

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

**MISC. APPLICATION NO. 466 OF 2022**

**BETWEEN**

**MWANASHERIA MKUU WA SERIKALI .....APPLICANT**

**VERSUS**

**ALICE CELESTINE NDYALI MSIMAMIZI WA MIRATHI  
WA MALI ZA MAREHEMU  
(SELESTINE MATHEW NDYALI) ..... 1<sup>ST</sup> RESPONDENT**

**CHINESE TANZANIA JOINT SHIPPING COMPANY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Date of last Order:** 07/03/2023

**Date of Ruling:** 23/03/2023

**MLYAMBINA, J.**

*Whether the Applicant adduced sufficient reason for the grant of extension of time, and; whether a point of illegality constitutes sufficient ground for extension of time are the vital issues in this application. In deciding the same, the Court will consider the submissions of the parties, Court records, laws applicable and case laws. The application is for extension of time to file revision against *Labour Dispute No. CMA/DSM/ILALA/841/18 dated 24/4/2020* before Hon. Alfred Massay.*

The application was argued orally. The Applicant was represented by Learned State Attorneys, Mr. Mathew Fuko and Ms. Lilian Mirumbe. Whereas, Mr. Michael Mgombozi, Pearsonal Representative appeared for

the first Respondent and Mr. Gasper Truway appeared for the Respondent.

At the date of hearing, the Applicant's counsel notified the Court that there are some offending paragraphs in the counter affidavit. By leave of the Court, it was ordered the point of law be argued along with the merits of the application.

On the noted point of law, Mr. Fuko submitted that; the Counter affidavit of the 1<sup>st</sup> Respondent contravenes the law. He stated that; it contains arguments, statements and conclusion which is not proper. He identified the contended paragraphs which are paragraphs 6, 8, 9 and 10 of the 1<sup>st</sup> Respondent's counter affidavit. Mr. Fuko urged the Court, if it finds such paragraphs have such defects, be expunged and not form part of the Counter affidavit. The counsel put his reliance to the case of **Lalago Cotton Ginnery & Oil Mills Company Limited v. The Loans & Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 Court of Appeal of Tanzania at Dar es Salaam (unreported).

As to the merit of the case, Mr. Fuko adopted the Applicant's amended affidavit sworn by Mr. Boaz A. Msoffe, filed on 1/3/2023 to form part of his submission. He submitted that; the impugned decision of CMA was issued on 24/4/2020. The Applicant was not a party to the case. After the decision, the Applicant got information from Chinese

Tanzanian Joint Shipping Company by a letter dated 6/10/2022 and a letter dated 10/10/2022. The counsel submitted that; by the time they got information, it was already out of time. It was over one year and a half. They therefore filed this application on 23/11/2022.

Mr. Fuko went on to submit that; after been aware on 6/10/2022 up to 23/11/2022, they convened a meeting and consulted the Attorney General jointly with the Ministry of Infrastructure and Transport as verified at paragraphs 7 and 8 of the affidavit. The counsel stated that; it was revealed that the decision of CMA had illegality on the CMA entertaining the claim on arrears of terminal benefits. Mr. Fuko argued that; point of illegality constitutes sufficient reason for extending time. To support his submission, he referred the Court to the case of **Principal Secretary Ministry of Defence & National Service v. Devram Valcambhia** (1992) TLR 185 where the Court held that:

We think that when, as here, the point of law at issue is illegality or otherwise of the decision been challenged, that is sufficient importance to constitute sufficient reason for extending time.

Mr. Fuko clarified further that on arrears of terminal benefits he meant pension arrears. He added that; annexure SM2 to the Counter affidavit, reveals the letter from PPF and the correspondences which also includes SM3. He argued that; CMA had no jurisdiction because

*Section 44 of Social Security Regulatory Authority Act, 2019 in its* requires all pension issues be referred to the appropriate scheme and not otherwise. He also pointed that; *Section 4 of Employment and Labour Relations Act [Cap 366 RE 2019] (to be referred as 'ELRA')* defines what a dispute means. He argued that; pension arrears issues do not follow on labour matters.

It was further argued by Mr. Fuko that *Section 14 and Section 15 of the Labour Institutions Act [Cap 300 Revised Edition 2019] (to be referred as 'LIA')* talks of function and powers of the CMA respectively. Mr. Fuko stated that; if this application is not granted, the Applicant will be affected. He added that; even the claimed pension arrears have been paid as proved by Annexure CTS of the supporting affidavit. He therefore urged the Court to grant the application.

In response to the application, Mr. Mgombozi urged the Court not to expunge the contended paragraphs 6, 8, 9, and 10 of the first Respondent's counter affidavit. He strongly argued that; the referred paragraphs do not have conclusions. Mr. Mgombozi submitted that; the affidavit in Labour Matter is different from other affidavits. To support his preposition, he notified the Court that there are decisions of Hon. Judges Mandia, J; Mipawa, J; Aboud, J; and Rweyemamu, J on such aspect. He further referred the Court to the case of **Regina Mushi v.**

**The Board of Trustees of National Social Security Fund NSSF** in Civil Application No. 457/18 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported), where it was emphasized that the affidavit in labour matters is different from other affidavits. That, the affidavit in labour matter contains statements, chronologic orders, reliefs and arguments. He also cited the case of **Anna Msagati & 61 Others v. Panasonic Batteries Tanzania Ltd**, High Court of Tanzania, Misc. Labour Application No. 121 of 2020 (unreported). He therefore prayed for the Counter affidavit be adopted to form part of his submission.

On the jurisdictional issue, Mr. Mgombozi submitted that; *section 14(1)(b)(i) &(ii) of LIA* gives jurisdiction to CMA to decide dispute of this nature on unlawful deduction of salary of the employee. He stated that; in CMA form No. 1, the claim was on unpaid terminal benefits and not on pension arrears. He cited the case of **Celestine Mathew Ndiale v. Chinese Tanzania Joint Shipping Company**, Labour Revision No. 396 of 2015, High Court of Tanzania Labour Division at Dar es Salaam (unreported), where the Court remitted the file back to CMA to determine the matter on merits.

Mr. Mgombozi further submitted that; the employer was deducting salary and remitted to SINOTASHIP Staff Endowment Scheme. He said, the 1<sup>st</sup> Respondent's remuneration was remitted to that scheme. He

added that; PPF confirmed that the Applicant was not a member of their scheme. He went on to submit that; the 1<sup>st</sup> Respondent was registered by PPF in 2007 but she was recruited since 1974. He added that; for all along, the deductions were confirmed on 1978 and been remitted to the said scheme. The representative conceded that it is true the claim of the 1<sup>st</sup> Respondent was on pension arrears.

It was submitted by Mr. Mgombozi that the pension arrears of the 1<sup>st</sup> Respondent were illegally remitted to SINOTASHIP instead of PPF SINOTASHIP. Mr. Mgombozi argued that; *Section 2 of the Parastatal Pension Fund Act No. 25 of 2001* required the employer to register in that scheme and remit the employees contributions. Instead, the employer illegally remitted to SINOTASHIP. He went on to submit that; this dispute is of two natures. The first nature is on employment remuneration deduction and the second nature is on pension.

Mr. Mgombozi further contended that; the employer violated *Section 9 of Act No. 5 of 2001*. Further, *Section 47 of Act No. 25 of 2001* required PPF to file a case against the employer who never remitted the salary deductions. The 2<sup>nd</sup> Respondent never registered themselves to PPF. He further conceded that this dispute was on pension.

On the main application, Mr. Mgombozi denied the allegation that the Applicant got the information on 6/10/2022. He said, the Applicant



was aware of this dispute. In his affidavit, the Applicant testified that; he is the State Attorney of the Government. He is the legal adviser of the Government and all its Corporations. In 2019, there were amendment of the law which required all cases of Government institutions, Corporations and Parastatals be dealt by the Attorney General and prosecuted by Solicitor General. He said, the State Attorney had a duty to follow up on what transpired to the institutions.

It was submitted by Mr. Mgombozi that; the decision was issued ex-parte on 24/4/2020. He said, the Judgement Debtor had notice but never appeared. Filing this application on 23/11/2022, means the Applicant delayed for two years and eight months. He argued that; the Applicant had to account for each day of delay. He further elaborated that the ex-parte decision was delivered on 24/12/2022. The 2<sup>nd</sup> Respondent applied to set aside the ex-parte decision and his application was refused. From 24/12/2022 to 23/11/2022, it is two years and the Applicant has not accounted for each day of delay while he is the Chief Legal Officer of the Government and Public Institutions.

Mr. Mgombozi was of the view that; this delay is a tactic to the 1<sup>st</sup> Respondent who was illegally deducted his salary, and which has never been paid. He added that; they waited for the death of the 1<sup>st</sup> Respondent on 31/05/2020 to file this application. Mr. Mgombozi further

argued that this application is an abuse of the Court process as per the case of **Capital Decoration and Building Works v. Edward Rugayaza & 45 Others**, High Court Tanzania Labour Division at Dar es Salaam (unreported), pp. 11-14; and the case of **Bank of Tanzania v. Said A. Marinda & 30 Others**, Civil Reference No. 3 of 2014, Court of Appeal of Tanzania at Dar es Salaam (unreported) where the Court held that; litigation must come at an end and extension should not exceed 60 days. He therefore prayed for this application to be dismissed.

Mr. Truway for the second Respondent, on his part, submitted that; the decision of Hon. Judge Mashaka did not confer jurisdiction to CMA to decide on this case. He said, the Hon. Judge referred the case to CMA for both parties to be heard on jurisdiction issue. He added that; the dispute before the Court is of 2018 and the rest disputes were withdrawn. Further; as per CMA Form No. 1, the dispute is on unpaid terminal benefits. Thus, if it was a dispute of unfair termination or fair termination but terminal benefits are not paid, CMA have jurisdiction.

Mr. Truway further supported this application on the ground that both parties are given opportunity to be heard on this dispute and reach justice. He said, CMA misdirected itself because CMA form No. 1 was on unpaid terminal benefits but the evidence was on unpaid pension. He submitted that; the jurisdiction of CMA can be assessed by looking at



CMA Form No. 1, drawn disputable issues from the opening statements of both parties and the evidence adduced by both parties.

In rejoinder, Mr. Fuko submitted that; *Rule 24(3) of the Labour Court Rules* lays down the requirement of the affidavit. That, the letter dated 26/2/2007 (annexture to the Counter affidavit) confirms that the 1<sup>st</sup> Respondent was issued with PPF number. Therefore, he failed to exhaust local remedies.

Before dwelling into the merit of the application, I will start with the contention that the Respondent's counter affidavit is contrary to the law. As rightly submitted by Mr. Fuko, the affidavit in Labour Court is governed by *Rule 24(3) of the Labour Court Rules* which is to the effect that:

The application shall be supported by an affidavit, which shall clearly and concisely set out –

- (a) The names, description and addresses of the parties;
- (b) A statement of the material facts in a chronological order, on which the application is based
- (c) A statement of the legal issues that arise from the material facts; and
- (d) The relief sought.

*Rule 24(3) (supra)* lists what should be included in the affidavit brought before this Court. After going through the first Respondent's

counter affidavit, particularly at paragraphs 6, 8, 9 and 10, I noted the deponent concluded arguments and conclusions in the mentioned paragraphs. Pursuant to the provision of *Rule 24(3) (supra)*, arguments and conclusions are not supposed to be pleaded in the affidavit. Therefore, the contested counter affidavit in question is contrary to the law.

The Applicant prayed for the defective paragraphs in the first Respondent's counter affidavit be expunged from the record. For the purposes of speedy administration of justice, the Court is in agreement with his prayer. Thus, paragraphs 6, 8, 9 and 10 of the first Respondent's counter affidavit are hereby expunged from the record.

As to the main application, the Applicant adduced two reasons to pursue this Court to grant the extension of time sought. *First*, the Applicant delayed to receive information about existence of this application and the presence of illegality in the impugned decision. *Second*, illegality of the impugned decision.

To start with the first reason, as per the letter dated 06/10/2022 (annexture CT3), the Applicant was requested for his involvement in the matter while it was on execution stage by the second Respondent. The Applicant was further requested for his intervention into *Execution No.*

06 of 2021 by the second Respondent with a letter dated 10/10/2022 (annexture CT3).

The first Respondent in his submission admitted that in 2019 there were amendment of the law which required all cases of Government Institutions, Corporations and Parastatals be dealt by the Attorney General and prosecuted by Solicitor General.

The amendment was done following the introduction of the Office of Solicitor General as per *Order 2(1) of the Constitution of the United Republic of Tanzania (Office of Solicitor General (Establishment) Order, 2018 GN. No. 50 of 2018*. The Order further listed the functions of the office of the Solicitor General as stated under *Order 4* thereto (*supra*). Those functions *inter alia* include; to intervene and take over any civil proceeding at any stage against the government. This is in terms of *Order 4(1)(h) of GN No. 50 of 2018 (supra)* which provides;

intervene and take over at any stage civil proceedings, appeal, execution or any incidental proceedings before any Court of law or arbitral tribunal in which the Central government, independent departments, agencies or a local government authority have interest

Therefore, following the above amendments it is when the Applicant was notified and requested for his involvement in the matter

at hand. After the request from the second Respondent on 23/11/2022, the Applicant filed the present application for extension of time to be afforded with an opportunity to challenge an award which was delivered on 24/04/2022. On such circumstance, it is my view that, following the above transformation, the Applicant justified his delay.

The Applicant's involvement in the matter is in accordance with the law. Thus, he cannot be denied with such an opportunity. It was not practicable for the Applicant's office soon after its establishment to become aware and act immediately with all matters against the government like the present one. It is until when they were fully informed by the government institutions which were directly dealing with those matters. In the matter at hand, the Applicant knew the existence of this matter after being informed by the second Respondent. As such, the reason constitutes sufficient reason for the grant of extension of time sought.

As to the raised point of illegality, I entirely agree with the Applicant that the same constitutes sufficient ground for the grant of extension of time as it was held in the case of **Principal Secretary Ministry of Defence & National Service** (*supra*). The same has been held by numerous Court decisions including the case of **VIP Engineering and Marketing Limited and Two Others v. Citibank**

**Tanzania Limited**, Consolidated Civil Reference No.6, 7 and 8 of 2006, Court of Appeal of Tanzania, (unreported) where it was held that:

It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under *Rule 8 (now Rule 10) of the Court of Appeal Rules* regardless of whether or not a reasonable explanation has been given by the Applicant under the Rules to account for the delay.

Again, in the case of **TanESCO v. Mufungo Leonard Majura and 15 Others**, Civil Application No 94 of 2016, Court of Appeal of Tanzania, (unreported), it was stated that:

Notwithstanding the fact that, the Applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned...suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court.

Furthermore, the Court in the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil application No. 02 of 2010 Court of Appeal of Tanzania at Arusha (unreported), it was held that:

Since every party intending to appeal seeks to challenge a decision either on points 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 demonstrate 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 also be apparent on the face of the record, such as the question of jurisdiction;* not one that would be discovered by a long drawn argument or process. [Emphasis supplied]

In the instant matter, Mr. Fuko strongly argued that the CMA entertained the claim on arrears of terminal benefits associated with pension fund which the CMA had no jurisdiction over the same. Mr. Mgombozi for the Applicant admitted in his submission that the claim was on pension arrears. The question as to; *whether the CMA had jurisdiction or not* cannot be determined at this stage. Hence, since the illegality pointed by the Applicant is crucial, it is my view that it is important for the parties to be heard on the matter at issue.

In the circumstances, it is my view that the present application has merit. The Applicant has demonstrated sufficient reasons for the grant of extension of time sought as stated above. Taking into account that



the dispute is of a long period of time (since 2009), the Applicant is granted 14 days leave to file the intended application.

It is so ordered.



**Y.J. MLYAMBINA**

**JUDGE**

**23/03/2023**

Ruling delivered and dated 23<sup>rd</sup> day of March, 2023 in the presence of learned State Attorney Stephen Noe Kimaro for the Applicant, the 1<sup>st</sup> Respondent in person, and Gaspar Truway for the 2<sup>nd</sup> Respondent.



**Y.J. MLYAMBINA**

**JUDGE**

**23/03/2023**