IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., LEVIRA, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 294 OF 2020

GABRIEL P. MAKUNDI.....APPELLANT

VERSUS

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

(Appeal from the decision of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Wambura, J.)

dated the 26th day of June, 2020
in
Revision No. 31 of 2018
.....

JUDGMENT OF THE COURT

5th June & 6th September, 2023

LEVIRA, J.A.:

The appellant, Gabriel P. Makundi was aggrieved by the decision of the High Court (Labour Division) at Dar es Salaam (the High Court) in Revision No. 31 of 2018 dated 26th June, 2020, which decision confirmed the decision of the Commission for Mediation and Arbitration (the CMA) that dismissed the appellant's application for condonation. As a result, he has come before us armed with two grounds with a view of challenging it. The following are his complaints in those grounds:

1) That the Honourable Judge erred in law and fact for dismissing the appellant's application for

dismissed his application for want of sufficient grounds to justify grant of the relief sought. Aggrieved, the appellant filed in the High Court Labour Division Revision No. 31 of 2018, the subject of the current appeal which was eventually dismissed and the decision of the CMA was upheld.

At the hearing of this appeal, the appellant was represented by Mr. Anthony Arbogast Mseke, learned advocate, whereas the respondent had the services of Mr. Khalfan Hamisi Msumi, also learned advocate.

Mr. Mseke submitted in support of the appeal to the effect that the appellant justified his delay by indicating 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 Xiao Chun, the Managing Director and majority shareholder in the respondent company. Therefore, he unsuccessfully referred the matter to the CRB on 8th August, 2013. He went on to state that, in the meantime, the appellant was waiting for Mr. Tian to keep his promise but later in 2015, he decided to seek for his rights before the CMA. In the circumstances, Mr. Mseke argued that it was not correct for the learned Judge to hold that there was no justification for the delay while in 2013, the appellant referred the matter to the CRB and later to the CMA in 2015. He faulted the decision of the High Court saying that the learned Judge adopted wholesale the decision of the CMA to deny

the appellant an opportunity to file the intended appeal. He went on to argue that, initially, before December, 2016 the matter could not be taken to the CMA because it was yet to be established. In addition, he said, even after the establishment of the CMA there was a certain period of time which had to lapse before taking the matter there. According to him, the time started to run against the appellant from February, 2007 and not December, 2006 as held by the High Court. In support of his argument, he cited the decisions of the Court in the case of **Motor Vessel Sepideh & Pemba Island Tours & Safari v. Yusuf Mohamed Yussuf & Ahmad Abdullah,** Civil Application No.91 of 2013 and **Dianarose Spareparts Ltd v. Commissioner General Tanzania Revenue Authority,** Civil Application No. 245/20 of 2021 (both unreported) which provide for what constitutes good cause for extension of time. Other cases cited by the counsel for the appellant were **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited** Civil Application No. 111 of 2009 and **Tanzania Ports Authority v. Ms. Pembe Flour Mills Ltd.** Civil application No.49 of 2019 (both unreported).

Mr. Mseke implored us to consider the provisions of section 88 (4) (c) of the Employment and Labour Relations Act (the ELRA) which requires labour matters to be decided without due regard to technicalities and decide that the appellant advanced good cause

justifying extension of time and dismiss the decision of the Labour Court.

In response, Mr. Msumi adopted the respondent's written submissions in opposition of the application which he had filed in Court on 24th November, 2020 to form part of his oral submission. He supported the decision of the High Court stating that, the High Court Judge rightly dismissed the applicant's application for extension of time for failure to account for 10 years delay. In his views, the reasons for the delay advanced by the appellant were not plausible as the CMA came to the existence in the same year of the decision but the appellant came to the court in 2015. According to him, the appellant has never become diligent in pursuing his right and has not advanced good cause for his inordinate delay. He supported his argument with the decision of the Court in **Laureno Mseya v. Republic,** Criminal Application No. 4/06 of 2016 (unreported).

Mr. Msumi insisted that the appellant was aware of the complained underpayment from 2006 and he refused payment until 2015. He delayed for 10 years without any good cause. In the circumstances, he said, the discretionary powers of the court to extend time need to be exercised judiciously as it was decided in **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported).

Finally, the learned counsel implored us to dismiss this appeal for lacking in merits.

Mr. Mseke reiterated his submission in chief while rejoining. Upon our prompting, he admittedly argued that the issue of illegality of the impugned decision was not expressly stated by the appellant.

We have considered and weighed the rival arguments from both parties. Also, we have considered the grounds of appeal presented by the appellant, which we think, can conveniently be reduced to one issue; to wit, whether the High Court Judge was justified to hold that the appellant had failed to advance sufficient reasons for the delay to warrant the extension of time sought. We take note at the outset that, the appellant's application for condonation based solely on the reasons for the delay as a good cause for extension of time. There was nothing regarding the allegation of illegality of the impugned decision.

The law is settled in relation to limitation of time upon which labour disputes other than disputes of unfair termination of employment may be filed before the CMA. In terms of Rule 10 (2) of the Labour Institutions (Mediation and Arbitration), Rules, 2009 G.N. 64 of 2004, (the Labour Rules) the limitation period is sixty days (60) from the date when the cause of action arose. However, time can be extended upon good cause being shown to condone failure to comply with the time set in terms of Rule 31 of the Labour Rules. It is common knowledge that

there is no single definition of what constitutes good cause, but the Court has set out the criteria for grant of extension of time which when established amounts to good cause; these were stated in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) to include, but not limited to:

> *"(a) The applicant must account for all the period of delay.*
>
> *(b) The delay should not be inordinate.*
>
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
>
> *(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

We have thoroughly gone through the record of appeal, it is apparent that the appellant's main reasons for the delay were that when the dispute arose, firstly, he resorted to internal mechanism to have the dispute between him and the respondent resolved amicably. However, the settlement did not work out as the respondent failed to table the actual financial and audited accounts to ascertain the accuracy and legality of what he was being paid. Secondly, that at the time the

dispute arose the CMA was not yet in existence, so it was impracticable to lodge the complaint.

Starting with the second reason, it is on record that the dispute between the parties herein arose in 2006 when the appellant became aware that he was underpaid. Admittedly, it was before the establishment of the CMA which was established in 2007 through GN. No. 1 of 2007. As intimated above, Rule 10 (2) of Labour Rules requires the matter to be instituted within 60 days from the date the dispute arose, however, in the circumstances of this matter, it was impracticable for the appellant to institute the same as the CMA was yet to be established as he claimed. However, this fact alone in our considered view is not sufficient, because in the year 2007 when the CMA was established the appellant ought to have instituted his case, but he waited until in September, 2015 after lapse of 8 years that is when he lodged his complaint. The law requires that the applicant who seeks for extension of time before the court to account for each day of delay. This position was restated in the case of **Ludger Bernard Nyoni v. National Housing Corporation**, Civil Application No. 372 / 01 of 2018.

In the instant case, the appellant's 8 years delay was not explained out and therefore, we have no reason to fault the High Court

Judge's decision when she held at page 333 of the record of appeal that:

> *"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."*

Apart from that, the appellant complained that it was wrong for the Judge to uphold the decision of the CMA because the arbitrator counted time of the delay from the time when the CMA was not in existence. By way of emphasis, we reiterate what we have already indicated above that according to the law, time reckons when the cause of action arises. Therefore, it was proper for the learned Judge to hold, we quote:

> *"The fact that the arbitrator counted the delay from 2006 before the establishment of the CMA notwithstanding, in the sense that it would not change the time when the cause of action arose."*

All in all, since the appellant failed to account for each day of the delay, and since the dispute between him and the respondent arose in 2006, it is, our settled opinion, notwithstanding the fact that the appellant referred the matter to the CRB in 2013, his complaint was filed before the CMA out of time and the appellant failed to account for the

delay. We are satisfied that the High Court Judge dealt upon the grounds of revision presented before her accordingly. Therefore, we find no reason to disturb her findings.

In the result, this appeal fails and is accordingly dismissed.

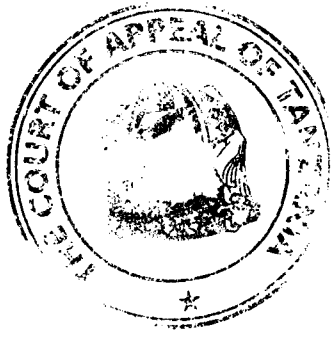
DATED at **DAR ES SALAAM** this 5th day of September, 2023.

S.A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 6th day of September, 2023 in the presence of Ms. Neema Ndossi, learned Counsel for the Appellant and Mr. Khalfan Hamisi Msumi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL