

TANZANIA / JUDGMENT

Ruling MC ACMIRS v Medical Store Department 11 2

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16 August 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA COMMERCIAL DIVISION AT
DAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 16426 /2024 (Originating from Misc.
Commercial Cause No 32 of 2023) M/S ACMIRS CONSULTING LIMITED
APPLICANT versus MEDICAL STORE DEPARTMENT.....1ST RESPONDENT
ATTORNEY GENERAL 2nd RESPONDENT

RULING

Date of last order: 24/09/2024 Date of Ruling:1/11/2024 GONZI, J. The Applicant is seeking extension of time to file an application for registration of Arbitral award issued on 16th August 2022 by Mr. Nuhu Mkumbukwa, Arbitrator. The applicant also prays for cost of this application and any other orders that the court may deem just to grant. The gist of this matter is that the Applicant filed in this Court Commercial Application No. 32 of 2023 moving the court to register an arbitral award which was issued in 1 its favour. The Respondents filed a preliminary objection challenging the application for reason that it was filed out of time. The court upheld the preliminary objection, consequently on 4th April 2024, the application was dismissed. The Applicant initiated the filing of the application for registration of the arbitral award by filing this application seeking extension of time to refile the same. The Respondents, however, did not file a counter affidavit despite being served. When the matter came for hearing on 27th August 2024, they failed to appear, as a result, the application proceeded exparte against the Respondents. On 9th September 2024, this Court ordered the application to be disposed by way of written submissions. In his written submissions the Learned Counsel for the Applicant, Mr. Kavola Semu adopted his affidavit and that of the arbitrator Mr. Nuhu Nkumbukwa, to form part of the submissions. He submitted that granting extension of time is entirely in the discretion of the court. He cited the case of Benedict Mumello versus Bank of Tanzania, Civil Appeal No. 12 of 2002 (unreported) where the Court of Appeal, at page 5-6, held that: 2 “It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and the extension of time may only be granted where it has been sufficiently established that delay was with sufficient cause.” He further submitted that the Court in exercising this discretion will observe whether the delay was with sufficient cause to warrant it to extend time. He contended that sufficient reason/cause is not defined in the statutes, however, there is a long list of judicial

decisions of the High Court and Court of Appeal of Tanzania on what constitutes a sufficient reason/good cause. Reference was made to the case of Yusufu Same and another versus Hadija Yusuf, Civil Appeal No. 1 of 2002, Court of Appeal of Tanzania Dar es salaam (unreported) where at page 9, the Court quoted with approval its decision in Felix Tumbo Kissima versus Tanzania Tele- Communication Co Ltd and another [1997] TLR 57 where the Court held that: - “It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step.” He further made reference to the case of Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women’s Christian Association, Civil Application No. 2 of 2010 (unreported), where at pages 6 and 7, the Court of Appeal highlighted the following conditions for granting of applications for extension of time. These are:

1. The Applicant must account for all the period of delay.
 2. The delay should not be inordinate.
 3. The Applicant must show diligence, and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take.
 4. If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance as the illegality of the decision sought to be challenged.” 4 Mr. Kavola Semu, Learned Advocate, was of the view that the applicant's application has met all the necessary conditions for this Honorable Court to grant an extension of time as demonstrated in the affidavit. He continued that that the delay in filing an application for registration of the Arbitrator’s award was occasioned by a reasonable cause. On accounting for all period of delay, he drew the Court’s attention to paragraphs 7, 8, 9, 10, 11 of the affidavit in support of the application sworn by him, and paragraphs 3, 4 and 5 of the affidavit of Nuhu Mkumbukwa, the Arbitrator, to substantiate the argument that the Arbitral award was issued by the Arbitrator on 31st August 2022 through a letter which was never served to the Applicant nor her Attorney. Mr.Semu, Learned Counsel, further highlighted that the Applicant learnt about the issuance of the award several months later. Immediately, the Applicant followed up several times to National Construction Council (NCC) where she obtained control number on 11th January 2023 as per annexure Acmir 4 and paid the arbitral fees on 13th January 2023. The Applicant was notified about the issuance of the award on 13th February
2023. She made close follow up to obtain the award as proved by annexure Acmir 5 where after receiving the award, she immediately instructed the 5 Arbitrator to register the award. The Arbitrator registered the award on 22nd March 2023. Mr. Kavola Semu, Learned Advocate, submitted that the Applicant was thus made aware that the award was ready on 13th February 2023, unaware of the previous notification on the readiness of the award issued only to the Respondents. He argued that due to this anomaly, the application for registration of the award presented in court on 22nd March 2023 was out of time, counting

form 31st August 2022 when the award was issued, contrary to section 17(1) of the Arbitration Act read together with part III item 18 of the Law of Limitation Act Cap 89 RE 2019. Further, as stated in the affidavits, on 22nd March 2023, the Applicant filed an application for registration of the arbitral award and the Respondents raised a preliminary objection that the application was out of time. The objection was upheld and the application was dismissed on 4th April 2024. It was the submission of the Applicant's Counsel that the time spent in prosecuting Misc. Commercial Cause No 32 of 2023 from 22nd March 2023 to 04th April 2024 deserves to be excluded because it amounts to a technical delay. 6 Mr. Semu cited the case of Elly Peter Sanya Versus Ester Nelson, Civil Appeal No. 151 Of 2018(unreported) where the Court of Appeal at page 26 defined what is a technical delay and held that: "It is now settled principle that the delay in taking action within the time specified by law caused by time spent in prosecuting a matter in court constitutes good cause of delay. This is what is now known in legal arena as technical delay." Mr. Semu submitted that the period spent in court in prosecuting the case amounts to a technical delay which is excusable. According to paragraph 16 of the affidavit of Kavola Semu, after obtaining the ruling of Misc. Commercial Cause No 32 of 2023, dismissing the application for registration of the award, in the period between 4th April 2024 and 5th June 2024, the advocate notified her client and shared the ruling. He further prepared and issued an opinion on the same and made deliberation and consultation on the way forward. Thereafter the Applicant formally instructed the advocate to file this application. The Advocate conducted research, reviewed the documents and filed this application and 7 that is how each day of delay is accounted. He made reference to the case of Peter William Matke versus Abdallah Champion, Civil Appeal No. 56 of 1994, (unreported copy attached) where Hon. Katiti, J., as he then was, held at page 5 that: "That every day's delay needs an explanation, though not in a pedantic manner." Mr. Kavola Semu submitted that from the date the award was issued on 31st August 2022 to 4th June 2024 when this application was filed online, the Applicant has accounted for the delay and the said delay is not inordinate as much of the time the applicant was in court pursuing the application for registration that is Misc. Commercial Cause No 32 of 2023 which was dismissed on 4th April 2024. He submitted that the Applicant's conduct was diligent, not apathy, negligent and or sloppy. He reiterated that had the Applicant been timely notified of the readiness of the award on 31st August 2022 like the Respondent, she would have filed the application within time. He argued that no prejudice will be occasioned to the Respondents as they did not oppose this application. 8 He prayed that for interest of justice that an extension of time be granted so that the Applicant can enjoy the fruits of the arbitral award. Having carefully gone through the Applicant's submissions and the supporting affidavits, the central issue to be determined is whether or not the applicant is entitled to be granted an extension of time. This Application was filed under Section 17(1) of the Arbitration Act and Item 18 of Part III of the Law of Limitation Act CAP 89. Section 17(1) of the Arbitration Act provides that: "The law of Limitation Act shall apply to arbitral proceedings as it applies to other legal proceedings" The above provision was relied upon together with Part III of item 18 which provides that: "Under the Civil Procedure code for the filing in court of an award in a suit

made in any matter referred to arbitration order of the court, or of an award made in any matter referred to arbitration without an intervention of a court, six months” 9 However, at the very outset, I should point out that the proper provision governing limitation of time in arbitration matters is Item 21 of Part III of the Schedule to the Law of Limitation Act Cap 89 which provides that: “Application under the Civil Procedure code, the Magistrates’ Courts Act or other written Law for which no period of limitation is provided in this Act or any other written law, sixty days.” The ambiguity between the two items was considered in length by this court in the case of LOUIS DREYFUS SUISSE SA VERSUS KAHAMA OIL MILLS LIMITED, (MISC. COMMERCIAL CAUSE NO. 67 OF 2023)

[2024] TZHCComD 105. This Court held that: [The] phrase “Award made without the intervention of a Court” did not, and does not, capture arbitral proceedings and awards made under the Arbitration Act. Item 18 of Part III of the Schedule to the Law of Limitation Act, Cap 89, in its second limb prescribes the time limit of 6 months for (Application) “Under the Civil Procedure Code for the filing in court of an 10 award made in any matter referred to arbitration without the intervention of a court.” It follows that the reference to that phrase under Item 18 of part III of the Schedule to the Law of Limitation Act, Cap 89, relates only and exclusively to the arbitral awards made without the intervention of the court under the provisions of the Second Schedule to the Civil Procedure Code. As the provisions of the Civil Procedure Code do not apply to arbitration proceedings and awards made under the Arbitration Act, 2020 then all applications under the Arbitration Act are not captured by Item 18 of Part III of the Schedule to the Law of Limitation Act Cap 89..... Therefore, Item 18 of Part III of the Schedule to the Law of Limitation Act, Cap 89, exclusively and explicitly covers only arbitral awards regulated by the Second Schedule to the Civil Procedure Code. The applications under the Arbitration Act, are covered by Item 21 of Part III of the Schedule to the 11 Law of Limitation Act, Cap.89 and set the time limit at 60 days.” Despite the wrong citation of enabling provision, the same is not a fatal irregularity. Since the court is seized with the requisite jurisdiction, the Court will therefore continue to determine the present application on the basis of the true position of the law. The issue now is whether the present application deserves to be granted? In my view, the answer is in the negative. The application at hand cannot be granted for the following reasons: Firstly, is that the decision in Misc. Commercial Cause No 32 of 2023 before Hon. Agatho, J. dismissed the application which was for recognition and enforcement of the same arbitral award for being time barred. If this court now grants an extension of time, that will, in effect, be a permission for the Applicant to file the same application that was dismissed by this court. The dismissal order still subsists un-vacated, unchanged. Hence, it bars the intended application. The Court cannot exercise its discretion and grant an extension of time for a party to do an act which is not allowed by the law. 12 In the case of East Africa Development Bank versus Blueline Enterprises Limited, Civil Appeal No 101 of 2009, Court of Appeal, at page 11-12. “Once an order for dismissal is made under section 3(1) it is not open to an aggrieved party to go back to the same court and institute an application for extension of time. The remedy is to seek review before the same court. The

rationale is simple. That is as far as the court is concerned the issue of time limitation has been determined. So, a party cannot go back to the same court on the same issue. It follows that, after the order of dismissal was made by Mandia, J on 22/06/2007 it was not open to the appellant to go back to the same court and institute the application before Sheikh, J. It was res judicata.” Secondly, this court is now functus officio. The same grounds relied upon by the Applicant for extension of time in the present case were raised and argued before Hon. Agatho, J., in Misc. Commercial Cause No 32 of 2023. They were refused. The court cannot now re-hear the same arguments and make a fresh determination thereon. The Court is functus officio. 13 As such there is no basis for the court now to consider and determine the merits of the present application as it has no jurisdiction to do so. In the case of Tanzania Portland Cement PLC versus Lukas Mwakabanga [2024] TZHCLD 158 (Tanzlii), High Court, at page 4 Mlyambina, J., had this to say “...It is crystal clear that the doctrine of “functus officio” restricts a judge or a magistrate or the arbitrator to perform a function which has been performed already. It means that when a matter is finally determined, it cannot be re-determined. In other words, the doctrine of functus officio means that once the court has passed a ruling, it becomes “functus officio” or without further authority and it cannot alter or review except to correct clerical or arithmetical errors or error apparent in the ruling”. Even if the matter were not res judicata due to the dismissal order or the court were not functus officio, the application would not sail through on merit either. Extension of time is entirely in the discretion of the court as elucidated in the case of Benedict Mumello (supra) in which the court upon sufficient cause of delay being shown may grant an application for extension of time. The Court would be taken aback by the two months delay from 04/04/2024 14 to 05/06/2024 during which the Applicant’s advocate was allegedly preparing an opinion on the ruling, making deliberations and consultations on the way forward, conducting research, reviewing documents and filing this application. I am, therefore, satisfied that in the circumstances of this case this court cannot exercise its discretionary powers in favour of the Applicant by extending time within which to register the arbitral award. In the Upshot, the application is devoid of merit and is hereby dismissed. Since the matter proceeded ex parte, I make no orders as to cost. It is so ordered. A.H.GONZI JUDGE 01/11/2024 Ruling is delivered in Court this 1st day of November 2024 in the presence of Mr. Noel Adam Mosha Advocate for the Applicant. A.H.GONZI JUDGE 01/11/2024 15

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Prepared on 15 October 2026 · Esheria