

TANZANIA / JUDGMENT

basic elements limited vs shukran dismas makoba 12 others 2023 tzhcld 1195 23 march 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT PAR ES SALAAM MISCELLENEOUS APPLICATION NO. 393 OF 2022 (Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 16th day of July 2018 in Labour Dispute No. CMA/DSM/KIN/R. 900/2017 by (Kachenje: Arbitrator) BASIC ELEMENTS LIMITED..... APPLICANT VERSUS SHUKRAN DISMAS MAKOKA & 12 OTHERS..... RESPONDENTS

RULING

K, T, R, MTEULE, J, 15th March 2023 & 23rd March 2023 This is an application seeking for an extension of time to file an application for revision against the CMA decision in Labour Dispute No. CMA/DSM/KIN/R.900/2017 dated 16th July 2018. The instant application is supported by an affidavit of Doreen Kalugira, the Applicant's Advocate who deponed the facts comprising what she proclaims to be the reason to justify extension of time. She advanced the ground of illegality asserting the following in the CMA:- unsworn witness testimonies, admission of photocopies of the documentary exhibits, application for i condonation granted not in accordance with the law, entertainment of time barred matter hence lack of jurisdiction. In opposing the application, a counter affidavit of Edward Simkoko, the Respondent's Personal Representative was filed in which the facts in the affidavit were disputed. The application was heard by a way of oral submissions where the applicant was represented by Advocate Doreen Kalugira and Advocate Habibu Kasimu Habibu, while the Respondent by Mr. Edward Simkoko, Personal Representative. In her submissions, Advocate Doreen having reiterated what is stated in the affidavit, made reference to the case of Metro Petroleum Tz Limited and 3 others v. United Bank of Africa, Civil Appeal No. 147 of 2019 Court of Appeal of Tanzania at pages 12 & 13 where it was decided that where there is illegality the Court has a duty to extend time so that the illegality can be determined. She stated that basing on the case cited, in relation to legal irregularities, they thus prayed for extension of time to be allowed to challenge the CMA decision. In replying to the application, Mr. Simkoko citing the case of Lyamuya Construction Company Ltd vs. Board of Registered Trustee of 2 Young Women's Christian Association of Tanzania, Civil Application No. 2

of 2010 stated that the Court set factors to be considered in extending time including accounting of every day of delay. He further added that the applicant has not explained for how long she has delayed and why the delay happened. According to Mr. Simkoko the impugned decision was issued in 2018 and they are bringing their application today. He averred that there is a delay of more than 4 years and the reason for such delay is not explained. On that basis he of the view that the applicant was negligent, and she slept on her right. Mr. Simkoko added that according to Lyamuya's Case, for the ground of illegality to stand, the same must be apparent on the face of the record which do not need long drawn arguments to determine. He submitted that since the list of illegalities stated by the Applicant's counsel need evidence to be ascertained, then such grounds lack legal substance to qualify illegality. Supporting his position, he cited the case of Sabena Technics Dar Limited vs. Michael J. Luwunzu, Civil Application No. 451/18 of 2020, Court of Appeal of Tanzania, at Dar es Salaam, (Unreported). 3 Mr. Simkoko submitted that the applicant has been playing delaying tactics especially when they are prompted events such as a progress in execution proceedings, is when they come out with these frivolous applications. He recalled another similar incident in the case of Basic Elements Limited vs. Shukrani Dismas Makoba and 12 others at page 13 where Hon. Mganga, Judge commented that what the applicant is doing is tactical to delay applicant's enjoyment of the fruit of their decree. He thus prayed for the application to be dismissed. In rejoinder Mr. Habibu Advocate for the Applicant submitted that the ground of illegality is very crucial because there are legal matters which need to be addressed. He added that even the Lyamuya Construction's case at page 6, recognize illegality as one of the grounds for granting extension of time. Being guided by parties' submissions, this Court finds one main issue for determination which is whether the applicants adduced good reason for this Court to grant extension of time to file revision application. 4 The law guiding the timing for filing of Revision Applications is Section 91

- (1) of the Employment and Labour Relations Act, Cap. 366 of 2019 R.E, The section provides: -
"91. -(1) Any party to an arbitration award made under section 88 (10) who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for a decision to set aside the arbitration award: -
 - (a) within six weeks of the date that the award was served on the applicant unless the alleged defect involves improper procurement;" From the above provision the time limit in filing revision application against the decision of CMA is 42 days. It is an established general principle that, it is the discretion of the Court to grant an extension of time upon a good cause shown, [See. Tanga Cement Company vs. ' Jumanne D. Masangwa and Another, Civil Application no. 6 of 2001 2001, Court of Appeal of Tanzania, (Unreported); and Praygod Mbagu V. Government of Kenya Criminal Investigation Department and Another, Civil Reference No. 4 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, 5 (Unreported)]. Again, the said reasonable cause or good cause has to be adduced by a party seeking extension of time in order to move the court to exercise its discretion. The good cause must be determined by reference to all the circumstances of each particular case. In the case of Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010, the Court of Appeal of

Tanzania, at Dar es Salaam, (Unreported), the Court developed five principles to guide determination of what amounts to good cause for an application for extension of time. I agree with respondent regarding the principle in Lyamuya's Case (supra). The grounds to guide grant of extension of time according to Lyamuya's case are as follows: - 1. That the applicant must account for all the period of delay, 2. The delay should not be inordinate, 3. The applicant must show diligence, 4. Other reasons, such as the existence of a point of law of sufficient importance not apathy negligence or sloppiness in the prosecution of the action that he intends to take and lastly, 5. If the court feels that there are other sufficient grounds such as the illegality of the decision sought to be challenged. From the above authority for the applicant to enjoy Court's discretionary power the Court will be guided by the above-mentioned criteria in granting 6 extension of time one of them being illegality alleged in the impugned decision. In the present matter the CM A award was issued on 16th July 2018 and application for Revision was filed on 12th October 2022 while according to Section 91 (1) (a) (b), of Cap 366, the applicant ought to have filed her application on 28th August 2018 when 42 days lapsed. Instead, it was filed on 12th October 2022 that means there was a delay of more than four years. In my view, this delay is apparently inordinate. The Applicant has not advanced factual reasons for such delay. The only ground relied upon by the Applicant to justify extension of time is illegality. It is well known that illegality of an impugned decision constitutes a sufficient ground for extension of time. However, the respective illegality has to be sufficient in content and apparent on the face of record. (See Stephen B.K. Mhauka vs. The District Executive Director Morogoro District Council and two Others, Civil Application No. 68 of 2019, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported) and Iron & Steel Ltd vs Martin Kumalija & Others (Civil Application 12 of 2021), TZCA (Unreported). 7 The question now is whether the applicant has demonstrated sufficient points of illegality which demonstrates errors apparent on the face of record. The first point of illegality raised by Advocate Karugila is that the testimony of the witness was not taken under oath. According to the award, the arbitrator indicated in the evidence of both witnesses who testified in the CMA that the said evidence was given on oath. This being the case, it will need a long-drawn arguments to confirm otherwise from what the arbitrator has declared in the award. On this reason, this point lacks the qualities of being an illegality. Another point said by the Applicant to be illegality admission of photocopies of documentary exhibits without following the procedure. Admissibility of photocopies is something allowed in law subject to some preconditions having met. Whether the said conditions are met or not is a point which must be prompted by an objection. Since the matter was heard ex - parte, it is hard to fault the arbitrator in admitting to the photocopies in a situation where no objection was raised to their admissibility. As well, this cannot be termed as an apparent error on the face of record. 8 The last asserted point of illegality is that condonation was granted not in accordance with the law. Condonation is a contentious matter to be decided upon long arguments made to establish reasons for delay. The Applicants counsel did not give further particulars of the nature of "not in accordance with law" for the court to understand the nature of illegality asserted regarding condonation. This does not suffice to constitute grounds for extension of time. The fact that the matter was time barred is defeated by the 3rd point concerning

granting of condonation not in accordance with the law. If condonation was granted, then there can be no time barred matter. This is not an error apparent on the record. From the above analysis, I am of the view that all the points asserted to be illegality in the CMA award lack qualities of being under the ambit of illegality for the ground to stand. That means they are not errors apparent on the face of the award or record. On this basis I am of the view that no illegality is sufficiently demonstrated to the extent required to justify extension of time. From the foregoing, I cannot see any sufficient reasons established to satisfy grant of extension of time to lodge the revision application against 9 the CMA award in Labour Dispute No. CMA/DSM/KIN/R.900/2017. This Application is dismissed for want of merit. No order as to costs. It is so ordered. Dated at Dar es Salaam this 23rd day of March 2023. 10

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