IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC.CIVIL APPLICATION NO 210 OF 2021

BETWEEN

SHIVACOM TANZANIA LIMITED.....APPLICANT

VERSUS

VODACOM TANZANIA PUBLIC LIMITED COMPANY .....RESPONDENT

RULING

MRUMA.J.

This ruling relates to the respondent's (Vodacom) Notice of Preliminary Objection dated 9th of June 2021 in response to the Applicant's (Shivacom) Chamber Summons application dated 6th May 2021 and supported by the affidavit of Tanil Somaiya, a majority Shareholder Chairman and Managing Director of the applicant's Company, sworn on 6th May 2021 which sought the following orders:

1) Extension of time be granted to the Applicant to make an application to challenge the conduct of arbitral proceedings and two Partial Final Awards dated 19th November 2019 and 9th March 2021 rendered in arbitral proceedings between the Applicant as Claimant and the Respondent as Respondent and Counter-Claimant

2) Costs of the Application be borne by the Respondent

3) The honourable court be pleased to grant such other orders as it may deem fit and just to grant.

The respondent's Notice of Preliminary Objection raises the following grounds:

1) *This Honourable Court has no jurisdiction to make an order granting the Applicant extension of time to challenge the conduct of the arbitration proceedings of partial Final Award dated 18th November 2019 and Second Partial Final Award dated 9th March 2021 as the seat of arbitration applicable is London, England (As mandatory provisions of the English Arbitration Act, 1996 apply;*
2) *In the alternative, this court has no jurisdiction to make orders granting the Applicant extension of time to:-*
   - *(i) challenge the Partial Final Award dated 18th November 2019 and Second Partial Final Award dated 9th March 2021 as the Applicant has not exhausted the arbitral process of appeal or review available under English Law Given that the applicable seat of arbitration is London England or;*
   - *(ii) challenge the conduct of the arbitration proceedings for serious irregularities as the seat of arbitration is London;*

3. If this court determines it has jurisdiction the Applicant has lost the right to object to the conduct of the arbitration proceedings pursuant to section 75 (1) of the Arbitration Act 2020 as it took part in such proceedings without making any objection concerning the conduct of the proceedings either forthwith or within any other appropriate time limit;

4. If this court determines it has jurisdiction the Applicant is incompetent for failure to comply with section 69 (1) or 75(1) of the Arbitration Act;

5. if this court determines that it has jurisdiction the application is incompetent for lack of supporting affidavit.

On 6th December 2021, the matter was set for hearing of preliminary objections, and both Ms Ester Nyika for the Respondent and Mr Michael Ngalo for the Applicant consented to have the Preliminary Objection canvassed by way of written submissions. In their submissions Gasper Nyika and Madina Chenge, abandoned preliminary umber 1 (b) (i) and d. According to the applicant, the first question for this court to determine is whether this court has jurisdiction to determine the present application under Section 14 of the Law of Limitation Act.

Counsel for the Respondent argues that an applicant who moves court for extension of time under Section 14 of the Law of Limitation Act, must demonstrate that the court has jurisdiction to entertain the application for which extension is sought. He submitted that the Applicant has brought an application for extension of time on the ground that 28 days have elapsed, but the Law of Limitation Act does not prescribe 28 days period for instituting any application. The learned counsel submits that the 28 days period is time afforded under Section 72 (3) of the Arbitration Act 2020 which came to force on 18th January 2021 and subject to the limitation set out in section 5, it applies to all arbitrations and arbitral awards made or deemed to have been made under the repealed Arbitration Act, 1931. The learned counsel went on to submit that in terms of section 91(2) of the Arbitration Act, anything done or concluded under the repealed Act or regulations is deemed to have been done and concluded under the Arbitration Act. He stated that in the present case, parties had agreed to refer any dispute arising under the Super Dealer Agreement and EVD Agreement to arbitration and that the rules applicable were agreed to be the Arbitration Rules then in force of the United Nations Commission on International Trade Law **(UNCITRAL Rules)** as amended in 2010 the parties also agreed that the seat of arbitration shall be in London, England.

It was further submission of the learned counsel that in terms of the Arbitration Act, both the Partial Final Award dated 18th November 2019 and the Second Partial Final Award dated 9th March 2021 from which the Applicant are seeking for extension of time from this court are foreign awards. The counsel contends that because Section 72(3) of the Arbitration Act only applies to an application or appeal made under section 69 or 70 of the Arbitration Act and as Section 5 (1) of the Arbitration Act states that the provisions of the Act applies where the seat of the Arbitration is Mainland Tanzania, then it follows that the court can only entertain an application under sections 69 and 70 of the Arbitration Act where the seat of the arbitration is Mainland Tanzania or where the Award the subject of such application is not a foreign award.

Before responding to the submissions in support of the preliminary objection raised, Mr Ngalo counsel for the Applicant observed that the so called grounds of objection do not constitute proper pure point of law which can be considered and determined without examining in detail the contents of supporting affidavit the counter affidavit and the reply affidavit including all the annextures thereto. In other words the learned counsel contends that the preliminary objection raised by the Respondents do not pass the test of being pure point of law.

Responding to the Respondent's counsel submissions in support of preliminary objections, Mr Michael Ngalo submitted that arguments posed by the counsel for Respondent are extremely erroneous, legally flawed, misconceived and misleading. According to the learned counsel submitted that an order for extension of time is an equitable remedy within the court's discretion the principles guiding the courts in exercising this discretionary power being shown good or sufficient reason for the delay. According to the learned counsel that provision doesn't say or provide that court cannot or has no jurisdiction to entertain an application seeking for extension of time to challenge foreign awards or judgments as the Respondent's counsel seem to contend.

Let me start with the question whether there is a competent Preliminary Objection before the court. The law with regards to Preliminary Objection was settled in the old famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS LTD. (1969) EA 696**, by the Court of Appeal for East Africa, where Law J.A. and Newbold P. held as follows:

Law, JA :

"So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Newbold, P :

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing butt unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

Much more recently, the Supreme Court of Kenya again reconsidered the position of parties resorting to the use of Preliminary in the case of **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION – V- JANE CHEPERENGER & 2 OTHERS [2015] e KLR.**

"The occasion to hear this matter accords us an opportunity to make certain observations regarding

the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

From the above authorities, the Supreme Court of Kenya has taken a more liberal approach to how courts should handle Preliminary Objections. Its view is that disputes between parties should not be summarily resolved, except where a Preliminary Objection raised serves the public purpose of effective utilization of judicial time and other resources. Such type of preliminary objections should be entertained by the court. It therefore follows that in deciding whether a point raised is pure point of law court has to see whether the raised point can be applied on undisputed facts that would not need the calling of additional evidence. I find this decision persuasive and legally sound.

The Respondent's first Preliminary Objection is with regards to jurisdiction of this court. I will therefore endeavour to dispense with the same forthwith. Noting that jurisdiction is everything and the court its power, authority and legitimacy to entertain any matter before it comes from its jurisdiction. As demonstrated above, the preliminary objection is hinged on the ground that this Court has no jurisdiction under section 14 of the Law of Limitation Act [Cap 189 R.E. 2019] to entertain an application for extension of time to challenge the conduct of arbitral proceedings and two partial Final Awards dated 19th November 2019 and 9th March 2019.

A recourse against an arbitral award is provided for under Section 72 (3) of the Arbitration Act which allows an unhappy party to appeal against the Arbitral Award where the awards subject of the Appeal is foreign awards but the Respondent counsel argues that it only applies where an application or appeal is made under sections 69 and 70 of the Arbitration Act under the specific grounds listed under Section 72(3) of the Act and that this court can only entertain an application under sections 69 and 70 of the Arbitration Act where the seat of the arbitration is Mainland Tanzania or where the award is not a foreign award.

The Respondent argues that this court does not have jurisdiction to entertain an application under Sections 69 and 70 of the Act as both the Partial Final Award dated 18th November 2019 and Second Partial Award dated 9th March, 2021 which the Applicant seeks to challenge are foreign awards. Counsel for Respondent submits further that the English Arbitration Act which came into force on 31st January, 1997 and which applies to all arbitrations commenced on or after that date where the seat of arbitration is in England, Wales and Northern Ireland is similar to our Arbitration Act as both laws are based on UNCITRAL Model Law, a model arbitration law produced by UNCITRAL with the aim of harmonizing national arbitral laws. The learned counsel contends that like our Arbitration Act, Section 492) of the English Arbitration Act 1996 contains mandatory provisions listed in Schedule I which apply where the seat of arbitration is England. These provisions apply notwithstanding any agreement to the contrary. He stated that parties who have designated England as seat of arbitration, in terms of the provisions of sections 67, 68 and 69 of the English Arbitration Act can only be challenged in England.

The undisputed facts of this case are that indeed the parties were involved in an arbitration case of which Partial Final Arbitral Award and

Second Partial Award had already been pronounced and that the Applicant who was aggrieved by those Arbitral Awards now wants to challenge them out of time. The only question at this stage is whether this court has jurisdiction to entertain the application for extension of time to enable the Applicant to challenge the Awards which are considered to be foreign awards. In law court's jurisdiction can be defined as any power conferred by the law upon the court or magistrate or judge to decide or adjudicate any dispute between the parties. Jurisdiction of a court is conferred by a statute or law.

The issue before this court for determination is whether this court is conferred with jurisdiction to extend time under Section 14 of the Law of Limitation Act to enable the Applicant to make an application to challenge the conduct of arbitral proceedings whose seat of arbitration is London England. The applicant has sought to rely on the submissions of the Respondent and contended that the counsel for the Respondent have not cited any provision under the Arbitration Act which impliedly or expressly ousts court's jurisdiction to entertain and determine either an application for extension of time to challenge any arbitral award be it local or foreign or local petitions under the Arbitration Act to challenge foreign procured award.

In the case of **Sunshine Furniture Co Ltd Versus Maersk (China) Shipping Co Ltd and Another Civil Appeal No 98 of 2016** the Court of Appeal held that parties to a contract has the right to decide forum for adjudication of any dispute and in so doing oust jurisdiction of the court. In that case the Appellant had sought USD 84,830.10 in damages from the Respondent jointly and severally for the Respondents' alleged acts of negligence in handling the Bill of Lading. The Respondent denied the Appellant's claim. In addition to the denial they raised preliminary objection to the jurisdiction of the court of the High Court as the bill of Lading under which the Appellant's cause of action arose specifically vested jurisdiction in the High Court of England and Wales in London. The High court sustained the objection after considering the contents of Clause 26 of the Bill of Lading which the Respondent relied. The case was therefore dismissed as the High Court ruled that it didn't have jurisdiction due to express choice of forum clause in the bill of Lading.

Like in the present case parties to the arbitration chose the law applicable and forum for resolving their dispute. By choosing the seat of the arbitration it means that they chose the territorial jurisdiction of any dispute arising from their dispute to be London and therefore ousted

jurisdiction of this court. This court has no territorial jurisdiction in London.

It is for the foregoing reasons that the application dated 1st April, 2021 lacks merit and is hereby dismissed with costs to the Respondent.

A.R. Mruma,

Judge,

17. 11. 2022

Dated at Dar Es Salaam this 22nd day of November 2022.