IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUGAKINGIRA, J.A., And MROSO, J.A.)

CIVIL APPEAL NO. 60 OF 1998

BETWEEN

TANZANIA COTTON MARKETING BOARD..... APPELLANT

AND

COGECOT COTTON COMPANY S.A. ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mapigano, J.)

dated the 25th day of November, 1997

in

Misc.Civil Cause No.34 of 1998

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

The appellant Board's petition to impeach an award under s. 15 of the Arbitration Ordinance (Cap. 15) and rr. 5 and 6 of the Arbitration Rules, 1957, was dismissed by the High Court on the ground that it was time-barred. This appeal is against that decision. Counsel for the appellant had two alternative arguments: First, that the High Court erred in holding that the time of limitation was 60 days. In his submission the petition was a suit founded on a judgment, namely the award, therefore the time of limitation is 12 years reckoned from the date the notice of filing the award was served on the appellant. In the alternative, that s. 21 of the Limitation Act, 1971, applied and that the period spent prosecuting a previous proceeding between the same parties which terminated on 16/6/97 ought to have been excluded.

There is no merit in either of these arguments. With the first argument, and as observed by counsel for the respondent, the issue about the petition being a suit was never canvassed before the High Court. That court cannot be judged on an issue it never had an opportunity to consider and express an opinion. In fact the position taken then was the opposite. Counsel who appeared for the appellant before the High Court stated categorically that "This is not a suit." That was, indeed, correct and not a slip. A petition under rr. 5 and 6 of the Arbitration Rules is an application rather than a suit. Rule 5 states in part: "... all applications made under the Ordinance shall be made by way of petition." A petition is therefore the prescribed mode of making an application under the Arbitration Ordinance, and it is common knowledge that other modes are prescribed under other laws.

Applications under the Ordinance fall under Item 21 of Part III of the First Schedule to the Limitation Act, since the Ordinance itself does not provide for the period of limitation, and the period is 60 days. Although the High Court reckoned the period from 11/12/96, the correct date was, in our view, 11/3/96, that being the date the appellant acknowledged receiving notice of the filing of the award. The petition, the subject of this appeal, was filed on 2/7/97, well beyond the 60-day limit. The High Court was therefore correct in holding as it did even on the basis of the date it adopted.

The alternative argument is equally misconceived. In order for s. 21 to apply, and for time spent in the prosecution of another proceeding to be excluded, it has to be shown, inter alia, that

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that other proceeding was prosecuted in a court which, from defect of jurisdiction, was incompetent to entertain it. Counsel for the appellant was not heard to say that the proceeding which terminated on 16/6/97 (see [1997] TLR 165) was prosecuted in a court incompetent to entertain it. It is obvious to us that the whole of the instant proceeding is a bad tactic.

The appeal is dismissed with costs.

DATED at DAR ES SALAAM this 2nd day of September, 2002.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR