

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 396 OF 2022

BETWEEN

DEONIS KITOGA APPLICANT

VERSUS

EAST AFRICA FRUITS CO. LIMITED..... RESPONDENT

JUDGEMENT

Date of last order: *03/03/2023*

Date of Judgement: *08/03/2023*

MLYAMBINA, J.

Before venturing into the merit of the application, I must emphasis at the outset that parties are bound by their own pleadings. Such position has been highlighted in range of Court decisions including the case of **Makori Masoga v. Joshua Mwaikambo & Another** (1987) TLR 88 where it was held that:

In general, I think it is elementary a party is bound by his pleadings and can only succeed according to what has averred in evidence. He is not allowed to set up a new case.

In the present application, the Applicant is challenging the decision of the Commission for Mediation and Arbitration ('CMA') on refusal to grant condonation. Dissatisfied by the CMA's decision, the Applicant filed his application before this Court through the Notice of application, Chamber

summons and the supporting affidavit. In his affidavit, the Applicant urged the Court to determine the following legal issues:

- i. Whether the Applicant has sufficient reason to warrant condonation.
- ii. Whether there was illegality or injustice on the disciplinary hearing procedure and its outcome.
- iii. Whether there was a technical delay on the side of Applicant.

In the written submissions in support of the application, the Applicant advanced the following grounds for determination:

- i. Whether the Applicant herein/employee has adduced sufficient reasons to warrant condonation.
- ii. Whether there was illegality or injustice in the impugned disciplinary hearing and its outcome of termination from employment.
- iii. Whether the Mediator has a jurisdiction to entertain an application for condonation.

Apparently, through the written submissions, the Applicant conversed on different issues not related to the issues averred in the affidavit in support of the application. The issue as to; *whether the Mediator has jurisdiction to entertain an application for condonation* was not stated in the affidavit. The same was raised *suo motto* by the Applicant in his written submission. The Respondent's Counsel in his submission has also

notified the Court on this anomaly. As stated in the introductory part of this decision, a party's case is limited to what has been averred in evidence.

It is my view that the Applicant was supposed to submit on the grounds which have been initially stated in the affidavit and not otherwise. Therefore, the new ground introduced in the written submissions by the Applicant will be disregarded by the Court.

This application was disposed by way of written submissions. Before the Court, the Applicant was represented by Mr. Deus Tarimo, Learned Counsel, whereas Ms. Doreen D. Mutagwaba, Learned Counsel appeared for the Respondent.

Arguing in support of the first ground, Mr. Tarimo submitted that; immediately after termination, the Applicant took initial steps for referring his dispute to CMA as averred under paragraph 7 & 8 of his affidavit. He stated that; the Applicant failed to proceed with the necessary steps due to some technical error on procedures governing CMA. That, the copy of the CMA Form No.1 should be served and signed by the employer before filing the same to the CMA. He alleged that; as far as the Applicant is a layman, he could not understand that procedure

rather he thought after filling the form and serve one copy to the employer, his complaints has been completely and effectively lodged.

It was also submitted that; around November, 2021 after collecting and serving Form No. 1 to the employer, the Applicant got serious ill and felt severe pain due to the disease he suffered from chronic back pain with radiculopathy previously diagnosed in October 2021, as averred at paragraph 8 & 9 of the Applicants affidavit together with annexure DK- 4 (copies of the medical chits) dated 18, 21 and 22 of October 2021.

It was added that; at that material time, around November, 2021, the Applicant was unable to move back to the CMA to pursue his matter. That, he was still attending hospital for medical checkup progress and therapist exercise, taking medical dosage and rest at home as instructed.

Mr. Tarimo argued that; it is a settled principle that sickness or any health matters are not the choice of a human being as cannot be shelved and no one can be blamed. He referred the Court to the case of **Emmanuel R. Maira v. The DED Bunda District**, Civil Application No. 63/2010 Court of Appeal of Tanzania at Dar es Salaam (unreported) p. 7 where Kalegeya, J.A (as he then was) opined that:

The Applicant has acted diligently to pursue his cause only that he was technically being knocked out. In my

considered view, this kind of situation coupled with the undisputed incapacitation by sickness, indeed provide good cause for delay entitling the Applicant to the order sought.

Also, Mr. Tarimo put his reliance to the case of **Elisha Edson Nkuyumba v. Jambo Foods Limited**, Revision No. 02/2010 High Court of Tanzania, Shinyanga District Registry, p. 7 in affirmation with the case of **Felix Tumbo Kisima v. TTCL and Another** [1997] TLR in which it was held that:

It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the Applicant's power to control or influence resulting in delay in taking any necessary steps.

It was further submitted that; as far as the Applicant has shown diligent by referring his complaint to the CMA timely, but caught up in the web of technicality and sickness which indeed was out of his control or influence, it is a sufficient reason to persuade this Honourable Court to grant extension of time.

As to the second ground, Mr. Tarimo submitted that; after the conduct of investigations against the offences leveled against the

Applicant, the findings of the said investigation were not availed to the Applicant and no investigation report was produced or tendered. To cement on the relevance of investigation report, Mr. Tarimo referred the Court to the cases of **Kiboberry Limited v. John Van Der Voot**, Civil Appeal 248/2021 Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Alliance One Tobacco Tanzania Limited v. Grayson Mcharo**, Revision No. 54 of 2019 High Court of Tanzania Labour Division at Morogoro (unreported).

It was further submitted that, during the disciplinary hearing the Applicant was not afforded with the chance to present his defence deliberately. Mr. Tarimo contended that; the Applicant responded to the limit of the questions asked by the panellist of the disciplinary committee. He further alleged that the Applicant was not afforded with the chance to cross-examine nor to question the credibility of the witness or evidence adduced against him.

Mr. Tarimo argued that; it is a settled principle that, failure to afford a person with the right to present his defence against an offence or his alleged misconduct, is a serious irregularity and infringement of natural justice principle as enshrined in the Constitution of Tanzania, 1977 as amended from time to time specifically *Article 13(6)*. He urged the Court

to intervene the alleged illegality and correct the same. To buttress his position, he pleaded the Court to be guided by the decision of the Court of Appeal in the case of **Principal Secretary Ministry of Defense v. Devram Valambhia** [1992] TLR 185. He urged the Court to revise the CMA's decision and grant the extension of time sought.

In response to the application, Ms. Mutagwaba narrated the following background of the matter; that the Applicant was the former employee of the Respondent employed as a Driver from 11th March until 13th October, 2021 when he was terminated from employment. He stated that; the Respondent is a company dealing with selling/buying of fruits in Tanzania. That, the Applicant was terminated after the disciplinary hearing committee found him guilty with forgery of sales information, price abuse and receiving company sales money in his personal number.

Ms. Mutagwaba alleged that; after termination, the Applicant engaged himself with the same business as the Respondent, hence became the Respondent's competitor in the market. In the event the Respondent sued him for breach of confidentiality agreement in *a civil suit No. 44/2022 at Kinondoni District Court*. After such suit, surprisingly the Applicant instituted his claim at the CMA together with the

application for condonation. The counsel contended that the Applicant's claim at the CMA is an afterthought after the Respondent instituted civil suit against him.

Ms. Mutagwaba further notified the Court that the Applicant has submitted on new issues/grounds that are contrary to the grounds stated in the notice of application. He said, the main issue before the Court is; *whether the Applicant had adduced sufficient reasons for his application for condonation to stand, thus, other issues on the merit of the case be disregarded.* Therefore, the counsel replied to the first ground only.

With respect to the first ground, Ms. Mutagwaba submitted that; four factors are to be considered for the CMA to grant the application for condonation. He names the factors as the degree of lateness, reasons for lateness, prospects of succeeding with the dispute and obtaining the reliefs sought against the other party and prejudice to the other party.

She stated that; the Applicant delayed for 146 days and his reason for the delay are being a lay person and that he was suffering from chronic backpain. It was argued that; ignorance of law has never been a ground for extension of time. To support his submissions, the counsel referred the Court to the case of **Hamimu Hamisi Totoro @Zungu**

Pablo & 2 Others v. Republic, Criminal Application No. 121/07 of 2018.

With reference to annexure DK4, Ms. Mutagwaba submitted that; the Applicant attended the hospital in October 18th, 21st and 22nd 2021 and the Respondent was served with the Applicant's CMA F.1 (annexture DK3) on 11th November, 2021 being almost 3 weeks after he attended the hospital.

She added that; the allegation that the Applicant was seriously sick is not true and his annexures and averment in paragraphs 6 and 7 of the affidavits are contradicting. It was further submitted that; the Applicant did not state his condition from 22nd October, 2021 to 06th April, 2023 when he filed the application at the CMA.

As to the prospects with the intended dispute, Ms. Mutagwaba submitted that; the Applicant's claim was on unfair termination and its reliefs thereto. He stated that there are no chances of success because the Applicant was employed on fixed term contract and not on permanent terms where claims of unfair termination could stand.

It was further submitted that granting this application will prejudice the Respondent since the Applicant has no intention to pursue it rather to disturb and waste time of the Respondent. As to the cases

cited by the Applicant, the Counsel submitted that; the same are irrelevant to the circumstance of this case.

In conclusion, Mr. Mutagwaba submitted that; the Applicant failed to adduce sufficient reasons for the grant of application for condonation. He stated that; he did not account for the 146 days delay as it was held in the case of **Ludger Bernard Nyoni v. National Housing Corporation**, Civil Application No. 372/01/2018. He therefore urged the Court to dismiss the application.

After careful consideration of the parties' rival submissions, CMA and Court records as well as relevant law, I find the Court is called upon to determine only one issue; *whether the Applicant adduced sufficient reason to warrant condonation.*

On to the raised jurisdictional issue, the Court is of the view that, so far as the Respondent was afforded the right to respond the same through his reply submission, there is no prejudice if the Court proceeds to determine the same. The question as to Mediator's jurisdiction to determine application for condonation was decided by the Court in the case of **Rui Wang v. Eminence Consulting (T) Limited**, Revision No. 306 of 2022, High Court Labour Division Dar es Salaam (unreported) where it was held that:

Therefore, time limit being one of the jurisdictional issues to consider, it is my view that pursuant to the provision of Rule 15 of GN. No. 64/2007 the Mediator can determine an application for condonation. A dispute cannot be mediated by the Mediator if he/she has no jurisdiction to entertain the matter. Thus, the issue of determining an application for condonation should be considered first before mediating the particular dispute. It is my further finding that in the case of **Barclays Bank T. Limited v. AYYAM Matessa** (*supra*) the debate was on the Mediator's jurisdiction to decide the complaint on merit. Which in my view an application for condonation does not determine the application on merit.

I subscribe to the above referred case position. Indeed, the Mediator has jurisdiction to determine an application for condonation. I therefore take the same stance in the matter at hand. The Mediator has jurisdiction to determine an application for condonation as he did in this application. Therefore, I find such ground to have no merit.

Turning to the main issue at hand, *whether the Applicant adduced sufficient reasons to warrant condonation*. In his paragraph 9, 10 and 11 of the affidavit in support of the application for condonation at the CMA, the Applicant deponed the following reasons which hindered him to file his application on time:

9. That, the Applicant upon learning that he was unfairly terminated from work, he consulted an advocate whom he could not recall his name for advice on the remedy available for the situation and he instructed to open a suit before the Commission for Mediation and Arbitration (CMA) for further orders and reliefs.

10. That, the Applicant unknowingly of the procedures before the Commission for Mediation and Arbitration went to collect CMA Form No. 1 that Referral of a dispute to the Commission for Mediation and Arbitration and filled in all the details and wrongfully went to serve the other party instead of submitting the same to the Commission for the purposes of instituting of case before the Commission.

11. That, the Applicant was having chronic back pain with radiculopathy and was diagnosed with Lumbar Spine and hence failed to proceed of instituting complaints against the Respondent before the Commission for Mediation and Arbitration.

Notwithstanding the Applicant's submissions before this Court, the above were the main reasons adduced before the CMA. The record shows that the Applicant was terminated from employment on 13/10/2021. He referred the dispute to the CMA on 30/05/2022. Time

limit for filing disputes about fairness of termination are referred at the CMA within 30 days from the date of termination in terms of *Rule 10(1) of GN. No. 64/2007*. In the present application, the Applicant delayed to file the dispute timely within the time limit provided by the law due to the above reasons.

The Court has examined the advanced reasons to see if they were sufficient to grant the extension of time sought. To start with the first ground, that the Applicant is a layman who is unaware of the procedures for filing disputes at the CMA. The Applicant's allegation simply refers to the defence that he is ignorant of the law. The question as to; *whether such ground can stand* has been addressed in numerous decisions which will be referred hereunder. It is my view that, such allegation is baseless because the procedures for referring disputes at the CMA are provided by the law to wit, *section 86 of the Employment and Labour Relations Act, [Cap 366 Revised Edition 2019]*.

The mandatory provision of the law is to be adhered without any unjustifiable excuse. As properly submitted by Mr. Rutagwaba, ignorance of law has never been a ground for extension of time. This is the Court's position in numerous decisions including the cited case of **Hamimu**

Hamisi Totoro @Zungu Pablo & 2 Others (*supra*) where it was held that:

The issue here is whether ignorance of law constitutes a good cause for the extension of time. There is a plethora of authorities to the effect that ignorance of law has never been a good cause for granting of extension of time.

I subscribe to the above holding. At paragraph 9 of the supporting affidavit, the Applicant stated that after learning that he was unfairly terminated, he consulted an advocate. Therefore, he ought to have been dully instructed by his Advocate of the procedures and laws governing filing of disputes at the CMA. Thus, the reason of ignorance of law cannot stand before this Court.

The second reason is on allegation of sickness. I fully agree with the Applicant's submission that sickness can stand as a ground for extension of time. However, such ground to succeed depends on the circumstances of each case. In the application at hand, the Applicant alleged to have back pain with radiculopathy and diagnosed with Lumbar Spine. The Applicant attached the Medical report from Sanitas Hospital to prove his assertion. The attached report shows that the

Applicant was an outpatient who attended the named hospital on 18/10/2021, 21/10/2021 and 22/10/2021.

The record further reveals that the dispute at the CMA was filed on 06/04/2022. Under such circumstance, the Applicant ought to have accounted for the delay from October, 2021 when he alleged to have been sick to 06th April, 2022 when he referred the application at the CMA.

Examining the records at hand, no reason has been adduced to such effect. Each day of the delay had to be accounted for as it is the Court's position in range of decisions including the case of **Ludger Bernard Nyoni** (*supra*) where it was held that:

It is settled that in an application for enlargement of time, the Applicant has to account for everyday of the delay involved and that failure to do so would result in the dismissal of the application.

In this application, the Applicant failed to account for all the days of the delay to refer the matter to the CMA. Thus, the Court finds no justifiable reasons to depart from the CMA's decision and grant the relief sought.

In the end result, the present application has no merit and it is dismissed accordingly. It is so ordered.



Y.J. MLYAMBINA

JUDGE

08/03/2023

Judgement pronounced and dated 8th March, 2023 in the presence of learned Counsel Deus Tarimo for the Applicant and Deus Tarimo holding brief of Doreen Mutagwaba for the Respondent.



Y.J. MLYAMBINA

JUDGE

08/03/2023