IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 30 OF 2022

(Arising from the Commission for Mediation and Arbitration at Arusha Labour Case No. CMA/ARS/ARB/323/2021)

FESTUS MAHENDEKA.....1ST APPLICANT

ERASTO SHANGALI.....2ND APPLICANT

GODLISTEN NNKO.....3RD APPLICANT

CASSIAN TIRA.....4TH APPLICANT

STEVEN MATALUMA.....5TH APPLICANT

OMARY ATHUMANI.....6TH APPLICANT

HUMPHREY MATERU.....7TH APPLICANT

FELIX LUKUMAY.....8TH APPLICANT

FATUMA NDOSSY.....9TH APPLICANT

SAADIA ATHUMAN.....10TH APPLICANT

ROSE KALLAM.....11TH APPLICANT

MARIAM FADHIL.....12TH APPLICANT

HONORATHA PANTALEO.....13TH APPLICANT

MAGRETH MALLYA.....14TH APPLICANT

EMMY MOSHY.....15TH APPLICANT

NEEMA ISRAEL.....16TH APPLICANT

VERSUS

ARUSHA MODERN SCHOOL LIMITED.....RESPONDENT

JUDGMENT

15/12/2022 & 16/02/2022

KAMUZORA. J,

This application emanates from the Applicants' allegation of unfair termination. It was alleged that the Applicants were employed by the Respondent on different occasions and their employment were unfairly terminated on basis of financial crisis and the mode was retrenching the Applicants. That, after termination the Respondent was ordered by the District Commissioner to pay the Applicants all their claims and the Respondent promised/pledged to pay all the dues to the Applicants the promise which was never honoured. It was also alleged that the Respondent wilfully ignored to pay the claims including contribution of the Applicants to NSSF and thus the Applicants opted to refer the matter before the Commission for Mediation and Arbitration (CMA) but they were out of time. The Applicants decided to file an application for condonation but the same was dismissed by the CMA hence the present revision application.

This application was brought under the provision of section 91 (1)(a) or (b) and 2 (a) or (b) or (c) and section 94 (1)(b)(i) of the Employment and Labour Relations Act, 2004 (ELRA) and Rules 24(1)(2) (a-f) and (3) (a-d) and 28 (1)(c)(d) and (e) of the Labour Court Rules, G.N No. 106 of 2007. The Applicants herein pray that this court be pleased to call and

examine the record of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARS/323/2021 and satisfy itself as to correctness, legality and or propriety of the ruling thereto. In addition, the Applicants pray this court to order the CMA to condone them and determine the matter on merit. Their chamber application was supported by joint affidavit of the Applicants. The application was contested by the Respondent through the counter affidavit deponed by Khalfan Said Masoud, Principal Officer of the Respondent.

Parties in this application opted to argue the application by way of written submissions and they complied to the submissions schedule save for the rejoinder submission. In their submission in support of the application, the Applicants adopted the content of the Joint Affidavit and submitted that it is a settled principle of law that sufficient reason or good cause is a pre-condition for the court to grant extension of time. They referred **Rule 31 of Labour Institutions (Mediation and Arbitration) G.N No. 64 of 2007** to support the argument that the Commission may condone any failure to comply with the timeframe in these rules upon good cause being shown.

On what amounts to sufficient or good cause for delay the Applicants referred the case of **Elias Msonde Vs. Republic, Criminal**

Appeal No. 93 of 2005. They submitted that it is depends on the particular circumstance of each case. They explained that, in the present case the Applicants submitted before CMA that the delay was stirred up by malicious and endless promises of the Respondent to pay the Applicants. For the Applicants, failure of the Respondent to pay the Applicants as prior agreed and promised before the District Commissioner constitutes sufficient cause to condone the time to file the dispute to the CMA. Referring the decision of the HC in the case of **Nyanjugu Sadiki Masudi Vs. Tanzania Mines, Energy, Construction and Allied Workers Union (TAMICO) [2013] LCCD 185,** the Applicants insisted that the CMA erred by failure to condone the Applicants' extension of time despite material explanation by the Applicants on the reasons for the delay. That, the reasons for the delay were properly deponed in the affidavit and the Applicants were not the only responsible party for the delay. The Applicants believes that the Respondent also contributed the delay when she kept promising the payments of the Applicants' entitlement.

The Applicants further submitted that extension of time is discretionary powers vested to the court but, it is trite principle that such discretionary powers are to be exercised judiciously by adhering to the principle of natural justice and accord parties right to be heard/fair trial.

It was the Applicants' view that, denying them extension of time where sufficient reasons were accorded will lockout the Applicants from their right to be heard and cause breach of principles of natural justice.

Referring the Court of Appeal decision in the case of **Lyamuya Construction Co. Ltd Vs. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 the Applicants insisted that they acted diligently, with patience and respect towards the Respondent. That, despite all unfulfilled promises, the Applicants kept making follow-ups to ensure they are paid their entitlements but the Respondent wilfully and maliciously delayed to fulfill his promises knowing that time will lapse for Applicants to refer their complaint to CMA. They maintained that, what transpired amounted to sufficient reason for the CMA to condone the Applicants' delay and hear them on merit as it will not prejudice the Respondent. To buttress their submission, they referred the case of **Mobrama Gold Corporation Vs. Minister of Energy & Minerals and 2 Others,** (1998) TLR 425.

The Applicants contended that, failure to grant extension of time will be at their peril because their rights would have not been determined as the Commission will have closed the doors to justice. They were of the view that granting the application will be advantageous to both Applicants and Respondent as they will all get an opportunity to be heard on merit.

The Applicants therefore insisted that the application be granted.

In response, the Respondent argued that the Applicants' submission suggests that there was pending payments due and payable to Applicants and that the employer kept on promising to pay such arrears but in vein resulting to the Applicants' delay in taking necessary steps. The Respondent referred paragraphs 8, 9 10 and 11 of the Respondent's counter affidavit filed before the CMA as containing the reason as to why the CMA declined to give any credence to the alleged unfulfilled promises. He explained that, the facts revealed that in shutting down the school business, the Respondent followed due process of the law. That, the employees were comprehensively consulted as required by the law and were fully represented by the trade union of their choice at each stage. That, by mutual consent they narrowed down whatever was to be paid to all employees totalling about TZS 170M and the same was settled as per copies of documents evidencing all payments made to employees appended to the counter affidavit. That, it was also shown that the Respondent equally paid all NSSF arrears to NSSF at a tune of TZS 200.M as per copies of documents appended to the counter affidavit.

The Respondent insisted that, the NSSF claims raised in the present case are fatally misconception as the CMA has no jurisdiction over NSSF claims and above all, the Respondent paid the claims to NSSF authority.

In the Respondent's view, the case before the CMA was not for unfulfilled promises or unpaid NSSF contribution rather, it intended to challenge the retrenchment and the same was filed before the CMA after expiry of one year.

The Respondent further submitted that the decisions from Court of Appeal of Tanzania and from this honourable court are clear that political settlement and out of court negotiations can never constitute a sufficient ground for extending time even where there is betrayal. That, in the case at hand there were no any scintilla of evidence laid before the CMA capable of establishing that there was any promise ever made by the Respondent and any betrayal. The Respondent formed a view that the findings made by CMA were valid, fair or verifiable and in accordance with the law hence no point in faulting the CMA decision.

Regarding the Applicant's argument on the right to be heard, the Respondent submitted that the right to be heard cannot be exercised in vacuum but in accordance with the law. That, the requirement to file case within time is a requirement of the law and it is the same law that sets standards to be met when a litigant comes to court out of statutory time. That, in the case at hand the standard was not met and the CMA hands were tied. Referring Court of Appeal decisions in the cases of **Tanzania Fish Processor Vs. Cristopher Luhangula,** Civil Application No. 161 of

1994, **Daudi Haga Vs. Jenitha Abdan Machanju,** Civil reference No. 1/2000 and **Mbogo Vs. Shah,** (1968) E, A 93 the Respondent submitted that a person seeking extension of time has to account every single day of delay to enable the court to exercise its discretion. The Respondent insisted that in the matter at hand the delay was inordinate and no proof of promise or betrayal was established. That, nothing was demonstrated as a point of law in the intended case worth of constituting an independent ground for extending time save for desire of leniency which could never justify the extension of time.

On the authorities cited by the Applicants, the Respondent was of the view that the same are distinguishable and they can only be acted upon to support the CMA finding. The Respondent therefore urged this Honorable court to dismiss the application with cost.

I have considered the application, the record from the CMA and the submissions by the parties for and against the application. From the record, the Applicants applied for condonation before the CMA and the only reason deponed in the Applicants' affidavits for delay in instituting the claim was the endless promises of the Respondent to pay the Applicants' claims. The question that was posed before the CMA was whether the unfulfilled promises by the Respondent constituted good cause for the grant of the application for extension of time.

In his Ruling the Honourable Mediator being guided by the decisions in **Fidelis Fernande Vs. Parastatal Sector Reform Commission,** Misc. Civil Application No. 26 of 2006 and **Alex Leole Vs. Tanzania Portland Cement Co. Ltd,** Misc. Civil Application No 259 of 1997, formed a view that a promise to pay has never been a good reason for extension of time even if one of the parties is betrayed. The Mediator also pointed out that the evidence was silent on the action taken by the Applicants from the date they were promised to be paid. It was concluded that the Applicants were unable to account for the delay and that, 366 days' delay was excessive and cannot be tolerated in administration of justice.

I fully agree with the CMA conclusion in this matter for the very same reasons. In embracing the reasoning by the CMA, I also passed through the application for condonation filed by the Applicants before the CMA. There is no dispute that the Applicants were employees of the Respondent. It is clear that the dispute arose on 19/06/2020 which is the date of the alleged termination. The application for condonation was lodged before the CMA on 06/08/2021 as per the CMA official seal on the documents. The degree of lateness for that matter is more 12 months which in my view is inordinate delay. This was also the holding of this court in Revision Application No. 29 of 2021, **Mohamed Salum Kondo**

Vs. Sterling Surfactants Limited (unreported) where the delay of six months was considered inordinate.

In their separate affidavits with almost similar facts, the Applicants alleged that after discovering that they were less paid, they made several follow-ups with the Respondent and the Respondent promised to pay the Applicants but in vain. It is unfortunate that, the Applicants never attached any document in their affidavit supporting the alleged follow-ups and promises. Again, the Applicants alleged to have reported the matter to the District Commissioner who in turn summoned the Respondent. That, the Respondent agreed to the Applicants' claims and promised to pay the Applicants but in vain. It was also claimed that the Applicants had several visits and meetings at the District Commissioner's office and at all times the Respondent promised to pay. Still no evidence was attached to support the visits and meetings to the District Commissioner. It was expected that if the meetings were conducted, there were correspondences or letters summoning the Respondent for the allegations reported to the District Commissioner but none was submitted. The circumstance in this case is similar to **Mohamed Salum Kondo(supra)** where the Applicant alleged that the delay was due to criminal accusation against him and regular reporting to Police Station for the intended investigation. My Brother Gwae J had this to say;

"If as per the Applicant's complaints or rather main reasons that, there were criminal accusations against him, yet to be brought to the court of law, in my view, the Applicant ought to have annexed documentary evidence to substantiate such assertions such as IR, RB Number, an affidavit from police authority. In the absence of reliable and tangible evidence to support the assertion, the Applicant's reason is left with no legs to stand."

I subscribe to the above holding and maintain that evidence substantiating meetings and promises were necessary to justify the degree of lateness in filing the dispute before the CMA. The reasons by the Applicants in this matter remain mere assertion not supported by evidence as the Applicants were unable to demonstrate if in anyway there was any official negotiation relating to the matter at hand. Thus, even the case of **Nyanjugu Sadiki Masudi** referred to by the Applicants is inapplicable in the matter at hand.

In that case this court held that in labour laws efforts for amicable settlement of dispute are encouraged and recognised and they constitute a good cause for delay. Even if I opt to take that position, the Applicants in this matter were unable to demonstrate with evidence that their delay was instigated by the effort towards amicable settlement.

On the argument that if extension of time is not granted the Applicants' right to be heard will be infringed, I agree with the

Respondent's argument that right to be heard cannot be exercised to circumvent the law. A party who intends to be heard on any claim is duty bound to comply to the time set by the law. Similar argument was raised before the Court of Appeal in Civil Appeal No. 283 of 2021, **Ahmed Teja t/a Almas Autoparts Vs. Commissioner General TRA** Tanzilii Media neutral citation [2022] TZCA 724. It was held;

> *"..... sub article (3) of article 13 of the Constitution provides that the courts shall safeguard the rights and duties of citizens according to law, so* ***the appellant's right to be heard should be exercised according to law."***

The court also adopted the statement by the High Court in **Afriscan Group (T) Limited Vs. Said Msangi**, Commercial Case No. 87 of 2013 (unreported) where it was held: -

> *"The right to be heard just like other rights, must be exercised within the confines of the law so as to avoid further breach of justice"*

Being guided by the above decision of the Court of Appeal, I find the Applicants' argument that there was denial of right to be heard unwarranted. In my view, the Mediator was correct to hold that the Applicants failed to justify their delay in referring the dispute to CMA. I therefore find no merit in this revision application and it is hereby dismissed. Considering that this revision application emanates from labour dispute, I make no orders as to costs.

DATED at **ARUSHA** this 16th Day of February 2023

D.C. KAMUZORA

JUDGE