IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 129 OF 2022

(Arising from an exparte Award issued on 11/3/ 2022 by Hon. Nyang'uye, H. A, Arbitrator, in Labour dispute No. CMA/DSM/TEM/133/2020/39/2020 at Temeke)

SIMON LOGISTICS GROUP LIMITED ..... APPLICANT

VERSUS

SERVIN J. MBAGA & 18 OTHERS ..... RESPONDENTS

JUDGMENT

Date of the last order: 26/08/2022
Date of Judgment: 5/9/2022

B. E. K. Mganga, J.

Servin J. Mbaga, Pendo Kasim, Hamisi M. Njowele, Avelinus M. Mzyomboki, Sospeter Wambura, Necto Mbiliwili, Joshua A. patyo, Tobias A. Ponda, Issa Hemedi, Ally S. Chipanga, Josephat Mrecha, Omari Kibiki, Adam Mlonga, Moses M. Lenjia, Sabini J. Dimoso, Lisa C. Enock, Nuru B. Rajabu, Sadick A. Juma and Swaum A. Skaruwanda, the herein respondents were employees of the applicant as security guards. Their employment commenced on different dates, and some were employed for unspecified period while others were employed for fixed term contracts

with the duration of a period between one year and three years. It happened that on 5th July 2019 applicant terminated employment contracts of the respondents allegedly, due to operational requirements. Respondents were aggrieved by the said termination, as a result, on 19th March 2020 they appointed Servin J. Mbaga to file Labour dispute No. CMA/DSM/TEM/133/2020/39/2020 on their behalf before the Commission for Mediation and Arbitration at Temeke complaining that they were unfairly terminated. In the referral form referring the dispute before CMA (CMA F1), respondents indicated that they were claiming to be paid a total of TZS 55,769,806/= being one month salary in lieu of notice, severance pay, one month salary and leave pay.

Being alert that they were out of time, Servin J. Mbaga also filed an application for condonation (CMA F2) together with his affidavit in support of that application. In CMA F2, Servin J. Mbaga indicated that the delay was for 224 days and that reasons for the delay were (i) unfulfilled promises by the employer, (ii) the matter was later referred to the District Commissioner, (iii) the matter was later referred to the Regional Commissioner and (iv) lack of legal adviser. In his affidavit in support for

the application for condonation, Servin J. Mbaga deponed that, after several attempts, they communicated the matter to the District Commissioner and the Regional Commissioner, and that the employer promised to pay their demands within 6 months. He deponed further that, the delay was due to unfulfilled and continued false promises by the Manager and struggling to find rights through other authorities and further that the delay was not due to negligence.

Resisting the application for condonation, applicant filed the counter affidavit of Jesca John Samangu who deponed that employment of the respondents came to an end on 5th July 2019 by mutual agreement and that there was no promise to pay the alleged dues.

On 2nd October 2020 Ngalika E, Mediator, delivered a ruling granting condonation to the respondents. In the said Ruling, the mediator noted that respondents did not account for each day of the delay. Notwithstanding, the arbitrator granted the application based on the ground that parties agreed before the Regional Commissioner that applicant was to pay the respondents within six months.

On 1st June 2021 three issues were drafted namely, (i) whether there were valid reasons for termination, (ii) whether procedure for termination was followed and (iii) to what relief(s) the parties were entitled to. It happened that thereafter applicant failed to enter appearance, as a result, the dispute was heard exparte. On 11th March 2022, Hon. Nyang'uye, H. A, Arbitrator, issued an award that termination of the respondents was unfair and awarded them to be paid a total of TZS 55,769,806/=.

Applicant was aggrieved with the said award hence this application for revision. Doreen Kalugira, Advocate for the applicant filed her affidavit in support of the Notice of Application containing five (5) grounds namely: -

1. *That the Arbitrator erred in law and facts by issuing the award to people who never proved their claims before the Commission.*
2. *That the Arbitrator erred in law and facts by receiving and admitting secondary evidence.*
3. *That the Arbitrator misdirected by issuing an award to the respondents who had been paid by the applicant.*
4. *That the arbitrator erred in law and fact by concluding that the respondents were procedurally terminated.*
5. *That the arbitrator erred in law and facts by deciding the matter that was out of time hence lacked jurisdiction.*

In countering the application, respondents filed both the Notice of Opposition and the joint counter affidavit.

When the application was called on for hearing, Doreen Kalugira and Habibu Kasimu, learned Advocates appeared and argued for and on behalf of the applicant while Mr. Denis Dendela, learned Advocate appeared for and on behalf of the respondent.

During hearing, Ms. Kalugira, advocate for the applicant dropped grounds No. 3 to 5 and argued only the 1st and 2nd grounds.

Submitting on the 1st ground, Ms. Kalugira argued that Rule 28(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 requires that even if the dispute is heard exparte, the party is required to prove the case by presenting opening evidence and any argument in support of the case. She argued further that, the issue was whether, respondents were employees of the applicant and therefore, respondents had a duty to prove that they were employees of the applicant. She went on that, in the CMA proceedings, only one Servin Mbaga (Pw1) testified. She argued that, in his evidence, PW1 did not adduce evidence touching on employment and evidence of all respondents

hence evidence of PW1 did not prove that all respondents were employees of the applicant. Ms. Kalugira submitted further that, PW1 tendered employment contracts of six (6) respondents as exhibit P1 collectively. She argued that exhibit P1 was illegally admitted without being read out. She cited the case of ***Godfrey Isdory Nyasio v. Republic***, Criminal Appeal No. 270 of 2017 CAT (unreported) to support her arguments. She argued further that, the said contracts of six respondents did not prove that all respondents were employees of the applicant.

Counsel for the applicant submitted further that, PW1 also tendered a letter for retrenchment as exhibit P2 without also being read. She submitted further that, evidence of PW1 is contradictory because he testified that there was no consultation meeting or notice but exhibit P2 refers to the meeting and notice that was issued.

Ms. Kalugira, learned advocate for the applicant, submitted further that, the issue whether, there was valid reason for termination was wrongly framed. She argued that in the form referring the dispute at CMA (CMA F1), respondents indicated that they were not given any reason.

Submitting on the 2nd ground, Ms. Kalugira, argued that the arbitrator erred in receiving and admitting secondary evidence. She submitted that all exhibits i.e., payments (exh. P2 and P3) are photocopies and were admitted in violation of the provision of Section 66 of the Evidence Act [Cap. 6 RE. 2019] and that procedures for tendering secondary documents were not complied with. She cited the case of ***Daniel Apael Urio V. Exim (T) Bank***, Civil Appeal No. 185 of 2019 CAT (unreported) and submitted that respondents had a duty to explain the whereabout of the original and serve the applicant with a notice to produce. She concluded by submitting that since the procedure to tender secondary document were not complied, those secondary documents should be expunged. In her submissions, she went on that, respondents were paid one month salary in lieu of notice, severance pay, leave and one month salary

Before counsel for the applicant wound up her submissions, the court asked her to address on whether the application for condonation was properly granted. Responding on this issue, Ms. Kalugira submitted that condonation was not properly granted because the delay was not accounted for. She argued that reasons advanced by the respondents in

the affidavit in support of the application for condonation are not sufficient reasons.

Mr. Dendela learned advocate for the respondent in reply opted to start with the issue of condonation raised by the court. He submitted that condonation was properly granted. Mr. Dendela submitted that respondents were out of time for 224 days because applicant promised them as per exhibit P2 and P3, but she did not honour the promise. Counsel submitted further that, respondents delayed filing the dispute because they went to see the District Commissioner and the Regional Commissioner to solve the dispute and further that they had no legal adviser. Mr. Dendela submitted further that applicant did not file an application at CMA to set aside the said exparte award. Therefore, she cannot complain that the award was wrongly issued. During submissions, Mr. Dendela conceded that applicant is not challenging the procedure used by the respondents to obtain the award, but challenges substances of the award and that this application was properly filed.

Responding to the 2nd ground, Mr. Dendela submitted that documents that were tendered were original thereafter respondents took

original and retain copies in the CMA file. He argued that it is not true that respondents tendered copies. But during submissions, he conceded that CMA proceedings does not reflect that originals were tendered and thereafter respondents substituted with copies.

Responding to the 1st ground, Mr. Dendela learned counsel for the respondents submitted that PW1's evidence covered all respondents. He submitted further that respondents were awarded the amount that the applicant indicated earlier and promised to pay them. He distinguished the cases cited by Counsel for the applicant because they relate to criminal cases while this is a labour matter. He concluded that the award was properly issued and prayed the application be dismissed.

In rejoinder, Mr. Kasimu learned counsel for the applicant reiterated submissions made in chief by Ms. Kalugira. He maintained that there was no valid reason for grant of condonation because District and Region Commissioners are not the proper forum.

I have examined the CMA record and considered submissions made on behalf of the parties in this application and I wish to start with the issue that was raised by the court namely whether the application for

condonation was properly granted or there were grounds justifying the grant of condonation.

It was submitted by counsel for the applicant that there was no justification for the grant of condonation because reasons that respondents tabled the dispute before both the District Commissioner and the Regional Commissioner were not good cause for the delay as the two officials are not the proper forum. It was further submitted that respondents did not account for the delay of 224 days. On the other hand, counsel for the respondents submitted that condonation was properly granted as respondents justified for the delay because they took the matter to the two aforementioned officials and further that they had no legal adviser.

For condonation to be granted, applicant must adduce evidence showing that there was good cause for the delay as it is provided for under Rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, GN. NO. 64 of 2007. The word good or sufficient cause was discussed in the case of ***Dephane Parry v. Murra [1963] EA 545*** wherein it was held: -

"…Though the court should no doubt give a liberal interpretation to the words "sufficient cause' its interpretation must be in accordance with judicial

principles. If the appellant has a good case on the merit but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

In the application at hand, counsel for the respondents submitted that there was sufficient cause for the delay because applicant promised to pay the respondents and further that they took the matter to administrative officers and that they had no legal adviser. With due respect to counsel for the respondents, in my view, those are not good grounds for extension of time. It has been held several times that out of court settlement cannot be a ground for condonation or extension of time. In the case of ***M/s. P & O International Ltd v. the Trustees of Tanzania National Parks (TANAPA),*** Civil Appeal 265 of 2020) [2021] TZCA 248 (unreported) the Court of Appeal held that: -

"It is trite that pre-court action negotiations have never been a ground for stopping the running of time…the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties…negotiations or communications between the parties…did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by the law within which to mount an

action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time."

It is my view that lack of legal adviser cannot be a ground for extension of time because it is presumed that everyone knows the law. I have examined the affidavit that was filed by Servin J. Mbaga in the application for condonation and find that he did not explain as to when he secured the legal adviser for the court to see that initially the delay was due to lack of legal adviser. In absence of that disclosure, it cannot be ascertained that the delay was due to lack of legal adviser.

It was submitted by counsel for the applicant that in terms of Rule 28(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 respondents were required to prove that they were employees of the applicant since that was one of the issues drafted. With due to respect to counsel for the applicant, I have examined the CMA record and find that on 1st June 2021 three issues namely (i) whether there was valid reason for termination, (ii) whether procedures for termination were complied with and (iii) to what relief(s) are the parties entitled to. These issues were drafted in the presence of Richard Kafulila, the applicant's legal officer. The issue whether respondents were employees

of the applicant or not, was not amongst the issues drafted in presence of the parties. That issue was wrongly drafted by the arbitrator at the time of composing the award.

It was submitted by counsel for the applicant that Servin J. Mbaga (PW1) did not adduce evidence touching his co-respondents and that he tendered only six (6) contracts of employment of the respondents as exhibit P1 collectively. I have examined the CMA record and find that PW1 tendered six (6) contracts of employment for (i) himself, (ii) Hemedi Ndalama, (iii) Moses Muhomba Lenjia, (iv) Avelinus Mfaume Mzyomboki, (v) Adam Julius Mlonga and (vi) Ally said Chipanga all being one-year fixed term contract with different commencement dates and different monthly salary. I have noted also that the fixed term contracts of (i) Josephat Charles Marecha, (ii) Sospeter Wambura, (iii) Netco Rasmosi Mbiliwili and (iv) Hamis Mussa Njowela though are in the CMA record were not marked as admitted as exhibits hence they are not evidence. Apart from the foregoing, there is no employment contracts of the eight (8) other respondents. Since only six contracts of employment were tendered and admitted as exhibit P1collectively, there is no evidence relating to the rest

respondents. It was an error on part of the arbitrator to award all respondents without evidence.

It was submitted by counsel for the applicant that exhibits were tendered without being read over. It is true that the record does not show that all exhibits that were tendered were not read over. It was submitted by counsel for the respondents that the cases cited by counsel for the applicant are applicable only in criminal cases and not in labour cases. I have noted that there is no much contention of the requirement of reading the exhibits. It is my view that exhibits are read to enable the other party to know its contents and prepare for the defence. In the application at hand, the dispute was heard in absence of the applicant hence reading or failure to read those exhibits served nothing. At any rate, counsel for the applicant did not submit how that omission prejudiced the applicant. I therefore find that this ground lacks merit.

Counsel for the applicant submitted that PW1 gave contradictory evidence that there was no consultation meeting or notice but exhibit P2 refers to the meeting and notice that was issued. I have carefully read evidence of PW1 and find that he stated that there was no consultation but

that respondents were served exhibit P2 showing that they were consulted, and that consultation meeting were held. In my view, there is no contradiction.

It was also submitted by counsel for the applicant that the issue whether, there was valid reason for termination was wrongly framed but during submission, counsel referred to CMA F1 wherein respondents indicated that they were not given reasons. As pointed hereinabove, this issue was drafted by the parties on 1st June 2021, hence arbitrator cannot be faulted. More so, I don't see reason and logic for this complaint if the CMA F1 shows that respondents indicated that there was no valid reason for termination. Raising the issue relating to availability of reason for termination was proper in my view, so that respondents can adduce evidence showing that there was no valid reason for termination of their employment.

It was submitted by counsel for the applicant in the 2nd ground that arbitrator erred in law and fact by accepting and admitting exhibits P2 and P3 that are photocopies without following the procedures provided for under the law. It was submitted by counsel for the respondents that

respondents tendered original documents and thereafter took the originals and retain copies in the CMA file. But during his submissions, counsel for the respondents conceded that CMA proceedings does not reflect that originals were tendered and thereafter respondents substituted with copies. I agree with counsel for the applicants that the procedure provided for under the law was not adhered to. I allow this ground.

For all explained hereinabove and, in the upshot, I allow this application, quash, and set aside the CMA award.

Dated at Dar es Salaam this 5th September 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 5th September 2022 in chambers in the presence of Doreen Kalugira and Habib Kassim, Advocates for the applicant and Servin Justine Mbaga, the respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) Labour Division DIVISHENI YA MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE