

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 195 OF 2022

(Arising from Commercial Cause No. 72 of 2021)

DEZO CIVIL CONTRACTORS CO LIMITED..... APPLICANT

Versus

OYSTERLEY INVESTMENT LIMITED RESPONDENT

Date of last Order: 14th December 2022

Date of Ruling: 14th December 2022

RULING

MKEHA, J:

In the present application, the applicant is moving the court for an order of extension of time within which to file petition for challenging an award made by QS EVANS SENENGULA WAPALILA, sole arbitrator on 2nd October 2021 in an arbitration between the parties. The application is made under section 14 (1) of the Law of Limitation Act. The same is supported by an affidavit affirmed by Mr. Sheikh Mohamed Bawazir, the Managing Director

of the Applicant's company. The application is opposed through a counter affidavit sworn by Mr. Nehemia Geoffrey Nkoko, the respondent's advocate. Mr. Geoffrey Lugomo learned advocate represented the applicant.

The application follows unsuccessful attempt of the applicant to petition for challenging the award in Miscellaneous Commercial Application No. 23 of 2022 that was decided by this court on 27th October 2022. While determining the petition, his Lordship observed that: "in the matter at hand, it is clear, even from the petitioner's legal counsel, that, the petitioner was well aware that she was already outside the legally prescribed time within which to file a petition. Proceeding to file the petition while the law is clear cannot be assumed to be a mistake of fact". His lordship proceeded to hold that: 1. That, the preliminary point of objection is hereby upheld as this Petition was filed out of time and without there being leave of this court to file it out of the prescribed time. 2. That, in view of the above, this petition is hereby struck out.

Following the background hereinabove, the learned advocate for the applicant was emphatic that this same court can proceed to entertain an application for extension of time to file the petition for challenging the

disputed arbitral award. He thus urged the court to consider the reasons for the delay as contained in the applicant's affidavit and thereby proceed to grant the application.

Mr. Nehemia Nkoko learned advocate for the respondent opposed the application. He was of a firm view that this court, having made a finding that the former petition had been filed out of time without first seeking leave of the court, the consequential order was dismissal of the application notwithstanding the fact that His Lordship made an order striking out the Petition. Reliance was put on the decision in **HASHIM MADONGO AND TWO OTHERS VS MINISTER FOR INDUSTRY AND TRADE, CIVIL APPEAL NO. 27 OF 2003.**

The only determinative issue is **whether the application is maintainable.** In the case cited by the learned advocate for the respondent a similar thing happened. After the trial Judge had made a finding that the matter before him had been filed out of time without leave of the court, he proceeded to strike out the matter. Later on, an application for extension of time was filed before the same court. The Court of Appeal held the words "striking out" to be construed as meaning that the matter

had been dismissed since the Law of Limitation requires so. The following is what the court substantially held:

With respect, we wish to pause here and observe that, for reasons which will be apparent hereunder, Ms. Monica Otaru was correct in the assertion that after the application was determined the appellants were not at liberty to bring a fresh application, notwithstanding that the Judge struck out the application instead of dismissing it. The Court went on pondering whether the Judge was correct in law in striking out the application instead of dismissing it. The Court observed: "With respect we think that he ought to have dismissed the application before him". The Court reasoned that, under section 3 of the Law of Limitation Act, a proceeding which is instituted after the prescribed period has to be dismissed. The Court went on to hold that, the Judge ought to have dismissed the application after he was satisfied that it was time barred. The Court added that, it was not open to the Judge to strike out the application. After the observations and holdings as indicated hereinabove, the Court concluded as hereunder;

"Having said so, we are in agreement with Ms. Monica Otaru, learned Senior State Attorney, that after the application before J. was

dismissed as it should have been, it was not open to the appellants to go back to the High Court and file the application subject of this appeal. In fact, even the application before.....J. andJ. were untenable in law. We say so because, as far as the High court was concerned, the issue of time limitation had already been determined by.....J. The issue was determined whenJ. held that an application for extension of time ought to have been filed prior to filing the application for prerogative orders. In the circumstances, the only remedy available to the appellants after dismissal of the application was to appeal to the Court of Appeal". The facts in this case resemble with what happened in the cited caselaw. As such, I am bound to follow the instructive words of the Court of Appeal in the cited case.

For the foregoing reasons I hold the application to be unmaintainable. The same is struck out with costs.

DATED AT DAR ES SALAAM this 14th day of December 2022.




C.P MKEHA

JUDGE

14/12/2022

Court: Ruling is delivered in the presence of the parties' advocates.




C. P. MKEHA

JUDGE

14/12/2022