

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 12/18 OF 2021

IRON AND STEEL LIMITED.....APPLICANT

VERSUS

MARTIN KUMALIJA AND 117 OTHERS.....RESPONDENT

(Application for extension of time within which to file an application for extension of time to lodge a Notice of Appeal on a second bite arising from the decision of the High Court of Tanzania, Labour Division at Dar es Salaam) dated the 30th day of October, 2015

(Abood, J.)

in

Revision Application No. 187 of 2015.

RULING

15th & 28th February, 2021

MWAMPASHI, J.A.:

On 30.10.2015, the applicant lost her Revision Application No. 187 of 2015 before the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) in which the award by the Commission for Mediation and Arbitration (the CMA) in Labour Dispute No. CMA/DSM/KIN/573/11/828 to the respondent, was confirmed. Aggrieved by the High Court decision, she duly lodged a notice of appeal on 12.11.2015. The notice of appeal was, however, struck out by the Court on 27.02.2019 on account that the applicant had failed to take essential

steps in furtherance of her intended appeal. Still determined to challenge the High Court decision, the applicant filed before the High Court, an application for extension of time within which to file a fresh notice of appeal. Unfortunately, the application was refused on 13.12.2019.

The applicant's application for extension of time to file a fresh notice of appeal having been refused by the High Court, the applicant was required, under rule 45A (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), to again apply to this Court for extension of time, on a second bite, within fourteen (14) days of the refusal by the High Court, which she did not. Having failed to do so, the applicant, has now approached this Court in the instant application filed on 25.01.2021, seeking for extension of time within which to file an application for extension of time to lodge a notice appeal on a second bite. The application which is by way of a notice of motion is brought under rule 10 of the Rules and it is supported by an affidavit affirmed by Mr. Idrissa Ally, the applicant's Human Resource Manager. In resisting the application, the respondents filed an affidavit in reply sworn by the 1st respondent, Mr. Martin Kumaliya.

At the hearing before me, the applicant and respondents were represented by Messrs. Odhiambo Kobas and Juma Nassor, respectively.

Having adopted the notice of motion and the supporting affidavit, Mr. Kobas, on what he termed as technical reasons, prayed to abandon his written submission he had earlier filed on 25.01.2021. Thereafter, he gave the background of the matter and proceeded to argue that after the refusal of the application for extension of time to lodge a fresh notice of appeal by the High Court on 13.12.2019, the applicant was required to apply for extension of time to lodge a notice of appeal to this Court, on a second bite, under rule 45A (1) (a) of the Rules, at least by 27.12.2021. He further contended that since the applicant delayed to file such an application and as the instant application was filed on 25.01.2021, there is a delay of about thirty (30) days which the applicant is required to account for. He however, argued that in this application, the period of the said thirty (30) days delay, is not going to be accounted for by the applicant because the application is solely based on the ground of illegality. It is also not out of place, if I point out at this very stage that according to the notice of motion, particularly from paragraphs 5 and 6, the ground or point of illegality as raised by the applicant, is on two limbs, to wit:

- 1. That, the High Court Labour Division, in exercise of its discretionary powers, failed to appreciate the serious irregularities over the dispute in the CMA which was preferred in*

a representative capacity in contravention to the procedure laid down under Rule 5(2) and (3) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, and thereby refused to grant extension of time to file notice of appeal.

2. That, the High Court erred in law in affirming the CMA award which awarded the Respondent 12 months salary each without there being evidence from each respondent as to the date of his employment and the salary payable to each one of them; some of them were on probation and below six months in employment.

It is also worth noting, at this stage, that, in the course of his submission in support of the application, Mr. Koba abandoned the first limb of the point of illegality. The first limb having been abandoned, the application was thus left predicated upon the sole ground on the second limb.

In his submission to substantiate that the impugned decision by the High Court is tainted with illegality Mr. Kobas contended that there is an apparent illegality on the face of the High Court judgment dated 30.10.2015. He referred me to page 7 of the said judgment arguing that as also deponed in paragraphs 4, 5, 9 and 10 of the supporting affidavit, the issue of the failure by the arbitrator before the CMA to frame issues

which was a fatal irregularity, was not properly and rightly decided by the High Court hence prejudicing the applicant.

It was insisted by Mr. Kobas that, by itself, the ground on illegality as raised by the applicant, constitutes sufficient reason for the grant of extension of time. To cemented his argument, he referred me to the decisions of the Court in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] T.L.R. 185, **M. B. Business Limited v. Amos David Kasanda and 2 Others**, Civil Appeal No. 48/17 of 2018 and **Exim Bank (Tanzania) Limited v. Jacqueline A. Kweka**, Civil Application No.348/18 of 2020 (both unreported).

It was finally argued by Mr. Kobas that the fact that the illegality which is apparent on the face of the record has been raised, I have no mandate to further question it. He urged me to grant the application so that the point of illegality is referred to the right forum for determination.

Mr. Nassor adopted the affidavit in reply he had earlier filed on 05.02.2021 and contended that the application is baseless as the applicant has totally failed to show good cause justifying the delay. Though, he agreed with his learned friend that, by itself, a point of

illegality, can constitute good cause for extension of time, he firmly argued that such a point must be apparent on the face of the record and should not be that which has to be established by a drawn long argument or process.

It was further submitted by Mr. Nassor that the complaint in the notice of motion regarding the award of 12 months salary to each of the respondents has not been explained neither in the supporting affidavit nor in the submission by Mr. Kobas. It was insisted that the complaint does not amount to illegality and it is not apparent on the face of the High Court judgment. Mr. Nassor contended that the complaint is on questions of evidence and therefore that the application cannot be granted on that complaint.

Mr. Nassor did also contend that the point on the failure by the CMA to frame issues is a new ground as it is neither listed in the notice of motion as required by rule 48 (1) of the Rules nor covered in the supporting affidavit. He thus urged me to disregard it. It was further argued by him that even if the point is considered the same is not an illegality on which extension of time can be granted. He pointed out that the point was also properly determined by the High Court.

Finally, Mr. Nassor argued that the cases cited by Mr. Kobas are all distinguishable as unlike in our case, the illegalities in those cases were apparent on the record. He pointed out that, in the case of **M. B. Business Limited** (supra), the applicant was not a party to the suit in which it was deprived of its ownership to the property in dispute. He thus prayed for the application to be dismissed.

In his rejoinder, Mr. Kobas insisted that the High Court judgment is tainted with illegality which is apparent on its face and that the application should be granted on that sole ground. It was contended by him that the points have been explained under paragraphs 9 and 10 of the supporting affidavit. He further insisted that the point on the failure by the CMA to frame issue has been properly raised and further that the point is suitable both in applications for extension of time and in appeals. Mr. Kobas did therefore pray for the application to be granted as sought in the notice of motion.

Having heard the submissions for and against the application and in consideration of the notice of motion together with the affidavits filed in support of the application and in its resistance, the issue before me is simply whether or not the application is meritorious and grantable.

To begin with, let us revisit rule 10 of the Rules, from which the Court derives its powers in extending time under which it is provides that:

“The Court, may, upon good cause shown, extend 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 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”.

From the above provision, it is clear that the powers of the Court in extension of time is discretionary and it can be exercised only when good cause is shown. See- **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** [2006] T.L.R. 235 and **Abdallah Salanga & 63 Others v. Tanzania Harbours Authority**, Civil Reference No. 08 of 2003 (unreported). It is also settled that, while it is not possible to define what constitutes “good cause”, the Court has, in a number of its decisions, listed down factors that have to be considered when determining whether or not “good cause” has been shown for the Court to exercise its discretion under rule 10 of the Rules. These factors include the length of the delay, the reasons for the delay, whether the

applicant was diligent, the degree of prejudice the respondent stands to suffer if time is extended, whether there is a point of law of sufficient importance such as the illegality of the decision intended to be appealed against. See- **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R 387, **Dar es Salaam City Council v. Jayantilal P. Rajan**, Civil Application No. 27 of 1987, **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Association of Tanzania**, Civil Application No. 02 of 2010 and **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwand**, Civil Application No. 06 of 2001 (All unreported).

Since, as I have also alluded to above, the instant application is based on a sole ground that the High Court Judgment intended to be challenged, is marred with illegalities, it is worth restating the position that, it is now settled that illegality of the impugned decision constitutes good cause for purposes of extension of time. In **VIP Engineering and Marketing Limited and 2 Others v. Citibank Tanzania Limited**, Consolidated References Nos. 6, 7 and 8 of 2006 (unreported), the Court stated:

"We have already accepted it as established law in this country that where the point of law at

issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reason" within the meaning of rule 8 (now rule 10) of the Rules for extending time".

Again, in **Attorney General v. Consolidated Holdings Corporation and Another**, Civil Application No. 26 of 2014 (unreported), it was observed by the Court that:

"With regard to the last point, contentions as to illegality or otherwise of the challenged decision have now been accepted as a good cause for extension of time".

In recent years, following the earlier decisions including the above cited cases, it has been realized that the principle on illegality as a ground for extension of time, appear to be so wide. That being the situation, the principal had to be elaborated and it was in **Lyamuya Construction Company Limited** (supra) where the Court came out and stated 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 supplied]

The position that where illegality is raised as a ground for extension of time, the illegality must be apparent on the face of the decision intended to be challenged has been emphasized by the Court in a number of cases including in **Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) v. Mohamed Mshindo**, Civil Application No. 28/17 of 2017 (unreported).

Guided by the above trite position of the law, the issue before me is whether the points of illegalities as raised by the applicant raise points of law of sufficient importance and also whether they are apparent on the face of the High Court impugned decision. Beginning with the point on the failure by the CMA to frame issues, I agree with Mr. Nassor that the same has been improperly raised as it is not among the grounds in the notice of motion and it is also not even hinted in the supporting affidavit. According to rule 48 (1) of the Rules, it is in the notice of

motion where grounds for the relief sought are stated. It is provided by rule 48 (1) of the Rules that:

"Subject to the provisions of sub-rule 3 and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit and shall cite the specific rule under which it is brought and state the ground for the relief sought".

[Emphasis added]

In the instant application, the ground on the failure by the CMA to frame issue was just raised by Mr. Kobas in his submission which is not evidence but a bare statement from the bar. The submission is nothing but an afterthought. As alluded to above, the ground was not stated in the notice of motion and not even stated in the supporting affidavit. As rightly argued by Mr. Nassor, the same deserves no consideration of the Court

As regard to the complaint that the respondents were erroneously awarded 12 months salary each without there being evidence from each of the respondents, apart from the fact that I agree with Mr. Nassor that this issue is more evidential, I find that the same is not apparent on the High Court impugned decision. As it was emphasized by the Court in

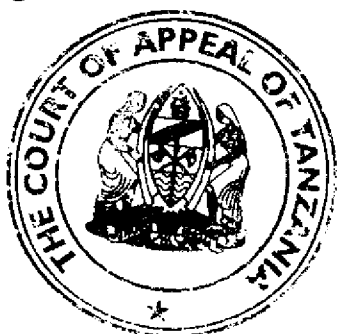
Lyamuya Construction Company Limited (supra), for a point of illegality to constitute good cause for extension of time it must be apparent on the face of the record and should not be a point that would be discovered by long drawn argument or process.

In the event, for the above reasons, I find that the applicant has totally failed to show good cause, be it as to illegality or otherwise, for me to exercise the discretion under rule 10 of the Rules and extend time for the applicant as sought in the notice of motion. I thus dismiss the application accordingly. I make no order as to costs as this application arises from a labour dispute.

DATED at DAR ES SALAAM this 27th day of February, 2023.

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered on this 28th day of February, 2023 in the presence of Ms. Lulu Mbinga, the counsel for the Applicant and in absence of the Respondent is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL