

IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

MISC.COMMERCIAL APPLICATION NO.50 OF 2020

*(From the Matter of Arbitration under the National Construction Council Arbitration  
Rules 2001 Edition)*

CLAUS BREMER ASSOCIATES LIMITED..... APPLICANT

v

THE OFFICE OF CHIEF COURT ADMINISTRATOR,  
JUDICIARY OF TANZANIA..... RESPONDENT

**RULING**

Date - Last Order, 27/08/2020.

Date of the Ruling, 20/10/2020

**NANGELA, J:**

This ruling arises from an application for extension of time lodged in this Court by the Applicant, M/s Claus Bremer Associates Ltd, on the 24<sup>th</sup> April 2020. The application, which was lodged by way of Chamber Summons under section 14(1) of the *Law of Limitation Act*, Cap.89 [R.E 2019], was supported by an affidavit sworn by one John Samwel Kitundu.

In its chamber summons, the applicant sought for the following orders:

1. That, the Court be pleased to extend time within which the Applicant will be allowed to file the registration of the Arbitration Award delivered and dated on the 1<sup>st</sup> of April 2019 to form Decree of the Court.
2. Cost be provided for.

3. Any other relief(s) this Honourable Court may deem fit or just to grant.

On the 25<sup>th</sup> June 2020, the Respondent, through the services of the office of the Solicitor General, filed a counter affidavit opposing the application. A reply by the Applicant to the Respondent's counter affidavit was filed on the 24<sup>th</sup> July 2020. On the 27<sup>th</sup> August 2020, the matter was scheduled for mention for orders and the Applicant entered appearance through the services of Mr Simon Josephat, a learned Advocate. The Respondent was absent.

Since all pleadings were complete, Mr. Simon prayed, in the absence of the Respondent, that, the matter be disposed by way of written submissions to avoid any further delays. This Court granted the prayer and made the following schedule of filing, that:

1. the applicant should file its submission on or before 10<sup>th</sup> of September 2020, and the same be served upon the Respondent, not later than 3.30pm of the day of filing.
2. The Respondent to file its written submission on or before 24<sup>th</sup> September, 2020, and be served upon the Applicant, not later than 3.30pm of the day of filing.
3. Rejoinder submission, if any, be filed on or before 30<sup>th</sup> September, 2020.
4. Ruling to be delivered on 20<sup>th</sup> October, 2020, at 10.00 am.

The parties herein complied with the orders of this Court and filed their submissions promptly. I will therefore summarise the contents of their submission before I consider their merits or otherwise.

In his written submission, the learned counsel for the Applicant submitted that, the application is brought under section 14 (1) of the *Law of*

*Limitation Act, Cap.89 [R.E, 2019]* and is supported by an affidavit of John Samweli Kitundu. In his affidavit, the deponent stated that, the Applicant was a Claimant in the Arbitration proceedings governed under the National Construction Council Arbitration Rules, 2001 Edition (referred hereafter as NCCA Rules, 2001).

The proceedings in question were presided over by a sole administrator, one Evans Senegula Wapalila, who issued his final award on 1<sup>st</sup> April 2019. It was submitted that, the final award was collected by the Applicant on 17<sup>th</sup> June 2019. Citing Rule 15 (1) of the NCCA 2001, the learned counsel for the Applicant submitted that, the collection of an Award is subjects to both parties' payment of all relevant costs associated with the Arbitration proceedings. He submitted that, whereas the Applicant diligently effected the outstanding payment and collection awaited the Respondent to do the same, a fact which was almost done in two months later after being notified by the Council.

He submitted that, immediately after collecting the award, the Applicant started to make follow-up of the payment on the satisfaction of the award as well as liaising with the arbitrator to cause the award to be filed for registration. He submitted that, the award has never been challenged anyhow whatsoever or been set aside, and, maintained, that implies the Respondent was satisfied or agreed with the determination of the award, and, therefore, was supposed to effect payment as requested by the Applicant immediately after the delivery of the award.

The learned counsel for the Applicant further submitted that, despite requesting the Respondent to effect payment on the satisfaction of the award so as to avoid further litigations and costs, such endeavours did not bear fruits, hence, efforts to have the award filed were initiated in this

Court on January 2020, a month late, as the award ought to have been filed within six months.

He contended that, the delay to have the award filed in this Court in time was not due to the negligence of the Applicant but rather, as stated in the affidavit, it was due to a number of circumstances beyond the Applicant's control, as well as financial constraints inflicted on the Applicant by the Respondent. He submitted that, although the registration of the award was filed out of time and the same was struck out on 16<sup>th</sup> March 2020, the Applicant acted diligently and on 28<sup>th</sup> April filed this application seeking for extension of time.

Relying on the decision of Court of Appeal in the case of **Benedict Mwimello v Bank of Tanzania**, Civil Appeal No.12 of 2010, Court of Appeal of Tanzania, (unreported), the Applicant submitted that, the grant of extension of time is on the discretion of the Court provided that there is a disclosure of good or sufficient cause for the delay. He also placed reliance on the case of **Mocrama Gold Corporation Ltd vs Minister of Energy and Minerals** [1998] TLR, 425 arguing that, looking at the affidavit and the submission made herein, it is clear that there are sufficient reasons for the delay to file the award and, hence, the need to grant this application for extension of time.

The Respondent has opposed the application. In his submission, the learned counsel for the Respondent adopted the contents of the counter affidavit filed in this Court and submitted that, while it is undisputed that the power of this Court to extend time to do a legal act out of time is discretionary, the exercise of such power is invoked very sparingly.

He submitted that, there must be materials enabling the Court to act upon when deciding whether to grant an application for such extended time or not. He submitted that, the application does not disclose good reasons

that may warrant this Court to extend time as the applicant failed to act with good diligence in attending her case. He relied on the case of **Kalunga and Co. Advocates vs NBC Ltd** [2006] TLR 235 where it was stated that:

“...the Court has a wide discretion to extend time where the time has already expired, but where there is inaction or on the part of the applicant, there ought to be some kind of explanation or material upon which the Court may exercise the discretion.

The Respondent submitted that, the Arbitral award was delivered on 1<sup>st</sup> of April 2019 and was collected on 17<sup>th</sup> June 2019. However, he submitted, referring to paragraph 5 of the Applicant’s affidavit, that, while the Applicant averred that the award was served on her on 28<sup>th</sup> May 2019, meaning that it was not true that the award was collected on 17<sup>th</sup> June 2019. He argued that, since the Applicant collected the award on 28<sup>th</sup> May 2019, time started to run against the Applicant on the same day and expired on 27<sup>th</sup> November 2019.

It was submitted that, on 17<sup>th</sup> June 2019 the Applicant wrote to the Sole Arbitrator to cause the award to be filed in this Court, and the Applicant was informed of the costs involved. It was also contended that, according to **Annexure CB-2** to the Affidavit of the Applicant, the Applicant has averred that, she was ready to meet the costs or charges involved and, for that matter, cannot put any blame on the Respondent. He submitted that, there was no prior agreement between the parties to the arbitration regarding the sharing of those filing charges and the Respondent has never contributed to the delay of filing the award and the Applicant has not substantiated such allegations.

It was a further contention of the Respondent’s counsel that, financial constraints on the part of the Applicant cannot constitute

sufficient reason for extending time. To buttress that submission, reliance was placed on the Court of Appeal decision in the case of **Wambele Mtimwa Shahame vs Mohamed Hamis**, Civil Ref.No.8 of 2016 (unreported), where the Court of Appeal, while citing the case of **Yusufu Same & Another vs Hadija Yusufu**, Civil Appeal No.1 of 2002 (unreported), stated as follows, that:

“We are aware that financial constraint is not a sufficient ground for extension of time. See *Zabitis Kawuka v Abdul Karim (EACA) Civil Appeal No.18 of 1937.*”

It was submitted further, that, the submission of there being financial constraints on the part of the Applicant was an afterthought and, that, even if financial constraint was to be allowed as a sufficient ground, the Applicant has not substantiated such claims regarding financial constraints. Further, that, the Applicant’s submission contradicts **Annexure CB-2** of the Applicant’s affidavit. He concluded, therefore, that, the Applicant slept over his right to cause the award to be filed in this Court within time as the Applicant decided to effect payment of the demanded fees by the Arbitrator in a manner and time as was pleasing to its own.

On the basis of what has been stated herein, the Respondent’s counsel submitted that, the application does not disclose sufficient reasons to warrant the granting of the prayers sought. He prayed for the dismissal of the application with costs.

In a brief rejoinder submission, the Applicant submitted that, although the Respondent focused only on the issue of financial constraint, that issue was not the only reason which delayed the applicant. Referring to his affidavit in support, the Applicant submitted that, it was the failure of the Respondent to effect payment as final costs prior to the collection of the

award. The Applicant relied on the case of **Kalunga and Co. Advocates v NBC Ltd [2006] TLR 235** to urge this Court to exercise its discretion and grant him the extended time to file the award in this Court, noting that the applicant has all along been diligent and had not acted negligently.

He further argued that, there has not been a hard and fast rule regarding what constitutes good cause but each case is heard on its own merit. To that end, the Applicant referred this Court to the case of **Bertha Bwire v Alex Maganga, Civil Reference No.7 of 2016 (unreported)** where the Court stated, concerning the power to exercise its discretion, that, “such discretion must be exercised judicially and flexibly with regard to the relevant facts of the particular case.” He, thus, reiterated his submission in chief, noting that, the circumstances prevailing prior the registration constitute sufficient reasons for the delay and should persuade the Court to exercise its discretion.

I have carefully considered the submissions by the rival parties herein. The application before me is not a complex one. It is an application seeking for extension of time within which the Applicant will be able to file in this Court an Arbitral Award delivered and dated 1<sup>st</sup> April 2019, so as to enable it form a Decree of this Court, hence, enforceable. An earlier attempt to file the award as **Miscellaneous Commercial Cause No.3 of 2020** failed following a successful objection by the Respondent, and, for that reason, it got struck out by the Court.

Let me state that, like any other application for extension of time, the decision whether or not to grant time within which an applicant will be able to file an Arbitral award in this Court, having failed to do so within the prescribed time, is a decision arrived at as a result of an exercise of the

Court's judicial discretion. The granting, therefore, is not a matter of someone's right.

It is worth noting, however, that, powers exercised on the basis of discretion, are powers that must be exercised judiciously and not on caprice, whim, likes or dislikes. In essence, exercise of discretion vested in the court is dependent upon various circumstances, which the Court must consider, among them being the need to do real and substantial justice to the parties to the suit, the nature and reasons for such a delay, to mention but a few. See the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appl. No.2 of 2010, (CAT) (Unreported).

Courts have long emphasized that; discretion, should be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case* [77 ER 209; (1597) 5 Co.Rep.99] stated as follows:-

"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

**Osborn vs. Bank of the United States, 22 U. S. 738 [1824]**, Chief Justice John Marshall (as he then was), writing on judicial power, stated the following on the subject:-

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a

discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

As regards the instant application, the key issue for determination by this Court is: **whether or not the Applicant has demonstrated good grounds to warrant this Court to extend time within which the Applicant will be able to file the Arbitral Award.**

In its submission, the Applicant has contended that the Award has never been challenged anyhow whatsoever or been set aside, and, maintained, that implies the Respondent was satisfied or agreed with the determination of the award, and, therefore, was supposed to effect payment as requested by the Applicant immediately after the delivery of the award. I think that is a mistaken assumption. If the party who lost in the arbitral proceedings remain silent after the award has been delivered, that does not mean that he has agreed or is satisfied. If he pays the amount settled in the award without any problem that will be fine. But things are not always that way and that is why the legislature in its wisdom legislated that the award shall be filed in court.

Basically, once an award is issued, unless the other party pays the amount awarded to the Claimant immediately thereafter without further hustles, it is the duty of the party in whose favour it was decided to cause the Arbitrator to have the award filed in court of competent jurisdiction, if that party wants to have it enforced as a Decree of the Court. The other party, against whom the award was issued, cannot challenge such award before it is filed before the Court.

Such a legal position was clearly set out by the Court of Appeal in the case **Tanzania Cotton Marketing Board vs Cogegot Cotton Company SA** [1997] T.L.R. 165. See also the case of **Kigoma/Ujiji Municipal Council vs Nyakirang'ani Construction Limited**, Misc. Commercial Cause No.239 of 2015 [2019] TZHCComD 3; [26 May 2016 TANZLII], and **Afriq Engineering & Construction Co. Ltd vs The Registered Trustees of the Diocese of Central Tanganyika**, Misc. Commercial Cause No.4 of 2020 (unreported) and **Afriq Engineering & Construction Co. Ltd vs The Registered Trustees of the Diocese of Central Tanganyika**, Commercial Review No.3 of 2020 (unreported).

Concerning demonstration of sufficient reasons upon which the Court may act in the course of exercising its discretion, it is clear, as stated earlier, herein, that, the instant application was filed under Section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019]. For ease of reference, Section 14 (1) of that Act provides as follows:-

Notwithstanding the provisions of this Act, the court may, "for any reasonable or sufficient cause"; extend the period of 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. (Emphasis added).

In its affidavit, the Applicant has stated, in Paragraph 5, that, the Award was served on the Applicant on the 28<sup>th</sup> May 2019. As correctly stated by the Respondent, the sixth months within which it should have been filed in this Court ended on 27<sup>th</sup> November 2019.

In my assessment of the reasons disclosed in the affidavit regarding why the Applicant could not file it within the prescribed time, the only reasons which speak louder is in paragraph 8 of the Applicant's supporting

affidavit, i.e., the delay was caused by financial constraints. However, and with due respect, as the Court of Appeal stated in **Wambele Mtimwa Shahame vs Mohamed Hamis, (supra)** financial constraint is not a sufficient ground for extension of time.

Besides, it is also a settled law now that an Applicant seeking for extension of time to do a legal act which ought to have been done within a particular prescribed time must account for each day of delay. This has been emphasized in a number of cases, one of them being the case of **Hassan Bushiri vs Latifa Lukio Mashayo, Civil application No. 3 of 2007, Court of Appeal of Tanzania** (unreported). In that case the Court of Appeal was of the view that:

“Delay even of a single day has to be account for; otherwise, there would be no point of having rules prescribing periods within which certain steps have to be taken.”

In the instant application, the Applicant has not been able to demonstrate why he delayed to act within the prescribed time. It is indeed true that Courts are to act with flexibility as suggested by the Applicant, with a view to uphold substantive justice. Nevertheless, the need to uphold substantive justice to the parties does not mean avoiding procedural requirements including those which set for time limits. Once a person is outside the prescribed time limit the law allows him or her to apply for extension but he/she must avail to the Court sufficient reasons for the delay, including account for each day of such delay. This is now a settled legal position.

Having carefully examined the affidavit in support of the application, as well as the submissions of the Applicant, I am satisfied that the Applicant has not been able to convince this Court as to why he was not able to file the award in this Court within the prescribed time. In other

words, the Applicant has failed to disclose sufficient reason(s) for the delay, including accounting for each day of delay. Consequently, this Court declines to grant the application and proceeds to dismiss it with costs to the Respondent.

It is so ordered.



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**DEO JOHN NANGELA**  
**JUDGE,**  
**HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(COMMERCIAL DIVISION)**  
**20/10/2020**

Ruling delivered on this 20<sup>th</sup> day of October 2020, in the presence of the Advocates for the Applicant and in the absence of the Respondent.



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**DEO JOHN NANGELA**  
**JUDGE,**  
**HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(COMMERCIAL DIVISION)**  
**20/10/2020**