

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPLICATION NO. 39 OF 2006

AND

IN THE MATTER OF ARBITRATION ACT (CAP. 15)

AND

IN THE MATTER OF ARBITRATION

BETWEEN

- 1. MINISTRY OF AGRICULTURE, FOOD
SECURITY AND CO-OPERATIVES.....1ST PETITIONER**
- 2. HON. ATTORNEY GENERAL.....2ND PETITIONER**

VERSUS

AFRISCAN CONSTRUCTION CO. LIMITED....RESPONDENT

- 1. Date of Hearing - 1/3/2007**
- 2. Date of Ruling - 2/3/2007**

RULING

MASSATI, J

The Petitioners filed this petition on 27/10/2006 seeking to set aside the award of an arbitrator dated 12th June 2006, and revised on 11/7/2006, under S. 15 and 16 of the Arbitration Act (Cap. 15).

In an answer to the petition filed by R.K. Rweyongeza and Company, Advocates, the Respondent filed four preliminary objections. When Mr. Marandu, learned counsel took over Mr. Rweyongeza's brief, he asked for leave, and I allowed him to file additional grounds of objection arising from the Reply filed by the Petitioners. He raised three additional objections.

Mr. Marandu argued the additional points of objection first and together. The thrust of the three objections is that, first the petition did not annex the award or the submission. To that extent it was incompetent. Second, the said award and submission were instead annexed/ referred in the Reply as per paragraphs 5, 9 and 11. In his view this was contrary to Rule 8 of the Arbitration Rules and O. VI r. 7 of the Civil Procedure Code Act 1966. Therefore both the petition and the reply were incompetent and bad in law.

Turning to the first batch of preliminary objections, Mr. Marandu, argued two substantive points. First, the petition was time barred. He said that under Article 21 Part III to the first schedule to the Law of Limitation

Act 1971, the prescribed period is 60 days. As the award was published on 12/6/2006, time began to run on that day and expired on 11/8/2006. This petition was filed on 27/10/2006, therefore well out of time. His second point is that having withdrawn the cross petition in Misc. Commercial Cause No. 29/ 2006 on 13/9/2006 by consent of both parties, and there being no liberty to file a fresh one, the petitioners were estopped and barred by law from filing the present petition. He cited S. 70 (3) and O. XXIII r. 3 of the Civil Procedure Code 1966 in support of his argument. He also cited cases such as WENTWORTH v BULLEN (1829) 9 B and C 40. PURCELL v F.C. TRIGELL LIMITED (1973) 3 All ER 67, which was followed in FLORA N. WASIKE and DESTINED WAMBOKO (1994) E.A. (C.A.K.) and lastly, KATIRAKA CHINTAMANI DORO AND OTHERS v. CONTREDDI ANNAMAODA AND OTHERS (1974) 2 SCR. 655, all of which were to the effect that a consent / compromise order/ judgment could not be set aside or appealed against, except on grounds of fraud, coercion or some other similar ground. It was his submission that so long as the withdrawal of the petition and cross petition were unconditional (i.e. without liberty to file a fresh petition) and so long as there was no allegation of fraud etc., the petitioners are barred in law from instituting the present petition.

With these, Mr. Marandu, learned counsel, prayed that the court find the petition incompetent and bad in law and strike it out. Mr. Marandu did not pursue the fourth preliminary objection raised in the Answer.

In response Mr. Chidowu, learned state attorney submitted that, first, the petition did refer to the award and the submission and the reply did not therefore contain new matters. So it was his view that Rule 8 of the

Arbitration Rules was complied with. On the question of limitation, the learned state attorney submitted that the applicable law was item 18 of Part III of the First Schedule to the Law of Limitation Act, which sets the prescribed period as 6 months and not item 21. Therefore, accepting that the award was published on 12/6/2006, he said that the petition, which was filed on 27/10/2007, was filed within 6 months, thus well in time. On the issue of the order of withdrawal made on 13/9/2006, Mr. Chidowu, submitted that there was neither an agreement nor a compromise decree. In any case, O. 23 (r. 3) of the Civil Procedure Code 1966 does not bar the parties from filing a fresh petition. He quoted a passage from a book by JACK JACOB: PLEADINGS, PRINCIPLES AND PRACTICE (p. 108) to the effect that withdrawal of a suit does not generate an issue estoppel.

Mr. Chidowu also sharply differed with Mr. Marandu on his interpretation of S. 70 (2) and O. XXIII r 3 of the Civil Procedure Code Act. He said that these provisions apply to appeals, but there was no appeal in the present case. He also distinguished the cases cited by Mr. Marandu. He thus prayed for the dismissal of the preliminary objections with costs.

In his rebuttal, Mr. Marandu submitted by repeating that the petition does not refer to the award and the submission. They were being introduced for the first time in the Reply. He further submitted that the order in Commercial Case No. 29 of 2006 was a reflection of the agreement of the parties, which led to a forbearance from both parties thus constituting a valid contract, and should be enforced. As to the law of limitation, Mr. Marandu submitted that item 18 of the First schedule to Part III of the Law of Limitation Act, governed the filing of the award by an arbitrator under S. 12

of the Arbitration Act, which is not the same as filing a petition by any party; which is the case here. He also maintained his position that by virtue of S. 2 of the Civil Procedure Code Act 1966, which subjects all civil proceedings to the provisions of the Civil Procedure Code 1966, any petition to set aside an award was an appeal, and therefore a civil proceeding subject to the provisions on O. 23 (3) and S. 70 (3) of the Civil Procedure Code 1966. So the learned counsel reiterated his prayers for the striking out of the petition by reason of incompetence.

The first issue that calls for determination before I consider the other objections is whether the petition was filed in time. And having considered the arguments advanced by the learned counsel, I must first determine the law applicable.

In my view both counsel are wrong as to which item of the schedule to the law of Limitation Act is applicable. There is no doubt in my mind and there I agree with Mr. Marandu learned counsel, that Article 18 of the first schedule Part III applies to awards to be filed by the arbitrators. For ease of reference I will quote the item:-

“ 18. Under the Civil Procedure Code 1966, for the filing in court of an award in a suit made in any matter referred to arbitration by order of the court, or an award made in any matter referred to arbitration without the intervention of the court.”

Without going into a detailed analysis of the provisions of the law, it appears to me that item 18 refers to awards filed under Rules, 10 or 17 of the

Second Schedule to the Civil Procedure Code 1966, or S. 12 of the Arbitration Act (Cap 15). In the present case, the petition is filed under s.s. 15 and 16 of the Arbitration Act. So item 18 of Part III to the first schedule to the law of Limitation Act is in applicable. So Mr. Chidowu is not correct in so submitting.

Similarly, item 21 of part III of the First Schedule to the Law of Limitation Act only applies to applications to which no period of limitation is prescribed. It is unfortunate that both learned counsel did not thoroughly search through the schedule. Had they been minded to do so, they would have discovered that the applicable provision is item 2 of Part III which reads:

“ 2. Under the Civil Procedure Code 1966, to set aside an award.”

Section 2 of the law of Limitation Act 1971, defines the word ‘award’ to mean ‘*an award of an arbitrator*’.

According to the petition, the Petitioners seek among other reliefs that:-

“ The Honourable Court be pleased to set aside the award of the arbitrator....”

It is therefore clear to me that the petition is caught under item 2 of Part III of the First Schedule to the Law of Limitation Act and neither under item 18 nor item 21. So Mr. Marandu is also wrong in his submission that item 21 was applicable.

The prescribed period of limitation under item 2 is thirty (30) days. Since the parties acknowledge that the award was first published on 12/6/2006, and since it is not disputed that it was revised on 11/7/2006, it is my finding that time began to run on 11/7/2006 and 30 days thereafter expired on 10/8/2006. It is obvious therefore that filing the petition on 27/10/2006 rendered the petition time barred.

Section 3 (1) of the Law of Limitation Act, enjoins the court to dismiss any proceeding which it finds was instituted out of time, whether or not limitation is set up as a defence. I would give effect to that Section by dismissing the present petition without going into the merits of the other preliminary objections, since a plea of limitation is sufficient to dispose of the matter. In view of the circumstances of this case, particularly the conduct of the Petitioners, I will order that the Respondent be awarded its costs in this petition.

It is so ordered.



S.A. MASSATI

JUDGE

2/3/2007

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