

Nile Holding Ltd v Emmanuel Kamwenje and Others

Judgment

Court:	High Court of Malawi
Registry:	Commercial Division
Bench:	Honourable Justice C.W.M Malonda
Cause Number:	Commercial Cause No. 4 of 2022
Date of Judgment:	December 01, 2022
Bar:	C. Ndalamu, Counsel for the Applicant K. B. Soko, Counsel for the Respondent

RULING ON APPLICATIONS TO STRIKE OUT APPLICATIONS FOR LEAVE TO ENFORCE AN ARBITRATOR AWARD AND FOR ORDERS COMPELLING A PARTY TO DO SOMETHING FOR BEING IRREGULAR

INTRODUCTION AND BRIEF FACTS

1. This is an application to strike out applications by the Applicant, namely their application for leave to enforce an award by the arbitrator and an order compelling a party to do something. The Respondents have brought this application and is raising four irregularities to argue why the Applicant's case should not proceed.

2. The application is made under Order 2 rule 3 of the Courts 9 (High Court) (Civil Procedure) Rules , 2017, herein referred to as the rules.

3. In brief the facts of this case as narrated in the statement of case and the sworn statement for the current application are as follows:

4. The parties had a dispute between them which went through Arbitration. The Applicant obtained a favourable outcome from the Arbitration proceedings on or around January 2020. However, for reasons to be explained later, the Respondent did not comply with the Arbitrator's award. Around April 2022, the Applicant sought leave from this Court to enforce the award, and the Respondents wants the registration to be stopped in its tracks for various reasons, including irregularities in the sworn statement.

5. The Applicant has also raised irregularities which are similar to those raised by the Defendant. The Defendant wants the case struck off as it is fraught with a lot of irregularities, on the other hand, the Applicant wants the registration of the award to proceed and to enforce the arbitrators award.

ISSUES IN DISPUTE

6. The contention in this court is to determine the following:
 - a. whether the irregularities raised by the Defendant warrant striking of the case.
 - b. Whether the irregularities raised by the Claimant warrant the Defendant's processes to be declared ineffective.
 - c. Whether the delay in registering the Arbitration award means any party wishing to enforce it is estopped from doing so due to lapse of time.

LAW

7. I appreciate that I have an opportunity to benefit from both statute and case law on the issues in dispute.

8. Firstly, dealing with the issue of signing irregularities in the application and sworn statements.

9. Order **10 rule 1** of the rules provides the following:

A party may apply during a proceeding for an interlocutory order or direction of the Court by filing an application in a proceeding in Form 4.

10. Order **10 rule 2 (a)** of the rules provides the following:

“2. (1) An application in a proceeding shall:

(a) be signed by the applicant or the applicant’s legal practitioner;

11. Order **18 rule 6** provides the following:

6.(1) Subject to sub rule (2), a sworn statement shall only contain facts that the deponent is able to prove with his own knowledge.

(2) A sworn statement may contain a statement of information and belief provided the sources of the information or the basis for the belief are also set out in the statement

12. Order **18 rule 7(2)** provides the following:

7.(1) The body of a sworn statement shall be divided into paragraphs numbered consecutively, each paragraph being as far as possible confined to a distinct portion of the subject.

(2) Each page of a sworn statement, including any exhibit, shall be numbered legibly and distinctively, beginning on the first page of the statement with the Arabic numeral ‘1’.

13. Order **24 rule 1** provides as follows:

All documents filed in a proceeding shall be in the forms set out in the First Schedule.

14. Order **28 rule 2 (1) (g)** provides the following:

2.(1) A judgment may be enforced by one or more of the following means

(g) an order to do or not to do a thing

15. **Section 27 of the Arbitration Act** provides the following:

An award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

Section 17 of the same provides the following:

Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

Section 3 of the same provides the following:

The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the Court.

APPLICATION OF LAW TO THE FACTS

16. The parties cited well established both and case positions to canvas their divergent positions. They both adopted sworn statements and skeletal arguments. I have read all the legal provisions and case authorities cited.

17. I have gone through the court file and in terms of sequencing of the legal processes I have established the following timeline.

18. The applicant filed 2 applications on 19th April 2022. One application was for an inter-parties application for leave to enforce the Arbitrator's award, the second application was an inter-parties application for an Order to do a thing. Both applications were set down for hearing by the Court on the 7th November 2022 after the parties had adjourned an earlier hearing date. It is during this hearing that the Defendant's have raised preliminary objections which I will address in this ruling.

19. As for the irregularities occasioned by the Applicant, he has admitted that their application was not signed by the applicants nor their legal practitioners as required by Order 10 rule 2. However, they have complied fully with Order 10 rule 1 which prescribed use of Form 4 which is provided in the schedule of the rules. Hence I agree with them that they cannot be punished for using a prescribed form. See Order 10 rule 1, see also Order 24 rule 1 of the rules. It is therefore my finding that the Applicants application is effective as it is clear who prepared the document. See Order 2 rule 2 and Order 2 rule 3 (d). An irregularity

need not be an automatic nullification of proceedings.

20. I further cure the irregularity regards the lack of pagination on the sworn statement filed by both parties as this has not occasioned any prejudice to both litigants who have been able to address the sequencing in the documents through the use of numbered paragraphs. See Order 2 rule 2 and Order 2 rule 3 (d). An irregularity need not be an automatic nullification of proceedings.

21. As for the irregularities occasioned by the Respondent. His sworn statement has been attacked as it was sworn by the applicant himself Mr Emmanuel Kamwenje, yet some of the contents are arguing points of law. Order 18 rule 6 provides the following:

6.(1) Subject to sub rule (2), a sworn statement shall only contain facts that the deponent is able to prove with his own knowledge.

22. I have gone through the sworn statement several times and it is my finding that only paragraph 7 and 8 offend the above rule as they are legal arguments suitable for skeletal arguments and not for the purposes of a sworn statement. I therefore declare that these parts of the sworn statement ineffectual. See Order 2 rule 2 and Order 2 rule 3 (c) and (f). An irregularity need not be an automatic nullification of proceedings and the Court may make an Order that it deems fit.

23. Looking at the facts, the more contentious and substantive preliminary objection is based on the argument that the delay in seeking leave of the court to

register the award, bars the claimant from seeking enforcement of the same. The Defendant has relied on several cases including [Sulemani v Sulemani MSCA Civil Appeal No 64 of 2018](#) that a delay must be explained as lack of explanation is fatal, see [Ex parte HRDC, AMA and MLS Judicial Review Cause No 33 of 2020](#). In essence, the Defendant is pleading to apply the statute of limitation to the case of the Arbitration award.

24. It is my view that registration of arbitral award is a none contentious issue. In most cases, it is done as a matter of course and through ex-parte Leave of the Court. The Arbitration Act has not prescribed the process on how such leave of the court may be obtained, nevertheless, I have gone through the Arbitration Act and do not see any legal provision that can be invoked to prevent an Arbitration award from being registered.

25. On the other hand, the Arbitral award can be set aside either prior to registration or after registration and it should not be taken that failure to register the arbitration award with the Court revokes the authority of the Arbitrator to the extent that the Arbitral award is inoperable and of no legal effect. Such a line of thinking is perilous and would go against several legal principles, such as the irrevocable powers of the Arbitrator, see section 3 Arbitration Act, the finality of the Arbitrators decision, see **section 17 Arbitration Act, and Order 1 rule 5 (e)** of the rules which provides for active case management in the form of:

(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers it appropriate, and facilitating the use of such procedure.

26. The crux of the matter is that not all cases that go through Arbitration must find themselves in mainstream litigation before the Courts. Such litigation is reserved for peculiar circumstances provided for in the Arbitration Act. Lack of registration of the award before the Court does not affect the lawfulness of the Arbitration award. It remains intact. It is only the mode of enforcement that is affected by none registration i.e. enforcement as a Judgement of the Court or enforcement as an Arbitral award.

27. I have found the reasoning of the MSCA convincing in the case of [Bauman Hinde And Co Ltd v David Whitehead and Son Ltd \(MSCA Civil Appeal 17 of 1998\)](#), in which the appellant sought to set aside the registration of a foreign arbitration award. Much as the case relates to a foreign arbitration award, the reasoning applies to an arbitration award obtained nationally, with the exception that the legal provisions that are used are different. The Court provided that:

“To put it briefly, the two sections provide that a foreign arbitration award may be enforced either by an action or with the leave of the court in the same manner as a local judgment to the same effect, and that where leave is so given, judgment may be entered in terms of the award. Execution of the judgment would then follow the usual processes”

Which is similar to **Section 27 of the Arbitration Act** for enforcement of awards:

An award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

28. After all the authority of the Arbitrator is irrevocable even in the face of perceived delay. The authority can only be revoked in exception circumstances with leave of Court and in very specific circumstances under section 24, 25 and 26. see **Section 3 Arbitration Act.**

The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the Court

29. Section 24 of the Arbitration Act provides for setting aside of the arbitral award by the Court and it is upon application by the affected party citing any misconduct by the Arbitrator. The law provides that :

Removal of arbitrator and setting aside of award Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him. Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside. Where an application is made to set aside an award, the Court may order

that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

30. For the above reasons, it is therefore my finding that the Claimant is not barred from seeking leave of the Court to enforce the Arbitral award as the award is still effective and there is no misconduct application against the Arbitrator to bar such award from enforcement prior or after the registration of the award.

31. I have nevertheless considered the preliminary objection to see if it has any merit especially the advanced position of inordinate delay of registering the award.

32. I have had recourse to the case of Reserve bank of Malawi et al v Finance Bank (Involuntary liquidation) et al Constitutional Cause No 5 of 2010, in this case, the Constitutional court discussed at length case law and principles, providing guidelines for use on an application to strike out for want of prosecution.

(1) *"The basic rule is that an action may be struck out where the court is satisfied"*

'(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and

(b) that such delay will give rise to a substantial risk that it is not possible to

have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party' (See [Birkett v James \[1977\] 2 All ER 801](#) at 805, [1978] AC 297 at 318.)...

(2) *The general burden of proof on an application to strike out for want of prosecution is on the defendant.*

(3) 'Inordinate' delay cannot be precisely defined. 'What is or is not inordinate delay must depend on the facts of each particular case' (see [Allen's case \[1968\] 1 All ER 543](#) at 561, [1968] 2 QB 229 at 229 at 268). It is clear, however, (a) that for delay to be inordinate it must exceed, and probably by Page 8 of 10 a substantial margin, the times prescribed by the rules of court for the taking of steps in the action and...

(4) *Delay which is inordinate is prima facie inexcusable* (see [Allen's case \[1968\]](#) credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.

(6) *A defendant cannot rely on a period of delay for which he has himself been responsible.*

(7) *A defendant cannot rely on a period of delay if at the end of the period he 'so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay.....'* (See [Allen's case \[1968\] 1 All ER 543](#) at 556, [1968] 2 QB 229 at 260.)"

The Court went further to explain the principles:

"Analysis on the principles since Birkett v James (Trill v Chaser)"

The first point reiterates the basic principle that an action may be dismissed if there has been inordinate and inexcusable delay by the plaintiff or the plaintiff's lawyers, and (b) there is a substantial risk to having a fair trial of the issues or likelihood of serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

On the second principle, Lord Justice Neill confirms what Mr. Misha, Senior Counsel, stated; the burden of proof lies on the defendant, including proof of prejudice. Specific evidence or proof is unnecessary:

"In my judgment, in order to determine whether a defendants has suffered the necessary prejudice when it is in the form of impairment of witness' recollections as a result of inordinate or inexcusable post-writ delay, the court must examine with care all the circumstances of the case, including both the affidavits evidence and issues disclosed by the pleadings it is not, in my judgment essential in every case that there should be evidence of particular respects in which potential witnesses' memories have faded ... So long as there are primary facts from which inferences can properly be drawn ... it is not a reversal of the burden of proof that the court at the invitation of the defendants should draw an inference of prejudice from the material put before it" ([Shtun v Zalejska \[1996\] 3 All E.R. 411](#), Peter Gibson, L.J., (424).

The delay was not inordinate

The third point requires that it be established that there was delay in the sense that the inordinate delay must "exceed, and probably by a substantial margin,

the times prescribed by the rules of court for the taking of steps in the action and (b) that delay in issuing the writ cannot be classified as 'inordinate' provided the writ is issued within the relevant period of limitation." Lord Diplock defines inordinate delay as "materially longer than the time usually regarded by the profession and courts as an acceptable period' (page 809). For Lord Neill inordinate delay is delay that 'must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action' (page 979).

The Defendants' Counsel cited many cases where the High Court and the Supreme Court determined certain times inordinate. Cases are just instances where, on the peculiar circumstances, the court exercised its discretion one way or the other. On one extreme, is the time which all fair minded people would consider long enough as to be inordinate. On the other extreme is short time which, with everything, is still inordinate delay. In [Headford Bristol District and Health Authority \[1995\] P.I.Q.R.P. 180](#), 28 years and in [Biss v Lambeth, Southwark and Lewisham Health Authority \(Teaching\) \[1978\] 2 All E.R. 125](#), 11 ½ years were not, alone, considered inordinate delays. On Lord Neill's definition, there was inordinate delay. See, however, the cases Unyolo J cited in [Sabadia v Dowsett Engineering](#) where two years was not considered inordinate despite accepting the definition in [Birkett v James](#). Here it is over seven months. I do not think that this is inordinate delay on [Sabadia v Dowsett](#)."

33. In light of the above precedent, it is my finding that there is no inordinate delay, and any perceived prejudice suffered by the defendant is self-inflicted. I have reached this conclusion because based on the exhibits tendered in by the

Applicant, as early as August 2020, 5 months or so after the award was made by the Arbitrator, there was some communication between the parties to come to the table and discuss a way forward. However, due to dissatisfaction with the outcome of the arbitration process, no progress was made to resolve the issue cordially. Instead, the respondents continued to operate the company and ignored the arbitration award. They have admitted to moving on without the Applicant which was not appropriate in the face of the award.

34. Based on the facts above, and all the circumstances of this case, it is my finding that there was no inordinate delay in registration of the Award i.e. from January 2020 to April 2022, when the applicants sought to enforce the award through the Court process. See Reserve bank of Malawi et al v Finance Bank (Involuntary liquidation) et al Constitutional Cause No 5 of 2010.

35. As for the application to do a thing filed by the Claimant, I am in agreement with the Defendant that such an application is premature in this case as there is currently no court judgement to enforce at this stage. Only after the registration of the award as a Court order will such an Application be mature.

36. In light of all the above, the Applicant is therefore not estopped from registering the Arbitral award due to lapse of time as the legal and factual arguments advanced by the Respondent are not supported by facts and law.

DECISION AND ORDER

37. Based on the reasoning above, it is my ruling that the preliminary objection to strike out is not successful.

38. As for the preliminary objection regards the application to do a thing, the objection is sustained as the application is premature.

39. It is my further decision to proceed and grant leave to enforce the award to allow it to be enforced as a Judgement of this Court. The Respondent is given 14 days within which to apply to set aside the registration, if so minded.

40. As for costs, each party shall pay its own costs.

Made in Chambers this 1st of December 2022