IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MWAMPASHI, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 454 OF 2020

ELLY MATIKU ..... 1ST APPELLANT

JOHNSON MAINA ..... 2ND APPELLANT

VERSUS

MEDITERRANEAN SHIPPING COMPANY (T) LTD ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania, Labour Division at Dar es Salaam]

(Mwipopo, J.)

dated the 26th day of June, 2020

in

Misc. Application No. 284 of 2019

JUDGMENT OF THE COURT

12th & 28th July, 2023

MWAMPASHI, J.A:

This is an appeal against the decision of the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) dated 26.06.2020, in Miscellaneous Application No. 284 of 2019. In the said impugned decision, the High Court dismissed the appellant's application for extension of time within which to file an application for revision of the decision of the Commission for Mediation and Arbitration at Temeke (the CMA Temeke) in Labour Dispute No. CMA/DSM/TEM/124/2015 dated 15.12.2015 which refused the

appellant's application for condonation for late referral of the dispute to the Commission.

Given the nature of the decision from which the instant appeal arises, the background facts of the matter need to be appreciated first. The appellants were employed by the respondent until on 30.08.2014 when they were terminated. Aggrieved, the appellants timely referred the dispute to the Commission for Mediation and Arbitration at the Headquarters of the Commission at Ilala Dar es Salaam vide Labour Dispute No. CMA/DSM/ILA/R.803/14/194. On 21.04.2015, the dispute was struck out on the ground that the CMA at Ilala lacked territorial jurisdiction. It was held that the dispute had been wrongly filed before the CMA Headquarters Registry at Ilala instead of being filed at Temeke where the dispute had arisen. That being the case, the appellants had to refer their dispute at Temeke CMA Registry but as the prescribed period of 30 days within which such a dispute ought to have been referred, had elapsed, on 05.05.2015, the appellants filed Dispute No. CMA/DSM/TEM/124/2015 for condonation for late referral of the dispute to the Commission. The applicants' main reason for the delay in referring their dispute to the CMA in time, was that they had innocently referred the dispute to the CMA Headquarters at Ilala believing that it had jurisdiction to handle the dispute.

On 15.12.2015 the CMA Temeke, dismissed the appellants' application for condonation on the ground that the appellants had failed to show good cause for the delay. In particular, it was found by the CMA Temeke that the delay of the period of 14 days from 21.04.2015 when the dispute was struck out by the CMA headquarters at Ilala up to 05.05.2015 when the application for condonation was filed before the CMA Temeke, had not been accounted for, by the appellants.

Aggrieved by the dismissal of their application for condonation, the appellants referred the matter to the High Court vide Revision No. 507 of 2015, seeking for the reversal of the CMA Temeke decision dated 15.12.2015. The said application for Revision was struck out on 08.12.2016 for being incompetent. Aggrieved and still desirous of challenging the CMA Temeke decision, on 04.01.2017, the appellants filed Miscellaneous Application No 7 of 2017 before the High Court, for extension of time within which to file an application for revision of the said decision of the CMA Temeke. Unfortunately for the appellants, this application was also struck out on 17.07.2017 following the concession by the appellants' counsel one Ms. Asia Chali, that the application was incompetent for being supported by a defective affidavit. Sometimes in May, 2019, the appellants filed a fresh

application for extension of time within which to file an application for revision of CMA Temeke decision vide Misc. Application No. 325 of 2018. Again, the said application was struck out on 16.05.2019 for being incompetent and one of the ailments was the defectiveness of the supporting affidavit. It should also be noted that the said application was struck out at the instance of Ms. Judith Kyamba, learned counsel, who represented the appellants and who prayed for the application to be struck out with leave to refile.

Finally, on 21.05.2019, the appellants filed Miscellaneous Application No. 284 of 2019, the subject of the instant appeal, for extension of time within which to file an application for revision of the CMA Temeke decision dated 15.12.2015 in CMA/DSM/TEM/124/2015. Essentially, in justification of the delay the appellants raised four grounds in support of their application; **One**, that they were busy in court litigating their application for revision and other previous applications for extension of time which were all struck out on technicalities, **two**, that they always acted promptly and diligently in filing their applications, **three**, that their advocate one Mr. Emmanuel Safari was bereaved and had to travel upcountry and when he returned back, it was during Christmas and New Year court vacation and **four**, that the decision of the CMA Temeke was tainted by illegality

in that in concluding that the appellants had not accounted for the period of 14 days, the CMA Temeke wrongly interpreted and relied on section 14 of the Law of Limitation Act [Cap. 89, R.E. 2002] (the LLA).

On 26.06.2020, Miscellaneous Application No. 284 of 2019 for extension of time within which to file an application for revision of the decision of the CMA Temeke, was dismissed by the High Court. It was found by the High Court that lodging three incompetent applications in a row, did not amount to promptness and diligence on part of the appellants but rather it was a manifestation of their negligence. The High Court also found that the appellants had failed to account for the delay of 27 days in filing Miscellaneous Application No. 7 of 2017. As on the ground that Advocate Emmanuel Safari was bereaved, the High Court found that at the material time the appellants were being represented by Advocate Asia Chali and not Emmanuel Safari. On illegality, it was found that the ground was misconceived and baseless because in dismissing the appellants' application for condonation, the CMA Temeke did not apply section 14 of the LLA as alleged by the appellants.

It is against the above decision of the High Court that the appellants have filed the instant appeal on the following five grounds of complaint:

1. *That, the Honourable High Court Judge grossly erred in law and in fact by discussing and determining the merits of the intended application for revision;*
2. *That, the Honourable High Court Judge grossly erred in law and fact by discussing Application No. 507 of 2015 as well as Application No. 7 of 2017 while the matter in hand was extension of time in Application No. 284 of 2019;*
3. *That, the Honourable High Court Judge grossly erred in law by analysing and determining the merits of the illegalities relied by the Appellants as grounds for extension of time something which was beyond his mandate;*
4. *That, the Honourable High Court Judge grossly erred in law and fact for not finding that the Appellants have sufficient ground for extension of time; and*
5. *That, the Honourable High Court Judge grossly erred in fact and in law for not affording the Appellants an opportunity to be heard on their intended revision Application.*

Before us, when the appeal was called on for hearing, the appellants were represented by Mr. Nazario Michael Buxay, learned advocate, whereas, the respondent had the services of Messrs. George Ambrose Shayo and Gilbert Ndaskony Mushi, both learned advocates.

When invited to argue the grounds of appeal, Mr. Buxay, without further ado, adopted the written submissions and the list of authorities earlier filed on 01.02.2021 and 06.07.2023 respectively.

According to the written submissions, it is argued on the first ground that, the High Court strayed away and acted beyond its mandate when it discussed and determined the merits of the appellants' intended application for revision forgetting that what was before it was an application for extension of time to file an application for revision and not an application for revision. It was insisted that the High Court ought to have confined itself to what was before it and not venturing into the determination of the intended application for revision.

In opposing the appeal, the respondent filed its written submissions which was adopted by Mr. Shayo as soon as he took the floor. Regarding the first ground of appeal, Mr Shayo, contended that the ground is baseless and misconceived. He argued that the High Court neither discussed nor determined the merits of the appellants' intended application for revision as complained by the appellants. It was further submitted by him that when one reads the whole ruling, he cannot fail to observe that in remarking that "*Therefore, this ground for revision is meritless,*" which is the basis for the first ground of complaint and on which the appellants have capitalised, the High Court never meant to determine the appellants' intended application for revision but rather the word "*revision*" was inadvertently inserted in

the sentence. He insisted that all what was intended to be expressed was that the ground for the application for extension of time to apply for revision was meritless. Mr. Mushi, thus, urged us to dismiss the ground.

Admittedly, the first ground of appeal that, the High Court discussed and determined the merits of the appellants' intended application for revision, is based on the last sentence in the remark made by the High Court in its ruling when discussing and determining illegality as a ground raised by the appellants for their application for extension of time. The High Court remarked that:

> *"I have read the ruling of the Commission in Dispute No. CMA/DSM/TEM/124/2015 and find that there is nothing in the Ruling which show that the Hon. Mediator relied on interpretation of section 14 of the Law of Limitation Act, in dismissing the application. The reason for the Hon. Mediator to dismiss the application is that the applicants failed to state the reasons for delay in filing the dispute for 14 days from 21/04/2015 up to 05/05/2015.* ***Therefore, this ground for revision is meritless"***
>
> [Emphasis added]

As it was rightly argued by Mr. Shayo, looking at the above reproduced remark and considering the context of the whole ruling of the High Court, it cannot be said that the High Court determined the merits of the appellants' intended application for revision. We agree with Mr. Shayo that the appellants capitalised on the inadvertent insertion of the word "revision" in the last sentence and are just trying to make a mountain from a molehill. We are of the settled view that based on what was being discussed in that paragraph and as rightly argued by Mr. Shayo, it cannot be said that the appellants' intended appeal was discussed and determined by the High Court.

We entertain no grain of doubt in our mind that, what the High Court found meritless was the ground of illegality which had been raised by the appellants for their application for extension of time to file an application for revision. The meritless ground referred to, in that sentence, was not a ground for the appellants' intended application for revision, as the appellants are trying to impress on us. As we have alluded to above, the discussion on the reproduced paragraph was on the substance of the ground of illegality raised as a ground for extension of time to file an application for revision and no more. The first ground of appeal is therefore baseless and it is accordingly dismissed.

On the second ground of appeal which faults the High Court in determining the application for extension of time which was before it, by making reference to Revision Application No. 507 of 2015 and Miscellaneous Application No. 7 of 2017 which were earlier filed by the appellants and struck out by the High Court, it was submitted for the appellants that in doing so, the High Court, subjected the appellants to double punishment. It was maintained that the High Court ought not to have determined the application before it basing on those other two applications.

The response by the respondent on the second ground of appeal was that the High Court was justified in determining the application for extension of time to file an application for revision, which was before it, by looking at the historical background of the matter including referring to the said two other applications. It was argued that, the High Court could not have determined the application before it without looking and considering the period of time spent when Revision Application No. 507 of 2015 and Miscellaneous Application No. 7 of 2017 were filed and struck out.

On our part, we again agree with the respondent that the second ground of appeal is not only baseless but also misconceived. In determining the application for extension of time within which to file

an application for revision, consideration of the period of time spent when Revision Application No. 507 of 2015 and Miscellaneous Application No. 7 of 2017 were pending in the High Court, was inevitable, regardless of the fact that the said two applications ended up being struck out. The period from 15.12 2015 when the CMA Temeke dismissed the appellants' application for condonation up to 21.05.2019 when Miscellaneous Application No. 284 of 2019 was filed to the High Court, which period is within the period whem the two other applications were filed and struck out, was the period of delay which the appellants had to account for. That being the case, the High Court was duty-bound to satisfy itself that the period of delay was account for and it could not have done so without referring to the said two other applications.

It is also our observation that Revision Application No. 507 of 2015 and Miscellaneous Application No. 7 of 2017 came into consideration of the High Court because two of the appellants' grounds for extension of time were that, the delay was occasioned by the applicants being busy in court corridors prosecuting other relevant applications, which includes the two applications in question, and that they had been acting promptly and diligently. The High Court could not have determined the said two grounds and satisfied itself that the

appellants' claim of being in court corridors and acting promptly and diligently constituted good cause for extension of time, without making reference to the two applications. The second ground of appeal is therefore baseless and misconceived and it is hereby dismissed accordingly.

The third ground of appeal is to the effect that the High Court determined the merits of the ground on illegality which had been raised by the appellants to justify enlargement of time within which to file an application for revision contrary to the settled position that where illegality is raised as a ground for extension of time, the duty of the court is only to see and satisfy itself if such an illegality has been established and not to consider and determine its merit. It was submitted that the High Court determined the merits of the said ground on illegality hence pre-empting the appellants' intended application for revision. It was further submitted that in the instant case, the appellants managed to show that the CMA Temeke decision was fraught with illegality because in reaching at the decision that the appellants failed to account for the delay of 14 days, the High Court relied on section 14 of the LLA which is not applicable in labour disputes. It was insisted that in determining the merits of the ground of illegality the High Court acted beyond its jurisdiction. To buttress

the argument, the Court was referred to decisions of the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185 and **Monica Nyamakare Jigamba v. Mugeta Bwire Bhakome (As an administrator of the Estate of Musiba Reni Jigamba) and Another**, Civil Application No. 199/01 of 2019 (unreported).

In the submissions against the third ground of appeal, it was argued for the respondent that the High Court did not determine the merits of the ground of illegality as complained by the appellants. It was further submitted that all what the High Court did was to satisfy itself whether the alleged illegality was apparent on the face of the record. It was also argued that the alleged illegality that the CMA Temeke based its decision on section 14 of the LLA was unfounded and a cooked story because as rightly found by the High Court, the decision by the CMA Temeke was not based on section 14 of the LLA. It was insisted that the High Court did not determine the merits of the ground of illegality and that the position of the law is that to constitute a ground for extension of time, the alleged illegality has to be apparent on the face of the record. On this, we were referred to the decisions of the Court in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association**

of Tanzania, Civil Application No. 2 of 2010, **Omary Ally Nyamalege (as the administrator of the estate of the late Seleman Ally Nyamalege) and 2 Others v. Mwanza Engineering Works,** Civil Application No. 94/08 of 2017 and **Finca (T) Limited and Another v. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (all unreported).

The third ground of appeal need not detain us at all. We have scanned through and examined the ruling of the High Court and observed that the High Court never determined the merits of the alleged ground on illegality. As the illegality raised by the appellant in support of their application for extension of time was that in finding that the appellants had failed to account for the delay of 14 days, the CMA Temeke, improperly interpreted and relied on section 14 of the LLA which was not applicable to the matter at hand, the High Court was obliged to satisfy itself that really, the alleged illegality was apparent on the face of the decision of CMA Temeke. This was what the High Court did and found that there was nothing in the decision of the CMA Temeke which showed that the decision was based on section 14 of the LLA. In fact, the CMA Temeke did not even mention or refer to the said provision of the LLA in its ruling. It should be restated that where illegality is raised as a ground for extension of time, such an

illegality must be apparent on the face of the record and not one that would be discovered by a long-drawn argument or process. See- **Lyamuya Construction Company Ltd** and **Omary Ally Nyamalege (as the administrator of the estate of the late Seleman Ally Nyamalege) and 2 Others** (supra).

In the fourth ground of appeal, the appellants' complaint is that the High Court erred in dismissing the appellants' application for extension of time while sufficient cause for the delay was shown by the appellants. In the written submissions in support of the appeal it is submitted that the appellants managed to establish that they were not inactive or sleeping but that they were in the corridors of the courts fighting for their right, that they were diligent, that the delay was not inordinate and also that all days of delay were accounted for. On the adversary side, it was submitted that the appellants failed to show sufficient cause as all days of delay were not accounted for and also that the appellant were negligent and not diligent because they wasted years by filing a series of incompetent applications.

In determining the above stated ground of appeal, the issue which calls for our determination is whether sufficient cause was shown by the appellants to warrant extension of time. In other words, the issue before us, in regard to the fourth ground, is whether the High

Court erred in concluding that the appellants failed to show sufficient cause for enlargement of time sought.

As alluded to earlier, the appellants had four grounds in support of their application for extension of time; that they were busy in court litigating their application for revision and other previous applications for extension of time which were all struck out on technical grounds, that they always acted promptly and diligently in filing their applications, that their advocate, one Mr. Emmanuel Safari, was bereaved and had to travel upcountry and when he returned back, it was during Christmas and New Year court vacation and that the decision of the CMA Temeke was fraught with illegality.

We have carefully examined how the High Court considered and determined the above four grounds for extension of time and also why it concluded that no sufficient cause was shown to warrant extension of time. We find no reason to fault the High Court decision. It is settled that granting extension of time is in the discretion of the court and that the discretion must be exercised judiciously according to the facts of each case. Given the circumstances of the case at hand, the High Court rightly declined to exercise its discretion in favour of the appellants. First of all, we agree with the High Court that the delay was attributed to by the incompetent applications which the appellants

kept on filing. As rightly found by the High Court, filing three incompetent applications in a row is a manifestation of nothing else but negligence and ignorance of law which has never been an excuse for extension of time. It should be borne in mind that one of the principles in granting extension of time is that the applicant should not have contributed to the delay by his actions, inactions or conduct. In the instant case, as we have pointed above, the appellants contributed to the delay by filing three incompetent applications in a row which ended up being struck out, some at the instance of the appellants' own advocates.

Further, as also rightly found by the High Court the appellants did also completely fail to account for the delay of about 27 days from 08.12.2016 when Application No. 507 of 2015 for revision was struck out to 04.01.2017 when Miscellaneous Application No. 7 of 2017 for extension of time within which to file an application for revision, was filed. It is settled that in applications for extension of time, every day of delay must be accounted for. See- **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 2 of 2007 and **Karibu Textile Mills v. Commissioner General (TRA)**, Civil Application No. 192/20 of 2016 (both unreported).

It is also our considered view that the appellants' attempt to account for that delay by arguing that their advocate Mr. Emmanuel Safari was bereaved, could not have rescued the situation because as found by the High Court, the record clearly show that by that time, the appellants were being represented by another different advocate and not Mr. Emmanuel Safari. It should also be borne in mind that Mr. Emmanuel Safari, who the appellants claim was representing them and who was allegedly bereaved and out of the city, did not swear affidavit to substantiate the claim despite that he was mentioned in the affidavit filed by the appellants in support of their application before the High Court. It is a settled position of the law that, if an affidavit mentions another person, that other person must swear an affidavit. See-**NBC Limited v. Superdoll Trailer Manufacturing Company Ltd,** Civil Application No. 13 of 2002, **Benedict Kimwaga v. Principal Secretary Ministry of Health,** Civil Application No. 31 of 2000, (both unreported) and **John Chuwa v. Antony Ciza** [1992] T.L.R. 233. In the former case it was stated that:

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

As pointed out above, the appellants' last ground for their application for extension of time before the High Court was that the decision of the CMA Temeke was fraught with illegality because in concluding that the appellants failed to account for 14 days, the CMA Temeke wrongly interpreted and relied on section 14 of the LLA. As rightly found by the High Court, the alleged illegality was not apparent on the face of the decision of the CMA Temeke. The CMA Temeke never referred to or relied on section 14 of the LLA in its ruling let alone mentioning it. In those circumstances, the alleged illegality did not constitute sufficient cause for extension of time. The fourth ground therefore fails.

The fifth and last ground of appeal which reads that the Honourable High Court Judge grossly erred in fact and in law for not affording the appellants an opportunity to be heard on their intended application for revision has its basis on the appellants' complaint on the first ground of appeal, that their said intended application for revision was discussed and determined by the High Court. The first ground of appeal having been decided in the negative that, the High Court did not discuss and determine the appellants' intended application for revision, the fifth ground of appeal dies naturally.

In the event and for the above reasons and observations, we find that the appeal lacks merit. As rightly found by the High Court, the appellants failed to show good cause that would warrant extension of time sought. Consequently, the appeal is accordingly dismissed in its entirety. As the application from which this appeal stems is a labour related matter, we make no order as to costs.

DATED at **DAR ES SALAAM** this 25th day of July, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered on this 28th day of July, 2023 in the presence of Ms. Agnes Hudson Ndusyepo, counsel for the Appellant also holding brief for Mr. Abdallah Kazungu, learned advocate for the Respondent is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL