

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 156 OF 2023

*(Arising from the award of the Commission for Mediation & Arbitration of DSM at Ilala
Issued by Hon. E. Ngaliwa: Arbitrator) Dated 30th May 2023 Labour Dispute No.
CMA/DSM/TMK/60/2023)*

EMMANUEL C. TONTE AND 2 OTHER.....APPLICANT

VERSUS

KIOO LIMITED.....RESPONDENT

EXPARTE-JUDGEMENT

Date of the last order: 30th Oct. 2023

Date of judgement: 17th Nov. 2023

OPIYO, J.

In this matter, the applicants were employed by the respondent on diverse dates and in a different position. It was alleged that their relationship turned hostile on 31st December 2022 when the respondent decided to terminate their contract without being paid their terminal benefits. On such decision there was a misunderstanding between them. For the whole time they tried to pursue their rights indifferent ways, but in vain until 10th March 2023 when they decided to lodge their labour dispute before CMA claiming to be unfairly terminated both substantively and procedurally resulted from breach of contract together with the

application for condonation. Their application for condonation was denied leading to this application under Sections 91(a)(b), (2) (b)(c), and 94(1)(2) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019] and Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2007 praying for this court to be pleased to to call for records, revise and set aside the CAMA award No. CMA/DSM/TMK/60/2023 by Hon. Ngalika, E. Mediator dated 30th May 2023.

Their claim is that the mediator erred in law and facts by not considering that applicants were not paid their terminal benefits. And that the mediator erred in law and facts by not considering that the employer acts against applicants was culminated with illegalities in denying them extension of time. Their further claims are that mediator erred in law and facts disregarding the right to be heard between the parties and not considering that applicant had justifiable reason for the delay.

Before this court, the respondent filed counter affidavit out of time, it was therefore struck out making the hearing to be conducted *ex parte*. Applicants were represented by Mr. Hemedi Omary, Personal Representative. Arguing for the application, Mr. Hemedi submitted that the applicants were employed by respondents at different times on

specific term contracts. 2nd applicant entered agreement on 23/05/2011, 3rd applicant on 09/09/2011 and 1st on 24/05/2011. He stated that the contracts were renewable as one expires. But, surprisingly on 27th December, 2022 the applicants received letters showing that their contracts elapsed and they were to leave employer's premises.

He continued to submit that under Section 15(6) of Cap 366 RE 2019 it is stated that, if employer varies the contract, the same has to be initiated in writing. But in this matter nothing was initiated in writing to justify any variation by the employer. He added that, after receiving the letter on 30th December 2022 showing how much each would be paid, but the same have never been paid irrespective of several follow ups. After seeing that the payment was not coming forth as promised they were fumbling on the right way to pursue their rights. This landed them to the Temeke Member of parliament that is when they met a personal representative who started the proper process for them by filing the claim before CMA after the time to do so had elapsed.

Mr. Hemedi submitted that the applicant did not give regard to the fact there were obvious errors committed by the employer in terminating applicants employment and the applicants were not paid anything upon

termination even if they could have agreed with the termination. He argued that each person has a right to be heard constitutionally. Therefore the arbitrator ought to have considered it and give them a chance to be heard on what they considered as their basic claims.

Lastly, he submitted that the mediator did not consider that the above points constituted good reason for delay on part of the applicants. he added that, worse still they were never notified by the employer on what to do in case of dissatisfaction with the termination, that is why they were pursuing their rights in wrong way leading to their delay, but even that was not at all considered by the applicant. Supporting his stand, he cited the case of **EQbas Ebrahim Vs. Alexander Wahyungi**, Civil Appl. No. 235/1]7 of 2020, Maige, J at Pg 4. In which it was held that: -

"As there were obvious errors as explained above, it was prudent for arbitrator to extend time to enable them to be paid their dues. Also, under Section Rule 31 of GN No. 64 the arbitrator was supposed to apply the same to enable them to get their dues."

They thus prayed for the CMA decision to be quashed and set aside and allow the application to pursue their rights.

The main issue for determination is whether there was a justifiable reason for the CMA to grant condonation. Challenging the decision of

the CMA, Mr. Hemedi contended that the applicants were not paid their terminal benefits at all amid unfair termination making the decision of the employer to be tainted with illegality, hence, justifiable reason for delay. Under **Rule 10(1) of G. N No. 64 of 2007** any dispute about fairness of employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate.

From the above provision, since the applicants were terminated on 30th December 2022 and the matter was filed at CMA on 10th March 2023. It means there was a delay of more than 70 days. This Court and Court of Appeal already established a well-known principle that in enlarging time the Court has discretion upon good cause has shown [See. **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania, (Unreported); and **Praygod Mbaga V. Government of Kenya Criminal Investigation 5 Department and Another**, Civil Reference No. 4 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported)]. Under normal circumstances, such kind of delay is usually termed as inordinate, leading to the denial of the application for extension of time

based on the decision in the land mark case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, the Court of Appeal of Tanzania, at Dar es Salaam, which among other things held that apart from requirement for accounting for each day of delay, the delay in question generally should not be inordinate. It is also fortunate that the same case considers other reasons, such as the existence of a point of law of sufficient importance not apathy negligence or sloppiness on part of the applicant and other sufficient grounds such as the illegality of the decision sought to be challenged.

Reverting to this matter, the applicants challenged the decision of employer as being illegal for having errors as they were terminated with no reason, while they had fixed renewable contracts. And after termination not being paid anything even those promised in the termination letter. Obviously, in this case the applicant did not account for each day of delay as required and the delay is indeed inordinate, but the facts that they were terminated without being paid anything irrespective of their long service entails illegality worth considering in giving them a chance to be heard out of time. In law, as decided in the

case of **Principal Secretary, Ministry of Defence & National Service v. Devran Valambia** [1992] T.L.R. 185 when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures rectify it. Under the circumstances the applicants were in, of chasing an empty promise of being paid in vain, the chances are that they may find themselves inevitably late to take proper action.

From the above observations, the CMA the decision of the CMA denying the applicants extension of time for their matter to be heard out of time is hereby quash and set aside. The applicants are granted extension of time for their matter to be heard out of time. No orders as to costs this being a labour matter.



A handwritten signature in black ink, appearing to be 'M. P. Opiyo'.

M. P. OPIYO,
JUDGE
17/11/2023