

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

MISCELLANEOUS APPLICATION NO. 323 OF 2019

BETWEEN

TOTAL TANZANIA LIMITED APPLICANT

VERSUS

SEET PENG SWEE RESPONDENT

RULING

Date of Last Order: 03/06/2020

Date of Ruling: 17/07/2020

S.A.N. Wambura, J.

The applicant **TOTAL TANZANIA LIMITED** has filed this application under the provisions of Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 55(1) and 56(1)(3) of the Labour Court Rules, GN No. 106 of 2007 and Section 94(1)(e) of the Employment and Labour Relations Act, No. 6 of 2004 praying for the Orders that:-

- (a) That this Honourable Court be pleased to extend time within which an application for revision of CMA award in Labour Dispute No. CMA/DSM/KIN/R.478/15/1054 can be made.*

(b) Any other relief this Honourable Court may deem fit and just to grant.

The application was supported by a sworn affidavit of the applicant's Head of Legal Affairs one Masha Msuya Kileo.

The respondent's Counsel Nuhu Mkumbukwa filed a counter affidavit on behalf of the respondent **SEET PENG SWEE** challenging the application.

With leave of the Court the application was disposed of by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

It is on record that aggrieved by the award of CMA in Labour Dispute No. CMA/DSM/KIN/R.478/15/1054 delivered on 13/04/2017 in favour of the respondent, the applicant filed an application for Revision with No. 331/2017 which was struck for being filed out of time. Misc. Application No. 412 of 2018 seeking extension of time was withdrawn. Thereafter is when the application at hand was filed in May, 2019.

Apart from submitting at length that the award was improperly and illegally procured at CMA as held in the cases of **Principal Secretary Minister of Defence and National Service Vs. Devram Valambia**

[1992] TLR 185 and **Lyamuya Construction Co. Limited Vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Appl. No. 2/2010 the applicant has also submitted there was a technical delay as held in the case of **Elly Peter Sanya Vs. Esther Nelson**, Civil Appeal No. 151 of 2018.

They thus prayed for the grant of the application.

In their submissions the respondents began by submitting on the preliminary objection which they had raised to the effect that:-

- (i). *The application has been overtaken by events as a Garnishee Order Absolute has been issued thus closing the execution proceedings as it was held in the case of **Shabir Ebrahim Bhaijee & 2 Others Vs. Selemani Rajabu Mizino & Registrar of Titles**, Civil Appl. No. 40 of 2007.*
- (ii). *The application is frivolous and vexatious as the applicant has disrespected the Orders of this Court in execution proceedings.*
- (iii). *That grounds for extension of time are new and not the same as those raised in the application which was withdrawn so the application lacks merit. They urged the Court to follow the*

*decisions in the cases of **Wangai Vs. Mugambi & Another** [2013] 2 EA 474 and **Jebra Kambole Vs. Attorney General**, Misc. Civil Cause No. 27/2017.*

Responding to the applicant's submissions they argued this Court to dismiss the application as the same has been filed after an inordinate delay of over 788 days since the award was delivered and no sufficient cause has been adduced citing the cases of **Benedict Mumello Vs. Bank Of Tanzania**, Civil Appeal No. 12/2002; **Tanga Cement Co. Limited Vs. Jumanne D. Masangwa & Amos A. Mwalandwa**, Civil Appl. No. 6 of 2001 and **Shanti V Hindocha**, [1973] EA 209 to mention just a few.

That the conditions laid in the case of **Lyamuya Construction Co. Limited Vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania** (supra) were not met by the applicant. This is because they have not accounted for the delay and the applicants dilatory conduct contributed to the delay.

That the illegality alleged is an afterthought as the issue of whether the respondent's employment was confirmed or not after the probation period was never raised at CMA.

In their rejoinder the applicant responded to the preliminary objection raised by stating that it ought to be dismissed as all the grounds raised are not on pure points of law but had to be proved so do not qualify to be preliminary objections as defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696.

They insisted that there was a technical delay and that the award was illegally procured, thus prayed for the application to be granted.

Now as for the preliminary objection raised, it has to be disposed of first and since all parties have submitted for and against it, I will rule on the same first.

As rightly submitted by the applicants what amounts to a preliminary objection was well defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** (supra).

In Civil Application No. 175 of 2005, **SELCOM GAMING LIMITED Vs GAMING MANAGEMENT (T) LIMITED & GAMING BOARD OF TANZANIA** (unreported), the Court observed that:-

"A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case,

but on stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the application."

In the case of **Shahida Abdul Hassanali Kasam V. Mahed Mohamed Gulamali Kanji**, Civil Appl. No. 42 of 1999 (unreported) the Court held as herein quoted:-

"The aim of a preliminary objection is to save time of the court and of the parties by not going into the merit of an application because there is a point of law that will dispose of the matter summarily. Examples: Objection to the jurisdiction of the court, or a plea of (time) limitation, or a submission that the parties are bound by the contract to refer the dispute to arbitration".

[Emphasis is mine].

So a preliminary objection must first raise a point of law based on ascertained facts and not on evidence. Secondly if the objection is sustained, it should dispose of the matter as it was held in the case of

COTTWU (T) OTTU UNION AND ANOTHER AND HON. IDDI SIMBA MINISTER OF INDUSTRIES AND TRADE AND OTHERS, Civil Application No. 40 of 2000 (unreported).

It goes without saying therefore that all issues herein raised need proof and so do not fall under the category of being called preliminary objections. I thus overrule all the grounds thereto raised.

As far as the main application is concerned, I believe parties have spent a lot of time in arguing on the illegality of the award and benefits of the intended revision. I will not do so as it will be as good as entertaining the said revision.

There is no dispute that this Court can under the provisions of Rule 56(1) of the Labour Court Rules, 2007 grant an application for extension of time were sufficient cause has been adduced and in as long as the application has been promptly filed without inordinate delay as was held in the case of **Tanga Cement Co. Limited Vs. Jumanne D. Masangwa & Amos A. Mwalandwa** (supra).

That in granting the same the applicant has to prove that the delay has not been contributed by the applicant's dilatory conduct or negligence:

illegality of the face of the record, the intended revision was overwhelming chances of success or there was a technical issue which caused the delay. That except for where the illegality is on the face of the record, the applicant has also to account for the delay of each day as held in the cases of **Karibu Textile Mills Vs. Commissioner General TRA**, Civil Application No. 192/20 of 2016 and **Bushiri Hassan Vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007.

They also argued there was a technical delay. A technical delay is to my understanding to the effect of a delay in being served with relevant documents or there had to be another matter to be resolved before the filing of the intended matter for example one seeking leave to file a representative suit before filing a revision.

This is not the case in the matter at hand, as there were no such delays. By filing an application for revision out of time that was negligence.

But again after the said revision was struck out they filed another matter which was later withdrawn prior to the filing of this application. Thus there cannot be said to be a technical delay at all.

As stated earlier parties have argued at length on the illegality of the award. It suffices to say that an illegality of the award which on the face of the record may have merit as it was held in the case of **VIP Engineering and Marketing Limited & 3 Others Vs. Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006.

In the cases of **JHPIEGO Vs. Emmanuel Mmbaga**, Misc. Labour Application No. 238 of 2019 and **Hezron Magessa Mariogo Vs. Kassim Mohamed Said**, Civil Application No. 227 of 2015, it was held that where an issue of illegality is raised, it constitutes sufficient cause of granting an application for extension of time regardless of whether or not a reasonable explanation has been given by the applicant to account for the delay.

This being the circumstances in the matter at hand, then I accordingly allow the application as prayed for. Applicant to file the intended Revision within fourteen (14) days from the date of this Order.

S.A.N. Wambura
JUDGE
17/07/2020

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SEET PENG SWEE RESPONDENT

Date: 17/07/2020

Coram: Hon. S.R. Ding'ohi, Deputy Registrar

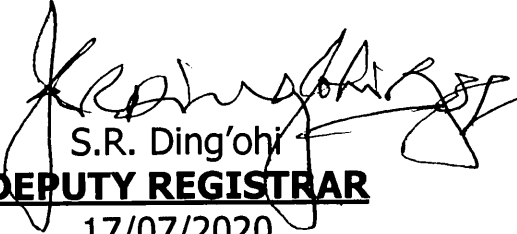
Applicant: }
For Applicant: } Absent

Respondent:

For Respondent: Ms. Elizabeth Dominic Advocate

CC: Lwiza

COURT: Ruling delivered this 17th day of July, 2020.


S.R. Ding'ohi
DEPUTY REGISTRAR
17/07/2020