

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

DAR ES SALAAM.

MISC. COMMERCIAL APPLICATION NO. 89 OF 2021

LAZAFI COMPANY LIMITEDAPPLICANT

VERSUS

WORLD VISION TANZANIA..... RESPONDENT

Date of Last Order: 15/09/2021

Date of Ruling: 01/10/2021

RULING

MAGOIGA, J.

The applicant, **LAZAFI COMPANY LIMITED** under the provision of section 14(1) of the law of limitation Act [Cap 89 R;E 2019] and section 95 of the Civil Procedure Act [Cap 33 R; E 2019] instituted this application against the above named respondent praying for the following orders, namely:-

- i. This honorable court be pleased to order extension of time to file an arbitral award i.e. Final Award (save for costs) made and published on 22nd October,2020 by a sole arbitrator, one, Qs Cornel Tryphones to the High Court Commercial Division.



- ii. Any other reliefs that this honorable court may deem fit and just to grant.

The chamber summons was taken at the instance of Ms. Chiku Chande, learned advocate for the applicant and is supported by an affidavit deposed by Mr. Ibaya Lazaro Magira, Principal Officer of the applicant, stating the reasons why this application should be granted.

Upon being served with the application, the respondent filed a counter affidavit deposed by Ms. Janeth Edson, an officer of the respondent stating the reasons why this application should not be granted.

The material facts to this application are imperative, albeit in brief, to be stated. In between February, 2006 to July, 2008 the applicant and Respondent entered into construction agreement of various projects in Maswa and Itilima District in Simiyu region which all were VAT exclusive. Among other terms, parties agreed to the mechanism of solving their disputes, in case one arises, that is by arbitration process.

Facts go that, in the course of implementation of the contracts, a dispute arose and the applicant's concern was whether the contracts were VAT exclusive or inclusive and who was liable to pay VAT. This state of affairs, led to several communications which were in vain. Consequently, parties referred their dispute to arbitration as per the terms of agreements. Mr. Qs Cornel Triphone was appointed as sole arbitrator on 22nd October, 2020 and having dully heard and considered



the matter issued the final award save for costs. Facts went further that, on 21st December, 2020 the final award was ready for collection from NCC. And subsequently, on 17th March, 2021 the applicant requested the arbitrator to file an award but the arbitrator did not act upon that request for reason not known to applicant. Thereafter on 10th May 2021 the arbitrator filed an award with some procedural defects which was withdrawn with the leave to refile the same. Following that withdraw, the applicant was out of statutory time to file an award for registration, hence, this application for extension of time to file an award for registration.

The applicant at all material time has been enjoying the legal services of Ms. Chiku Chande, learned advocate. The respondent as well at all material time has been enjoying the legal services of Ms. Pauline Mtui learned advocate. The hearing of this application was done orally.

Ms. Chiku adopted the chamber summons and the supporting affidavit to form part of her oral submission in support of the application. The learned counsel went on to submit that, the final award was published on 22nd October, 2020 but the same was filed on 10th May, 2021 after the lapse of six months. The learned counsel for the applicant explained the delay, she told the court that, they have two reasons for seeking an extension. **First**, late filing was not caused by the applicant's negligence but rather the sole arbitrator as stated under paragraph 13 of the

affidavit. Expounding on the point, the learned counsel stated that, Rule 51(4) of the Arbitration Rules require the arbitral tribunal within the prescribed time, to file an award to the court for registration and give notice to the parties. However, for reason not known to the applicant, the arbitrator filed an award on 10th May, 2021 which was already out of prescribed time despite the early reminder as stated under paragraph 12-13 of the affidavit. Additionally, the learned counsel submitted that, the arbitrator filed two separate awards on a single application which was wrong and causing them to be improper before the court causing them to be improper and was withdrawn. According to her, the delay to have the award filed in this court in time was not due to the negligence of the applicant but rather the arbitrator as all the time, the applicant was diligent in make follow up as well as and making several reminder to cause the arbitrator to file an award, but such endeavors did not bear fruits, hence, efforts to have the award filed were initiated out of time as the award ought to have been filed within six months.

Submitting on the second reason, learned counsel for the applicant stated that the arbitral tribunal was late to inform the parties as to when the award was ready for collection .The learned counsel went on to submit that rule 15 of the Arbitration Rules requires the arbitral tribunal to notify the parties as to when to collect the award. Unfortunately parties were not informed timely until two months passed and



immediately after collecting the award applicant started making follow up and liaison with the arbitrator to cause the award to be filed for registration but the efforts were in vain.

It is on the totality of the above reasons; the learned counsel for the applicant invited this court to grant her prayers as contained in the chamber summons so as to pave way for the interest of justice to be done.

On the other hand, the respondent through Ms. Mtui adopted the contents of the counter affidavit filed in this court and acknowledged that the award was published on 22nd October, 2020 and parties were informed on 26th October, 2020, that the award was ready for collection at NCC after payment of the costs.

Submitting further, the learned counsel disputed the claim that parties were informed after two months, contending that the delay was due to failure to make payment of costs in time as payment for costs was a condition for collection of an award. According to her, the delay was due to financial constraint. Submitting on the point the learned pressed that, financial constraints does not constitute sufficient reasons for extending time. To buttress her argument, she cited the case of BOGETA ENGINEERING LIMITED VS NANYUMBU DISTRICT COUNCIL, MISC. COM CASE NO 9 of 2019 HCCD (DSM) (Unreported) in which the court held that, issue of late payment cannot be a ground for extension of time.

The learned counsel for the respondent acknowledged that, it is the role of arbitrator to file the award after request by the parties. However, according to her, no request has been made by the respondent requesting the arbitrator to cause the award to be file in the court instead the applicant was busy with other steps like making demand on payment of the awarded amount .

On the basis of what she has stated herein, the learned counsel submitted that, the applicant failed to disclose sufficient reasons to warrant the granting of the prayers sought. She prayed for dismissal of this application.

In brief rejoinder, as to the issue of email which was sent on 17th March, 2021, the learned counsel for applicant reiterated her earlier submissions and added that the truth is that, the applicant requested for registration of the award within time and the arbitrator replied that he is working on it

In the foregoing, Ms. Chande requested the court not to punish the applicant because someone did not do his legal duty and invited the court to grant prayers as in the chamber summons.

This marked the end of hearing of this application.

I have carefully considered the affidavit in support of this application, counter affidavit and the oral rivaling submissions by the learned advocates for parties' herein together with the supportive exhibits, and I

am inclined to find this application merited. Since grant of an application for extension of time is a judicial discretion to be exercised judiciously depending on surrounding circumstances, always the aim must be to achieve real and substantial justice between parties, the weight and implication of the issue to parties to the suit, the nature and reasons for delay just to mention a few are matter of utmost importance for consideration by the Court. The case of **Lyamuya Construction Company Ltd vs. Board of registered trustees of young women's Christian association of Tanzania, Civ Appl No. 2 of 2010 (CAT) (Unreported)** underscore the points for consideration very amply.

As regard to the instant application, the issue for determination is whether the applicant has demonstrated sufficient cause to warrant this court to extend time within which the applicant will be able to file an award? In her submission in chief, the counsel for the applicant has contended that, the delay in filing the award for registration was caused by the negligence of the arbitrator despite prompt request to do so. According to her, the arbitrator failed to act upon the request. On the other hand, Ms. Mtui was of the firm view that, delay in filing an award was not caused by the applicant but due to financial constrains, and therefore, lateness, if any, was attributed by the applicant's failure to pay costs to arbitrator. Secondly, the applicant was busy dealing with other steps instead of requesting the arbitrator to register the award.

Having considered the submission of parties herein above, I see the substance in Ms. Chande's submissions that, the delay in filing the final award was beyond the applicant's control and not attributed to the applicant. I am entitled to the above stance for several reasons; **one**, the records are louder and clear that, the award was published on 22nd October, 2020 and the notice for collection of final award was ready on 21st December, 2020 as per annexure LZF 06. Therefore on that regard, I cannot act on Ms. Mtui submission that notification for collection of award was made on 26th October, 2020 for it is a mere statement from the bar. It was the duty of the respondent to controvert the evidence given by applicant and that's why I agree with Ms. Chande that parties were informed after two month have passed from the date of publication which is clear indication that it is arbitrator who attributed the delay.

Two, Sections 51 of the Arbitration Act, imposes two obligations; first, it enjoins the arbitrator to cause the award be registered after the request is made. Secondly, it requires the parties to collect an award upon being informed, having examined the annexure under paragraph 12 of the affidavit and weighed these divergent contentions, I am of the firm view that, the applicant performed his obligation by requesting the arbitrator to file an award through email dated 17th March, 2021, and arbitrator replied that that he is acting upon it. In that situation, delay in

filing the final award was beyond the applicant's control because he could not perform the obligation of the arbitrator as the power to file an award is vested with the arbitrator. The applicant is only duty bound to make request which she did within time and therefore the argument that the delay was due to financial constraint is hereby rejected. The case of BOGETA ENGINEERING LIMITED (supra) is distinguishable because in that case, the applicant was late to pay costs to arbitrator while in the instant application, the applicant has paid the costs within time and requested the same but for unknown reasons the arbitrator did not file the award. So it was arbitrator who attributed to the delay and therefore the applicant cannot be punished for the wrong committed by the arbitrator. See the case of **The International Airlines of the United Arab Emirates Vs. Mossoro Nassoro civil application No 569 of 2019** in which the court had this to say; what constitute good cause has not been codified, although the following factors must be considered, these are; whether or not the application was brought promptly, a valid explanation for delay and whether there was diligence on the part of the applicant.

Guided by the above stance, I find in the instant application, the applicant has given valid explanation for delay and that she was diligent.

Three, the innocent applicant cannot be punished for negligence of an arbitrator who filed two separate awards on the same application. His

enduring negligence implies lack of diligence on the part of arbitrator in filing an award warranting the applicant to withdraw the application. As a result, the instant application was made out of time, and therefore I agree with the applicant that, the arbitrator is plainly blameworthy for his inaction in late filing of the award within time. It is worth noting that, the reasons for extension must be determined by reference to all circumstances of each particular case. See the case of **General Manager Tanroads Kagera Vs Ruaha Concrete Company Ltd Civil appl. No 96 of 2002 (unreported)**

Therefore, the circumstances of this case warrants the grant of extension of time because it is the negligence of an arbitrator which attributed the delay in filling the award for registration. Finally I am of a settled mind that, the applicant has shown good cause for delay thus the application has merits and it is hereby granted with an order for each party to bear his/her own costs. The applicant is given 14 days from the date of this order to file the award in this court for necessary orders.

It is so ordered

Dated at Dar es Salaam this 1st October, 2021




S.M.MAGOIGA
JUDGE
1/10/2021