affidavit in support of the condonation application, the reasons advanced for the delay was the existence of a criminal case against the applicant which kept him under police custody with sickness developed after his release coupled with a community service sentence he was serving, all limiting his independence.

During mediation, the mediator disallowed condonation and dismissed the application for reasons of having no good cause for the delay. The applicant was aggrieved and filed this revision application.

Along with the Chamber summons, the applicant filed his affidavit in which the facts of the case are narrated. In the affidavit the applicant stated that the mediator failed to consider that an applicant is a lay person and therefore deserved consideration of the CMA in attaining his substantial right with minimum legal technicalities. In the affidavit the applicant raised the following legal issues: -

1. Whether it is proper for the CMA, a quas-judicial body, to deny the applicant, a lay person without legal representation, a right to lodge evidence documents during hearing.
2. Whether it was proper for CMA to admit and consider the counter affidavit lodged out of time without leave to do so.
3. Whether or not, the honorable arbitrator did not misdirect herself by failing to consider the ultimate sufferings of the applicant while having his substantial rights clear.
4. Whether the honourable arbitrator has given proper weight to the whole circumstances surrounding this case that, that the applicant is the innocent victim of the mistreatment by

the responding employer, and that the results of this case also affect the interest of these applicant and others who are left behind.

The application was challenged by a counter affidavit sworn by Mariam Tauka respondent's Human Resources Manager who deponed that the applicant grossly failed to account for the delay as per the standard required and thus the arbitrator made the correct decision.

The application was heard orally. The Applicant was represented by Mr. Balthazar Kitundu, whereas the Respondent was represented by Mr. Arafat Sinare, Advocate. I appreciate parties' rival submissions which have been very useful in making this judgment.

From the parties sworn statements and submissions, I find one issue for determination which is **whether the applicant have provided sufficient cause for this Court to revise the CMA decision.**

Before embarking to the substance of the above issue, I will firstly explore the legal guidance for condonation application in CMA. It is founded under **Rule 11 (2) to (3) of the Labour Institutions (Mediation and Arbitration) GN. No. 64 of 2007.** The Rule provides:-

"(2) A party shall apply for condonation by completing and delivering the prescribed

condonation form when delivering the late document or application to the Commission. This form must be served on all parties to the dispute”.

(3) an application for condonation shall set out the grounds for seeking condonation and shall include the referring party’s submissions on the following:-

- a) The degree of lateness;*
- b) The reasons for the lateness*
- c) Its prospects of succeeding with the dispute and obtaining the relief sought against the other party;*
- d) Any prejudice to the other party; and*
- e) Any other relevant factors.”*

I take note of the already developed legal position that, it is a discretion of the Court to grant an application for extension of time which has to be exercised judiciously. In exercising this discretion judiciously, the factors enumerated under Rule 11 cited above must be adhered to. This is in consonant with the already developed jurisprudence that the applicant must show a good cause to justify grant of extension of time. (See **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001, Court of Appeal of Tanzania, (Unreported)). I quote the relevant part of the decision for clarity thus: -

"...an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined? From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."

I am further guided by the principle in **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, Court of Appeal of Tanzania, at Dar es Salaam, (Unreported), where the Court set the following factors in determination of the application for extension of time:-

- i. " The applicant must account for all the period of delay;*
- ii. The delay should not be inordinate;*
- iii. The applicant must show diligence and*

- iv. reasons, such as the existence of a point of law of sufficient importance not apathy negligence or sloppiness in the prosecution of the action that he intends to take; and*
- v. If the court feels that there are other sufficient grounds such as the illegality of the decision sought to be challenged."*

From the above legal provision and authorities, it is apparent that for someone to be granted an extension of time (condonation), that person must show good cause for the delay.

Now the question is; did the arbitrator error in refusing the condonation? It is on record that the applicant was terminated on 20th November 2019 and the matter was referred to CMA on 8th October 2021. This means there was a delay of more than a year. The applicant provided an account of the days delayed that he was facing a criminal trial with sickness he sustained therein which persisted after being released from the custody. He claimed to have attempted to produce the medical report to substantiate the sickness, but the arbitrator refused. He complained that, CMA being a quasi-judicial board, the mediator should not have refused the evidence of the applicant's sickness.

In his submissions, Mr. Kitundu blamed the arbitrator for having failed to accept the documentary evidence regarding applicant's sickness which caused the delay. Mr. Kitundu cited **section 88 (4) of the Employment and Labour Relations Act, Cap 366 of 2019 R.E** and submitted that under the provision an arbitrator may conduct the dispute in any manner he finds appropriate for the sake of determining it fairly and quickly. In his view, the CMA being a quasi-judicial body, ought to deliver substantial justice with minimum legal technicalities. He further supported his contentions with the principle of overriding objectives found in our civil procedures.

I have gone through the entire submissions by the respondent in search of the response to the applicant's assertion that he wanted to produce documentary evidence to substantiate that his sickness was the cause of delay. Neither this assertion in the submissions nor the fact in the affidavit that the applicant was sick was disputed by the respondent. That applicant's assertion was not disputed neither in the CMA as no valid counter affidavit in existence in the CMA to refute the sickness claim nor in the submission in this matter. In my view, when someone provides a sworn statement by a way of affidavit, that fact remains good evidence unless countered by another sworn statement. The mediator refused to believe the applicant's sworn

statement and as well refused further proof of it by documentary evidence. I agree with the submissions by the counsel for the applicant that the applicant's evidence remained unchallenged hence the arbitrator ought to have given it a consideration.

It is to be noted that the matter was on mediation. This being the case, the mediator was not bound by procedural norms available in other courts. The mediator could have accepted the medical reports or else, the facts adduced in the affidavit could have been sufficient proof of applicant's sickness if not countered by any other sworn statement.

The applicant alleged the mediator of having considered the facts of the respondent's counter affidavit which was filed out of time and already declared to be of no effect. I have gone through the proceedings; it is on record that the respondent's counter affidavit was found to be of no effect because of having been filed out of time. But I saw arbitrator's statement making reference to the respondent's statements. I could not find in the record of the CMA the parties submissions. Whatever is on record seems to have been reported by the arbitrator but the original statements of what the mediator was reporting does not feature anywhere in the CMA record. On this account, I am inclined to agree with the applicant that the arbitrator

considered unavailable statement of the respondent as the counter affidavit was already declared to be with no effect and that no parties' submission was on record.

I have taken note of the allegation that the applicant was not terminated from his employment, but he was allegedly suspended pending investigation of allegations against him. This being the case, his status is still unknown, and, in my view, it needs a judicial definition. This is a kind of a situation which needs to be taken care of by the principle of important points of law which necessitate extension of time.

The above analysis finds the 1st and the 2nd grounds of revision with merit. This means the arbitrator erred in denying the applicant a right to present documentary evidence of his sickness, and by considering a counter affidavit which was already found to be of no effect. The arbitrator failed to consider the evidence adduced by the applicant through the affidavit concerning his sickness incarceration due to being under remand custody and subjected to community service sentence.

It is established that sickness is a good ground for extension of time.

(See Alasai Josiah (Suing by his Attorney Oscar Sawuka) v. Lotus Valley Ltd, Civil Application No. 488/12 of 2019 where the Court of

Appeal said, "*sickness is beyond human control and therefore no body will fault the applicant for being sick*" and held it to be a good cause for grant of extension of time.

In this matter, it was established that the applicant was sick with a period of incarceration in remand custody and a term of community service sentence which curtailed his independence as submitted by the applicant's counsel and sworn in the applicant's affidavit in the CMA, making him unable to pursue a case. On this basis I see all these to constitute sufficient grounds to allow condonation. The arbitrator ought to have allowed the condonation. On this basis I find there to have sufficient grounds to revise the decision of the CMA hence answering the first issue affirmatively.

From the upshot, I revise the CMA decision with reference No. CMA/DSM/TMK/228/2021 and set it aside. I condone the late reference of the application in the CMA and make an order for the CMA to proceed with the application on merit. The application is therefore allowed.

Dated at Dar es Salaam this 21st day of October 2022.



KATARINA REVOCATI MTEULE

JUDGE

21/10/2022