IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 411 OF 2019

BETWEEN

FIDELIS MSAMILA & 283 OTHERS..... APPLICANTS

VERSUS

THE CHIEF EXECUTIVE OFFICER TANZANIA TELECOMUNICATIONS COMPANY LTD.....RESPONDENT

JUDGEMENT

Date of Last Order: 28/08/2020

Date of Judgement: 04/09/2020

Aboud, J.

The Applicants filed the present application seeking revision of the ruling of the Commission for Mediation and Arbitration (herein after referred as CMA) which was delivered on 30/07/2018 in Labour Dispute No. **CMA/DSM/ILA/R.592/13** by Hon. Kachenje. J.J.M.Y, Arbitrator. The application was made under the provisions of Sections 91 (1) (a) (b) & 91 (2) (a) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 R.E 2019] (herein after referred as the Act) and Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d)

and 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN. No. 106 of 2007 (here forth the Labour Court Rules).

The application emanates from the CMA where the applicants referred a dispute claiming for salary increment as per the respondent's Board of Directors Resolution which was taken by the respondent sometimes in 2012. The respondent opposed the application by filling preliminary objections to the effect that:-

i. That the Honourable Commission lacks jurisdiction to entertain the dispute on the ground that the dispute was hopelessly time barred.
ii. That there was misjoinder of the parties
iii. There is wrong citation of moving provisions of the law for filling additional evidence.

In his findings the Arbitrator upheld the first preliminary objection and dismissed the application. Aggrieved by the Arbitrator's decision the applicant filed the present application.

The matter was argued by way of written submission. The applicants and the respondent were represented by Mr. Mashiku J. Sabasaba and Ms. Lucian Gallet, Learned Counsels respectively.

Arguing in support of the application Mr. Sabasaba submitted that, the CMA's impugned ruling is tainted with fatal errors which erode its authenticity. He stated that throughout the ruling the applicants are recorded as respondents and the employer has been recorded as the applicant. The Learned Counsel argued that the error is fatal which distorts the entire contents of the ruling.

As to the merit of the application he submitted that, the Arbitrator erred in law by dismissing the labour dispute as he did not determine the same on merit. Mr. Sabasaba argued that after having found that the matter was incompetent for being instituted out of time without proper application for condonation the Arbitrator ought to have struck out the matter instead of dismissing the same. He said the position of the law is that, no incompetent suit or Appeal or application can be dismissed unless it has been heard on merit. To strengthen his submission he cited the cases of **Yahaya Athumani Kisesa vs. Hadija Omari Athumani and 2 others,** Civ. Appl. No. 105 of 2014 DSM (unreported) and **Wolfram B. Haule vs. Friginia Ole Mashale**, Land Appl. HC DSM No. 81 of 2011 (unreported).

The Learned Counsel finally prays the Court to quash the dismissal order of the CMA and in its stead order that the suit should have been struck out.

Responding to the application Ms. Lucian Gallet strongly submitted that, the Arbitrator properly dismissed the complaint as the same was filed out of time without an application for condonation. To strengthen her submission she cited the case of **Ahmed Mbonde Vs. The Director Bulk Building Contractor**, Rev. No. 214 of 2018, Lab. Div. DSM (unreported). She therefore prayed for the application to be dismissed.

In rejoinder Mr. Sabasaba reiterated his submission in chief.

Having considered the rival submissions by the parties, I find the issues for determination before the Court are whether the Arbitrator's ruling has errors on the face of record and secondly is whether the Arbitrator properly dismissed the complaint.

In determining the first issue I find it worth to quote what is stated at page one, first paragraph of the Arbitrator's ruling which is

to the effect that:-

> "The respondents herein who are the complainants in the main suit instituted this trade dispute in this Honourable Commission as against the Chief Executive officer, Tanzania Telecommunications Company Limited (TTCL)".

From the quotation above it is my view that, the Arbitrator twisted the parties' names for the purpose of writing the relevant ruling. However, each party maintained his status in the main suit. Thus, such an exchange is not an error on the face of record so long as the Arbitrator specifically mentioned that the respondents were the complainant in the relevant complaint.

Furthermore even if such an anomaly was an error on the face of records, it is my view that it cannot stand as a ground for revision. The law empowers parties to make an application to correct an award as is provided under section 90 of the Act read together with Rule 30 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (to be referred as Mediation and Arbitration Rules) GN. No 64 of 2007. Therefore, the applicants were supposed to make an application at

the CMA to rectify such an error as soon as they became aware of the same.

On the second issue as to whether the Arbitrator properly dismissed the complaint. The arbitrator dismissed the complaint because he found that the CMA lacked jurisdiction to handle the matter which was filed out of time and without condonation. Therefore, parties herein did not dispute the fact that the CMA had no jurisdiction to determine the dispute on that ground. What the applicant tabled before the Court is to challenge the dismissal order. In his submission Mr. Sabasaba argued that instead of dismissing the dispute the Arbitrator ought to have strike it out.

The distinction between dismissal and striking out was made in the case of **Yahya Athumani Kisesa** (supra) when quoting East African Court of Appeal case of Ngoni – Matengo where it was held that:-

> "... When the appeal came before this court it was incompetent for lack of the necessary decree ... This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly

constituted appeal at all. What this Court ought strictly to have done ... was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the later phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of ..."

Similarly, in the case of **Emmanuel Luoga v. Republic,** Criminal Appeal No. 281 of 2013 (unreported) where the Court had an occasion of dealing with the issue whether it was proper for the first appellate court to dismiss the appeal which was incompetent, it was stated as follows:-

"We are of the view that upon being satisfied that the appeal was incompetent for reason it had assigned, it ought to strike out the appeal instead of dismissing it. The reason is clear that by dismissing the appeal it implies that there was a competent appeal before it which

was heard and determined on merit which is not the case. "

Also in the case of **Amon Malewo v. Diocese of Mbeya** (R.C), Civil Appeal No. 22 of 2013 (unreported), the Court refused to adjourn and struck out the appeal which was incompetent before it. It is stated as follows:-

> "After all it is trite law that any court of law cannot adjourn what is not competently before it. All said and done/ we hold this appeal to be incompetent. We strike it out with no order as to costs".

All the authorities cited above emphasized that ordinarily, the remedy of a matter which is incompetent before the Court is to be struck out but not dismissal.

However, the cases cited above should be distinguished with the application at hand as they were incompetent applications resulted from the issue of jurisdiction which is not the case at hand. It is on record that the present application originates from incompetent complaint due to the fact that the matter was filed out of time at that stage. It is my view that the only remedy for

complaints or applications filed out of time without leave of the CMA or the Court is dismissal. The applicants were supposed to file an application to seek leave (condonation) of the CMA to extend time within which to file their complaint. This is also the position in the case of **DED Sengerema D/Council Vs. Peter Msungu & 13 Others**, Lab. Div. Mwanza, Misc. Appl. No. 27/2013 (unreported) Rweyemamu J. held that:-

> "When an action is time barred a party seeking to initiate it must first apply for extension of time. That the applicant did not do, consequently, I find this application incompetent and dismiss it as per the requirement of the law and practice".

The above position was restated in the case of **TANESCO Ltd vs. Bakari Mayongo**, Lab. Div. SBWG. Rev. No. 02 of 2015 [2015] LCCD 1 where it was held that:-

> "The only remedy for the late filed application in this court is dismissal and not striking out as the applicant would wish it to be in this matter, so that they can file their application

for extension of time to file the revision application."

The Court went on to hold that:-

"It is unfortunate the law of limitation Act on actions knows no sympathy or equity, it is a merciless sword that cuts across and deep into all those who get caught in the web."

On the basis of the above discussion it is my view that the Arbitrator correctly dismissed the application before him as it was filed out of time without leave to do so. I therefore uphold the dismissal order of the CMA in Labour Dispute No. CMA/DSM/ILA/R.592/13.

In the result I find the present application has no merit and is hereby dismissed.

It is so ordered.

I.D. Aboud

JUDGE

04/09/2020