

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 116 OF 2023

(Arising from a Ruling delivered on 21/4/2023 by Hon. Mbunda, P.J, Arbitrator in Labour dispute NO. CMA/DSM/KIN/81/2023 at Kinondoni)

NEXIA S.J. TANZANIA APPLICANT

VERSUS

SUZAN FURAHA LUGOE RESPONDENT

JUDGMENT

*Date of last Order: 05/07/2023
Date of Judgment: 19/07/2023*

B. E. K. Mganga, J.

Facts of this application briefly are that, on 6th October 2021, Suzan Furaha Lugoe, the herein respondent signed a two years fixed term contract of employment with Nexia SJ Tanzania, the herein applicant as Audit System Associate. In the said contract, the parties agreed that the said contract will commence on 20th October 2021 and that, respondent will be under probation for six months from the date of commencement of the contract. The two enjoyed their employment until

on 29th September 2022 when applicant served respondent with a letter showing that her employment will be terminated on 30th October 2022. On 30th October 2022, respondent's employment came to an end.

On 8th February 2023, respondent filed Labour dispute No. CMA/DSM/KIN/81/2023 before the Commission for Mediation and Arbitration (CMA) at Kinondoni complaining that her employment was both substantively and procedurally unfairly terminated. In the Referral Form (CMA F1), respondent indicated that she was claiming to be paid TZS 14,680, 000/= being compensation for unfair termination for two years and severance pay. In part A of the said CMA F1, respondent indicated that the dispute arose on 29th September 2022 but in part B of CMA F1 she indicated that termination was on 30th September 2022. Respondent being out of time, filed also an application for condonation (CMA F2) supported by her affidavit. In the said CMA F1, respondent indicated that she was out of time for eighteen months. Reasons that were advanced by the respondent to implore the arbitrator to grant condonation are that due to termination of her employment, she became confused as a result she lost/ misplaced termination letter. She stated further that in December 2022, she consulted Optima Law Chambers for legal advice, and she was advised that she had to file an application for condonation because she was out of time. She also

stated that, she was advised by lawyers from the aforementioned chambers that since lawyers were preparing for annual leave as per High Court Calendar, she should wait until they are back in January 2023.

In opposing the application for condonation, applicant filed the counter affidavit sworn by Christina Christopher Rweyemamu, her principal officer. In her counter affidavit, Christina Christopher Rweyemamu, deponed inter-alia that respondent did not adduce sufficient or reasonable grounds for condonation to be granted and that she failed to account for each day of the delay.

On 21st April 2023, Hon. Mbunda, P.J, arbitrator, having considered evidence of the parties in both the affidavit and the counter affidavit and submissions thereof, delivered a ruling granting condonation. In the said ruling, the arbitrator found that respondent lost termination letter and reported at police and further that it was a mistake of the advocate who advised her to wait, and that respondent cannot carry the burden of the mistakes of her lawyers. In the said Ruling, the arbitrator found that the dispute arose on 29th October 2022 and that respondent filed the dispute at CMA on 8th February 2023 while being out of time for 102 days but concluded 17 days of delay are

reasonable days to grant condonation given circumstances of the application.

Applicant was aggrieved by the said ruling hence this application for revision. In support of the Notice of Application, applicant filed the affidavit of Christina Christopher Rweyemamu. In the said affidavit, applicant raised two grounds namely: -

- i). That, the Arbitrator erred in law and fact in holding that respondent adduced good grounds for the delay.*
- ii). That, the Arbitrator erred for not evaluating evidence of the applicant properly.*

Respondent filed her counter affidavit to resist the application on ground that it lacks merit.

When the application was called on for hearing, Mr. Benard Chuwa, learned Advocate, appeared and argued for and on behalf of the applicant while Patricia Pius and Richard Eusebio, learned Advocates, appeared and argued for and on behalf of the respondent.

Arguing the 1st ground in support of the application, Mr. Chuwa, learned counsel for the applicant submitted that, condonation is not a matter of formality because in the application for condonation, applicant must show good grounds for the delay. Counsel argued that the reason for the delay that was advanced by the respondent was that she lost her

termination letter and that, her lawyer advised her to wait until after vacation period. Counsel went on that, losing termination letter does not amount to good ground for condonation because the matter could have been filed even in the absence of termination letter. He argued that CMA F1 does not require attachment of termination letter, but it only requires a person to fill the date of termination. He strongly submitted that, the reason that respondent was advised by her lawyer to file an application for condonation after being out of time, is not a good ground for condonation. He referred to the case of **M/S P&O International Ltd V. The Trustees of Tanzania National Parks (TANAPA)**, Civil Appeal No. 265 of 2020, CA (unreported) to support his submissions that out of Court negotiation cannot stop time to run.

Mr. Chuwa submitted further that; the Arbitrator held that respondent should not be punished for negligence of her advocate. He strongly submitted that, Advocates were supposed to file the application and then go for the vacation. He cited the case of **Zuberi Mussa V. Shinyanga Town Council**, TBR Civil Application No. 3 of 2007, CAT (unreported) to support his submissions. Counsel conceded that, in paragraph 8 of the respondent's affidavit in support of the application, respondent did not state that her advocates were negligent rather, that due to the facts that her advocates were on vacation.

Counsel for the applicant submitted further that, respondent did not account for each day of delay. He went on that, the arbitrator found that respondent accounted for 100 days and failed to account for 17 days and that 17 days were not inordinate. Counsel for the applicant cited the case of ***Standard Chartered Bank (T) Ltd V. Mkingwa Stephen Mkingwa***, Revision Application No. 278 of 2021 HC (unreported) to support his submissions that, in the application for extension of time, each day of the delay must be accounted for.

Arguing the 2nd ground, Mr. Chuwa submitted that, evidence of respondent at CMA had inconsistency hence unreliable. Counsel submitted that, respondent reported at Police on 01st October 2022, but the loss report was received on 23rd January 2023. He argued that respondent did not give reason for not to be issued with the loss report within a short period. During submissions, Mr. Chuwa conceded that respondent had no power to order Police to issue the said loss report at a certain date. He maintained that loss of termination letter is not a good ground for granting condonation. He added that, grant of condonation is a discretion that was supposed to be exercised judiciously and prayed the application be allowed.

Resisting the application, Ms. Pius, learned counsel for the respondent submitted generally that, condonation was properly granted in terms of Rule 11(3)(a), (b), (c), (d) and (e) of Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that provides matters to be considered in granting condonation. She argued that respondent met those criteria. Counsel for the respondent conceded that, there is no requirement of attaching exhibits at the time of filing CMA F1. She however was quick to submit that, in the application at hand, it was important for the respondent to be in possession of termination letter before filing the dispute. Counsel went on that, respondent approached her lawyer while out of time hence it was important for a termination letter to be attached to establish the date the dispute arose. Counsel for the respondent submitted further that, paragraph 6 and 7 of the respondent's affidavit in support of condonation, shows circumstances that led to loss of termination letter hence there was a need of having a loss report.

She went on that, good cause for the delay depends on circumstances of each case and submitted that ***Mkingwa's case*** (supra) is distinguishable. She added that, what is required in the application for condonation is that applicant must put sufficient material or evidence before the Court. She strongly submitted that, in the

circumstances of the application at hand, respondent discharged that duty. Ms. Pius submitted further that; Arbitrator exercised discretion judiciously. She concluded by praying that the application be dismissed, and parties be ordered to go back to CMA for the matter to be heard on merit.

In rejoinder, counsel for the applicant only reiterated his submissions in chief.

I have examined evidence of the parties in the affidavit and counter affidavit filed at CMA in support and in opposition of the application for condonation and considered submissions made by counsel in this application. The main issue to be answered in this application is whether criteria for granting condonation or extension of time was met by the respondent.

It was correctly submitted by both counsel that in an application for extension of time or condonation, the court is called to exercise its discretion and that discretion must be exercised judiciously. See the case of *Mza RTC Trading Company Limited vs Export Trading Company Limited*, Civil Application No.12 of 2015 [2016] TZCA 12 wherein the Court of Appeal held:-

*"An application for extension of time for the doing of any act authorized ...is on exercise in judicial discretion... judicial discretion is the exercise of judgment by a judge or court **based on what is fair, under the circumstances and guided by the rules and principles of law ..."***
(Emphasis is mine).

In exercising its discretion, the court must scrutinize evidence or facts or material put before it in order to be fair. The court must also be guided by the rules and principles of law. Condonation or extension of time cannot be granted if there is no material put before the court by the applicant. Now, in the application at hand, the issue is whether, respondent placed materials sufficient for the arbitrator to grant condonation or not. In her affidavit, respondent stated *inter alia*: -

- "5. That, on 29th September, 2022 the Respondent herein issued me with a termination letter alleging there is lack of work and that my employment is to seize (sic) effectively from 30/10/2022.*
- 6. That, the act of the Respondent brought confusion on my side due to the fact that it was sudden...*
- 7. That, from the said confusion and out of the confusion, I lost/misplaced the termination letter and I could not focus on anything relating to exercising my infringed rights because the said letter was the proof of my termination.*
- 8. That sometimes in December, 2022, I decided to consult lawyers who happened to be OPTIMA LAW CHAMBERS for legal advice on how I should proceed with this matter. I was informed that I have to file a claim to CMA but since I was already out of time I will have to file application for condonation. However since it was the end of the year the lawyers were preparing for the annual leave as per the High Court Calendar therefore I was told to wait until they are back in January 2023.*

9. That, while waiting for them to come back I decided to report to police about the loss of my termination letter which I obtained it in January and submit the same to my lawyers.”

The afore quoted paragraphs are the only material that was put by the respondent before the arbitrator for grant of condonation. In the ruling, the Hon. Arbitrator concluded that respondent reported at police on 1st October 2022. In my view, that conclusion was erroneously arrived at. I am of that view because, paragraphs 8 and 9 above suggests otherwise. It is clear from paragraph 8 quoted above that respondent approached her lawyers on unnamed date of December 2022 and paragraph 9 shows that while awaiting her lawyers to come back from vacation, she decided to report at police. In my view, respondent made a report to police after she has contacted her lawyers and that was in December 2022. Therefore, respondent did not report timely the alleged loss of termination letter.

It was correctly submitted that there is no requirement of attaching exhibits at the time of filing CMA F1. I therefore see no logic as to why respondent did not file CMA F1 within time. It was argued on behalf of the respondent that, termination letter was important because, it could have helped the respondent to indicate a proper date of termination. Much as that argument may be interesting, I find it not convincing because respondent filed CMA F1 and application for

condonation (CMA F2) in absence of termination letter yet, she indicated the date of termination of her employment.

It is alleged by the respondent that she lost/ misplaced termination letter because she was confused. I find that, that was a naked lie. I am of that view because, in paragraph 5 of her affidavit quoted hereinabove, respondent stated that she was served with termination letter on 29th September 2022 indicating that her employment will be terminated effectively on 30th October 2022. It is my view that, respondent worked with the applicant for one month after being served with termination letter. In my view, the allegation that she became confused after termination is an embellishment. Had the arbitrator carefully scrutinized affidavit of the respondent, he would have not arrived at the conclusion he did. I therefore agree with applicant that arbitrator did not properly evaluate evidence.

In the ruling, the arbitrator held that the blame is to respondent's advocate who advised her to wait until they are back from vacation and that respondent cannot be punished due to mistakes of her lawyers. With due respect to the Hon. Arbitrator, mistakes of an advocate cannot be a ground for extension of time. In the case of [*Lim Han Yung & Another vs Lucy Treseas Kristensen*](#), Civil Appeal No. 219 of 2019

[2022] TZCA 400 the Court of Appeal discussed whether, negligence of an advocate is a good ground for extension of time and held as follows:-

"It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates..."

In her affidavit in support of the application for condonation, respondent did not attach an affidavit of the advocate who advised her to wait until the lawyers from Optima Law Chambers comes from vacation. Therefore, averments that respondent was advised by lawyers from the said law chamber to wait to file the application until when they come back from vacation is hearsay due to absence of the affidavit in support of that averment. See the case of [**Sabena Technics Dar Limited v. Michael J. Luwunzu**](#), Civil Application No. 451/18 of 2020, CAT (unreported), [**Franconia Investments Ltd v. TIB Development Bank Ltd**](#), Civil Application No. 270/01 of 2020, ***Benedict Kimwaga v. Principal Secretary Ministry of Health***, Civil Application No. 31 of 2000, ***NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd***, Civil Application No. 13 of 2002 (all unreported to mention but a few).

It was submitted by counsel for the applicant that respondent did not account for each day of the delay and cited ***Mkangwa's case*** (supra). I agree with that submission because in her affidavit in support

of the application for condonation, respondent did not account for each day of the delay. There is a plethora of case laws that in an application for extension of time, an applicant is required to account for each day of the delay. See the case of **Sebastian Ndaula vs. Grace Lwamafa**, Civil Application No. 4 of 2014, CAT (unreported), [Said Nassor Zahor and Others vs. Nassor Zahor Abdallah El Nabahany and Another](#), Civil Application No. 278/15 of 2016, CAT, (unreported), [Finca T. Limited & Another vs Boniface Mwalukisa](#), Civil Application No. 589 of 2018) [2019] TZCA 56, [Zawadi Msemakweli vs. NMB PLC](#), Civil Application No. 221/18/2018 CAT (unreported), [Elias Kahimba Tibendalana vs. Inspector General of Police & Attorney General](#), Civil Application No. 388/01 of 2020 CAT (unreported) and **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007, CAT (unreported) to mention but a few. In **Mashayo's case** (supra), the Court of Appeal held *inter-alia* that: -

"...the 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."

It was submitted by counsel for the respondent that respondent complied with the provisions of Rule 11(3)(a), (b), (c), (d) and (e) of GN. No. 64 of 2007 (supra). With due respect to counsel for the

respondent, that rule was not complied with. The said rule requires that in an application for condonation, applicant must set out grounds for condonation and shall include the degree of lateness and reasons for the delay. As pointed hereinabove, respondent did not adduce good grounds for the delay and did not account for each day of the delay.

From what I have discussed hereinabove, I find that the application is merited. I therefore allow this application, quash and set aside CMA ruling that granted respondent condonation.

Dated at Dar es Salaam on this 19th July 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on 19th July 2023 in chambers in the presence of Nimrod Msemwa, Advocate for the Applicant and Richard Eusebio and Karama Shoshe, Advocates for the Respondent.



B. E. K. Mganga
JUDGE