

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

LABOUR REVISION NO.85 OF 2021

***(C/f Employment Dispute No.CMA/ARS/210/21 at the Commission for
Mediation and Arbitration at Arusha.)***

AYOUB MSAFIRI MSHOTE.....1ST APPLICANT

MICHAEL CAROL TEMU.....2ND APPLICANT

LUCY MSAFIRI.....3RD APPLICANT

Vs

PARADISO MINERALS (T) LIMITED.....RESPONDENT

JUDGMENT

Date of last Order:26-7-2022

Date of Judgment:24-8-2022

B.K.PHILLIP,J

A brief background to this application is that in June 2021 the applicant herein filed an application at the Commission for Mediation and Arbitration at Arusha (Henceforth " the CMA") claiming for payment of salary arrears from 2016 to 2021 together with an application for condonation. The reasons advanced by the applicants in their application for condonation were as follows; that the respondent's managing director, had been sick for a long time since August 2016. He promised to pay them to their salary arrears upon his recovery and disposal of his property (Sundown Carnival Hotel).They were patient because ,first they had been working with him for about 29 years. Secondly, they were aware of his poor health

condition and the challenges his was facing in his mining business. Unfortunately, on 3rd of July 2020, the respondent's managing director passed on. So, they had to await for the appointment of the administrator of deceased's estate to sort out their claims as promised by the deceased. Upon appointment of the Administrator of the deceased estate they started making follow up of their claims but there was no cooperation from the deceased's family and the administrator of the deceased's estate. Consequently, they had to file their claims at the CMA together with the application for condonation.

The application for condonation was heard inter parties and the Arbitrator ruled out that the applicants failed to adduce good cause for the delay in filling their claims. Aggrieved by the aforesaid decision of the CMA, the applicants filed this application under the provisions of Rule 91 (1) (a), (2) (b) 4(a) and 94 (1) (d) of the Employment and Labour Relations Act No.6 of 2004, Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d), 28 (1) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007, praying for the following orders;

- i) That the Honourable Court be pleased to call for the records and examine the proceedings and decision of the CMA in Labour Dispute No. CMA/ ARS/210/21 delivered on 20th day of August 2021 by Honourable Mourice Egbert Sekabila, the Mediator, in view of satisfying itself on its legality, propriety, rationale and correctness thereof.
- ii) That the Honourable Court be pleased to revise and set aside the CMA's Ruling in Labour Dispute No. CMA/ ARS/210/21 delivered on

20th day of August 2021 by Honourable Mourice Egbert Sekabila, the Mediator for being illegal, improper, irrational and incorrect.

The applicant's application is supported by a joint affidavit sworn by the applicants. At the hearing the applicants appeared in person whereas the learned Advocate Mnyiwala Mapembe appeared for the respondent.

The application was heard viva voce. The applicants' submissions were to the effect that the Arbitrator erred to dismiss their application for condonation because they adduced good cause for the delay in filing their claims for salary arrears. Their erstwhile boss, the late Phillip Mkenga Kabwe was sick and on humanitarian reasons they accepted his promises to pay them. However, he did not keep his promise because before his demise he sold his property (Sundown Carnival Hotel) but did not pay them their dues. They reported the matter to the District Commissioners' office in Arusha where Kabwe's son attended the reconciliation meeting and was ordered to tell his father to pay the applicant their dues. However, no payment was made by the managing director. Finally, the District Commissioner advised them to refer their complaints to the Labour office. On 3rd of July 2021, Mr. Kabwe passed on and they have never been paid their salary arrears to date.

In response to the applicants' submissions, Mr. Mapembe argued that the decision of the CMA is correct because the applicants failed to account for the days of delay. He contended that according to the CMA form No.1 and 2 filed by the applicants at the CMA, the applicants' cause of action arose on 1st September 2016. The application for condonation was filed on 14th

June 2021. That is 57 months from the date the cause of action arose. The reasons for delay in filing their claims at the CMA are all related to the sickness of the respondent's director, the late Kabwe. Mr. Mapembe went on arguing that the respondent and the respondent's managing director are two distinct persons under the law. The death of the respondent's director had nothing to do with the applicants' claims. The applicants failed to prove that Mr. Kabwe's sickness and the allegedly promise to pay them was the cause for their failure to file their claims at the CMA timely. Negotiations done out of Court have never been a good cause for delay under the law, contended Mr Mnyiwala. He cited that case of **Kowe Malegeri Vs Airwing Secondary school, Revision Application No. 61 of 2019** (unreported), to cement his arguments.

Moreover, Mr. Mapembe submitted as follows; That in their submissions the applicants told this Court that on the 21st April 2020 they were directed by the District Commissioner's office to file their complaints at the CMA. However, they did not heed to that advice. They filed their complaint on 14th June 2021 after expiry of 358 days. The applicant failed to prove that they were employees of the respondent as required in Rule 11(3) of GN.No.64/2007. Sundown Carnival Hotel belonged to a different company from the respondent Company. The applicant failed to prove that proceeds of sale of Sundown Carnival Hotel were supposed to be used to settle their claims for salary arrears. Mr. Mnyiwala prayed for the dismissal of this application.

In rejoinder, the applicants submitted that they heeded to the advice made by the District Commissioner. At the CMA they were not accorded

opportunity to prove their claims including the fact that they were employees of the respondent. The late Kabwe was operating the respondent's Company single-handedly. He was the sole person with powers in the Company because other directors in the Company were his children and were not active in decision. The Sundown Carnival Hotel was the property of the late Kabwe.

In addition to the above the 3rd applicant told this Court that her husband, now deceased, he was employed by the respondent Company.

Having analyzed the submissions made by the parties as well as perused the Court's and CMA's records, I have the following observations. One, the 3rd applicant, Lucy Msafiri had no *locus standi* to institute the application for condonation and claims for arrears of salaries of her late husband because by the time she filled the same, she was not yet appointed as the administratrix of the deceased estate. In his decision the Mediator pointed out that the 3rd applicant's capacity to file her claims at the CMA was questionable since she had no letter of appointment as the administratrix of her late husband's estate. I entirely agree with him. Therefore, this application in respect of the 3rd applicant fails outright.

With regard to the remaining applicants, it is a trite law that in an application for condonation the applicant has to account for the days of delay by giving good cause for the delay. At this juncture, I think it is also worthy point out that the factors to be considered in deliberations on an application for extension of time have been stipulated in number of cases. For instance, in the case of **Lyamuya Construction Company**

Ltd Vs Board of Registered Trsutee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010,

(unreported) His Lordship Massati J.A as he then was said the following;

".. As a matter of general principle , it is in the discretion of the Court to grant extension of time .But that discretion is judicial , and so it must be exercised according to the rules of reason and justice , and not according to private opinion or arbitrarily. On the authorities, however, the following guidelines may be formulated;

- a) The applicant must account for all period of delay.*
- b) 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 to be challenged.."*

As alluded earlier in this judgment, the main reason advanced by the applicant for delay in filing their application at the CMA is that their boss, the late Kabwe was sick but he kept on promising them that he would pay their salary arrears. They trusted him. Consequently, the time for filing their complaints at the CMA lapsed without fulfilling his promise and finally he passed on.

From the foregoing, the main issue for determination in this case is whether promise to pay the claimed amount by the employer is a good cause for the delay. The position of the law is that a promise for payment

of the claimed amount if substantiated is a good cause for delay. The vice versa is also correct , that is, unsubstantiated promise to pay cannot be a good cause for delay in filing claims at the CMA. See the case of **Messi Rogers Kimei Vs Motel Sea view Labour Revision No. 14 of 2013** (unreported).It is important to understand that a promise for payment of the claimed amount is such a general excuse which can be made by anybody. Therefore, without having concrete/tangible evidence apart from mere words, it is not safe to grant an application for condonation relying on an allegation that the employer made a promise to pay the claimed amount.

In the instant application the applicant delayed to file their complaint at the CMA for a period of more than three (3) year. Definitely, this is inordinate delay. As correctly submitted by Mr. Mapembe, the applicants are required to account for each day of delay. However, they have not shown any concrete and tangible evidence such a written document signed by the respondent's Company or the managing director , the late Kabwe committing himself to pay the claimed salary arrears. The applicants mere words that they were promised to be paid their salary arrears by the late Kabwe, cannot be relied upon by this Court to grant the application for condonation. Considering the period of delay aforesaid, it is clear that the 2nd and 3rd applicants have not shown any diligence in handling their case.

It is noteworthy that the issue on whether or not the applicants were employees of the respondent is irrelevant in the application for condonation because that issue could be dealt with during the hearing of

their complaint if their application for condonation would have sailed through.

In the upshot, I do not see any plausible reasons to fault the decision of the Mediator. This application has no merits. The same is hereby dismissed.

Dated this 24th day of August 2022




B.K.PHILLIP
JUDGE.