IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 373/18/2018

SERENGETI BREWERIES LIMITED ..... APPLICANT

VERSUS

HECTOR SEQUEIRAA ..... RESPONDENT

(Application for extension of time within which to file notice of appeal from the Judgment and Decree of the High Court of Tanzania of Tanzania, Labour Division at Dar es Salaam)

(Mipawa, J.)

dated the 2nd day of June, 2016

in

Revision No. 287 of 2015

.....

RULING

3rd & 17th May, 2019

NDIKA, J.A.:

On 7th August, 2018, the applicant, Serengeti Breweries Limited, applied by a notice of motion under Rules 10 and 45A (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) against Hector Sequeiraa, the respondent herein, for extension of time within which to lodge a notice of appeal against the judgment and decree of the High Court of Tanzania, Labour Division at Dar es Salaam (Mipawa, J.) in Revision No. 287 of 2015. The application is a second bite, so to say, following the dismissal by the same court (Mashaka, J.) on 13th July, 2018 of an initial application for extension of time.

Before dealing with the merits of the application, I find it necessary to set out the facts of the case and the context in which this matter has arisen.

Sometime in 2011, the respondent, an Indian citizen, lodged an employment dispute against the applicant in the Commission for Mediation and Arbitration (CMA), alleging unfair termination from the position of General Manager – Human Resources on a two-year contract. The CMA ruled in favour the respondent whom it awarded US$ 130,680.00 as compensation in respect of the unexpired term of contract, subsistence allowances and repatriation expenses. The award was upheld by the High Court, Labour Division at Dar es Salaam (Mipawa, J.) vide judgment dated 2nd June, 2016 in Revision No. 287 of 2015 the applicant herein had instituted. Being dissatisfied by that outcome, the applicant, through Mkono & Co. Advocates, duly manifested its intention to appeal to this Court by lodging a notice of appeal on 29th June, 2016. However, for some reason the notice was not served within the prescribed time on the respondent contrary to Rule 84 (2) of the Rules and that, despite two attempts to seek enlargement of time to effect requisite service, the notice was finally struck out. Still being desirous of pursuing the intended appeal, the applicant rebooted its quest by approaching the High Court, Labour

Division vide Miscellaneous Application No. 402 of 2017 seeking extension of time to file a fresh notice of appeal. As stated earlier, this application bore no fruit as it was dismissed on 13th July, 2018, hence the present application.

The application is anchored on one ground only stated in Paragraph 16 of the accompanying affidavit deposed by one Gwandumi Mwangolombe, the applicant's Legal Manager. Briefly, it is averred that:

> *"16.1 Both proceedings in the CMA and the High Court (Labour Division) (Mipawa, J.) (rtd) were tainted and riddled with an illegality for failure to appreciate the fact that by the time the respondent was filing Labour Dispute* ***No. CMA/DSM/TEM/157/2011****, he was legally no longer an employee as he had no valid work permit, being a foreigner.*
>
> *16.2 Both proceedings in the CMA and the High Court (Labour Division) (Mipawa, J.) (rtd) were tainted and riddled with an illegality for their failure to appreciate the fact that the respondent's application for work permit was declined by the relevant authority which was out of the applicant's control."*

Mr. Alex G. Mgongolwa, learned counsel, appeared for the applicant to present an oral argument highlighting the written submissions lodged in support of the application. Relying on the accompanying affidavit, Mr. Mgongolwa ran through what he considered to be the essential facts of the case. He stated that the applicant "intended to employ" the respondent in the position of General Manager – Human Resources on a two-year contract subject to issuance of a work permit by the Commissioner for Labour. But I am compelled to interject here that the learned counsel's claim of the "intention to employ" the respondent is misleading because it is acknowledged in Paragraph 2 of the accompanying affidavit that "the respondent ... was once employed by the applicant" and that he "commenced work in the position of General Manager – Human Resources on 29th August, 2009 upon being issued with a six months' work permit."

Mr. Mgongolwa, then, admitted that the respondent was initially granted a Class B work permit number 071237 that allowed him to work for six months only. He went on saying that upon the expiry of the permit, the applicant requested on behalf of the respondent for a new work permit without success. That the applicant could not, therefore, employ the respondent on account of a statutory prohibition of employment of foreigners without work permit [section 26 (2) of the National Employment

and Promotion Services Act, 1999 (NEPSA)]. That aggrieved by the applicant's decision of not employing him, the respondent instituted the proceedings before the CMA claiming unfair termination of employment and was awarded compensation in the sum of US$ 130,680.00. The said CMA's award, as stated earlier, was upheld by the High Court.

The learned counsel ardently contended that upon the respondent being refused a work permit, he became unemployable and that the applicant could not retain his services lest it committed an offence under section 27 (7) of the NEPSA which proscribes employment of a foreigner without a work permit. It was his further submission that the CMA had no jurisdiction to entertain the employment dispute because the employment contract between the parties was void for want of work permit. He added that it was an apparent illegality on the part of the CMA and, by extension, on the part of the High Court, that they proceeded to entertain and determine the dispute as if they had jurisdiction to do so. The learned counsel urged me to follow the path trodden by the single Justices of the Court in two unreported decisions in **Eliakim Swai and Frank Swai v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 and **Mgombaeka Investment Company Limited & Two Others v. DCB Commercial Bank PLC**, Civil Application No. 500/16/2016. In both cases, the single

Justices granted extension of time upon the question of apparent illegality of the decision of the High Court being raised by the applicant.

Mr. George Kilindu, learned counsel for the respondent, strongly opposed the application as totally bereft of merit and that it was blatantly frivolous. Relying on two affidavits in reply, one deposed by himself and the other by the respondent, the learned counsel argued that the applicant employed the respondent on a two-year contract and that the latter was issued with an initial six months' work permit. Apart from claiming that the accompanying affidavit was a load of hearsay depositions because the deponent failed to disclose the source of his information, the learned counsel contended that the alleged lack of jurisdiction on the part of the CMA was raised by the applicant before the High Court, which, then, heard the parties and dealt with the point extensively. In the end, the court dismissed the point as it affirmed the jurisdiction of the CMA.

Reacting to the two authorities relied upon by his learned friend, Mr. Kilindu stressed that when illegality is cited as a ground for extension of time, the alleged illegality must be apparent on the face of the record and that it must raise a legal point of sufficient significance. While conceding that the illegality raised by the applicants in the two cases cited met the

aforesaid threshold requirement, he argued the applicant in the instant matter has failed to disclose any illegality that is manifest on the record, let alone one raising a point of sufficient legal significance.

Rejoining, Mr. Mgongolwa maintained that the CMA had no jurisdiction to take cognizance of the matter and determine it once the work permit was refused. He added that the question involved being a claim of want of jurisdiction is manifest on the record and that it is an issue of sufficient legal significance. Moreover, he criticized the High Court for not determining the point even though it was raised by the parties. It was his further submission that the learned Judge, rather startlingly, ignored a decision of that court (Rweyemamu, J.) on the point in **Rock City Tours Ltd. v. Andy Nurray,** Revision No. 69 of 2013 at Mwanza (unreported) dismissing a CMA award of compensation for unfair termination to a foreigner who had no work permit. In that case the court had held that the CMA had no jurisdiction in the dispute arising from a contract of employment that was void for want of work permit.

At this point, it bears restating that, in their respective submissions, both counsel made reference to the recent decisions of single Justices of the Court in **Eliakim Swai** (supra) and **Mgombaeka Investment**

Company Limited (supra) acknowledging the principle that the Court could extend time where the points of law proposed for the intended appeal raise the illegality of the decision concerned. Both decisions relied on the decision of the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185, which is the earliest on the point. In that case, the Court held, at page 188, as follows:

> *"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules [now rule 10 of the 2009 Rules] for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law."*

The above position was restated by the Court in **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and**

Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) thus:

> *"We have already accepted it as established law in this country that where the point of law at issue is illegality or otherwise of the decision being challenged, that by itself constitutes 'sufficient reason' within the meaning of rule 8 of the Rules [rule 10 of the 2009 Rules] for extending time.... As the point of law at issue in these proceedings is the illegality or otherwise of the decision of the High Court annulling the respondent's debenture with Tri-telecommunications (Tanzania) Ltd, then this point constitutes 'sufficient reason' ... for extending the time to file a notice of appeal and applying for leave to appeal. This is notwithstanding the fact that the respondent brought the applications very belatedly ..."*

In **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), a single Justice of the Court elaborated that:

> *"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, 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 be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."***
[Emphasis added]

Guided by the above authorities, I have considered the notice of motion, the accompanying affidavit and the affidavits in reply and then applied my mind to the written and oral submissions presented for and against the application. The sticking point for determination is whether the application raises a point of illegality of the impugned decision of the High Court that is of sufficient importance and that it is manifest on the record.

In the instant case, it is on record that the respondent, a non-citizen, was employed by the applicant in the position of General Manager – Human Resources and that he assumed the position on 29th August, 2009 upon being issued with a six months' work permit. Undoubtedly, upon the

expiry of the initial permit, the respondent was not issued with a new permit. Before the High Court, the respondent blamed the applicant for neglecting to seek and obtain a new permit and the court agreed with him on that score and found that the absence of the permit was a smokescreen for the applicant's act of terminating the respondent's services unfairly. But it seems arguable, as contended by Mr. Mgongolwa that, whether or not the applicant was blameworthy for failure to secure a new work permit for the respondent, as a matter of law the respondent could not engage in paid employment with the applicant without any new permit being issued after the initial authorization had expired.

When the absence of the work permit was raised to the High Court in the first ground of revision as a jurisdictional issue on the authority of a previous decision of that court in **Rock City Tours Ltd.** (supra), Mipawa, J., at pages 12 to 13 of the typed judgment, took the view that:

> "... *this Court is of the firm decision in the situation at hand and without flicker of doubt that the termination of the respondent's employment was under the disguise and camouflage of work permit. Throughout the records there is no any written document ... denying the respondent work permit for the remaining time of his contract .... Therefore,*

the reason advanced by the applicant for terminating the respondent was much and greatly contributed by herself."

In conclusion, the learned High Court Judge dismissed the first ground and affirmed the CMA's jurisdiction in the matter as he held that:

"The conduct of the applicant employer in the whole of this labour dispute polluted all the allegation that the termination of employment was due to expiry of work permit .... It is with firm decision that the first ground for revision fails and the CMA decision on that issue is confirmed."

I have carefully read Rweyemamu, J.'s decision in **Rock City Tours Ltd.** (supra). In this case, the respondent, a non-citizen, entered into an employment contract and worked for the applicant before a valid work permit was issued. After his application for a work permit was refused he continued working for some time until when the applicant terminated the relationship. He successfully contested the termination before the CMA, which ordered the applicant to pay compensation. On revision, Rweyemamu, J. held that the absence of work permit should have reasonably raised a jurisdictional question before the CMA. That it should have been clear to the CMA that the absence of a work permit rendered the purported employment contract between the parties void at the very

least; or that, if it was a contingent contract, it became void when the expected event did not occur, that is the respondent failed to obtain a Class B work permit. Referring to section 14 (1) (1) (a) and (b) (i), (ii) and (iii) of the Labour Institutions Act, 2004 stipulating the jurisdiction of the CMA, that is, mediating and arbitrating any dispute concerning labour matter between any employer and any employee, the learned High Court Judge held that the CMA had no jurisdiction in a dispute which did not concern a labour matter involving an employer and employee. The court faulted the CMA for failing to enquire into and decide (on the facts before it), whether or not it had jurisdiction in the case, and by proceeding to arbitrate the dispute, the CMA acted improperly and that it had no jurisdiction to arbitrate on a dispute based on a void contract. In consequence, the court nullified the whole of the CMA proceedings leading to the impugned award being quashed and set aside.

Admittedly, in the instant case Mipawa, J. was not bound by the position taken in **Rock City Tours Ltd.** (supra), it being a decision of another judge of the same jurisdictional hierarchy. Nonetheless, as observed by the Court in **Ally Linus and 11 Others v. Tanzania Harbours Authority and the Labour Conciliation Board of Temeke** [1998] TLR 5 at 11:

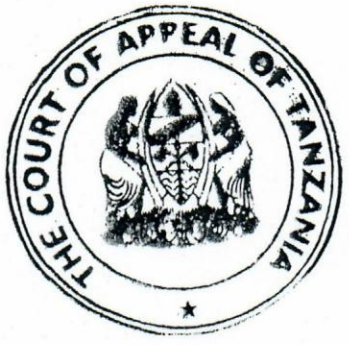
"it is not a matter of judicial courtesy but a matter of duty to act judicially, which requires a judge not lightly to dissent from the considered opinions of his brethren."

It seems arguable to me that the learned High Court Judge, with utmost respect, gave no consideration to the position taken in **Rock City Tours Ltd.** (supra) and that in due course he might have passed up the chance to address the jurisdictional issue arising from apparent unenforceability of the contract between the parties herein after the initial work permit expired. His reasoning and finding, that the applicant's work permit narrative was a disingenuous camouflage, seems to have not dealt with the question over the CMA's competence in the matter. Without prejudging the intended appeal, it is in my view arguable, on the reasoning in **Rock City Tours Ltd.** (supra), that the CMA proceeded without jurisdiction to arbitrate on a dispute based on a seemingly void contract for compensation in respect of the unexpired term of that contract when the respondent had no valid work permit. By any yardstick, this issue is of sufficient legal importance as it goes to the root of the impugned decision itself. It justifies extension of time to afford this Court an opportunity to investigate and determine the matter.

The upshot of the matter is that I find merit in the application, which I grant. Accordingly, I order the applicant to lodge a notice of appeal within thirty days from the date of the delivery of this ruling. Costs shall follow the event in the intended appeal.

DATED at **DAR ES SALAAM** this 16th day of May, 2019.

G. A. M. NDIKA
JUSTICE OF APPEAL



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL

Extracted on 17th day of May, 2019.