

**THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 367 OF 2021**

**BETWEEN**

**SKYWARD CONSTRUCTION CO. LIMITED ..... APPLICANT**

**AND**

**CLEO E. SWAI ..... RESPONDENT**

**RULING**

Last Order: 24/02/2022  
Date of Ruling: 28/2/2022

**B. E. K. Mganga, J**

Respondent was an employee of the applicant. It happened that their relationship went bad as a result, respondent filed a dispute at CMA where, on 19<sup>th</sup> October 2020, it is alleged that, a settlement deed was entered in favour of the respondent to be paid TZS 23,000,000/=. On 30<sup>th</sup> September 2021, applicant filed this application seeking extension of time within which to file an application for revision. In the affidavit in support of the notice of application, Mr. Fauz Abdallah Eshaq, the director and shareholder of the applicant, deponed that on 11<sup>th</sup> September 2021, it came to the knowledge of the applicant that respondent filed execution application before the High Court for payment of the aforementioned amount. That, applicant sent Mr.

Alpha Mchaki, her counsel to peruse the CMA file and find that CMA recorded settlement deed and marked mediation successful. He deponed further that settlement deed was obtained by fraud and that CMA had no jurisdiction as the dispute was time barred. The affidavit of Mr. Fauz Abdallah Eshaq is supported by the affidavit of Alpha Jackson Mchaki, advocate of the applicant. In his affidavit, Mr. Mchaki, deponed that on 20<sup>th</sup> September 2021, he perused CMA record and find that on 1<sup>st</sup> September 2020, respondent filed the dispute at CMA against the applicant indicating that the dispute arose on 13<sup>th</sup> March 2020. That, applicant raised a preliminary objection and that the same was scheduled for hearing on 16<sup>th</sup> October 2020. Mr. Mchaki stated further that on 19<sup>th</sup> October 2020, settlement deed was recorded in favour of the respondent to the effect that the latter will be paid TZS 23,000,000/= by the applicant.

On the other hand, the respondent filed a counter affidavit opposing the application. In the counter affidavit, respondent stated that on 21<sup>st</sup> December 2021, applicant was served with application for execution of the CMA award arising from the settlement deed, but willfully, refused to accept service. Respondent attached to his affidavit the affidavit of Ally. A. Muba, the process server. That, on 27<sup>th</sup> July 2021, the High Court appointed Comred Action Mart and Court Brokers to execute the said CMA

award. That, the court broker gave applicant 14 days and that applicant filed this application 63 days thereafter. Mr. Swai stated further in his counter affidavit that, he filed dispute No. CMA/DSM/ILA/695/2020 and that on 24<sup>th</sup> September 2020, Mr. Erick Erasmus Bitarohize, advocate for the applicant filed the counter affidavit and a notice of preliminary objection that the affidavit filled by the respondent is defective. That, on 19<sup>th</sup> September 2020, applicant prayed to register settlement deed signed by her senior officer as a result it was so registered. Respondent stated in his affidavit further that applicant failed to honour the said settlement deed.

When the application came for hearing, Mr. Alpha Mchaki, advocate appeared and argued for and on behalf of the applicant while Daud Maziku Maduki, the Personal Representative for the Respondent, appeared and argued for and on behalf of the respondent.

Arguing the application on behalf of the applicant, Mr. Mchaki, learned counsel, submitted that there is illegality in the CMA award as CMA had no jurisdiction to entertain the matter as deponed. Counsel for the applicant conceded that the matter was settled on 19<sup>th</sup> October 2020, by Cleo Swai, the respondent in this application and Erick Erasmus Bitarohize, Advocate of the applicant and the mediator. Counsel for the applicant argued that there is illegality and cited the case of *Principal*

**Secretary, Ministry of Defence and National Service v. Devran Valembhia** [1991] TLR 387 to support his submission that, when the point at issue is one alleging illegality, the court had duty to extend time for the purpose of ascertaining the illegality. He cited further the case of **Arunaben Chaggan Mistry v. Naushad Mohamed Hussein**, Civil application No. 6 of 2016, CAT (Unreported) that illegality is a sufficient ground for extension of time. Counsel for the applicant submitted further that, settlement deed was made on 19<sup>th</sup> October 2020, but applicant was not aware of the said settlement deed. In the course of his submission, counsel for the applicant conceded that, the award complained of, was not attached to the affidavit in support of the application and that nothing in the application is showing that the said settlement order was attached.

Mr. Maduki, the personal representative of the respondent, strongly opposed the application and submitted that there are no good grounds for extension of time. Mr. Maduki submitted that, the dispute was settled at CMA through CMA F.6 and CMA F.7 as a result, the respondent filed application for execution, but applicant refused to sign this Court's summons served by Mr. Huba the process server. Mr. Maduki submitted further that, the said settlement deed was signed by the applicant which means; he withdrew the preliminary objection she had raised earlier on.

In rejoinder, Mr. Mchaki, counsel for the applicant reiterated his submissions in chief that CMA had no jurisdiction.

From submissions and affidavit in support of the notice of application, applicant filed this application relying on illegality. It is true that illegality, if proved, is one of the grounds for extension of time. I say, if proved, because it is not a legal requirement that once applicant alleges that there is illegality, automatically, qualifies to be a good ground for extension of time. It has been held several times by the Court of Appeal that, for illegality to be a ground for extension of time, it has (i) to be proved by the applicant that there is illegality and (ii) the said illegality has to be apparent on the face of record. One of these cases is ***Lyamuya Construction Limited v. Board of Registered Trustees Womens's Christian Association of Tanzania***, Civil Application No. 2 of 2010, CAT (unreported). In ***Lyamuya's case***, supra it was held:-

*"It follows then that an allegation of illegality by itself suffices for an extension of time. However, such an allegation of illegality "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".*

In the application at hand, I have found strangely that; (i) applicant neither attached the settlement deed complained of nor CMA proceedings

which, he claims that her advocate had an advantage to peruse and find that it contains illegality. In my view, it was crucial for the applicant to attach the said settlement deed and proceedings to enable the court to see whether the alleged illegality is apparent on the face of record or not; and (ii) neither the notice of preliminary objection that was filed at CMA challenging CMA jurisdiction nor the counter affidavit opposing the application by the respondent at CMA was filed by the applicant. These could have, in my mind, helped the court to examine properly whether; CMA had jurisdiction or not. In short, all these were key in helping the court to examine whether; there is illegality or not, and whether; the same is apparent on record or not. More so, applicant has not proved by evidence that the said settlement deed was not signed by an officer from her office. It was submitted by Mr. Mchaki, counsel for the applicant that, applicant was unaware of the said settlement deed. With due respect to him, that submission bears no support in his affidavit or the affidavit of Fauz Abdallah Eshaq. In my view, that submission does not help the applicant as it is not evidence. If at all applicant wanted to distance herself from the said settlement deed, she was supposed to do so by evidence including, by filing the affidavit of the person who signed or is alleged to have signed the said settlement deed. On the contrary, most of the

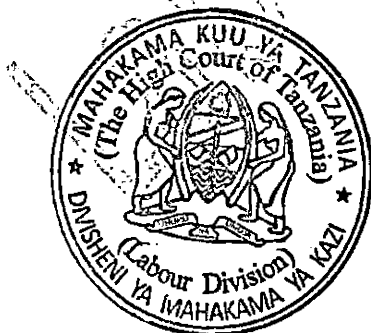
information relating to the said settlement deed and a preliminary objection was supplied by the respondent. In fact, in the counter affidavit, respondent annexed (i) the counter affidavit sworn by Erick Erasmus Bitarohize, who was counsel for the applicant at CMA (ii) the notice of preliminary objection (iii) the said settlement deed, (iv) certificate of settlement (CMA F.6) and (v) settlement agreement under mediation Form (CMA F.7);

I have examined both the notice of preliminary and the counter affidavit, that were filed at CMA and find that, they did not challenge the jurisdiction of CMA. That said, applicant has failed to prove or just show that there was the said alleged illegality based on jurisdiction. I have noted further that, the said settlement deed appears to have been signed by an advocate who was representing the applicant at CMA, senior officer of the applicant on one hand, the respondent on the other and the mediator. Strangely, nothing was said by the applicant in this application as to whether, those who signed on her behalf had no mandate or not; or that the persons who are alleged to have signed the said settlement deed are not from her office. Both CMA F.6 and CMA F.7 were signed by Godwin Saul, the accountant of the applicant on behalf of the applicant on one hand, the respondent on the other, and the mediator. Applicant for reasons

best known to him, said nothing in this application as to competence or otherwise of the said Godwin Saul in signing the said settlement deed. I am of the view that applicant is aware that the said settlement deed was correctly and legally entered on her behalf which is why, she has failed to bring evidence to challenge it. The least I can say in relation to the preliminary objection is that, applicant withdrew or had no intention to pursue it which is why, she entered into settlement deed as submitted by Mr. Maduki, the personal representative of the respondent.

For all what I have discussed hereinabove, I find that applicant has failed to advance good grounds to enable this court to exercise its discretion of extending time. That said and done, I hereby dismissed this application for want of merit.

Dated at Dar es Salaam this 28<sup>th</sup> February 2022.



A handwritten signature in black ink, appearing to read 'B.E.K. Mganga'.

B.E.K. Mganga  
**JUDGE**