

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL CAUSE NO. 09 OF 2022

CHINA CIVIL ENGINEERING CONSTRUCTION

CORPORATION LIMITED.....APPLICANT

VERSUS

LWEMPISI GENERAL COMPANY LTD.....RESPONDENT

RULING

18th & 20th October, 2022

DYANSOBERA, J.:

The instant petition has been filed by the petitioner herein for judgment and decree against the respondent as follows: -

1. This Honourable court be pleased to hear the petition for leave to register and enforce an arbitral award dated 15th December, 2021
2. Judgment be entered as per the final award
3. Costs of the petition be provided for
4. Any other relief (s) which this Honourable court may deem fit and appropriate to grant.

The petition has been resisted by the respondent who has filed a reply to the petition along with a notice of preliminary objection on two points,

namely, that the petition is hopelessly filed out of the prescribed time and in contravention of Item No. 18 of the 3rd Schedule to the Law of Limitation Act, Cap 89 R.E.2019 and that the petition is incurably defective for want of an affidavit verifying the contents of the petition.

The factual background to this petition is, briefly, the following. The parties herein were in a commercial relationship dating way back from June, 2009 whereby they signed an agreement of the proposed construction of a commercial building to be built on Plots Nos. 24 and 25 located at Rwagasore Street in Mwanza City jointly owned by the respondent and the National Housing Corporation and the value of the contracted amount was TZS 4, 838, 000, 000. 00.

On 30th July, 2011 the proposed construction of the above mentioned structure stopped and a breach of contract ensued. The matter was then referred to the National Construction Council for Arbitration whereby Engineer Dr. Kumbwaeli W. Salewi arbitrated the parties' dispute and issued and signed the arbitral award on 15th December, 2021.

As indicated above, the petitioner is now seeking to register and enforce the said arbitral award, hence this petition.

On 19th day of October, 2022 when the matter was called for hearing, Messrs. Andrew Luhigo and Ephraim Mrawa, learned Advocates, appeared

for the petitioner whereas the respondent enjoyed the legal services of Mr. Meswin Masinga, learned Counsel. It was resolved that both the preliminary hearing and the substantive petition be heard at a go.

Arguing in support of the preliminary hearing, Counsel for the respondent made the following submission. With respect to the first limb of preliminary objection, he contended that regulation 51 (4) of the Arbitration (Rules of Procedure) Regulations, 2021 makes reference to the Law of Limitation Act that the filing of the petition intending to enforce the Arbitration award is subject to time limitation. Elaborating on this, Counsel for the respondent submitted that Part III item 18 of the Schedule to the Law of Limitation Act provides for the time limit to register an award to be six months from the date of an award. According to him, the award was issued/delivered on 15th December, 2021 and this petition was filed on the 31st July, 2022 (Sunday) meaning that the petition was filed after a lapse of more than eight months. Supporting the legal requirement that the petition had to be filed within six months from the date of the award, Counsel for the respondent relied on the cases of **Kigoma/Ujiji Municipal Council v. Nyakirang'ani Construction Ltd**, Misc. Commercial Cause No. 239 of 2015 and **Bogeta Engineering Ltd v. Nanyumbu District Council**, Misc. Commercial Cause No. 9 of 2019. The court was, thus, invited to dismiss this petition under Section 3 of the Law of Limitations Act.

In relation to the second limb of preliminary objection, it was submitted on part of the respondent that the petition is incurably defective for want of an affidavit of the applicant verifying the contents of the petition. He contended that there ought to be an affidavit of the petitioner's Principal Officer or Director to verify the contents of the petition.

In another dimension, learned Counsel introduced another point of objection that when he was preparing for hearing, he came to realize that Regulation 3 (1) (c) and (d) which requires an award to be certified by the petitioner or his advocate as a true copy of the original was not complied with. Counsel further referred this court to paragraph (d) of Regulation 63 (1) of the Regulations arguing that this requirement stems from regulation 51 of the Regulations.

Counsel for the respondent was of the view that on the cited authorities, this petition which has been filed outside the prescribed time should be dismissed with costs otherwise, if the court finds that the petition was filed in time, then it should make a finding that the absence of an affidavit verifying the petition makes the petition defective.

In response to the submission by Counsel for the respondent, Mr. Andrew Luhigo had the following to submit. In relation to the first limb of preliminary objection, he contended that the petition is well within the prescribed time. He elaborated that being aware that a petition like the

present one has to be filed within six months and that six months period started to run on 15th day of December, 2021, the petitioner did, on 5th March, 2022, file a petition with the Award and the said petition was labeled as Miscellaneous Civil Application No. 16 of 2022 and was before this court (Hon. Mnyukwa, J) but was struck out on 11th day of July, 2022 with leave to refile it within 21 days. Counsel for the petitioner refuted the argument by counsel for the respondent that the petition was not filed that on 26th July, 2022 but 31st July, 2022. He contended tha, the petitioner refiled the petition which is currently before you labelled as Misc. Cause No. 9 of 2022. With these facts, it goes without much emphasis that the current petition before this court was well filed within the time prescribed by law, Mr. Luhigo emphasized.

Replying to the argument by Counsel for the respondent that parties are bound by their pleadings, Mr. Luhigo stated that the petitioner was not bound to state these facts in his pleadings because issues of time are issues of law and pleadings are for facts only and not law and that the order of the court dated 11th July, 2022 in Misc. Civil Application No. 16 of 2021 is law. He supported his argument by tendering a copy of the order of the court whose copy was also served to learned Counsel for the respondent. In further elaboration, Counsel for the petitioner told this court that the petition was filed on line and a copy of that order was attached along for the court.

On the 2nd preliminary objection on lack of verifying affidavit, Counsel for the petitioner pointed out that it is a well-known principle of law that the points of preliminary objection ought to be on points of law arguing that Counsel for the respondent has completely failed to lead this court to any statutory provision or case law requiring that matters of this nature should be accompanied by affidavit verifying contents of the petition and that requirement is nothing but the respondent's counsel own creation.

On the argument that the petition lacks a verifying affidavit, Mr. Luhigo informed the court that the last page of the petition contains a verification clause on the contents of the petition.

With regard to the complaint that the award attached to the petition was not certified, Counsel for the petitioner argued that the petition was filed via digital methods as a new system of the court. He contended that their uploading of the petition on the court digital platform also involved an original copy of the Award and, therefore, Regulation 63 (1) (c) and (d) is not applicable in this case in that the requirement for certificate is when a copy is supplied. He insisted that they supplied an original document through a digital platform and that if the court wants the original, the petitioner is willing to cooperate.

He urged this court to overrule the preliminary objections and grant the petition with costs.

In a rejoinder, Mr. Meswin Masinga maintained that the petition was filed on 31st July, 2022 which was on Sunday and not on 26th July as Counsel for the petition would wish the court to believe. He wondered how could the petition be filed on a Sunday.

Mr. Masinga was insistent that the petitioner was bound to state in his pleadings that he had earlier on filed a petition which was later struck out and that he could do this by inserting a clause/paragraph to that effect.

In fine, Counsel for the respondent reiterated what he had submitted in chief.

Now on the petition. Mr. Andrew Luhigo, in supporting the petition, submitted that the petition has been brought under section 68 (1) of the Arbitration Act 2020 and Reg. 63 (1)(a) -(e) of the Arbitration (Rules of Procedures) Regulations, 2021, GN No. 146 of 2021. Adopting the contents of the petition comprising 13 paragraphs and 4 prayers filed before this court on 26th July, 2022 and verified by one Ephraim James Mrawa, Mr. Luhigo contended that the key prayer of the petitioner is an award dated 15th December, 2021 made by Engineer Doctor Kumbwaeli W. Salewi between the parties herein to be registered by this court and accepted for enforcement as a judgment and decree of this court. The petitioner also seeks in the same petition, leave as per the contents as referred in arbitral award. The

petitioner further seeks for the costs of this petition and any other reliefs the court deems just to grant.

Replying to the submissions by Counsel for the petitioner, Mr. Meswin Masinga, adopted the reply to the petition filed by the respondent and verified by Richard Rugarabamu, the managing Director of the respondent. He invited this court not to recognize the petitioner's arbitral award dated 15th December, 2021 issued by Engineer Dr. Kumbwaeli W. Salewi on the ground that it was issued out of time.

Elaborating on this aspect, Counsel for the respondent argued that the relationship between petitioner and respondent was contractual and the breach, if any, was to be filed within six months. He buttressed his argument by citing Section 40 (1) of the Law of Limitation Act Cap. 89 R.E. 2002 [R.E. 2019] and Part I, Item No. 7 of the Schedule to the Law of Limitations Act which provides that for institution of a suit based on contract the time limit is six years. He was of the view that the Arbitrator had no jurisdiction to proceed with arbitration and affirmed that the issue of jurisdiction goes to the root of the matter. To underpin this argument learned Counsel for the respondent cited the cases of **Said Mohamed Said v. Mussin Amir and Another**, Civil Appeal No. 110 of 2020 and **Tanzania Revenue Authority v. Tango Transport Co. Ltd**, Civil Appeal No. 84 of 2009.

Counsel for the respondent was of the settled opinion that this court has mandate, before it recognizes and registers the award as decree of the court, to determine whether the Arbitrator had jurisdiction to entertain proceedings instituted out of time. He urged the court not to allow this petition for failure to adhere to the requirements stipulated under regulation 63 (1) (c) and (d) of the Arbitration (Rules of Procedure) Regulations which requires the award filed or attached to the petition to be certified to authenticate the genuineness of the award. The court was asked to struck out the petition with costs.

Mr. Andrew Luhigo, submitting in response, contended that, as per Section 68 (3) of the Arbitration Act 2020, the only ground the respondent could use to contest the registration and enforcement of this arbitral award is to show that the Arbitral Tribunal lacked substantive jurisdiction to make the award. He argued that Section 69 of the same Act provides that if the respondent wished to challenge the award on the substantive jurisdiction, he had to give notice to the petitioner and the arbitral tribunal which made the award, he ought to have applied for such an order to challenge the award on substantive jurisdiction. He expressed that it was expected of the respondent to bring an order that he has procured under section 69 of the Arbitration Act 2020 or at least evidence of ending proceedings initiated by him under section 69 of the Arbitration Act, 2020 something which the respondent has

not done. Counsel for the petitioner observed that the respondent has adopted a ***wrong avenue in challenging the jurisdiction of Arbitral tribunal in these proceedings because that will not only be contrary to S. 69 of the Act but also that will be a converting these proceedings as if they were appellate proceedings against Arbitral tribunal award which is totally wrong.***

As to time limit jurisdiction issue, this court was called upon to go through pages 22 and 23 of the Arbitral Award titled "Preamble to Award and Direction".

On the point that there was non-compliance to Reg. 63(1)(c) and (d) of the Regulations, 2021, Counsel for the petitioner was emphatic that the petitioner complied with the law by filing original copy of the arbitral award and arbitral award proceedings on the court's on line or digital plat form. He reiterated that this petition has merit and should be granted with costs.

Let me start determining the preliminary objection. As far as the preliminary objections are concerned, it was the argument of Counsel for the respondent that the petition was filed out of the prescribed time while Counsel for the petitioner maintained that it was filed in time. Having considered the rival submissions on this first limb of preliminary objection, there is no dispute that the former petition which was filed in court and registered in court as Misc. Civil Application No. 16 of 2021 was filed in time

but struck out. However, the striking it out was with leave to refile it within a period of 21 days from the date of that order. The petitioner, it is clear, complied with both the law and the order of the court and filed this petition within the time set by the court.

It is true, as contended by Counsel for the respondent, that parties are bound by their pleadings but as rightly argued by Mr. Luhigo, failure to plead that the matter had been previously filed in time but struck out with an order of refiling within 21 days cannot amount to a preliminary objection because the failure to insert the clause in the pleadings is not a pure point of law. This first limb of preliminary objection falls away.

Regarding the second limb on the petition being defective for want of an affidavit verifying the contents of the petition, Counsel for the respondent has failed to point out which law has been contravened or rather, which law sanctions such procedure. Such argument cannot, therefore, qualify as a preliminary objection as it is not a pure point of law. This second limb of preliminary objection also crumbles.

Having so observed, I overrule both preliminary objections and embark on determining the petition.

On the petition filed by the petitioner. There is no dispute that parties submitted themselves to the arbitral tribunal to arbitrate their commercial

dispute. The petitioner carried the day. Armed with the award, the petitioner seeks for leave to register and enforce an arbitral award dated 15th December, 2021 as judgment and decree of the court.

It is trite that recognition and enforcement of an arbitral award is a vital part of arbitration as without which, the whole arbitration process is pointless. The court is therefore, the enforcement regime. Section 73 sub-section (1) and (2) in particular, of the Arbitration Act [Cap. 15 R.E.2020] provides that an award by the arbitral tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court and further that where leave of the court is given, judgment may be entered in terms of the award.

However, sub-section (3) of Section 73 of the Act is clear that: -

‘(3) Save as otherwise provided, leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award’.

It is on record that although the petitioner has filed this petition seeking leave to register and enforce the arbitral award and to enter judgment for the final award, the move which is sanctioned by sub-sections (1) and (2) of

Section 73 of the Act as adumbrated hereinabove, the respondent has filed a reply to the petition objecting to the grant of the petition.

With respect to the respondent and his learned Counsel and as rightly argued by Counsel for the petitioner, the objection is misconceived. The reasons are not far fetched and are these.

One, although an award may be challenged on various grounds including on the substantive jurisdiction of the tribunal, the law is clear that the challenge may be made by a petition to the court either during the pendency of the arbitration proceedings or after the Final award is issued by the Arbitrator. The rationale for this is that the Arbitrator may at his discretion decide and determine the question of jurisdiction either as a preliminary question or he may determine the issue on the award as to jurisdiction under rule 28 (4) of the Rules and Section 37 of the Act.

Besides, the party against whom the award is made may challenge the enforcement of the award under Section 74 (1) (a) and (b) of the Act. As to how that application should be made, resort must be had to the provisions of section 63 (1) of the Act. This, the respondent did not do.

Two, it appears that the respondent attempted to challenge the substantive jurisdiction of the arbitral tribunal during the arbitration hearing. Although it is not clear whether the arbitral tribunal made decision on this

aspect, the law is, however, perspicuous on what the respondent was duty bound to do and the consequences. Paragraphs (a) and (b) of sub-section (2) of Section 80 of the Act stipulates that

(2) Where the arbitral tribunal rules that it has substantive jurisdiction, a party to arbitral proceedings who could have questioned that ruling-

(a) by any available arbitral process of appeal or review;

(b) by challenging the award,

does not do so or does not do so within the time allowed by the arbitration agreement or any provision of this Act, he may not object to the arbitral tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

There is no suggestion leave alone indication that the respondent complied with those explicit provisions of law.

Three, the respondent, by filing a reply to the petition, went contrary to the provisions of rule 51 (6) of the rules which required him to show cause as to why the award should not be registered and enforced pursuant to the provisions of Section 73 of the Act. There was no explanation on part of the respondent justifying the refusal by this court to register and enforce the award.

(2) A document submitted at or after midnight or on a Saturday, Sunday, or public holiday shall, unless it is rejected by the court, be considered filed the next working day.'

The respondent and his Counsel should take a note that the current law, as it stands on filing of documents on line does not bar filing such documents on Sundays or even on Saturdays.

On the respondent's complaint that the petition filed did not comply with regulation 63 (1) (c) and (d) of the Regulations in that the arbitral award was not certified, Counsel for the petitioner refuted that argument submitting that the law was complied with. I think Counsel for the petitioner is right and Counsel for the respondent has misinterpreted the law to mislead this court. .

Rule 63 (1) of the Rules provides that save as is otherwise provided, all applications made under the provisions of the Act or these Regulations, shall

(c) an annexed to it the submission, the minutes or proceedings of the arbitral tribunal award or the ruling to

which the petition relates, or a copy of it certified by the petitioner or his advocate to be a true copy.

Apart from the fact that paragraph (d) is a replica of paragraph (c), the law is clear that what is to be certified as a true copy is not the arbitral award rather, it is the ruling to which the petition relates.

Further, rule 17 of the Judicature and Application of Laws (Electronic Filing), Rules, 2018 clearly stipulates that a party who has filed electronic documents shall be responsible for producing the originals of such documents and proving their authenticity.

With these obvious legal provisions, I think the respondent and his Counsel see their mistake.


In the final analysis and for the reasons adumbrated above, I grant the petition, give the leave to enforce the arbitral award and enter judgment and decree for the petitioner in terms of the arbitral award dated 15th day of December, 2021 as follows: -

- (i) "The Respondent breached the contract.
- (ii) The Respondent pays the Claimant Tsh. 1,258,584.136.58 being principal outstanding sum.
- (iii) Interest is payable as at the BOT Commercial borrowing rate from the date it was due to the date it is eventually paid.
- (iv) The eviction from site done by the Respondent was contractual.

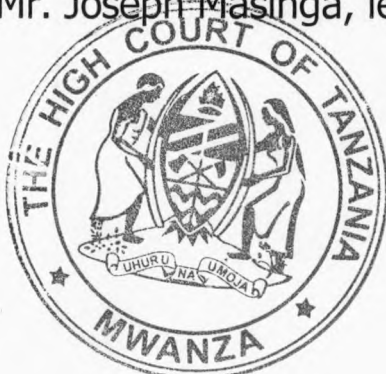
The cost of this Award is Tsh. 26,495,940/=. This includes NCC and Arbitrator's fees and costs. This is to be shared equally between the claimant and the respondent"

The petitioner is awarded costs for this petition.

Order accordingly.


W.P. Dyansobera
Judge
20.10.2022

This ruling is delivered at Mwanza under my hand and the seal of this Court on this 20th day of October, 2022 in the presence of Mr. Patrick Suluba Kinyerero, learned Counsel holding briefs for Mr. Andrew Luhigo, learned Advocate for the applicant as well as for Mr. Joseph Masinga, learned Counsel for the respondent.




W.P. Dyansobera
Judge