THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT TANZANIA
AT MBEYA
MISC. CIVIL APPLICATION NO. 39 OF 2019

THE TANZANIA NATIONAL ROADS AGENCY.....APPLICANT

VERSUS

TAFISA GENERAL ENTERPRISES LIMITED.....RESPONDENT

RULING

Dated: 14th September & 11th October, 2021

KARAYEMAHA, J

This is an application for extension of time within which to file a petition to challenge the final arbitral award dated 31/8/2017 filed on 26/9/2017 in the High Court of Tanzania Mbeya Registry by QS Modestus J. Lukonge – Sole Arbitrator.

This application, which is based on section 14 (1) of the *Law of Limitation Act*, [Cap. 89 RE 2019] was lodged on 18/11/2019. Supporting the application is the affidavit of the applicant setting out grounds on which a prayer for extension of time is based.

Brief facts of the matter are that 31/8/2017 a final arbitral award was delivered in favour of the respondent who was awarded Tshs. 150,000,000/=. The applicant deponed that on 4/12/2017 received the

notice from the Deputy Registrar of the High Court Mbeya on the existence of the final award in the Court registry. On being invited to show cause, the applicant on 6/12/2017 stated her interest to challenge the final award which she did on 19/12/2017. She, therefore, filed Misc. Civil Cause No. 4 of 2017. Sadly, the application was struck out for being incompetent on 31/10/2019 on the reason that the applicant did not attach a certified copy of the final award hence contravened Rule 8 of the *Arbitration Rules* GN. No. 427 of 1957 (the Rules). Following that Court's order the applicant filed the present application seeking for an order of extension of time within which to file the petition to challenge the final arbitral award out of time because she was aware of being time barred.

The application was sternly contested by the respondent through the counter affidavit deponed by Daniel Lawrence Muya, the respondent's legal counsel authorized in that effect.

Disposal of this application took the form of written submissions, preferred on a consensual basis by parties and consistent with the schedule drawn by this Court.

The applicant is represented by Mr. Usaje Mwambene, learned State Attorney, who submitted on three aspects. He commenced by praying to adopt his affidavit in support of his chamber summons.

On aspect one, Mr. Mwambene contended that they spotted some errors and irregularities on the face of the record in the original arbitration proceedings between parties because the award was improperly procured and in some part the Arbitrator misconducted himself. He stated that where the issue of illegality is raised, by itself constitutes sufficient reasons for extending time. He cited to that effect a plethora of cases including the Court of Appeal decision in cases of ***The Principal Secretary Ministry of Defence and National Service v Devran Valambia*** [1999] TLR 387 and ***Petrobert D. Ishengoma v Kahama Mining Corporation LTD (Barrick Tanzania Bulyankulu), Minister of Labour, Employment and Youth Development & The Attorney General***, Civil Application No. 2 of 2013, CAT – Tabora (Unreported) at page 14.

He submitted on the second aspect that the delay was not actual but a technical delay because the first petition was filed in time and struck out on technical reasons. He attributed the delay to the factors which he said were developed by the court itself and not to the applicant's laziness. Believing that the delay fell in the category of technical delay he stated that it should be granted. He buttressed his argument with cases of ***Fortunatus Masha v William Shija and another*** [1997] TLR 154 and ***National Bank of Commerce LTD v***

Humoud Ally Salum, Civil Application No. 268 of 2017 CAT – DSM (unreported).

Mr. Mwambene argued in the third aspect that the applicant has strong and sufficient reasons to justify grant of the prayer for enlargement of time. Agreeing that extension of time is granted at the discretion of the Court, Mr. Mwambene is also aware that the discretion must be exercised judiciously as per the case of ***Mbogo v Shah*** [1968] EA. Contented that the applicant has clear reasons for the delay and a strong arguable case, the learned State Attorney sought this court to exercise its discretion judiciously.

Mr. Daniel Muya, learned Counsel, who represented the respondent, commenced his submission by stating at the wake that a 13 paragraphed applicant's affidavit did not demonstrate good cause/sufficient cause to warrant extension of time. He observed that the issue of irregularities on the part of the arbitral award did not feature in the affidavit, instead was raised in the submission only. He held the view that the applicant offended the cherished principle in pleading that proceedings in civil suit and the decision thereof must result from what has been pleaded and hence goes to the parlance that parties are bound by their pleadings. He relied on cases of ***Nkulabo v Kibirige*** [1973] EA 1Q2 and ***Filson Mushi v Jitegemee SACCOS***,

Civil reference No. 6 of 2017 HC (unreported), ***YARA Tanzania Limited v Charles Aloyce Msemwa and 2 others,*** Commercial Case No. 5 of 2013 HC (Commercial Division – DSM) and ***James Funke Ngwagilo v Attorney General*** [2004] TLR 161 where the principle that parties are bound by their pleadings which serve as a notice to the adverse party was stated with clarity. On the basis of the legal position set by Courts of record, Mr. Muya argued that the Court should disregard the applicant's argument premised on irregularities.

Responding on the aspect of technical delay, Mr. Mulya's submission is, mainly, to the effect that since the applicant has not ventured to produce any facts deponed in the affidavit that support the assertion that the delay was due to technical ground and not actual ground coupled with the contention of illegality as per the case ***National Bank Commerce Ltd v Humoud Ally Salam*** (supra), the application was not fit to be granted.

On the third aspect, his arguments are to the effect that the applicant has no sufficient cause that can mandate this court enlarge time. He stated that since the applicant failed to show good cause or indicate the spotted illegalities and the delay having stemmed from ignorance of procedure, the application is unmaintainable for lacking sufficient cause.

Rejoining, Mr. Mwambene, briefly put his retaliation to the effect that the issue of illegality was raised under paragraph 5 of the affidavit hence has not introduced any new facts and violated any principle guiding pleadings. He also stated that since the delay was a technical one this case is fit for grant of extension of time.

I have considered both parties' rival submissions and I taken note of various authorities. I do appreciate each well party's researched and articulated submission as far as this matter is concerned. I must state at the wake that having gone through their respective submissions, the three raised aspects have merits but I wish to concentrate on the discussion of time limit to file the petition to challenge the final arbitral award and then the aspect of technical delay.

For the purpose of regularizing parties understanding, I hasten to observe here that a party aggrieved by an arbitral award has no avenue to challenge the same through a court of law until and unless the award is filed in court for purposes of registration as a decree of the court. See ***Tanzania Cotton Marketing Board v Cogecot Cotton SA*** [1999] TLR 165 and ***Kigoma/Ujiji Municipal Council v Nyakirang'ani Construction Linited,*** Misc. Commercial Cause No. 239 of 2015. It is noteworthy here that the law as it stands now, provides for time within which to file such an award for reinforcement and not the time for

challenging the same. See item 18 of Part III of the *Law of Limitation Act.*

As logic would tell, where parties have chosen to be bound by the decision of an arbitrator, it follows that one will automatically comply with it. However, where the other party is aggrieved and wishes to challenge the same, in my considered opinion, the available remedy is to boycott performance or compliance. In the circumstance, that other party will be compelled to seek assistance of the court by filing such award for purposes of its enforcement vide its registration and adoption as a decree of the court. Once that process is initiated, it is, then an opportunity presents itself for the aggrieved party put into motion the machinery of challenging the final arbitral award. In that accord, time for challenging the same starts to run from the day the said award is filed in court for the purpose of registration and adoption of the same as a decree of the court and such filing is brought to notice of the respondent/petitioner.

It is not disputed that the period of limitation for filing such an award procured through arbitration without court intervention of the court is six months (see paragraph 18 of part III to the *Law of Limitation Act*). I have widely and deeply read the law of *Limitation Act and Arbitration Act* and concluded that none of them provide for the

limitation period within which to institute petition to challenge the award after it has been filed in Court. I have read the submissions by parties, no reference has been made in relation to the period within which the petition or an application to challenge the final award should be filed. I have also read several High Court decisions relating to this matter in cases of ***Claus Bremer Associates Limited v The Office of Chief Court Administrator, Judiciary of Tanzania***, Misc. Commercial Application No. 50 of 2020 (Nangela, J), ***Kibo Hotel Kilimanjaro Limited v The Treasury Registrar (being legal Successor to the Presidential Parastatal Sector Reform Commission) and 2 others***, Misc. Civil Application No. 488 of 2019 (Masabo, J.) and ***MIC Tanzania Limited v Crystal Mobile Tanzania Limited,*** Misc. Commercial Application No. 166 of 2020 (B.K. Phillip, J.). It is gleaned from these decisions that, the period provided is to file a final arbitral award in the court for reinforcement which is 6 months from the date of its publication. None of them has specifically stated the time limit for filing the petition to challenge the final arbitral award. An attempt which has inspired me was made by Mwambegele J. (as he then was) in ***Kigoma/Ujiji Municipal Council*** (supra).

> *"Apparently, neither the law of Limitation nor arbitration Act provides the limitation period within which to institute the said petition or application to challenge the award after it*

has been filed. Resort in that circumstance is to be made to item 21 to part III (supra) which provides for the period of 60 days for such application whose limitation period is not provided. Apparently therefore, the said application should be brought within 60 days from the date the filing of the award was brought to notice of the petitioner."

This is no doubt a good principle from which we can draw inspiration. I take inspiration from this decision to underscore my view that a petition to challenge the final arbitral award should be under item 21 of Part III of the Schedule to the *Law of Limitation Act* which is sixty (60) days.

A glance at the affidavit that supports the application informs this court that the applicant was dully notified of the existence of the final arbitral award on 4/12/2017 which was registered to be adopted as decree of the court. In view of ***Kigoma/Ujiji Municipal Council case*** (supra), the time to challenge it started to run from that day, ie., 4/12/2017. The applicant's first attempt to challenge it was made on 19/12/2019 via Misc. Civil Application No. 4 of 2017 which was hardly 15. Obviously, it was within time. However, that application bounced on the ground that it was incompetently lodged before the court hence was struck out on 31/10/2019. On 18/11/2019 the applicant filed the current application.

A thorough review of the applicant's affidavit and submissions in support is to the effect that from 31/10/2019 the applicant has been vigilant seeking an avenue to challenge the final arbitral award. It is averred that after receiving the High Court ruling on 6/11/2019, he communicated the decision to the applicant's management on 8/11/2019. On 14/11/2019 Mr. Mwambene was directed to prepare an application for extension of time so as to file the petition to challenge the final award out of time. On 18/11/2019 the current application was filed which after four (4) days.

As hinted earlier on, there is no room for discussion over the truth that the first petition to challenge the final arbitral award was filed within 60 days but was struck out for being in contravention of rule 8 of the Rules. Under these circumstances, I share Mr. Mwambene that the delay was technical delay in the sense that the first was filed in time. See the case of ***William Shija v Fortunatus Masha*** [1997] TLR 154. Had it not been for defects which were found in the first petition, the instant application would not have been filed. However, since the applicant was dully notified of the existence of the final arbitral award on 4/12/2017 in the High Court, she was obliged to file the petition to challenge the same on 4/2/2018. By that date the applicant was genuinely pursuing Misc. Civil Application No. 4 of 2017 until when it

was struck out on 19/12/2019 for being incompetent. It goes without saying, therefore, that she was already time barred technically because, as alluded to above, applicant was to file her petition by 14/2/2018. The settled position of law is that delays that arise as a result of pursuit, by the applicants, of a matter which turns out to be defective or untenable are excusable. This principle was accentuated in ***Fortunatus Masha vs. William Shija*** [1997] TLR 154, and was fortified in the recent decisions of the CAT in ***Tanzania Fish Processors Limited vs. Eusto K. Ntagalinda,*** Civil Appeal No. 41/08 of 2018 (unreported) and ***Amani Girls Home vs. Isack Charles Kanela,*** CAT – Civil Application No. 325/08 of 2019 (Mwanza – unreported) in which diligent pursuit of the appeal through unsuccessful applications was deemed to be sufficient to warrant extension of time. Incepting this position of law, Hon. Ismail, J. stated in the case of ***Dina Anyango vs. Babuu Garende Samson,*** Misc. Civil Application No. 96 of 2019 (HC – Mwanza) that:

> *They are acceptable delays, and are preferred to,* ***in legal parlance, as technical delays, and they constitute a sufficient cause for enlargement of time within which to institute an appeal.*** [Emphasis supplied]

See also ***Fortunatus Masha*** (supra) and ***National Bank of Commerce LTD*** (supra).

In the instant case, applicants genuinely pursued Misc. Civil Application No. 4 of 2017 till 31/10/20109. The successful objection resulted to its being struck out. The applicant is now benefiting from the underlined principle of technical delay. I agree with Mr. Mwamboneke that the technical delay in the current application forms the bases of a reasonable and sufficient reason.

In the upshot, I am inclined to hold that the applicant has passed the legal test set for extension of time basing on the technical ground.

In view of the above discussion, this Court settles for an order that application for extension of time within which to file a petition to challenge a final arbitral award dated 31/08/2017 is granted.

Costs to be in the due course.

It is so ruled.

DATED at **MBEYA** this 11th day of October, 2021

J. M. KARAYEMAHA
JUDGE