IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 329 OF 2021

(*Originating from the Ruling of the Commission for Mediation and Arbitration at Ilala in Labour Dispute No. CMA/DSM/ILA/40/21, Hon. M. Chengula, Mediator, dated 20th August 2021*)

BETWEEN

BROOKLYN MEDIA (T) LTD ..... APPLICANT

AND

BAKARY ALLY MZEE..... ..... RESPONDENT

JUDGMENT

Date of last order: 0803/2022
Date of Judgment: 8/4/2022

B. E. K. Mganga, J.

Brief facts of this application are that; respondent had a fixed term contract with the applicant expiring on 30th June 2020. That, on 26th May 2020, respondent was instructed by the applicant to go for annual leave but on 2nd July he received a letter terminating his contract of employment. Aggrieved by termination of his employment, on 23rd February 2021, respondent filed a referral of a dispute to the Commission for Mediation and Arbitration (CMA) complaining that the

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respondent terminated his employment on 2nd July 2020 unfairly. In the CMA F.1, respondent showed that he was claiming to be paid severance pay, leave pay and one month salary in lieu of notice. In the said CMA F1, respondent did not show the amount he was claiming. Together with the CMA F. 1, respondent applied for condonation by filing both CMA F.2 and an affidavit in support of the application for condonation. In the affidavit in support of the application for condonation, applicant stated that he was shocked with termination of his employment and that he did not know what he was legally required to do to seek justice, as a result he decided to consult his lawyer. That, he was advised by his lawyer to try to negotiate with the applicant and that the delay was due to lack of knowledge.

On the other hand, applicant filed the notice of opposition and the counter affidavit affirmed by Yusuf Washokera, the Managing Director of the applicant resisting the application. In the counter affidavit, the deponent stated that the fixed term contract of employment of the respondent expired automatically on 30th June 2020.

Having heard submissions of both sides, Hon. M. Chengula, Mediator, on 20th August 2021, granted the respondent condonation. In the ruling granting condonation, the arbitrator held that in terms of Rule

31 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007, CMA can grant condonation upon good cause being shown. The arbitrator held that respondent was making follow up trying to settle the dispute with the applicant, delay is not inordinate and that there are high chances of success.

Applicant was aggrieved by the said ruling hence this application seeking the court to revise the said ruling based on the following grounds:-

1. *That the mediator erred in law and fact to Condone application which was based on lack of knowledge how to pursue the remedies and attempt of negotiations to settle the matter.*
2. *That the mediator erred in holding that one month and two days delay is not inordinate.*
3. *The mediator erred in law and fact by relying on chances of success without considering reasons for delay advanced in CMA F2.*

Respondent filed a counter affidavit opposing the application. In his counter affidavit, respondent stated that there was negotiation between applicant and respondent and further that applicant instituted a criminal case at police as a result several meetings were held at police between applicant and respondent.

By consent, the application was argued by way of written submissions. In the written submissions, applicant enjoyed the service of

David Andindilie, learned counsel while applicant enjoyed the service of Daudi Mzeri, learned counsel.

Arguing the application on behalf of the applicant, in his written submissions, Mr. Andindilile, learned counsel submitted that in application for condonation, sufficient reason for delay must be shown. He submitted that lack of knowledge advanced by the respondent is not sufficient reason. He cited the case of ***Ngao Godwin Losero v. Julius Mwarabu, Civil Application No. 10 of 2015, CAT,*** Arusha (Unreported) to bolster his argument.

On the 2nd ground relating to negotiation, counsel for the applicant submitted that there was none. He argued further that, respondent was supposed to consider that limitation law does not stop by negotiation out of court. Counsel cited the case of ***M/s. P & O International Ltd v. the Trustees of Tanzania National Parks (TANAPA), civil Application No. 265 of 2020***, CAT (unreported) and the High court decision (Kalegeya, J, as he then was) in the case of ***Makamba Kigome & Another v. Ubungo Farm Implements Limited & PRSC, Civil case No. 109 of 2009*** (unreported) quoted in ***TANAPA's case*** (supra) to support his argument.

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On the ground relating to the holding that the delay was not inordinate, and that respondent had chance of success, counsel for the applicant submitted that mediator was supposed to consider what is provided for under Rule 11 of the Labour Institutions (mediation and Arbitration) Rules, GN. No. 64 of 2007 in totality and not in isolation. He went on that, even if a party might have chance of success, he must adduce sufficient reason for the delay. Counsel cited the case of ***Dephane Parry v. Murra [1963] EA 545*** to cement on his argument. Counsel further cited the case of ***Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni, Civil ppeal No. 19 of 2016*** (unreported) wherein the court of appeal held that "however unfortunate it may be for the plaintiff, the law of limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web".

Responding to the applicant's written submissions, Mr. Mzeri, learned counsel submitted that, the application at hand is not maintainable because it is interlocutory not subject for being revised in terms of Rule 50 of the Labour Court Rules, GN. No. 106 of 2007 (supra). Counsel for the respondent submitted that respondent applied for condonation and

that the same was granted upon good cause being shown and that the grant of condonation did not determine the matter to its finality.

Counsel for the respondent submitted further that, reasons advanced by the respondent namely, striving to settle the matter out of court was a good cause hence, the mediator exercised discretion in granting the application judiciously under Rule 11 of GN. No. 64 of 2007 (supra).

In rejoinder submission, counsel for the applicant submitted that application for condonation and the subsequent complaint are two different things although are filed together because they bear different numbers. He argued that if condonation is granted, the file moves from the mediator to the arbitrator. He maintained that application for condonation is concluded after a ruling being issued. Counsel reiterated his submission in chief that there was no good cause for the mediator to grant condonation.

I have passionately considered submissions by counsels in this application. I should commend them for being well focused and helpful. Having considered their submissions, I have found that it is important to dispose first the issue raised by counsel for the respondent in relation to competence of this application. It was submitted that the application is

incompetent because the ruling of the mediator is interlocutory not subject to revision in terms of Rule 50 of GN. No. 106 of 2007 (supra). But counsel for the applicant was of different view. It is my considered opinion that application for condonation is a separate application. It is normally demined to its finality once a ruling is delivered either granting or dismissing the application. I am of that view because in application for condonation the issue that has to be determined by CMA is whether there are good cause for delay for the application to be granted or dismissed. Once the application is granted or dismissed, then, that becomes the end of the application. Nothing can be left for it to be said that it has not been finally determined. If the application is dismissed, the applicant can file application for revision before the High court and that is acceptable. The logic is simple, that is to say, the application was decided to its finality against the applicant. By parity of reason, if the application for condonation is decided against the respondent, then, it is also decided to its finality, and therefore, respondent had an option to file application for revision. To hold otherwise, in my view, is treating the parties in the same application with double standard namely granting applicant right to appeal but denying the same right to the respondent. In my view, parties in the same proceedings must be treated equally.

The test whether an order or ruling is interlocutory or not, was given by the Court of Appeal in the case of ***Tanzania Motor Services Ltd & Another v. Mehar Singh t/a Thaker Singh, Civil Appeal No. 115 of 2006***, wherein it held that:-

> *"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to betreated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."*

From what I have explained, I'm of the view that, the order granting condonation is not interlocutory. We cannot allow one party, namely, the applicant if it is decided against him to file an application for revision but denying the respondent that opportunity. I therefore overrule the preliminary objection raised by the respondent.

Now back to the grounds of revision raised by the applicant. The reason advanced by the respondent for the delay was lack of knowledge and negotiation between the parties to settle the matter. Counsel for the applicant submitted that, this is not a sufficient ground. Counsel for the respondent submitted that there was good cause for the delay. In my view, these are not good cause for the delay justifying condonation to be granted. As correctly submitted by counsel for the applicant, it was held by the Court of Appeal in ***Ngao's case*** (supra) that ignorance of

the law has never been a good cause for extension of time. It was also held in ***TANAPA's case*** (supra) cited by counsel for the applicant that pre-court negotiations has never been a ground for stopping the running of time. In ***TANAPA's case*** (supra) the Court of Appeal held:-

> *"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 retarder 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 was held by the mediator that respondent had chances of success. This holding was strongly criticized by counsel for the applicant arguing that at first, respondent was supposed to show sufficient cause for the delay. I entirely agree with counsel for the applicant. A similar issue was discussed and held in Parry's case (supra), as follows:

> *"...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*

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dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

I am of the view, that chance of success alone cannot be a ground for condonation, otherwise, parties will stay with their claims for years and years and thereafter file an application based on chance of success. That will be circumvention of the law of limitation and policy behind it, which, in my view, cannot be accepted.

In the up short, I find that there was nothing material to justify grant of condonation. I therefore allow the application, revise, quash, and set aside the ruling granting condonation to the respondent.

Dated at Dar es Salaam this 8th April 2022.

B.E.K. Mganga
JUDGE

Judgment delivered on this 8th day of April 2022 in the presence of David Andindilile, counsel for the applicant and Daud Mzeri, counsel for the respondent.

B.E.K. Mganga
JUDGE

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

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