

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. LABOUR APPLICATION NO. 21 OF 2022

(Originating from the award of the Commission for Mediation and Arbitration in CMA/GTA/06/2021)

GEITA GOLD MINING LTD.....APPLICANT

VERSUS

YUAJA MLEMELWA.....RESPONDENT

RULING

25th & 26th May, 2023

Kilekamajenga, J.

The applicant, through the legal services of the learned advocate, Mr. Ernest Masanga Makene, preferred the instant application seeking extension of time to file a revision against the decision of the Commission for Mediation and Arbitration. The application was accompanied with an affidavit of Cecilia Nkanabo, the applicant's Senior Human Resource Officer. The same was made under Rule 24(1)(2)(a)(b)(c)(d)(e) and (f) and 24(3)(a)(b)(c) and (d) and Rule 55(1), 56(1) and (3) of the Labour Courts Rules, GN No. 106 of 2007. During the hearing of the application, the learned advocate, Mr. Elias Hezron appeared for the applicant whereas the respondent enjoyed the legal services of the learned advocate, Mr. Bahati Kessy. In his oral submission, the counsel for the applicant prayed to adopt the affidavit accompanying the application. He further alleged illegality as the reason for the extension of time. He expounded the illegality further that DW1 did not take an oath nor affirmation when testifying something



which amounts to an illegality to warrant extension of time. He invited the court to the principle of the law stated in the case of **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein & 3 Others**, Civil Application No. 6 of 2016. It was the counsel's submission that, at this stage his role is to display the illegality for the court to grant extension of time. He vehemently urged the court to enlarge time for the applicant to file a revision.

The submission from the counsel for the applicant led to the response from Mr. Kessy for the respondent. Before going further with the submission, he prayed to adopt the notice of opposition and the respondent's counter affidavit. Expounding further the objection to the application, the counsel for the respondent informed the court on the requirement to state the illegality in the affidavit as failure to do so may render the alleged illegality a new issue in the application. For that reason therefore, Mr. Kessy urged the court to disregard the alleged illegality for being a new issue. He referred the court to the case of **The Registered Trustees of Archdiocese of Dar es salaam v. The Chairman Bunju Village Government and 11 others**, Civil Appeal No. 147 of 2006, CAT at Dar es salaam (unreported). He insisted that, the reason of extension of time must be stated in the affidavit because oral submission is not evidence. In this application, the applicant or the counsel was supposed to state the reason for extension of time in the affidavit. The affidavit in support of the application

seems to be hinged on second hand information as the deponent chronicled information received from Benard Otieno who, unfortunately, did not swear an affidavit as required in the case of **Dianarose Spare Parts LTD v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021. In his view, the cited illegality is not a good reason to warrant this Honourable Court to enlarge time. He fortified his argument with the cases of **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No.13 of 2019, CAT at Dar es salaam (unreported); **Distillers LTD v. Benetson Mishosho**, Civil Appeal No. 382 of 2019, CAT at Dar es salaam (unreported). Finally, Mr. Kessy urged the court to dismiss the application.

In the rejoinder, Mr. Hezron for the applicant distinguished the case of **Distiller** (*supra*) to the instant circumstances. When responding on the case of **Archdiocese** (*supra*), the counsel conceded on the need to state the reason for the delay in the affidavit something which the applicant complied. He further argued that, the case of **Dianarose** (*supra*) is distinguishable to the instant application. Also, the case of **Charles Richard Kombe** (*supra*) was not on a labour dispute and therefore distinguishable. He reiterated the prayer to allow the application.

Having considered the rival arguments from the advocates, the major issue for determination is whether the applicant has advanced sufficient reason or good cause to warrant extension of time. I am aware, extension of time is the discretion of this court which must be exercised where the applicant has demonstrated good reason to warrant the court to grant. This position is clearly stated in the cases of **Tanga Cement Co. v. Jummanne Masangwa and Another** Civil Application No. 6 of 2001 (unreported); **Sospter Lulenga v. Republic**, Criminal Appeal No. 107 of 2006, Court of Appeal of Tanzania at Dodoma (unreported); **Aidan Chale v. Republic**, Criminal Appeal No. 130 of 2003, Court of Appeal of Tanzania at Mbeya (unreported) and **Shanti v. Hindochi and Others** [1973] EA 207.

There is no exhaustive definition of sufficient reason, hence the court has to gauge each reason depending on the circumstances of each case. In the case of **Seif Store Limited v. Zulfikar H. Karim**, Civil Application No. 181 of 2013 (unreported), the Court of Appeal of Tanzania stated that:

"The interpretation of what constitutes good cause is entirely left to the discretion of the court, a subjective approach. However, categories of what constitutes a good cause are never closed."

It has been an established principle of the law that where there is an allegation of illegality, the court must grant extension of time for the appellate court to

correct the record. This principle of the law is stated in many cases including the case of **Principal Secretary, Ministry of Defence and National Service Versus Devram P. Valambilia** [1992] TLR 185 where the Court of Appeal of Tanzania stated that:-

"We think that where, as here, the point of law at issue is the illegality of or otherwise of the decision being challenged, that is of sufficient reason" Within the meaning of Rule 8 of the Rules for extension of time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand...in our view when the point at issue is one challenging 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 be established, to take appropriate measures to put the matter and the record right."

In the case of **VIP Engineering and Marketing Limited v. Citibank (T) LTD**, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 (unreported), the Court of Appeal of Tanzania emphasized further that:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes reason for extension of time under Rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

See also, the case of **Veronica Fubile v. National Insurance Corporation and Three Others**, Civil Application No. 168 of 2008 (unreported); **Citibank (T) Limited v. TTCL and Others**, Civil Application No. 97 of 2003 (Unreported); **William Malaba Butabutemi v. The Republic**, Criminal Application No. 5 of 2005 (unreported); **National Insurance Corporation of (T) LTD v. Shengena Limited**, Civil Application No. 63 of 2011 (unreported).

With time, the Court of Appeal, in my opinion, realised the misuse of the doctrine of illegality in application for extension of time and finally qualified it further. In the case of **Tanzania Cigarette Company (TCC) v. Hassan Marua**, Civil Appeal No. 49/01 of 2018, the Court of Appeal stated that:

"It is not every claim of illegality that be found to be a good cause, the illegality must be apparent."

The Honourable Court of Appeal went further expanding the jurisprudence on illegality in the case of **Charles Richard Kombe** (*supra*) thus:

"...it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred."

While referring to an Indian case of **Chunila Dahyabhai v. Dharamshi Nanji and Others**, AIR 1969 Guj 213 (1969) GLR 734, the Court of Appeal of Tanzania was persuaded with the principle stated there in thus:

"...the words 'illegality' and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not errors of either law or fact after the formalities which the law prescribes have been complied with."

In the case of **Charles Richard Kombe** (*supra*), the Court of Appeal of Tanzania went on emphasizing that:

"It is clear from these observations that a mere error of law in the exercise of jurisdiction is not enough."

In the application at hand, the applicant alleged existence of illegality on paragraph 26 of the accompanying affidavit. The alleged illegality was further clarified by the counsel for the applicant during the hearing. The illegality was hinged on the fact that, DW1 did not take an oath or affirmation when testifying. However, when gauged in line within the above stance taken by the Court of Appeal, such an alleged illegality may not benefit the privilege of being a good cause for extension of time. As stated above, to amount to an illegality, there must be a question of jurisdiction, or where there is denial of the fundamental

right to be heard or where the matter was time barred. In the case at hand, the alleged irregularity does not fall within the above pigeon holes stated in the current position of the law.

Furthermore, the counsel for the respondent objected the application for failing to disclose the illegality in the affidavit rather than stating the same in the oral submission. I subscribe to the counsel for the respondent's submission that, the applicant simply mention hinted on the existence of illegality without further explanation. In my view, he denied the respondent the right to know the nature of alleged illegality for their proper preparation and response. In other words, the alleged illegality remained the secret of the applicant and his/her counsel until the date of hearing. In my view, this is not the best practice and legal issues cannot be brought behind the doors. I further entirely agreed with the professional submission of Mr. Kessy that, the reason for delay must be stated in the affidavit as oral submission during the hearing does not amount to evidence. On this point, the Court of Appeal of Tanzania in the case of **The Registered Trustees of the Archdiocese of Dar es salaam** (*supra*) made it clear that:

"...an affidavit is evidence we think it was expected that, reasons for the delay would be reflected in the affidavit. In the absence of the reasons, it occurs to us that there was no material evidence upon which the judge would determine on merit the application before him."

The Court went further stated that:

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

In the case of **Joao Oliveira and Soul of Tanzania Limited v. IT Started in Africa Limited and Baraja Bernard Kangoma**, Civil Appeal No. 186 of 2020, CAT at Arusha (unreported), the Court of Appeal of Tanzania stressed further that:

"It is now settled that as a matter of general principle submissions by counsel are not evidence."

In conclusion, the applicant has failed to advance sufficient cause for extension of time. The alleged illegality does not benefit from the principles of the law to warrant extension of time. Also, the reason for the delay was supposed to be stated in the applicant's affidavit something which the applicant failed to do so. The oral submission of the applicant's counsel is not evidence. In totality, the application lacks good cause for extension of time. I hereby dismiss the application. No order as to costs as it is a labour dispute. It is so ordered.

DATED at **Mwanza** this 26th day of May, 2023



Ntemi N. Kilekamajenga.
JUDGE
26/05/2023



Court:

Ruling delivered this 26th May 2023 in the presence of the respondent but in the absence of the applicant. Right of appeal explained.



Ntemi N. Kilekamajenga.
JUDGE
26/05/2023



