IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM SUB-REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 575 OF 2023

REAL AUTHENTIC WORKS LIMITED ..... PETITIONER

VERSUS

CRDB BANK PLC ..... RESPONDENT

RULING

S.M. MAGHIMBI, J.

This Application beforehand was lodged under the provisions of Section 84 (1), (2)(a), (3) (a) and (b), (4) and (5) of the Arbitration Act, [Cap. 15, R.E. 2020], Regulation 63(1)(a) of the Arbitration (Rules of Procedure) Regulations, 2021, G. N. No. 146 of 2021 and Section 14 (1) of the Law of Limitation Act, Cap. 89, R. E. 2019. The applicant is moving the court for orders that:

1. This Honorable Court may be pleased to extend the time within which the Applicant can lodge an application to the court to challenge the proceedings, orders and Awards made by the Arbitrator that was lodged in court by the Applicant to seek legal

remedies that would assist the Applicant to access justice after a failure of compliance to the principles of natural justice in the conducts of Arbitration proceedings instituted in the Arbitration Tribunal of Dr. Wilbert B. Kapinga, the Sole Arbitrator.

2. Costs of this application be borne by the respondent

Before this court, the applicant was represented by Mr. Mohamed Tibanyendera while the respondent was represented by Mr. Gasper Nyika, learned Counsel.

Brief background is that this application is based on a long-term commercial relationship between the two parties herein whereby in the year 2017, the parties reduced their relationship into writing by executing a Framework Agreement for the Provision of General Marketing and Advertising Services ("the Framework Agreement") which commenced on the 28th July 2017. The said Framework Agreement recognized the Petitioner as a Service Provider and the Respondent as a beneficiary of the Petitioner's services with consideration to be paid by the respondent. It was a term of the agreement that all disputes arising from or in connection with the agreement shall be amicably resolved by mutual agreement of the party's failure of which, an aggrieved party shall be at liberty to institute Arbitration

proceedings. A dispute did arise between the parties and was referred to arbitration. It is the proceedings of this arbitration, particularly what is alleged to be a conduct of the arbitrator that the petitioner intends to challenge in this court. Being out of time to do so, the petitioner has lodged the current application seeking for the aforementioned orders.

The application was disposed by way of written submissions. Both parties filed their submissions accordingly, much appreciation to the learned Senior Counsels for filing their submissions accordingly. I must state at this point that notably so, in their submissions both to support and oppose the application, the parties have drifted from what would be the necessary issues to argue in an application for extension of time, which is advancing sufficient grounds for the delay to lodge this application. Instead, a substantial part of both parties' submissions is on what is to be actually tabled and determined if this application succeeds and time is so extended. Therefore, for the purpose of clarity and focus, my determination and consideration of the submission of the parties will only base on the reasons for the delay advanced by the applicant.

It is trite law that in an application for extension of time, the issue originating from arbitration proceedings not being exceptional, a party has

to advance sufficient reasons for the delay. What constitutes sufficient reasons is not by any hard and fast rules, rather, each case has to be decided in its own circumstances. Illegality has also been mentioned as another reason that can prompt a court to extend time. In this case, my duty is to consider the submissions of the parties in so far as reasons for extending time are concerned, and see whether there are grounds warranting this court to exercise its jurisdiction to extend time.

Mr. Tibanyendera submitted reasons for the delay is that after discovering that the sole arbitrator and learned counsel for the respondent were having close contact and correspondence together with advocate Maganga Kenneth Tusubira who was then entrusted to represent the petitioner before Arbitration. He also attempts to convince the court at some point in time, there was a break of communication between the petitioner and their advocate.

Mr. Tibanyendera's submissions were also that the petitioner expressed the intention to terminate the arbitral proceedings upon service of notice to terminate the arbitration proceedings vide a letter dated 16th December 2020 which was duly served to the Respondent and the sole arbitrator. The Petitioner lived under a belief that there was no steps taken

apart from the Initial Procedural Order dated 5th August 2020, and that the Arbitrator will take appropriate steps to terminate the arbitration proceedings due to the facts disclosed in the letter dated 16th December 2020. There was no communication so far made by the Arbitrator regarding the arbitration proceedings, a fact which prompted the Petitioner to seek alternative legal services from Mzige & Associates Advocates who took action by writing a letter dated 10th May, 2021 to the Respondent which is Annex RAW – 10 to the Petition. To the surprise on the part of the Petitioner, the said letter was replied to by counsel for Respondent who disclosed that the arbitration proceedings had already been terminated by the sole arbitrator. In reply, Mr. Nyika submitted that the Petitioner has failed to account for each day of delay for the application for extension of time to be granted to it. He elaborated that the Petitioner was made aware of the Final Award on 9th June 2021 and 25th June 2021 while the current Petition was filed on 11th October 2023 which is more than 24 months since the Petitioner was made aware of the existence of the Final Award. His argument was that contrary to the law on grant of extension of time, the Petitioner has not accounted for each day of delay since she became aware of the existence of the Final Award on 25th June 2021. His conclusion was that the Petitioner has failed

to account for each day of delay and prayed that the Petition be denied for failure to account for each day of delay.

On my part, having gone through the lengthy submissions of the parties, as elaborated earlier, my duty is to see whether sufficient grounds for the delay have been established. The records are undisputed that via a letter dated 09th day of June, 2021 from the respondent's advocate to the petitioner, the petitioner was made aware of the existence of the arbitral award. This is well admitted by the petitioners on clause 1.20 and 1.21 of the petition, that through the said letter dated 09th June 2021, the petitioner was made aware of the existence of the award. Under Clause 1.22 of the petition, the petitioner elaborated that it was not until the 05th day of June, 2023 that they applied for copies of proceedings and award of the Arbitral Tribunal Dr. Wilbert Kapinga. The gap between the year 2021 when the information of the existence of the award, to the 05th day of June 2023 when the first letter was sent to the Arbitral Tribunal has not been accounted for. In his submissions to support the grant of this application, Mr. Tibanyendera cited the case of **Cosmas Mwaifwani vs. The Minister for Health, Community Development, Gender, The Elder & Children & Others (Civil Appeal 312 of 2019) [2022] TZCA 378 (15 June 2022)** where

the Court of Appeal dealt with similar circumstances as the case at hand when delay in releasing information to a terminated employee were considered to be highly contentious and the High Court's determination of the matter on preliminary Objection was quashed. The time for calculating period for lodging an application for judicial review was therefore calculated from the date of knowledge by the Appellant of the existence of the decision impugned and not the date of a decision. He urged the court to determine the application at hand without any sort of legal problems whatsoever.

It is in the same spirit of the precedented principle by the Apex Court that the petitioner ought to have established reasons for the delay from June 2021 when she was made aware of the existence of the Arbitral Award to the 09th day of October, 2023 when this case was filed. The Court established that the calculation should have commenced on the date that the applicant became aware of the existence of impugned decision, this holding also conferred an obligation on the applicant/petitioner to establish the period of delay from the date she became aware of the existence of the impugned decision to the date of filing an application to extend time. Unfortunately, in our case at hand, that obligation has not been met by the petitioner.

The Petitioner has also raised an issue of impartiality that led to illegalities in the arbitration proceedings of the sole arbitrator, Dr. Kapinga. Mr. Tibanyendera argued that the issues raised in the Petition suggest a failure of justice on the arbitration process where the arbitrator turned himself into an adjudicator by refusing to withdraw himself from the conduct of arbitration after receiving a written letter alleging lack of trust. Instead, he submitted, the Arbitrator made a biased decision by terminating the proceedings without notice to Petitioner and without affording the Petitioner a right to be heard, something which he argued to be a total failure of the principles of natural justice which has long been apprehended by the courts in this country. He then submitted that it is a cardinal principle that illegalities in decisions are sufficient reasons to extend the time, citing the case of **VIP Engineering and Marketing Limited and 2 Others versus Citibank Tanzania Limited Consolidated Civil References No. 6, 7 and 8/2006** (unreported) where the Court held at Page 18:

> *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable*

explanation has been given by the applicant under the rule to account for the delay"

He then submitted that the sole arbitrator was wrong to continue to act on the basis of correspondences with the said Advocate Maganga Kenneth Tusubira without notifying the Petitioner after a clear notice to the arbitrator and to the Respondent that the said Advocate did not have any valid practicing licence/ Certificate by that time and the Arbitrator continued to contact the same advocate without disclosure to Petitioner. That the advocate was prevented by law to act on behalf of the Petitioner after the notice was duly served upon the arbitrator hence the act of lack of impartiality leading to loss of trust on the part of the Arbitrator. He supported his submissions by citing the case of **Edson Osward Mbogoro Vs. Dr Emmanuel Nchimbi Civil Appeal No. 140 of 2006** (unreported), where at page 13 the Court of Appeal has this to say:

"After considering the above decisions of those Commonwealth countries, that is to say, England, Kenya and Uganda, we can say that although there is no specific statutory provision on the point, if an advocate in this country practices as an advocate without having a current practicing certificate, not only does he

act Illegally but also whatever he does in that capacity as an unqualified person has no legal validity. We also take the liberty to say that to hold otherwise would be tantamount to condoning Illegality. It follows that the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this Court by Dr. Wambali purporting to act as an advocate of the appellant were of no legal effect. Therefore, there is currently no competent appeal before this Court and we uphold the second ground of objection."

He also cited the case of **Baraka Owawa vs. Tanzania Teachers union Misc. Application No. 6 of 2020** (unreported) where the Court emphasized that:

"Whatever documents prepared endorsed or work done by an unqualified person does not have legal value in courts. The reasons are not far to find, first such work is a result of criminality and deceit, secondly, the work or document lacks legality."

He then submitted that the respondent is not disputing that the acknowledgement of the Sole arbitrator was done by the unqualified person as per Annexture CRDB 1 attached to the respondent's answer to the

petition. For the above reasons, he argued, the arbitration proceedings emanated from illegality and the sole arbitrator was wrong to grant the prayer of dismissal without considering the legality of the proceedings before him. His conclusion was that the award to terminate proceedings and dismiss the petitioner's claim for want of prosecution was delivered without hearing the petitioner about why the sole arbitrator must be revoked and claim not to be dismissed for want of prosecution.

In reply, Mr. Nyika submitted that although existence of illegality is a sufficient reason to grant extension of time, his argument was that it is now an established principle that for an illegality to constitute a sufficient reason, then the alleged illegality must be apparent on the face of records, and it should not be that which has to be established from long arguments. He cited the case of **Jubilee Insurance Company (t) Limited Vs Mohamed Sameer Khan,** Civil Application No. 430/01 of 2020 where the Court of Appeal of Tanzania at Dar es Salaam in citing with approval the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) had the following to say on illegality as a ground for extension of time:

"Illegality does not constitute a sufficient ground in every application for extension of time and also that even where illegality is pleaded, it must be apparent on the face of the record, and it should not be that which has to be discerned from long and protracted arguments."

Mr. Nyika further referred this honorable Court to a case of **Hamza K. Sungura Vs. The Registered Trustees of Joy in the Harvest, Civil Application No. 90/11 of 2022, CA of Tanzania at Kigoma** (Unreported) and **Musa S. Msangi and Another v Anna Peter Mkomea,** Civil application No. 188/17 of 2019, CAT at Dar es Salaam (Unreported) which confirms that illegality as a sufficient cause, in application for extension of time, has to apparent on the face of records.

He went on submitting that since the Petitioner has alleged illegality, then the Petitioner is required to show that the alleged illegality is apparent on the face of records, arguing that from the contents of the Petition and Petitioner's submissions, the Petitioner has not established any apparent illegality on the face of the records warranting granting of the Petitioner's prayer. That the illegality alleged in the petition requires long and protracted arguments from both parties for this honorable Court to ascertain whether

there is illegality or not. He then pointed out that the Petitioner alleged that she was not afforded a right to heard in the arbitration proceedings and that the proceedings were terminated without affording the Petitioner right to be heard. In response, he submitted that the allegation that the Petitioner was not heard in the arbitration proceedings is not correct as stated in the answer to the Petition at paragraphs 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9 1.10, 1.11, 1.12, the Petitioner was afforded a right to be heard however, the Petitioner chose not to participate in the arbitration proceedings. He submitted further that the Arbitration proceedings were initiated by the Petitioner herself through the Petitioner's chosen legal counsel and all the communications in the arbitration proceedings were made through the address and mode of communication which was agreed by the parties in the arbitration i.e through emails. Further that the Sole arbitrator has never communicated with the Respondent alone while the arbitration proceedings were pending and that all the communication made by the tribunal were official and were made by the Sole Arbitrator, the Respondent's counsels and the Petitioner's Counsel, Mr. Keneth Maganga of Great Harvest as can be seen from the email correspondences attached in the answer to the Petition as annexure CRDB-1, CRDB-2 and CRDB-3.

Mr. Nyika then argued that the Petitioner has not attached any evidence showing that the Sole arbitrator was communicating with the Respondent alone while the arbitration proceedings were pending as alleged in the Petition and the Petitioner's submissions. He submitted that before the Final Award was issued by the arbitral Tribunal and before the arbitral proceedings were dismissed for want of the Petitioner's prosecution, the Petitioner was afforded a right to be heard but chose not to, pointing to paragraphs 1.10, where the Petitioner was ordered to file its statement of claim within 8 weeks i.e on or before 25th November 2020, and failed to do so within the required time and therefore the Respondent prayed for the dismissal of the arbitration proceedings for want of prosecution.

I have considered the submissions of the parties on the issue of illegality and in avoiding to get into the determination of the intended petition to challenge the award before time is extended, I have considered those submissions with a lot of caution that I do not find myself putting the cart in front of the horse. Therefore, the extent of the submissions I have reproduced is in so far as the issue of illegality for the purpose of extending time is concerned. Any further consideration of the submission might have turned lethal on my part where the horse and the carts' positions are concerned in this context.

Now, the petitioner urges the court to exercise its discretionary powers to extend time on the ground of illegality. The alleged illegality is based on the principles of natural justice in particular a denial of the right to be heard before the Arbitration proceedings were dismissed. His submission was that the arbitrator turned himself into an adjudicator by refusing to withdraw himself from the conduct of arbitration after receiving a written letter alleging lack of trust. Instead, he submitted, the Arbitrator made a biased decision by terminating the proceedings without notice to Petitioner and without affording the Petitioner a right to be heard. Further that the arbitrator was communicating with the respondent without involving the petitioner. In reply Mr. Nyika submitted that the alleged illegality ought to be apparent on the face of records, arguing that from the contents of the Petition and Petitioner's submissions, the Petitioner has not established any apparent illegality on the face of the records warranting granting of the Petitioner's prayer. His argument was that the illegality alleged in the petition requires long and protracted arguments from both parties for this honorable Court to ascertain whether there is illegality or not. Further that the petitioner has failed to attach any evidence showing that the Sole arbitrator was

communicating with the Respondent alone while the arbitration proceedings were pending as alleged in the Petition and the Petitioner's submissions

I must state on the onset that I am in agreement with Mr. Nyika that the alleged illegality as fronted by the petitioner is one which requires a lengthy line of argument result of which may be either in favour of or against the petitioner. It is principled in the cited case of **Lyamuya Construction Company Ltd** (supra), whereby the court, while referring to the case of **Transport Equipment Limited Vs. D.P Valambhia [1993] T.L.R 91,** where the Court of Appeal held:

> *"The Court there emphasized that such point of law must be "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"*

As for the case at hand, the alleged illegality includes the denial of right to be heard, something which the respondent has counter argued that the petitioner was accorded the right to be heard through his advocate. The petitioner in the long run brings an argument that the said advocate was not qualified to practice. As correctly so argued by the respondent, the advocate

in controversy was brought and introduced to the arbitral proceedings by the petitioner herself. It was therefore not the duty of the arbitrator to know whether the advocate's license was updated, neither was it an issue to be verified by the respondent. Had the issue been raised by the counterpart then the case would have been different. In our case at hand, the petitioner coming to allege the validity of an advocate brought by them at this stage is but an escape from liability through the window without justifying why the door available was not used. It is indeed an afterthought.

On the above findings, I find that the petitioner has failed to adduce sufficient reasons to warrant this court to exercise its discretionary powers to extend time. Consequently, the application is hereby dismissed with costs.

Dated at Dar-es-salaam this 20th day of May, 2024.

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S.M. MAGHIMBI

JUDGE