IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 31 OF 2018

BETWEEN

GABRIEL P. MAKUNDI ..... APPLICANT

VERSUS

S.E.C (EAST AFRICAN) COMPANY LIMITED ..... RESPONDENT

JUDGMENT

Date of Last Order: 04/06/2020

Date of Judgment: 26/06/2020

S.A.N. Wambura, J.

Aggrieved by the ruling of the Commission of Mediation and Arbitration [herein to be referred to as CMA] in the Labour Dispute No. CMA/DSM/ILA/R.412/533/15 dated 19/06/2017 which dismissed his application or condonation for lack of merit, the applicant **GABRIEL P. MAKUNDI** has filed this application praying for:-

1. *That the Honourable Court be pleased to revise the ruling of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/R.533/2015.*

2. *That upon revising the CMA proceedings, decision and orders thereof, this Honourable Court be pleased to issue an order setting aside and quashing the ruling which has been improperly and illegally procured.*

3. *Any other order(s) that this Honourable Court deems fit and just to grant.*

It is supported by his sworn affidavit.

Challenging the application, the respondent **S.E.C (EAST AFRICAN) COMPANY LIMITED** filed a counter affidavit sworn by Emmanuel Dismas Kisusi, their Advocate. The applicant was represented by Mr. Abogast Advocate.

With leave of the Court the matter was disposed of by way of written submissions. I thank both Counsels for adhering to the schedule and for their submissions.

In support of the application the applicant's Counsel submitted that the arbitrator misled himself by ignoring all the reasons stated by the applicant to justify his lateness. That the arbitrator started to count the delay from December, 2006 to 2013, while the applicant prayed for

condonation on 5th January, 2007 when CMA came into force. That CMA had no mandate to decide on matters which happened before it came into existence. CMA came into force on 5th January, 2007 through GN No.1/2007. That the law does not operate retrospectively, citing the case of **The Principal Secretary, Ministry of Defence and National Service v Duram P. Valambia** (1992) TLR 185 CAT, as quoted in the case of **Sepideh & Another v Yusuph Mohamed Yusuph & Another**, Civil Application No. 91 of 2013.

That one among the reasons adduced by the applicant is that the actual financial and audited accounts, were never tabled for the applicant to ascertain the accuracy and legality of what he was being paid irrespective of various promises. The applicant was not sure if he was paid correctly or not. That is why he was insisting for the audited financial account and statements which were not tabled. That the applicant was still in service of the respondent, therefore he had legitimate expectations that the matter will be resolved internally as promised.

It was further submitted that the respondent failed to honor his promises. The applicant thus referred the matter to Constructors

on 8th July, 2015 in the applicant's absence. This is because the venue was changed in the last minute and relocated to Nikko Tower Hotel without the applicant being informed. He therefore decided to knock at the doors of CMA seeking condonation. This was on 18th September, 2015. Therefore the issue of accounting on each day of the delay cannot stand as the applicant was waiting for the audited accounts to be presented in the board meeting, and it was not disputed by the respondent that he promised the applicant that he would issue financial accounts and financial statement at the Board meeting.

The applicant's counsel further submitted that extension of time is a judge's, magistrate's and arbitrator's discretion. That every case should be treated on its own merit referring the cases of **Tanzania Ports Authority v Pembe Flour Mills Ltd,** Civil application No. 49/2009, and **Royal Insurance Tanzania Limited v Kewangwa Strand Hotel Limited**, Civil Application No. 111/2009. That in the **Royal Insurance case** (supra) the court considered various factors to be taken into account in granting extension of time. The applicant deserved to be condoned due to the circumstances of the delay itself and it will not prejudice the respondent in anyway.

That, the labour law jurisprudence provides that matters are not guided by fast and hard technicalities, citing Section 88(4) (b) of Employment and Labour Relations Act Cap. 366 RE. 2019 to that effect.

He thus prayed for the revision and setting aside of the CMA's ruling.

In response to the applicant's contentions, the respondent prayed to adopt the counter affidavit of Emmanuel Dismas Kisusi to form part of his submissions. He submitted that the application for revision is time barred according to Section 91(1) (a) of Cap. 300 RE. 2019. That no notice to seek revision of CMA's award was even issued by the applicant as required by Regulation 37(1) of GN 47 of 2017.

It was further submitted that the duration of referring an application for revision of CMA's award is six (6) weeks. The applicant received the impugned award on 1st January, 2018 and filed this application on 25/01/2018. The application was filed contrary to the time required by the law. The applicant referred to the cases of **Precision Air Services Limited v Janeth Matola,** Rev. No. 272 of 2010 HCLD (unreported) and **Serengeti Breweries Limited v Joseph Boniphace,** Rev. No. 133 of 2017 to that effect.

The respondent's counsel contended that CMA rightly dismissed the application for condonation on the ground that the delay was due to the dilatory conduct of the applicant. That the applicant failed to adduce sufficient reasons for the delay, and did not account for each day of the delay. Since the applicant failed to do so, then the result was dismissal as was held in the case of **Juma Masunga Mayenga v Kembo Matulanga Mpagulwa,** Rev. No. 56 of 2018. That, according to Rule 31 of GN 64 of 2007 the dismissal of the applicant's application for condonation was according to the law and for the best interests of justice.

He thus prayed for dismissal of the application.

Having gone through the contesting submissions of the parties, I believe this court has to determine the following issues;

i. Whether the application for revision was timely filed.
ii. Whether the applicant had sufficient cause to suffice the grant of condonation.

1. Was the application for revision timely filed?

It was the respondent's contention that the application for revision was filed out of the statutory six (6) weeks as provided by the law, hence the application is time barred.

Section 91(1) (a) of Cap. 366 RE. 2019 provides;

> *"Section 91(1)* ***Any party*** *to an arbitration award made under section 88(8)* ***who alleges a defect in any arbitration proceedings*** *under the auspices of the Commission* ***may apply to the Labour Court for a decision to set aside the arbitration award-*** *Revision of arbitration award;*
>
> *(a)* ***within six weeks of the date that the award was served on the applicant unless*** *the alleged defect involves improper procurement;"*
>
> *[Emphasis is mine].*

This position was properly interpreted by the Court of Appeal in the case of **Serengeti Breweries Limited v Joseph Boniphace,** Civil Appeal No. 150 of 2015, where it was held that:-

> *"...in the light of the cited decisions, the plain and clear meaning of Section 91(1) of ERLA is that,* ***the limitation period of six weeks begins to run against the applicant after the award is served on***

the applicant. *The law is so couched because it is not open to the applicant to know if he is aggrieved with the award unless it is served to the applicant."*

[Emphasis is mine].

It is on record that the ruling was issued on 16th September, 2017 and the applicant obtained a copy of the ruling on 9th January, 2018 as stated by the applicant at paragraph 13 of his affidavit, and an annexed copy from CMA's register book (Annexure MP4). That is not disputed by the respondent. This application was filed on 25th January, 2018. Basing on the position of the law as stated above, it is obvious that from the day the applicant received CMA's ruling to the date of filing, it was almost three (3) weeks. That means this application was timely filed.

2. Did the applicant adduce sufficient cause to suffice the grant of condonation?

Limitation of filing other disputes before CMA is provided for under Rule 10 (2) of the **Labour Institutions (Mediation and Arbitration) Rules**, 2007 (GN 64 of 2004) which provides that:-

"Rule 10 (2) All other disputed shall be referred to the Commission within ***sixty days from the date when the dispute arised."***

[Emphasis is mine].

There is no doubt that CMA can grant an extension of time for one to file his/her application out of time under Rule 31 of GN No. 64 of 2004. However, this can only be done where the applicant has adduced sufficient cause. What amounts to sufficient or good cause has been discussed in a number of cases including the case of **Attorney General V Tanzania Ports Authority & another,** Civil Application No. 87 of 2016 which stated that:-

"Good cause includes whether the application has been ***brought promptly, in absence of any invalid explanation for the delay and negligence on the part of the applicant."***

[Emphasis is mine]

Again in the case of **Oswald Masatu Mwizarubi v. Tanzania Fish Processors Ltd**; Civil Application No. 13 of 2010 (unreported) it was held that:-

"The term good cause is a relative one and is dependent upon the circumstances of each individual case. It is upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

In the instant matter CMA dismissed the application for condonation on the ground that, the applicant had not adduced sufficient reasons and had failed to account on each day of the delay, which was of about ten (10) years.

The applicant's reasons for the delay are that the actual financial and audited accounts, were never tabled for the applicant to ascertain the accuracy and legality of what he was being paid irrespective of various promises from Mr. Tian; He unsuccessfully referred the matter to Constructor's Registration Board (CDB) on 8th August, 2013. That he was patiently waiting for Mr. Tian to keep his promise but later he decided to seek for his rights before CMA. That was in 2015.

It is obvious that from 2006 the applicant knew that he was underpaid as he stated in paragraph 6 of his affidavit. Since 2006 he

refused the payment as they were contrary to the agreement. Yet he decided to be patient until 2015.

I find the delay to be too long and it was caused by his own dilatory and lack of diligence. Since he had a chance of finding other means of claiming for his right despite of waiting for the promise to be realized. The fact that the arbitrator counted the delay from 2006 before the establishment of CMA notwithstanding, in the sense that it would not change the time when the cause of action arose. If the argument is that CMA was established in 2007 why did he not file the same then or why did he not appeal to the board if the venue was changed unexpectedly?

It is a principle of law that, when applying for extension of time, the applicant has to account on each day of the delay. This position has been emphasized in various court decisions such as in the case **Sebastian Ndaula Vs. Grace Rwamafa**, Civil Application No. 4 of 2014, at Bukoba, [unreported] where Juma, JA (as he then was) held that:-

> *"The position of this Court has constantly been to the effect that in an application for extension of time, the applicant has to account for every day of the delay."*

Similarly in the case of **Bushiri Hassan V. Latifa Lukio Mashayo,** Civil Application No. 3/2007 (unreported) it was held that:-

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

Again in the case of **Tanzania Fish Processors Ltd v Christopher Luhangula,** Civil Appeal No. 161/1994, CAT at Mwanza it was held that:-

> *"the question of limitation of time is a fundamental issue involving jurisdiction...it goes to the very root of dealing with civil claims, limitation is a material point in the speedy administration of Justice.* ***Limitation is there to ensure that a party does not come to court as and when he chooses."***
>
> *[Emphasis is mine].*

The applicant has failed to adduce sufficient reasons and to account on each day of the delay in the period of almost ten (10) years.

I thus find no need to fault the arbitrator's ruling. I herein dismiss the application for want of merit.

S.A.N. Wambura
JUDGE
26/06/2020

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 31 OF 2018

BETWEEN

GABRIEL P. MAKUNDI ..... APPLICANT

VERSUS

S.E.C (EAST AFRICAN) COMPANY LIMITED.... ... RESPONDENT

Date: 26/06/2020

Coram: Hon. W.S. Ng'humbu, Deputy Registrar

Applicant:

For Applicant: Mr. George Shayo holding brief for Arbogast Mseke - Advocate

Respondent: Absent

For Respondent:

CC: Lwiza

COURT: Judgment delivered this 26th June, 2020 in the presence of Mr. George Shayo, Learned Counsel holding brief for Mr. Arbogast Mseke Learned Counsel for the applicant and in the absence of the respondent is certified true copy of the original.

W.S. Ng'humbu

DEPUTY REGISTRAR

26/06/2020