

TANZANIA / JUDGMENT

bernard mihayo vs tanzgraphite t limited

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM REVISION NO. 104 OF 2022 BERNARD MIHAYO.....APPLICANT VERSUS TANZGRAPHITE (T) LIMITED..... RESPONDENT (From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni) (Mbunda: Mediator) dated 25th March, 2022 in REF: CMA/DSM/KIN/541/2021

JUDGEMENT

12th & 30th September, 2022 Rwizile, J Mr. BERNARD MIHAYO asked this Court to call for the records and proceedings of the Commission for Mediation and Arbitration (CMA) with the No. CMA/DSM/KIN/541/2021 and revise the proceedings, ruling and its decision. Facts that pave way to this application is that the applicant was employed by the respondent on 26th July, 2016 on a fixed term contract of one year that was renewable. In March, 2020 the applicant was sent on leave without pay for an indefinite period of time. There was no reason and no prior consultation. While the applicant was on leave, the respondent required him to sign a "Mutual Separation Agreement" which was supposed to commence on 31st October, 2021 upon accepting a terminal payment of TZS. 19,688,154.40. In protest, the applicant referred the dispute to the CMA on legality of termination of employment by way of "mutual separation agreement" and "forced leave without pay". Discovering he was out of time, filed an application for condonation, which was dismissed. The applicant not satisfied by dismissal of his application for condonation, he filed this application in protest. His application is supported by the affidavit sworn by January Raphael Kambamwene, learned Advocate for the applicant. In his affidavit, the applicant forwarded three issues for determination as hereunder;

- i. That the 'blanket dismissal' of the application for condonation, the CMA unlawfully refrained from entertaining what are otherwise very valid and timeously filed two distinct claims. // That CMA erred in holding that the complaint of wrongful dismissal, filed on 17th day of December, 2021 was out of the 30 days' time limit. The Mediator overlooked the fact that the wrongful termination should have been reckoned as from 1st November, 2021 the day the "mutual separation agreement" was disclosed to the applicant for soliciting his signature, and not 31st October, 2021 the date indicated in the "mutual separation agreement" as the date employment was deemed to come to an end. Hi. That the CMA erred in

law In treating the complaint of 'forced unpaid leave' was time barred when in actual fact this was a continuous complaint and is still continuing. There is no basis for holding that time started to run from the date the applicant was despatched on leave without pay, as the same is accumulating on a daily basis. The application was heard by written submissions. Both parties were represented. Mr. January Raphael Kambamwene appeared for the applicant whereas Mr. Gasper Nyika and Miss Samah Salah were for the respondent. Mr. Kambamwene submitted that the respondent informed the applicant of leave without pay and a letter sought for termination of the employment by offering mutual separation agreement. He stated that the agreement on leave without pay ran for over 21 months. He continued to argue that there was no consultation to the signing of the mutual 3 separation agreement. He stated at the CMA that, the respondent terminated his employment by reasons of change of mining law passed by the parliament. He stated that at the hearing of the application for condonation, the respondent stated that the applicant, by not signing the mutual separation agreement was still an employee. In his view, the application cannot be considered to be time barred. He further argued that the kind of dispute raised by the applicant did not need condonation. The learned counsel held the view that what was done amounts to an illegality and impropriety of leave without pay, illegality of termination of employment by way of mutual separation agreement and level of cash compensation under the mutual separation agreement. He then prayed, the decision and proceeding of the CMA be struck out. In reply, for the respondent, it was submitted that CMAF1 stated the labour dispute to be breach of contract but in the proceedings, he ended up submitting on unpaid leave and unfair termination. He continued to argue that the mediator referred to the case of John Mosses and 3 Others v Republic, Criminal Appeal No. 145 of 2006, Court of Appeal of Tanzania and proceeded to determine the matter to see if there were good reasons for the delay. It was held that the applicant provided no 4 reason to justify the delay. In his view, if the applicant believed the disputes needed no application for condonation, he was not supposed to file the same. The learned counsel was therefore plain that the CMA decision was correct. The respondent proceeded to submit that rule 11(3) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 and the case of Lyamuya Construction Company Limited v Board of Registered Trustee of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 show, the determining factors in granting condonation is to account for each day of delay and one has to show diligence. It was stated further that the applicant's reason for delay was to wait for being called to return to work. It is the respondent's further argument which stated that cannot be a good reason for delay as held in the case of John Moses and 3 Others v The Republic (supra), Alex Lwabina and BP Tanzania Limited, Miscellaneous Labour Application No. 481 of 2019, Alsony Peter Gilman v A to Z Textile Mills Ltd, Labour Division No. 6 of 2013 and Salome Mussa Lyamba v K.K. Security (T) Ltd, Revision No. 278 of 2010 5 It was insisted that the applicant stated that he was put on leave without pay since March 2020 but failed to justify so. It was said, his contract ended on 31st October, 2021 but failed to file the application before 17th December, 2021. The applicant therefore, it was vehemently argued, failed to account for each day of delay as in the cases of Lyamuya (supra), Zito Zuberi Kabwe and 2 Others v The Attorney

General, Civil Application No. 365/01 of 2019, Karibu Textile Mills v Commissioner General (TRA), Alex Lwabina (supra) and Salome Mussa (supra). He was therefore not diligent. On the issue of illegality, the argument was that, it does not apply to commencement of proceedings in Court or CMA. That even if it were to be determined, it was not part of the grounds referred at the CMA. It was further argued that, illegality and impropriety of leave without pay and illegality of termination of employment by way of mutual separation agreement are not part of the affidavit supporting this application. It was said, they are therefore allegations from the bar. In the view of the respondent, illegality must be of sufficient importance and apparent on the face of the record, reference was in the case of Finca (T) Limited and Another v Bonoface Mwalukisa (unreported), Civil Application No. 589/12 of 2018 which cited the case of Lyamuya. 6 Finally, by stating that the applicant failed to account for each day of delay by reason outside of his control and so CMA was right to dismiss the application for condonation. It was prayed, the application be dismissed. Upon hearing both sides, the contested issue here is if the applicant demonstrated sufficient reason for CMA to grant his application for condonation. In determination, I have to say, the law under rule 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) G.N. No. 64 of 2007 provides for the time frame of filing labour disputes at CMA. It states: - "10(1) Disputes about the fairness of an 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." And,

- (2) AH other disputes must be referred to the Commission within sixty days from the date when the dispute arose." As CMAF1 shows, the applicant was claiming for a breached of a contract and a payment of withheld emoluments. While in applicants' testimony, he stated his labour dispute arose from leave without pay and unfair 7 termination. Indeed, the record shows, breach of contract, the applicant referred to is the result of unfair termination and withheld emoluments due to leave without pay. On leave without pay; there is no dispute that the applicant was the employee of the respondent. Also, that the applicant went on leave without payment on October, 2020. This kind of dispute as rule 10(2) of G.N No. 64 of 2007 provides, it deals with a labour dispute that arose from other claim apart from unfair termination. Its time limitation therefore is within 60 days. The applicant filed a labour dispute on 17th December, 2021. For this fact, the labour dispute ought to be filed in December, 2020. But the applicant filed it after the lapse of 14 months (420 days). For that matter, he was time barred and hence a need for application for condonation. The law allows for the grant of extension of time for a dispute filed out of time. Rule 11 of G.N. No. 64 of 2007 provides that: - "This rule applies to any dispute, referral document or application delivered outside the applicable time prescribed in the Act or these rules." 8 But the granting of is not automatic, one has to adduce sufficient reason for delay and also to account for each day delayed. This has been provided under rule 31 of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 that: - "The Commission may condone any failure to comply with the time frame in these rules on good cause." In the case of Wambura NJ. Waryuba v The Principal Secretary Ministry for Finance and Another, Civil

Application No. 320/01 of 2020, it was held: - "... it is essential to reiterate here that the Court's power for extending time... is both wide-ranging and discretionary but it is exercisable judiciously upon cause being shown." The applicant's reason for delay was that he was waiting to return to work, for easy reference on untyped proceeding: - "... Sababu ya kucheiewa ni kwamba niikuwa nangoja kurudi kazini." As it has been seen the days delayed were 420. But all this happened when the applicant was on leave caused by the respondent. A question is, was it possible to start a dispute with his employer when on leave. 9 Above all, there was no dispute by that time to necessitate filing of dispute by that time. The dispute arose when termination was commenced. It is trite, as held in the case of Joel Silomba vs The Republic, Criminal Application NO. 5 OF 2012, CA, (Unreported), that in considering whether or not to grant such extension of time, courts take into account these factors:

- (i) the length of the delay; (H) the reason for the delay: was the delay caused or contributed by the dilatory conduct of the applicant? (ill) whether there is an arguable case, such as, whether there is a point of law or the illegality or otherwise of the decision sought to be challenged; and/or (iv) the degree of prejudice to the opposite party if the application is granted. considering the ratio in the case of Joel Silomba (supra) and the case of Wambura N.J. Waryuba(supra). I find no obstacle to apply my discretion, that there were sufficient encumbrances that led to the delay of filing the application. Such delay, I think is justified and the respondent would not be prejudiced if the condonation was granted by the CMA. I fault the finding of the CMA in this point. 10 On breach of contract; there is no dispute that the applicant was given a mutual separation agreement dated 18th November, 2021 (which was not signed) it is attached as exhibit. The application for condonation was filed on 1701 December, 2021. For this kind of dispute as stated in rule 10(1) of G.N. No. 64 of 2007 has to be filed at CMA within 30 days. As the records shows the applicant filed the application on day 29. And so was within time limit and for that matter there was no need for filing an application for condonation. This point lacks legal stand as the application was within time. For the circumstances, I find this application to have merit. It is allowed, the CMA decision is consequently set aside. As this is the labour matter, no order as to costs. A.K. Rwizile
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