

TANZANIA / JUDGMENT

bidco oil soap ltd vs emmanuel kimario

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR-ES-SALAAM REVISION NO. 145 OF 2023 (Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni, Labour Dispute No. CMA/DSM/KIN/460/20/119 by Hon. Mbeyaie, R., Arbitrator dated 29th July, 2022) BETWEEN BIDCO OIL & SOAP LTD APPLICANT VERSUS EMMANUEL KIMARIO RESPONDENT

RULING

Date of Last Order: 21/ 08/2023 Date of Ruling: 18/ 09/2023 MLYAMBINA, J. This application arises from the Award of the Commission for Mediation and Arbitration (herein CMA) delivered on 27th July, 2022 by Hon. Mbeyaie, R. (Arbitrator). The Applicant is seeking for revision of the Award. Before the hearing, the Respondent raised two but argued one often recurring preliminary objection, namely: Fomu Namba 10 imesajiliwa nje ya muda na haijawahi kuwasiiishwa kwa Mjibu Maombi, hivyo kukosa uhalali kama iivyoielezwa kwenye aya ya 21 ya Sheria za Ukombo wa Muda (Item 21 of the Law of Limitation Act, 2019). i Hivyo maombi haya ya marejeo yanakiuka takwa la kisheria lililowekwa kwenye Kanuni ya 34(1) ya Kanuni ya Ajira na Mahusiano Kazini ya Mwaka 2017. The afore objection literally mean: Form 10 has being filed out of time and has never been served to the Respondent, thus lacking validity as defined in paragraph 21 of the Law of Limitation [Act of 2019]. As such, this application for revision violates the statutory requirement set out in the Employment and Labour Relations (General Regulations), G.N. No. 47 of 2017. Counsel Emmanuel Julius Mashamba was for the Applicant and Mr. Phillip Lincoln Irungu and Florian Frances were for the Respondent. Arguing in support of the preliminary objection, Counsel Irungu submitted that; initially the Applicant filed Revision Application No. 293 of 2022 which was struck out for lack of the notice of intention to seek for revision of Award (CMA F. 10). The Applicant was granted an extension of time to file a revision application. He attached the CMA F. 10 which shows that the application was filed on 21st June, 2023 without being granted an extension of time or been served to the Respondent. It was his view that, it is a high time for this Court to set base and principle of time limitation to file CMA F 10. Further, Counsel Irungu submitted that; CMA F. 10 as introduced by Regulation 34(1) of G.N. No. 47 of 2017, is compulsory and has to be served to the other party prior filing of the application for

revision. He cemented his point by referring to the cases of Access Bank Tanzania Limited v. Dixon Bohela, Revision No. 85 of 2023 (unreported); Anthony Massoy v. China Dansheng Bank Limited, Revision No. 51 of 2023 (unreported) and Mlenga Kalunde Mirombo v. The Trustees of Tanzania National Parks and Another, Revision No. 06 of 2021 (unreported). It was the Respondent's Counsel submission that the Labour Laws do not provide for time limit to file CMA F. 10 and so the proper provision to be used is item 21 of the schedule of Law of Limitation which provides 60 days as time limit. Thus, since the Applicant's application was for revision, and section 91(1)(a) of the Employment and Labour Relations Act [Cap. 366 Revised Edition 2019, herein ELRA] provides time limitation to be 42 days from the date the Award was issued, the notice has to be filed prior to it. Counsel Irungu was emphatic that the time limitation to file CMA F. 10 is at least 41 days from the date of the Award or when the Award was served to the Applicant. The Award which is being challenged was issued on 29th July, 2022. The CMA F. 10 ought to be filed not later than 07th September, 2022. The Applicant filed the CMA F.10 on 21st June, 2023. It was filed without the application for extension of time even after the previous application (Revision No. 293 of 2022) was struck out for the same reason. That means, it was more than 13 months from the date the Award was issued. The Respondent called upon the Court to expunge from the record CMA F. 10 for being filed out of time. Thus, the application is incompetent and should be struck out. To support the point, the Respondent referred the Court to the case of Anthony Massoy v. China Dansheng Bank Limited (supra) which referred the case of Unilever Tea Tanzania Limited v. Paul Basondole, Labour Revision No. 14 of 2020, High Court at Iringa, (unreported) p. 12. consequently, the Respondent prayed the application to be dismissed for being incompetent. In reply, Mr. Mashamba submitted that the Applicant after the former application for revision was struck out, through Misc. Application No. 475 of 2022 obtained the leave to file revision out of time within 14 days. He added that the leave was granted on 15th June, 2023 and he filed the notice of intention to seek for revision on 21 June, 2023. He filed this application on 28th June, 2023. Mr. Mashamba was of submission that Regulation 34(l) of G.N. No. 47 of 2017 provides for CMA F. 10 as a mandatory form to be filed prior filing of the revision application to the High Court. He added, its only reason is to inform the CMA to prepare and forward the records to the High Court. He stated that there is no time limit for its filing. He added that this Court stated that CMA F. 10 has to be filed prior the application for revision. It was his view that the Respondent complied with the mandatory requirement by filing the said form at CMA and the High Court prior to this revision. Further, Mr. Mashamba submitted that CMA F. 10 should not be compared with the notice of appeal as it does not institute the appeal, does not provide for the details of the nature of the order to be appealed and does not provide for time within which to file the same but merely the information to the CMA. He then supported his point by referring to the case of Tanzania Revenue Authority v. Mulamuzi Byabusha, Revision No. 312 of 2021 at page 9-11 (unreported). According to Mr. Mashamba, as per Rule 3(1) of the Labour Court Rules, 2007, G.N. No. 106 of 2007 the Court has to be driven by equity and not technicalities for the purpose of ensuring substantive justice. To support the point, he cited Article 107A of the Constitution of the United Republic of Tanzania, 1977 and cases of Tanzania Revenue Authority v. Mulamuzi Byabusha (supra) and Fredy Mbeyela v. Tanzania Education Authority, Revision No. 269 of 2021, at pages 6 & 7 (unreported) pursuing this Court to be in line with the overriding

objective principle. He then prayed for the preliminary objection raised to be overruled. In rejoinder, Counsel Irungu for the Respondent submitted that the Applicant did not reply to the allegation that the disputed notice was not served to the Respondent, he conceded to their submission. On the issue of the CMA F. 10 to not be considered as the notice of appeal and the case of Tanzania Revenue Authority v. Mulamuzi Byabusha (supra), he rejoined that this Court in various decisions has stated the importance of filing CMA F. 10 before filing an application for revision. To support his point, he referred to the most recently cases of Access Bank Tanzania Limited

- v. Dixon Boheta (supra), Anthony Massoy v. China Dansheng Bank Limited (supra) and Mlenga Kalunde Mirombo v. The Trustees of the Tanzania National Parks and Another, Revision No. 06 of 2021 (unreported). The Respondent reminded the Court in the situation of conflicting decisions, it should be guided with the most recent one. He cemented their point by referring to the case of Mantra (Tanzania) Limited v. The Commissioner General, Tanzania Revenue Authority, Civil Appeal No. 430 of 2020, Court of Appeal of Tanzania at Dodoma at page 17 (unreported). I have considered the rival submissions of both parties. The objection raised is on the time limitation which is a term of comprehensive import embracing validity of the application. Time limitation is all about limits of the power of the Court/CMA to hear and determine a matter. A Court cannot entertain a matter which is time barred, it lacks such jurisdiction. There is no dispute that CMA F. 10 is a mandatory document which needs to be filed prior to the institution of the application for revision. This has been provided for under regulation 34(1) of G.N. No. 47 of 2017 which states that: The forms set out in the Third Schedule to these Regulation shall be used in all matters to which they refer. (Emphasis is mine) As matters now stand, it shows that this application was filed after the granting of an extension of time. The same can be proved by the attachment named BDC 3 which is the ruling in the Misc. Application No. 475 of 2022. The time granted was 14 days from the date of the ruling which was 15th June, 2023. But the prayer in the said Misc. Application was only for extension of time to file revision of the CMA Award. Nowhere in the record shows that the extension of time to file CMA F. 10 was also applied and granted. For that matter, it could not be possible for this Court to grant for the application for extension of time to file CMA F. 10. For easy of reference, the prayer read at page 1 that: ... The Applicant prays for this Court to extend time for them to file the application for revision against CMA Award (Emphasis is mine). At page 14 that: ... The Applicant to file his intended application within 14 days from the date of this ruling (Emphasis is mine). The above order sought is, in my view, both clear and salutary in its effect, namely, that the Applicant applied for 14 days to file the intended application. There was no prayer for extension of time to file CMA F. 10. Although the law does not specifically provide for the time limit for a party to file CMA F. 10, as stated by Mr. Mashamba and previous decisions, I am conscious that the same should be filed at CMA within reasonable time and be served to the other party before the time limit to file for the revision application to the High Court. To be apt to the point, I squarely don't find any force in the argument of Counsel Irungu that the time limitation to file CMA F. 10 be at least 41 days from the date of the Award or when the Award was served

to the Applicant. The reason behind is that the 41 days cannot give the CMA and the other party reasonable time for the purposes intended under regulation 34(1) of G.N. No. 47 of 2017. Indeed, the 60 days' time limit under item 21 of the schedule of Law of Limitation are against the provisions of Section 3 and Section 91 of the ELRA (supra). It is the duty of the Court to see that the provision of procedural law is not abused or under rated, and that undue advantage is not taken of it. In so doing, the Court will not be banking on technicalities. It is acting in aid of substantive law and justice which abides to its procedural handmaids. More so, the notice (CMA F.10) carries both administrative and judicial function. One, it is administrative in the sense that it alerts CMA to prepare the records as there is an intended revision. Two, it is judicial in the sense that it informs the Decree Holder that the Decree cannot be executed. Three, it informs the opposite party that revision process has commenced. Therefore, all the three-pointed objectives should not defeat the provisions of Section 91 of the ELRA (supra) which directs that revision application should be filed within 42 days. In responding to the call of Counsel Irungu for setting base and principle of time limitation to file CMA F. 10, I hold that an application for filing CMA F. 10 (notice) should be filed within thirty (30) days from the date of the decision/ Award or the date of serving the decision/Award to the Applicant. By observing the vitalness of filing notice, specifically to carter the administrative objective, when 30 days lapses, the Applicant must file an application for extension of time for notice (CMA F. 10). Given the fact that Rule 11 (1), (2) and (3) and 29 of GN No. 64 of 2007 does not apply on Rule 34 of GN No. 47 of 2017 which requires filing of CMA F. 10, I advise the responsible person or body to make amendment of GN No. 47 of 2017 in order to allow a party who delays to file CMA F. 10 to file the same before the CMA. Meanwhile before GN No. 47 is amended to carter the procedure for extension of time to file CMA F. 10, I lay a supposition that the Applicant should file the application for extension of time before the High Court Labour Division in terms of Rule 56 (1) of the Labour Court Rules, GN. No. 106 of 2007. In this matter, the records shows that the Applicant applied for the extension of time on application for revision only. It seems the Applicant assumed that by being granted extension of time to file a revision application, also could file CMA F. 10. That was wrong on its part. One cannot file a document which is time barred without being granted leave to file the same. In the case of Michael s/o Mwakajaba v. Bewatu (Represented by Sephania Simba - Principal Officer), Civil Revision No. 02 of 2021, High Court at Mbeya (unreported), p.7 it was held that: ... The law is very clear that a party who is time barred ought to apply for extension of time ... It was submitted by Counsel Irungu that the Respondent's was not even served with the CMA F. 10. Such assertion was not replied by Mr. Mashamba in his submission. In the case of Kaspar Jan Rienermann v. Benedict Mashiba, Commercial Case No. 32 of 2022, High Court at Dar es Salaam (unreported) it was held: In the end this Court finds that the Defendant failure to respond to the paragraphs...15 of the plaint constituting the claims, amounts to admission ... Likewise, in this application, Mr. Mashamba did not respond to the issue of not serving the Respondent with the CMA F. 10. That means, he admits to it. On that matter, the CMA F. 10 filed in this application is being expunged out of the record for being filed without leave of the Court. This leaves the application to be incompetent before the Court. The Respondent

through his counsel prayed for this application to be dismissed. As I have found that the Applicant in the main application was within the time limit granted, this defect of filing CMA F.10 without being granted leave does not warrant dismissal of the matter. For the above reasons, which differ in some respects from those of Counsel Irungu and Mashamba, I therefore struck out this application with no order as to costs. It is so ordered. Y J .

MLYAMBINA JUDGE 18 / 09/2023 Ruling delivered and date 18th day of September, 2023 in the presence of Counsel Emmanuel Julius Mashamba for the Applicant and Philip Irungu for the Respondent. JUDGE 18 / 09/2023

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