

TANZANIA / JUDGMENT

FLORENCE O

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 26048 OF 2024 FLORENCE O. KAPERA & 44
OTHERS APPLICANTS VERSUS JANDU CONSTRUCTION
& PLUMBER LIMITED RESPONDENT

RULING

Date of Last Order: 25/11/2024 Date of Ruling: 10/12/2024 B. E. K. Mganga, J. Florence O. Kapera, Assad Jarufu Hassani, Mwanahamisi Muki, Ally A. Mwinyikombo, Ramadhani Ntala, Thomas A. Mandala, Lawrence L. Upete, Libangati Mollel, Amina Bukuli Luhanyula, Shomvi Tambalizeni, Fabian Mlungwa, Kimaro M. Irene, Salum S. Mayunga, David H. Munubi, Amani H. Mohamed, Godson R. Kimaro, Rajab S. Kilebwe, Shomari S. Shomari, Omary A. Ibrahim, Abdallah Mjahili, Hamis A. Hassani, Ruta A. John, Boniface A. Mwami, Abdallah Mwinyikongo, Abdulraheem Panesar, Mohamed S. Kondo, Robert J. Mhina, Faiza O. Bananga, Abeid M. Bojo, Mohamed S. Kumbala, George J. Massawe, Omary Gereza, Ramadhani Kupagasa, Fidelis J. Mbochokele, Twaha I. Duru, Zawadi A. Yusuph, 1 Ashiru Byarwa, Kelvin D. Kiles, Mbaraka M. Mbaraka, Mudathir Ulaya, Yusuph Mbegu, Abdallah J. Salehe and Omary J. Mkose, the herein applicants filed this application seeking the Court to extend time within which to file an application for revision against an award that was issued by Hon. M.S. Mbena, arbitrator on 21st November 2023 at the Commission for Mediation and Arbitration (CMA) in favour of Jandu Construction & Plumber Limited, the herein respondent. In the joint affidavit sworn by Florence Oswald Kapela and Assad Jarufu Hassan, the applicants stated inter-alia that, the award was delivered on 21st November 2023. That, on 13th May 2024 they filed Miscellaneous Application No. 10818 of 2024 but the same was withdrawn on 4th August 2024 as it was wrongly filed as Civil Application. That, they thereafter filed Miscellaneous Labour Application No. 17856 of 2024 but the said application was withdrawn on 26th September 2024. They further deponed that, TAMICO legal representative who represented applicants at CMA refused to hand over the case file and the award. They also deponed that, there is illegality on the impugned award because they were denied to tender exhibits. Resisting the application, respondent filed both the notice of opposition and the counter affidavit sworn by Josepha D. Tewa, 2 advocate. In the said counter affidavit, the deponent disputed what was deponed by the applicants and put them on strict proof thereof. When the application was called on for orders, the parties prayed the application be argued by way of written submissions, as a result, an order was issued to that effect. In complying with the court's

order of arguing this application by way of written submissions, applicants did not engage an advocate, but respondent enjoyed the service of Josepha D. Tewa, learned advocate. In their written submissions, applicants submitted that, reasons for delay to file an application for revision from 24th November 2023 when the arbitrator delivered an arbitral award, are well explained into paragraph 7 of their joint affidavit. They also submitted that, after the decision was delivered on 24th November 2023 at CMA, without any reason, their legal representative from TAMICO who represented them at CMA, refused to hand over the CMA case file and CMA arbitral award despite of being informed by the applicants to file a revision before the High Court of Tanzania to challenge the award. They further submitted that, after a very long follow up from TAMICO, the said CMA file and the copy of the award were lately handled over to them on 15th February

2024. That after receiving the said file and CMA award, being 3 laypersons, they struggled to find another legal aid service to enable them to prosecute the revision before the high court until they found legal assistance from Tanganyika Law Society, Mzizima Zone, whereby Advocate Amina Mkungu was assigned and appointed on 27th February, 2024, to represent them. They added that, on 27th February, 2024, when they secure the said advocate, the statutory time limitation to apply for the revision had already expired. Applicants also submitted that, the delay was not due to their negligence but was contributed by a person appointed by TAMICO who provided legal assistance to them who, withheld the CMA file and CMA award, as a result, they failed to file revision within time. They further submitted that, they delayed to file the intended revision within time because they delayed to get legal assistance from Tanganyika law society after being lately given the file by their representative form TAMICO, who prosecuted their labour dispute before CMA. Applicants further suubmitted that, it is settled principal that, an application for extension of time to be granted, the court must exercise its judicial discretionary power after applicants have advanced sufficient reasons for the delay which might be considered that the delay was not due to negligence. They cited the case of Hyansitha Malisa vs John 4 Malisa (Civil Application 167 of 2021) [2023] TZCA 239 (10 May 2023) to that position. They also cited the case of Tanga Cement Co. Ltd vs Jumanne D. Masangwa & Another (Civil Application 6 of 2001)

[2004] TZCA 45 (8 April 2004), Moto Matiko Mabanga vs Ophir Energy Plc & Others (Civil Application No. 463 of 2017) [2019] TZCA 135 (17 April 2019) to the position that, the court should consider length of the delay and that, in an application for extension of time, it is the duty of the applicant to lay materials justifying the court to exercise its discretion. In their submissions, applicants added that the delay is not inordinate. Applicants further submitted that, the illegality complained of cannot be cured if time will not be extended. They cited the case of Hassan Abdulhamid vs Erasto Eliphase (Civil Application 402 of

2019) [2020] TZCA 49 (16 March 2020) to the position that, a claim of illegality of the impugned award constitute sufficient cause for extension of time regardless whether or not, a reasonable explanation has been given by the applicant under the rule to account for delay.

With those submissions, applicants prayed the Court to allow this application. Resisting the application, in her reply submissions, Ms. Tewa, learned advocate for the respondent, cited the case of *Lyamuya 5 Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania* (Civil Application 2 of 2010)

[2011] TZCA 4 (3 October 2011) and submit that, for time to be extended, applicants must show good cause for their failure to file revision within the prescribed time, account for the delay, whether the application has been promptly filed, applicants must be diligent and there must be any other sufficient reasons according to the particular circumstances of the case, such as, the illegality of the impugned decision. Counsel for the respondent further submitted that, applicants have failed to meet the conditions set in *Lyamuya's* case (*supra*). She also submitted that, applicants have failed to account for each day of the delay of 170 days from 24th November 2023 when the CMA award was delivered to 13th May 2024 when they filed the 1st application for extension of time. She added that, applicants have just stated that, the representative from TAMICO refused to handover the file to them without any proof of follow up of the file and without attaching an affidavit and handover of the file to support their affidavit. To cement that applicants were supposed to account for each day of the delay, counsel for the respondent cited the case of *Alois Magana @ Kipilipili 6 vs Gidion Mwangosi* (Civil Application No. 204/06 of 2022) [2024] TZCA 543 (10 July 2024). On illegality, counsel for the respondent submitted that, the CMA award does not show that applicants were denied a chance to tender exhibits. She added that, every error on point of law constitutes an illegality. She went on that, illegality to be a ground for extension of time, it must be shown that, the court acted illegally for want of jurisdiction, or there was denial of right to be heard or the matter was time barred. To support her submissions, counsel cited the case of *Charles Richard Kombe vs Kinondoni Municipal Council* (Civil Reference No. 13 of 2019) [2023] TZCA 137 (23 March 2023). She further submitted that, the illegality complained of by the applicants is not the fault of the arbitrator rather, it was of their representative. Counsel further submitted that, for illegality to be a ground for extension of time, it must be apparent on the face of record hence no need of a long drawn argument for it to be established. To cement on those submissions, counsel for the respondent cited the case of *Uswege Webb Luhanga & Another vs Mussa Mohamed Mnas & Another* (Civil Appeal No. 218 of 2021) [2024] TZCA 106 (23 February 2024). 7 With those submissions, counsel for the respondent prayed the application be dismissed for want of merit. In rejoinder, applicants submitted that, they made several attempts through phone calls to regain their file and the award. They also submitted that, in one of those attempts, with support from Tanganyika Law Society under the service of Advocate, Amina Mohamed Mkungu, soon after being assigned, the said advocate informed the TAMICO representative to hand over the case file and CMA award eventually, a representative from TAMICO handed over the file which enable them to file an application for extension of time. They also submitted that, they were faced with a multiplicity of events that kept on mutating, without forgetting sickness of applicants' representative. They added that, each day of delay has been accounted and proved, which is basically technical delay, sickness

and negligence. Applicants maintained that, whenever illegality is raised, even if the delay is not accounted for, the application has to be granted. To support their submissions, they cited the case of VIP Engineering and Marketing Limited and Two Others v. City Bank Tanzania Limited, (Consolidated Civil Reference No. 6, 7 and 8 of 2006), CAT(unreported). They further submitted that, the illegality complained of is right to be heard. They added that, being laypersons, they struggled to defend their right and that, the award denied them right during hearing. They cited the case of Anthony M. Masanga vs Penina (mama Mgesi) and Another (Civil Appeal No. 118 of 2014)

[2015] TZCA 556 (18 March 2015) and The Judge i/c High Court Arusha & another v. N.I.N. Munuo Ng'uni [2006] T.L.R 44 CA and submit that, right to be heard includes also adequate opportunity to be heard so as to achieve the quest for fair trial and that, they were not given adequate opportunity to be heard. They went on that, the arbitrator had an opportunity to be fair for extending time even a day to both parties to adduce their evidence to justify or prove employment relationship by tendering inter-alia, employee's identification card, salary slip (payroll) or witness etc. Applicants further submitted that, the application at hand being a labour matter relating to employment relationship between the parties, in the Award, the arbitrator failed to read correctly and interpret the provisions of section 61 of the Labour Institution Act, [Cap. 300, R.E 2019] on whether, employer-employee relationship existed. To support that the said relationship existed, they cited the case of Wambura v. 9 Zuri Haji, Revision Application No. 42/2012 at Mwanza, LCD 2014. With those submissions, applicants prayed that the application be granted. I have considered rival submissions of the parties in this application and wish, as a starting point, to point out that, this application will be disposed of based on evidence of the parties both in the affidavit and the counter affidavit filed because, those are the only evidence in support and in opposition thereof. I am of that view because, it is a settled principle in our jurisdiction that, both affidavit and counter affidavit, are substitutes of oral evidence. See the case of Rustamali Shivji Karim Merani vs Kamal Bhushan Joshi (Civil Application 80 of 2009) [2012] TZCA 16 (27 February 2012), Attorney General vs Dickson Paulo Sanga (Civil Appeal 175 of 2020) [2020] TZCA 371 (5 August 2020), [2020]1 T.L.R 61(CA), Chavda & Company Advocates vs Arunaben Chaggan Chhita Mistry & Others (Civil Application 25 of 2013) [2017] TZCA 154 (22 May 2017). Therefore, any matter not contained in the affidavit or the counter affidavit in support or in opposition of the application, however convincing it is, will be disregarded because, that is not evidence. See the case of Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another (Civil Appeal No. 82 of 2017) [2018] TZCA 297 (14 10 December 2018) and Sunlon General Building Contractors Ltd & Others vs Kcb Bank Tanzania Ltd (Civil Appeal 253 of 2017) [2020] TZCA 353 (16 July 2020). I should also point out that, this being an application for extension of time, for the same to be granted, there must be sufficient material to justify the the court to exercise its discretion as it was held in the case of Mza Rtc Trading Company Limited vs Export Trading Company Limited (Civil Application No. 12 of 2015) [2016] TZCA 12 (27 October 2016). It was correctly submitted on behalf of the

parties that, for the application for extension of time to be granted, applicant must show good cause, account for each day of the delay, show delligence and not negligence and there must be any other sufficient reasons such as illegality as it was held in Lyamuya's case (supra). The issue in the application at hand is whether, applicants complied with those conditions. It is undisputed that, the award that applicants seeks extension of time so that it can be revised was delivered on 21st November 2023. It is also undisputed that, on 13th May 2024 applicants filed Miscellaneous Application No. 10818 of 2024 but the same was withdrawn as it was 11 filed as Miscellaneous Civil Application. I have read the joint affidavit in support of the application and find that, the only reason advanced by the applicants for the delay from 21st November 2023 to 13th May 2024 is that, their legal representative from TAMICO who represented them at CMA, refused to hand over the CMA case file and the award despite of being informed by the applicants to file a revision before this Court to challenge the award. In addition to that, it was stated that, the said file and CMA award was handed to them on 27th February 2024. In the joint affidavit, applicants indicated that, the said handing over of the CMA file and the award is evidenced by annexure FK-5 to the affidavit in suport of the application. With due respect to applicants, I have read annexure FK-5 to the affidavit in suport of the application and find that, it has nothing to do with handing over of the CMA file or the award to the applicants. Annexure FK -5 is a list of documents to be relied upon by the applicants at the time of hearing the dispute at CMA. The said FK-5 was signed on 24th May 2023 by Ambakishye Kipamila, Trade Union Lawyer from TAMICO on behalf the herein applicants. I have carefully read the affidavit in support of the application and annextures thereof and find that, there is no document showing that there was a delay or refusal by the said Ambakishye Kipamala to handover the CMA file or the award to the applicants. In fact, there is no any communication between 12 the applicant and their representative from TAMICO showing that applicants demanded to be given the said CMA file and the award and that their representative refused. I therefore find that the claim that the delay to file revision was due to refusal or delay to be handled over the CMA file and the award by their representative from TAMICO is unsubstantiate and reject it. Assuming that there was that delay and that, they were given the said CMA file and the award on 27th February 2024, of which evidence is wanting, in their affidavit in support of the application, applicants did not account for the delay from 27th February 2024 to 13th May 2024 when they filed Miscellaneous Application No. 10818 of 2024. In addition, there is no affidavit of the said Amina Mkungu, advocate, who they allege, demanded and obtained the said CMA file and the award from the applicants' representative from TAMICO and or the said representative from TAMICO. In absence of the affidavits of the said persons, the affidavit of the applicants become hearsay. I am of that view because, it was held in the case of Sabena Techincs Dar Limited vs Michael J. Luwunzu (Civil Application 451 of 2020) [2021] TZCA 108 (14 April 2021), Power & Network Backup Ltd vs Olafsson Sequeira (Civil Application No. 307 of 2021) [2023] TZCA 80 13 (1 March 2023), Ester Baruti vs Seith Senyael Ayo & Another (Civil Application No. 514/17 of 2022) [2023] TZCA 17824 (13 November 2023), Elly Matiku & Another vs Mediterranean Shipping Company T. Ltd (Civil Appeal No.454 of

2020) [2023] TZCA 17461 (28 July 2023) and Franconia Investment Ltd vs Tib Development Bank Ltd (Civil Application 270 of 2020) [2021] TZCA 563 (30 September 2021) to mention but a few. I therefore find that, the allegation that the delay was caused by their representative who refused to hand over in time the CMA file and the award as unsubstantiated. In addition to the alleged refusal of their representative to hand over the CMA file and the award, in rejoinder submissions, applicants submitted that, they faced with multiplicity of events that kept on mutating without forgetting sickness of their representative. With due respect to the applicants, these facts were not stated in their affidavit hence they are not part of their evidence. They are submissions from the bar which are not evidence hence cannot be acted upon by this court. It was also submitted by applicants that, there was also technical delay. With due respect to the applicants, there is no technical delay in the application at hand because, all applications that they filed in court 14 were filed while they were already out of time which is why, they were seeking extension of time. Technical delay applies only when the former application or matter was filed within time but it was not heard on merit due to technical reason. Technical delay cannot apply when the former application was filed already out of time. Further to that, in their joint affidavit in support of the application, applicants did not state that there was technical delay rather, this came out during rejoinder submissions which is not evidence. It was deposed in the affidavit in support of the application that, there is illegality because, applicants were denied right to tender exhibits. In their rejoinder submissions, applicants submitted that, they are laypersons and that, they struggled to defend their right, but they were denied their right during hearing. They further submitted that, they were not afforded adequate opportunity to be heard so as to achieve the quest for fair trial. With due respect to the applicants, those allegations or facts are not in their affidavit in support of this application hence they are submissions from the bar which are not evidence. I also find that, submissions that, the arbitrator failed to extend time even a day to both parties to adduce their evidence to justify or prove employment relationship between them by tendering inter-alia, employee's 15 identification card, salary slip (payroll) or witness etc is not part of evidence in the affidavit hence cannot be acted upon by this court. In the affidavit in support of the application, applicants did not attach the CMA proceedings to show that they prayed to tender exhibits but they were denied by the arbitrator. I have read the CMA award and find that there is nothing suggesting that applicants prayed to tender exhibits but they were denied that chance by the arbitrator. I find that, that allegation was unsupported by evidence in this application hence it fails. In addition to the foregoing, for illegality to be a ground for extension of time, the same must be apparent on the face of record that is to say, it must be the one that does not require elaborate argument to be established as it was held in the case of African Marble Company Limited (AMC) vs Tanzania Saruji Corporation (TSC), Civil Application No. 8 of 2005 [2005] TZCA 87 and Chandrakant Joshubhai Patel v. Republic, [2004] TLR 218, Abdi Adam Chakuu vs Republic, Criminal Application No. 2 of 2012 [2017] TZCA 138, Ansaar Muslim Youth Center vs Ilela Village Council & Another, Civil Application No. 310 of 2021 [2022] TZCA 615 and Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian

Association of Tanzania (Civil Application 2 of 2010) 16

[2011] TZCA 4 (3 October 2011) to mention but a few. In Chandrakant's case (supra), the Court of Appeal held that:- "An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions...It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established..." I have read the impugned award and find that, there is no illegality that is apparent on face of the record. It is my view that, if applicants failed to tend exhibits to establish that they were employees of the respondent, they cannot at this juncture, come up, as an afterthought, try to use illegality as a ground to remedy what they failed to do while at CMA during hearing of the dispute. It was submitted that, applicants are laypersons which is why they banked on the representative from TAMICO hence the delay to file revision within time. In my view, being laypersons cannot be an excuse and reason for extension of time. I am of that view because, it was held by the Court of Appeal in Uswege's case (supra) that:- "...Nevertheless, we take cognizance of our legal proposition that has been repeatedly stated, for instance in Bariki Israel v. R, Criminal Application No. 4 of 2011 and Charles Salugi v. R, Criminal Application No. 3 of 2011 (both unreported), that, a prudent and diligent party who needs legal assistance should act promptly. Put in other words, the right to a fair hearing obliges each party to be timely on his toes, much as ignorance of law is no defence. He who sleeps over his right, as did the appellants for twenty-one good days, has no right..." I should add that, the logic behind the legal position that ignorance of the law is not a defence arises from the truth that, laws are enacted in the parliament by members of parliament who are elected by the public and are representatives of the public. It is therefore, clear that, members of parliaments enacts laws on behalf of the public and represents ideas and views of the public or society in the parliament. Therefore, laws are passed by the public through the parliament hence a member of the public which passed the law, cannot be ignorant of the law he or she passed in the parliament. For all what I have discussed hereinabove, I find that the application is not merited and dismiss it. Dated at Dar es Salaam on this 10th December 2024 B. E. K. Mganga JUDGE Ruling delivered on this 10th December 2024 in chambers in the presence of Florence Oswald Kapera, Assad Jarufu Hassani, Libangati 18 Mollel and Salum Salehe Mayunga amongst the Applicants and Josepha Tewa, advocate for the Respondent. B. E. K. Mganga JUDGE 19

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