IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 773 OF 2018

(Originating from Misc. Civil Application No. 100 of 2018)

IN THE MATTER OF ARBITRATION ACT, CAP 15 R.E 2002

AND

IN THE MATTER OF ARBITRATION

BETWEEN

M/S HERKIN BUILDERS LIMITED.....APPLICANT

AND

THE PERMANENT SECTRETARY, MINISTRY

OF FINANCE AND ECONOMIC AFFAIRS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last Order: 12/05/2020
Date of Judgement: 24/07/2020

MLYAMBINA, J.

This application has been brought under *Section 14 (1) of the Law of Limitation Act, Cap 89.* The applicant is seeking for extension of time within which the applicant may file an application for leave to appeal to the Court of Appeal against the Judgment and Decree of the High Court of Tanzania, Dar es Salaam District Registry at Dar

es Salaam (Hon. Mwandambo, J) dated 27th day of October, 2017 in *Misc. Civil Application No. 1000 of 2016.*

The applicant got an arbitral award in its favour. Before a final award was made a preliminary objection on the point was raised by the respondent that the arbitrator had no jurisdiction to entertain the matter. The arbitrator heard the parties, overruled the objection and proceeded to hear and determine the matter before him on merit.

The respondents were dissatisfied, asked the arbitrator to file the award in this court and then filed an application by way of petition to set aside the arbitral award on the ground of misconduct, *Misc. Civil Application No. 1000 of 2016.* In its judgment dated 27th day of October, 2017 Honorable Mwandambo, J. (as he then was) set aside the award on the ground that the arbitrator had no jurisdiction.

The applicant was aggrieved by the decision, it filed the notice of appeal on 10th day of November, 2017 and timely filed an application for leave to appeal to the court of appeal. Misc. Civil Application No. 723 of 2017. Unfortunately, the same was struck out on technical grounds. Hence this application it. In their written submission the applicant stated that for the application of

extension of time to be granted one must adduce sufficient reasons. The word sufficient is not defined. However, in a case of **Benedict Shayo v. Consolidated Holdings Corporation as a Receiver of Tanzania Film Company Limited Civil Application No. 366/01/2017** (unreported) established the facts which the court has to consider when exercising its discretion of extending time. These are the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligently of the decision sought to be challenged and the overall importance of complying with prescribed timelines.

According to the applicant, the delay in filing the application was due to the fact that the applicant application for leave to appeal to the Court of Appeal, which was timely filed was struct out on a technical ground, resulted from interpretation adopted by the court on affidavit is support. Looking at the impugned affidavit and the ruling one would note that it was not a result of the applicant's negligence or inaction. Immediately after the same was struck out the applicant on 10th day of October, 2018 wrote a letter requesting for copies of ruling and drawn order which was not timely supplied despite the applicant efforts of making follow up until when the

applicant managed by its own efforts to get the copies of ruling and drawn order.

It was the applicant's submissions that the initial application was timely filed the delay from the date the notice of appeal was lodged until the initial application was struct out on 10th November 2018 constituted an excusable technical delay. The delay from the time when the initial application was strike out up to the time when this application was filed is also excusable since it was caused by the court as the court delayed to supply the applicant with the copies of ruling and drawn order despite applicant efforts of making follow-up. The applicant was therefore of position that it has been acting promptly and diligently after termination of the initial application by promptly and timely filing a letter requesting.

It was the applicant submission that the applicant was not informed by the court that the copy was ready for collection. In view of the applicant, it is the duty of the court after the applicant prayed to be supplied by copies of ruling and drawn order to notify the applicant that the copies are ready for collection in absence of that notification it will be unjust to condemn the applicant. To backup such position, the applicant cited the case of **Tanzania China Friend Ship Textile Co. Ltd Charles Kabweza and Others,** Civil Application No. 62 of 2015

Further, it was the applicant's submission that the decision which the applicant intend to challenge in a Court of Appeal, raises points of law of sufficient importance such as the illegality on arbitration law, that need the attention of the Court of Appeal as stated under paragraph 18 of the applicant's affidavit. The court set on appeal when it determined the issue of jurisdiction. This is because the issue of jurisdiction was submitted for a decision by the parties to the arbitrator and the arbitrator having heard the parties decided on it. The applicant argued that the law on arbitration does not allow the court to assume appellate jurisdiction while considering a challenge of an arbitral award.

In view of the applicant, where the point at issue is the illegality or otherwise of the decision being challenged, that is the point of law of sufficient importance to constitute a sufficient reason for extension of time. The applicant cited the case of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 387.

It was the applicant's submission that the applicant acted promptly and diligently to prosecute the matter and the delay in filing the

present application was not caused by negligence. The respondent cannot suffer any prejudice if time is extended.

In reply to the applicant's submission, the respondent pointed out that there are well known principles establishing the grounds in which courts are to consider when applying for extension of time. The respondent cited the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Court of Appeal of Tanzania, Arusha Civil Application No. 2 of 2010 in which Masati, J.A (as he then was) stated that:

> *As a matter of general principle, it is in the discretion of the court to grant extension of time. But that discretion is judicial and so it must be exercised according to the rules of reasons and justice and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:*
>
> *a) The applicant must account for all the period of delay.*
> *b) The delay should not be in ordinate.*
> *c) The applicant must show diligence and not apathy. Negligence or sloppiness in the prosecution of the action that he intends to take.*

d) If the court feels that there are other sufficient reasons such as the existence of a point of law of sufficiency importance, such as the illegality of the decision sought to be challenged.

On accounting for the period of delay, it was the respondent's submission that the applicant has failed to account for each day of delay. The applicants failed to account for 4 days from the time the ruling was pronounced on 10th October, 2018 to the time a letter requesting the ruling was filed in court on the 15th October, 2018. The respondent added that the applicant has also failed to account for 51 days from the date of requesting the ruling to the date of filing the application, on 6th December 2018, making the total period of time that is unaccounted for to be 55 days.

It was the reply submission that the applicant has tried to justify for the days that are unaccounted for by shifting the blame to the court a fact that was not attested in the affidavit but submitted through the bar. Nonetheless, there was no affidavit from the court proving that the ruling was not provided on time to the applicant. Much less any fact showing the date that the ruling was provided to the applicant or that the applicant was diligently making follow-ups of the ruling.

In opposing the application, the respondent stated that it is a well-known principle that parties are bound by their pleadings as it was stated in **James Funke Gwagilo v. Attorney General** (2004) TLR 161. It is thus the respondent's submission that the applicant's affidavit has no facts to prove that they acted promptly, diligent and accounted for the 55 days delay. The respondent cited the case of **Sebastian Ndaula v. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa),** Civil Application No. 4 of 2014 (unreported) in which Juma J.A stated the failure to account for each day of delay amounted to failure to advance good cause to justify the extension of time hence led to dismissal. It was the respondent's submission that the applicant has also failed to account for each day of the delay, hence failed to show good cause to justify the extension of time.

On the point of technical strike out of the application, the respondent submitted that the said application was struck out as a result of the advocate's negligence to observe well known principles drafting an affidavit, hence it does not constitute a reasonable ground for the extension of time. The respondent cited the case of **Wankira Benteel v. Kaiku Foya,** Civil Ref. No. 4 of 200, Court of Appeal of Tanzania (unreported) where Kaji, J.A stated that:

any mistake by applicant's counsel do not constitute sufficient reason for extending time.

On the illegality of the decision, the respondent submitted that the decision of court was made in accordance to law.

On the point that the trial Judge erred in law in determining the issue of jurisdiction as in doing so it acted as an appellate court and that the issue of jurisdiction was raised during arbitration, the respondent called upon the court to note that the Judge did not error in law as the decision was made was within the court's jurisdiction. Hence, there was no illegality on the face of record as alleged by the applicant that could warrant the grant of the extension of time. On the issue of jurisdiction in arbitration matters the respondent cited the case of **Mvita Construction Company v. Tanznaia Harbours Authority,** Civil Appeal No. 94/2001, at Dar es Salaam (unreported) at page 28 in which it was ruled;

...in arbitration, like in a court of law, want of jurisdiction renders a decision and award a nullity, also both in court cases and in arbitration, jurisdiction can be raised at any stage of the proceedings. In a civil case objection to jurisdiction can be raised at any stage even at the final appeal stage and in

an arbitration, objection can be raised even after publication of an award.

The court ruled further at page 40 quoting from English case of **Westminster Chemicals and Produce Ltd v. Eichholz and Loeser** (1954) Vol. 1 QB reported in Llyods List Law Reports 99 at page 105; that:

> If *there is an agreement and if one the parties has studied beforehand and thinks that dispute is outside it, he can then go before the arbitrator, if he so wishes, and protest. If he protests against the jurisdiction of the arbitrator, it is held that he can take part in the arbitration without losing his right and what he is doing, in effect is that he is merely saying: I will come before you, but I am not, by conduct in coming before you and arguing the case to be taken as agreeing to accept your award.*

From **Mvita Case** (*supra*) it was the respondent's submission that the court in determining the matter of jurisdiction of the arbitrator acted within its jurisdiction. As regards the point that when the issues of jurisdiction raised in illegality that constitute a sufficient reason to warrant the extension of time the respondent cited

Lyamuya case (*supra*) thus, that constitute a sufficient reason to warrant extension of time, the honorable court stated that;

> *...the 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.*

It was the respondent's submission that the applicant through the record has failed to prove that there is a point of law that could warrant the extension of time, as it is apparent that the court has the jurisdiction to determine the matter of jurisdiction of the arbitrator, hence the point of illegality will fail.

In a brief rejoinder, the applicant was in agreement with the submission by the respondent on the guidelines stated in the case **of Lyamuya Construction Company Ltd** (*supra*) as this application is concerned, but it submitted that the pointed out reasons in both the affidavit supporting this application and in the submission in chief constitutes sufficient cause to condone the delay.

On the respondent's submission that the applicant failed to account for 4 days from the date when the ruling was delivered to the date when she requested the ruling, the applicant rejoined that in our

jurisdiction there is no specific time limit within which the letter requesting for copies ruling/proceedings/judgment/drawn order should be prepared and submitted to the court. However according to the decisions/precedent, the applicant is required to request for copies of the ruling/proceedings/decree/judgment/drawn order within reasonable time which the applicant believe to 30 days. The applicant recited he case of **The Principal Secretary, Ministry of Defence and National Service** (*supra*). It was the applicant's submission that it was well within reasonable time requested for copies of the ruling and drawn order.

Regarding the point that the applicant failed to account for 51 days from the date of requesting the ruling to the date of filing the application, the applicant rejoinder that the alleged delay of 51 days was not caused by the applicant's inaction and /or negligence. The applicant maintained that once a party has written a letter requesting for copies of the ruling is home and dry and it is upon the court to supply the requesting for copies of the ruling is home and dry and it is upon the court to supply the requested document to back up the position, the applicant cited the case of **Transcontinental Forwarders Ltd v. Tanganyika Motors Ltd** [T.L.R] 328.

It was the applicant's further rejoinder that the respondent does not dispute the fact that the applicant has never been notified of the readiness of the ruling and drawn order. In her view, that is also a sufficient reason for condoning the delay. The applicant recited case of **Tanzania China Friendship Textile Co. Ltd** (*supra*). The applicant submitted that it cannot be punished by courts fault.

As regards the respondent submission that applicant did not attest all grounds in the affidavit, and that other grounds have been submitted at bar, it was the applicant's Rejoinder that the said submission is devoid of merit as in the chamber summons it is specifically provided that the application is supported by affidavit of Rosan Mbambo together with other grounds and arguments to be advanced at the hearing.

Regarding the issue of illegalities pointed out in the affidavit in support of the application, the applicant reiterated what has been submitted in submission in chief.

The applicant submit that the respondent has submitted nothing in opposition of the application at hand. The applicant insisted that it acted promptly and diligently to prosecute the matter and the delay in filling the present application was not caused by negligence

I have anxiously considered the application, the supporting affidavit, the written submissions duly and timely filed before the court, the case digest therein and the applicable law. Both parties are in agreement on the principles enunciated in **Lyamuya case** (*supra*) for one to qualify grant of extension of time.

There is no dispute between the parties on the following important facts: ***First,*** the impugned decision in Misc. Civil Application No. 1000 of 2016 was rendered by my brethren Mwandambo, J. (as he then was) on 27th October, 2017. ***Second,*** aggrieved by the decision, the applicant filed the notice of appeal on 10th November, 2017. ***Third,*** upon filing Misc. Civil Application No. 723 of 2017, it was found that the supporting affidavit was defective. Hence the application was struck out on 10th October, 2018. In that application it was further noted that the remaining part of the affidavit did not suffice to take the matter on merits. **Fourth**, the applicant wrote a letter dated 10th October, 2018 requesting for certified copies of the ruling and drawn order. ***Fifth,*** this application was filed on 6th December, 2018. ***Sixth***, there is no dispute that from 10th October, 2018 when Misc. Civil Application No. 723 of 2017 was struck out to 6th December, 2018 when this application was filed is about 55 days.

The question before the court is whether the applicant acted diligently in making follow-up of its case.

> *The court of appeal that. Upon receipt of the copy of the ruling, the applicant filed this application.*

The applicant did even not tell us as to when exactly it received the copies of ruling and drawn order. Though it is true that the applicant stated that the application is supported with the affidavit of Rosan Mbambo together with other grounds and arguments to be advanced at the hearing, in my view, the time of receipt of the requested copies must be stated in the affidavit as it goes to the root of the case in application for extension. It cannot merely be advanced by an advocate at the hearing stage. It is the finding of this court that the applicant did not account for the delay. Worse, there is nothing in the supporting affidavit to reveal that there was a delay by the court in issuing the requested copies of ruling and drawn order. Paragraph 16 of the supporting affidavit of Rosan Mbambo merely states:

> *That the applicant wrote a letter requesting for copies of ruling and drawn order with intention of attaching the same in an application for extension of time to file leave to appeal to.*

Even if yes, the applicant requested for the copies, which this court do not agree, the applicant has not stated in its written submission as to when exactly they received the requested copies. This was nothing else than to evade accounting for each day of their delay.

I do further agree with the applicant in the cited case of **Transcontinental Forwarders Ltd** (*supra*), that once a party has written a letter requesting for copies of the ruling, is home and dry. It is upon the court to supply the requested copy. However, when the applicant comes to the court seeking for extension of time on the ground for delay to get the copy of the requested document, such party must state in his /her affidavit as to when exactly he was supplied with such copies. In so doing, the opposing party will have to respond through counter affidavit and not from the bar.

On the point of not being notified on the readiness of the ruling, I hold that the applicant had a sole duty of making follow up of the same.

Both parties are not in issue that the point of illegality, if it is of sufficient importance, is a good ground for extension of time to do a certain action in court as per **Lyamuya 's decision**. The case

of **Transport Equipment Limited v. D. P Valambhia** (1993) TLR 91 the Court of Appeal Tanzania held that:

> *When he point at issue is one alleging illegality of the decision being challenged, the court has a duty even if it means extending the time of or the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and records rights.*

However, it is also an established principle of law that illegality alone has never been a good cause for granting extension. In the case of **Etiennes Hotel v. National Housing Corporation, Civil Reference** No. 32 of 2005, Court of Appeal of Tanzania (unreported), it was held inter alia that:

> Plea of illegality is accepted principle as sufficient ground for extension of time but subject diligence...

In order for the court to establish whether there was a good cause or sufficient reasons, depends on whether the application for extension of time has been brought promptly as well as whether there was diligence on the part of the applicant. This was held in the case of **The International Airline of the United Arab Emirates v. Nassorror**: Civil Application No. 263 of 2016, court of appeal of Tanzania at Dar es Salaam (unreported) at page 7

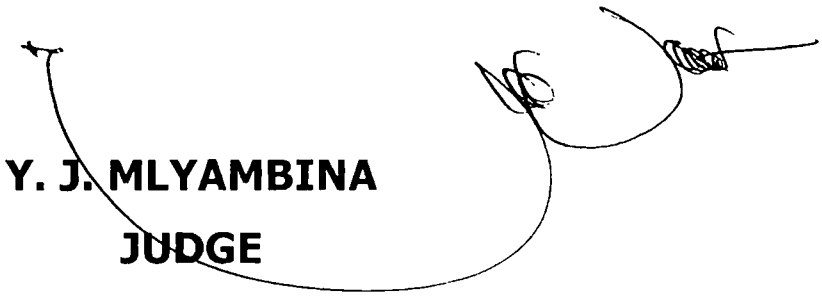
In the circumstances of the above, the instant application is bereft of merit. It is hereby dismissed with costs.

Y. J. MLYAMBINA

JUDGE

24/4/2020

Ruling delivered and dated 24th July, 2020 in the presence of learned State Attorney Neisha Shao holding brief of Counsel Victor Kikwasi for the applicant, and Neisha Shao for the respondent.



Y. J. MLYAMBINA

JUDGE

24/4/2020