

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION No. 488 of 2019

(Originating from an Arbitration Award and Misc. Civil Case No. 147 of 2004)

**KIBO HOTEL KILIMANJARO LIMITED.....APPLICANT
VERSUS**

THE TREASURY REGISTRAR.....1ST RESPONDENT

(being Legal successor to the Presidential
Parastatal Sector Reform Commission)

MOSHI HOTELS LIMITED.....2ND RESPONDENT

MOHAMED A. ISMAIL.....3RD RESPONDENT

RULING

3rd November and 15th December 2020

MASABO, J.

The Application is for extension of time. Relying on section 14 (1) of the [Cap 89 RE 2019], the applicant is seeking for an extension of time within which to file an application for filing an Arbitral award. The application is supported by an affidavit deponed by Frank Marealle, who is identified as the principal officer for the applicant. The application was sternly contested by the respondents who averred that the application is untenable as no cogent ground has been advanced as to the delay.

In brief, the background of the application is an arbitral award delivered by Mohamed Ismail, the Arbitrator, on 9th June 2004. The applicant had deponed that he did not apply to have the award registered within the

statutory period of 6 months owing to proceedings which were pending in different courts and these include, Misc. Civil Case No. 147 of 2004 which was dismissed on 19th June 2007, Land Case No. 198 of 2007, dismissed with costs on 18th June 2018; Civil Appeal No. 122 of 2016 before the High Court which was later withdrawn.

The application was sternly contested by both respondents through Counter affidavits filed 15th October 2019 (for the 3rd Respondent) and on 26th February 2020 (joint affidavit for the 1st and 2nd respondent).

Hearing proceeded in writing. The applicant represented by Mr. Seni S. Malimi and Ms. Rita Odunga Chihoma, learned counsels, narrated the background of the application and proceeded to submit that the time within which to file the application expired in 2004. They argued that this court is mandated to extend the time upon a good cause been demonstrated (**Michael Lessani Kweka v John Elifaye** [1997] TLR 152). Further, it was submitted that, in determining whether a good cause has been demonstrated, the court is mandated to consider, among other things, surrounding circumstances, the weight and implication of the issue. They further cited **Mobrama Gold Corporation v Minister for Energy & Minerals and East Africa Gold Mines Limited** as an intervenor [1998] TLR 425 where it was held that the extension of time need not be denied where such denial will stifle the applicant's case.

Further, they submitted that the applicant has demonstrated a good cause warranting the extension of time. Placing reliance on the decision of the Court of Appeal in **Aman Girls Home v Isack Charles Kanela**, Civil Appeal No. 325/08 of 2019 (unreported) they argued although the law requires that the applicant should account for the delay, the duration spent in court diligently pursuing a legal remedy is excusable. Moreover, they submitted that although the responsibility of filing an arbitral award is that of the arbitrator (section 12 (2) of the Arbitration Act Cap 15 RE 2002[now repealed]), the arbitrator is at liberty to file the award or instruct someone else to file the award. That, since the applicant was a party to the award and has moved this court, he qualifies for the extension sought.

On their part, the 1st and 2nd Respondent represented by Mr. Benson Hoseah, learned State Attorney, submitted that, upon the award being published by the 3rd Respondent on 9th June 2004, the applicant filed Misc. Cause No. 147 of 2004 seeking to set aside the award which by then, had not been filed and as the result the application was struck out. The applicant being aggrieved, appealed on 2016 through Civil Appeal No. 122 of 2016, which he later caused to be withdrawn on 2nd September 2019. Mr. Hoseah argued further that, what was withdrawn is a notice of appeal hence reliance should not be placed on the authorities cited as the applicant herein was busy in court for nothing. He submitted further that the appeal was not a bar for the applicant to seek extension of time to have the award registered.

Mr. Hosea further cited the provision of section 12(2) of the Arbitration Act and argued that the responsibility to file the award is that of the Arbitrator, not the parties. The Arbitrator files the application upon request by the party and since no reason has been advanced as to why the applicant did not move the 3rd Respondent to file the award, the application cannot issue.

In rejoinder the counsels for the applicant submitted that, the appeal process before Court of Appeal is technically terminated by the withdrawal of the notice as no appeal before the Court can be sustained after the withdrawal of notice for appeal. He argued further that, the provision of section 11(2) of the Arbitration Act need not be strictly interpreted [**Tanzania Cotton Marketing Board v Cogecot Cotton Company SA** [1997] 63 CA

I have thoroughly read and considered the affidavit, counter affidavit and the submission made by both parties. Needless to say, expeditiousness and finality of litigations obligates litigants to strictly obey and adhere to the rules of procedure prescribing time within which to take a certain legal action (**Ratnam v. Cumarasamy** (1964) 3 All ER 933). Where a litigant is hindered by a valid cause to comply with such timelines, the court may exercise its discretion to extend the time upon a good cause being demonstrated (See **Benedict Mumello v Bank of Tanzania**, Civil Appeal No. 12 of 2012, Court of Appeal of Tanzania (unreported))

In the instant case, extension is sought under section 14 (1) of the Law of Limitation Act, Cap 89 RE 2019, to enable the applicant to file an arbitral

award published in on 9th June 2004. According to item 18 of the part III of the Schedule to the Law of Limitation Act, Cap 89 RE 2019, filing of an arbitral award is done within 6 months after the publication of the respective award. It therefore follows that, since in the instant case the arbitral award was made on 9th June 2004 and whereas this application was filed on 13th September 2019, the delay is for about 15 years. This is exorbitantly inordinate and not excusable in the absence of a good cause.

In addition to consideration of the duration of delay, factors such as the ability of the applicant to account for all the period of delay, whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in prosecution of the action; and existence of a point of law or sufficient importance such as the illegality of the decision sought to be challenged are relevant in determining if a good cause has been established (see **Zahara Kavindi and Another v Juma Swalehe & Others**, Civil Application NO. 4/5 OF 2017 (CAT at Mwanza)(unreported)).

The applicant has assigned only a sole ground for his delay, to wit he was busy pursuing remedy in this court and the Court of Appeal. He has correctly argued that, the time spent in pursuit of legal remedy in court is excusable (**Aman Girls Home v Isack Charles Kanela** (supra). The argument represents the position of law (see **Fortunatus Masha v. William Shija and Another** [1997] TLR 154). According to these authorities, the period spent by the applicant in pursuit of a legal remedy in court has been deemed

as technical delay hence excusable. Literally, this would impliedly entitle the applicant for excusal.

However, as the law requires that the circumstances of each case be considered, I am taken aback by the *sui generis* nature of the award sought to be filed. I will pose for moment to take stock of the law regulating filing of arbitral awards. According to section 17 of the Arbitration Act, an arbitral award becomes enforceable as a decree upon being filed in court. The mode and procedure of filing the award is prescribed under the section 12(2), which states as follows:

(2) The arbitrators or umpire shall, **at the request** of any party to the submission or any person claiming under him and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, to be filed in the court; and notice of the filing shall be given to the parties by the arbitrators or umpire

Placing reliance on this provision, Mr. Hosea has argued that, first, the application for extension of time was filed by an incompetent party (this point was raised and argued as preliminary objection but it was reserved to be determined in the course of determination of merit) and second, since the law requires parties to move the arbitrator to file the award, a good cause

should be demonstrated as to what prevented the applicant from moving the arbitrator to perform his duty.

The Arbitrator who is impleaded as 3rd Respondent has deponed in counter affidavit that the delay is inordinate and no cogent explanation has been given regarding the said delay as the pending proceedings in the High Court and the Court of Appeal had nothing to do with filing of award. On his party, the applicant has sternly argued through their counsels that, section 12(2) should not be strictly interpreted and have placed reliance on **Tanzania Cotton Marketing Board v Cogecot Cotton Company SA** (supra).

With great respect to the counsels for the applicant, while I entirely agree with them that the filing of the award need not mandatorily be done by the arbitrator himself to the exclusion of any other person (**Tanzania Cotton Marketing Board v Cogecot Cotton Company SA** [1997] TLR 165 (CA)), I can only partially relate to their submission to the extent that, the application herein is not incompetent for having been preferred by a person other than the arbitrator. The part which I am unable to agree is the reasons which prevented the applicant from filing the award on time. Throughout the affidavit and the submission, we have not been told if at any material time the applicant moved the arbitrator to register the award. In my humble view, the applicant cannot escape the label of negligence as the procedure under the Arbitration Act is very explicit as to the steps to be taken by the parties.

Unlike in ordinary proceedings where a wrong action taken by the party, for instance, moving the court through a wrong provision of law naturally bars the applicant from filing a similar application while the defective application is still pending, in the instant case, as deponed by the arbitrator, the pendency of the application or the appeal did not automatically prevent the applicant from moving the arbitrator to do what he is mandated by the law. As it could be seen under the above provision, the wording of section 12(2) is clear and precise as to what needs to be done by the parties to have the award registered. In total disregard of this provision, the applicant never moved the arbitrator to perform his legal duty.

The absence of explanation on whether the applicant moved the arbitrator to register the award, and if not, the factors which prevented her to move the arbitrator to exercise his duty, have consequently denied me the necessary materials upon which to exercise the discretion vested in me by section 14(1) of Cap, 89. As held in in *Ratnam v. Cumarasamy* (1964) 3 All ER 933: -

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step-in procedure requires to be taken, **there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules**

which is to provide a time-table for the conduct of litigation.

In my humble view, granting the prayers will not only be tantamount to rewarding the applicant for her dilatory acts.

This being said, I dismiss the application with costs.

DATED at DAR ES SALAAM this 15th day of September 2020



A handwritten signature in blue ink, appearing to be "J.L. MASABO".

J.L. MASABO
JUDGE