

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION**

AT MWANZA

MISCELLANEOUS COMMERCIAL APPLICATION NO. 06 OF 2022

AND

IN THE MATTER OF THE ARBITRATION ACT [CAP 15 R.E. 2020]

AND

**IN THE MATTER OF AN APPLICATION FOR EXTENSION OF TIME TO
CHALLENGE REGISTRATION OF ARBITRAL AWARD ISSUED THROUGH THE
TANZANIA INSTITUTE OF ARBITRATORS DATED 25TH JANUARY, 2021,
IN FAVOUR OF THE RESPONDENT:**

BETWEEN

GEITA TOWN COUNCIL APPLICANT

VERSUS

**M/S HOME AFRICA INVESTMENT
CORPORATION LIMITED..... RESPONDENT**

RULING

Date of last order: 24/05/2023

Date of ruling: 26/05/2023

AGATHO, J.:

In this application, the applicant Geita Town Council, under the provisions of Section 14(1) of the Law of Limitation [Cap 89 R.E. 2019] instituted the application seeking the Court's order for extension of time within which to file petition to challenge the registration of the award issued by the sole arbitrator one, Dr. Kumbwael W. Salewi dated 25th

January, 2021. This is expressed in the chamber summons supported by the affidavit duly sworn by Ms. Subira Mwashamba a senior State Attorney working in the office of the Solicitor General, stating the reasons why this application should be granted on the following orders;

1. That this honourable court may be pleased to extend time within which to file the petition challenging the award by Dr. Kumbwaeli W. Salewi (sole arbitrator) dated 25th January, 2021.
2. Any other order(s) this Honourable court may deem fit to grant.

On the adversary side, the Respondent upon being served with the application filed a counter affidavit sworn by James Maximillian, the Principal officer of the Respondent stating the reasons why this application should not be granted. When the application called on for hearing, the applicant had the legal service of Mr. David Kakwaya, Principal State Attorney Messrs Mathias Kabengwe and Allen Mbuya State Attorneys whilst, the Respondent had the legal service of Mr. Godlisten Lyimo, learned Advocate. The hearing of the application was done orally.

In support of the application, Mr. Kakwaya began his submission by adopting the chamber summons and the contents of the supporting affidavit to form part of his oral submission in support of the application. The learned principal state Attorney went on to submit that this

application was pegged under the provision of Section 14(1) of the law of limitation Act and explained the delay as stated in paragraph 15 of the affidavit which according to him stipulates illegalities which warrants this court to grant the application. Expounding on the point the learned principal state Attorney had it that, Section 14(1) of the law of Limitation Act [Cap 89 R.E. 2019] allows the court to extend time if there is reasonable or sufficient cause. However, he was quick to point that this section does not define the term sufficient cause. He contended that although there is no definition of the term sufficient cause, through case law there are established circumstances or factors to be considered when granting extension of time. He buttressed his argument with the case of **Arunaben Chaggan Mistry v Naushad Mohamed Hussein and 3 others, Civil Application No. 6 of 2016 CAT at Arusha**. According to Mr. Kakwaya the reasons why they are seeking an order for extension of time is that they have noted some illegalities on the tribunal proceedings which show that, the arbitrator acted beyond its power for he acted as appellate court by confirming the adjudicators award instead of issuing the award according to the evidence presented before it.

Submitting on second aspect of illegality, Mr. Kakwaya pointed that the arbitrator's award was based on fidic contract which was not a part of the contract as such arbitrator exercised the power without jurisdiction.

On the last aspect he elaborated that there is uncertainty or ambiguity on the award. According to Mr. Kakwaya these are sufficient reasons for extending time. He reasoned that at this stage this court is not allowed to consider the merit of illegality. Its duty is to grant the application. To cement his argument, he referred this court to several cases including the case of **Victoria Real Estate Development Limited v Tanzania Investment Bank, and 3 others, Civil Application No. 225 of 2014 CAT** and **the Regional Manager TANROAD Lindi v DB Shapriya Ltd, Civil Application No. 29 of 2012 CAT**. He contended that these cases are to the effect that illegality may constitute good cause for the purpose of extending time. He added that the court is not allowed to consider the merits of the illegality. He relied on the case of **Attorney General v Electrics International Company Limited and Another, Civil Application No. 479/16 of 2022 CAT at DSM**. In which the court held that, court should refrain from considering substantive issues that are to be dealt with by the appellate court. On the above submission the learned Principal State Attorney prayed that this court grant the application basing on the reasons stated in paragraph 15 of the affidavit.

In his rebuttal submission, Mr Lyimo, the learned counsel for Respondent, started his submission by adopting the contents of the counter affidavit which was prior filed in this court on 08/03/2023 to form

part of his submission against the grant of the application. He highlighted two issues in his submission to wit: One, whether the application is proper before this court, and two, if the answer is in affirmative then whether the applicant has passed the legal tests set for the grant of extension of time.

Submitting on his first issue, he contended that this application was filed prematurely because there is not an award that has been filed for registration in this court which could be challenged by the applicant. He contended further that, it is trite law that whenever one wishes to challenge the arbitral award, that award has first to be filed for registration before the court and thereafter one may challenge it. To cement his submission, he relied in the case of **Tanzania National Roads Agency v TAFISA General Enterprises Limited, Misc. Civil Application No. 39 of 2019, HCT (unreported)**. **Kigoma/Ujiji Municipal Council v Nyakirang'ani Construction Limited, Misc. Commercial Cause No. 239 of 2015, HCCD at DSM** and the case of **A Caste Corporation v the Registered Board of Trustees of PPF, Misc. Commercial Case No. 16 of 2009, HCCD at DSM**.

The learned counsel for Respondent added that, the evidence to show that no award has been filed before this court is supported by the

order of this court dated 28th February, 2022 allowing applicant to file an award within 21 days so that it could challenge it. According to the learned counsel for Respondent the court was aware that, no one can challenge the award which has not been filed for registration. However, to date the applicant has not complied with court order and he is before this court seeking extension of time to challenge the award without filing the award, the act which according to him is abuse of court process because the applicant was given time to file an award in this court but she did not file and has not stated why she did not file the said award. He reasoned that since no award has been filed for registration, it is crystal that the present application was filed prematurely.

He added that, the allegation of illegality alleged by the applicant under paragraph 15 of the affidavit ought to have been dealt first by the tribunal because it is a requirement of section 77 (2)(b) of the Arbitration Act Cap 15 R.E. 2020 that any aggrieved party has to exhaust all available recourse under section 64 of the Act before taking further steps. According to the learned counsel for the respondent the applicant allegation on illegality was not referred to arbitral tribunal for correction of the stated illegality as such this application is prematurely.

On the second issue, the respondent's counsel submitted that the applicant failed to show good cause for she failed to account for each day

of delay. He argued that, there is no explanation as to what the applicant was doing in more than one year after she received the award on 15/9/2021. To support his point the learned counsel cited the case of **Lyamuya Construction Company Limited v The Board of Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT**. He added that, the right to file petition challenging registration of the award start to accrue from the date when the award is filed in court as such the right to challenge the award has to be within the time limited. He referred this court to the case of **Dezo Civil Contractors Co. Ltd v Osteerlay Investment Limited, Misc. Commercial Application No. 23 of 2022 HCCD at DSM** (unreported). And he distinguished all cases cited by the applicant's Principal State Attorney on ground that both cases cited by him are for extension of time to file an appeal while the instant application is on extension of time to file petition within which to challenge the arbitral award. He prayed that this court dismiss the application for want of good cause.

In brief rejoinder to Mr Lyimo's submission, Mr Kakwaya, Principal State Attorney reiterated his submission in chief and stated that, the court did not give that order for extension of time to file an award suo motu. He went on submitting without elaborating further that there was

circumstance which made the court to give that order for extension of time.

Re-joining on section 64 of the Arbitration Act cited by the respondent's counsel, Mr Kakwaya contended that that Section does not apply because the arbitrator acted beyond his powers by treating the matter as an appeal. Concerning the issue of accounting for days delayed, he contended that whenever the issue of illegality is pleaded the accounting delayed days is not required. On this point, he referred this court to the case of **Arunaben** (supra).

Submitting on competence of the application Mr Kakwaya, the learned Principal State Attorney, submitted that registration of the award to become a decree is different from petition to challenge the registration of the award. As such if the legislature wanted the award to be registered first then the law could have said so. Regarding the cases cited by the Respondent's counsel, the learned Principal State Attorney contended that all cases cited were decided before the enactment of the new Arbitration Act [Cap 15 R.E. 2020]. He stressed that, **Kigoma/Ujiji case** (supra) was of 2016 while the case of **A Caste Corporation** (supra) was dealing with the issue as to when the award turns into a decree. He added that

all the cases cited are High Court decisions which are not binding upon this court. He pressed the court to grant the application with costs.

From the outset, I should state that, I agree with the learned counsel for Respondent that this application has been filed prematurely as it seeks to challenge an arbitral award which is not before this Court. The wording of Rule 51(4) of the Arbitration Rules is loud and clear that it requires the arbitral tribunal within prescribed time to file an award for registration and give notice to the parties. Literally, that means the award has first to be filed before the court, thereafter if the petitioner or any interested party wishes to challenge the registration she can do so.

It is worthwhile to draw a line of demarcation between requirement of filing of the arbitral award sought to be challenged and the issue of extension of time of the said award based on illegality/ies because that seem to be points drifting the parties apart. In my view that is crucial in determining the application at hand.

The issue of illegality as a factor for extending time is worth to be expounded. Having considered the rival arguments of the parties' learned counsel on grant or not to grant and having gone through the affidavit and the counter affidavit, and particularly the authorities cited, I agree

with Mr Kakwaya, learned Principal State Attorney that illegality is a good cause for extending time. However, for the illegality to be good cause:

- i. It must be a point of law of sufficient importance,
- ii. It must be apparent on the face of the record,
- iii. Be embedded in the decision sought to be challenged.

Briefly, on the issue of illegality claimed, I am of view that while illegality is a good cause for granting extension of time but in the circumstance of this application that ground is misplaced because the arbitration award sought to be challenged was not filed in this court. It is my considered opinion that if the law does not categorically require filing of the arbitral award before one can challenge it as Mr Kakwaya, Principal State Attorney claims, justice and reason will be defeated as the court is invited to grant the extension of time based on illegality which it has not seen for the impugned arbitral award has not been filed in the court.

Looking at the affidavit in support of the application, there is no base for this court to be persuaded and believe that indeed the said allegations are points of law of sufficient importance because the impugned award is not before this court. The learned Principal State Attorney has submitted that the illegalities were noticed in the award, but the said award was neither filed in this court nor attached to the

application. In absence of the impugned award this court cannot act on the bare submission of the applicant's counsel that there is illegality without perusing the impugned award. It is trite law that where the illegality is contained, in the proceedings, it must be attached with the affidavit. See the case of **Tanzania Harbours Authority v Mohamed R. Mohamed [2003] TLR 76** in which it was held as follows:

"Admittedly, this Court has said in a number of decisions that time would be extended if there is an illegality to be rectified. However, this Court has not said that time must be extended in every situation. Each situation has to be looked at on its own merits. In this case the defence has been grossly negligent and surely cannot be heard now to claim that there is a point of law at stake..."

Guided by the above authority, and in my respectful view extension of time is not a right of a litigant but rather a discretionary power of courts which though must be exercised judiciously, litigants should lay a basis. Therefore, it is not in every application where illegality is raised as reasons for extension of time the same will be granted as of right. If one applies for extension of time, its grant depends on the circumstance of the case and in particular the error or illegality has to be apparent on the face of

record. See the case of **Lyamuya Construction Company. Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT**. In the case at hand the records including the arbitration award is not filed in the court.

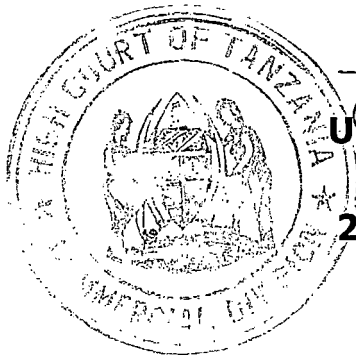
In amplifying his allegation of illegalities, the learned Principal State Attorney submitted that, the arbitrator acted beyond his powers because the award was based on fidic contract and that there is uncertainty or ambiguity in the award. In my view, all these allegations ought to have been seen in the award. But for reasons known best to the applicant she did not embed them with the affidavit as such this court was denied an opportunity of going through the impugned arbitral award because it was not filed in the court. Since there was no arbitral award filed, the court was unable to appreciate the gist of the alleged illegalities. Consequently, it was incapable of exercising its discretion to extend time. The application was ipso facto pre-mature. It is like placing a horse before the cart.


For the foregoing reasons the application is rejected for being premature and hence lacking merit.

Each party shall bear its costs.

Order accordingly.

DATED at MWANZA this 26th Day of May, 2023.




U. J. AGATHO
JUDGE
26/05/2023

Date: 26/05/2023

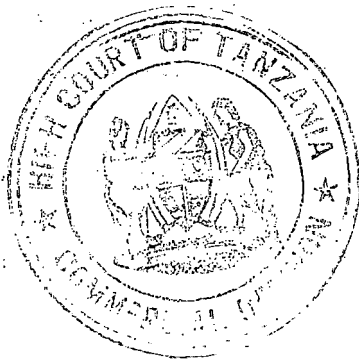
Coram: Hon. U. J. Agatho, J.


For Applicant: Allena Mbuya, State Attorney.

For Respondent: Allen Mbuya, State Attorney holding brief of Advocate
Godlisten Lyimo.

C/Clerk: Beatrice

Court: Ruling delivered today, this 26th May 2023 in the presence of
Allen Mbuya, learned State Attorney for the Applicant, also holding
brief of advocate Godlisten Lyimo for Respondent.




U. J. AGATHO
JUDGE
26/05/2023