

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]

AT ARUSHA

MISC. LABOUR APPLICATION NO. 50 OF 2021

(Originating from Labour Dispute No. CMA/ARB/ARS/72/2009)

GWANDU MARGWE AND 16 OTHERS..... APPLICANTS

VERSUS

TANGANYIKA WILD CAMP LTD.....RESPONDENT

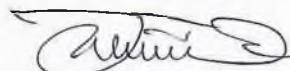
RULING

1st September, & 06th October, 2022

TIGANGA, J:

This ruling is in respect of the application for extension of time which was filed by the applicants, seeking this court to extend time for them to file an application for review of the decision of this court in Revision No. 148 of 2010 out of time.

The application was filed under section 94 (1)(f) of the Employment and Labour Relations Act [Cap 366 R.E 2019] and Rule 24 (1) (2) (a)(b)(c)(d) (e) (f) (3) (a) (b) (c) (d) 56(1) of the Labour Court Rules, 2007 and any other enabling provision of the law. The same was filed by the notice of application, chamber summons and affidavit sworn by the applicant stating both the prayer and the grounds for the application respectively.

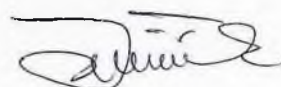


From the affidavit, it is on record that, following the retrenchment of the applicants from the employment of the respondent on 24/04/2009, the applicant filed before the CMA, Labour Dispute No. CMA/KAR/153/2009. That Labour dispute was decided on 11/05/2010. The content of the award is not necessary at this stage as the application at hand is not dealing with the award. That decision aggrieved the applicants. They decided file Labour Revision No. 148 of 2010, in which the CMA decision was quashed and set aside by my Senior Sister, Hon. Sumari, J, on 06/09/2012.

Thereafter, the applicants through their personal representative one Gaudine R. Mrugaruga noticed some illegalities in the proceedings. Consequently, on 07/02/2017, they lodged the application for extension of time to file Notice of Review via Misc. Application No. 07 of 2017, which was ultimately withdrawn on 12/11/2018 with leave to refile the same within 30 days.

On 07/12/2018, the applicant lodged Misc. application No.47 of 2018 seeking leave to be allowed to file a Notice of Review out of time of Revision No. 148 of 2010.

However, the said application No. 47 of 2018 was on 14/12/2020 struck out on the ground that, the two person who signed the Notice of



Application did not have permission of the court in respect other applicants.

In the affidavit, the applicants alleged that, following the untimely death of the representative, Mr. Mrugaruga then, there was to be a handing over of the file before they lodged the representative suit in Misc. Application No. 29 of 2021, which was granted on 11/10/2021, hence this application.

The application was opposed by the respondent by filing the Notice of opposition and representation introducing Mr. Mwanili Mahimbali, Advocate. The counter affidavit by Mr. Ombeni Elias Mollel, deposed that, although most of the information deposed in the affidavit are true, but they are not accounting the days delayed, and give reasons for such inordinate delay. That has just narrated the background of the dispute at hand.

The matter was made orally. Mr. Nzowa, Advocate appeared representing the applicant, while Mr. Munisi, Advocate appeared holding brief of Mr. Mwanili Mahimbali but with instruction to proceed.

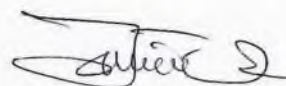
In the submission in chief, Mr. Nzowa capitalized on the illegality and accordingly to him the illegality is pointed out in paragraphs 3.2 and 3.3 of the affidavit filed in support of the application. The promise of that

illegality is that the person who conducted mediation, is a very person who conducted Arbitration. In his view, that is contrary to section 88(2) (a) of the Employment and Labour Relations Act (Supra).

He submitted further that, it is now the law that illegality once raised and proved becomes good cause for extension of time. He cited the cases of **Tusindivo Zuberi vs. Ally Hamis**, Civil Application No. 05 of 1999 at page 2, and the case of **Principal Secretary Ministry of Defence and National Service Vs. Devram Valamblvia** [1992] TLR 185.

He reminded the Court that, the legal base of his application is that the person who conducted mediation is the one who arbitrated the dispute as Indicated in Annexure "B"

In reply, the counsel for the respondent adopted the affidavit of one Ombeni Elisa Mollel and submitted that, although he is in agreement that illegality is the ground for extension of time, the same must be apparent on face of the record. He submitted further that it also must be pleaded in the affidavit. Countering the argument that illegality is the sole ground, he submitted that, paragraphs 3.2 and 3.3 allegedly by the applicant to have contained the ground for illegality, do not depose about the said illegality as the respondent's counsel wants this court to believe.

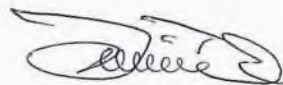


He said, there is no proof that the person who mediated the parties is the one who arbitrated it. He submitted further that the name on the certificate of non-settlement is different from that on the award, substantiating his argument he said, in the certificate of non-settlement by mediator, the mediator is to be Joseph while in the award, it is J. J. Mnzava.

In his view, without an affidavit stating that these names meant one person, there is no base this court can be persuaded to believe the allegation. Further to that he submits that the contents of paragraph 3.5 shows that the illegality was noticed in the proceedings, but the proceedings were not attached to the application.

In his view, and guided by the authority in the case of the **Registered Trustees of Subusiso Foundation Vs. Angelus Bandy Ngatunga** LCD – 2015 volume II reported as case No. 201, while at 284, it was held that where the illegality is contained, in the proceedings, it must be attached with the affidavit.

Further he submitted that, section 88 (2) (a), of the Employment and Labour Relations Act (supra) does not state that the person who stands as a mediator can not preside over as the Arbitrator.

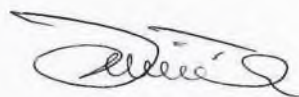


He said if the illegality has not been shown in the affidavit but instead, argued in the submissions, then the period of delay must be accounted for. On that he relied on the decision of Benjamini Mgagani Vs. Bunda District Designated Hospital. Misc. Labour Application No. 12 of 2021, Hon. Mahimbali, J.

He also submitted that for illegality to constitute good cause for the delay, it must be a pure point of law and apparent on the face of record, not the one to be discovered by the long-drawn process. In his view, the said illegality is not apparent on the face of record because the same must be traced by looking at the annexures which were not made part of the affidavit. Therefore, in his view, the case of **Lusindiko Zuberi** is inapplicable.

He said further that, being discovered in 2012, in the proceedings, there is no reason as to why the action was not taken immediately. He went as far as challenging the legality of the verification clause as being defective.

In rejoinder, the counsel for the applicants said that, the issue of the illegality of the award on account of being mediated and arbitrated by the same person did not arise in the proceedings before the CMA. That, what was before that court was the fairness of the



termination/retrenchment and its legality. In this application, the decision which is sought to be challenged is Revision No. 148 of 2010, he argued.

In the case of **Lyamuya Construction Company Limited Vs the Board of Registreerd Trustee of Young Women Christian Association of Tanzania**, Civil Application No. 02 of 2010 [2011] Tz CA 4, while stating on the point of illegality as being good cause for extension of time, the court held inter alia;

"If the court feels that there are other sufficient reasons for the applicant reiterated what he submitted in chief but insisted on the following aspect, that the names of the Arbitrator and Mediator are the same, that the illegality is appointed and visible as reflected on F.5 and the award which are attached to the application. "

At the end, he asked for the application to be granted.

From the application and the counter affidavits filed in opposition of the application, the following issues are clear, **one**, that the application is for extension of time to file an application for review of the order of this court in Revision No. 148 of 2010, which allowed the application for revision filed by the respondent for the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged.

From the above extract, it is a principle of law that for the illegality to be good cause, it must be:-

- i. A point of law of sufficient importance
- ii. It must be apparent on the face of the record
- iii. Be embedded in the decision sought to be challenged, and if
I may add;
- iv. It must also have been pleaded in the affidavit not only raised
and argued in the submissions.

In this case, the alleged illegality has not been pleaded in the affidavit and it has not been pleaded that it is of such sufficient importance. In my view the illegality is of sufficient importance if its upholding, substantively affects the outcome of the dispute or case. It should be on the face of the record not the one to be traced by a long-drawn process or ascertained by evidence. In this application, the alleged illegality is neither apparent on the record of the decision sought to be challenged that is Revision No. 148 of 2010, nor in the proceedings or judgment. It is said to be imbedded in the proceedings of the CMA, which was not subject of the revision in the Revision No. 148/2010.

Furthermore, the same has not been conspicuous in the affidavit, therefore, it has not been pleaded. That said and done, I find that in the

circumstances of the case at hand, the ground of illegality was relied upon out of the context. Therefore, the application fails for the reasons given. No order as to costs is made.

It is accordingly ordered.

DATED at **ARUSHA**, this 06th day of October, 2022.



A handwritten signature in blue ink, appearing to read "J. C. Tiganga", is written over a horizontal line.

J. C. TIGANGA

JUDGE