THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

MISC. CIVIL APPLICATION NO. 27 OF 2023

(Arising from final Arbitration Award of Qs Hyacintha Benedict Makileo dated 16th October, 2022)

SOKOINE UNIVERSITY OF AGRICULTURE..... APPLICANT

VERSUS

RAMANI CONSULTANTS LIMITED .....RESPONDENT

RULING

Hearing date on: 11/8/2023

Ruling date on: 14/8/2023

NGWEMBE, J:

This application was instituted by Sokoine University of Agriculture seeking extension of time upon which, she may challenge the final arbitral award dated 16th October, 2022. In determining this application, I have decided to commence by stating some guiding principles in respect of the application of this nature; thereafter I will revert back to the arguments advanced by learned counsels, finally I will relate them with applicable laws, precedents and safely arrive to the conclusion.

Since time immemorial with countless precedents, extension of time is purely within the domain of court's discretionary powers. As such the duty of the applicant is to disclose sufficient/satisfactory reasons capable of moving the court to exercise its discretionary powers. According to Civil Procedure Code, any application in a court of law must be in a form of a chamber summons supported by an affidavit. In essence, an affidavit is evidence in a form of writing. The affidavit always should comprise only evidence or facts constituting reasons for delay. Affidavit should not comprise law, arguments or prayers. If the affidavit has stated law, arguments and prayers, that affidavit cannot support the chamber summons, thus that chamber summons will have no affidavit in support. Those are some fundamental principles applicable in every application in a court of law, unless the law provides otherwise like Labour Laws.

The above understanding is in line with the reasoning of judges of Privy Council in the case of **Ratnam Cumarasamy [1965] 1 WLR 8 at page 12** where they came up with a rule of law applicable even in our jurisdiction through the Law of Limitation Act and other laws providing time limitations. Those judges observed as follows: -

> *"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 any court of law, when extension of time is asked by a party, the party asking for, must convince the consciousness of the trial court with reasonable cause as to why the court should waive the application of the law of time limitation and enlarge it for the applicant to actualize his/her intention outside the time allocated for it. In fact, to my understanding no court can exercise a discretionary power without being satisfied on material facts justifying such delay even if is a delay of one day.

Therefore, the uncompromised duty of the applicant is to lay before the trial court, sufficient reason (s) for such delay. In this application, the applicant has moved this house of justice by section 14 (1) of the Law of Limitation Act (Cap 89 R.E. 2019) which section is quoted hereunder: -

> *"Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of time limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application"*

The applicant has employed this section to seek extension of time within which to petition before the court of law to challenge the final arbitral award pronounced by Qs. Hyacintha Benedict Makileo a sole arbitrator dated 16 October, 2022. The chamber summons was supported by a detailed affidavit narrating the whole journey of the dispute to the date of final arbitral award. However, the application met with strong

resistance from the respondent. First the respondent raised two grounds of preliminary objections, however, on the hearing date of this application, which both parties were represented by learned counsels, the preliminary objections were withdrawn and both agreed to proceed with the main application. Second, the respondent equally resisted the applicant by filing a detailed counter affidavit responding to each and every fact raised by the applicant. For clarity the representation on the hearing date, the applicant was represented by learned State Attorneys namely, Baraka Nyambita assisted by Rehema Mtulia and Lunyamadzo Gillar, while the respondent was represented by the learned advocate Jerry Msamanga.

Arguing on the application, the learned State Attorney insisted that the petition to challenge the arbitral award is provided for under section 74 & 75 of the Arbitration Act Cap 15 R.E. 2020 read together with section 77 of the Act. Thus, the time provided for in those sections is 28 days from the date of final arbitral award. Further argued that upon having extension of time, they intend to challenge both substantive and procedural law applied by the arbitrator in arriving to the award. Therefore, the time of challenging that procedure adopted by the arbitrator is not provided for under the Act, hence decided to take refuge in the Law of Limitation Act. The Law of limitation Act provide time limitation of 60 days for any matter whose time limitation is not specifically provided for.

Admitted that the sixty (60) days, lapsed long time ago, but the reasons for such long delay are provided for under paragraphs 30 to 38 of the affidavit in support to the chamber summons. Moreover, in paragraph 39 the applicant advanced illegalities apparent on the final arbitral award

which need to be corrected by this court. Supported his argument by citing the case of **Attorney General Vs. Emmanuel Marangakisi & 3 others, Civil Application No. 138 of 2019; and Attorney General Vs. Mkongo Building and Civil Works Contractors Ltd & another, civil application No. 266/16 of 2019.** Rested by a prayer that the orders sought in the chamber summons be granted.

In turn, the learned advocate for the respondent, forcefully resisted the prayers for extension of time by submitting that, the application for extension of time is premature same should be dismissed with costs. Justified that the respondent, who is a holder of the arbitral award has not yet lodged an application in this court to enforce that award. As such, the applicant should wait until the respondent has lodged an application for enforcement of the award, then may institute an application of this nature. Cited section 68 of the Arbitration Act. Added that the application by the respondent will be in a form of an application for execution of the award. In the absence of such application, the current application is premature for no one may apply for stay of execution while the execution itself is not in court.

In alternative, the learned advocate resisted the application for extension of time due to failure of the applicant to advance justifiable reasons for such long delay, that is, from 16th October, 2022 to 10th May, 2023 when this application was filed in this court.

Submitted further that, what the applicant has submitted in this court is a demonstration of negligence and inaction which cannot be a sufficient reason for extension of time.

On illegality, the learned advocate for respondent briefly stated that, the award of the arbitrator had no element of illegality whatsoever. Thus, rested by a prayer that the application be awarded with a dismissal with costs.

In brief rejoinder the learned State Attorney rejoined that, the cited law by the respondent is a dead law and inapplicable. That the correct provision of law is sections 74 & 75 of the Act. Further, added that the mode of payment of fees was on time base not lumpsum. Equally rejoined on the illegality as a good cause for extension of time.

Having briefly recapped the arguments advanced by the learned counsels, I think the task ahead of this court is to decide if at all there is sufficient reason to invoke its discretionary powers to extend time. Some of the detailed arguments advanced and argued by both parties will be reserved for the second stage if extension of time is granted.

I have taken pain to read every paragraph of the affidavit and counter affidavit together with all annextures to satisfy if there is any satisfactory reason justifying consideration of this application. Notably, paragraph 30 of the affidavit clearly described, both parties became aware of the final arbitration award, through a letter from National Construction Council dated 17th October, 2022. However, collection of same award was subject to payment of the required fees. Those fees were not specific to each party, thus necessitated another marathon of demanding break down of

those fees to each one so that they may access copies of final arbitral award. The cause of delay was detailed in paragraphs 30 to 38 of the affidavit.

In similar vein, the respondent briefly took note on those paragraphs by adding that parties were aware of the scale of fees.

To determine this issue, I think the straightforward question is whether the applicant after being aware of what was required before collecting copies of award was negligent and inaction? To answer this question, I need not to invent the wheel, rather there are countless precedents in similar vein, that the applicant must demonstrate active follow up not negligence and sloppiness. Above all, the best reason, the applicant may convince any court of law is to prove that the delay was not caused by her inaction. In other words, the applicant is not the source of delay. This ground was decided many decades ago in the case of **Shant Vs. Shi Ndocha and others [1973] E.A 207,** where the court held: -

> *"The application for extension of time is concerned with showing sufficient reasons why he should be given more time and* ***the most persuasive reason that he can show the delay has not been caused or contributed by dilatory conduct on his part".***

Throughout our laws, the term 'good cause' constituting delay has not been defined. With a help of **Black's Law Dictionary** (8th Edition) defines *good cause* to mean *"legally sufficient reason"* meaning the applicant, has uncompromised duty to disclose good cause or sufficient reason for such delay, even if, it is a single day, such delay must be counted for. This was

likewise was decided in the case of **Tanga Cement Co. Ltd Vs. Jumanne D. Massanga and Amos A. Mwalwanda, Civil Application No. 6 of 2001** where Nsekela J.A, held:-

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant"*

In another similar pronouncement was made in the case of **Shah Hemraj Bharmal and Brothers Vs. Santash Kumari W/o J.N Bhola [1961] E.A 679 at page 685** where the court held: -

> *"The matter is one of discretion and we do not wish to lay down an invariable rule, but rules are made to be observed and where there has apparently been excessive delay, the court requires to be satisfied that there is an adequate excuse for the delay or that the interests of justice are such as to require the indulgence of the court upon such terms as the court considers just"*

Another important consideration is on length of delay, whoever delays for many days or months or years, the reason for such long delay must be strong capable of convincing the conscience of the trial magistrate or judge to exercise his discretionary powers to extend time. This point is born out of the fact that a person cannot claim ignorance of his own rights. More so, whoever sleeps on his own rights, will be allowed to continue sleeping forever.

Equally important consideration in application for extension of time, is chances of success of the intended appeal/petition of appeal or revision and the degree of prejudice if not granted. This is not as well new, rather was considered in the case of **Henry Muyaga Vs. TTCL, application No. 8 of 2011** where the Court of Appeal held: -

> *"The courts may take into consideration, such factors as, the length of delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice if the application is not granted"*

The question is whether the applicant has disclosed sufficient reason capable of convincing this court to grant extension of time? I think, the applicant has enough reasons, so to speak, that the delay was not caused by dilatory conduct of the applicant. Several letters were written requesting for explanation to assist the applicant to pay the required fees so that the final arbitral award may be released to the applicant. This ground alone may suffice. However, I am called upon to consider yet another important issue related to illegality of both procedural and substantive decision arrived by the arbitrator.

Paragraph 39 of the applicant's affidavit itemized five issues baptized as illegalities. Passing through them, I think they trespass to the validity of the award itself. At this juncture, I need not to determine if they carry any weight or otherwise, but suffice to note that, they are, on the face of it, legal issues. Even without referring to any precedent, yet illegality is a good cause for extension of time. Few precedents decided by the court of

Appeal in the issue of illegality includes the cases of **Principal Secretary, Ministry of Defence & National Service Vs. Devram Valambhia [1992] T.L.R. 185; VIP Engineering and Marketing Ltd & 3 others Vs. Citibank Tanzania Ltd, Consolidated reference Nos. 6, 7 & 8 of 2006; and Tanzania Breweries Ltd Vs. Herman Bildad Minja, Civil appalication No. 11/18 of 2019.** All those cases, arrived into concurrent conclusion that: -

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

I think, without going into details, this court has a duty to extend time with a view to allow the disputants to argue before a superior court on those illegalities of the award. Deciding otherwise, may mean maintaining those illegalities for future reference without being corrected.

While I am approaching to the conclusion, I am attracted to highlight that, where there is a legal issue worth drawing an attention to the superior court, such right should be exercised even by the cost of extending time. Article 13 (6) (a) of the Constitution of United Republic of Tanzania is quoted in its original language that: -

> *"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia* ***haki ya kukata rufaa au kupata nafuu***

nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika" (Emphasis is mine).

In brief the article provides right to be heard, and the right to appeal to the superior court to whoever aggrieved by a decision of a trial court or tribunal. However, such constitutional right is subject to compliance with other statutory requirements, such as time limitation; having a legal ground worth being heard by the superior court; and many more. Failure to comply with time limitation, unless there were strong reasons for that delay, otherwise, may vitiate that right of appeal or revision.

As I have already said, extension of time is purely under the court's discretion upon disclosure of sufficient reasons. In this application, I am satisfied that the applicant disclosed sufficient reasons for delay capable of convincing this court to grant extension of time.

The reasons advanced by the applicant in the affidavit and arguments have satisfied the consciousness of this court and accordingly I proceed to invoke my discretionary powers to grant extension of time for fifteen 15 days within which, the applicant may actualize her intention. The circumstances of this application invite this court to order that costs will follow the final verdict of the intended petition/appeal.

Order Accordingly

Dated at Morogoro in chambers this 14th August, 2023

P. J. NGWEMBE

JUDGE

14/08/2023

Court: Ruling delivered in chambers this 14th day of August, 2023 in the presence of Eliakimu Machunda, State Attorney for the applicant and Charity Mzinga, Advocate for the Respondent.

Right of appeal explained.

P. J. NGWEMBE

JUDGE

14/08/2023