IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MWANZA

REVISION APPLICATION NO. 41 OF 2018

(Arising from the Ruling in the Consolidated Labour Dispute No. CMA/KWIMB/437-440/2018)

BETWEEN

RAYMOND PATRICE RAGITA & 3 OTHERS ..... APPLICANTS

VERSUS

M/S ALAB CONTRACTORS CO. LTD ..... RESPONDENT

RULING

22nd April, & 17th July, 2020

ISMAIL, J.

This is an application for an order of revision with a view to setting aside the ruling of the Commission for Mediation and Arbitration (CMA) at Mwanza, which was delivered on 13th July, 2018, in which the applicant's efforts to persuade CMA to condone the delay in filing the dispute fell through. The said application was dismissed by CMA on the ground that it lacked jurisdiction to entertain an application that had been filed

inordinately out of time and that no sufficient reasons were given to justify the delay.

The application is preferred under the provisions of section 91 (1) (a), (b), (2) (a), (b), (c); and section 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004 (ELRA) and Rules 24 (1), (2) (a), (b), (c), (d), (e), and (f), (3) (a), (b), (c), (d), (e) and 28 (1) (a), (b), (c), (d) and (e) of the Labour Court Rules, 2007, GN 106 of 2007. The application which is supported by affidavits, sworn severally by the applicants, mainly implores the Court to call the records of the CMA in the CMA/KWIMB/437-440/2018, and revise and set aside the ruling made on 13th July, 2018, and allow the applicants to pursue their complaints against the respondent. The contention is that the CMA did not consider that the parties were engaged in negotiations which protracted, and that there was a promise to have the dispute on payment of salaries resolved amicable.

When the matter was called for orders on 22nd April, 2020, at the instance of the parties, the Court ordered that the matter be disposed of by way of written submission in line with the schedule which was duly conformed to.

Submitting on behalf of the applicant, Mr. Herymick Chagula, learned counsel, began by giving a background of what is now a contention before

this Court. Highlighting the parties' contention, the learned advocate submitted that two questions arise from this matter and these are:

1. *Whether the applicants have good and sufficient reason for the delay to warrant CMA to exercise its discretionary powers to allow referrals out of time; and*
2. *Whether the CMA has jurisdiction to entertain the referrals.*

In respect of the first issue, Mr. Chagula holds the view that the applicants demonstrated sufficient cause that justified the delay and that evidence in that respect was adduced at CMA. The evidence proved, he contended, that the parties were locked in some negotiations with a view to achieving an amicable solution. The evidence included minutes and agenda of the meeting held at Kwimba District Council at which a commitment to pay salary arrears was reflected. The same can also be said with respect to several other correspondences between the applicants and the respondent, all of which underscore the contention that negotiations were on going. He contended that the applicants were under impression that a solution would be found.

With respect to whether CMA can entertain referrals, the counsel for the applicants held the view that the Mediator strayed into error of law and fact when he dismissed the application for condonation. Mr. Chagula strenuously contends that, having shown good cause for the delay, the

CMA was obliged to grant a condonation. He further contended that since the reason for the respondent's failure to make good the applicants' dues was that it was owed the sum of money by Kwimba District Council for whom it did some construction work. It is the applicants' contention that mere reference of the dispute on time would not guarantee payment of the salary arrears if the respondent hadn't been paid the contractual sum due from its client.

In conclusion, the applicants urged the Court to grant the application by quashing and setting aside the decision of CMA and allow hearing of the matter on merit.

Submitting in rebuttal, Mr. Lubango, who advocated for the respondent, took a different view on the matter. Leaping to the defence of the CMA's decision, the learned counsel contended that no sufficient reason for the delay had been shown as none of the correspondences attached reveal that the respondent and the applicants were engaged in any negotiation or discussion or promise to pay salary arrears. Arguing in respect of the first issue, the learned counsel cited Rule 31 of the Labour Institutions (Medical and Arbitration) Rules, 2007 which allows condonation of time. Mr. Lubango contended that demonstration of sufficient reason constitutes a pre-condition for condonation as accentuated in several

decisions, key among them being ***Finca (T) Ltd & Another v. Boniface Mwalukisa***, CAT-Civil Application No. 589/12 of 2018 (unreported); and ***Waziri Mgovano v. Jenepher Kayuni***, HC-Revision No. 22 of 2011 (unreported).

Mr. Lubango further argued that the established principle is that promises, negotiations or discussions outside court do not constitute sufficient cause for condonation. On this he cited two decisions of this Court in ***Leons Barongo v. Sayona Drinks Ltd***, HC-Revision No. 182 of 2012 (unreported); and ***Alex Leoie v. Tanzania Portland Cement Co. Ltd***, HC-Civil Case No. 259 of 1997 (unreported).

Noting that the degree of delay in the matter is 12 months, the learned counsel for the respondent contended that nothing can be gathered as the reason for delay and the applicants have not accounted for each day of the delay, consistent with section 86 (1) of the ELRA and Rule 10 of GN. No. 64 of 2007.

On whether the Court has jurisdiction to entertain the instant application, the respondent's counsel argued that the CMA was justified in its decision since the applicants had failed to account for each day of their delay in taking action. On this he referred to a trio of Court decision which are ***John Cornel (T) Ltd v. Grevo***, HC-Civil Case No. 70 of 1998; **CRDB**

Bank v Allen Butembero, HC-Misc. Application No. 74 of 2013; and ***Longido District Council v. Gariel Mkonyani and Uchunguzi Kabonaki,*** HC-Misc. Labour Application No. 8 of 2015.

He prayed that the decision of the CMA be upheld and the application be dismissed.

The contending submissions bring out one profound question, and this is as to whether CMA strayed into an error when it dismissed the dispute for being preferred tardily. As unanimously submitted by counsel, CMA is vested with discretionary powers to condone disputes filed outside the time prescription provided that the applicant demonstrates a good cause for the delay. The applicant is also responsible for accounting for each day of delay. This statutory requirement under the employment and labour regime picks a hue from the general principles that govern extension or enlargement of time. These are to the effect that an application for extension of time, akin to condonation in labour disputes, is only granted upon the Court's satisfaction that the applicant thereof has presented a credible case that warrants such grant and that, in so doing, he has acted in an equitable manner. The rationale for this daunting requirement has been succinctly laid down in the persuasive holding of the Supreme Court of Kenya in ***Nicholas Kiptoo Arap Korir Salat v. IEBC &***

7 Others, Sup. Ct. Application 16 of 2014, from which the following excerpt has been extracted:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants* ***have to lay a basis [for], where they seek [grant of it].***"

The scope of application of the Court's discretion was widened in the decision of the same Court (Supreme Court of Kenya) which laid down key principles which should guide a court that sits to consider an application for extension of time. In the case of ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General,*** Application No. 50 of 2014, it was lucidly held as follows:

> *"... We derive the following as the underlying principles that a court should consider in exercise of such discretion"*
>
> 1. *extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
> 2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
> 3. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
> 4. *where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*

5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
6. *whether the application has been brought without undue delay; and*
7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

The foregoing position substantially mirrors the position accentuated by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), in which key conditions for the grant of an application for extension of time were laid down. These are:

> *"(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 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 illegality of the decision sought to be challenged."*

As stated earlier on, both counsel are unanimous, in the instant application, that the condition precedent for the party's success in an application for condonation is the applicants' demonstration of reasonable or sufficient cause from which the CMA would gauge the applicant's action. This stringent requirement is intended to tame applications submitted by parties who are at fault and are all out to benefit from their own inaction.

The requirement is intended to conform to the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in which it was held that ***"... no court will aid a man to drive from his own wrong."***

In performing this duty of taming actions of the unscrupulous, who are all out to drive from their own wrong, courts and tribunals have a duty of ensuring that the applicant of the enlargement of time is not denied the right of appeal, unless circumstances of his delay in taking action are inexcusable and his or her adversary was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3.

While sufficient cause derives no definite definition, inference in respect thereof can be made as guided by the Court of Appeal in a multitude of its decisions. In ***Henry Leonard Maeda and Another v. Ms. John Anael Mongi***, CAT-Civil Application No. 31 of 2013 (unreported), it was held as follows:

> "... the courts may take into consideration, such factors as, ***the length of delay, the reason for the delay*** *and* ***the degree of prejudice that the respondent may suffer if the application is granted.***"

The reason advanced by the applicants for their dilatoriness is the negotiations which were allegedly ongoing between the parties. The

applicants further argue that, in any case, timeous filing of the dispute would not achieve anything as the respondent was yet to be paid sums they were owed by Kwimba District Council. This is a view vociferously opposed by the counsel for the respondent, and I feel inclined to subscribe to the reasoning behind the respondent's denial of this contention. The applicants' latter contention defeats what they stated in the former contention. It implies that failure to take necessary action timeously was deliberate, motivated by the fact that the respondent was yet to be paid and, as such, there was nothing on which the applicants would fall to recover their salary arrears. This is a defeatist argument and it cannot be said that such a contention would fall in the realm of sufficient cause. It would not find any purchase, least of all by the CMA.

With respect to the contention that the parties were still negotiating, I find nothing gluey about this argument. The applicants have not stated, with any semblance of precision, as to how long it took for the parties to negotiate and why they believed that such negotiations prevented them from taking action, knowing that any resort to legal action would have to conform to time prescription set out by statute. Nothing would prevent the applicants from instituting the proceedings in CMA as out of court negotiations went on. Contrary to the applicants' belief, institution of a

dispute would hasten the respondent's action lest it would find itself getting adverse orders which would not give any room for subsequent negotiation.

Further to that, I feel inspired by the decisions in ***Leons Barongo*** and ***Alex Leole*** (supra) in both of which the Court severally held that negotiations for settlement cannot check limitation. I take the view, that CMA was justified in its decision to withhold its discretion to grant a condonation since such condonation would be based, not on any plausible reasons, but on grounds of sympathy which would amount to an injudicious exercise of its discretion. In so doing, CMA acted within the letter and spirit of the reasoning in ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546, in which the defunct East African Court of Appeal held as follows:

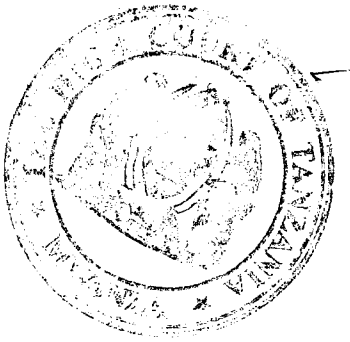
> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles.* ***If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."***

Consequently, I do not find anything blemished in the conduct of the CMA as to compel intervention by this Court. I find that the decision to dismiss the application was consequential to the fact that the applicants had not met the threshold set out by the law for triggering the discretion to allow the condonation.

In the upshot, I find this application lacking in merit and, accordingly, I dismiss it in its entirety.

It is so ordered.

DATED at **MWANZA** this 17th day of July, 2020.



M.K. ISMAIL

JUDGE

Date: 17/07/2020

Coram: Hon. M. K. Ismail, J

Appellant: Absent

Respondent: Mr. Kabogo, Advocate

B/C: B. France

Court:

Ruling delivered in chamber in the presence of Mr. Kabago, learned Advocate for the respondent and in the absence of the applicants and their Counsel, this 17th July, 2020.

M. K. Ismail

JUDGE

At Mwanza

17th July, 2020