

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB- REGISTRY

AT MUSOMA

LABOUR REVISION NO. 39 OF 2020

(ARISING FROM CMA/MUS/42 OF 2020)

ANDREW JOHN MNDEME..... APPLICANT

VERSUS

SERENGETI SERENA SAFARI LODGE..... RESPONDENT

JUDGMENT

4th October and 21st October, 2021

F. H. MAHIMBALI, J.:

This is an application for revision in respect of the ruling of the CMA that rejected the applicant's prayer for extension of time to refer a labour dispute. This application was brought by way of chamber summons predicated under sections 91(1)(a) and (b) , s. 91(2) (c) , s. 91 (4)(a) (b) , s. 94 (1) (b)(i) of the Employment and Labour Relation Act [NO. 366 R.E. 2019] , Rule 24(1), (2) (a),(b),(c), (d), (e) and (f) , 3(a),(b),(c) and (d) and Rule 28(1) (a), (c), (d) and (e) of the Labour Courts Rules. This application was supported by the affidavit sworn by

the applicant.

The applicant deponed in his affidavit that he was the applicant at the Commission for Mediation and Arbitration Application No. CMA/MUS/42/2020 which decided the matter in favor of the respondent on the 9th day of November, 2020. That in that application at the CMA he was seeking an order for extension of time to file a complaint for unfair termination against the respondent.

He had filed a similar application at the CMA in Arusha and he realised he was transferred to Musoma, hence he had to file another application at Musoma. He has attached the transfer letter in his application.

He further deponed that the cause for his application for extension of time was triggered by the respondent's action of denying him salaries since April, 2019 and precluded him from his NHIF membership while he was attending to medical treatment. He attached copies of the medical certificates and reports. He stated that the CMA did not consider his reason that he was sick and diagnosed with heart problems. He was also advised to go for monthly check up at Jakaya Kikwete Cardiac Institute. He also deponed that he faced economic hardship due to attending medical clinic and that these reasons were beyond human capacity.

On the other hand, the respondent objected to this application through his counter affidavit and deponed that the applicant is put to strict proof.

During the hearing of this matter, the applicant was represented by Advocate Mhagama and the respondent enjoyed the legal services of Advocate, Allen Godian.

Submitting in support of the application, Adv. Mhagama prayed his affidavit be adopted as part of the applicant's submission. He averred that the applicant was employed by the respondent and his duty station was at Arusha and while working at Arusha, the applicant succumbed illness and he was diagnosed with heart disease (while still in employment). As he was undergoing medical treatment, he was transferred to Musoma (Serengeti duty station) unknowingly. The applicant was removed from his payroll and denied his social security payment (NSSF). It later came to the knowledge of the applicant that he was constructively terminated. He filed a complaint at the CMA Arusha where the respondent raised a preliminary objection that the CMA had no jurisdiction as the applicant's duty station was at Musoma. The respondent tendered a transfer letter to substantiate his claim. The applicant objected to this claim but the CMA dismissed the application

for want of jurisdiction. Hence available remedy for the applicant was to file an application for extension of time at Musoma. In the course of preparation for the matter at Musoma, the applicant fell sick again and travelled to Dar es salaam for further medical treatment. He later managed to file the application for extension of time at CMA Musoma but it was dismissed for want of sufficient reasons. His reason for failure to file his application on time is sickness. He deponed in his affidavit at para 6 to 9 it is the applicant's view that the arbitrator erred not to consider that sickness is sufficient reason to grant extension of time.

He further submitted that the applicant has sworn at paragraph 8 that he was advised to attend monthly medical check-up at the hospital and this affected him mentally and financially to handle the matter timely, and sickness is one of the sufficient reasons for extension of time. To cement his submission he cited the case of **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 nobody will fault the applicant for being sick".

He further averred that the CMA erred in not considering sickness as a ground for extension of time. Additionally , in this matter there is no negligence on the part of the applicant in conducting the matter.

Objecting to this application, Advocate Allen submitted that the arbitrator did not error in his ruling as the applicant had not stated any good reason. On his transfer from Arusha to Serengeti was dully communicated to him and the said letter has been attached by the applicant in his application. The applicant was also lawfully terminated on the 27/03/2019 and when he filed this complaint at Arusha it was dismissed for want of merits. He further stated that the applicant has to account for each day of delay and in this case he failed to do so as he was terminated on the 27/03/2019 and his application at Musoma is dated 20/02/2020 (about eleven months). The applicant had a total of 30 days from the date he was terminated. From 27/03/2019 (date of termination) 30 days expired on 26/4/2019. The applicant alleged he was sick and there is medical certificate from JKCI from March 2019. The applicant has not stated from 26/4/2019 up to 2/5/2019 where he was. The medical report from JKCI shows the 30 days given from 3/5/2019 to 3/6/2019. He filed his application at Arusha CMA on 20/10/2019 and it thus makes a total of 137 days in which the applicant failed to account

for. The CMA at Arusha issued their decision on 20/2/2020. From 7/1/2020 to 20/2/2020 there are 43 days and the applicant has not accounted for them. Therefore, there is a total of 187 unaccounted days by the applicant.

He stated further that at paragraph 8 of the applicant's affidavit he swore that he attended monthly medical check-up and it was his view that the check ups are not equal to being sick as to prevent him to attend court. It was his submission that the applicant has not accounted for 137 days and that is enough not to grant him extension of time. To cement his submission he cited the case of **Ramadhani Kihwani v Tazara**, Civil Application No. 401/18 of 2018 at page 9 where the Court of Appeal held;

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken"

He finally prayed this application be dismissed for want of merits.

Re-joining, Advocate Mhagama stated that the above cited case by the respondent, the conditions are not similar with the case at hand and in the same case at page 3 it stated that what entails a good cause is not sufficiently defined, it will depend on circumstances of each case.

It was his view that in the current case the applicant was sick and he had not recovered to pursue the case. He submitted that the letter of transfer and termination letter were not acknowledged by the applicant hence they were not properly communicated. He first filed the application at CMA-Arusha because he was constructively terminated. As already stipulated in para 8 of the affidavit the applicant was sick he could not have taken proper legal course timely. It was his humble prayer that this application be allowed and the decision of the CMA be allowed and set aside.

Having gone through the affidavit, counter affidavit and heard the parties' submissions, it is now for the court of determine if this application has merits. This court will consider whether the arbitrator at the CMA acted judiciously in exercising his power in refusing to grant the applicant extra time to file his dsipute. The law is settled that extension of time is not an absolute right but it is upon judicial discretion and the applicant has to show "good and reasonable cause". This was held in the case of **KALUNGA AND COMPANY ADVOCATES VS NATIONAL BANK OF COMMERCE LIMITED** [2006] TLR 235 at page 235 where the Court of Appeal states;

(i)...the court has a wide discretion to extend time where

the time has already expired, but where there is inaction or delay on the part of the Applicant, there ought to be some kind of explanation or material upon which the court may exercise the discretion given."

It is settled that what amount to sufficient cause is not yet defined. See TANGA CEMENT COMPANY LIMITED VS MASANGA AND AMOS A. MWALWANDA , Civil application No.6 of 2001 where it held;

"What amounts to sufficient cause had not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly , the absence of any valid explanation for delay , lack of diligence on the part of the applicant."

However, there are factors that are used to determine whether the applicant has shown good and reasonable cause such as the length of the delay, whether or not the delay has been explained away, diligence on the part of the applicant and whether there is an illegality in the impugned decision. The above factors were also stated in **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In addition, the applicant has to

account for each day of delay.

In this case, the applicant's cause of delay was sickness and he attached a medical report from Shree Hindu Union Charitable Hospital dated 21/3/2019 where he was given bed rest for one week , another report dated 12/4/2019 where he was excluded from duty for 4 days and a letter from Jakaya Kiwete Cardiac Institute dated 28th September 2019 where he was attending clinic from 3rd May 2019 to date (28th September, 2019) it was recommended that he attends clinic on monthly basis for review. It was the learned arbitrator's view that sickness is not a good cause to warrant the applicant's extension of time as monthly clinic attendance did not hinder the applicant from filing his application on time.

With all due respect, sickness is a ground for extension of time as it is beyond human control. This court is at one with the case cited by the learned advocate for the applicant. That is the case of **Alasai Josiah (suing by his attorney Oscar Sawuka) v Lotus Valley Ltd** , Civil Application No. 498/12 of 2019 at page 8 where the court held ;

"from the above paragraphs, it is my observation that circumstances of the present application are peculiar. Sickness

is beyond human control and therefore nobody will fault the applicant for being sick ...”

The applicant had shown sufficient cause as he was sick. He also has to account for each day of delay, the applicant alleged that he was terminated from work on the 27th March of 2019 and he was supposed to refer his dispute to the CMA within 30 days as per Rule 10(1) of the Labour Institutions Act, 2004 G.N No. 64 of 2007. Therefore, in the case at hand the applicant was supposed to refer his dispute to the CMA on or before 26th April, 2019, but he referred his dispute on the 20th of October, 2019 which was dismissed for want of jurisdiction. This means he was six months and 20 days late to institute his dispute at the CMA. He alleged that he was sick (21/3/2019 – 27/3/2019, 12/4/2019 - 16/4/2019). It is my humble view the dates when he attended clinic from 3/5/2019 are accounted for because he alleged he was sick and the report shows he had to attend a monthly clinic. It is not the duty of this court to dispute that he was sick and the level of sickness on how it hindered him from filing his application on time. Furthermore, attending a monthly clinic is part and parcel of medication.

That said it is the holding of this court that the circumstances of the present application are peculiar. The applicant was sick and in the

due course he was terminated from his employment. As between challenging his employment timely and attending sickness, prudence dictates that attending medication must prevail as done in the present case. For sure, sickness is beyond human control and therefore no body will fault the applicant for being sick (see the case of **Alasai Josiah (suing by his attorney Oscar Sawuka) v Lotus Valley Ltd** , Civil Application No. 498/12 of 2019). There being sufficient proof of his medication as per the said sickness, and subsequent monthly clinics, the court of law must consider it as sufficient legal cause and should hardly close its eyes unless there is a good reason to do so such as elements of fraud and dishonesty in it. As certainly we are not sure to the extent of his medical recovery from the last check up, I am afraid of being so mathematical in the circumstances of this case. The facts of this case being peculiar, the applicant ought to have been considered in the granting of extension of time to file his labour dispute at the CMA. Being gripped by his stated reasons in the affidavit and the manner the application has been argued, the circumstances of this case urge me to exercise the court's discretion cautiously and judiciously. In the circumstances, the decision of CMA is quashed and set aside. The applicant is hereby extended with time to refer his dispute to the CMA

within 42 days from today for it to mediate or arbitrate as per law.

It is so ordered.

DATED at MUSOMA this 21st day of October, 2021.




F. H. Mahimbali

JUDGE

21/10/2021

Court: Ruling delivered this 21st October, 2021 in the presence of Mr. Frank Wilberd Nlakishe, advocate for the Applicant, respondent being absent and Miss Neema P. Likuga – RMA was present.


F. H. Mahimbali

JUDGE

21/10/2021