

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA
(CORAM: LILA, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 142 OF 2019

TATU MGETTA..... 1ST APPELLANT
THEOPISTER ERASTO..... 2ND APPELLANT

VERSUS

MWANZA SATTELITE CABLE TV..... RESPONDENT

[Appeal from the Ruling of the High Court of Tanzania at Mwanza]

(Mgeyekwa, J.)

dated the 21st day of November, 2018

in

Revision Application No. 49 of 2017

JUDGMENT OF THE COURT

30th November & 6th December, 2022

LEVIRA, J.A.:

The labour dispute between the appellants, Tatu Mgetta and Theopister Erasto started sometimes in October 2012 and it persisted till in the year 2017 when the appellants decided to refer it to the Commission for Mediation and Arbitration (the Commission). The appellants' decision came after failure of several attempts to resolve the said dispute between them and the respondent. However, their option to resort to the Commission came late as Rule 10 (1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 (the Labour Rules) requires referral against unfair termination to be filed

within thirty (30) days and for other disputes within sixty (60) days. Thus, since their dispute with the employer took almost five years over and above the prescribed time limitation, they had first to apply for condonation before their complaints could be determined by the Commission, which complaints included salary underpayments by the respondent.

When their application was placed before the Arbitrator, it transpired that the application for condonation was preferred under Form CMA F1 made under the repealed law, the Employment and Labour Relations (Forms) Rules, 2007 - GN. No. 65 / 2007 instead of Form CMA F1 under the Employment and Labour Relations (General) Regulations, 2017 - GN. No. 47/ 2017 which was applicable by then. We observed further that for that reason, the Arbitrator made a remark that the application was improperly before the Commission. Nonetheless, he went on to determine the condonation application on merit and made a finding that the applicants (appellants) had failed to advance sufficient reasons to justify the relief sought. Consequently, he dismissed the application and ordered each party to bear its own costs. Aggrieved, the appellants unsuccessfully appealed to the High Court. In her decision, the learned first appellate Judge was also of the firm view that the appellants had failed to account for each day of delay and therefore, dismissed the

appeal. Still aggrieved, the appellants have preferred this appeal, raising three grounds in the Amended Memorandum of Appeal which mainly fall under a sole complaint that, *the first appellate Judge erred in law to uphold the Arbitrator's decision as she failed to note that having found the application incompetent, the Arbitrator ought to have struck it out instead of dismissing it.*

At the hearing of the appeal, the appellants appeared in person without legal representation and they opted to adopt the contents of their joint written submissions which they had filed in Court on 3rd June, 2019 with no more. On her side, the respondent had the services of Mr. Vedastus Laurean, learned advocate.

We have thoroughly gone through the appellants' written submissions. With respect, we could not find any material relevant to the matter before us. It is our observation that to a large extent, the appellants have tried to express their dissatisfaction with the treatment they got from their employer (the respondent) which ultimately led to their termination from work, which is not the case herein.

In reply, Mr. Laurean supported the appeal straight away as he submitted that it was wrong for the Arbitrator to dismiss the appellants' appeal having made a finding that the same was improperly before the Commission as it was preferred under a wrong Form. According to him,

the Arbitrator ought to have refused to accept the said application Form in terms of Rule 12 (3) of the Labour Rules so as to give the applicants an opportunity to refile their application under a valid Form and not to dismiss it as he did.

He went on to state that, the Arbitrator was also wrong to determine the merits of the application after making a finding that it was improperly before him having been preferred under a wrong Form. In the circumstances, he said, by skipping that stage of refusing to accept the Form (the application for condonation) and continuing to determine the application on merit, the Commission acted beyond what it was expected of it. Therefore, he submitted that the appeal may be allowed on that basis and not on the strength of what the appellants have presented. As a result, he urged us to allow the appeal, nullify the proceedings and quash the decisions of the Commission and the High Court. He further urged the Court to direct that, should the appellants feel that they are still interested to pursue their application, they may file a fresh one in accordance with the law.

Having considered the submissions by the parties, the record of appeal and the appellants' complaint, the issue calling for our determination is whether it was proper for the High Court to uphold the decision of the Commission which determined the appellants' application

for condonation on merits and finally dismissed it while it had already made a finding that the same was improperly before it. We think this issue should not detain us much. It is settled position that a court of law or quasi-judicial board is not enjoined to determine on merit any incompetent matter. In case of any incompetent matter being placed before it, the remedy is to struck out, reject or refuse the same.

Rule 12 (1) - (3) of the Labour Rules provides as follows:

*"12 (1) A party shall refer a dispute to the Commission for mediation by **completing the prescribed form ("the referral document")**.*

(2) The referring party shall –

a) sign the referral document in accordance with rule 5;

b) attach to the referral document, a written proof, in accordance to rule 6, that the referral document was dully served on the other parties to the dispute;

c) if the referral document is filed out of time, attach an application for condonation in accordance with rule 10.

*(3) The Commission shall **refuse to accept a referral document** until the requirements of sub-rule (2) has been complied with." [Emphasis added].*

The above provision is very clear that disputes before the Commission are supposed to be presented in a special Form referred to as a referral document. The said Form is provided under the Employment and Labour Relations (General) Regulations, 2017 (GN. No. 47 of 2017) (the Regulations). However, as intimated above, the appellants preferred their dispute under a wrong Form. This means that their application was improperly before the Commission and thus ought to have been refused in terms of Rule 12 (3) of the Labour Rules, as correctly submitted by the counsel for the respondent. We are settled in our mind that, the Commission misdirected itself to determine the merits of the application which was improperly before it. We may add that since the condonation application before the Commission was found to be improper, it means, there was no application, so to speak, which could have moved the Arbitrator to consider and make a finding that the reasons for the delay advanced were insufficient for the grant of the application. Therefore, it is our considered opinion that the appellants were prejudiced by the decision of the Commission which dismissed their application instead of refusing to accept it so as to avail them an opportunity to file a proper one. In the circumstances, we find that the first appellate court was wrong to uphold the decision of the Commission which was erroneously entered.

We therefore, allow the appeal and proceed to exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [Cap 141 RE 2019] to quash and set aside the decisions of both the Commission and the High Court dismissing the appellant's application for condonation. We vacate the dismissal order and substitute it with refusal under Rule 12 of the Labour Rules. We order that if the appellants are still interested to pursue their matter before the Commission, they may file a fresh referral document (Form) attached with an application for condonation in accordance with the requirements of the law.

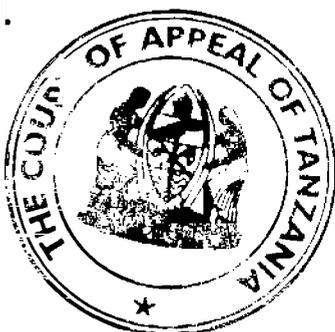
DATED at MWAMZA this 5th day of December, 2022.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 6th day of December, 2022 in the presence of the 2nd appellant in person and absence of the 1st appellant and Ms. Franscisca Ntemi holding brief for Mr. Vedastus Laurean, learned counsel for the respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL