

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 49 OF 2018**

(Arising from Commercial Case No. 63 of 2016)

**MHINGARA GENERAL ENTERPRISES LTD**

**T/A DURBAN HOTELS LTD.....APPLICANT**

**VERSUS**

**BULYANHULU GOLD MINE LTD &**

**T/A ACACIA-BULYANHULU GOLD MINE.....RESPONDENT**

**RULING**

**MRUMA, J:**

The ruling in this preliminary objection will not detain me much. The Applicant Mhingara General Enterprises Limited T/a Durban Hotels Limited has filed an application for extension of life span of Commercial Case 63 of 2016. That case has been pending since May, 2016. The reasons for its delay has mainly being attributed by the parties and to be specific by the Defendants.

After being served with the plaint, the Defendant refrained from taking any action, instead they filed a petition asking the court to refer the matter to an arbitrator.

The petition was successful and the parties were directed to cause their dispute to be submitted to an arbitrator. Meanwhile the suit was stayed pending arbitration.

On 30/11/2016, the court was informed that the Defendants had replied to the Plaintiff's letter and in that letter they had shown interest to submit to an arbitrator. The parties therefore successfully applied for two months extension to continue with arbitration.

On 28/02/2017, the Court was informed that despite effort by the Plaintiff's Counsel to have the matter submitted to arbitrator the Defendants were adamant. This Court ordered the matter to proceed with the next stage. The Defendants were ordered to file their defence.

When the matter was called for orders on 24/04/2017, the life span of the case had expired and Mr. Matumla successfully applied for its extension. The life span was extended for six (6) months.

Together with their written statement of defence, the Defendants had raised four (4) preliminary objections which were dismissed on 26<sup>th</sup> July 2017 and the matter was ordered to proceed, this application was filed at the time when the matter was before a mediator Judge.

Let me start by reminding the parties that Article 107 a (2) (e) of the constitution of the United Republic of Tanzania enjoins the Court in this country to dispense justice without being tied up with undue procedural technicalities.

I have perused the preliminary objection raised by the Defendants Counsel and I find that they are all technical issues.

In the first preliminary objection it has been submitted that the Applicant's affidavit contravenes the provisions of section 10 of the Oaths and Statutory Declaration Act [Cap 34 RE 2002]. The said section provides:-

*"Where under any law for time being in force any person is required or entitled to make an statutory declaration, the declaration shall be in the form prescribed in the schedule to this Act, provided that where under any written law a form of statutory declaration is prescribed for use for the purpose of that law such form may be used"*

The term Statutory Declaration is not defined under the Act however, the term can be defined as a declaration made pursuant to any written law. The question that follows is whether the affidavit in support of the present application is a statutory declaration made under Oaths and Statutory Declaration Act. While I may agree that affidavit for proposes of proving certain facts (evidence) is a statutory declaration, but in my view it does not fall in all fours within the ambit of Section 10 Cap 34 of the Laws. The proviso to section 10 of the **Oaths and Statutory Declaration Act [Cap 34 2002]** provides that;

*"Where under written law a form of statutory declaration is prescribed for use for the proposes of that law such form may be used."*

Affidavit being a voluntary declaration of facts written down and sworn to by the declarant is a witness statement within the ambit of **Rule 48 (1) of the High Court (Commercial Division) Procedure Rules**. Sub-rule (2) of Rule 48 prescribes the form which may substantially be



used. Thus, it was not mandatory for the Applicant to use the form prescribed under the scheduled to Oaths and Statutory Declaration Act (Cap 34).

Regarding the law cited, on 28/02/2018, I alerted parties on the life span of the case. In making that advise I had in mind the period during which the matter was stayed. On 24, April 2017, this court had made an order to the effect that the life span of the case be extended for six (6) months effectively from 30<sup>th</sup> May, 2017, this means that the extended life span was to expire on 30<sup>th</sup> November, 2017. On 17<sup>th</sup> November, 2017 court was informed that there was an application for departure from the scheduling order. Following that notification, the mediator Judge stopped mediation process and remitted the record to the trial Judge for determination of that application. The said application was dismissed on 28/02/2018.

Thus, given the chronological events in this matter I find that it was correct and proper for the Applicant to bring this application under Rule 32 (3) of the High Court (Commercial Division) Procedure Rule. Under that Rule, application for extension of life span ought to have been made orally.

In terms of section 93 of the Civil Procedure Code court has discretion to enlarge period granted by it for doing any act prescribed. As stated earlier, on 30<sup>th</sup> May, 2017 this court extended the life span of the case for six (6) months I note that between 17<sup>th</sup> November, 2017 to 28<sup>th</sup> February 2018 the main suit could not proceed because the Defendant had filed Misc. Commercial Application 370 of 2017 seeking departure from the scheduling order so that she could bring an

application for amendment of her written statement of defence. That, said I dismiss the preliminary objection raised with cost to the Applicant. I proceed to grant a prayer for extension of life span of Commercial Case No. 63 of 2016. The life span of that case is enlarged to another period of ten (10) months counting from 30<sup>th</sup> November, 2017. Counsel for the parties being officers of the court are advised to assist the court to do the substantive justice.

Order accordingly.



  
A. R. Mfuma,

Judge

12<sup>th</sup> July, 2018