IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DARES SALAAM

MISC. LABOUR APPLICATION NO. 32 OF 2023

(Arising from the decision of Labour Dispute No. CMA/DSM/TMK/323 of 2022 by Hon. Ngalika dated 7th November, 2022)

BETWEEN

PHILIPO LANGIA.....APPLICANT

AND

LAKE CARRIERS LIMITED.....RESPONDENT

RULING

Date of last Order: *20/06/2023*
Date of Ruling: *27/06/2023*

MLYAMBINA, J.

This application has been made under *Rule 24(1), 24(2)(a)(b)(c)(e) and (f) (2)(3)(a)(b)(c)(d) and Rule 56 and Rule 55 of the Labour Court Rules, GN.No.106 of 2007.* It seeks for extension of time within which to file revision application against the decision of the Commission of Mediation and Arbitration (herein CMA) in *Labour Dispute No. CMA/DSM/TMK/323/2022* issued by Hon. Ngalika, E. Arbitrator. The application has been supported with the affidavit of PHILIPO LANGIA ATHUMANI, the Applicant who was represented by Daudi Maziku Maduki, from World Poor People Association (Legal Department).

On 11th May, 2023 when the application came for hearing, Mr. Daudi Maziku for the Applicant in the absence of the Respondent's Counsel but with notice prayed the application be disposed by way of written submissions. The Court granted the prayer. According to the schedule, the Applicants' submission in chief was to be filed by 18th May, 2023, reply submissions by 25th May, 2023, Rejoinder (if any) by 29th May, 2023. The application was to be mentioned on 1st June, 2023 with the view of fixing a ruling date.

Very unfortunate, on 1st June, 2023 when the application was called for mention, the Applicant appeared in person and informed the Court that his Representative was sick since a week before. He further informed the Court that his Representative had drafted the written submissions. He thus prayed be given extension of time to file the same.

In reply, Counsel Heriolotu for the Respondent insisted for the Court to dismiss the application for the Applicant's non compliance of the Court's order. For interests of justice, and taking into considerations that the purported written submissions were already drafted but waiting to be filed, the Court granted extension of time for the Applicant to file his written submissions in chief in five days, that is up to 6th June, 2023, reply

submissions by 13th June, 2023, Rejoinder if any by 20th June, 2023 and the matter was to be mentioned on the 20th June, 2023.

Again, unexpectedly, on 20th June, 2023 it transpired that the Applicant never complied with the Court's order. He thus prayed for the Court to decide based on his supporting affidavit to the application. Counsel Heriolotu in response wanted the Court to give direction in deciding the matter because the Applicant failed to comply with the Court's order.

At this juncture, the issue is whether the Court should dismiss the application for the Applicant's none compliance to the Court's Order or decide on merits based on the supporting affidavit and the Counter affidavit of the Respondent. I have in a number of time, while noting that there is an established general rule of practice and procedure that; an affidavit is a substitute of oral evidence, maintained that an application supported with an affidavit cannot be dismissed for want of prosecution or non-appearance of the Applicant and/ or his/her Advocate when the matter is called for hearing or when the Applicant fails to file written submissions as per the Courts' schedule. It has to be decided based on the available affidavit evidence. Dismissing the application defeats the object of having an affidavit as supporting evidence in the application made by way of Chamber

summons. Indeed, the act of dismissing the application does not give reasons as to why the evidence given by way of affidavit are thrown out. I reached such position in the case of **Atuwonekye Mwenda Applicant v. Hezron Mangula**, Misc. Land Application No. 5 of 2020, High Court of Tanzania Iringa Sub Registry (unreported) and in the case of **Stephen Ngalambe v. Onesmo Ezekia Chaula and Songea Municipal Council**, Misc. Land Application No. 05 of 2022, High Court of Tanzania Songea Sub Registry (unreported).

Though I agree with Counsel Heriolotu that an order of the Court must be respected, I also consider that an affidavit is self-proving evidence to be acted upon by Courts in the absence of supplementary submission by a Party or his Advocate. For that reason, if a party does not appear during hearing of the application or does not file a written submission in disposing the matter, the Court should decide the application based on the available supporting affidavit, counter affidavit and reply to counter affidavit (if any). Such action will serve *inter alia* five purposes: *One*, it will bar a thousand of chamber applications seeking to set aside the dismissal orders. *Two*, applications will be determined conclusively once for all. *Three*, it will serve time of the Parties and of the Court as the same matter will not be

entertained in the same Court twice or more times. *Four*, it will assist in avoiding multiplicity of applications by the same court over the same issue. *Five*, it will remind parties and their Advocates on preparing affidavits properly and avoid general denials in Counter affidavits.

With the above reasoning, and taking into considerations that the Applicant upon failure to file his written submission has implored this Court to decide based on his supporting affidavit, I find worth to determine this application based on the available affidavit evidence and counter affidavit rather than dismissing for want of prosecution.

The Applicant has sworn inter alia that he was employed by the Respondent on 16/4/2021 but his employment was unlawfully terminated on 17/8/2022. Thereafter, the Applicant filed a Labour Dispute on 13/09/2022. The CMA F1 was lodged at the CMA Dar es Salaam Zone. After two weeks, he was directed to lodge his CMA F1 at Temeke. Following nonappearance of the Respondent, the dispute was entertained ex-parte. Unfortunately, the Mediator, without jurisdiction, dismissed the complaint. According to the Applicant, it is the Arbitrator whom the law empowers to dismiss a labour dispute and not a Mediator.

The Applicant raised the following legal issues calling for determination by this Court upon grant of extension to file revision:

i. Whether the Mediator has jurisdiction to dismiss a Labour Dispute.

ii. Whether the Applicant has right of extension of time to lodge the intended application.

In response, the Respondent through Counter Affidavit sworn by its Principal Officer one Innocent Emmanuel Mwaipopo opposed the application and called upon the Applicant to strict proof of unfair termination.

The Respondent noted the fact that the Applicant had instituted his claim on the 13th September 2022 at CMA Dar es Salaam Zonal offices. However, there is no proof showing that there were instructions from CMA Dar es Salaam Zone that the complaint should be instated at CMA Temeke. The Respondent called upon the Applicant to abide with the labour laws in seeking the remedies and not otherwise.

I have considered the affidavit, counter affidavit, and the records before the Court. It is undeniable fact that the Labour Dispute before the CMA Temeke was lodged out of time contrary to *Regulation 10(1) of GN No. 64 of 2007* which requires the complaint be lodged within 30 days. As

reasoned by the Mediator, the Applicant ought had complied with the procedures of seeking condonation as directed under *Regulation 29 (a) of GN No. 64 of 2007.*

In any case, the impugned decision was delivered on 7th November, 2022 and the copy of decision was supplied to the Applicant on 13th December, 2022. This application was lodged on 27th March, 2023. The Applicant has not accounted even a single day of delay. It is more than 95 days from the date the Applicant was given the copy of decision, which is a delay of 53 days unaccounted in the supporting affidavit.

Needless, the Applicant has raised an issue of illegality to the effect that the Mediator had no jurisdiction to dismiss the application. On that note, I do agree with the Applicant that where an issue of illegality is raised, it constitutes sufficient cause of granting an application for extension of time regardless of whether or not reasonable explanation has been given by the applicant to account for the delay. That is the position in the case of **Total Tanzania Limited v. Seet Peng Swee** at page 9 paragraph 2 as referred in the case of **JHPIEGO v. Emmanuel Mmbaga** Misc. Labour Application No. 238 of 2019 and **Hezron Magessa Mariogo v. Kassim Mohamed Said**, Civil Application No. 227 of 2015 (unreported).

Also, in the case of **Mwanasgeria Mkuu wa Serikali v. Alice Celestine Ndyali (Msimamizi wa Mirathi wa Mali za Marehemu Celestine Mathew Ndyali & Another**, High Court of Tanzania (unreported), p. 13 as referred in the case of **Tanesco v. Mufungo Leonard Majura and 15 Others** Civil Application No. 91 of 2016, Court of Appeal of Tanzania in which it was stated:

> *Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned.....suffices to move the court to grant extension of time so that the alleged illegality can be addressed by the court.*

The same principle has been maintained in the case of **Hb Worldwide Limited v. Godrej Consumer Products Limited**, Court of Appeal of Tanzania (unreported) p. 12 paragraph 2 as referred in the case of **VIP Engineering and Marketing Limited & Three Others v. Citibank Tanzania Limited** Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) where the Court stated:

> *It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 (now rule 10) regardless of whether or not reasonable explanation has been given by the applicant under the rule to account for the delay.*

However, the point of illegality raised by the Applicant is devoid of any merits. Under the provisions of *Rule 29 (1) (a), (b), (c) (11)* read together with *Rule 2 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN No. 64 of 2007* empowers the Commission (Mediator and Arbitrator) to determine an application in any manner it deems proper.

I therefore find nothing wrong was committed by the Mediator in dismissing the time barred application. As properly found, the Applicant had a duty to file an application for condonation instead of lodging a labour complaint before the CMA.

In the premises, the application is hereby dismissed for lack of merits. Each party to bear his/its costs. It is so ordered.

Y.J. MLYAMBINA
JUDGE
27/06/2023

Ruling delivered and dated 27th June, 2023 in the presence of the Applicant in person and absence of the Respondent.

Y.J. MLYAMBINA
JUDGE
27/06/2023