

THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(LABOUR DIVISION)  
AT MBEYA

MISC. LABOUR APPLICATION NO.19 OF 2022

*(From the Commission for Mediation and Arbitration for Mbeya at  
Mbeya in Labour Dispute No. CMA/MBY/112/2019)*

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED .....APPLICANT

VERSUS

1. GEORGE AUSTIN MTIESA
2. EMAMNUEL SIMKOKO
3. SALIM ADAM
4. IBRAHIM MWANDIWA
5. DEO WILBERT
6. FRANCIS MALILA
7. HASSAN MTUMBUKA
8. DENIS NCHUMBUKA
9. FELIX A. SHIBANDA
10. ENOCK KIBIKI
11. YONA G. MWADYEDYE
12. SATO MWAIHOJO
13. HASSAN BORI
14. PETRO SIMFUKWE
15. BOAZ MWANDAMBO
16. GEORGE OTIENO
17. ELIZABETH SAMSON MAHALI

RESPONDENTS

## **RULING**

Date of Last Order: 30.05.2023

Date of Ruling : 01.11.2023

### **MONGELLA, J.**

The applicant herein preferred this application under Rules 24 (1), (2) (a-f), 24 (3) (a-d), 55 (1), and 56 (1), (3) of the Labour Court Rules, G.N. No. 106 of 2007. He is seeking for extension of time to file revision application against the whole proceedings and award of the commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/MBY/112/2019. His application is accompanied by the sworn affidavit of one Thadeo Godfrey Mwabulambo, her advocate and principal officer.

The brief facts of the application as drawn from the applicant's affidavit are that; the respondents were employed by the applicant under specific task employment contracts in diverse roles, such as meter readers, telephone operators and artisans. When their contracts came to an end, the applicant issued them with notice of intention not to renew their contracts. It paid them one month salary in lieu of notice and issued them with certificates of service. Aggrieved, the respondents lodged a complaint in the CMA for allegedly unfair termination and the same was determined in their favour. The said award was delivered on 28.01.2022. It is the said award that the applicant wishes to challenge.

The respondents opposed the application vide sworn counter affidavit of one, George Mtiesa, the first respondent and representative of the rest of the respondents. He alleged that the application was vexations, frivolous and an abuse of court process. That, the applicant has no sufficient cause or reasonable ground for the court to grant an order for

extension of time. He further raised an objection that the application was incompetent for being supported by a defective affidavit.

The application was argued in writing. The applicant was represented by Mr. Thadeo G. Mwabulambo, learned advocate while the respondents were represented by Ms. Doreen R. Wawa, who stood as their legal representative.

Prior to submitting in chief, Mr. Mwabulambo prayed to adopt his affidavit as part of his submission. He averred that upon being aggrieved by the decision of the CMA issued on 28.01.2022, the applicant lodged Revision Application No. 03 of 2022 before this court within the prescribed period of 42 days as provided under **section 91 of the Employment and Labour Relations Act [CAP 366 RE 2019]** (ELRA). However, due to preliminary objection raised challenging the competence of the application on the ground of a defective affidavit, to which the applicant conceded, the application was struck out without leave to re-file. He added that with intent to exercise her right to appeal under **Article 13 (6) (a)** of our **Constitution**, the applicant had to filed the application at hand believing she had sufficient cause to be granted extension of Time.

With that background, Mr. Mwabulambo alleged technical delay as the reason to be granted extension of time. That time was spent in pursuing Revision Application No. 03 of 2022. He cited the case of **Fortunatus Masha vs. William Shona and Another** [1997] TLR 154 in support of his argument. He further reasoned that the applicant has been diligent whereby immediately after the application being struck out, she logged

the application at hand to seek extension of time to lodge his application.

The second reason he advanced is based on illegality of the CMA Award. Pointing the illegalities, he claimed that: **one**, that the CMA had no jurisdiction to entertain the dispute since the respondents were employed for less than 6 months as provided under **section 35 of the ELRA**. **Two**, that the arbitrator awarded the respondents severance pay while the term of service had expired, which was contrary to **Section 42 (3) of the ELRA**. He supported both issues with the case of **Tropical Contractors Limited vs. Juma Shabani and 2 others**, Labour Revision No. 560 of 2018 (HC at DSM, unreported). He urged the court to consider his argument on the illegalities pointed out alleging that he has complied with the requirement of the case of **Zuberi Masake Mohamed vs. Mkurugenzi Mkuu Shirima la Bandari**, Civil Application No. 93/15 of 2018 [2018] TZCA 337 TANZLII.

In reply, Ms. Wawa first challenged the competence of the application on two points. First, she alleged that the application was defective for being preferred under a defective affidavit contrary to **Section 7 of the Notaries Public and Commissioners for Oath Act [Cap 12 RE 2019]**. Second, she alleged the limitation on filing of the submission, whereby she averred that the applicant's submission was served to them on 02.03.2022 instead of 01.03.2022.

As to extension of time Ms. Wawa cited the case of **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII, in which the Court of Appeal stated factors to be taken into

consideration in granting extension of time, which include accounting for each day of delay, that the delay must not be inordinate and the applicant must show diligence not apathy, negligence or sloppiness in prosecution of the action sought to be taken.

While conceding that the issue of illegality held water, Ms. Wawa proceeded to reply on all grounds of extension raised by the applicant. On the question of technical delay, she disputed the same contending that the applicant's then advocates had mistakenly sworn their affidavit in contravention of **Section 7 of the Notaries Public and Commissioner of Oaths Act**. That, after such error being made, the counsels did not do anything for six months until the objection was raised to which they conceded without assigning reasons as to why the same was attested by the counsel for the applicant. She argued that an error made by an advocate due to negligence or lack of diligence is not sufficient cause to grant extension of time. She supported her argument with the case of **Yusuf Same and Another vs. Khadija Yusuf** [1996] TLR 347. She further argued that the applicant did not account for each day of delay from the day the same was struck out.

On the application having overwhelming chances of success, Ms. Wawa was of the view that the ground was not among the important factors to be considered in extension of time. She challenged Mr. Mwabulambo for failure to elaborate on how the application has a great chance of success.

As to the presence of illegality in the impugned decision, Ms. Wawa had the view that the award was not problematic, but Mr. Mwabulambo wanted this court to rely on opening statements while the same are not

evidence, unless admitted by the parties as provided under **Rule 24 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN No. 67 of 2007**. She contended that, the learned applicant's counsel failed to prove the existence of the illegality. She further challenged the argument by Mr. Mwabulambo as to whether the contracts the respondents had with the applicant were on specific task averring that the same were not specific task contracts as they do not match the definition provided under **Section 2 of the ELRA**. She further challenged the existence of such contracts considering the allegation by Mr. Mwabulambo being false.

Rejoining, in the issue of technical delay, Mr. Mwabulambo maintained that technical delay is differentiated from actual delay as explained in **Fortunatus Masha** (supra). He said that in actual delay, a party must account for each day of delay so as to give room to the court to determine the diligence and seriousness of the applicant in prosecuting his case, but in technical delays the applicant is only required to inform the court that he or she filed his matter on time, but the same was struck out. He cited the case of **Damari Watson Bijinja vs. Innocent Sangano**.

As to the point of overwhelming chance of success, he averred that Ms. Wawa had ignored the fourth factor to be considered in granting extension of time as provided in **Lyamuya Construction** (supra). Explaining further, he said that overwhelming chances of success can be considered where the court sees that there are sufficient reasons, such as, existence of point of law of sufficient importance, such as, illegality of the decision sought to be challenged. He supported his averment with the case of **The Principal Secretary, Ministry of Defence and National Service vs. Devram P.**

**Valambhia** [1992] T.L.R. 185. He concluded by maintaining his prayers for the application to be allowed so that the applicant could challenge the CMA Award.

I have considered the parties affidavit and counter affidavit, respectively, as well as their submissions. The applicant herein seeks to be granted enlargement of time so he can file an application for revision to challenge the CMA Award in Labour Dispute No. CMA/MBY/112/2019. From what I have gathered in their pleadings and submissions, after the CMA delivered its Award on 28.01.2022, the applicant filed Labour Revision No. 03 of 2022. The matter was struck out on 18.08.2022 for being incompetent by being supported by a defective affidavit. As derived from the said order, it appears that the matter was struck out without leave to appeal, hence this application.

In the counter affidavit of George Mtiesa, the first respondent, deponed that the affidavit of Mr. Mwadulambo attached to the applicant's chamber summons was defective. However, in her submissions Ms. Wawa only addressed the issue of incompetence of the affidavit in application No. 03 of 2022, which was struck out by this court for being incompetent under **section 7 of the Notaries Public and Commissioner for Oaths Act**. I therefore find her point and arguments misplaced and overrule the same.

With regard to the application, it is well settled that the grant of extension of time is within the discretion of the court where the applicant discloses a good and sufficient cause for the delay. The factors that are usually considered as constituting good cause include; reason for and length of the delay, explanation accounting for such delay and in appropriate

cases, existence of a point of law or illegality of sufficient public importance in the impugned decision. See: **Mashaka Juma Shabani & Others vs. The Attorney General** (Civil Reference No. 30 of 2019) [2023] TZCA 17615 TANZLII; **Melau Mauna & Others vs. The Registered Trustees of the Evangelical Lutheran Church in Tanzania (ELCT) North Centre Diocese & Another** (Civil Application No.546/02 of 2021) [2023] TZCA 17585 TANZLII; and **Elias Kahimba Tibenderana vs. Inspector General of Police & Another** (Civil Application 388 of 2020) [2022] TZCA 497 TANZLII.

Mr. Mwabulambo has advanced three reasons for the grant of extension. These are: technical delay, great chance of the application succeeding and illegality. Upon observing his averments, I find the applicant's submission on the second reason is founded on the issue of illegality. I shall therefore examine the reason of technical delay and illegality.

With regard to technical delay, Mr. Mwabulambo averred that he filed Labour Revision No. 03 of 2022 which was struck out for being supported by a defective affidavit. On the other hand, Ms. Wawa challenged the assertion contending that the delay was not technical but caused by negligence on the part of Mr. Mwabulambo, the applicant's counsel.

With due respect, I find Ms. Wawa has misdirected herself as to what amounts to technical delay. Unlike actual delay, technical delay refers to such times where the applicant has sought the relevant remedy, but the same gets struck out for being incompetent for some reason. As such, the court does not consider the negligence of a party in the defects but whether the initial application was filed within time and the applicant



acted promptly in seeking for extension of time. In **Fortunatus Masha** (supra), the Court of Appeal stated:

"A distinction has to be drawn between cases involving real or actual delays and those, such as the present one, in which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted."

See also: **Bank M (Tanzania) Limited vs. Enock Mwakyusa**, (Civil Application No. 520/18 of 2017) [2018] TZCA 291 TANZLII; and **Salvand K. A. Rwegasira vs. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported).

From the foregoing description, it is clear that it is immaterial as to what reason caused the court to strike out the application. It is undisputed that the applicant herein filed Labour Revision No. 03 of 2022 before this court, which was struck out on 18.08.2022, such time spent by the applicant in entertaining the revision warrants to be excused as technical delay. Having settled the time up to 18.08.2022 which the applicant has accounted for, the same leaves the period of 17 days from 19.08.2022 to 05.09.2022 on which this application was brought before this court, which applicant did not account for. Accounting for each day shall however be relevant if the reason of illegality shall be found to lack merit.

As to the question of illegality, it is settled law that illegality is a sufficient ground for granting extension of time. Where the applicant raises a question of illegality, the court may grant the applicant extension of time for the illegality to be addressed. This was well expounded in **Mashaka Juma Shabani & Others vs. The Attorney General** (supra), whereby the Court of Appeal reasoned:

"It is trite that, where the decision sought to be challenged is tainted with an illegality, extension of time may be granted so that such illegality may be addressed. See for instance, the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T. L. R. 185. In that case, the Court held that:

"Where...the point of law at issue is the illegality or otherwise of the decision challenged, that is of sufficient importance to constitute sufficient reason within the meaning of rule 8 [now rule 10] of the Rules for extending time"

Explaining the illegality, the applicant raised two points; **one**, that the CMA had no jurisdiction to resolve the dispute under **Section 35 of the ELRA** as the respondents had not been employed for more than 6 months. The said provision states:

"The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts."

**Two**, that the found under **subsection (3)** of the provision which states:

“(3) The provisions of subsection (2) shall not apply Arbitrator’s Award of severance pay was contrary to **Section 42 (3) of the ELRA**, which prohibits awarding of severance pay to an employee whose term of service had expired. Such instructions are:

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(c) to an employee who attains the age of retirement or an employee whose contract of service has expired or ended by reason of time.”

In granting extension of time on ground of illegality, the court does not have to determine whether the illegality alleged has merit or not. Doing that would amount to resolving the matter to which extension is sought. Elaborating on this stance, the Court of Appeal in **Ramadhani Bakari & Others vs. Aga Khan Hospital** (Civil Application No.5/01 of 2022) [2023] TZCA 17552 TANZLII stated:

“It is a settled law that in an application for an extension of time where the applicant raises illegality as a ground, the Court has a duty to grant it and that it is not for the Court extending time to determine as to whether or not the point raised is correct. This is because such a determination would be the domain of the Court that would preside over the intended appeal.”

In the foregoing, I am of the considered view that the illegalities advanced by the applicant in the impugned CMA Award are apparent on face of record, of sufficient importance, and shall not involve long drawn processes of argument. They are sufficient enough to warrant extension of time sought. I therefore allow the application. The applicant is herein granted 14 days from the date of this Ruling to file her revision

against the CMA decision in Labour Dispute No. CMA/MBY/112/2019.  
Given that it is a labour matter, I make no orders as to costs.

Dated and delivered at Mbeya on this 01<sup>st</sup> day of November 2023.



X *L.M.*

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L. M. MONGELLA  
JUDGE  
Signed by: L. M. MONGELLA