IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 40 OF 2020

K.K SECURITY CO.LTD..... ..... APPLICANT

VERSUS

EMMANUEL J MAGITA.....RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Temeke)

(Amos: Arbitrator)

Dated 30th December 2019

in

CMA/DSM/TEM/151/2019/127/2019

JUDGEMENT

3rd & 16th March 2022

Rwizile, J

The applicant being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/TEM/151/2019/127/2019, filed the present application. As it is usually the case, it is filed by a chamber summons supported by the affidavit sworn by Daniel Mwakajila a Human resource Manager for the applicant stating grounds for which this application is based.

Facts leading to this application can be stated thus; the applicant is the security Company registered in Tanzania. On 30th March 2011, the respondent was employed as the security guard. When his employment relationship became bad with her employer, on 14th July 2014, was terminated. Not happy with termination, he filed a labour dispute with the CMA. He claimed for terminal benefits for unfair termination. He was successfully paid, a notice, gratuity, leave, compensation for 12 months remuneration, that is the total sum of TZS 4,146,154.00. This followed the finding of the CMA that termination was procedurally unfair.

The applicant was not satisfied by the award, hence this application. The grounds for which this application is based are;

i. *Whether the CMA was correct in granting leave to refile a labour dispute after holding that it was time barred.*
ii. *Whether the arbitrator was correct to determine the dispute which was filed out of time without any order for extension*
iii. *Whether it was legally right for the arbitrator to hold that the termination was both substantively and procedurally unfair.*

Mr. Elpidius Philmon and Hassan Mwemba learned counsel appeared for the applicant and argued the application.

Submitting on the first ground, it was stated that an application for condonation styled as CMA/DSM/TEM/458/2018, was struck out with

leave to refile in 14 days. He said, the same was filed after a lapse of 37 days styled as CMA/DSM/TEM/638/2018. The learned advocate went on stating that the same was ruled to be out of time, but still the arbitrator directed that the same can be refiled in accordance with the procedure. In the view of the applicant's counsel, the decision was uncalled for and did not comply with section 3 of the Law of Limitation Act. He also referred to the case of **Hashim Madongo and 2 others vs Minister for Industry and Trade and 2 Others**, Civil Appeal No. 27 of 2003 at page 9.

Arguing, the second point, he said, it was not proper to proceed with mediation without first determining application No. CMA/DSM/TEM/151/2019 for condonation. It was argued, that the same was a res judicata. He said, as the preliminary objection by the applicant on res judicata was raised and dismissed, the next step ought to have determined the said application. Failure to do so, it was added, is in contravention of Rule 11(1) and 31 of the GN No. 64 of 2007. The learned advocate held the view that the proceedings that followed were a nullity and ought to be set aside.

Lastly, the applicant's counsel was of the view that it was not proper to hold that termination was not fair in terms of procedure and yet award the amount of 12 months remuneration as held in the case of **Felician**

Rutwaza vs World Vision Tanzania, Civil Appeal No. 213 of 2019. This court was therefore asked to nullify the proceedings.

Mr. Kiwaligo Mtoni learned counsel for the respondent, submitting on the first issue, stated that the application for condonation was struck out and a direction was made by the arbitrator that another one be filed. He said, that was done after finding that the application was time barred. He argued further that the respondent just complied with the directive of the arbitrator. He went on arguing that, it was good for the arbitrator to relax the rules of procedure in labour disputes. He said, the case of **Madongo** (supra) is distinguishable as it dealt with the issues before the Industrial Court. The counsel went on saying, section 46 of the Law of Limitation Act, applies here to cure the mischief. He asked this court to dismiss this point and take into consideration that the case has taken 4 years.

Dealing with the second issue, he said, CMA/DSM/TEM/151/2019 for condonation, was not determined instead mediation followed. He said, since the application was heard, then the applicant ought to call it to the attention of the arbitrator. In his view, the same has been overtaken by events. This point has no merit, he argued.

On the last issue, it was argued that there was no error in the award. since compensation is the discretion of the arbitrator and there was no failure of justice this application has no merit, it should be dismissed.

By way of rejoinder, it was argued that the rules of procedure are binding in this court, since they are as a vehicle to justice. Otherwise, the learned advocate reiterated his submission in chief and asked this court to nullify the proceedings.

Having heard the submission of the parties. The first point to determine is *Whether the CMA was correct in granting leave to refile a labour dispute after holding that it was time barred.*

Before going into details of the submissions, the court notes that the respondent filed his application on 29th March 2018. Before it was heard on merit, based on the applicant's objection, the same was struck out. The arbitrator advised the respondent to file properly application that complied with the law. The applicant then filed another dispute CMA/DSM/TEM/458/2018.

This also was struck out with leave to refile in 14 days. This happened on 11th September 2018. The respondent did not give in. He filed another

application CMA/DSM/TEM/638/18. The applicant filed an objection on ground of time limitation. The commission heard the same and was content that since leave was for 14 days, commencing from 11th September 2018 and ending on 24th September 2018 and that since the application was filed on 17th October 2018, the same was out of time. The commission stated that at page 2;

> *Hivyo kwa vile mleta maombi yaani mlalamikaji amefungua mgogoro huu bila kufuata taratibu, tume inatupilia mbali maombi ya mlalamikaji na kama mlalamikaji bado anaona anamadai ya msingi basi anatakiwa mgogoro upya kwa kufuata utaratibu sahihi.*

In other words, the commission, ruled out that despite the application being filed out of time given by the commission, still, the respondent was given another chance to follow the law and refile an application. Later, the respondent then filed CMA/DSM/TEM/151/2019. Before this was heard, the applicant filed two points in objection. That the application for extension of time was untenable and should not be granted and that it was res judicata. The commission dismissed the objections and proceeded to hear the impugned application.

It is apparently clear that from the record, the impugned application was heard immediately after dismissal of the objections as to the propriety of the application for condonation. Parties are in agreement that there was no application for condonation that was heard and determined.

To answer the first issue therefore, it is clear from the record that the respondent filed an application for condonation. The first one was struck out for failure to comply with the procedure. Upon filing another one, it was also struck out with leave to refile. The same was filed out of the 14 days given by the commission.

It has been consistently held that when the court sets time for an action, that action must be performed as directed. It is true therefore that any application, matter or suit that is filed out of the prescribed time, must be dismissed. In my view, the rationale of having time limit is to compel parties take necessary actions in respect of their cases. This is important because, it goes to the root of the doctrine of litigations must come to an end. In law, section 3 of the law of Limitation Act, as submitted, is categorical that cases filed out of time must be dismissed.

As well, it was held by the Court of Appeal in the case of **Hashim Madongo** (supra) at page 9. The court applied section 3 and 46 of the Law of Limitation Act, as well as section 19(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, to hold that an application

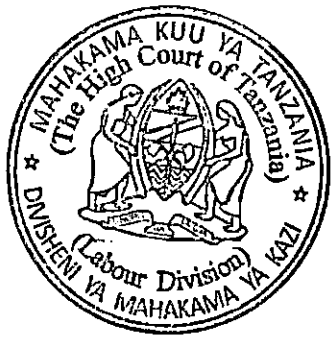
found time barred has to be dismissed. In that case, the court held there was no room for striking out an application filed out of time.

The arbitrator, having noted that the application for condonation was filed out of time ought to dismiss it. In the same spirit therefore, there was no room for the respondent to refile the same for whatever reasons. Not even as submitted by the respondent that refiling was in compliance of the directive of the arbitrator. The arbitrator was ultra-vires and usurped the powers he does not have. For that matter, the application that was filed later as shown above was not to be entertained. It was a res judicata.

It is common ground that, any matter dismissed, for all intents and purposes, is finally determined. The case of **Hashim Madongo**, (supra) is relevant and cannot be said, to have dealt with the Industrial Court, when in fact the law of Limitation applies to this court as it did to the Industrial Court.

Furthermore, the respondent has submitted that since the application for condonation was not heard, instead the main application was heard, then the issue of condonation was overtaken by events. I believe this is not right. This is so, because, before determining the impugned application, the commission was first to make sure the same is within its jurisdiction.

A matter that is time barred is not in the jurisdiction of the court or the commission for that matter unless and until the same it extends time for doing so. In this case, I have no hesitation to say, all applications for condonation were dismissed. The last one was not even heard. The commission jumped to hear the main application before condoning its time limitation. In all fairness, the commission had no mandate to plunge into hearing the merits of the impugned application before determining whether there was sufficient cause to file it out of time. Since that was not done, and the application for condition filed out time ought to be dismissed. Then, it was not entitled to hear the impugned application which was not filed in time and time was never extent. All what it had to do was to dismiss it. Having said what I have said, I quashed the award and its resultant orders are set aside. Since, the first issue disposes off the entire application, there is no need to deal with the remaining two issues. Parties have to bear own costs.



A. K. Rwizile

JUDGE

16.03.2022