

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM.

MISC. CIVIL APPLICATION NO. 7 OF 2021

(Originating from Commercial Cause No 2 of 2019)

M/S KURINGE CONTRACTOR CO.LTDAPPLICANT

VERSUS

MOSHI URBAN WATER SUPPLY AND

SANITATION AUTHORITY.....1ST RESPONDENT

XAVIER M. NDALAHWA..... 2ND RESPONDENT

NATIONAL CONSTRUCTION COUNCIL.....NECESSARY PARTY

Date of Last Order: 2/08/2021

Date of Ruling: 20/08/2021

RULING


MAGOIGA, J.

The applicant, **M/S KURINGE CONTRACTOR COMPANY LIMITED** under the provision Section 14 (1) of the Law of Limitation Act [Cap 89 R. E. 2019] and Section 95, 3B (1) and 3B (1) (a) of the Civil Procedure Code [Cap 33 R. E. 2019] instituted the instant application against the above-

named respondents praying this honorable court be pleased to grant the following orders, namely -

- i. this honorable court be pleased to extend time within which the 2nd respondent /arbitrator to file before this court his final arbitral award delivered by him on 24th March,2017 in favor of applicant in the matter between the applicant and respondent for it be registered as the decree of the honorable court.
- ii. any other relief(s) or orders this honorable court deem fit and just to grant
- iii. Costs be in cause.


Upon being served with the application, the respondents filed counter affidavit. Simultaneously, the 1st respondent raised two set of preliminary objections and whereas the 2nd respondent raised six set of preliminary objections. Subsequently, On 2nd August, 2021 when this application was called on for hearing the preliminary objection, Mr. Emmanuel Kessy conceded to two sets of preliminary objections raised by the 2nd respondent as well as to 5 sets of preliminary objections raised by 1st respondent on joining the 2nd and necessary party as parties to the application.



In the circumstance, the 2nd respondent and necessary party were expunged from the court records and the raised preliminary object in respect of joining the 2nd respondent and necessary party. Thereby remaining with the 1st preliminary objection which was to the effect that this *honorable court lacks jurisdiction to entertain this matter as it is functus officio*.

The facts of this application albeit in brief are that, on 24th March, 2017, the arbitrator, one Mr. Xavier Ndalawawa, gave award in favour of the applicant, as matter of law he was required to file an award for its enforcement. On 14th August, 2017 an arbitrator filed an award at the High Court, Moshi registry through Misc. Civil Cause No 2 of 2017 the said application was marked withdrawn, following the raised preliminary objection of time barred.

In the meantime, the second application for filing an award was refiled through Misc. Civil Cause No 4 of 2018, however, same was struck out for reasons that it was time barred. According to the records, on 19th March, 2019, another the application for filing an award was filed through Misc. Commercial application No 2 of 2019 at High Court (Commercial division) DSM, before Fikirini, J, (as she then was) the said application was dismissed



pursuant to section 3 of the Law of Limitation Act, [Cap 89 R.E.2019] on 12th November, 2019.

Facts go that, on 18th January, 2021, the applicant filed this instant application seeking an extension of time within which to file application for registration of an award which was against the 1st respondent, Moshi Urban Water Supply and Sanitation Authority, Xavier Ndalawa an arbitrator as 2nd respondent and National Construction Council as Necessary party. It is against the stated background there has been filed in this court a notice of preliminary objection on competence of the instant application, hence, this ruling.

At the hearing of this application, Mr. Emmanuel Kessy learned advocate, appeared for the applicant, Mr. Baraka Nyambita and Laurean Kessy learned State Attorneys represented the respondent.

In the course of hearing, Mr. Nyambita, the learned State Attorney started his submission by adopting the contents of his written skeleton argument and submitted that the court is functus officio and the instant application is an abuse of court process. According to Mr. Nyambita, this application is the third attempts by applicant to register the award in this court.



Expounding on the three attempts, the learned State Attorney submitted that the three applications were Misc. Civil cause No. 2/2017, which was filed in HC Moshi registry and which was withdrawn. The second application was Misc. Civil Cause No. 4 of 2018 which was filed again at High Court Moshi registry and was strike out on the ground that it was filed out of statutory time limit. And the third time attempt is an application filed through Misc. Commercial application No 2 of 2019 which was filed in High Court Commercial Division Dar -es salaam before Fikirini J, which was on 12th November, 2019 was dismissed for being time barred.

Submitting further the learned State Attorney, submitted that, after the dismissal order, the applicant was not allowed to file another application for extension of time because a dismissal order amount to conclusive determination of the application for registration of the award. On that note, the learned attorney concluded that, the court becomes *functus officio* to determine the application for extension of time and any attempt is an abuse of the court process.


Adding on the point Mr. Kessy submitted that, the issue of limitation had been finally and conclusively determined. In support of the preliminary objection the learned State Attorney, cited various cases that discusses



when the court is said to *functus officio*. The **case East African Development Bank Vs Blueline Enterprises Limited Civil Appeal No 101 of 2019 CAT at Dar es salaam**, in which after the order of dismissal was ordered the appellant was not allowed to go back to the same court and institute the application for extension of time.

Another case cited was **Olam Uganda Limited suing through its attorney United Youth Shipping Company Limited Vs. Tanzania Harbor Authority Civil Appeal No 57 of 2002** whereby the court held that dismissal order amount a conclusive determination of the a suit and appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal.


More so, the learned state attorney cited the case of **Worldwide Trading Company Limited and two others Vs. National Bank of Commerce Limited, Civil Appeal No 258 of 2017 CAT Dar-es Salaam** whereby the court stated that adjudicating on a matter that was time barred in the same court made court *functus officio*. Therefore, the learned State Attorney concluded that this court cannot now determine the application



for extension of time because the court's hands are tied up and thus prayed that the application be dismissed.

On the other hand, Mr. Emmanuel Kessy learned advocate started his submission by stating the historical background of the application and objected to raised preliminary objection on ground that, it is for the first-time this kind of application to be filed before this court. According to Mr. Kessy there has never been dismissed or struck out or determined in any way for court to be *functus officio*.

Expounding on the point Mr. Emmanuel Kessy submitted that for the court to be *functus officio* the matter must have been conclusively determined. The applications referred by the respondent's counsel were not application for extension of time. They were applications for filing award, therefore, for them being dismissed do not bar the applicant to file an application for extension of time. The learned counsel for applicant pointed out that the **East African Development Bank Vs Blueline Enterprises Limited (supra)** and other cases cited are distinguishable because this instant application is not the similar to previous applications which were dismissed.



On the reasons advanced above the learned counsel for applicant, urged this court to dismiss the preliminary objection on point of law with costs and proceed to hear the application.

In rejoinder, Mr. Nyambita, learned State Attorney reiterated her earlier prayers for dismissal of the application with costs.


This marked the end of hearing of this preliminary objection on point of law. The task of this court now is to determine the merits or demerits of the objection. Having carefully considered the rival arguments of the legal minds of the parties' counsel, I have noted that there are facts which are not in disputes between the parties. These are; **One**, there is no dispute that, Misc. Civil Cause No. 2/2017 was withdrawn and the applicant refiled another application through Misc. Civil Cause No. 4 of 2018 which was struck out for reasons that it was time barred. **Two**, there is no dispute between the parties that, on 19th March, 2019 the application for registration of an award was file through Misc. Commercial Application No. 2 of 2019 at High Court (Commercial Division) DSM, and it was dismissed for being time barred.

However, parties' learned trained minds lock horn on whether the dismissal order had the effect of rendering the court *functus officio* on application for



extension of time within which to file an application for registration of award? I have read the ruling of my learned sister judge, Madam Fikirini J, (as she then was) indeed she dismissed the application pursuant to Section 3 of the Law of Limitation Act, [Cap 89 R.E.2019] because same was instituted out of time without court's leave. I'm aware that an order of dismissal presupposes that the parties were heard on merit and amount to final conclusive of the matter and it is not open for a party to go back to the same court and seek extension of time as it was stated in the case of **Hassim Madongo and Two others Vs Minister for Industry and Two others Civil Appeal No 2003(unreported)** that once the petition is being dismissed on account of time barred it is not open for applicant to open fresh application.

That being the position, then, the question now is whether the dismissal of an application for filing award can operate as a bar to this application for extension of time to file an application for registration of an award. According to Mr. Kessy the order of dismissal of the application of filing an award is different from the instant application and cannot bar this application. While, according to Mr. Nyambita, the two applications are



similar and the dismissal order amounted to final conclusive of the registration of an award.

Indeed, looking at the ruling in Misc. Commercial application No 2 of 2019 the application was for registration of an award and the instant application is for extension to register the same award that was dismissed. In my considered opinion, the issue of registration of the impugned award was concluded when Hon Fikirini, J (as she then was) dismissed the application for registration. To allow this application for extension will serve no purposes and it will take us to the same destination where Hon. Fikirin, Judge ended. The applicant is was not dissatisfied by the dismissal of the learned sister Fikirini judge the remedy available to her was to appeal against that ruling and not to come back again on pretext of extension. That said, the arguments by Mr. Kessy that, these two applications are different applications may sound good but the effect of that order of dismissal was to put the matter to an end unless reversed by review of the same court or on appeal by higher court.

I am entitled to the above stance because application No. 2 of 2019 was for filing award and the instant application is for extension of time within



which to file the same award so is geared to achieve that was dismissed, this is improper and bars any further application on the same point.

The Court of appeal established the principle as to when a court is said to be *functus officio* in the case of **John Mgaya and 4others vs Edmund Mjengwa and 6others, Criminal Appeal No 8 (A) of 1997 (unreported)** in which quoted with approve the principle laid down by the court of Appeal for Eastern Africa in **KAMUNDU V R (1973) EA 540**. The court stated that; -

A further question arises, when does magistrate's court become functus officio and we agree with the reasoning in Manchester City recorder case that this case only be when the court disposes of a case by verdict of not quit or by-passing sentence or making some orders finally disposing of the case.

In the instant application, it is plain that the order of the of dismissal (Fikirini, J) dated 12th November, 2019 in Misc. Application No. 2 of 2019 dismissing applicant's application did dispose off an application similar to instant application because after extension will take us to registration which has been finally disposed off. The order by Hon Fikirini, J in my considered opinion did, thus, rendered this court *functus officio*.

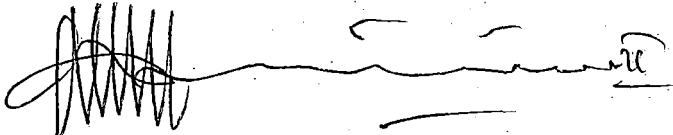
In essence, objection raised by learned State Attorney, Mr. Baraka Nyambita is merited and is hereby sustained.

In the final analysis, the instant application is hereby struck out with costs for being misconceived as the court is *functus officio* and indeed is an abuse of the court process.

It is so ordered.

Dated at Dar es Salaam this 20th day of August, 2021.




S. M. MAGOIGA
JUDGE
20/08/2021