**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 560 OF 2019**

*[Arising from Misc. Civil Application No.337 of 2019]*

**M/S VEHICLE AND EQUIPMENT LEASING**

**(T) LIMITED.....APPLICANT**

**AND**

**SERENGETI BREWERIES LIMITED.....RESPONDENT**

**RULING**

**Date of last Order:** *13/04/2021*
**Date of Ruling:** *21/05/2021*

**MLYAMBINA, J.**

The Applicant has applied for extension of time within which it can file on application to challenge the Arbitral Final Award dated 20th February, 2019 and filed in this Court on 1st day of July, 2019. The application was made under *Section 14 (1) of the Law of Limitation Act Cap 89 (R.E. 2002).* The application has been taken at the instance of M/S Law Associates, Advocates and it is supported with the affidavit of Rosan Mbwambo, Advocate.

The reasons adduced in support of this application are contained in paragraph 17-20 of the affidavit and submission in chief of the Applicant. To be precise, I will here by quote the given reasons:

17. That apparently, the AOD No.21 did not indicate the case number and he Court Registry, when the Arbitrator was contacted, he responded through an email dated 9th July, 2019 that the filing was done on 1st July, 2019in this Court. He also attached he Court exchequer receipt. Yet, the case number was not indicated in the receipt.

18. That I state that the Arbitrator notified the parties of the filing of the final award on 9th July, 2019. Efforts to secure the case number did not succeed until when the notice to appear in this Court for mention was received. This summons was received in our offices on 19th August, 2019 from mention scheduled on 11th September, 2019. The sixty day period within which to file the application to challenge the final award was to expire on 9th September, 2019, two days before the date of mention.

19. That the Applicant's lawyers drafted the application to challenge the final award for filing by 9th September, 2019. Unfortunately, when I informed the Applicant that the papers are ready for signing, I it transpired that the Applicant company principal officers able to

*sing the papers were outside the country for official duties and could not make it for signing before then.*

20. *That the Applicant asked me to send the papers by courier for signing abroad. I advised the Applicant that since there is an affidavit in support of the application in would be difficult to get the affidavit attested outside the country timely for filing by 9th September, 2019.*

The Applicant was of submission that the Award which is sought to be challenged is tainted with serious illegalities and irregularities which constitutes sufficient reasons for extension. On that note, the Applicant cited the case of the principle **Secretary, Ministry of Defence and National Services v. Duramp clambia** (1992) TLR 387 in which the Court of Appeal held:

> *If the point of law at issue is the illegality of the decision being challenged that constitutes sufficient reasons.*

According to the Applicant, the irregularities and illegalities in the Final Award complained of include:

1. That the Arbitrator did not involve the parties in the appoint of the legal expert /advisor.

2. That the Arbitrator did not follow the required procedures in the appointment of the expert/legal advisor.
3. In the alternative that the Arbitrator did not involve the said legal advisor /expert in the determination of the issue to which she was appointed.
4. That the Arbitrator did not seek and obtain the expert's opinion for consideration in the determination of the matter.
5. That the Arbitrator did not share any opinion of the expert whom the parties before determining of the matter as required by law.
6. That the parties were not heard on the opinion of the expert/legal advisor before the matter was determined.
7. The Arbitrator did not consider and determine the points raised and submitted by the Applicant that the preliminary objections were not pure points of law to be determined at a preliminary stage as he did.
8. The Arbitrator did not consider and determine the point that in the issue of res judicata all ingredients that make the matter *res-judicate* must exist.

9. The Arbitrator did not consider and determine existence or otherwise of all the ingredients of res-judicata in the matter before him as raised and submitted by the Applicant.

10. The Arbitrator did not consider and determine the obligation of concentration principle, the future conducts principle as well as other ingredients of res judicata as submitted by the Applicant.

11. The Arbitrator grossly overlooked applicability of the principle of *res-judicata* in arbitration vis-s-vis in the Courts of law.

12. That the Arbitrator did not consider and determine whether or not the subject matter the claims and the issues decided in the previous arbitration are completely different from the subject matter or claims and or issues in the subsequent arbitration as submitted by the Applicant.

13. That it is not clear from the Final Award which specific principles /ingredients that Arbitrator considered and determined that they existed and which rendered he matter *res-judicata*; and

14. The Arbitrator overlooked the principles of law on *res-judicata* and thereby did not determine the matter before him according to the applicable law.

It was the Applicant's written submission that contemplating on the narrated facts in the supporting affidavit, it is apparent the delay of filing the application to challenge the Award were caused by unforeseeable reasons and were beyond the control of the Applicant. Further, the Applicant was not negligent or inactive on the part of both the Applicant and or its lawyers. The Applicant cited the case of **Alliance Insurance Corporation v. Arusha Art Limited,** Civil Application No. 512 of 2016, and Court of Appeal of Tanzania at Arusha (unreported).

On further principles governing extension of time, the Applicant cited the case of **Lyamuya Construction Company Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) in which it was held:

> *On 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 inordinate; (c) the Applicant must show diligence, and*

*not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and (d) if the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.*

At the outset, I have noted both parties are not in dispute with the principles governing grant of extension of time for a certain action in Court. Apart from the cited cases by the Applicant, there are other dozens of cases on the same principle. For instance, in **The International Airline of the United Arab Emirates v. Nasoro,** Civil Application No. 263 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 7 the Court was of position that;

*in order for the Court to establish whether there was a good cause or sufficient reason, 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.*

Also, in the case **of Tanzania Coffee Board v. Rombo Millers Ltd,** Civil Application No. 13 of 2015 (unreported) the Court of Appeal of Tanzania held that:

> *Extension of time should be considered on two grounds; that every day must be accounted for which the Applicant did; and the reason for the delay must be sufficient....*

The principle that an Applicant must account for each day of delay has been held so in various cases including the case of **Kombe Charles Richard Kombe v. Kinondoni Municipal Council,** Civil Application No. 379/01 of 2018, Court of Appeal of Tanzania, (unreported) and **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda,** Civil Application No. 41/08 of 2018, Court of Appeal of Tanzania, Mwanza (unreported).

In this case, as replied by the Respondent, the Applicant failed to establish good reasons. *One*, there emails of the Applicant's Officer one Pauline Wambui complaining its Lawyer Rosan Mbambo regarding the delay in sending the draft application for review and the lawyer kept promising it will be done. The exchange run from 23rd August, 2019 to 5th September, 2019. In an email dated 5th September, 2019, Rosan Mbambo says:

*I underestimated the work. The draft is finally done and ready for your inputs and signature.*

It is acknowledged by the Applicant and its lawyers that they got the case number on 19th August, 2019. However, they did nothing until 9th September, 2019 expired. On that note, the Applicant failed to account for each day of delay from 19th August, 2019 to 9th September, 2019. It indeed, demonstrates that the Applicant was not diligent in following up with the matter.

On the point that the Applicant's Officer travelled abroad, I find there are no supporting document and affidavit of the said Officer to prove the same. In the case of **NBC Ltd v. Superdoll Trailer Manufacture Co. Ltd,** Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 13 of 2002 (unreported) the Court held:

*Affidavit which mention another person is hearsay unless that person swears as well.*

Even if it is true that the said Officer was abroad, the supporting affidavit has not stated in which Country. If it was within Commonwealth Countries or not. In terms of *Section 11 (1) of the Notary Public and Commissioner for Oaths Act Cap 12 (R.E. 2019),* the powers to administer oaths on documents are not only vested

to the Advocates or Magistrates/Judges within United Republic of Tanzania. They are also vested to Foreign Services Officers present in Commonwealth Countries.

Indeed, in terms of the law, an oath can be made before a Foreign Service Officer having authority under any written law to administer oaths outside the Commonwealth Countries. In the case of **Dodrej Consumer Products Ltd v. HB World Wide Ltd** Commercial Appeal No. 2 of 2019 (unreported) my brethren Magoiga, J at page 21 stated:

> *...there are three kind of declarations that are recognizable under our laws; first, statutory declarations made in Tanzania under the oaths and statutory declarations act. Second, declaration made in any other commonwealth country before justice of peace, notary public or any other person having authority under any law in force to take or receive declaration, and; three, declarations made in any other country before a foreign service officer having authority under any written law to administer oaths or any person specified by the Minister responsible for Legal Affairs by an order in the gazette.*

The Applicant's evidence exemplary reveals negligence or reckless on its part. He stated that he made oral application on 11th September, 2019 followed by several adjournments. He also claims that there were apparently unforeseeable reasons while preparing the application beyond his control. I do understand that *Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 (R.E. 2019)* allows formal and informal application, it is however, highly useful for the application on additional evidence to be brought formally. In so doing, the Court will consider affidavit evidences than mere submission from the bar. In the case of **Independent Power Tanzania Limited v. VIP Engineering and Marketing Limited,** Civil Appeal No. 54 of 2004, Court of Appeal of Tanzania at Dar es Salaam (unreported), Mroso J. (as he then was) made the following observation:

> *We agree with the appellant that the prerequisites for entertaining an oral application under the proviso to rule 2 of order XLIII of the Civil Procedure Code, 1966 had not been met. the Court had to consider if a fit situation existed before it could decide to entertain the oral application...had the high Court applied its judicial mind to the bare allegation, it would have found that no proper circumstances were put before it to give*

*justification for it to decide that it was fit to entertain the oral application... we also agree that the normal procedure for making an application in the High Court and in the subordinates Courts is by way of a chamber application supported by affidavit and that oral applications have to be justified before they can be entertained...*

One would have expected on serious application for extension of time, the Applicant should have been serious and made formal application immediately after realizing he was late.

As regards the point of illegality, I agree with the Applicant that it is a good ground for extension. However, it must be apparent on the face of records. In the instant application the alleged *res judicate* point requires the Court to go into and dig the dispute. It is not an error apparent on the face of record. It was a legal point determined by the Arbitrator having heard both parties. It is not an illegality committed by the Arbitrator mistakenly to qualify as an error apparent from the face of records.

In the premises, the application is dismissed with costs for lack of sufficient reasons. It is so ordered.

**Y. J. MLYAMBINA**

**JUDGE**

**21/05/2021**

Ruling delivered and dated 21st May, 2021 in the presence of Counsel Hilary Hamza for the Applicant and Casto Lufungulo for the Respondent.

**Y. J. MLYAMBINA**

**JUDGE**

**21/05/2021**