

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA, J. A., MKUYE, J. A. And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 172 OF 2016

PATROBERT D. ISHENGOMA..... APPLICANT

VERSUS

- | | | |
|--|---|-------------------|
| 1. KAHAMA MINING CORPORATION LTD
[BARRICK (TANZANIA)BULYANHULU] | } | RESPONDENTS |
| 2. MINISTER FOR LABOUR, EMPLOYMENT
AND YOUTH DEVELOPMENT | | |
| 3. THE ATTORNEY GENERAL | | |

(Application for Revision of the ruling of the High Court of
Tanzania at Dar es Salaam.)

(Mihayo, J.)

dated the 19th day of November, 2009

in

Misc. Civil Cause no. 97 of 2007

.....

RULING OF THE COURT

9th May & 7th June, 2017

LUANDA, J.A.:

This is a ruling in respect of an oral application made by Mr. Cornelius Kariwa, learned counsel for the 1st respondent who sought an adjournment of the hearing of the application for revision lodged by the applicant, one Patrobert D. Ishengoma. Briefly the historical background giving rise to the application for an adjournment is this.

Sometime in 2002 the applicant was employed by the 1st respondent. His employment, however, was terminated in August, 2003. Being aggrieved by the termination, the applicant unsuccessfully lodged a complaint with the Labour Conciliation Board of Kahama (henceforth the Board). Dissatisfied, the applicant referred the dispute to the Minister responsible for Labour matters (the Minister). The Minister overturned the decision of the Board. In its stead, he ordered the applicant to be terminated. Following that decision of the Minister, so the applicant was entitled to be paid his terminal benefits. The District Labour Officer calculated the amount of money due to the applicant.

Armed with that document, he went to the District Court of Kahama with a view to executing it. However, he could not execute it for one reason or another. Later he came to realize that there was an application in the High Court (DSM Registry) vide Misc. Civil Cause No. 97 of 2007 lodged by the 1st respondent against the Minister responsible for Labour and the Hon. Attorney General. The application filed was for the quashing of the decision of the Minister by way of prerogative powers. Since he was an interested party in those proceedings, he made effort so

that he could be joined in those proceedings but to no avail. The High Court (Mihayo, J) quashed the decision of the Minister on 19/11/2011. It is this decision which is the subject of these revisional proceedings.

We wish to point out that initially the applicant had filed a similar application in this Court vide Civil Application No. 59 of 2014 and not No. 59 of 2010 as cited by Mr. Kariwa but on 7/12/2015 was struck out for failure on the part of the applicant to make available a copy of proceedings to the Court. On 10/6/2016 he filed these revisional proceedings after securing leave to file out of time.

It is not also irrelevant to point out at this juncture that the Hon. Attorney General (the 3rd respondent) who also appeared for the 2nd respondent, The Minister responsible for labour matters filed two notices of preliminary objection on points of law. But on 9/5/2017 the day when the application for revision came for hearing Ms. Alice Mturo Learned State Attorney assisted by her colleague Ms. Grin Aden also Learned State Attorney informed the Court that she abandoned the said notices which the Court readily sanctioned. It was after the withdrawal of the preliminary objection when Mr. Kariwa rose and prayed for an adjournment. The reason he advanced was that he was confused as there are two records in

respect of this matter namely Application No. 59 of 2010 (sic) and Application No. 172/2016 whereby his client did not brief him properly. In view of the said confusion he filed an affidavit in reply in respect of Application No. 59 of 2010. He thus prayed that the matter be adjourned so as to enable him file an affidavit in reply in connection with Application No. 172 of 2016.

The applicant strongly objected to the application for an adjournment. He said the application is a pending matter for a long time and that the 1st respondent was served on 10/6/2016. The application for an adjournment, he said, is a delaying tactic. He prayed the matter to proceed in absence of the 1st respondent for failure to file "written submission."

In rejoinder Mr. Kariwa reiterated their prayer to bring their affidavit in reply.

On the other hand Ms Mturo did not resist the application for an adjournment.

We have carefully gone through the record. The following are our observations. On 10/6/2016 the applicant filed these revisional

proceedings vide Civil Application No. 172 of 2016. According to the record, the address for service of the 1st respondent was in the care of their Human Resources Manager at Dar – Es Salaam. But on 9/9/2016, in terms of Rule 24 of the Court of Appeal Rules, 2009 (the Rules), Mr. Kariwa lodged a notice of change of address for service and later appeared as advocate for the 1st respondent. We reproduce the notice of change of address for ease of reference.

*"IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM*

CIVIL APPLICATION NO. 172 OF 2016

BETWEEN

PATROBERT D. ISHENGOMA..... APPLICANT

AND

*1. KAHAMA MINING CORPORATION LTD
[BARRICK (TANZANIA)BULYAHULU]* }
*2. MINISTER FOR LABOUR, EMPLOYMENT
AND YOUTH DEVELOPMENT* } *RESPONDENTS*
3. THE ATTORNEY GENERAL

(Application for Revision of the Proceedings, decision and ruling of the High Court of Tanzania at Dar es Salaam.(T.B.Mihayo) dated 19th day of November,2009 in Misc. Civil Cause No. 97 of 2007)

NOTICE OF CHANGE OF ADDRESS FOR SERVICE

(Made Under Rule 24 of the Court of Appeal Rules, 2009).

TAKE NOTICE that the address for service of the 1st Respondent in this matter shall be in the care of Kariwa & Co. Advocates, 1st Floor Mkunazini Building, Kiungani Street, P.O. Box 13138, DAR ES SALAAM.
info@kariwaadvocates.net.

Dated at Dar es Salaam this 7th Day of September, 2016

.....Sgd.....
Advocate for the 1st Respondent.

To Registrar

Court of Appeal of Tanzania

Copy to be served upon:

Patrobert D. Ishengoma,

Pamba Road/Opp. Miti Mirefu Street,

P.O.Box 11143, MWANZA

Mobile: 0764898947, 0786 830330, 0629 200200 and 0716 382298

Lodged in the Registry at Dar es Salaam on the 9th day of September
2016

.....Sgd.....

REGISTRAR"

On 4/4/2017 Mr. Kariwa filed an affidavit in reply which for all intents and purposes was in connection with Civil Application No. 59 of 2010 (sic) and not in relation to Civil Application No. 172 of 2016. It is clear that Mr.

Kariwa is yet to reply to the affidavit of the applicant. It means the affidavit of the applicant is not challenged by the 1st respondent. It is on the basis of this background that Mr. Kariwa is seeking for an adjournment so that he be able to make a reply thereof.

The issue for decision and determination is whether there is a good cause to accede to Mr. Kariwa's prayer.

Rule 59 of the Rules empowers this Court to adjourn the hearing of the application provided good cause is shown. And what amounts to good cause depends on the circumstances of each case.

In this case, we have seen Mr. Kariwa by his notice of change of address of the 1st respondent by mentioning Civil Application No. 172 of 2016 shows that he was aware of the existence of this application. By filing an affidavit purporting to be in connection with this application while is not; it is in connection with Civil Application No. 50 of 2014 which was struck out way back on 7/12/2015 according to the record, is nothing than potraying lack of diligence. And lack of diligence has never being a good cause and it will never be one envisaged under Rule 59 of the Rules. We

are not prepared to go along with Mr. Kariwa. We refuse to grant an adjournment.

The 1st respondent is yet to file her affidavit in reply. This matter is pending for some time now. Under these circumstances, we think it is appropriate to order the matter to proceed in the absence of the 1st respondent as requested by the applicant. We order therefore the matter to proceed in the absence of the 1st respondent.

It is so ordered.

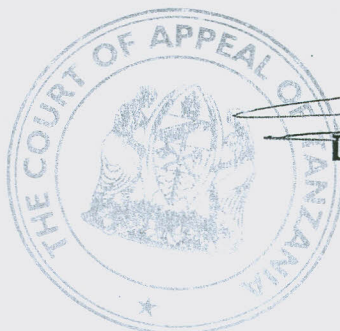
DATED at DAR ES SALAAM this 2nd day of June, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL