IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 01 OF 2023

(From the decision of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. REF: CMA/DSM/KIN/447/2022, Mbunda, P.J.: Arbitrator. Dated 22nd November, 2022)

WAMBURA NELSON NONKWE .....APPLICANT

VERSUS

K.K. SECURITY (T) LTD ..... RESPONDENT

JUDGEMENT

18th – 28th July, 2023

OPIYO, J

The matter proceeded orally. Both parties got the opportunity of representation from Learned Counsels. Mr. Wabeya Kung'e appeared for the applicant and Mr. Elipidius Philemon was for the respondent.

Mr. Kungé submitted that the applicant was aggrieved by the CMA decision that he filed the matter that was time barred. He stated that, the CMA decision was based on the dates that were filed in the CMA Form No. 1 where at part one it stated that the dispute arose on 29/09/2020 and in the second part, it showed the date of termination was 22/07/2022. His argument is that applicant's termination was by way of constructive

termination and so he had never been given termination letter. He cotinued to submitt that on 19/11/2020 he was called before disciplinary hearing, but until 08/07/2022 he had not been given the result of the disciplinary committee or termiantion letter.

He submitted further that, the applicant looked for legal assistant which led his office to write a letter to the respondent to enable him be availed with result of disciplinary committee or termination letter. Though the respondent was given 14 days of action, but those days elapsed without any reply. This made the applicant to file the application before CMA complaining for constructive termination.

Mr. Kungé continued to submit that, the applicant asked the Mabere Marando law Attorneys to help him to fill the CMA Form 1. Where one, Haghai Mwambingu, legal officer by then helped him to fill in the form and he mistakenly filled that the dispute arose in 29/09/2020 instead of 22/07/2022. He continued that the date of 22/07/2022 comes from the demand notice the applicant wrote to the respondent to be given the outcome of disciplinary committee. In his view, the mixing of dates is the human error from the legal officer who filled the form for applicant and so

the decision to dismiss the applicant's application for being time barred was not correct.

He submitted further that, the court has stated up teen times that the advocates mistakes should not be used to purnish litigants/parties. To support his point he cited cases of **Kambona Charless (***as administrator of the late Charles Pangani***) Vs. Elizabeth Charles** Civil Appeal No. 529/17 of 2019 CAT Dar es Salaam at page 8 which referred the case of **Zuberi Mussa Vs. Shinyanga Town Council**, Civil Appl. No. 3 of 2007 and **Ghania A. Kimambi Vs. Shadrack Reuben Ng'ambi**, Misc Appl. No. 692 of 2018 HC, Labour Div. at page 4. He finally prayed for the CMA decision to be quashed and set aside and the matter to be remitted to CMA to proceed on merits.

Mr. Philemon in reply submitted that, the matter before CMA was filed out of time as CMA Form No. 1 showed that dispute arose on 29/09/2020 and the applicant filed the matter on 17/08/2022. He added that the matter was out of time as it has been provided under rule 10(1) of Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 providing for 30 days as a prescribed time. He continued that, in calculating from the date he indicated the dispute arose and when he filed

the matter, he was out of time. In his view CMA was right to decide that the dispute was out of time.

He submitted further that, the advocate for the applicant stated that CMA Form 1 had two dates, one being 29/09/2020 as the date when the dispute arose and 22/07/2022 as when the termination occurred. In his view, the allegation that 22/07/2022 was the termination date is an afterthought because it is a date which was created by the applicant himself basing on their demand notice they wrote to the respondent. He stated that, the court cannot calculate from date created by the applicant himself as it will creat loophole for one who finds that he is out of time to write a demand note and create his own time to enable him file the application. For him, the first date of 29/09/2020 they claimed was mistakenly inserted without showing another date as to when the dispute arose apart from the one which is self created will be lying to the court.

He continued to submit that parties, are bound by their own pleadings. To cement on that he cited cases of **Mary Grace Suleman and 5 others Vs. Vicent Maseneje,** Misc. Land Appeal No. 47 of 2021 HC Dodoma at page 5 which referred the case of **Astepro Investment Co. Ltd Vs. Jawinga Co. Ltd,** Civil Appeal No. 8 of 2015 and the case of **Salmi Said**

Mlomekela Vs. Mohamed Abdallah Mohamed, Civil Appeal No. 149 of 2019 CAT at Pg 5. He added that the allegation of the mistake by Mwambingu in filing CMA Form No. 1 were not brought before CMA. He then prayed for the date the applicants stated as the date the dispute arose be the date for determining limitation period.

He further contended that, the advocate for the applicant argued that constructive termiantion is calculated from the date the respondent failed to reply to their letter, which is contrary to rule 10(1) of the G.N. No. 42 of 2007, but for constructive termiantion to arise there must be resignation on part of the employee, but no claim for resignation date was indicated to qualify the applicant to claim constructive termination.

On the issue that the advocates mistake should not bind the party he submitted that, the cases cited are distinguishable because the mistakes are different. In the case of Kambona the advocate only delayed in serving the other side with memorandum and record of appeal not mistakes in drafting pleadings. In the case of Ghania Kimambi, the mistake was non appearance that led to the matter to be dismissed for non appearance. Therefore, for him, as Haghai Mwambingu was not named at the CMA as the one who did the mistake and that the authorities are not attaching to

the pleadings, his justification is misconceived. He then prayed for the application to be dismissed.

In rejoinder Mr. Kung'e submitted that, the issue that the CMA was not informed on the wrong filling of the form is not true as the issue was well raised before CMA. He added that he does not dispute the prescription of limitation period, but, the advocate for the respondent seems to have forgotten that the provision of rule 10(1) of the G.N. No. 42 of 2007 talks of two major points, including that the 30 days has to start from termianation date. He submitted further that CMA F1 had two dates and the applicant was called in disciplinary committee on November, 2020. This fact is not disputed. He stated that the filling of 29/09/2020 was a mistake as he was not even yet to be called in the disciplinary committee. For him, it is a date which has no relation with the matter.

On the issues in the cases cited, he submitted that it is not on what issue was involved, but on the decision that advocates mistakes should not be used to punish their clients. He then reiterate what was prayed in his submission in chief.

This court after considering rival submission of the parties has the obligation to determine whether the arbitrator was right to determine that the matter at CMA was filed out of time. The law is very clear that the issue of unfair termination has to be taken to CMA within 30 days from the date of termination or the date the employer has made his final decision to terminate the employee as provided under rule 10(1) of G.N. No. 64 of 2007. In the matter at hand, the issue was for unfair termination via constructive termination. And through CMA F1, the applicant stated two different dates of termination one being 29/09/2020 as the date when the dispute arose and the other is 22/07/2022 as when the termination occurred.

In their rival arguments, the advocate for the applicant stated that the date mentioned as the date the dispute arose was mistakenly written by the then legal officer. For that he prayed for the mistake made by the legal officer to not be taken into being applicant's fault. Whereas the advocate for the respondent stated that the reason stated is an afterthought as it was not stated at CMA.

This being a revisional court, there is no way I can escape looking at what transpired at CMA during hearing in determining this matter. In going

through the proceedings, I have found the reason stated of mistakenly filling the CMA form No 1 was different from the one stated at this court. At CMA it was stated that it was out of slip of the pen by the complainant (applicant herein), while at this level it is stated that it was done by the legal officer, one Haghai Mwambingu and evel filing his affidavit to that effect. In my considered view, this shows the uncertainity of the advocate of the applicant arguments on who exactly did that mistake, if at all. As this is merely a revisional court, with only the power to revise as it has been provided under section 94(1)(b)(i) of the Employment and Labour Relations Act CAP. 366 R.E. 2019, it will deal only with determination of what was stated at CMA instead of receiving new evidence at this level. At CMA the matter was that the mistake was done by applicant and no mention of the legal officer envisaged.

It has been stated in several cases that CMA F1 is the pleading that initiate the dispute at the CMA. One of it is the case of **Mantra Tanzania Limited vs Joaquim Bonaventure**, Civil Appeal No. 145 of 2018, CAT at Dar es Salaam. And the same being the applicant's pleading she is bound by it. This has been held in the case of **The Registered Trustees of Islamic Propagation Centre (IPC) vs The Registered Trustees of**

Thaaqib Islamic Centre (TIC), Civil Appeal No. 2 of 2020, CAT that parties are bound by their pleadings.

For that matter, the applicant is bound to what he has filed in the CMA F1 that the dispute arose on 29/09/2020. The same may be reasonable as reflecting the date when the dispute between the parties started before he was called before the committee rather than 22/07/2022 which is clearly stated to be the date the demand note that was written to the respondent expired. This is a self created date. This date cannot be termed as the date for termination as it goes contrary to rule 10(1) of G.N. No. 64 of 2007.

The CMA F1 shows that the dispute was filed at CMA on 18/08/2022. It is seen with the naked eyes that the date mentioned as when the dispute arose of 29/09/2020 to the date the dispute was filed at CMA is two years plus. This proves that the matter was filed at CMA while being out of time. This is because, as correctly argued by the counsel for the respondent, self created date ca not be used to calculate the prescribed date for taking the required actions. Time limitation is in place to see the end of litigations is reached. Therefore, if it is left open for someone to choose any date to act, there will be no need to put a limit to any matter, as whoever wishes will circumvent it the way and time he so desires. We are told the disciplinary

action took place in the year 2020. According to rule 23 (4) of GN no 64/2007 the whole process of hearing by the disciplinary Committee requires to be finalised within a reasonable time. This include communicating the decision to the employee. From the date of the meeting, the outcome was to be communicated within a reasonable time too. It follows therefore that, upon exparation of such reasonable time the applicant was also supposed to take the necessary actions within a reasonable time, including resignation for a contructive termination to take stand. In the circumstances of this case, keeping mute for about two years before taking action is not a reasonable time. Reasonable time should at least be pegged within a month which is a prescribed period for filing a dispute from the date the dispute arose.

Thus, from the date of disciplinary hearing, the applicant was eligible to claim for the outcome of the disciplinary committee or resign within a reasonable time from this date to successfully claim for constructive termination timely. But as per records, he did not do so. He choose to stay away for unreasonably too long and chose to use a demand notice to create his own date of termination from the date the demand notice expired. This is not acceptable for it will indeed open a loophole to act as an escape door out of time limitation web. This is bount to creat

unneccessary uncertainty in law for each party will choose the time convinient to him to draft a demand not to revise the elapsed time limit as argued corretly argued by the counsel for the respondent.

As it has been determined above basing on the date the dispute arose, I find that the arbitrator was right to hold that the application was filed at CMA out of time. So, in determining the second issue, the proper remedy was to dismiss the application as the arbitrator did.

In the circumstances, I find this application to have no merit. It is hereby dismissed. CMA decision is upheld. No order as to costs.

M.P. OPIYO

JUDGE

28/07/2023