

**IN THE HIGH COURT OF TANZANIA**  
**COMMERCIAL DIVISION**  
**AT DAR ES SALAAM**  
**MISC. COMMERCIAL CASE NO 12 OF 2010**  
**IN THE MATTER OF ARBITRATION ACT CAP.15 R.E 2002**  
**BETWEEN**  
**SALEM CONSTRUCTION COMPANY LIMITED.....APPLICANT**  
**AND**  
**B.H.LADWA LIMITED.....RESPONDENT/PETITIONER**

**RULING.**

**MRUMA, J.**

The background giving rise to this application may be stated briefly. The respondent herein filed a petition to challenge an arbitral award. On the 5/10/2010 when the matter came up for mention the present applicant prayed to file his reply to the petition and the respondent (who was the original petitioner) sought for leave to rejoin. Both prayers were dully granted and the matter was set for hearing of the petition on 22/11/2010. Together with her reply to the petition the applicant (who was the respondent in the original petition), filed a cross petition praying for orders that the award be remitted to the arbitrators for reconsideration through oral hearing. Come the 22/11/2010, the

applicant/respondent did not appear in court. The cross petition was dismissed for want of prosecution and an order for ex-parte hearing of the petition was made. Before the matter could be heard, the applicant tried to impugn the dismissal order through an application to set aside the said orders. This Court (Bukuku J,) was not appeased by the reasons assigned for applicant's non appearance and hence bolted the door against the applicant. The applicant is aggrieved. She is now before this court seeking leave to take up her discontentment to the Court of Appeal. The respondent (petitioner) is not willing the issue to be taken to the highest court of the land and has vigorously opposed this application.

Under paragraph 12 of the accompanying affidavit it is categorically stated that the leave to appeal sought under this application is in respect of the dismissed cross-petition.

Under paragraph 13 of the affidavit a total of five questions considered fit for consideration by the Court of Appeal are raised. These are;

*13.1 Whether or not from the records of the proceedings, the affidavit in support of the application and the submissions made at the hearing the reasons advanced by the applicant were not sufficient to warrant setting aside the dismissal order.*

*13.2. Whether or not the Cross-petition was due and or set for hearing on 22/11/2010 warranting dismissal for want of prosecution;*

*13.3. Whether or not having failed to file a defence to the Cross petition within time prescribed by law, the respondent could be heard moving the Court to dismiss it;*

*13.4. Whether or not the High court, given the circumstances of the case before it, judiciously exercised its discretion in dismissing the Cross-Appeal(Sic!) and rejecting an application to set aside dismissal order; and*

*13.5. Whether or not the High court orders dismissing the cross- petition and rejecting an application to set aside dismissal order is in line with the Commercial Court mission statement of just, efficient and speedy disposal of commercial case.*

By an order of this court counsels made their submissions in writing and have duly complied with the filing schedule. The applicants were represented by Mr. Rosan Mbwambo learned advocate, while the respondents are represented by Mr. Dilip Kesaria learned advocate. I commend both of them for their saturated submissions in trying to argue for and against the application.

In the affidavit taken at the instant of the applicant's advocate, facts are presented as recounted briefly herein onset. Additionally the counsel stated that the respondent (original petitioner) did not comply with the court order to file a reply to the cross-petition and therefore there being no rejoinder on the same, the said cross petition could not proceed to be heard on the date it was dismissed for want of prosecution.

In his response, Mr. Kesaria challenges all that is stated and argues that the application is an abuse of process of law and that the applicant is riding two horses at the same time because while this application is pending she has applied for review of the same ruling.

Submitting in support of the application counsel for the applicant set out with some corrections of what he termed as some typographical errors appearing in his affidavit. One of those errors which seem to have caught an eye of respondent's counsel is that appearing at paragraph 11 of the affidavit as **"agreed"** instead of **"aggrieved"** (as put in correction by the applicant's counsel). Counsel for the respondent has challenged the correction arguing that the same should have been made on oath by way of reply to the counter affidavit.

It is Mr. Kesaria's bid to have the same impeached for reason that the applicant counsel had under that paragraph and by that word agreed to the ruling of this court and therefore he had

nothing to appeal against. The counsel submitted that such unsworn statement as regard to the correction should not prevail over the evidence given under oath.

With due respect, I do not agree with the counsel for the respondent. It would be quite an illogical conclusion to hold that by the words appearing in the affidavit the applicant was consenting to the ruling. Indeed it beats logic as the counsel's impression would suggest the applicant's counsel is set to challenge that which he agrees to. The said paragraph if read as a whole does not need tussling about between officers of the court whose interests are to ensure the ends of justice.

Article 107(A)(2)(e) of the Constitution of the United Republic of Tanzania as (amended) requires courts of law to dispense justice without being tied up with undue technical provisions which may obstruct smooth dispensation of justice. This duty is also vested on all legal practitioners seized with the opportunity of assisting courts of law to administer justice. That being the case therefore, all legal practitioners' bench and bar members alike are enjoined to desist from unnecessary brawls that appear to obstruct the dispensation of the real justice for which the court do exist. In fine therefore corrections intended by the counsel for the applicant are hereby so adopted.

I have equally gone through the submissions of counsels in the rest of the points, and I am of the firm view that the applicant herein should be allowed to proceed to the Court of Appeal.

It is a common ground that on the date the parties were set to appear for hearing of the petition, the present applicant (who was the respondent) did not appear. It is also on record that indeed the cross-petition was not answered as prayed for and as scheduling order in that respect would suggest.

Counsel for the applicant has expressed his view that the cross petition should not have been dismissed because the same was not answered and therefore it could not be heard on the day the main petition was to be heard. This court (Bukuku J,) had rejected this ground when it was raised as one of the grounds in the application for restoration of the dismissed cross-petition. This court having made its decision on the issue is now precluded from deciding the same issue; therefore the only proper forum to have the point reviewed is the Court of Appeal.

Regarding riding two horses at ago, indeed it is not disputed that the applicant herein also seeks to move this court to review its ruling. However, according to the submissions and averments in the affidavit, it is categorically stated that the order sought to be appealed against in this matter is that order which dismissed the application to set aside an order dismissing the cross-petition. It is further submitted that an application for review is in respect of


an order dismissing an application to set aside an order of ex-parte proof of the main petition which is not appealable. The counsel contends that the intended appeal is therefore specifically against an order of dismissal of an application for restoration of the cross- petition.

Counsel for the respondent has referred this court to the Court of Appeal's decision in the case of **CITIBANK (T) LTD versus TTCL&3OTHERS, Civil Application No 25/2005(C.A.T) unreported** and submitted that theoretically it is possible to pursue an appeal and review at the same time but in practice it is not worthwhile because the end result of both is either to have the impugned decision varied or faulted.

In as much as I associate myself with that view, it is nevertheless worth to note at this juncture that each case has to be decided on its own merits. In the instant case, the applications having been consolidated they ultimately met the same fate. An order thereof is appealable in so far as dismissal of an application for restoration of cross petition is concerned but not appealable as far as a dismissal for want of appearance order is concerned. Apart from that, as submitted by the counsel for the applicant, and rightly so, since it is theoretically possible, it is my considered opinion that this is a fit circumstance where a party can proceed in different avenues available under the laws.

In principal therefore the Court of Appeal's may be pleased to intervene and look into the propriety or otherwise of this Court's decision to refuse to allow an application for setting aside its orders dismissing cross-petition.

In fine therefore the application for leave to file an appeal to the Court of Appeal is allowed. Costs will be in the course.

  
**A.R. MRUMA,**  
**JUDGE**

26/09/2011

Coram: Hon. A.R.Mruma, Judge.

For the Applicant/Respondent – Mr. Shuma for Mr. Mbwambo for.

For the Respondent/Petitioner – Mr. Magusu for the Respondent.

CC: J. Grison.

Mr. Shuma Kisenge for Mr. Mbwambo for the Applicant. It is for ruling and we are ready to receive it.



COURT: Ruling delivered in presence of Mr. Shuma Kisenge who holds Mr. Rosan Mbwambo's brief for the Applicant and Mr. Magusu for the Respondent this 26<sup>th</sup> day of September, 2011.



**A.R. MRUMA,**

**JUDGE**

**26/09/2011**

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