IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 221/2023

(Arising from a Ruling issued on 27/7/2023 by Hon. Mbunda, P.J, Arbitrator, in Labour dispute No. CMA/DSM/KIN/1/2023 at Kinondoni)

LANCET LABORATORIES TZ LTD ..... APPLICANT

VERSUS

NELSON NG'IDA..... RESPONDENT

JUDGMENT

Date of last Order: 13/2/2024
Date of judgment: 19/2/2024

B. E. K. Mganga, J.

This application is of its own kind in our jurisdiction because it raises one important issue namely, whether, after the matter has been declared to be time barred, one of the parties can go back to the lower court and file an application for extension of time or condonation.

Brief facts behind this application are that, on 22nd January 2014, applicant employed the respondent as an Admin Intern. Thereafter, applicant promoted the respondent to various positions including Admin Manager in-charge of Procurement Logistics and IT. On 27th August 2021 applicant terminated employment of the respondent allegedly that, the latter committed several misconducts including conflict of interest,

dishonest, breach of company policy and procedures and poor store management. Respondent was aggrieved with termination of his employment as a result, on 28th August 2021, he filed Labour dispute No. CMA /DSM/KIN/281/2021/142/2021 before the Commission for Mediation and Arbitration (CMA) complaining that applicant terminated his employment unfairly. On 26th August 2022 Hon. William, R, Arbitrator, issued an award that termination of employment of the respondent was unfair and awarded respondent to be paid TZS. 25,020,000/= being twelve months salaries compensation for his termination. Applicant was aggrieved with the said award as a result, she filed Revision No. 369 of 2022 before this Court. On 28th November 2022, when the said revision application was called on for hearing, Prisca Nchimbi, learned Advocate, appeared and argued for on behalf of the applicant, while George Masoud, learned Advocate, argued for on behalf of the respondent. In the said revision application No. 369 of 2022, the court asked counsel to submit on jurisdictional issue or competence of the dispute that was filed and heard at CMA. On 16th December 2022, this court held that the dispute was filed at CMA on 28th September 2021 out of the 30 days provided for under Rule 10(1) of Labour Institutions(Mediation and Arbitration) Rules, GN. No. 64 of 2007 hence time barred.

On 2nd January 2023, respondent filed at CMA Labour dispute No. CMA/DSM/KIN/1/2023 at Kinondoni challenging fairness of termination of employment by the applicant. Respondent also filed an application for condonation (CMA F2) at CMA showing that the dispute arose on 30th August 2021 and that, he was out of time for 16 months. On reasons for the delay, he indicated in the said CMA F2 that, the dispute was filed at CMA on 28th September 2021 after being served with termination letter on 30th August 2021, but he failed to state the same in CMA F1. He also indicated that, it was stated in the termination letter that his termination was on 27th August 2021. In support of the application for condonation, respondent filed his affidavit sworn before Sindilo G. Lyimo, advocate on 30th December 2022 attached with CMA award in labour dispute No. CMA/DSM/KIN/381/2021/142/2021, the Judgment of this court in Revision No. 369 of 2022 and its decree. In the affidavit in support of the application for condonation, respondent clearly stated that, in revision No. 369 of 2022, this court raised a jurisdictional issue and that parties made submissions thereof and the court held that CMA had no jurisdiction because the dispute was time barred as there was no order for condonation.

The herein applicant filed the counter affidavit sworn by Godliving Nkya, her principal officer, resisting the application for condonation. In

the said counter affidavit, the deponent stated *inter-alia* that, the dispute has been finally determined and that, there is no room for filing a new complaint. Together with the said counter affidavit, respondent filed the notice of preliminary objection that the matter is *res judicata*.

On 27th July 2023, Hon. Mbunda, P.J, arbitrator, having heard submissions of the parties, issued his ruling granting condonation stating that two days of delay is reasonable and that, the herein applicant failed to prove that respondent was served with termination letter on 27th August 2021. The arbitrator further held that, respondent acted diligently by quickly filing the dispute at CMA. He added that, technicalities should not stand in the way of dispensation of justice.

After grant of condonation, the matter was forwarded to the Mediator for mediation. On 11th September 2023, respondent appeared before Mwangata, M. Mediator, for mediation but applicant did not appear because she was aggrieved with the said ruling.

Since applicant was aggrieved with the said ruling that granted condonation to the respondent, she filed this application for revision. In support of this application for revision, applicant filed the affidavit of Godliving Nkya, her principal officer. In the said affidavit, applicant raised two issues namely:-

1. *That the Labour Court in Revision No. 369 of 2022 Lancet Laboratories (T) Ltd vs Nelson Ng'ida having held that the labour dispute was filed out of time and CMA had no jurisdiction to entertain the matter, bringing a fresh complaint amount to res judicata and abuse of court process.*
2. *That the Honourable arbitrator erred in law in holding that the procedure for termination were not adhered to while in fact there was no evidence that the respondent was prevented from appealing against the Disciplinary Committee.*

In resisting this application, respondent filed his counter affidavit wherein he stated *inter-alia* that, the application for condonation was neither *res judicata* nor abuse of court process and that, applicant has no genuine reason to move this court to revise and set aside unknown award of CMA.

On 13th December 2023 after none-appearance of the respondent for several times, I ordered the application be argued by way of written submissions and scheduled submission orders. I directed that respondent be notified. When the application was scheduled for mention on 13th February 2024 with a view of ascertaining compliance of submission orders, Ms. Prisca Nchimbi, advocate for the applicant, notified the court that, respondent was notified on 29th December 2023 that the court ordered this application to be argued by way of written submissions and that, on 03rd December 2024, applicant served respondent with her written submissions. Counsel for the applicant

submitted that, respondent did not file his written submissions despite the fact that he was informed that there will be no extension of time.

Nelson Ng'ida, the respondent, who appeared in person, admitted that he was served with the written submissions through his advocate namely, George Masoud. Respondent notified the court that the said advocate is not cooperating and has not filed the reply written submissions. Faced with that reality, I allowed respondent to make oral submissions opposing this application.

In her written submissions, applicant submitted that the matter was *res judicata* and that, the issue limitation of time was decided by this court between the parties in Revision Application No. 369 of 2022. It was further submitted on behalf of the applicant that, the arbitrator has no power to overrule the decision of this court. Counsel elaborated that, Honourable arbitrator did not consider that, once the matter has been decided by the High Court, CMA lacks jurisdiction and further that, initially the dispute between the parties was decided to its finality.

It was further submitted on behalf of the applicant that, the application for condonation that was filed at CMA by the respondent was done in abuse of court process because and that, it is against the principle that litigations must come to an end. Counsel for the applicant further submitted that, the arbitrator did not determine the preliminary

objection raised by the applicant that the dispute was *res judicata*. In her written submissions, Ms. Nchimbi, advocate, prayed this application be allowed, CMA proceedings be nullified, and the ruling be quashed and set aside.

As pointed out hereinabove, I allowed respondent to submit orally. In his submissions, respondent conceded that, applicant filed Revision No. 369 of 2022 in this court and that, on 16th December 2022, this court held that, both CMA and this court has no jurisdiction over the dispute because it was filed at CMA out of time. He submitted further that, after delivery of the judgment of this court in Revision No.369 of 2022, he was advised George Masoud, advocate, and that, acting on that advice, he went to CMA where he filed the application for condonation, the subject of this application. Respondent went on that, the said advocate appeared at CMA and argued the application, as a result, condonation was granted but applicant was aggrieved hence this application. He maintained that, CMA had jurisdiction to hear and determine the application for condonation he filed and issue the impugned Ruling. Respondent concluded his brief submissions praying the court to dismiss this application so that the new dispute he filed at CMA can be heard.

On her part, Ms. Nchimbi, advocate for the applicant had no rejoinder.

I have examined the CMA record and considered submissions of the parties and find, as pointed hereinabove, that, initially respondent filed the dispute at CMA challenging termination of his employment and that, CMA issued an award in his favour. It is also undisputed by the parties, as it was also noted in the impugned CMA ruling, that, applicant filed revision No. 369 of 2022 before this court and that, this court held that CMA had no jurisdiction because the dispute was time barred. It is further undisputed facts by the parties that, having held that the dispute was time barred, this court nullified CMA proceedings, quashed and set aside the said award arising therefrom. See the case of ***Lancet Laboratories (T) Limited vs Nelson Ng'ida*** (Revision Application No. 369 of 2022) [2022] TZHCLD 1092 (16 December 2022).

It is also undisputed by the parties that, after delivery of the aforementioned judgment, on 2nd January 2023, respondent, filed at CMA labour dispute No. CMA/DSM/KIN/1/2023 that resulted the arbitrator issuing the impugned ruling that granted respondent condonation. I should, before kicking off, point out albeit in a passing, that, legally speaking, there is no dispute that was filed at CMA by the respondent. I am of that view because, respondent only filed an

application for condonation (CMA F2) because he did not fill and file Referral Form (CMA F1). In absence of the Referral Form(CMA F1), there cannot be a proper dispute that is filed at CMA. I am of that view because, section 86(1) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] clearly provides that, the dispute is filed at CMA in the prescribed Form. In fact, the said Form is CMA F1 made under Rule 34(1) of the Employment and Labour Relations (General) Regulations, GN. No. 47 of 2017. But, in the application at hand, respondent filed only Application for Condonation of late Referral of a dispute (CMA F2) also made under Rule 34(1) of GN. No. 47 of 2017 (supra). After the grant of condonation, respondent did not fill and file CMA F1, but the matter was placed before Mwangata, M. Mediator, for mediation. In the eyes of the law, there was no dispute to be mediated by Mwangata, M, Arbitrator, because there was no CMA F1 that initiates disputes at CMA as per section 86(1) of Cap. 366 R.E. 2019 (supra). The foregoing, nevertheless, is not the base of the decision in this application because parties did not have opportunity to address the court on that aspect.

Now back to the issues that were raised and argued by the parties hence the center for determination of this application.

I have carefully examined the CMA record and find that, applicant raised a preliminary objection that the matter was *res judicata*, but no ruling was issued by the arbitrator dismissing the said preliminary objection. The arbitrator only proceeded to decide the application for condonation on merit. In short, even in the impugned ruling, the arbitrator did not determine or discuss the issue of *res judicata* that was raised by the applicant. This was an error on part of the arbitrator because, once a preliminary objection is raised, the same must be decided either by sustaining or overruling it. There is a litany of case laws to that position. See for example the case of ***Khaji Abubakar Athumani vs Daud Lyakugile Ta D.C Aluminium & Another*** (Civil Appeal 86 of 2018) [2021] TZCA 32 (24 February 2021), ***Thabit Ramadhan Maziku and Kisuku Salum Kaptula v. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar***, Civil Appeal No. 98 of 2011, ***Ally Rashid & Others vs Permanent Secretary, Ministry of Industry & Trade & Another*** (Civil Appeal 71 of 2018) [2021] TZCA 460 (6 September 2021), ***Muzzammil Mussa Kalokola vs The Minister of Justice & Constitutional Affairs & Others*** (Civil Application 255 of 2019) [2022] TZCA 486 (2 August 2022), and ***Said Mohamed Said vs Muhusin Amir & Another*** (Civil Appeal 110 of

2020) [2022] TZCA 208 (25 April 2022) to mention but a few. In ***Muhusin's case*** (supra), the Court of Appeal held *inter-alia* that:-

> *"Unfortunately, in our present case, despite being raised, the learned judge did not wish to address the issue of jurisdiction to which he was obligated to consider even by raising it suo motu. Instead, he proceeded to hear and determine the suit without, first, ascertaining if the suit was lodged within time. Time bar touches on the jurisdiction of the court. That was, in our decided view, an error which cannot be condoned. Simply stated, even upon failure by the respondents to lodge submissions in support of the objection, the trial judge ought to have asked the parties to address him on that issue so as to satisfy himself if the court had the requisite authority to hear and determine it…"*

In the application at hand, applicant raised a preliminary objection and in her submissions at CMA, it was stated clearly that, if respondent was aggrieved with the decision of this court, was supposed to appeal before the Court of Appeal. Instead of appeal to the Court of Appeal, applicant filed an application for condonation for the matter which this court had held that both CMA and the High Court had no jurisdiction because the dispute was time barred. On the other hand, Mr. George Masoud, advocate for the respondent, in his written submissions in support of condonation at CMA submitted:-

> *"…In respect of the said facts for the delay of filing the dispute within 30 days from* ***30th August, 2021*** *in which the* ***applicants(sic) was served with the termination letter by the respondent*** *and* ***filed the same at CMA on 28th September 2021****, It is our submission that, in all time the Applicant have been prosecuting the aforementioned dispute as*

stated herein above and the same was filed at CMA ***on 28th September, 2021 within 30 days counting from 30th August, 2021 when the Applicant was served with the termination letter on 30th August, 2021, however the said fact was not considered at the High Court Labour Division by the Honourable Mganga J since the same was not raised at CMA and the said letter annexed on clause 5.5 of the Applicant affidavit was not tendered at CMA****, therefore the late filing of the same is due to* ***technical delay*** *which is out of the Applicant control as in all time since 28th September, 2021 until 22nd December, 2022, the Applicant has been always in court searching for door towards court of justice to have his rights determined…"*

The quoted submission by the herein respondent was loud and clear that, this court has decided on the issue of limitation of time. It was, therefore, open to the arbitrator to read the judgment of this court that was attached to the affidavit in support of the application and see whether, the preliminary objection that was raised by the herein applicant is merited or not. In other words, the arbitrator was supposed, first of all, to ask whether, he has jurisdiction over the matter or not. In my view, the arbitrator was supposed either to overrule the preliminary objection or to sustain it. The arbitrator was not supposed to circumvent the preliminary objection by turning his eyes away. Though the arbitrator pretended to have not seen the preliminary objection raised by the applicant, in his ruling, indirectly, seems to have overruled the judgment of this court as being mere technicality. In the impugned ruling, the arbitrator held *inter-alia* that:-

"…The material circumstances established by the applicant demonstrated sufficient cause for the Commission to exercise its discretion to grant the sought order. It is well to remember that the very purpose sought to be achieved by the Commission is to serve the ends of justice. Therefore, when substantial justice and technical consideration are pitted against each other, cause of substantial justice had to be preferred to that of the technicalities. Mere technicalities should not stand in the way of dispensation of substantial justice. This calls for a liberal delineation to show that due diligence was exercised by the applicant amounting to sufficient cause for the Commission to exercise its discretion…Commission is of the view that this application for condonation be granted and now is granted…"

It is my view that, the issue of time limitation that was raised and determined by this court in Revision No. 369 of 2022 between the parties cannot be issue of technicalities. It is an issue of jurisdiction. See the case of ***Swila Secondary School vs Japhet Petro*** (Civil Appeal 362 of 2019) [2021] TZCA 169 (30 April 2021) wherein the Court of Appeal held *inter-alia* that: -

"The law is settled that the issue of jurisdiction for any court is basic as it goes to the very root of the authority of the court or tribunal to adjudicate upon cases or disputes. Courts or tribunals are enjoined not to entertain any matter which is time-barred and in any event they did so, the Court unsparingly declare the proceedings and the consequential orders a nullity."

If the herein respondent was unhappy with the judgment of this court in Revision No. 369 of 2022, he was supposed to Appeal before the Court of Appeal. Mr. George Masoud, advocate for the respondent,

being an officer of the court, was, in my view, supposed not to mislead the arbitrator by his words quoted hereinabove. Unfortunately, the arbitrator was swayed away by the misleading statement in the quoted submission by counsel for the respondent that the latter was served with termination letter on 30th August 2021 and that, he filed the dispute on 28th September 2021 hence the dispute was not time barred. Based on those submissions, the arbitrator was influenced by sympathy and reached a conclusion that circumstances of the application warranted condonation to be granted.

The claim that respondent was served with termination letter on 30th August 2021 was considered by this court in Revision No. 369 of 2022 and was rejected because, the same was not supported by evidence of the respondent at CMA. See ***Lancet Laboratories (T) Limited vs Nelson Ng'ida*** (Revision Application No. 369 of 2022) [2022] TZHCLD 1092 (16 December 2022) at page 11 and 12 wherein this court held:-

> *"…Counsel for the respondent argued that respondent was served with termination letter on 30th August 2021. With due respect to counsel for the respondent, that submission is not supported by evidence on record. Nothing was stated by the respondent that he was served with termination letter on 30th August 2021. Naima Makata (DW1) testified that respondent was called on 27th August 2021 to collect his termination letter and that respondent collected the said letter on that day and signed the Disciplinary*

Hearing Form(exhibit D5). That evidence was not contradicted by evidence of the respondent. I believe that if respondent received the termination letter as he alleged, the same would have been reflected in exhibit D5 when he signed. It is clear that from the date of termination to wit, 27th August 2021 to the date of filing the application namely 28th September 2021, it is about thirty-two (32) days after exclusion the first day. Respondent filed the dispute at CMA out being of time for two days. He was therefore, prior to filing the dispute, to file an application for condonation because he was out of time. Since no application was sought and granted, the dispute was improperly heard at CMA and CMA lacked jurisdiction. Respondent knew that he was late for two days which is why he wrote the exact date of termination and the other date i.e., 30th August 2021 knowing that the latter date will serve him from not being out of time for two days. The least I can say is that, respondent was not properly advised because it was much easier to state the correct date and apply for condonation stating reasons for the delay for the said two days. Since he chose to lie in the CMA F1, he will bear the consequences thereof…"

From the quoted holding of this court, it is clear that, in his affidavit in support of the application, respondent told lies when he stated at paragraph 5.2 that applicant served him with termination letter on 30th August 2021. I am of that settled opinion because, when testifying under oath before Hon. William, R, Arbitrator, in Labour dispute No. CMA/DSM/KIN/381/2021/142/2021 respondent did not state that applicant served him with termination letter on 30th August 2021. Be as it may, if respondent found that this court misdirected itself by nullifying CMA proceedings, quashing and setting aside the award arising therefrom, he was supposed to appeal before the Court of

Appeal and not to go back to CMA to file an application for condonation. Again, Mr. George Masoud, advocate for the respondent, did not properly advise the respondent the proper course to take. I am of that view because, CMA has no power to overrule or circumvent the decision of this court even where the decision is found to have been arrived at *per in curium*. The least I can say is that, the arbitrator was trapped by the trap of sympathy initiated by lies of the respondent in the affidavit in support of the application. This court and the Court of Appeal has held several times that limitation of action knows no sympathy or equity. Some of the cases with that position are ***Barclays Bank Tanzania Limited vs Phylisiah Hussein Mcheni,*** Civil Appeal No. 19 of 2016 [2021] TZCA 202 and ***M/s. P & O International Ltd vs The Trustees of Tanzania National Parks (TANAPA),*** Civil Appeal No. 265 of 2020 [2021] TZCA *248*. In ***Mchemi's case***, (supra), the Court of Appeal 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 cut across and deep into all those who get into all those who get caught".*

Further to the foregoing, the arbitrator did not carefully read the judgment of this court that was attached to the respondent's affidavit in support of the application. Had the arbitrator carefully read the above quoted part of this court's judgment in Revision No. 369 of 2022, he

could have found that respondent told lies in his affidavit. That could have been the end of the matter because an affidavit containing lies cannot be acted on by the court. See the case of ***Jaliya Felix Rutaihwa vs Kalokora Bwesha & Another*** (Civil Application 392 of 2020) [2021] TZCA 62 (4 March 2021), ***Damas Assesy & Another vs Raymond Mgonda Paula & Others*** (Civil Application No 32/ 17 of 2018) [2019] TZCA 648 (17 April 2019), ***Bashir Ally vs Anyegile Andendekisye Mwamaluka & Others*** (Civil Appeal No. 49 of 2021) [2024] TZCA 47 (16 February 2024), ***Kidodi Sugar Estates & 5 Others v. Tanga Petroleum Company Ltd.***, Civil Application No. 110 of 2009, ***Ignazio Messina v. Willow Investments SPRL***, Civil Application No. 21 of 2001 to mention but a few. In ***Bwesha's case*** (supra) the Court of Appeal held inter-alia that:-

> *An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."*

It is my considered view that, after this court has held that the dispute that was filed by the respondent was time barred, respondent was barred to go back to CMA and file an application for condonation in relation to the same dispute. More so, the Arbitrator at CMA was also barred from hearing and determining the application for condonation that was filed by the respondent in presence of the Judgment of this

court to the position that CMA lacked jurisdiction. As pointed hereinabove, respondent, was supposed to appeal to the Court of Appeal if he was aggrieved by the decision of this court. There was no room and there cannot be room for the respondent to go back to CMA to apply for condonation. My position is fortified by what was held by the Court of Appeal in the case of ***Hashim Madongo and Two Others vs Minister for Industry and Trade and two Others***, Civil Appeal No. 27 of 2003 CAT(unreported), wherein it was held *inter-alia* that:-

> *"That after the application before Kalegeya, J was dismissed, as it should have been, it was not open to the appellants to go back to the high court and file the application subject of this appeal... the only remedy available to the appellants after the dismissal of the application was to appeal to the Court of Appeal and that the application for extension of time ought to have been filed prior to filing the application for prerogative orders."*

It was submitted by counsel for the applicant that what was done by the respondent is against the principle and policy that there must be end for each litigation. I agree with her. In fact, filing an application for condonation for the dispute that has been held by this court to be time barred and the arbitrator in granting condonation, resurected the dispute that has been already put to rest and has been burried. The resuraction of the dispute by the arbitrator through the grant of condonation has led the parties to leave their business and appear again before this court for hearing. In short, the impugned ruling is intended

to keep the parties to visit court corridors now and then. That is not the policy behind litigation.

For all said hereinabove, I hereby allow this application, nullify CMA proceedings relating to Labour dispute No. CMA/DSM/KIN/1/2023, quash and set aside the ruling arising therefrom.

Dated in Dar es Salaam on this 19th February 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 19th February 2024 in chambers in the presence of Prisca Nchimbi, Advocate for the Applicant and Nelson Ng'ida, the Respondent.

B. E. K. Mganga
JUDGE