

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

COMMERCIAL CASE NO.2 OF 2011

REGISTERED TRUSTEES OF GIBBON

WORI WORLD (T) PLAINTIFF

VERSUS

HERKIN BUILDER LIMITED DEFENDANT

Date of final order: 04/08/2011

Date of oral submissions: 21/09/2011

Date of ruling: 21/09/2011

R U L I N G

MAKARAMBA, J.:

Before this Court is an arbitral award which was filed in this Court on the 12th day of April 2011 under the provisions of the Arbitration Act, Cap.15 R.E. 2002, for purposes of being registered and enforcement as a Decree of this Court. On the 14th day of June 2011, the Applicant, the Registered Trustees of Gibbun Woori World (T), the Claimant in the Arbitration, lodged an application in this Court under the provisions of

section 95 of the Civil Procedure Code Cap.33 R.E. 2002, section 2(3) of the Judicature and Application of Laws Act Cap.358 R.E. 2002 and any other enabling provisions of the law seeking for among other orders that this Court be pleased to use its inherent powers to order the Respondent to accept the less amount than what it is shown in the final award and that this Court may exercise its powers in conformity with equity to meet ends of justice. The Application has been taken at the instance of the applicant and it is supported by an affidavit of RHEE SON GOOG and the other reasons argued at the hearing.

The application by consent of the learned Counsel for the parties was disposed of by way of oral submission, Mr. Mujumba, learned Counsel for the Claimant/Applicant and Mr. Msuya, learned Counsel for the Respondent.

The background to the application briefly is that the Claimant who is a NGO incorporated under the Trusteeship Incorporation Act Cap.375 RE 2002 and the Respondent who is a limited liability company involved in construction had submitted their difference to arbitration and the Arbitrator handed down an arbitral award on the 22nd day of March 2011 which was duly submitted to this Court for registration and enforcement. It would appear that from the affidavit of RHEE SON GOOG, the principal officer of the Applicant, on the 1st December 2008, the Applicant signed a construction contract with the respondent for constructing the proposed Welfare Centre and Staff house on Plot No.13 Block "D" Tegeta area Kinondoni Municipality in Dar es Salaam Region. The deponent avers

further that for some unavoidable circumstances the project could not be accomplished as planned. The parties submitted their dispute to an arbitrator, Retired Hon Justice Thomas B. Mihayo who was appointed by the National Construction Council to arbitrate the matter. The Claimant's prayers in the main claim were not granted but the prayers in the Respondent's counter claim were partly allowed.

The final award was transmitted to this Court by the arbitrator for registration and any further steps. As per paragraph 8 of the affidavit in support of the application, the Claimant/Applicant did not intend to challenge the Final Award and therefore has lodged the present application contending that due to the fact that the amount involved is too big compared to the contracted amount of USD 795,000.00 which the Claimant claims that he cannot manage to pay; and the fact that the patrons who were funding the Claimant's project have stopped funding pending determination of the dispute; and the fact that the Claimant is ready and willing to continue with negotiations between him and the respondent with a view to reaching a consensus in the matter, the Claimant is therefore praying before this Court to exercise its discretion to allow the Claimant to pay a lesser amount than the award sum. The Claimant depone further that since he has no other source of income to enable him to settle the award sum he was ready to dispose of the only asset available which belongs to the Claimant, a building site on Plot No.13 Block D at Tegeta towards fully settlement and satisfaction of the award. The Respondent by way of counter affidavit of SANYEL I. KISHIMBO has resisted the

application and that the instant application is unknown in law and equity and therefore it is not supposed to be granted.

I have carefully followed the oral submissions by Counsel. I wish to point out here that the process of registering an arbitral award and contesting is clearly stipulated under the law. In terms of the Arbitration Act, Cap.15 R.E. 2002, a party intending to contest the registration and enforcement of an arbitral award may petition the court where the award has been filed and show reasons in an affidavit in support of application by way of petition why the award should not be enforced as a decree of the court. In the present case this has not been done since as the learned Counsel for the Applicant has submitted and as could be gathered from the Affidavit in support of the application, the Applicant did not intend to contest the arbitral award from being registered and consequently enforced as a decree of this Court.

The Application before this Court, as the learned Counsel for the Applicant has put it is simply asking for the mercy of this Court and presumably this Court exercising its inherent powers under section 95 of the Civil Procedure Code will exercise its mercy and allow the Applicant to pay a lesser amount than the award sum. As the learned Counsel for the Respondent has submitted and rightly so in my view, the powers sought to be exercised by this Court are beyond its inherent powers as envisaged under section 95 of the Civil Procedure Code. Presumably, those powers are not even within the purview of the powers exercisable under equity, which as far as I can recollect are for affording a cure to some kind of

mischief in the law. In the present application, aside from the Applicant stating that he is not able to pay the award sum which he characterized as being more than the initial contract sum, due to lack of funds has not shown grounds for this Court to exercise its inherent powers or invoke equity, if at all it was minded to so do, so as to provide an equitable relief, which in my view does involve making an order for paying a sum less than the award sum.

In my considered view, and with due respect to the Applicant's Counsel, aside from the fact that the prayers sought for in the application are unknown under either law or equity, the Applicant has come to this rather prematurely. The Applicant if minded could approach this Court at the execution stage of the decree following an order of this Court declaring the arbitral award enforceable as if it was a decree of this Court, which as I intimated to earlier has not been contested by the Applicant. Even if this Court was to act under section 38(1) of the Civil Procedure Code, a party can only come to this Court if the parties to the execution process are at issue which needs to be determined by the court before making an order for execution of the decree and upon showing reasons for the Court so to determine. The scope of this Court at this stage is what is required in the event an arbitral award has not been contested as is the case presently. The law enjoins the court to declare the award as enforceable as if it was a decree of this Court.

In the event and for the foregoing reasons the Application has no merits. It is hereby dismissed. The circumstances are such that I shall

make no order as to costs. Each party therefore shall bear its own costs in this application. It is further ordered that the arbitral award filed in this Court on 12th day of April 2011 having not been contested is hereby declared to be enforced as if it was a decree of this court. It is accordingly ordered.

A handwritten signature in black ink, appearing to read 'R. V. Makaramba', is written over a horizontal dotted line.

R. V. MAKARAMBA

JUDGE

21/09/2011

Ruling delivered this 21st day of September, 2011 in the presence of Mr. Mujumba, learned Counsel for the Applicant and Mr. Msuya learned Counsel for the Respondent:

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

21/09/2011.

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