

**IN THE HGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 160 OF 2021

(Originating from Misc.Commercial Cause No 203 of 2017)

REGIONAL MANAGER, TANROADS SIMIYU APPLICANT

VERSUS

NYAMGURUMA ENTERPRISES CO. LTD..... RESPONDENT

Date of Last Order: 2/05/2022

Date of ruling 13/05/2022

RULING

MAGOIGA, J.

The applicant, **REGIONAL MANAGER, TANROADS SIMIYU** under the provision Section 11 (1) of the Appellate Jurisdiction Act, [Cap. 141 R; E 2019] instituted the instant application against the above- named respondent praying this honourable court be pleased to grant the following orders, namely: -

- a. an order for extension of time to the applicant to file notice of appeal to the Court of Appeal against the whole of judgement and the decree of the High court (Hon Philip, J) dated 21st February ,2019 in Miscellaneous Commercial Cause No. 203 of 2017 out of time;
- b. To give such further orders and or directives as it shall deem appropriate.

The chamber summons was accompanied by the affidavit of Mr. Kenan Thobias Komba, Principal State Attorney stating the reasons why this application should be granted.

Upon being served with the chamber summons and affidavit in support of application, the respondent filed a counter affidavit sworn by Mr. Erick Lutalo,



Managing Director of the respondent stating the grounds and reasons why this application should not be granted.

The facts leading to this application as gathered from the affidavits are imperative to be stated. The parties herein engaged into arbitration proceedings and eventually the impugned final award was awarded and published on 26th January, 2017 in favour of the respondent. Subsequently, the respondent applied for registration and enforcement of the award vide Misc. Commercial Cause No. 203 of 2017. When the applicant was served and given chance to show cause why the award should not be registered, filed Misc. Commercial Application No.39 of 2018. Suo motto the court raised the issue of competence of the petition without being accompanied by the award and after hearing parties struck out the application No. 39 of 2018 on the reason that the applicant had not attached the dully certified award and went on to register the award.

Being aggrieved by the order of registration, the applicant lodged an appeal to the Court of Appeal against the both rulings of the court in Misc. Commercial cause No. 203 of 2017 and Misc. Commercial Application No. 39 of 2018. However, the said appeal was withdrawn on 20th October, 2021 for being incompetent. Further facts were that, still enthusiastic to pursue the appeal, the applicant filed the instant application on 28th day of October, 2021 for extension of time to lodge a notice of appeal out of time, hence, this ruling.

When this application was called on for hearing, the applicant was represented by Mr. Kenan Komba, learned Principal State Attorney and Mr. Usaje Mwambene



learned Senior State Attorney and the respondent had the legal services of Mr. Godfrey Lugano, learned advocate.

The learned trained legal minds for parties adopted the long written arguments for the determination of this application, hence, this ruling.

The grounds for extension of time to file notice of appeal by the counsel for the applicant can be summarised in three point that; **first**, the delay was attributed by the circumstances which were beyond the applicant control that, she timely filed an appeal but was withdrawn on technical grounds. According to Mr Komba, the reason for delay is not an actual delay but a technical delay which is associated with technical reasons. To support his contention, cited the case **Fortunatus Masha Vs William Shija and Another [1997] TLR 154** in which it was held that:-

“Where it was stated that, distinction has to be drawn between cases involving real or actual delays and those such as the present one which clearly only involve technical delay in the sense that original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal has to be instituted. In the present case the applicant had acted immediately after pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted.”



Guided by the above case law, Mr. Komba submitted that, applicant has been diligently to prosecute his case ever since and denied having negligent or sloppy as error which led to striking out of the appeal was not caused by negligence. Relying on another decision of the Court of Appeal in the case of **National Bank of Commerce LTD Vs Humoud Ally Salum, Civil Appeal No 268 of 2017 (unreported)**, where the court held that, where there is an application which falls within the technical delay and the decision to be challenged is tainted by illegality the two circumstance as such are fit for one to grant of the sought extension of time.

It was Mr. Komba's submission that, on the above reasons, this court be pleased to grant the applicant's application as prayed.

Another reasons argued is on illegalities. Mr Komba mentioned three issues that need to be looked by the Court of Appeal. **One**, the applicant has no suable legal personality; **two**, the decree cannot be enforced to the applicant because he has no capacity to be sued; **three**, there is no evidence on the existence of the notice to arbitrate, an arbitration clause and submission. Expounding the point Mr. Komba told the court that, it is settled law that where an issue of illegality is raised as a reason for applying extension of time, such ground is sufficient cause for extension of time. To buttress his point, the learned Principal State Attorney cited the case of **Hamis Mohamed (as administratrix of Estates of the late Risasi Ngawe Vs Mtumwa Moshi, Civil Application No. 407 /17 of 2019 CAT (Unreported), Principal Secretary, Ministry of Defence and National Service V. Devram Valambia [1995] TLR 387, Kalunga & Company Advocates Ltd Vs NBC Ltd Civil application No 124 of 2015. Lyamuya Constraction Co. Ltd V Boards**



of Trustees of Young women's Christian Association of Tanzania Civil Application No 2 of 2010 (unreported)

Basing on guidance of the above cited cases, Mr. Komba submitted that, the illegality of impugned decision was clearly apparent, visible and obviously on the face of the record that, whether the arbitral award can be enforced against a person who had no sueable personality to sue or be sued, whether the award which is now court decree can be executed against the applicant who has no sueable personality nor enforced against TANROADS who was not party to the case and whether decree emanates from arbitral proceedings which lacks evidence of existence of notice to arbitrate, arbitration clause and submission. In his view these illegalities can only be rectified by the Court of Appeal.

Submitting further Mr. Komba added that, even where the applicant has failed to account for delay in lodging the application, the fact that there are illegalities as pointed out above constitute sufficient reasons for extension of time. To buttress his argument cited the case of **TANESCO vs. Mufungo Leonard Majura & 15 Others Civil Appeal No 94 of 2016 (Unreported)**.

According to Mr. Komba the above-mentioned illegalities are sufficient reasons for grant of application as prayed.

On the third ground Mr. Komba submitted that, the applicant has an overwhelming chance of success in the intended appeal because the applicant is not sueable because has no legal personality to sue or being sued. Expounding on the point, the learned Principal State Attorney submitted that, it is settled principle that proceedings filed against non -juristic person such proceedings are incompetent. To

support his contention cited the case of **Gibb East Africa Ltd Vs. Syscon Builders Ltd and Two Others, Civil Application No. 5 of 2005 (unreported)**. Mr. Komba went on submitting that, the so-called court decree cannot be executed against applicant who has no sueable legal personality nor be enforced against TANROADs who was not party to the case. Three, the decree to be enforced emanates from arbitral proceedings which lacks evidence of existence of a notice to arbitrate, an arbitration clause and submission. The absence of these important components rendered the arbitral award invalid and clearly shows that, the intended appeal stands a reasonable chance of success. In totality of the above grounds Mr. Komba prayed and urged this court to extend time within which the applicant can file notice of appeal out of time.

On the part of respondent, Mr. Lugano prayed to adopt the written skeleton arguments filed in opposing this application. On the first ground, Mr. Lugomo strongly argued that, applicant withdraw the appeal due to its own negligence during preparation of the records of appeal and his failure to serve the letter requesting the records within 30 days. Expounding to the point, the learned counsel for respondent submitted that, applicant through her legal counsel has requested certificates of delay in respect of two applications namely Misc. Application No. 203 of 2017 and Misc. Application No. 39/2018, however, the applicant negligently attached a certificate of delay of Application No. 39/2018 in Misc. application No. 203 of 2017 (Civil Appeal No. 205 /2019).

According to Mr. Lugano, the applicant's or his advocate's negligence is not and can never be taken as a good cause for extension of time by the court. To buttress his point cited the case of UMOJA GERAGE VS, NATIONAL BANK OF COMMERCE



(1997) TLR 109 in which it was held that, lack of diligence on the part of counsel is not sufficient ground for extension of time.

On the second ground Mr. Lugano argued that, all alleged illegalities were raised as point of preliminary objection in the statement of defence and the arbitrator made a ruling on them as per graph 10, 11, 12, 13 and 16 of the final award. Therefore, no court can fault the findings of the sole arbitrator on that regard because parties in an arbitration are generally bound by what they agree among themselves and the decision of arbitrator will not be faulted unless he has misconduct himself or the award was improperly procured. To cement his position referred this court to the article authored Registration and enforcement of arbitral awards in Tanzania by Wilbert B. Kapinga and -Erick S. Ng'imaryo and the case of TANZANIA ELECTRIC SUPPLY LTD V. DOWNS HOLDING (COSTA RICA) AND ANOTHER, MISC. CIVIL APPEAL No. 8 OF 2011 (Unreported) in which it was held that, if the questions is specifically referred and it becomes evidence that the parties desire to have a decision on that specific question from the arbitrator rather than from the court , the court will not interfere with the award of the arbitrator on the ground that there is error of law apparent on the face of the records even if the view taken by the arbitrator does not accord with the view of the court.

Submitting further Mr. Lugano argued that, the alleged illegalities are not among the grounds mentioned under section 70 of the Arbitration Act, 2020 and therefore do not qualify to be grounds to set aside both decision of the High court or the arbitral award. On that note, the learned counsel for respondent argued that the trial court correctly enforced the decree because parties had agreed to present their dispute to arbitration and after the struck out of Misc. Commercial Application No.



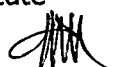
39 of 2018 nothing was left to bar the trial court to register the award. In support of his point cited the case of KIGOMA /UJJI MANICIPAL COUNCIL V. NYAKIRANG'ANYI CONSTRUCTION LIMITED MISC. COMMERCIAL CAUSE No. 239 of 2015 (HC) DSM (Unreported) in which it was held that, upon the petitioner seeking to have the award set aside being struck out there was nothing substantially before the court to bar it from adopting the award as a decree of the court.

On the third ground the learned counsel for respondent had it that, the intended appeal has zero chances of success on the following reasons; **one**, there is no illegalities and errors committed by the court in enforcing the award vide Misc. Commercial Application No. 203 of 2017 because all matters to invalidate the award was to be dealt on Misc. Commercial Application No. 39 of 2018 which was struck out and the respondent opted not to refile another application to challenge the registration of the award. According to Mr. Lugomo, the applicant appeal against Misc. 203 of 2018 was misconceived. The applicant is supposed to appeal against the decision in the petition and not Misc. Commercial Application No. 203 of 2017.

On that note, Mr. Lugano urged this court to dismiss this application with costs.

Having heard and followed the rivalling arguments for and against the grant of this application, in my respective opinion, the issue for determine is whether the applicant has demonstrated sufficient cause warranting this Court to grant the application.

It is trite law that, applicant seeking for extension of time having failed to act or do a certain legal act, must disclose sufficient reasons regarding why he was unable to do that act within the prescribed time. It should be further noted that, what constitute



sufficient cause cannot be laid by any hard and fast rules but depends on the fact in each case. The above stance was stated in the case of VODACOM FOUNDATION V. COMMISSIONER GENERAL (TRA) CIVIL APPEAL NO 107 /20 OF 2017(Unreported).

However, the relevant factors must be taken into account, these includes, length of the delay, the reasons for the delay whether there is an arguable case on appeal and if will cause prejudice to the defendant if time extended.

Now back to the instant application, having carefully considered the rival arguments of learned trained minds of the parties on grant or not to grant and having gone through the affidavit for and against the application and the circumstance of the case, the question is whether technical delay coupled with illegalities can be a sufficient cause to warrant extension of time to file notice of appeal out of time. The applicant contention is that, the delay to file was attributed by technical delay. While Mr. Lugano refuted reliance on technical delay and submitted that, the said technical delay were technical error caused by lack of diligence and seriousness of the part of applicant.

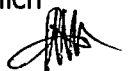
I agree with Mr. Lugano that, lack of diligence on the part of the advocated is not a sufficient reason for enlargement of time. However, extension of time may be granted if the party seeking extension of time has shown that he has acted reasonably diligently and promptly to seek remedy. If that is the position, then, the question that follows, therefore, is whether the applicant acted reasonably diligently and promptly in seeking the remedy. The original appeal was filed timely but the present situation arose only because the original appeal was found to be incompetent and technically struck out on 20th October, 2021. This means that the



appellant could refile it after rectification of the errors which featured in the said appeal and if there wasn't a presumption that the appeal can be re-filed again the Court of Appeal could have dismissed it to close all options of refiling. See the case of FORTUNATUS MASHA (supra) in which it was stated and held that:

"Where it was stated that, a distinction has to be drawn between cases involving real or actual delays and those such as the present one which clearly only involve technical delay in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal has to be instituted. In the present case the applicant had acted immediately after pronouncement of the ruling of the court striking out the first appeal. In these circumstances, an extension of time ought to be granted."

In the circumstance, I subscribe to the view taken by court in the above case, that since applicant have been dully penalised by having Civil Appeal No 205 of 2019 struck out, lack of diligence cannot be used to refuse extension of time to refile the fresh appeal because at first place applicant acted diligently and promptly in seeking the remedy save only for negligence on filling Civil appeal No 205 of 2019 and the said negligence was not in the delay to refiling the instant application but rather to previously appeal which was penalised by striking off the incompetent appeal. In these circumstance I hold that the alleged negligence on the applicant in filling incompetent appeal is not a ground for refuse to grant extension of time to relodge the notice of appeal since there was a technical delay on the part of applicant which



was sufficient cause to extend time and the said negligence has already penalised by striking out the appeal.

The next ground was on illegality. While I agree with Mr. Komba that once illegality is raised as ground of extension of time has been argued and proved, a party is not burdened to account for each day delay. However, a party may not be at liberty to come any time he wishes as long as he banks on illegality. I also agree with Mr. Lugano that, illegality that has been raised as ground for extension must be on the face of the record. The question is whether the raised illegality is sufficient importance and apparent on the face of the record? In the instant application it has been averred that, the kernel of the illegality is that the respondent sued the wrong person because applicant has no legal personality to sue or be sued and that there was no notice for arbitration and submission. While the learned counsel for respondent has argued that, those allegations were raised and determined by the sole arbitrator. In my view, these points of illegality raise sufficient importance points of law to be considered by Court of Appeal. I have perused the records on the impugned award TANROADS was not a party to the proceeding, parties were Regional Manager, TANROADS SIMIYU and Nyanguruma meaning that Manager TANROAD Simiyu is not legal person to sue or be sued which implies that there was no proper suit. This in itself is not only importance point of law but also sufficient to grant extension of time for purpose of ascertaining such points. In that regard, I am inclined to agree with Mr. Komba that, there is illegality which needs to be ascertained by the Court of Appeal.

On the last ground, Mr. Komba submitted that, applicant has an overwhelming chance of success in the intended appeal because the applicant is not sueable



because has no legal personality to sue or being sued. While Mr. Lugano submitted that, the intended appeal has zero chances of success.

This ground will not detain this court much, following the answers in ground number 2 that there are illegalities it suffices to grant extension notwithstanding other factors.

That said and done, this application for extension of time is hereby granted as prayed with no order as to costs because was not prayed by the applicant.

It is so ordered.

Dated at Dar es Salaam this 13th day of May 2022.



S. M. MAGOIGA

JUDGE

13/05/2022