IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 451/18 OF 2020

SABENA TECHNICS DAR LIMITED ..... APPLICANT

VERSUS

MICHAEL J. LUWUNZU ..... RESPONDENT

[Application for Extension of Time to File Written Submissions in Civil Appeal No. 246 of 2020 from the decision of the High Court (Labour Division) at Dar es Salaam]

(Wambura, J.)

Dated the 24th day of April, 2020
in
Revision No. 807 of 2019

RULING

25th March & 14th April, 2021

MWAMBEGELE, J.A.:

In this application, the applicant is seeking an order of the Court to extend time within which to file written submissions in Civil Appeal No. 246 of 2020. The application has been made by way of a notice of motion taken under rules 10, 48 (1) and (2) and 49 (1) of the Tanzania Court of Appeal Rules (the Rules). It is supported by an affidavit deposed by Benson Adam Mahuna, then advocate for the applicant and resisted by an

affidavit in reply deposed by Odhiambo Kobas, advocate for the respondent.

When the application was called on for hearing before me on 25.03.2021, Mr. Imamu Daffa, learned counsel, appeared for the applicant. The respondent was represented by Mr. Odhiambo Kobas, also learned counsel.

When given the floor to argue his application, Mr. Daffa adopted the notice of motion, the supporting affidavit and the written submissions filed earlier on in support of the application to be an integral part of his oral submissions. Having so done, he added that there is a point of law in the CMA award worth consideration by the Court. That point, he clarified, is that the applicant was not served before proceeding to hearing *ex parte*. The learned counsel argued that this is also a good cause upon which the Court can exercise its discretion to grant the extension sought. On that score, he prayed that the application be granted.

In the written submissions earlier filed, the applicant addressed four grounds on which he pegged her application for extension of time. **First**, that the written submissions were to be filed by 15.09.2020 but could not

as the Directors of the applicant company were under lockdown due to covid-19 in Belgium and lost communication with Advocate Amin Mohamed Mshana who was instructed to file the appeal. The Directors of the applicant lost track of the appeal until early October, 2020 when they instructed advocate Frank Steven Mwalongo to make a follow-up only to realise that no written submissions were filed in support of the appeal and the deadline was 15.09.2020. The present application was filed on 15.11.2020 which delay was not inordinate, he submitted. In support of his argument, he relied on the decision of the Court in **Attorney General v. Oysterbay Villas Limited & Kinondoni Municipal Council**, Civil Application No. 299/16 of 2016 (unreported) in which a delay of 45 days was held not to be inordinate.

Secondly, the applicant submitted that after recovering from the pandemic in early October, 2020, the Directors of the applicant acted promptly to instruct advocate Frank Steven Mwalongo who, after discovering the delay, promptly filed the present application. The learned counsel submitted that taking steps promptly accounts for the delay. To buttress this argument, the learned counsel cited to me **Mary Mbwambo**

and Another v. Mbeya Cement Company Ltd [2017] TLS LR 277; a decision of the Court.

Thirdly, the counsel submitted that there are illegalities in the proceedings, judgment and decree in Civil Appeal No. 246 of 2020 which needs attention of the Court in the event extension of time to file written submissions is allowed. The counsel enumerated the illegalities as; **one**, Form No. 1 was filed before the CMA contrary to rule 7 of Labour Institutions (Mediation and Arbitration) Rules, 2007 – GN No. 64 of 2007, **two**, the applicant was denied the right to be heard before the CMA, **three**, the applicant was not served with the summons, **four**, the evidence was not fully appreciated and, **five**, the High Court erred in holding that the applicant failed to adduce evidence before CMA. Relying on **Mary Mbwambo** (supra), the learned counsel submitted that on the ground of illegality, the court is moved to extend the time sought. He also cited **Transport Equipment v. D. P. Valambhia** [1993] T.L.R. 91 to buttress the point.

Lastly, the applicant's counsel submitted that the respondent will not be prejudiced if this application is granted. For this proposition, he cited

Benedict Shayo v. Consolidated Holding Corporation (as Official Receivers of Tanzania Film Company Limited), Civil Application No. 366/01 of 2017 (unreported).

In rebuttal, Mr. Kobas fervently resisted the application. He submitted that the main reason as to why the applicant delayed to file the written submissions is that the applicant's Directors; Stephane Elie Cecil Burton and Jose Ignacio Beltran Taura, travelled to Belgium where they were caught up by the lockdown due to Covid-19 and they and their families suffered from the scourge. This ground, he contended, is only hearsay and does not amount to good cause for the delay and thus cannot be relied on by the Court to extend the time sought. The Court could rely upon the ground to extend time only if there were affidavits of the said Directors. Otherwise, the depositions of Benson Adam Mahuna remain merely hearsay and falls short of supporting the contents of the notice of motion. To support this proposition, Mr. Kobas cited to me the Court's decision in **John Chuwa v. Athony Ciza** [1992] T.L.R. 233 wherein it was held that an affidavit of a person so material has to be filed. He also cited the decision of the Court in **Lalago Cotton Ginnery and Oil Mills Company**

Ltd v. the Loans and Advances Realization Trust (LART), Civil Application No. 80 of 2002 (unreported) for the same proposition.

The learned counsel also cited the decision of High Court in **Elihaki Giliad Mbwambo v. Mary Mchome Mbwambo and Amos Mbwambo**, Miscellaneous Civil Application No. 449 of 2019 (also unreported) in which the cases of **NBC Ltd v. Superdoll Trailer Manufacturing Co. Ltd**, Civil Application No. 13 of 2002 and **Benedict Kimwaga v. Principal Secretary, Ministry of Health**, Civil Application No. 31 of 2000 (both unreported decisions of the Court) were relied upon to buttress the point that an affidavit which mentions another person is hearsay unless that other person swears as well.

The learned counsel also submitted that the affidavit in support of the application is silent on how Covid-19 and the lockdown disabled the applicant from filing the written submissions while she had engaged an advocate to file an appeal which indeed was filed and the instructions to file an appeal constitute also the filing of written submissions and arguing the appeal. He added that the affidavit did not state when did Covid-19 strike and when did the Directors suffer and recover and when did the

lockdown start and when it was lifted. On that score, he contended, the applicant has failed to explain how illness contributed to the delay. For this proposition, the learned counsel referred me to **Juto Ally v. Lukas Komba and Aloyce Msafiri Musika**, Civil Application No. 484/17 of 2019 (unreported) in which the Court held that an applicant must explain how illness contributed to the delay in performing an act for which extension is sought.

It was also the submission of Mr. Kobas that all deposed facts show sheer negligence by the applicant's counsel which cannot be a ground to grant extension of time. On this submission, he cited an unreported decision of the Court in **Tanzania Rent A Car v. Peter Kimuhu**, Civil Application No. 226/01 of 2017. The learned counsel also relied on page 14 of this decision to submit that the applicant has not accounted for each and every day of the delay hence has failed to trigger the Court to exercise its discretion to grant the extension sought.

The learned counsel also submitted that the written submissions have addressed the Court on grounds of illegality, prompt filing of the application and that the respondent will not be prejudiced if extension is

given which are neither in the notice of motion nor in the supporting affidavit without first seeking leave of the Court under Rule 106 (3) (b) (ii) of the Rules. Thus, he argued, the issues of illegality in the impugned decision, promptness in filing this application and prejudice on the applicant must be disregarded for want of leave of the Court. Except for sickness due to Covid-19, all grounds in the written submissions are mere words from the bar and should therefore be ignored, he contended.

On the above submissions, Mr. Kobas surmised that the applicant has not advanced good grounds to warrant the extension of time sought and therefore, the application should be dismissed.

On the illegality raised by the applicant's counsel at the hearing to the effect that the arbitrator had a duty to satisfy himself that the applicant was served before proceeding with the case *ex parte*, Mr. Kobas contended that this does not constitute an illegality. The learned counsel submitted that it could be an error but not an illegality that would constitute good cause to extend time. He referred me to **Tanzania Rent A Car** (supra) in which the Court observed at p. 17 that an error in the impugned decision, unlike illegality in it, will not amount to good cause for extension of time

under rule 10 of the Rules. After all, he argued, it having no foundation in the notice of motion or supporting affidavit, it lacks supporting evidence and foundation on which to stand. It should be ignored; he surmised.

Rejoining, Mr. Daffa submitted that depositions in the affidavit are not hearsay; the same were sworn by advocate Benson Adam Mahuna who verified that except para 12 which is based on the information received from advocate Frank Steven Mwalongo, all the facts were of his own knowledge. There was thus no need to get other affidavits from Directors of the applicant or advocate Amin Mohamed Mshana, he submitted. He also contended that an error in the CMA award is apparent on the face of record and is good ground for the extension of time sought.

I have considered the grounds in the notice of motion, the supporting affidavit, the written submissions by the applicant and the oral submissions by both learned counsel for the parties before me. The kernel of this application is that the applicant wants extension of time within which to file written submissions in Civil Appeal No. 246 of 2020. The reasons advanced in the notice of motion are two; **first**, that the applicant's main operating office in Belgium was shut down due to lockdown because of

covid-19 and, **two**, that the Directors of the applicant were all in Belgium and they and their families were attacked by covid-19. The applicant spent quite some time and efforts including bringing to the fore authorities which reinforce the fact that an application filed without inordinate delay should be allowed. The respondent tersely resists submitting that the depositions in the affidavit are hearsay and also cites authorities to buttress the stance it the application should be dismissed.

I have considered and weighed the learned rival arguments by the advocates for the parties. I agree with Mr. Kobas that most of the depositions in the affidavit supporting the application, without affidavits of the Directors of the applicant company and of Mr. Amin Mohamed Mshana, remain hearsay. The law on the point is as stated by Mr. Kobas. The Court has been confronted with akin situations in a number of decisions. In **John Chuwa** (supra), the application for leave to appeal was filed two days after time and the reason given for the delay was that the cashier was absent from the station and hence no receipt could be obtained timely although the money was paid on the date the relevant documents were submitted. The said cashier did not file an affidavit to explain away the applicant's delay. The Court relied on its previous decision in **Kighoma Ali**

Malima v. Abas Yusufu Mwingamno, Civil Application No. 5 of 1987 (unreported) to hold that an affidavit of a person so material, as the cashier in that case, ought to have been filed. The same position was taken in decisions of the Court that followed thereafter – see: **Benedict Kimwaga v. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000 and **NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (both unreported). In the latter case, the Court was categorical that:

> *"... an affidavit which mentions another person is hearsay uniess that other person swears as well"*

Likewise, in **Benedict Kimwaga** it was observed that if an affidavit mentioned another person, that other person must swear an affidavit, otherwise it will be hearsay.

In the case at hand, the reasons for not filing the written submissions in time are found at para 10, 11 and 12 of the supporting affidavit which, for easy reference, I take the liberty to reproduce hereunder:

> *"10. That the reason for failure by the Applicant to file written submissions within time is that it had lost communication with the Counsel who was*

instructed to file the appeal due to the fact that the Applicant's main operating office in Belgium was shut down due to Covid- 19 lock down ordered by the Government of Belgium hence there was no communication with the Advocate.

11. That families of all the directors of the Applicants, residing in Belgium were all hit by Covid- 19. Form July, 2020 the Directors of the Applicant who are STEPHANE ELI CECIL PAUL BURTON a Belgium and JOSE IGNACIO BELTRAN TAURA a Spanish, lost track of the Civil Appeal No. 246 of 2020 until early October, 2020 when they got reliefs from Covid- 19 sickness and started following up the status of Civil Appeal No. 246 of 2020. A copy of the page of the online Brussels Times of 17th August, 2020 is hereby attached and marked as ***"Exhibit SAB – 6"*** *and leave of the court is craved to refer to it as part of this Affidavit.*

12. That upon loosing communication with Advocate Amini Mohamed Mshana, the Applicant instructed Advocate Frank Steven Mwalongo who made a follow up and found out that time to file written submissions in respect of the filed appeal had lapsed and Advocate Amin Mohamed Mshana

had no proper instructions from the Applicant at the time when he was supposed to have filed the written submissions."

The deponent verified that what is stated in, *inter alia*, para 10 and 11 is true to the best of his knowledge. I seriously doubt. How would he know that the Directors and their families were sick and under lockdown? How would he know that the applicant's office in Belgium was closed due to covid-19? How did he know the said Directors lost track of Civil Appeal No. 246 of 2020? I seriously doubt if these depositions would have been in the deponent's own knowledge. For the avoidance of doubt, I am aware that a copy of a page of the online Brussels Times of 17.08.2020 was appended to the affidavit and the deponent craved leave of the Court to be read as part of the affidavit. However, that online newspaper does not contain any details on the Directors of the applicant being attacked by Covid-19. Neither does it state anything about their families being also sick. It does not also say the applicant's office in Belgium was closed. It contains just general information on covid-19 in Belgium and its efforts to review measures against it as at 17.08.2020. The annexture therefore does not add any value to the depositions in the affidavit worth supporting

such depositions to be true to the deponent's own knowledge. This being the case, the affidavits of the Directors of the applicant were of paramount importance to lend credence to the depositions that they were attacked by covid-19 and under lockdown in Belgium therefore unable to timely file the written submissions. The depositions at paras 10 and 11 are, on the authorities cited above, mere hearsay. For the reasons stated, I do not find substance in Mr. Daffa's argument to the effect that the affidavits of the Directors of the applicant and of Mr. Amin Mohamed Mshana were not relevant. If anything, their affidavits were of paramount importance that the applicant could not dispense with to establish good cause for the delay.

Besides, the applicant has not brought to the fore how the Directors' sickness, if at all, contributed to the delay while they had engaged advocate Amin Mohamed Mshana to lodge an appeal which he did in that Civil Appeal No. 246 of 2020 was actually lodged. No reason is given why the engaged advocate could not file the written submissions. As the Court stated in **Juto Ally** (supra) sickness as a ground for extension of time must have a bearing on the delay.

I now turn to consider the grounds raised by the applicant in the written submissions and at the hearing of the application. However, before I do that, let me address the concern of Mr Kobas to the effect that the grounds of illegality, prompt filing of the application and that the respondent will not be prejudiced if extension is given just surfaced in the written submissions and implored me to disregard them. Counsel for the applicant did not respond on this argument.

This complaint will not detain me. Admittedly, the provisions of rule 106 (3) (b) (ii) of the Rules on which Mr. Kobas relied for his proposition, require, *inter alia*, that an applicant who iintends to apply for leave to introduce an additional ground not taken in the notice of motion, shall indicate so in the submissions. As the applicant raised new grounds in the written submissions beforehand to which the respond had time to and did make a response, I do not see any prejudice in the course of action by the applicant as to disregard the new grounds as Mr. Kobas implored me to. It does not seem to me that the maker of the Rules intended the drastic measures suggested by Mr. Kobas. I will therefore continue to address the grounds.

I start to consider the ground of illegality of the impugned decision. I have already pointed out above the illegalities complained of and for ease of reference, I wish to reproduce them here. They are; **one**, Form No. 1 was filed before the CMA contrary to rule 7 of Labour Institutions (Mediation and Arbitration) Rules, 2007 – GN No. 64 of 2007, **two**, the applicant was denied the right to be heard before the CMA, **three**, the applicant was not served with the summons, **four**, the evidence was not fully appreciated and, **five**, the High Court erred in holding that the applicant failed to adduce evidence before CMA. Admittedly, the law is settled in this jurisdiction that illegality of the impugned decision is good cause and may be used to extend time under rule 10 of the Rules. However, we wish to underline that the envisaged illegality is that of the decision sought to be challenged. In the case at hand, the applicant refers to the illegalities in the CMA decision not in the decision of the High Court against which Civil Appeal No. 246 of 2020 was filed.

Besides, I have serious doubts if illegality can be pleaded here and used to extend time. This is because, on the several decisions of the Court, time will be extended on the ground of illegality so as to rectify that illegality in the intended application, appeal, revision etc – see: **Principal**

Secretary, Ministry of Defence and National Service v. Devram Valambia [1992] T.L.R. 185 and **Transport Equipment Ltd v. D. P. Valambhia** (supra). It was held in the former case and reiterated in the latter that:

> *"... 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 purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."*

In the case at hand, the applicant seeks extension of time to file written submissions. Even if I grant the present application, the illegalities complained of, if any, will not be addressed and rectified in the written submissions intended to be filed. It therefore follows that this ground is misconceived. The Court was confronted with an identical situation in **Iron and Steel Limited v. Martin Kumalija and 117 Others**, Civil Application No. 292/18 of 2020 (unreported) in which the applicant moved the Court to enlarge time within which to lodge an application for stay of execution. The ground relied upon was the illegality of the decision sought to be challenged. However, there, like here, the applicant referred to the

illegalities in the decision of the CMA, not in the High Court's which was sought to be challenged. The Court made the following observation:

> *"... an illegality of the impugned decision will not be used to extend time in the circumstances of this case, for, no room will be available to rectify it in the application for stay of execution intended to be filed. Illegality of the impugned decision is not a panacea for all applications for extension of time. It is only one in situations where, if the extension sought is granted, that illegality will be addressed."*

I would hold the same in the application at hand. As already alluded to above, even if I would have found and held that there was an illegality in the impugned decision, I would have not granted the application because there would be no room to rectify that illegality in the written submissions for which extension of time is sought.

As the applicant has failed to explain why she did not timely file the written submissions, the grounds whether the application was filed promptly and that the respondent will not be prejudiced if the extension sought is granted, become superfluous to consider, for they cannot stand alone to extend the time sought.

The sum total of the above discussion is that the applicant has failed to explain away the delay. Likewise, she has not only failed to show any illegality in the impugned decision against which Civil Appeal No. 246 of 2020 has already been filed but also has misconceived the applicability of the ground of illegality which, as I have found and held, cannot be used to extend time in the circumstances of the present application.

In the end of it all, this application for extension of time to file written submissions is refused. As the application stems from the employer-employee relationship, no order is made as to costs

DATED at **DAR ES SALAAM** this 12th day of April, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The ruling delivered this 14th day of April, 2021 in the presence of M. Mariam Masandika, learned counsel for the Applicant and Ms. Lulu Mbinga, learned counsel for the Respondent is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL