IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

LABOUR APPLICATION NO. 18 OF 2018

(C/F Labour Dispute No. MOS/CMA/M/130/2013 in the Commission for Mediation and Arbitration for Moshi at Moshi)

SERENGETI BREWERIES LIMITED..... APPLICANT

VERSUS

BAHATI BALTHAZAR MALISA.....RESPONDENT

RULING

Date of Last Order: 13.02.2024
Date of Ruling : 16.04.2024

MONGELLA, J.

The applicant herein filed this application before this court on 12.12.2018 seeking for extension of time to file an application for revision of the award and proceedings of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. MOS/CMA/M/130/2013. The applicant's application was supported with the affidavits of Mr. George Stephen Njooka, Lucia Minde and Elizabeth John Mlemeta. The respondent filed respective counter affidavits vehemently opposing the application.

The application was determined by this court (Hon. Mkapa, J. as she then was) and eventually dismissed on 23.04.2020. Aggrieved by said decision, the applicant appealed to the Court of Appeal vide Civil Appeal No. 356 of 2020. The Court of Appeal in

determining the appeal noted that the applicant had pleaded illegality as one of grounds of delay, but the ground was never determined by this court. The Apex Court thus vacated the entire decision of this court and remitted the matter to this court to determine said issue and compose a fresh judgement.

Considering that the entire decision was vacated, I shall determine the application as if the same was never determined by this court. The parties had filed written submissions in arguing the application.

The brief facts of the application as drawn from the affidavits and submissions of the parties are that: the respondent was the claimant in Labour Dispute No. MOS/CMA/M/130/2013, which was determined in his favour on 27.03.2025. Aggrieved, the applicant filed Labour Revision No. 15 of 2015 before this court which was consolidated with Labour Revision No. 13 of 2015. The same was found incompetent for non-citation of enabling provision and struck out on 15.07.2016. On 20.07.2016, the applicant filed notice of appeal in the Court of Appeal. The applicant, noticing she had not served the respondent, filed Civil Application No. 158 of 2017 in the Court of Appeal seeking for extension of time to serve the respondent. This was dismissed on 20.07.2018. On 16.08.2018, the applicant filed notice of withdrawal of Notice of Appeal. On 07.12.2018 the Order for withdrawal was issued by the Court of Appeal and this application was filed on 12.12.2018.

The application was argued by written submissions whereby the appellant was represented by Mr. Nuhu Mkumbukwa, learned advocate while the respondent appeared in person.

Mr. Mkumbukwa advanced five grounds in support of the application. **First**, he alleged that the applicant honestly and diligently prosecuted Labour Revision No. 13 of 2015, which was struck out on 15.07.2016 for non-citation of enabling provision. That, from then on, the applicant filed Notice of Appeal on 20.07.2016, but noticing that he did not serve the respondent, he filed Civil Application No. 158/5 of 2017 in the Court of Appeal seeking for extension of time to serve notice. The application was dismissed on 20.07.2016 but the applicant was served a copy on 16.08.2018. On16.08.2018, the applicant lodged notice of withdrawal of notice appeal and the order for withdrawal was issued on 07.12.2018.

According to Mr. Mkumbukwa, the period from when Labour Revision Application was filed up to when the notice of appeal was withdrawn can be covered under technical delay. He alleged that the applicant having been penalized by the striking out of the labour revision and the appeal, she should not be denied the extension. He supported his argument on technical delay with the case of **Fortunatus Masha vs. William Shija and Another**, [1997] TLR 154 and **Yara Tanzania Limited vs. Shapriya & Company Limited** (Civil Application No 498,16 of 2016) [2017] TZCA 296 TANZLII.

He further averred that the fact that the previous application was found to be incompetent should not be a ground to reject this application as the applicant was already penalized for the same. He cemented his assertion by inviting the court to follow the decision in the case of **Philip Chemwolo and Another vs. Augustine Kubende** Civil Appeal No. 103 of 1984, [1986] eKLR, Court of Appeal at Nairobi and **Belinda Murai and Others vs. Amos Wainaina** [1978] LLR 2782.

Second, he contended that the revision involves crucial points of illegalities in the CMA award which need intervention of the Court as sworn on paragraph 4 of Mr. George Njooka's affidavit. Explaining the illegalities he contended that; first, the CMA award was issued without the arbitrator considering the applicant's evidence and exhibits admitted during trial and such omission vitiates the CMA award. Second, that the arbitrator considered matters not part to proceedings. He argued that deciding matters not in proceedings denied the parties the right to be heard. He considered this illegality going to the merit of the case. Third, that the trial arbitrator erred in law in holding that the reason and procedure for termination were unfair and invalid. Mr. Mkumbukwa held the view that the evidence on record showed that the respondent's termination was on fair and valid reason and holding otherwise was an illegality.

The learned counsel was of the view that the applicant ought to be awarded enlargement of time so that she could be heard on the

said points of illegality. He cemented his reasoning with the case of **The Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** [1992] T.L.R 185 and **The Registered Trustees of Joy in the Harvest vs. Hamza Sungura,** Civil Application No. 131 of 2009 (unreported).

Explaining the **third** ground, Mr. Mkumbukwa contended that despite the presence of illegalities on which extension of time can be granted even without accounting for each day of delay, still the applicant accounted for each day of delay. He referred the court to paragraph 16 (a) to (g) of Mr. Njooka's affidavit and Paragraph 14 (a) to (g) of Ms. Minde's affidavit convinced that days for delay were accounted for therein. Since the alleged account is well within the brief facts presented earlier, I shall not reproduce them.

The learned counsel further averred that since notice of appeal initiates an appeal, then the period from 20.07.2016 to 07.12.2018, when the order for withdrawing the notice was served upon the applicant, was a time an appeal was pending in the Court of Appeal and in that case, this application for extension could not be preferred. With that observation, he was firm that each day of delay was accounted for.

Fourth, Mr. Mkumbukwa contended that the application was filed without delay after the notice of withdrawal was served. That, the notice was served on 07.12.2018 and this application was filed on 12.12.2018. He had the stance that the applicant acted diligently,

hence the delay has to be condoned. He supported his argument with the case of **Benedict Mumello vs. Bank of Tanzania** (Civil Appeal 12 of 2002) [2006] TZCA 12 (12 October 2006) cited in **Tanga Cement Co. Ltd vs. Jumanne D. Masangwa & Another** (Civil Application 6 of 2001) [2004] TZCA 45 (both available at TANZLII).

Fifth, Mr. Mkumbukwa averred that the respondent would not be prejudiced if the application is granted. Instead, if not granted the applicant would be more prejudiced. He reasoned that, if the application is granted, the revision shall be filed and eventually the rights of the parties shall be determined. He added that in the event the revision is found in the respondent's favour, he will still have his decree for execution. However, he said, if this application is not granted the illegalities raised will not be resolved.

Invoking the overriding objective principle, the learned counsel averred that the overriding objective requires courts to give substantive justice without being bound by technicalities. In that regard, he had the view that per **Rule 56 (1) of the Labour Court Rules, 2007**, the applicant has demonstrated good cause for being granted extension of time. He prayed for the application to be granted.

The application did not go unopposed by the respondent. In reply, foremost, the respondent contended that the applicant displayed negligence taking the actions he did rendering the delay inexcusable. With regard to the claim of technical delay, the

respondent challenged that technical delay could only cover matters not determined on merit. In that regard, he was of the view that it was only Revision No. 13 of 2015 that was covered under technical delay.

On the other hand, he argued, the applicant lodged notice of appeal on 20.07.2016, but failed to serve the respondent in time. That, the applicant then filed an application for extension of time to serve the said notice on 29.12.2016, which the Court of Appeal dismissed for failure to account for 75 days. In that regard, he had the stance that the period from 29.12.2016 to 20.07.2018 which is equivalent to 1 year and 6 months cannot be excused as it does not fall within technical delay given that the application was determined on merit and dismissed for lack of merit.

The respondent asked the court to note that the accumulative acts of the applicant including filing the revision which was struck out for non-citation of enabling provision of law, failure to serve the respondent the notice of appeal and filing notice of withdrawal to the High Court instead of the Court of Appeal amounted to more than ignorance of the law. He averred that ignorance of the law is not a good ground for extension of time thereby cementing the argument with the case of **Khadija Mlebya vs. Mohamed Amri** (Civil Application 4 of 2013) [2014] TZCA 243 TANZLII and **Abdallah J, Digale vs. the Hon. Minster for Labour and 3 Others** (no citation was provided).

The respondent further challenged the cited cases of; **Fortunatus Masha vs. William Shija and Another** (supra); **Yara Tanzania Limited vs. Shapriya & Company Limited** (supra), **Philip Chemwolo and Another vs. Augustine Kubende** (supra) and **Belinda Murai and Others vs. Amos Wainaina** (supra) arguing that they are distinguishable to present circumstances. That, those cases were struck out for being incompetent and not determined on merit as was Civil Application No. 158 of 2017.

Concerning the claim of illegalities, the respondent disputed presence of any illegalities as advanced by Mr. Mkumbukwa. He contended that what he saw was intended grounds of revision which do not fall within the meaning of illegalities. He referred the court to the case of **Ngao Godwin Losero vs. Julius Mwarabu** (Civil Application 10 of 2015) [2016] TZCA 302 TANZLII challenging that the applicant has raised neither the issue of jurisdiction nor violation of the right to be heard. Further, he argued that all grounds of illegality raised by the applicant involve long drawn argument and process and thus do not fall within an error on the face of record. In the premises, he contended that this court is not in the position to exercise its discretion to extend time. In that regard he as well found the case of **The Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** (supra) distinguished and irrelevant to this matter.

On whether the applicant accounted for the delayed days, the respondent had the stance that the applicant failed to account for

each day of delay. He contended that such finding was also entered by the Court of Appeal whereby she was found to have not accounted for 75 days rendering the Court to dismiss Civil Application No. 158 of 2017. He added that even after the application was dismissed, the applicant did not make follow up on the copies until 16.08.2018 when 28 days had lapsed. He averred that the 28 days were not accounted for and there was no any letter presented showing that he requested to be served copies of the ruling. He cited the case of **Bharya Engineering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor** (Civil Application 342 of 2017) [2018] TZCA 339; **Jehangir Aziz Abdulrasul and 2 Others vs. Balozi Ibrahim Abubakar and Another,** Civil Application No. 265/01 of 2016 (unreported); and **Tanzania Coffee Board vs. Rombo Millers Ltd** (Civil Application 13 of 2015) [2015] TZCA 327 TANZLII. In total, the respondent claimed that the applicant delayed for 4 years.

Reacting on Mr. Mkumbukwa's argument that the applicant shall not be prejudiced by the grant of extension of time, he disputed the contention. Further, he averred that he has been unable to enjoy the award issued by the CMA due to the dubious applications tainted with ill motive to deny his rights as Justice delayed is justice denied.

The respondent further contended that cases must come to an end, but taking regard to the sequence of events, he was afraid that this case will not come to an end. He supported his argument with the case of **William Koross vs. Hezekiah Kiptoo Komen and**

Others Civil Appeal No. 223 of 2013 [2015] eKLR. He prayed that the application be dismissed with costs as the applicant has failed to demonstrate sufficient reasons to warrant this court to extend time.

Rejoining, Mr. Mkumbukwa maintained his stance that the applicant was diligent in pursuing the multiple applications and handling them. He was convinced that the applicant clearly expressed and accounted her whereabouts on each and every day of delay. As to some proceedings not falling under technical delay, he contended that the respondent misled the court by arguing that technical delay only covers matters struck out and not those determined on merits. He condemned the failure of the respondent to support his assertions with any authority.

Elaborating further, he submitted that technical delay covers all matters that did not finally determine the rights of the parties to its finality. With regard to the applicant's multiple applications, he contended that the same did not determine the rights of the parties to finality, thus covered under technical delay. Regarding the authorities he relied on, he found them relevantly applicable to the circumstance of the case at hand.

Mr. Mkumbukwa refuted the allegations that notice of withdrawal was filed in the High Court. He contended that the notice was filed in the appropriate registry and no negligence was involved. He made reference to the notice of withdrawal of notice of appeal filed and the withdrawal notice issued by the Court of Appeal.

As to illegalities, he made reference to paragraph 4 of Mr. Njooka's affidavit averring that the same displays how much the CMA award was tainted with illegalities that warrant extension to be granted. That, there were extraneous matters raised by the arbitrator which he considered an apparent error on the face of the record as per **Valambhia's case** (supra). He further contended that the presence of illegality in itself, without accounting for each day of delay warrants grant of extension. In that regard, he cited the case of **Christmas Elimikia Swai & Others vs. Tanzania Electric Supply Co. Ltd & Another** (Civil Application 559 of 2018) [2019] TZCA 546 TANZLII and that of **Anche Mwedu Ltd & Others vs. Treasury Registrar (Successor of Consolidated Holdings Corporation)** (Civil Reference 3 of 2015) [2019] TZCA 68 (4 February 2019) TANZLII.

Further, Mr. Mkumbukwa still maintained his position that the applicant accounted for each day of delay. He contended that the fact that the Court of Appeal dismissed Civil Application No. 158 of 2017 for the applicant's failure to account for each day of delay cannot not be used to deny her the orders sought in this application. He was of the view that the applicant's account of each day of delay is well found under paragraph 16(a-g) of Mr. Njooka's affidavit and paragraph 14 (a-g) of Ms. Minde's affidavit.

As to whether the respondent would be prejudiced, Mr. Mkumbukwa argued that justice hurried is justice buried. He maintained that delaying of case for interest of justice is itself justice. In showing that the applicant was diligent, he contended that the applicant took measures to exhaust available avenues set by the

law. That, he did not do so maliciously against the respondent. He insisted that the delay was not inordinate and thus urged the court to grant the application.

I have considered the submissions of both parties. It is well settled that granting extension of time is within the discretion of the court. There are however criteria to be observed. This was well expounded in the case of **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII where the court stated:

> "As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated: -
>
> (a) The applicant must account for all the period of delay
>
> (b) The delay should not be inordinate
>
> (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
>
> (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

In this application, the appellant has pleaded a number of reasons for being granted extension of time. First, he pleaded technical

delay covering the period from when Labour Revision No. 13 of 2015 was filed up to when the notice of appeal was withdrawn on 07.12.2018. It is well settled that technical delay may serve as a good reason for extension of time. The same is meant to cover the period the applicant preferred a matter that is struck out for being incompetent for some reason. This was well expounded in **Fortunatus Masha vs. William Shija and Another** (supra) whereby the Court stated:

> "A distinction has to be drawn between cases involving real or actual delays and those such as the present one in which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted."

In **Yara Tanzania Limited vs. Shapriya & Company Limited** (supra) the Court of Appeal in applying the principle of technical delay, as elaborated in **Fortunatus Masha** (supra), stated:

> "The period of delay between the date of the decision of the High Court on 19.05.2016 sought to be challenged by way of revision and 23.11.2016 when it was struck out for being incompetent, can conveniently be termed as a "technical delay" within the meaning of the

decision of the Court in Fortunatus Masha (supra)"

In the foregoing, it is thus clear that only the period from the date Labour Revision No. 13 of 2015 was filed to 15.07.2016 when it was struck out and up to 20.07.2018 when Civil Application No. 158 of 2017 was dismissed is covered under technical delay. The rest of the events are not covered as the applicant was not pursuing any matter in the Court of Appeal or any other court. The filing of notice for withdrawal of notice of appeal and the events that followed thereafter cannot be termed as prosecuting the matter before the Court for them to be covered under technical delay.

In essence, the applicant has failed to account for each day of delay. Example, the Ruling in Civil Application No. 158 of 2017 was delivered on 20.07.2018. It was until 16.08.2018, 27 days later, that the notice for withdrawal was filed in the relevant Court of Appeal registry. The fact that the applicant chose to file an appeal against an order for striking out, failed to serve notice to the respondent and after realizing the misdeed later on 29.12.2016 filed Application No. 158 of 2017, clearly displays negligence and lack of diligence on the applicant's part. While he might not have had any control over the reply over notice of withdrawal, he had control over serving the respondent and taking action to file the application hastily. Even if I was to ignore the entire period between 29.12.2018 when Civil Application No. 158 of 2017 was filed to 20.07.2018 when it was dismissed, there remains 28 days unaccounted for.

As to illegalities in the impugned award, the same are found in paragraph 4 of Mr. Njooka's affidavit. It is settled that when a party pleads illegality in the impugned decision, the same must be apparent on the face of record and not something that can only be discovered after long drawn argument or process. See, **Lyamuya Construction Company Limited** (supra); **The Principal Secretary Ministry of Defence and National Service vs. Devram Valambhia** (supra) and; **Chiku Harid Chionda vs. Getrude Nguge** (Civil Application No. 509 of 2018) [2019] TZCA 291 TANZLII. In **Lyamuya Construction** (supra) the Court held:

> "...it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that "of sufficient importance" and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process."

The illegalities raised under paragraph 4 of Mr. Njooka's affidavit are that:

a) The arbitrator erred in law and in fact by failure to consider evidence on record as testified by the Applicants witnesses;

b) The arbitrator erred in law and in fact for failure to consider the exhibits tendered by the applicants during trial

c) The arbitrator erred in law and in fact for considering matters which were not part of the proceedings

d) The arbitrator erred in law and in fact for holding that the reasons for termination of the respondent employment were invalid and unfair

e) The arbitrator erred in law and in fact for holding that the procedures for termination of the respondent employment were unfair.

Rather than illegalities on face of record, I find that the issues raised pose matters meant to be addressed in the revision by scrutinizing the evidence on record and the reasoning employed by the Hon. Arbitrator in his award. In that respect, all issues claimed to be illegalities by the applicant are not apparent on the face of record. They definitely shall involve long drawn argument to be determined. The issues raised under paragraph (a), (c), (d) and (e), in fact, mostly cover matters of facts.

With respect to paragraph 4 (c) in which the applicant complains that the court considered matters not part of the proceedings, I am of view that such matter is indeed of sufficient importance. Unfortunately, however, apart from stating that the trial arbitrator introduced extraneous matters, the applicant never pointed out what matters were extraneous for the court to observe whether the claim was substantiated. In the circumstances, the claim remains a mere statement with no evidence to back it up for the court to

scrutinize its existence. It is not the duty of the court to peruse the award and proceedings to find the alleged extraneous matter for itself. The applicant ought to have pointed the same in his submissions. Facing akin situation in **Salehe Omary Ititi vs. Nina Hassan Kimaro** (Civil Application 583 of 2021) [2023] TZCA 232 TANZLII, whereby there was no sufficient details on an alleged extraneous matter raised as an illegality warranting extension of time, a single Justice of the Court of Appeal stated:

> "Again, it is a settled principle of law in our jurisdiction that where an illegality in the decision being challenged is raised, the Court is supposed to grant the application for extension of time so that the matter can be considered. One of the Court's decisions to that effect is in the case of VIP Engineering and Marketing Limited v. Citibank Tanzania Limited, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported). **That notwithstanding, the applicant should successfully show that the alleged illegality can really be seen on the face of the record.** Going through the impugned decision, at page one, the High Court stated that before the trial court, the respondent claimed against the applicant for payment of Tsh. 9,000,000/= and a plot of land. After consideration of the appeal, the court allowed the respondent's appeal by granting her the stated claims. **Now, if one has to see whether there is an illegality in the impugned decision, he has also to peruse the record of the case in the trial court, the district court and the High Court. I do not think this is the duty of this Court in an application for extension of time**. That means the alleged illegality should be apparent on the face of the record of the impugned decision. *[Emphasis is mine]*

In the foregoing, the ground of illegality also fails. As seen, the appellant has failed to account for each day of delay. She has failed to demonstrate her diligence in pursuing her rights. In fact, she did state in her notice of withdrawal that it was because she could not access the respondent for service, while she had clearly failed to issue service on time and her application for extension of time to serve the respondent was dismissed.

This application is thus found to lack merit. It is hereby dismissed. Being a labour matter, I make no orders as to costs.

Dated and delivered at Moshi on this 16th day of April, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA