

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 188 OF 2022

(Appeal from the Decision of the District Court of Ilala at Ilala, Dar es Salaam, Miscellaneous Commercial Cause No. 2 of 2022 by Hon. Nyenyema -Magistrate dated 25th October 2022)

ZAP MEDIA LIMITED..... APPELLANT

VERSUS

SBC TANZANIA LIMITED.....RESPONDENT

JUDGMENT

6th & 14th July 2023

MKWIZU, J:

The Appellant is aggrieved by the decision of the District Court of Ilala in Miscellaneous Commercial Cause No. 2 of 2020 dated the 25th day of October 2022. He has appealed to this Court on the following grounds namely, -

- 1. That, the trial court erred in fact for not adhering to the requirement of registering the Arbitral Award for enforcement as the Court's judgment or order.*
- 2. That, the trial court erred in fact and law for failure to consider the Appellant's application on Miscellaneous Civil Appeal No 84 of 2022.*

On 10th May 2023 leave was granted for the matter to proceed via written submissions. Mr Mohamed Zameen Nazarali was in court for the

respondent while Mr Georgy Palangyo's advocate represented the appellant.

It is Mr. George Palangyo 's submission that the Arbitration Act, [Cap 15 R: E 2020] provides for the procedure for registering an Arbitral Award. Section 73(1) and (2) of the said act requires an Arbitral Award to be registered as a judgment or order of the Court, the request which is brought before the court through a petition under Regulation 63(1)(a) of the Arbitration (Rules of Procedure) G.N No. 146 of 2021. He maintained that the granting of the leave is only subject to the validity of the arbitral award.

Mr. Palang'yo submitted further that, a person aggrieved by the requested leaves to register the arbitral award shall, through petition apply to the Court to challenge the registration of the said arbitral award under Regulation 63, and this petition is to be regarded as a fresh case before the Court with a different registration number from that of leave to register and both files are to be tabled before the same Judge or Magistrate for determination.

He submitted that on 21st July 2022, the Appellant received the Notice to appear before Hon. A Nyenyema (PRM) in the Miscellaneous Commercial cause No. 2 of 2022 in the District Court of Ilala at Kinyerezi. He on that date requested for a time to file his Petition to challenge the petition by the Respondent (the Petitioner). On 6th September 2022, he successfully filed his Petition which was registered as Miscellaneous Commercial Cause No. 84 of 2022 to challenge the registration of the arbitral award through Miscellaneous Commercial Cause No. 2 of 2022 and was assigned to the same trial Magistrate Hon. A Nyenyema. He said, the trial court magistrate

on 20/9/2022 acknowledged the presence of Miscellaneous Commercial Cause No 84 of 2022. He however went ahead to determining the Application for leave to register the arbitral award leaving the applicant's petition No 84 of 2022 undecided on the reason that the petition to challenge leave to register the arbitral award was tardily filed contrary to the provisions of section 73(3) of the Arbitration Act. He supported his argument by the decisions of this court in **Kigoma/Ujiji Municipal Counsel Vs Nyakirangani Construction Ltd**, Miscellaneous Commercial cause No. 239 of 2015, in the High Court (Commercial division), (unreported), where the court was of the view that an aggrieved person by the petition to register an award cannot by himself re-engineer to challenge the said award until the other party filed it first.

He blamed the trial court for denying the appellant the right to be heard. He contends that the appellant was informed of the ruling of Miscellaneous Commercial Cause No. 84 of 2022 on 23rd November 2022 without hearing the parties on merit breaching the principles of natural justice of a right to be heard (*audi alteram partem*). The decision in **Pili Ernest v/s Moshi Musani**, Civil Appeal No. 39 of 2019, (CAT - Unreported) was also cited in support of the point. He lastly urged the court to allow his appeal with costs.

In rebuttal, the counsel for the respondent was of the view that the grounds of appeal are fundamentally flawed and misconceived. He said Miscellaneous Commercial Cause No. 2 of 2022 was filed by Respondent on 30th March 2022 and following a sequence of adjournments due to various circumstances including the absence of the appellant despite service of summons, both parties first appeared before Hon. Nyenyema,

PRM on 18th August 2022. During this appearance, the Appellant's counsel requested 14 days period to file a petition contesting the arbitral award. Leave was granted with an order requiring the appellant to file the said petition by 31st August 2022 and reply by the respondent by 7th September 2022 and parties were ordered to appear before the court on the same date.

The Appellant failed to meet the stipulated deadline and could not enter an appearance in court on 7th September 2022. The respondent's counsel urged the court to register the award as a judgment and decree of the court after the failure of the appellant to file his application as requested the prayer which was granted through the court ruling dated 20th September 2022 in the presence of the appellant's counsel. It is on this date that the appellant counsel notified the court that they filled the petition to challenge the arbitral award on 6th September 2022 faulting the Judiciary Statistical Dashboard System (**JSDS**) for incomplete admission and prayed for an extension of time of 7 days to file its petition out of time. Given the fact that the main application was already granted, the appellant was notified that the court is functus official and cannot go back on its decision.

Submitting on the allegation of violation of the principles of justice, the respondent counsel stated that the Magistrate adequately considered Miscellaneous Commercial Cause No 84 of 2022 by the appellant before giving its decision. He argued further that the allegation made by the Appellant that the Magistrate disregarded Miscellaneous Commercial Cause NO. 84 of 2022 is an attempt to shift the blame from their own failure to comply with the court's order by placing it on the Magistrate. The Magistrate correctly determined the Appellant's prayer for an

extension of time on page 3 of the judgment. The filing of Miscellaneous Civil Cause No. 84 of 2022 out of time rendered it incompetent as held in the case of **MMG GOLD Limited v Steven Wambura**, Labour Revision No. 25 OF 2020, High Court of Tanzania (Labour division), at Musoma (unreported)

Regarding the interpretation of section 73(3) of the Arbitration Act Cap 15 R.E 2020], the respondent counsel said, the argument that time for challenging an arbitral award commences when the prevailing party seeks to register the award is misconceived as it is the position under the repealed Arbitration Act [Cap 15 R.E 2022] which is no longer applicable. To him, section 77 (1) and 77(3) of the Arbitration Act provides the period of 28 days from the date of award as the period within which an award can be challenged. He was in support of the trial court's decision refusing to further extend the time for the appellant to file a petition to challenge an arbitral award after the lapse of the 28 days and additional time extended by the court. He contended that the Magistrate followed the established procedure stipulated by the Arbitration Act and, graciously, granted the Appellant an opportunity to challenge the arbitral award, even beyond the statutory timeframe. And that there was no requirement to give Miscellaneous Civil Cause No. 84 of 2022 due consideration as it was not in court when the Magistrate was determining Miscellaneous Commercial Cause No. 2 of 2022.

Having gone through the submissions of the parties and the record of the court, I realized that while the appellant's grievances are directed to the judgment dated 25/10/2022, the court records contain a ruling (not Judgment) of a similar date, and contents except for the last two paragraphs in the impugned judgment submitted along with the

memorandum of appeal. There are also missing records dated 25/10/2022 on what was delivered to the parties. This situation prompted resummoning of the parties' counsel to address the court on the anomalies.

On 6th July 2023, Mr. Zameen Mohamed was in court for the respondent while Mr Geory Palang'yo also learned advocate was in court for the appellant. Mr. Palang'yo admitted that there is a missing in the trial court's records the impugned decision plus the proceedings dated 25th October 2022 and the ruling available in the records was never brought to their attention. He prayed for the nullification of the entire proceedings and order a fresh hearing.

Mr. Zameen on the other hand gave chronological events of the matter from its filing before the trial court to 25/10/2022 as explained in this submission opposing the appeal. He said, on 20/9/2022 both parties were present in court and the ruling granting the applicant's (now respondent) prayer in the main application was read out before both parties followed by the applicant's prayer for judgment.

Mr. Zameen submitted further that on the same day, the respondent's counsel informed the court that he had filed his application challenging the main application electronically and that payment was made on 6/9/2022 followed by another ruling in respect of the second issue on whether the respondent's application to challenge the petition should be allowed or not which is now the ruling available on the records. The parties' next appearance in court was on 25th October 2022 when the impugned decision was delivered to both parties. He however admitted that both the judgment dated 25/10/2022 and the proceedings are

missing from the records. He in conclusion advised the court to reconcile the parties' submissions and, on the proceedings, or nullify the proceedings from 20th September 2022.

I have revisited the trial court records, there is no doubt that the court proceedings are marred with fundamental procedural errors vitiating the entire proceedings. The trial court proceedings are short. On 11th April 2022, the Respondent herein petitioned for the registration of the arbitral award premised under section 73 (3) of the Arbitration Act and Regulation 63 of the Arbitration Rules 2021. Respondent by then, (now appellant) was granted 14 days leave to file an application challenging the main petition, this was on 18/8/2022 and the matter was fixed for mention on 7/9/2022. On this last date, court proceedings were attended by the petitioner advocate, Mr. Zameen who prayed for the grant of the petition after failure by the respondent by then to file the application to challenge the petition. The order of the court on that date was as follows:

"Orders:

As it was decided in misc. criminal appl. No 108/222 page 11

Orders: Mention on 20/9/2022"

On 20/9/2022 both party's counsels were in attendance. The petitioner advocate informed the court that the matter was coming for the ruling on their prayer to have the arbitral award registered after failure by the respondent (now appellant) to file the requested petition. Mr Palang'yo on the other hand notified the court that they had filed the intimated challenge to the petition and payment was made and that the delays in complying with the courts order were caused by the challenges in the

Judicial online systems and prayed for the indulgence of the court to allow them to file the challenge to the petition. I will let the record of that day speak for itself: -

"20/9/2022

Coram: Hon A. Nyenyema PRM

For the petitioner: Mohamed Zameen

For the respondent: Georgy Palangyo for the respondent

c/c Placidia

Mr. Mohamed Zameer advocate: The last time I made a prayer that our petition is unchallenged, I prayed for the petition to be awarded as an extract to judgments it was not challenged and today is a ruling date

Sgd: A. Nyenyema

20/9/2022

I do pray to extract judgment from the arbitral award filed in the petition. That is all

Sgd: A. Nyenyema

20/9/2022

Mr. Georgy Palangyo :

We pray for the want of justice as the respondent has shown the purpose to challenge the petition whereby the matter is being challenged through a petition that has been filed on 31/8/2022 and the payment has been made via receipt no EC102475153909IP, the receipt of 6/9/2022 and for that purpose, we pray to be granted seven days to file the application of filing the petition out of time ordered by the court. It is our belief that the reasons for the difficulties were the matters of the judicial online system, but further qualification may be made through the applicant that will be made in this court. Therefore, before setting the date of the hearing, we request the prayers as we stated above. That is all.

Sgd: A. Nyenyema

20/9/2022

Mr Mohamed Zameen:

The ruling has been made the court is functus official to grant the prayer made by the respondent because it has been ruled that there is no petition filed. So the court cannot go back to hear the application for an extension of time as it cannot annul its ruling so if the respondent sees any advisory he can file the appeal to the High Court. That is all.

Signature

20/9/2022

COURT: *The ruling has been done; the respondent has to file the appeal before the High Court of Tanzania*

Sgd: A. Nyenyema

20/9/2022

orders: *Orders on the submission be on 23/9/2022.*

Parties to attend.

Sgd: A. Nyenyema

20/9/2022"

There was nothing recorded on 23/9/2022, instead, the parties were all recorded to be in attendance in court on 25/10/2022. The recorded details in the court proceedings are as follows:

"25/10/2022

Coram: Hon A. Nyenyema PRM

For the petitioner: Mohamed Zameen advocated for the petitioner.

For the respondent: Georgey Palangyo advocate

c/c Placidia"

There is in addition to the above proceedings a typed ruling of the court dated 25th October 2022 resolving the issue raised by the appellant's counsel (original respondent) on whether he should be allowed to file the petition to challenge the main petition or not as ordered on 20/9/2022.

While the parties agree that the challenged judgment was delivered to them on 25/10 /2022, there is nothing on the records reflecting the impugned judgment or showing when both the judgment and the available ruling were delivered to the parties. Strangely, both the challenged judgment (which is not part of the record) and the ruling available on the record are worded the same except for the two last paragraphs in the judgment that went ahead to grant the main petition. The parties' counsels have affirmed before the court to have no knowledge of the ruling in the court's records except for the copy of the judgment which is again not part of the records.

I have absolutely failed to comprehend the trial court's proceedings and orders. The trial court's order dated 7/9/2022 for instance is indefinable. Instead of answering Mr. Zameen's prayer, the trial magistrate gave a strange order mentioning a criminal decision without more. And while agreeing with Mr. Zameen that the court is functus official to decide whether the respondent should file his petition to challenge the main petition or not on 20/9/2022, the trial magistrate went ahead to set a ruling date on the similar issue that he had announced to be functus official. More serious is the issuing of two varying decisions on the same issue without justification.

The pointed-out shortcomings are, in my view, fundamental errors that cannot be left to stay in any court proceedings. I hereby nullify all the trial court proceedings, quash the ruling and judgment dated 25/10/ 2022, and set aside all the resultant's decrees and orders. The file is remitted back to the trial court for a fresh hearing before another magistrate of

competent jurisdiction. Since pointed errors were committed by the court, each party is ordered to bear its own costs.

DATED at DAR ES SALAAM, this 14th DAY of JULY 2023



E.Y. Mkwizu
Judge
14/7/2023