

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**LABOUR REVISION NO. 261 OF 2023**

*(From the decision of the Commission for Mediation and Arbitration at Kinondoni Labour Dispute No. CMA/DSM/TMK/117/2023, Hon. Ngalika, E. Mediator, Dated 25<sup>th</sup> September, 2023)*

**BETWEEN**

**MUHAMMAD TAHIR ..... APPLICANT**

**VERSUS**

**HARLEYS (T) LIMITED ..... RESPONDENT**

**RULING**

**Date of last Order:** 22/11/2023

**Date of Ruling:** 12/12/2023

**MLYAMBINA, J.**

The Applicant seeks for this Court to revise and set aside the Ruling of the Commission for Mediation and Arbitration (herein CMA) in *Labour Dispute No. CMA/DSM/TMK/117/2023* dated 25/9/2023 delivered by Hon. Ngalika Mediator which dismissed an application for condonation.

The hearing of this application proceeded orally. Both parties got the opportunity of being represented. Mr. Emmanuel Nasson, Advocate appeared for the Applicant, whereas Mr. Mussa Lilombo, Personal Representative was for the Respondent.

Mr. Nasson submitted that the cause of action occurred on 28/2/2023 and the dispute was referred to CMA on 7/6/2023. He stated that it wasn't

until 24/3/2023 when the Respondent denied paying repatriation and substance allowance pending repatriation. The Applicant advanced two grounds for condonation. First, illegality on resignation. Mr. Nasson contended that the Applicant was a fixed term contract employee. Thus, the law only allows resignation on fixed term employee on material breach of the contract, whereas the same was not the case in the matter at hand. He then cited *Rule 6(1) & 8(2) (a) of GN. No. 42 of 2007* to support his claim and added that; parties must come to an agreement of earlier termination. He then stated that the Mediator came to the finding that it was a long drawing point.

The second ground was continuous breach. Mr. Nasson submitted that the Applicant was claiming for repatriation and subsistence allowance because he is not working. He stated that the Respondent does not dispute but alleged that the Applicant secured another work which is not true. He then cemented his point by referring to the case of **Thilak Kumar Naidu Haniumantha v. Mount Meru Retailer Co. Ltd**, Revision No. 357 of 2021 High Court of Tanania, Labour Division at Dar es Salaam p. 14.

It was further contended that the Mediator did not address it all and that is why they are praying for the file to be remitted back for determination by CMA. To amplify his point, Mr. Nasson referred to the case of **Hosea**

**Mpambije and 6 Others v. Shellys Pharmaceuticals Ltd**, Revision No. 536 of 2020 High Court of Tanzania Labour Division at Dar es Salaam, pp.13-14. He then added that in the alternative, the Court be pleased to grant condonation as the Applicant was late for 15 days to file an application for condonation. He maintained that the delay was not accounted but they raised the ground of illegality.

In reply, Mr. Lilombo submitted that; as per the Applicant's complaint, the intended labour complaint, if condonation is granted, is breach of contract. He stated that among prayers in CMA F1 is for the payment of the remaining contract period which are almost 21 months. He added that such kind of complaint should be filed within 30 days as per *Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007* (herein *GN. No. 64 of 2007*). To cement his position, he relied to the case of **Sabrina Halfan Abdulazan v. Sayona Drinks Ltd**, Labour Revision No. 5 of 2022, High Court of Tanzania at Mwanza, P.8.

Mr. Lilombo proceeded to reply that; the Applicant was late for 69 days because the application was filed on the 99<sup>th</sup> day since termination notice became effective. He continued that the Applicant issued termination notice of 90 days on 28/11/2022 and so the effective date was 28/2/2023. He added that; if there was any claim for unfair breach of contract, he should

have filed not later than 30/3/2023 but he remained silent until 7/6/2023. Thus, he was late for 60 days. He submitted further that the Applicant keeps changing. At CMA through CMA Form No. 1, he said the late was 37 days, in the supporting affidavit, he maintained 14 days and while submitting he said 15 days.

Mr. Lilombo continued that on the point of illegality, sometimes it can be accepted however there are some conditions developed by the Court. *First*, such point of illegality must be of sufficient importance to warrant attention of the Court. *Second*, such point of illegality must be apparent on the face of record such as on jurisdiction and not that can be discovered by long drawn process or argument. *Third*, illegality must be with diligence and that there should not be sloppiness. To back up his points, he referred to the cases of **Shabani Masele and 2 Others v. Treasury Registrar and Attorney General**, Misc. Civil Application No. 729 of 2018, High Court, Dar es Salaam and **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, Court of Appeal of Tanzania at Arusha p. 8-9.

Mr. Lilombo went on to submit that the alleged illegality is contained in paragraphs 3.10.1, 3.10.11; 3.10.12 and 3.10.13 took long process and is not apparent on the face of records as they require testimonies to be proved.

For him, that can never be accepted to amount to an illegality. To support his point, he referred to cases of **Chandrakant Jashubhai Patel v. The Republic**, Criminal Application No. 8 of 2022 Court of Appeal, Dar es Salaam and **Vietel Tanzania PLC v. Ishmael Francis Mtweve**, Misc. Labour Application No. 25 of 2022, Tanga p. 8. In his view, the Applicant has not demonstrated the error on the face of record and that there is no illegality at all.

On the third ground of illegality with diligence, Mr. Lilombo submitted that the Applicant delayed for 69 days. He stated that the Applicant is a foreigner. It was the view of Mr. Lilombo that there was sloppiness. The Applicant issued termination notice pursuant to *clause 12 of the Contract* and that is why he sent three months' notice according to *Section 41(1) and (2) of the Employment and Labour Relations Act [Chapter 366 Revised Edition 2019] (herein to be referred as ERLA)* which allows the employment to be terminated by notice.

Further, according to Mr. Lilombo, the Applicant is trying to challenge his own notice. He stated that challenging the lawfulness of termination notice issued by the Applicant to the Respondent cannot be a ground of illegality. To support the submission, he referred the case of **TAMICO (KMCL) on behalf of Enoch Joseph & 113 Others v. Bulyanhulu Gold**

**Mines Ltd**, Civil Application No. 361/01 of 2018 Court of Appeal of Tanzania at Dar es Salaam p.15. On continuous breach, Mr. Lilombo submitted that the same has never been a ground for extension of time. He stated that if there is breach, the Applicant does not need extension of time because the claim accrues every time. To support the point, he cited *section 7 of the Law of Limitation Act [Chapter 89 Revised Edition 2019]* and referred to the case of **Aizack Adam Malya v. Willy Mlinga**, Revision No. 443 of 2019 High Court of Tanzania Labour Division at Dar es Salaam (unreported) which ruled that *Law of Limitation Act* does not apply in Labour matters.

He submitted further that even if the Law of Limitation applies, there must be some conditions including the relationship between the parties must be valid. He added that; in this case the Applicant terminated himself willfully through resignation letter.

On condition two, there must be some proof of promises, commitment or discussions in respect of the alleged issue but in the case at hand, the Applicant never proved the existence of promises by the Applicant to pay repatriation and subsistence allowance. To cement such point, he referred to the case of **Felician B. Itemba v. The Board of Trustees of ELCT Eastern and Coastal Diocese**, Civil Case No. 22 of 2021 High Court of Tanzania at Dar es Salaam (unreported) pp 9,10 & 11. He finally submitted

that this application has neither point of illegality warranting extension of time nor there is no continuous breach. He lastly prayed for the application to be dismissed for lack of merits.

In rejoinder, Mr. Nasson submitted that CMA F1 have different prayers and not one prayer only. He stated that the Applicant's claim is breach of contract and not on unfair termination and for that the time limit is 60 days and not 30 days as claimed. He continued that resignation on fixed term contract is limited by the law. He proceeded that on sufficient importance, it is this Court to interfere when there is injustice.

Mr. Nasson stated that the Applicant was recruited in Pakistan in 2016 and became used by the Respondent until 2023 before being abandoned. Mr. Nasson advanced four points more. *One*, it is the Respondent who initiated termination. *Two*, the 15 days were not accounted for. *Three*, the delay was not in ordinate. *Four*, *the Law of Limitation Act* applies in labour if there is a *lacuna* and that there is no labour law that has provided on continuous breach, that is why they resorted on *the Law of Limitation*.

According to Mr. Nasson, since there was continuous breach, then it was not proper to dismiss the dispute as continuous breach is not automatic. One has to seek for condonation. It was not a termination notice but a

resignation letter. He winded up his submission that the Counsel has not replied on the omission of CMA to address the issue of continuous breach. For him it deems to be an admission and so he prayed for the application to be allowed.

Having considered the rival submissions for and against the application advanced by both parties' representatives and in consideration of the CMA records, this Court has the duty to determine whether this application has merit.

In the matter at hand, there is no dispute that the Applicant was late to file for the application at CMA. The dispute is on the days considered to be late. The Advocate for the Applicant stated that the Applicant was late for 15 days while the Personal Representative of the Respondent stated that the Applicant was late for 69 days. To determine that issue, one has to know what the dispute is all about. CMA F1 shows that the dispute claimed is on breach of contract. *Rule 10(1) and (2) of GN. No. 64 of 2007* deals with time limitation for disputes to be filed at the CMA. It states clear under *sub (1)* that; for unfair termination is 30 days and under *sub (2)* for other disputes is 60 days. The nature of the dispute claimed by the Applicant is supposed to be filed at the CMA before the lapse of 60 days. For easy of reference, the relevant provision is to the effect that:

*10(2) All other disputes must be referred to the Commission within sixty days from the date when the dispute arose.*

CMA F1 shows that the dispute arose on 28/02/2023 and the matter was filed at CMA on 07/06/2023. This proves that there is a total of 99 days. That means, from the 60 days which are the time limitation provided by the law, it remains 39 days which the Applicant was late to file for his application. The Applicant was supposed to file the application at CMA not later than 29/04/2023. For that matter, there was a delay of 39 days which is from 30/04/2023 to 07/06/2023.

This application is concerning condonation. In application for condonation, there are factors needed to be considered depending on the circumstances of each particular case. *One*, to account for all the period of delay. *Two*, the delay must not be inordinate. *Three*, the Applicant must show diligence and not apathy. *Four*, no negligence or sloppiness and; five, the existence of a point of law such as illegality of the decision sought to be challenged. The same has been held in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010.

In the matter at hand, Mr. Nasson stated two reasons for lateness which were not considered at CMA. These are illegality on resignation and continuous breach.

On the issue of illegality, Mr. Nasson, the Advocate for the Applicant stated that illegality is seen whereby the resignation occurred while there was no immaterial breach of the contract contrary to *Rule 6(1) and 8(2) of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007*. In the case of **Hamisi Mohamed (administrator of The Estates of The Late Risasi Ngawe) v. Mtumwa Moshi (administratrix of The Late Moshi Abdallah)**, Civil Application 407 of 2019 (unreported), p. 13 it was held that:

It follows then that an allegation of illegality by itself suffices for an extension of time. However, such an allegation of illegality "must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process.

The reason pleaded of immaterial breach needs a long drawn of argument. One has to look at the contents of the contract itself so as to see whether there was a breach or not. It is not on the face of the record for it

to be considered as the ground for extension of time. Thus, the same does not suffice to stand as a ground for extension of time.

As regard to the issue of continuous breach, the same lacks merit. In the affidavit in support of the application for condonation the Applicant clearly stated that he resigned from employment on 08/12/2022 but the Respondent's management let him work up to 28/02/2023. Therefore, the employment contract between the parties herein ended on the mentioned date. On such circumstance, the ground of continuous breach cannot stand, as he was required to observe that; if the payment of his transport allowance is not done within 60 days, he had to rush to the CMA to refer his complaint.

On the other hand, the law requires the Applicant to account the days of delay. In the case at hand, Mr. Nasson did not do so. In the case of **Elias Kahimba Tibenderana v. Inspector General of Police & Another**, (Civil Application 388 of 2020) (unreported), it was held that:

Consistent with Rule 10 of the Rules, the Court has underscored several factors to be considered in applications for extension of time which include, reason for and length of the delay, explanation accounting for such delay and in appropriate cases, existence of a point of law or illegality of sufficient public importance in the impugned decision. See for instance; **Vallambhia Lyamuya Construction Co. Ltd v. Board of Trustees of the Young**

**Women Christian Association, Civil Application No. 2 of 2010** (unreported). The above reinforces the well-established principle that a litigant who wishes the Court to extend time has an obligation to explain away each day of the delay.

Applicant has delayed filing his application on time. The delay is of 39 days. He did not even state where he was on those days.

Conclusively, on the basis of the Applicant's failure to account for the days of the delay, the present application is hereby dismissed for lack of merits.

It is so ordered.



**Y. J. MLYAMBINA**  
**JUDGE**  
**12/12/2023**

Ruling delivered and dated 12<sup>th</sup> December, 2023 in the presence of Counsel Emmanuel Nasson for the Applicant and Musa Lilombo, Personal representative of the Respondent.



**Y. J. MLYAMBINA**  
**JUDGE**  
**12/12/2023**