IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 517/18 OF 2017

TUICO (On behalf of its members) ..... APPLICANT

VERSUS

1. **THE CHAIRMAN INDUSTRIAL COURT OF TANZANIA**
2. **THE HON. ATTORNEY GENERAL** ..... **RESPONDENTS**

(Application for extension of time within which to lodge an Application for stay of execution from the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam

(Hon. Mashaka, J.)

dated the 30th day of June, 2015

in

Revision No. 154 of 2014

RULING

3rd April & 27th May, 2019

KOROSSO, J.A.:

This application is made by way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), as amended by Government Notice No. 362 of 2017. The notice of motion filed under a certificate of urgency, is supported by an affidavit sworn by Godfrey Ukwong'a, Learned advocate for the applicants and annexed with copies of

various supporting documents including a list of 502 names of which the applicant is acting as a representative.

The applicants sought relief is for the Court to enlarge time for the applicant to re-hear and determine on merit and the satisfaction of the parties and in the interest of justice, the failed application for review in Civil Application No. 114 of 2011. The said affidavit in support of the notice of motion, expounds background facts leading to the current application.

Through oral and written submissions expounded by the applicants counsel and before this Court, the application is grounded on various factors as submitted. First, that the proceedings and composition of the Justices who heard and determined Civil Application No. 114 of 2011 are tainted with illegality. Specifically, on the fact that one of the Justices gave a dissenting judgment in Civil Appeal No. 67 of 2010 and thus the counsel argued, it was not judicious for the dissenting justice to sit and determine the decision of the majority justices of the Court.

The second ground is that, the way and the manner in which Civil Application No. 114 of 2011 was handled and led to there being two Rulings, created a crack in the procedure of handling reviews in this Court

and the lower court. Therefore giving rise to a need for the Courts directions so as to meet the ends of justice. Third, that there is a need for having provisions to cover the position on the role of Justices who dissent, where there is a review of appeals, and other related matters where review is an issue. With regard to the delay to file the application in time, the applicant submitted two grounds. First that the learned counsel for the applicant came across the need to proceed with a reference, after being consulted to assist/provide guidance, when many years had elapsed already. Second, that the fact that there are legal issues raised by the dissenting judge in the Review order, has legal force to compel the Court to enlarge time even when the time has long elapsed.

On the part of the Respondents, they filed an affidavit in Reply and a notice of preliminary objection on the 22nd of March 2018. The said objection was that the Application is *res judicata*, and thus the applicant should be estopped from pursuing it. On the 18th of October, 2018, the Respondents filed an additional notice of preliminary objection to the effect that:

> "*The Honorable Court lacks jurisdiction to entertain the application in view of the provisions of*

paragraphs 13(9) of the 3rd Schedule to the Employment and Labour Relations Act, 2004 as amended by the Written Laws (Miscellaneous Amendment) (No.2) Act, No. 11 of 2010 read together with Employment and Labour Relations (Extension of Time for Dispute Determination) Notice 2018, GN No. 149 of 2013".

On the date fixed for hearing, the applicants were represented by Mr. Ukwong'a Learned Advocate and the 1st and 2nd respondents were represented by Mr. Abubakar Mirisha, Learned Senior State Attorney. The Court invited parties to submit in relation to the preliminary objections raised by the respondents. The learned counsel for the respondents prayed to withdraw the notice of the first preliminary objection they had raised, that alleged that the application was *res judicata.* Upon consideration of the prayers and the submissions from the learned counsel for the applicants, who registered no objection to the prayer for withdrawal, the Court acceded to the prayer for withdraw and consequently, the 1st preliminary objection was marked withdrawn.

The applicant and respondent counsels, with the leave of the Court, then proceeded to submit on the 2nd preliminary objection raised only. This objection was that this Court, lacks jurisdiction to entertain the application in view of the provisions of paragraphs 13(9) of the 3rd Schedule to the Employment and Labour Relations Act, 2004 as amended by the Written Laws (Miscellaneous Amendment) (No.2) Act, No. 11 of 2010 read together with Employment and Labour Relations (Extension of Time for Dispute Determination) Notice 2018, GN No. 149 of 2013.

The Respondents contended that the preliminary objection raised and filed on the 26/10/2017 was a pure point of law, in line with the principles established in ***Mukisa Biscuits case***. That having regard to the fact that the present application was filed on the 26/10/2017, and that the time of filing of the notice of motion was outside the prescribed time provided by the Law and arguing that the ELRA (Extension of time for Disputes Determination) Notice 2013 provides under section 2 that the period for disputes under ELRA is extended for 3 years up to the 28th of May 2013. The respondents argued further that the date the application was filed is outside the parameters of the stated provision and therefore it is time barred for about one year and five months. Therefore, they argued that

the application is incompetent since it was filed in a Court which lacks jurisdiction to entertain the application.

The argument by the respondents being that, the Written laws Misc. Amendment Act, No. 2 of 2010, in part XVII, section 42, which is an amendment of paragraph 13 in the 3rd Schedule of ELRA specifies the time to challenge being three years and paragraph 13(9) specifies that the period of 3 years is what shall apply. After the extension given, that there is no other extension which was provided and thus according to the respondents, meaning that the current application for review is time barred. To cement this position the case of ***Yusuf Vuai Zyuma vs Mkuu was Jeshi la Ulinzi TPDF and 2 Others,*** Civil Appeal No. 15 of 2009, the Court of Appeal sitting in Zanzibar reffers where at pg. 6, it stated that, they agreed with the learned State Attorney that the appellant did not institute the suit within time was therefore time barred. That in this case, the suit was instituted beyond the time allowed rendering the suit time barred.

The respondents also cited another case, that is, ***Kenya Airways vs Nyanda Mgwesa Nyanda***, Civil Appeal No. 23 of 2012, (unreported) a High Court decision, where at pg. 7, it was stated that the importance of

the Law of Limitation has been religiously applied and binds the said Court. The decision having emphasized on the importance of the Law of Limitation and how it binds the High Court. The learned counsel concluded by stating that the current application was filed more than one year and half after the expiry of time, and there is no extension which has been sought from the responsible Minister, and thus prayed the Court dismiss the application with costs.

On the part of the applicants, their counsel argued that what is before the Court is an application for extension of time, which is only barred on there being no good cause shown. Therefore any matters related to the application being barred by operation of the laws relating to employment and amendments of ELRA are not applicable at this juncture. That the position is clear, that the dispute between the applicant and the respondent is locked up in the former industrial Court. That what transpired after the sittings in the Industrial Court, are issues which arose in Court when dealing with the dispute. The counsel argued further that what is before this Court is not the dispute, locked up with the former Industrial Court, but the application for extension of time to review so as to challenge the procedure used, which if successful will trace its way back to

the Industrial Court so that the dispute locked in the Industrial Court can find its way on which direction to go.

The applicants counsel submitted that while they partially concede to the preliminary objection raised by the respondents, it is only so far as the dispute is concerned, that is the matter to be referred to Center for Mediation and Arbitration, under the relevant provisions. That the amendments in the ELRA will not bar the applicants' proceedings to CMA. That the current application before the Court is not time barred, and before the Court is not a labour dispute.

The learned State Attorney rejoinder was to reiterate their stance, arguing that the application falls within the amended laws already stated. That the preliminary objection raised is grounded on the jurisdiction of this Court, and as long as the application is for extension of time to rehear, it falls under the amendments already submitted and it is therefore time barred.

There is no doubt that what is before the Court is an application for extension of time, to rehear and determine on merit and the satisfaction of

the parties, the failed application for review, that is, Civil Application No. 114 of 2011, which was determined by this Court.

In the said application, upon consideration of the grounds for the application and submissions before the Court. The Court found there was no error apparent on the face of the record to warrant the review order sought and thus found no merit in the application and proceeded to dismiss the application for review with costs.

The Section cited to move the Court to consider the application is Rule 10 of the Tanzania Court of Appeal Rules 2009 (as amended) which states:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed*

as a reference to that time as so extended".

Although the relevant provisions were not cited by the parties, the powers to review for this Court are enshrined under section 4(4) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (as amended) which states: "*The Court of Appeal shall have the power to review its own decision*". At the same time Rule 66 (1) of the Tanzania Court of Appeal Rules 2009 (as amended) provides for review by the Court of its own decisions upon conditions stated in Subrules (a) to (e) of Rule 66(1).

The respondents counsel has challenged the competence of this application. The challenge is grounded on the argument that this Court, has no jurisdiction to entertain the application for reasons already presented hereinabove as expounded by the counsel for the respondents. While the applicant's counsel has challenged this assertion finding it misconceived, by virtue of the fact that this is an application seeking extension of time and arguing that the issue under consideration should be whether good cause has been shown to warrant grant of the prayers sought by the applicant.

With regard to the raised preliminary objection by the respondents, which is under consideration, the applicant counsel registered no challenge on the competence of the preliminary objection raised. It is pertinent to remind ourselves that, it is now trite law that a preliminary objection should be based on a pure point of law, not on points whose facts need to be ascertained by way of evidence as expounded in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) E.A 696.

Considering the fact that the respondents objection relates to jurisdictional matters, that is, arguing that this Court lacks jurisdiction to entertain the application in view of the provisions of paragraphs 13(9) of the 3rd Schedule to the Employment and Labour Relations Act, 2004 as amended by the Written Laws (Miscellaneous Amendment) (No.2) Act, No. 11 of 2010 read together with Employment and Labour Relations (Extension of Time for Dispute Determination) Notice 2018, GN No. 149 of 2013. Thus, there is no doubt that the preliminary objection raised is a point of law.

The applicant counsel in his submissions partially conceded to the preliminary objection raised by the respondents, but stated it is only true so far as the dispute is concerned, and thus stating that it did not relate to the application before the Court.

Having considered the matter before the Court, and also all the decisions cited by the applicants and respondents related to what a Court should consider where there is an application for extension of time, such as the present application.

I have carefully considered the submissions from the counsels for the applicants and the respondents on this point, I am inclined to share the views expressed by the applicants counsel that, the matter related to whether or not this Court has jurisdiction for reasons expounded by the respondents counsel will be relevant for consideration and determination when the matter is considered in an application for review and not at this juncture. Understanding that, under Rule 66(1)(d) of the Tanzania Court of Appeal Rules, the issue on whether or not the Court has jurisdiction to entertain the case is a ground which can lead the Court to hear and determine an application for

review.

That being the case, I find that the preliminary objection raised is premature and not applicable for due consideration in this application, it is a matter which may be considered when addressing the merits of the said application. Therefore, I find the preliminary objection raised by the respondents devoid of merit and is therefore overruled.

In the circumstances, the application to proceed on merit, with hearing and determination of the issues before the Court. Costs be in the cause.

DATED at **DAR ES SALAAM** this 27th day of April, 2019.

W. B. KOROSSO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL