IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 11/18 OF 2019

TANZANIA BREWERIES LIMITED ..... APPLICANT

VERSUS

HERMAN BILDAD MINJA ..... RESPONDENT

(An Application for extension of time to lodge an application for revision against the ruling and orders of the High Court of Tanzania, Labour Division) at Dar es Salaam)

(Lyimo, DR)

Dated 26th June, 2015

in

Execution No. 42 of 2012

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RULING

4th October, 2019 & 19th March, 2020

SEHEL, J.A

Before me is an application for extension of time made under Rules 10 and 47 of the Court of Appeal Rules, 2009 (the Rules). The applicant is seeking for an extension of time within which to file an application for revision against the proceedings, ruling, and orders of the High Court (Lyimo, Deputy Registrar) in Execution No. 42 of 2012 dated 15th June, 2015 and 26th June, 2015 arising from proceedings and Arbitral Award of

the Commission for Mediation and Arbitration (CMA). The notice is supported by an affidavit sworn by Mr. Rahim Mbwambo, learned advocate for the applicant. The respondent has filed the affidavit in reply and both the applicant and the respondent have filed their written submissions.

The supporting affidavit, read together with the affidavit in reply, provide the historical and undisputed background to this matter, that: the respondent was employed by the applicant as MIS Coordinator whose services were terminated on 22nd day October, 2007. Aggrieved with that termination, the respondent took the matter to the Commission for Mediation and Arbitration (CMA) at Arusha Zone where he sought to be reinstated on grounds of unfair termination. On 26th day of September, 2008 the CMA delivered its Award. Both parties were aggrieved. The applicant preferred Revision whereas the respondent lodged an appeal, to the High Court. The appeal was dismissed with a reason that an Award issued by CMA is not appealable to the High Court. On Revision, the High Court quashed the proceedings and set aside the Award. It further ordered for the matter to start afresh.

On 28th day of October, 2011 CMA issued its Award whereby the respondent was ordered to be reinstated. The applicant was once again aggrieved thus preferred Revision No. 7 of 2012. That revision was withdrawn with liberty to re-file due to the defects in the jurat of attestation. Before it was re-instituted, the respondent passed away. He passed away on 18th January, 2013 whereas the applicant re-filed its revision on 23rd day of October, 2013. It was Revision No. 101 of 2013. That revision was dismissed on a point of preliminary objection. It was dismissed on 15th day of December, 2014. As such, the respondent commenced execution proceedings, Execution No. 42 of 2012.

The applicant deposed that it filed a preliminary objection against the application for execution which objection was sustained by the High Court. It further deposed that despite the objection being sustained, the application for execution was placed before the judge in charge for further directions. On 15th day of June, 2015 parties were summoned to appear before the Registrar whereby they were informed that the Judge in Charge has directed for the application to be determined according to law. Acting under that directive, the Registrar ordered both parties to sit

and agree on the amount the respondent was entitled in terms of section 40 (3) of the Employment and Labour Relation Act. No. 6 of 2004 as there was no possibility for reinstatement as the respondent is now the deceased.

The applicant was not satisfied with that order thus filed an objection proceedings. While that objection proceedings was still pending, the High Court on 26th day of June 2015 issued a garnishee order for the respondent to be paid TZS. 320,000,000.00.

Once again, the applicant was aggrieved. It filed to this Court an application seeking for revisional orders. That revision was struck out on 2nd day of November, 2018 hence the filing of the present application for extension of time within which to file an application for revision.

The application is opposed by an affidavit in reply of Christophina Justin Mkude, the widow and the administratix of the estates of the respondent.

When the application was called for hearing, Mr. Rahim Mbwambo and Mr. John Materu, learned advocates appeared for the applicant and respondent, respectively.

Adopting the notice of motion and affidavit in support of the application, Mr. Mbwambo, submitted that from the moment the applicant became aware of the existence of the garnishee order, the applicant did not sit idle instead it filed an application for revision to this Court, Civil Application No. 164 of 2015 which was struck out for failure by the applicant to attach record of proceedings. It was his submission that the applicant deposed in Paragraphs 22 to 28 of the affidavit that it was prosecuting with due diligence and in good faith. Elaborating further on diligence, Mr. Mwambo argued that the requirement to attach record of proceedings in application for revision was new development as there was no specific law providing for that requirement.

Mr. Mwambo added that since there are serious issues of illegalities and irregularities deposed in Paragraphs 21 and 29 of the affidavit, the applicant is entitled to be granted the extension of time. He pointed out that the Award issue by CMA was for reinstatement and not for payment of money therefore it was wrong for the High Court to issue a garnishee nisi; that the administratix was not joined as a party in the proceedings; that applicant was not accorded a right to be heard in respect of the

order issued, and that there was no application filed by the respondent for garnishee order. To support his argument that the applicant is entitled to be granted extension of time, he cited the cases of **Kalunga and Company Advocates v. National Bank of Commerce Ltd**, Civil Application No. 124 of 2005 and **V.I.P Engineering and Marketing Limited and 2 Others v. CITIBANK Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (both unreported). In the light of that submission, Mr. Mbwambo urged me to allow the application.

Mr. Materu first adopted the affidavit in reply and vehemently opposed the application by arguing that the applicant has failed to account for each period of delay. He countered attacked Paragraph 26 of the affidavit that it is not self sufficient to account for each day for delay. Mr. Materu contended that the applicant ought to have attached an affidavit from the Principal Officer of the applicant to substantiate the allegation that the internal process of tendering procedures delayed the filing of the present application for almost seventy two days but there is none. He further argued that even the tendering advertisement was not attached to the affidavit in support of the application. It was his

submission that this Court has repeatedly insisted on the requirement for the applicant to account for each day for delay. To cement his submission, he referred me to the case of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Reference No. 8 of 2016 and **Mtesigwa Lugola v. The Attorney General and Another**, Civil Application No. 34/06 of 2017 (both unreported).

On the issue of illegality, the learned advocate submitted that the intended application for revision is misconceived since the applicant has a right to appeal provided under section 57 of the Labour Institutions Act No. 11 of 2004. Having prefaced with the technical issue, Mr. Materu then proceeded to answer each and every alleged illegality. He argued that the complaints regarding payment of money and a right to be heard do not have merit because the law under Section 40 (3) of the Employment and Labour Relations Act No. 6 of 2004 allows the Court to award compensation in monetary terms where the employer decline to reinstate an employee. He said since the applicant refused to reinstate the respondent then the High Court was correct in awarding the money compensation.

Regarding the issue of Garnishee nisi, he argued that a garnishee order is one of the mode of execution of a monetary decree as provided under Order XXI of the Civil Procedure Code, Cap. 33.

On the complaint that the applicant did not file any application for execution, it was replied that the applicant did file it as evidenced by Annexure TBL 3 attached to the affidavit in support of the application.

Responding on the issue of joining the administratix as a party to the proceedings, Mr. Materu pointed out that Annexure R3 attached to the affidavit in reply evidenced that the administratix was joined and the applicant was fully aware. He therefore urged me to dismiss the application with costs.

In rejoinder, Mr. Mbwambo reiterated his earlier submission that there was no application for execution filed by the applicant seeking execution of a decree by mode of garnishee order and that the applicant did not refuse reinstatement rather it was seeking its right to appeal against the Award of reinstatement. He also argued that the record lacks evidence as to when and how the administratix was joined.

On the objection that the applicant ought to have filed appeal, Mr. Mbwambo argued that the objection is prematurely brought because the applicant at this stage is seeking an extension of time to file revision and it is not revision. Thus, if it has any merit, it ought to be raised at the time when the application for revision will be filed.

He also responded on the failure to account for the seventy two days, he stated that the affidavit is support was sworn and filed by the learned advocate of the applicant who is an officer of the Court and had full instructions from his client thus he did not see any justification as to why the Court should not believe the learned advocate.

Lastly, he distinguished the cases referred by the learned advocate for the respondent that they both did not deal with the issue of illegality which the present applicant is raising in this application. He therefore prayed for the application to be granted.

I have carefully considered the instant application in the light of the notice of motion, affidavits both in support and in reply and submissions made by both parties. Before going to the merits let me first deal with the objection that the application is misconceived because the

applicant has a right to appeal to this Court as provided by section 57 of the Labour Institutions Act No. 11 of 2004. Much as I would like to venture into determine the issue but I am afraid I will be going beyond my jurisdiction. At this juncture, my jurisdiction is to determine whether the applicant is entitled for an extension of time or not. Whether the applicant has a right to appeal and thus it is not entitled to seek for revisional power are issues to be determined by the Court and not Single Justice. In the **Regional Manager- TANROADS Lindi Vs. D.B Shapriya and Company Limited**, Civil Application No. 29 of 2012 (Unreported) it was reiterated that:

> *"...it is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issue before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews."*

In this application, I am guided by the above principle as such I refrain myself into venturing on matters that are within the mandate of the Court.

Coming back to the present application, it stands out form the submission of counsel that the applicant is seeking an extension of time within which to lodge an application for revision. It is trite law that an application for revision must be lodged within sixty days from the date of the decision sought to be revised (See Rule 65 (4) of the Rules). The decision which the applicant wishes to challenge by revision was issued on 26th day of June 2015 while the present application was filed on 15th day of January 2019.

The applicant banked on two main reasons as to why it has failed to file the application for revision within time. The first reason the applicant termed it as a technical delay simply because he argued that its earlier application for revision was struck out by the Court because it was unaware of the legal position that a party initiating revision proceedings ought to avail the Court with a copy of the proceedings of the lower court or courts, judgment or ruling and copy of the extracted decree or

order, as the case may be. The respondent in his response to that submission is more concerned with the period from date when the application for revision was struck out to the filing of the present application for extension of time. He contended that this period was not accounted for by the applicant.

According to the record, the application for revision was struck out on 8th day of November 2018 and the present application was filed on 18th day of January 2019. That is after the lapse of 72 days. The applicant in its affidavit in support of the application explained that period of delay as follows:

> *"That the period between 8th November 2018 when Revision No. 164 of 2015 was struck out to date of filing this application, the applicant was adhering to her mandatory internal procedures (tender process) of sourcing law firm to represent before this Court. Eventually Law Associates Advocates was selected again to represent the applicant, but unfortunately the said selection was*

completed during Court's and Law Associates Advocates' vacation."

That deposition made by the counsel for applicant, Mr. Materu argued that was a mere assertion because there is no documentary evidence attached to show that there was a tendering process and that in any event the deposition ought to be supported by the affidavit of the applicant's principal officer.

In **Lalago Cotton Ginnery and Oil Mills Company Ltd Vs The Loans and Advances Realization Trust (LART),** Civil Application No. 80 of 2002 (Unreported) the Court said:

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during these proceedings."

From the above, an advocate can swear and file an affidavit in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client.

In the matter at hand, the learned counsel for the applicant deposed on internal affairs of its client which affairs are only within the knowledge of the principal officer of the applicant and not within the advocate's personal knowledge. As rightly submitted by Mr. Materu, that internal affair ought to have been supported by an affidavit of the principal of the applicant.

In the case of **John Chuwa v. Anthony Ciza** [1992] TLR 233 in which an application for leave to appeal was filed two days out of time, the Court emphasized on the need of filing an affidavit of a material person in order to explain the delay (See also **Isaack Sebegele v. Tanzania Portland Cement Co. Ltd**, Civil Reference No. 26 of 2004 (unreported)). Since, the affidavit of a material person is lacking then I find that the applicant has failed to account for seventy days of its delay.

The applicant is also alleging that there are serious irregularities and illegalities in the intended impugned ruling. The said illegalities are; the Award issue by CMA was for reinstatement and not for payment of money therefore it was wrong for the High Court to issue a garnishee nisi, that the administratix was not joined as a party in the proceedings, that the applicant was not accorded a right to be heard in respect of the order issued, and that there was no application filed by the respondent for garnishee order.

It is settled law that where there is an allegation of illegality, it is important for the Court to grant the applicant the extension of time so that the alleged illegality can be considered by the Court. This was so held in the case of **The Principal Secretary, Ministry of Defence and National Service Vs Devram Valambhia** (1992) T.L.R 182 that:

> *"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be*

established, to take appropriate measures to put the matter and the record right."

In **VIP Engineering and Marketing Limited and Three Others Vs Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported) the Court of Appeal patently stated:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

It follows then that an allegation of illegality by itself suffices for an extension of time and it does not matter whether the applicant has accounted for each delay.

In view of the fact that the applicant has alleged that there are illegalities and irregularities, I find merit in the application for extension of time. Consequently, I grant the application. I order the applicant to file the intended application for revision within sixty days from the date

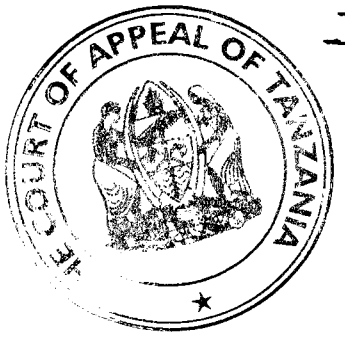
of the delivering of this ruling. Costs of this application shall abide by the outcome of the revision.

It is so ordered.

DATED at **DAR ES SALAAM** this 11th day of March, 2020.

B. M. A. Sehel
JUSTICE OF APPEAL

The ruling delivered this 19th day of March, 2020 in the presence of Mr. Herry Kauki, learned Counsel for the Applicant and Mr. Herry Kauki holding brief of Mr. John Materu, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL