IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS LABOUR APPLICATION NO. 318 OF 2021

(Arising from labour dispute No. CMA/DSM/ILALA/818/12 dated 13th March 2013 by Hon. Msuri, A., Mediator)

BETWEEN

ABDULSWAMADU MOHAMED.....1ST APPLICANT

KASSIM MWANGA.....2ND APPLICANT

JOHN J. MWAKISOLE.....3RD APPLICANT

AND

DAR ES SALAAM WATER AND SEWERAGE AUTHORITY (DAWASA) (Disestablished)/ DAR ES SALAAM WATER SUPPLY AND SANITATION AUTHORITY (DAWASA)(Established)..... 1ST RESPONDENT

DAR ES SALAAM WATER AND SEWERAGE CORPORATION (DAWASCO)(Disestablished).....2ND RESPONDENT

RULING

Date of last order: 09/03/2022
Date of Ruling: 21/04/2022

B.E.K. Mganga, J.

In 2012 applicants and 989 others who are not part to this application all being employees of the respondents were retrenched. On 20th December 2012, applicants and the said 989 others filed Labour Dispute No. CMA/DSM/ILA/818/12 to the Commission for Mediation and

Arbitration henceforth CMA challenging their retrenchment. In their application for condonation at CMA, applicants and 989 others showed that they were out of time for 12 years and 29 days. On 13th March 2013, Msuri, A, arbitrator after hearing submissions made on behalf of the applicants and the respondents, delivered his ruling dismissing application for condonation filed by the applicants. In the ruling, the arbitrator held that CMA had no jurisdiction over the dispute that was dismissed by the Industrial court in 2013 and that the dispute arose before coming into force the Employment and Labour Relations Act, No. 6 of 2004 but was referred to the labour Commissioner after 2007. The arbitrator held further that, applicants had different cause of action for different groups namely (i) compulsory retirement, (ii) retrenchment, (iii) termination based on misconduct and (iv) claims by applicants who were still working with the respondent. Aggrieved by that decision and being out of time, on 31st August 2021, applicants filed a notice of application supported with an affidavit seeking extension of time within which to file revision application so that the said ruling can be revised.

In the joint affidavit in support of the application, Abdulswamadu Mohamed, Kassim Mwanga and John Mwakasole deponed that on 7th June 2012, Abdulswamadu Mohamed filed an application for

condonation but the same was dismissed on **13th March 2013**. That, aggrieved with the ruling dismissing their application for condonation, on 23rd April 2014 applicants filed revision application **No. 80 of 2014** seeking the court to revise the said ruling but the same was struck out on **11th February 2015**. They deponed further that, thereafter they filed revision application No. 122 of 2015 but the same was also struck out on 27th November 2015 for absence of leave for representation. Applicants deponed further that, after Revision Application No. 122 of 2015 was struck out, they filed Miscellaneous **Application No. 315 of 2015** but was struck out as a result, they filed Miscellaneous Application **No. 80 of 2017** which was granted on **8th March 2018**. They deposed further that, their advocate noted that the decision they were intending to challenge was mistakenly shown that was delivered on 13th March 2013 while it was on 13th March 2014, as a result, on 17th April 2018, their counsel requested the court to return the file to CMA for correction of dates and names of the parties. That, after the file was sent to CMA, on 3rd July 2018 they filed an application for correction of dates and names of the parties and that the same was granted on 6th December 2018. That, on 22nd January 2019, they filed Revision Application No. 43 of 2019 but was withdrawn on **11th June 2019** and granted leave to file a proper Miscellaneous Application within 14 days. That, **on 24th**

June 2019, they filed Miscellaneous Application No. 378 of 2019 but they withdrew it on **15th July 2019** and were supplied with the court order on **5th August 2019**. That, on 13th August 2019 after spending time finding the law that changed names of the respondents, their advocate filed Miscellaneous Application No. 352 of 2020. That, on 23rd August 2021, after observations made by the court, applicants' counsel withdrew the said Miscellaneous Application No. 352 of 2020 with leave to refile. On reasons for the delay, applicants deponed that, initially the application was filed within time i.e., 10 days but was struck out and that thereafter there were subsequent withdrawals and refiling and application for correction of date of the ruling.

In resisting the application, respondents filed the counter affidavit of Bernadetha Hassan Mkandya, principal officer of the respondents. In her counter affidavit, the deponent merely noted and disputed the averments of the applicants and put them to strict proof thereof.

When the application was called for hearing, Mr. Symphorian Kitare, learned advocate appeared and argued for and on behalf of the applicants while Mr. Ayub Sanga, State Attorney appeared and argued for and on behalf of the respondents.

Submitting on the merit of the application on behalf of the applicants, Mr. Kitare, learned counsel argued that applicants were aggrieved by CMA ruling dated **13th March 2014** issued by Hon. Msuri A. Mediator, who dismissed the entire dispute filed by the applicants. Counsel went on that, on **23rd April 2014** applicants filed revision **No. 80 of 2014** that was withdrawn on 23rd August 2014 because in the revision application, number of applicants was nod diclsoed. After withdrawal of the said revision No. 80 of 2014, applicants found themselves out of time that is why, they have filed this application. He submitted further that, this application was filed on 31st August 2021. Counsel submitted also that there are illegalities in the CMA ruling because the Mediator dismissed the dispute at the time of considering grounds for condonation but went on to consider the merit of the dispute. He cited the case of principal secretary ***Ministry of Defense and National Service v. Devran Valambia [1992] T.L.R. 185*** (CAT) to cement on his argument that illegality is a sufficient ground for extension of time.

Counsel for the applicant also submitted that, from the date of filing Revision No. 80 of 2014 to the time of its withdraw, applicants were in court but faced technicalities. He cited the case of ***Michael***

Leseni Kweka v. John Eliasye [1997] T.L.R. 152 to bolster his argument that technical delay is a ground for extension of time.

Counsel for the applicant further implored the court to grant the application on reason that the delay was also caused by the court because the date of the ruling was wrongly shown as 13th March 2013 instead of 13th March 2014 and names of the parties were interchanged. He argued further that there was delay of sending the CMA file to CMA for correction of the error. Counsel cited the case of ***Tanzania Revenue Authority v. Tango Transport Company Limited, Civil Application No. 5 of 2006*** to show that mistakes by the court can be a ground for extension of time because applicant cannot be punished for the mistakes committed by the court. The last reason that was fronted by counsel for the applicants is that changes occurred in the structure and names of the respondent.

On the other hand, Mr. Sanga, learned State Attorney, resisting the application submitted that the Mediator dismissed the application for condonation but did not consider merits of the dispute.

On illegality as a ground for extension of time, State Attorney submitted that in the affidavit in support of the application, there is no paragraph showing that applicants stated that the CMA ruling contains

illegalities. He argued that in their joint affidavit, applicants relied only on technical delay. Mr. Sanga argued that submissions from the bar by Mr. Kitare, counsel for the applicants that there are illegalities are not born out of the joint affidavit in support of the application. Mr. Sanga submitted that parties are bond by the own pleadings. In alternative, he submitted that there is no illegality. Mr. Sanga went on that condonation was dismissed because the Mediator found that he has no jurisdiction, the delay was inordinate (12 years), joinder of cause of action and failure to follow procedures provided for under the law in relation to disputes that arose prior 2004.

It was submitted by Mr. Sanga, State Attorney that in terms of Rule 56(1) of the Labour Court Rules, GN. No. 106 of 2007, applicants were required to show sufficient cause for the delay. State Attorney cited the case of ***Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Womens Christians Association of Tanzania, Civil Application No. 2 of 2010,*** CAT (unreported), to cement on his submissions. He went on that in an application for extension of time, applicant must account for each day of delay, show diligence and not negligence or apathy. State Attorney submitted that the delay was caused by Mr. Kitare, Advocate for the applicants who was negligence and cited the of ***Hamimu Hamis Totoro@ Zungu***

Pablo and 2 others v. The Republic, Criminal Application No. 121/07 of 2018, CAT (unreported), ***Kambona Charles (as administrator of the Estate of the Late Charles Pangani v. Elizabeth Charles, Civil Application No. 529/17 of 2019*** and ***Wambele Mtumwa Shahame v. Mohamed Hamis, Civil reference No. 8 of 2016***, CAT (all unreported) to bolster his argument that ignorance of law or negligence of advocate is not a good cause for extension of time. State Attorney submitted further that, on 8th March 2018, counsel for the applicants was granted leave to file representative suit, but he wrote a letter on 17th April 2018 that is after 40 days, seeking correction of the date the ruling was issued and that the error was noted by the applicants almost 4 years after delivery of the ruling. That, Correction order was served to the applicant on 6th December 2018, but revision application No. 43/2019 was filed on 22nd January 2019 i.e.; after 40 days.

Mr. Sanga distinguished **Kweka's *case*** (supra) submitting that though it deals with technical delay but that was not caused by counsel for the applicant as it is in the application at hand. State Attorney argued that in **Othman's *case*** (supra)it was held that it is mandatory to attach the ruling but he submitted that the same is not mandatory in Labour cases.

In rejoinder, Mr. Kitare, learned Counsel for the applicants reiterated that the CMA ruling contains illegalities as reasons for dismissal went to the root of the dispute and not condonation. Counsel submitted further that, it is not necessary to account for each day of delay because after the CMA ruling, applicants acted promptly.

I have gone through both the affidavit and counter affidavit filed by the parties in this application and examined their rival arguments and find that I need to put right some of the issues before I proceed to determine the application. In my careful examination of the joint affidavit in support of the application, I have found that applicants did not plead illegality in their joint affidavit, as such, any submissions relating to illegalities cannot be considered because that is not evidence.

It was submitted by counsel for the applicants that changes that occurred in the structure and names of the respondent was one of the cause for the delay. Unfortunately, counsel did not explain how and why. Bare as it is, in my view, I hold that it was not. It was not enough for the applicants just to mention that change of names and structure of the respondents caused the delay to the applicants to file revision application before the court without explaining how did it cause the delay.

It was submitted by counsel for the applicants that the delay was contributed by the court because there were errors in the ruling relating to date of its delivery and names of the parties. Learned State Attorney was of the view that counsel for the applicants was negligent because he took 40 days from the date leave was granted to the date of writing a letter praying correction to be done. I have carefully considered the so-called error on date of the ruling and names of the parties and I am not convinced that it really existed. I am of that view because Mr. S. R. Kitare, advocate for the applicant wrote his letter to the Registrar High Court, Labour Division on **4th May 2018** praying the CMA record to be returned to CMA for correction of dates as appearing to annexture KCA-7 to the joint affidavit and the alleged correction was done on 6th December 2018 as shown in annexture KCA-8 to the joint affidavit. What has disturbed my mind is that, on 19th October 2015, Mr. Symphorian Kitare, advocate for the applicants and Mr. Simon Josephat, advocate assisted by Ms. Emeline Mmbando, advocate for the respondents appeared before Hon. L. L. Mashaka, J (as she then was) in Revision No. 122 of 2015 and made their submissions to the conclusion as appearing in the Ruling of the court dated 27th November 2015 annexed to the joint affidavit as annexture KCA-4. It is clear from the said ruling of the court that Mr. Kitare, advocate for the applicants argued seven (7)

grounds of revision. In none of those grounds, counsel for the applicant submitted that the date of the CMA ruling was incorrectly recorded or that names of the parties were improperly recorded. I have noted further that, the court having heard submissions of both counsels as reflected in the ruling that struck out revision No. 122 of 2015 on 27th November 2015, that Abdulswamadu Mohamed filed the said revision representing other applicants without leave of the court. In my view, counsel for the applicants was supposed to raise it if at all the situation was as claimed. It is clear also that prior to that, the same advocates appeared before Hon. I. S. Mipawa, J (as he then was) in Revision No. 80 of 2014 and the court struck it out on 11th February 2014 because the jurat of attestation was defective as shown in the ruling of the court (annexture KCA-4) to the joint affidavit. I have noted that the alleged correction of date of the ruling was done 6th December 2018 by Hon. E. Mwidunda, arbitrator but in absence of Hon. Msuri, arbitrator who issue the ruling as it was alleged that he was already transferred to another station.

In connection to the foregoing, applicants filed Miscellaneous application No. 315 of 2015 but the same was struck out by Hon. A.C. Nyerere, J(as she then was) on 24th February 2017 in presence of Mr. Kitare, counsel for the applicants but in absence of the respondents as

shown in the Drawn order (annexture KCA-5) to the joint affidavit of the applicants. without being tired, applicants filed Miscellaneous application No. 80 of 2017 as a result on 8th March 2018, Hon. A. C. Nyerere, J(as she then was) granted leave to the aforementioned three applicants to represent 887 others. The order was granted in presence of Mr. Kitare, counsel for the applicant and Simon Joseph, counsel for the respondents. In my view, in all these applications applicants were annexing the CMA ruling in their application but we are made to believe that they did not notice the incorrect date and names of the parties until on 17th April 2017 after being granted leave.

Wonders will never end and the most of them is human being himself. It can be wondered that Applicants filed revision No. 43 of 2019 but on 11th June 2019 Mr. Kitare, counsel for the applicants prayed to withdraw it on ground that they were supposed to file an application for extension of time. The prayer was granted by Hon. Z. G Muruke, J. With the service of Mr. Kitare learned counsel, applicants filed Miscellaneous Application No. 378 of 2019 but on 15th July 2020, Mr. Kitare, learned counsel for the applicants prayed to withdrew it on ground that applicants discovered change of names of the respondents as a result, the prayer was granted. Thereafter, applicants filed Miscellaneous Application No. 352 of 2020 which also was marked withdrawn by Hon.

Arufani, J on 23rd August 2021 following the prayer by Mr. Kitare, learned counsel for the applicants. Following withdrawal of the last-mentioned application, applicants filed this application.

It is undisputed that applicants filed a litany of applications before this court but all of them were found incompetent. It is also undisputed that in all these applications and at CMA, applicants were represented by the same learned counsel. It was submitted by State Attorney that counsel for the applicant was negligent, and that negligence of an advocate cannot be a ground for extension of time. From the occurrence of events as narrated hereinabove, I am of the view that there was negligence on part of counsel for the applicants. I am alive to the court of Appeal decision in the case of ***Kambona's case*** *(supra)* wherein it was held:-

> *"It is settled that a mistake made by a party's advocate through negligence or lack of diligence cannot constitute a ground for condonation of delay but a minor lapse committed in good faith can be ignored."*

In **Kambona's case** (supra) the court of Appeal also referred to its earlier decision in the case of ***Zuberi Mussa v. Shinyanga Town Council, Civil Application No. 3 of 2007*** (unreported) wherein it held:-

"Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case. ***If, for instance, an advocate is grossly negligent and makes the same mistake several times, that is lack of diligence. But if he makes only a minor lapse or oversight only once and makes a different on next time that would not, in my view, amount to lack of diligence."***

In the application at hand, counsel for the applicant repeated the same mistake several times. In my view, he was grossly negligent or lacked diligence. It is beyond imagination as to what happened in the litany of applications that were filed by the applicants for all those years. That cannot be permitted.

Counsel for the applicants relied on technical delay as a ground for extension of time, but in my view, the technical delay relied upon, was due to gross negligence that is not a ground for extension of time. In my view, technical delay, in the circumstances of this application cannot apply.

I should point albeit briefly that the view taken by counsel for the applicants that they are not required to account for each day of delay is not correct. There is plethora of authorities that in application for extension of time, applicants are required to account for each day of delay. It was submitted by State Attorney that **Othman's *case*** (supra)

that required attachment of ruling does not apply in labour cases because that is not mandatory, in my view, is a misconception. In my considered opinion, whatever application is made before the court, a ruling, order of judgment being challenged must be attached so that the court can satisfy itself whether the complaints are founded or not otherwise, the court will be in dark.

That said and done, I have found that the application is devoid of merit because applicant have failed to show sufficient cause for the delay and have failed to account for each day of the delay. I therefore hereby dismiss it.

Dated at Dar es Salaam this 21st April 2022.

B.E.K. Mganga
JUDGE

Ruling delivered on this 21st April 2022 in chambers in the presence of John J. Mwakisole, the 3rd Applicant and Boaz A. Msofe, State Attorney,for the respondent.

B.E.K. Mganga
JUDGE