IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 177 OF 2007

EAST AFRICAN DEV. BANK.....APPLICANT

VERSUS

BLUELINE ENTERPRISES LTD.....RESPONDENT

Date of last Order 24/8/09
Date of Ruling 28/8/2009

RULING

MWARIJA, J.

The applicant filed an application for leave to appeal to the Court of Appeal against the decision of this court (Sheikh, J) dated 26/3/2009. The subject matter of proceedings which gave rise to the said decision was an application for extension of time to file an application to set aside arbitrator's award. The application was brought under S. 14 (1) of the Law of Limitation Act, Cap. 89 R.E.2002. That application was struck out for being incompetent. Dissatisfied with that decision, the applicant intends to appeal, hence this application for leave.

Prof. Fimbo, learned counsel for the respondent has raised a preliminary objection to the application. The objection had three grounds but the learned counsel dropped the first ground at the hearing and argued grounds number two and three. The two grounds which were argued together are as follows;

(a) The application is not by way of petition contrary to mandatory provisions of the Arbitration Rules 1957, rule 5.

(b) The proceedings are not titled "in the matter of arbitration and in the matter of the Arbitration Act" contrary to the mandatory provisions of the Arbitration Rules 1957, rule 6.

Arguing in support of the two grounds of the preliminary objection, Prof. Fimbo submitted that since the background to this matter is arbitration proceedings, the arbitrator's award having been filed in court under the Arbitration Act, Cap. 15, the omission by the applicant to mention the Arbitration Act and the words "In the Matter of the Arbitration and in the matter of the Arbitration Act",

contravened the provisions of rule 6 of the Arbitration Rules. He added that under rule 3 of the Rules it is provided that the Rules shall apply to all awards filed under the Arbitration Act. He cited the decisions in the other two cases between the same parties to substantiate that position; Blueline Enterprises Ltd v. East African Development Bank. Civil Application No. 103 of 2003 (CA) (DSM) (unreported) and East African Development Bank v Blueline Enterprises Ltd, Misc. Civil Cause No. 142 of 2005 (HC) (DSM) (unreported).

As to the rule under which this application has been brought, that is rule 43 (a) of the Tanzania Court of Appeal Rules (hereinafter referred to as "TCA Rules') which requires that an application for leave of the High Court should be made by way of chamber summons, Prof. Fimbo submitted that the rule relates to O.XLIII r. 2 of the Civil Procedure Code ("the CPC") and is in conflict with rule 5 of the Arbitration Rules. On how to resolve that conflict, he submitted, firstly, that the usual rule of interpretation

should be used; that the general gives way to the particular. In that sense he argued that O.XLIII r. 2 of the CPC applies to general applications while rule 5 of the Arbitration Rules applies to particular applications (under the Arbitration Act).

Secondly, he submitted that s.2 and 64 of the CPC override r.43 of the TCA Rules read together with O.XLIII r.2 of the CPC because while S.2 provides that application of the CPC is subject to express provisions of other written laws, S. 64 provides that arbitration proceedings shall be governed by Arbitration Rules. Further, he submitted that while the CPC was enacted in 1966, the Arbitration Rules were already in force as they were published in 1957:

Prof. Fimbo further made a reference in his submission to the Kenyan Case of Manibbai Bailabhai Patel v. Mchal Singh & Anr. (1956) 23 EACA 2009 in which the East African Court of Appeal found that there was no conflict between r. 7 of the Kenyan Arbitration

Ordinance and O.XLIX of that country's Civil Procedure Rules. He however submitted that in the case at hand there is a conflict as stated because rr.3,5 and 6 of the Arbitration Rules make it mandatory that an application of this nature shall be brought by way of a petition. He cited another case between the same parties in this application, Misc.Civil Cause No. 324 of 2003 (HC) (DSM) (unreported) in which the court gave an interpretation to the word "shall" in r. 8 of the Arbitration Rules with regard to which documents should be annexed to a petition. He thus argued that litigants in our courts are not at liberty to choose and pick how to bring a matter in court, rather they must bring any matter according to the law as was held in the case of D.B.Shapriya & Co.Ltd v. Bish International BV, Civil Application No. 53 of 2002 (CA) (DSM) (unreported).

He further made submissions regarding the other case between the same parties, Blueline Enterprises Ltd v. East African Development Bank, Misc. Civil Cause No. 135

of 2005 (HC) (DSM) (unreported) in which it was held that r.5 of the Arbitration Rules was not applicable in bringing that application. He submitted that the decision to that effect departed from the other two cases, Misc.Civil Causes No. 142 of 2005 and Misc.Civil Cause No. 324 of 2003 both between the same parties. He said that Misc.Civil Cause No. 135 of 2005 was decided per incurium and therefore should be ignored. On those submissions the learned counsel prayed that the application be struck out for being incompetent.

The respondent was represented by Mr. Sullivan, Q.C. and Mr. Mwandambo, learned counsel. Submitting against the points of the preliminary objection, Mr. Sullivan, QC argued that the preliminary objection is misconceived because the way on which an application for leave to appeal is to be made is not governed by the Arbitration Rules but rather, the TCA Rules. He contended that the application was made under r. 43 (a) which provides that an application for leave to appeal may

be made formally or by a Chamber Summons. He argued further that the application is not one brought under the Arbitration Act and rules, it is brought under the Appellate Jurisdiction Act. By having been brought under S.5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 and r. 43 (a) of the TCA Rules, it was properly brought in compliance with the applicable laws, the learned Counsel submitted.

On the submissions by Prof. Fimbo that there is a conflict between r. 5 of the Arbitration Rules and r.43 (a) of the TCA Rules, Mr. Sullivan's reply is that such a conflict does not exist. He submitted that when r.43 is subjected to the three canons of interpretation of statutory provisions, it does not conflict with r.5 of the Arbitration Rules. He said that the Words "serve as is otherwise provided" in r.5 above resolves any conflict which might be there between the two stated rules.

On SS. 2 and 64 of the CPC, Mr Sullivan had a different view regarding their effect on the application. As

to S.64, he argued that the section provides for application of the 2nd schedule to the CPC in arbitration proceedings. He said that there is no provision in that schedule which relates to applications for appeal procedures and therefore the section is inapplicable to the present application. In reply to the authorities cited by Pr. Fimbo, Mr.Sullivan submitted that in the Kenyan Case of Maibhai, the decision was that there was no conflict found to exist between O.XLIX of the Kenyan Civil Procedure Rules and r. 7 of the Arbitration Rules. As to Misc.Civil Cause No. 135 of 2005 between the same parties to this application, he submitted that the decision was correct, because it was not made per uncurium. That application was not one to be made under the Arbitration Act and therefore Arbitration Rules did not apply. He argued that an application for stay of execution should not be equated with an application for leave to appeal to the Court of Appeal.

With regard to Misc. Civil Cause No. 324 of 2003, he submitted that the application was made under the Arbitration Act and therefore the Arbitration Rules were applicable while in Civil Application No. 103 of 2003, what was at issue was whether leave to appeal was required or not and the application was made under the Arbitration Act, thus Arbitration Rules were applicable. Since the present application is not subject to the Arbitration Act, he submitted, it should not be found to be incompetent for having not been brought under the Arbitration Rules.

Mr. Sullivan submitted further in the alternative that in case it is found that the application was brought in contravention of the Arbitration Rules, the respondent should be allowed to amend the application. Relying on the principle that justice should not be defeated by procedural technicalities and especially where injustice will not be occasioned if amendment is ordered, he prayed that if the application is found to be incompetent then an amendment should be ordered. To that effect he cited the

cases of Hamed .Rashid Hemed v.Mwanasheria Mkuu & Orthers (1997) TLR 35, Fortunatus Masha v William Shija & Anr (1997)TLR 41, DSM Education & Office Stationariy v NBC Holding Corp. & 2 Others, Civil Application No: 39 of 1999 (CA) (DSM) (unreported), Nimrod E.Mkono v State Trravel Services (1992)TLR 24, Mukisa Biscuit Manufacturing Co.Ltd v. West end distributors Ltd, (1969) EACA 696 and Ramadhani Nyoni v. Ms Haule & Co. Advocates (1996) TLR 71.

In his rejoinder submissions, Prof. Fimbo reiterated the position that a litigant does not have a liberty to choose a form of bringing a matter in court. Since that form is made mandatory by procedural rules, the court does not have a discretion to exercise when it happens that a particular mandatory rule has been breached. On the conflict of rules issue, he insisted in his submissions that the same exists and the way to resolve it is to have recourse to SS 2 and 64 of the CPC. Further, he stated that since the Arbitration Act was published in 1957, r 43

(a) of the TCA Rules, 1974 is not applicable because it could not have been in contemplation at the time of publication of the Arbitration Act. Referring to the VIP Case, Prof. Fimbo submitted also that as regards S.64 of the CPC, the court had clearly stated that the said section of the CPC is subject to s.3 of the Arbitration Act which provides that part II of the Act "shall apply only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try".

On whether an injustice will be occasioned if the preliminary objection is upheld but the court decides to use its descrition to order amendment, Prof. Fimbo submitted that injustice will be occasioned because the case was registered in 2005 and since then there have been a series of applications which have hindered the respondent from enjoying the fruits of the award. He thus prayed that the preliminary objection be allowed and the application be struck out.

From the submissions thoroughly made by the learned counsel for the parties, the substance of which has been pointed out above, what is in dispute is the proper law under which an application for leave to appeal should be brought. Prof. Fimbo for the respondent has argued that the application ought to have been brought by way of a petition in accordance with rr 5 and 6 of the Arbitration Rules. The rules provide as follows;

> "R.5. save as is otherwise provided, all applications made under the Act shall be made by way of petition.
> 6. All petitions, affidavits and other proceedings under the Act shall be entitled
>
> > 'In the matter of the arbitration and in the matter of the Act' and reference shall be made in the application to the relevant section of the Act."

The present application, as said earlier in this ruling, was brought under S.5 (1) (c) of the Appellate Jurisdiction Act and r.43 (a) of the Tanzania Court Appeal Rules, 1979. Mr. Sullivan, Q.C. has submitted that the application has been properly brought under the above stated provisions because the Arbitration Act and Rules are inapplicable to matters of appeal. I have carefully considered the submissions from the learned counsel for the parties. I have also analysed the provisions of law and the cases cited in support of the counsel arguments. I should state at the outset that the provisions of the Arbitration Rules, 1957 cited by Prof. Fimbo; rr. 3,5 and 6 concern matters made pursuant to the Arbitration Act. It is because of that position that in Misc. Civil Cause No. 142 of 2005 and Civil Case No. 103 of 2003 it was decided that the provisions of the Arbitration Rules ought to have been complied with. The reason is that the subject matters of decision in the said cases are those which are entertainable by the court under the Arbitration Act. As to Misc.Civil Application No. 135 pf 2005 however, that is not the case.

In Misc.Civil Application No. 103 of 2003, the relevant proceedings which were considered by the Court of Appeal in that case are those which originated from the High Court. Since they were made under the Arbitration Act, they were to be governed by the Arbitration Rules. The issue which was before the Court of Appeal was whether an appeal from the decision of the High Court originating from arbitration proceedings should be brought under s.5 (1) (a) or S.5 (1) (c) of the Appellate Jurisdiction Act. The court found that S.5 (1) (a) is inapplicable, rather, the applicable provision is S.5 (1) (c) of the said Act. The court found so because arbitration proceedings in the High Court are governed by the Arbitration Rules not the CPC. The proceedings before the High Court were in respect of an application to set aside an award of the arbitrator and that is why Arbitration Rules were held to apply. The court is vested with powers to entertain such an application under S.16 of the Arbitration Act. For that reason rr.5 and 6 of the Arbitration Rules were applicable. In Misc.Civil cause No. 324 of 2003, the court was moved under S.18 of the Arbitration Act (formerly

S.17) hence the reason why the application ought to have complied with rr 5 and 6 of the Arbitration Rules.

As to Misc.Civil Cause No. 142 of 2005 the matter which was considered concerned the way on which an application for stay of execution of arbitrator's award should be brought. The court held that the "proceedings relate to an application for stay of its execution (the arbitrator's award) .... Thus, Rule 5 of the Arbitration Rules, 1957 ought to have been followed by bringing the application by way of petition".

With regard to Misc. Civil Cause No. 135 of 2005, the applicant had applied for execution of the arbitrator's award. The application was made under the CPC. Upon an objection that the application did not comply with rr.5 and 6 of the Arbitration Rules, the court (Shangwa, J) held that " the application is not for stay of execution of an award pending the determination of the award or execution of the award, for this reason, it is not regulated by the Arbitration Act and the Arbitration Rules". Prof. Fimbo has submitted that the decision was made per incurium the earlier decision, Misc.Civil Cause No. 142 of 2005 and Misc.Civil Cause No. 324 of 2003. Mr.

Sullivan has opposed that view stating that the said decision was not made per incurium the other decisions above, the reason being that the application was not governed by the Arbitration Rules. I think, with due respect to Prof. Fimbo, as held by Shangwa, J the facts in the earlier decisions are distinguishable with those in Misc.Civil Cause No. 135 of 2005. Whereas in the two other cases the subject matters of the applications are provided for in the Arbitration Act, in Misc.Civil Cause No. 135 of 2005, the subject matter of the application as stated above is not provided for in the Arbitration Act. The Arbitration Rules were therefore not applicable. This is because there is no section in the Arbitration Act which provides for execution of the arbitrator's award. For that reason the execution is entertainable under the Civil Procedure Code. Further, in the authorities cited, none of them is to the effect that any application which arises from Arbitration proceedings shall be brought by way of petition regardless of absence of relevant provision to that effect in the Arbitration Act.

Now, with regard to the application at hand, Mr Sullivan has submitted that it was properly brought. I am inclined to

that view. The Arbitration Act does not provides for appellate procedures in matters which originate from arbitration proceedings. In other words, there is no enabling provision in the Arbitration Act under which the court is empowered to make an application for leave to appeal to the Court of Appeal. Since the way on which an application must be made under rr.5 and 6 of the Arbitration Rules applies to those applications made under the Arbitration Act, obviously an application for leave to appeal which is not one of the matters provided for under the said Act, does not fall within the ambits of rr 5 and 6 of the Arbitration Rules. In such an application, the court should be moved under the relevant provisions of other laws which vest powers on the court to entertain the application. The relevant provision in the present application is the Appellate Jurisdiction Act, Cap. 141 RE 2002, the Tanzania Court of Appeal Rules, 1979 and the CPC.

For the above stated reasons I find that the preliminary objection cannot succeed because the application was properly brought. The objection is hereby accordingly overruled. Cost in the cause.

A.G.MWARIJA

JUDGE

28/8/09

28/8/09

Coram: Hon A.G.Mwarija, J.

For the Applicant Mr. Michael Sullivan, Q.C and Mr. Mwandambo.

For the Respodnent Mr. Mwandambo for Prof.Fimbo

CC : Reteti.

Ruling delivered

A.G. MWARIJA

JUDGE

28/8/09

Mr.Mwandambo: We pray for a date of hearing of the substantive application.