

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

MISCELLANEOUS LABOUR APPLICATION NO. 464 OF 2019

BETWEEN

AIR TANZANIA COMPANY LIMITED..... APPLICANT

VERSUS

CAPT. MSAMI MMARI.....1ST RESPONDENT

SUED A. MJUNGU.....2ND RESPONDENT

RULING

Date of Last Order: 03/06/2020

Date of Ruling: 14/08/2020

About, J.

The applicant, **AIR TANZANIA LIMITED** filed this application seeking the Court's order for extension of time to file an application for revision to set aside the Deed of Settlement and subsequent award issued by the Commission for Mediation and Arbitration [hereinafter to be referred to as CMA] at Dar es salaam on 16th June, 2014 in Labour Dispute No. CMA/DSM/ILALA/245/10/263 by Hon. Massay, Mediator/Arbitrator.

At the hearing the applicant was represented by Mr. John Nzunda, Learned Counsel while Mr. Kelvin Kidufu, Learned Counsel

appeared for the respondent. With leave of this Court, the application was argued by way of written submissions.

Arguing in support of this application Mr. John Nzunda argued on three points as follows.

The first issue was on illegality, Mr. John Nzunda submitted that, the applicant is a Limited liability Company according to Section 39 of the Companies Act [CAP 212 RE 2002] and the adopted formal procedures of the applicant, the Company documents including the relevant deed of settlement was supposed to be signed by the Director with the Company seal and, witnessed by the company Secretary according to the Company policy. He said in this matter the Deed of Settlement lacks details of the person who signed it. He further argued that, CMA had obligation to do authenticity check before issuing an award based on illegal Deed of Settlement and the arbitrator failed to fulfil such obligation. In supporting of his submission, he cited different cases including the case of **Principal Secretary Ministry of Defence and National Services vs. Derval Valambia** 1992 TLR 18.

The second aspect was jurisdiction; he argued that the CMA had no jurisdiction to order payment of pension fund. To strengthen his argument he referred this Court in the case of **Masoud kondo &**

3 Others v. M/S Tanganyika Investment Oil Transport [2011-2012] LLCD 17 and the case of **Managing Director Southern Link v. Khamis M. Mgereka** [2011-2012] LLCD 37.

He further argued that, NSSF as well as PPF are social security funds established by their specific laws and the procedure for claiming and payment of the same are well illustrated in their laws.

On the last issue that the award is ambiguous, he argued that under Item 2 of the Deed of Settlement it was agreed that first respondent will be paid TZS 114,244,807 but the Arbitrator changed the figures in the award to the effect that the first respondent to be paid 1,142,444,807.38 the amount which was not in the Deed of Settlement. He further submitted that in the matter at hand, the Deed of Settlement and award are not in conformity, therefore makes an award ambiguous and unlawful. He added that the ambiguity itself suffice extension of time. To support his argument he cited the case of **Steven Kihyo and Others vs. St Christina Girls Secondary School** [2013] LCCD. Mr. John Nzunda therefore prayed for the application to allowed.

Opposing the application Mr. Kelvin Kidifu averred that, the illegality of the Deed of Settlement does not amount to illegality for this matter because it attracts long drawn argument as it is not a

clear point of law to support his argument. To support his argument he cited the case of **Lyamuya Construction Company Ltd Vs. The Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civ. Appl. No. 2 of 2010, CAT.

Mr. Kelvin Kidifu went on to submit that, the Deed of Settlement on the Applicant's side was signed by the Managing Director/Chief Executive Officer (MD/CEO) and stamped with official stamp witnessed by the Human Resource Manager. He further stated that the applicant failed to tender the Company's policy to enable this Court to see who has mandate to sign the relevant document.

As regards to the issue of jurisdiction he submitted that, the CMA award only provided for monetary arrangements which the parties had agreed without touching much on the legality of every term. Mr. Kelvin Kidifu also conceded that the CMA had no jurisdiction to entertain disputes on pension funds.

On the issue of ambiguity of the award he submitted that it is a clerical error which does not touch the substantive matter of the case. He therefore prayed for the application to be dismissed.

In rejoinder the Mr. John Nzunda contended that, the respondent did not comply with the Court's order because they were

served on 28/05/2020 instead of 26/05/2020 as ordered by the Court. He therefore prayed for the Court to strike out the respondent's application from the Court's registry.

As to the merit of the application Mr. John Nzunda reiterated his submission in chief.

Before determining the merit of this application it is worth to comment on the applicant's submission that the respondent's reply should be struck out because he delayed to serve him. It is undisputed that the respondent was ordered to file his submission in this Court on or before 26/05/2020 and he complied with. It is also undisputed that the applicant was served on 28/05/2020, however it should be noted that the purpose of serving the other party timely is to enable him/her to have enough time to prepare for his/her defense. In this application the applicant was served on 28/05/2020 and he was required to file his rejoinder on or before 01/06/2020. From the date the applicant was served to the date he was supposed to file his rejoinder I find it to be a reasonable time for him to prepare for his submission of which he did. Therefore, I find no justifiable reasons to strike out the respondent's submission.

After considering parties submissions, Court records, relevant labour laws and practice I find the main issue to be determined is whether the applicant has adduced sufficient cause to be granted leave to file the intended revision application out of the prescribed time.

As it was cited in the Notice of Application and Chamber Summons, the applicant's prayer is made under 56(1) of the Labour Court Rules, GN 106 of 2007. This is the provision of law that gives this Court power to extend time upon good cause shown. The relevant provision is to the effect that:-

“Rule 56 (1) - The **court may extend or abridge any period prescribed by these rules on application and on good cause shown,** unless the court is precluded from doing so by any written law.”

[Emphasis is mine].

It is therefore expected that the applicant will show that he was prevented by sufficient or reasonable or good cause and the delay was not caused or contributed by his act or omission as it was held in the case of **Tanga Cement Company Ltd v. Jumanne D.**

Masangwa & Another, Civil Application No. 6 of 2001, CAT at Tanga.

In the present matter, the applicant submitted that the reason for this application to be granted is based on the illegality, jurisdiction and ambiguous of the award.

In respect of the alleged illegality, the applicant's affidavit states specifically being the Deed of Settlement was signed by unauthorized person and lacks Company's seal contrary to section 39 of the Companies Act. I have gone through the relevant document and it is apparent on the face of it, that it was signed by the Human resource Officer and does not have a Company seal as rightly submitted by the applicant. The respondent's Counsel argued that those illegalities are from the Deed of settlement and not the award. I fully agree with him on that aspect; however it has to be noted that the award was drawn from the Deed of Settlement which constitutes illegality. Thus the award cannot be separated from such illegalities.

In the cases of **Zuberi Nassor Mohamed v. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application No. 93/15 of 2018, CAT Zanzibar and **Lyamuya Construction Co. Ltd** as cited in the case of **Omary Ally Nyamalege & 2 Others v. Mwanza**

Engineering Works, Civil Application No. 94/08 of 2017

(unreported) the Court emphasized that:-

".... Such point of law must be of sufficient importance and I would add that it must be apparent on the face of record, such as the question of jurisdiction not that one would be discovered by long drawn argument or process."

[Emphasis is mine].

As held above in Court's the case of Zuberi Nassor Mohamed (supra) decision, the alleged illegality must be apparent on the face of record. In the application at hand since the applicant did specifically pointed out the alleged illegality which is apparent on the face of record, is my view that it constitutes sufficient cause to grant the application at hand. It is a principle of law that, once the issue of illegality is concerned, the court has to find it as a good reason for extension of time.

The position has been stated in different cases, including the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 182, where by this

court at page 189 observed that:-

“In our view 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 to put the matter and the record right.”

Furthermore, in **Kashinde Machibya vs. Hafidhi Said, Civil Application No. 48 of 2009** this Court of Appeal had this observation:-

“Bearing in mind that it is now established law in this country that where a point of law involves the illegality of the decision, that by itself constitutes sufficient reason to grant an extension of time.....even if the appellant’s intended appeal is out of time, there is no other option but to grant extension of time.”

Likely in the case of **Kalunga and Company, Advocate Vs. National Bank of Commerce Limited** [2006] T.L.R 235 the held

that:-

"Since the point at issue is one alleging illegality of the decision being challenged i.e. the validity of the High Court's decision in interpreting a statutory provision and the propriety of a judge raising an issue 'suo motto' and making a decision without the parties concerned being heard upon it, sufficient reason has been shown for granting an extension of time to file an application for leave to appeal to the Court of Appeal."

Also in the Court of Appeal of Tanzania case of **Attorney General Vs. Consolidated Holding Corporation and Another, Civil Application No. 73 of 2015, Dar es Salaam Registry** (unreported) held that:-

"...contentious as to illegality or otherwise of the challenged decision have now been accepted as a good cause for extension of time."

On the basis of the above decisions it is my view that, in the application at hand the applicant has demonstrated good cause to warrant the extension of time as prayed.

I find no need to labour much on other grounds established by the applicant as the ground of illegality itself suffice to grant the application at hand. Furthermore the respondent's Counsel conceded that the CMA had no jurisdiction to entertain claims of PPF.

On the issue of the ambiguity of the award the respondent's Counsel conceded the same and alleged that it was just a clerical error. That being the position it is my view that, it is paramount important for the application to be granted the order sought so as to enable the Court to put the record clear because the Deed of Settlement and the award are inseparable documents which should not differ substantially.

In the result the present application has merit. Extension of time to file revision application is hereby granted. The applicant is to file the intended revision application on or before 31/08/2020.

It is so ordered.



I.D. Aboud

JUDGE

14/08/2020