IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 239 OF 2015

IN THE MATTER OF THE ARBITRATION ACT CAP. 15 R.E 2002

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

KIGOMA/UJIJI MUNICIPAL COUNCIL ..... PETITIONER

AND

NYAKIRANG'ANI CONSTRUCTION LIMITED ..... RESPONDENT

24th December, 2015 & 26th May, 2016

RULING

MWAMBEGELE, J.:

Before me is a petition filed by Kigoma/Ujiji Municipal Council (henceforth "the petitioner") seeking to move this court to set aside the Award made in favour of M/s Nyakirang'ani Construction Limited (henceforth "the respondent"). The pleadings have it that a dispute had ensued between the petitioner and respondent that led to invoking the terms of the Agreement to submit the same to arbitration and eventually the impugned arbitral award.

Along with an answer to the petition, a preliminary point of objection was raised by the respondent on three grounds that:

1. The petition is hopelessly incompetent for violation and noncompliance with the mandatory requirements of rule 12 of the Arbitration Rules GN No. 427 of 1957 in that no filing fees has been paid by the petitioner in these proceedings;
2. That the application is hopelessly time-barred; and
3. The petition is incompetent for failure to annex the decision of the court granting leave to file the petition out of time.

As events turned out, when the petition was called for hearing on 07.12.2015, this court allowed disposing of the preliminary point of law by way of written submissions. Both parties through their respective counsel – the respondent through Advocate Dennis M. Msafiri of MM Attorneys and the petitioner through the Attorney General's Chambers - have complied with the order of this court in respect of the filing schedule.

In the main, the arguments fronted by the counsel for the respondent in respect of the preliminary objection can be summarized thus; on the first ground, it is contended generally that payment of fees being mandatory and the petitioner not being a Government in terms of the Court Fees Rules, 1964 - GN No. 308 of 1964 and the High Court of Tanzania (Commercial Division Fees) Rules, 2012 – GN No. 249 of 2012, and there having been no fees paid, then the petition is incompetent and liable for being struck out.

The learned counsel for the respondent, basing on various authorities including section 4 of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002 (henceforth "the Interpretation Act"), has at length

endeavoured to show that the petitioner herein is not a "Government" and as such not exempt to pay court fees. To buttress his point the learned counsel has cited ***Rashid Hassan Vs Mrisho Juma*** [1988] TLR 134 and ***John Chuwa Vs Anthony Ciza*** [1992] TLR 233 in which the court held that payment of filing fees is a mandatory legal requirement. In rejoinder, the learned counsel stresses that the petitioner is a body corporate by virtue of the establishing Act; that is, the Local Government (Urban Authorities) Act, Cap. 288 of the Revised Edition, 2002.

On the second ground, his contention, mainly, is to the effect that since in terms of section 5 of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (henceforth "the Law of Limitation Act"), right of action accrues on the date of the cause of action, the right to challenge an award arose on 17.10.2014 when the same was made and published. It is his argument that the right to set aside that award accrued on that date and not at the date when the parties appeared before the court or on any other date. He surmises that since there had been no order of the court extending time within which to file this petition in terms of the Law of Limitation Act, and since this petition was filed more than six months provided under the law, the same is time barred.

On the third point, his arguments are to the effect that since the petitioner pleaded to have been given an order of the court extending time within which to institute the present petition, and since no such order has been attached to the said petition to exhibit the same, this petition is incompetent as it invites the court to act on a conjecture.

On the other hand, counsel for the petitioner has equally responded. Briefly put, his retaliation to the first point is to the effect that the interpretation

adopted by the respondent's counsel of what is a "Government" is absurd. He, in effect, contends that the petitioner is covered under rule 8 of GN No. 249 of 2012 which exempts the Government from paying fees. In the circumstances, he contends, the objection is misconceived.

On the second point his response is, in essence, that the petitioner having been granted leave to file this petition by the order of this court on 15.11.2014, and that having further been granted extension of time to do so, on 04.09.2015, the petition is well within time.

By way of concession to failure to annex the said order, he puts that since at the time of filing the petition they were still pursuing a written copy of the same, and since written submissions amount to a hearing, it would have been apposite for them to append it to the submission. To him, the preliminary objection raised by the respondent is an abuse of the court process intended to delay the matter.

I take note of the various authorities referred by both counsel and do commend them in so far as the same are concerned. I must state, at the outset, that having gone through their respective submissions, this point will not detain me much, for, apparently and outrightly the three-point preliminary objection raised is indeed devoid of merit and arguments thereof are based on a serious misconception of the law.

I will start with the first point of objection, in which the respondent submits that the petitioner herein is not a government and therefore not covered under the exemption. The answer therein is found in the very section 4 of the Interpretation Act. Therein, the term "Government" is defined as "the Government of the United Republic of Tanzania". To my understanding, the

the Government of the United Republic of Tanzania, for administrative purposes, exists or is divided into two forms, namely the Central Government and the Local Government by virtue of the Local Government (District Authorities) Act, Cap. 287 of the Revised Edition, 2002 and The Local Government (Urban Authorities) Act, Cap. 288 of the Revised Edition, 2002. Thus, it being a local government does not make it a lesser government or nongovernment as argued by learned counsel for the respondent.

And to reinforce the above discussion, the following definition from the Constitution of the United Republic of Tanzania, 1977 under article 151; the interpretation provision, may help:

> "'Serikali' maana yake ni pamoja na Serikali ya Jamhuri ya Muungano, Serikali ya Mapinduzi ya Zanzibar au Halmashauri ya Wilaya au ya Mji, na pia mtu yeyote anayetekeleza madaraka au mamlaka yoyote kwa niaba ya Serikali au Halmashauri"

And the official Revised Version in English of "KATIBA YA JAMHURI YA MUUNGANO WA TANZANIA YA MWAKA 1977" defines the term "the Government" under its corresponding interpretation of article 151, to include:

> "the Government of the United Republic, the Revolutionary Government of Zanzibar or a District Council or Urban Authority, and also any person exercising any power or authority on behalf of the Government or local government authority".

It is apparent from the above definition in the highest law of our land that the local government authority is part and parcel of the definition of the term "government". Therefore, the argument that a local government authority is not a government is in any view a serious misconception of the law and as such the first point crumbles.

On the second point, it is argued that the application is time barred because the time within which to institute it started to run on the date of publication of the award. Once again, the learned counsel for the respondent seems to be treading on a land he is unsure of. For purposes of regularizing his understanding, I hasten to observe here that a party aggrieved by an arbitral award has no avenue to challenge the same through a court of law until and unless the award is filed in court for purposes of registration as a decree of the court – See: ***Tanzania Cotton Marketing Board Vs. Cogecot Cotton SA*** [199] TLR 165). It is noteworthy here that the law as it stands now, provides only the time within which to file such an award for enforcement and not the time for challenging the same – See: item 18 of Part III of the Schedule to the Law of Limitation Act. Thus, until then, a court of law has no jurisdiction to meddle with that which parties have agreed to be bound by.

As logic would have it, where parties have chosen to be bound by the decision of an arbitrator, it follows that one will automatically comply with it. However, where a party is aggrieved and wishes to challenge the same, in my considered opinion, the available remedy is to boycott performance or compliance. In that circumstance, the other party will be compelled to seek assistance of the court by filing such award for purpose of its enforcement vide its registration and adoption as a decree of the court. Once that process is initiated, it is then that an opportunity presents itself for the aggrieved

party to put into motion the machinery of challenging the award In that accord, time for challenging the same starts to run from the day the said award is filed in court for the purpose of registration and adoption of the same as a decree of the court and such filing is brought to notice of the respondent/petitioner. It is not disputed that the period of limitation for filing such an award procured through arbitration without court intervention of the court is six months (see: paragraph 18 of Part III to the Law of Limitation Act Cap, 89 of the Revised Edition, 2002). Apparently, neither the Law of Limitation nor the Arbitration Act provides the limitation period within which to institute the said petition or application for challenging the award after it has been filed. Resort in that circumstance is to be made to item 21 to Part III (supra) which provides for the period of 60 days for such application whose limitation period is not provided. Apparently therefore, the said application should be brought within 60 days from the date the filing of the award was brought to notice of the petitioner. As shown (infra), the petition was filed by an order of this court and was so filed timeously.

Thus, since the second point is premised on the lapse of time for filing this petition reckoned from the date an award was made, I hereby overrule the same.

Before I pen off on this point let me point out some procedural lapses I have noted in the record and the pleadings in particular. The learned counsel for the petitioner insisted that the petition was filed well within time because there had been extension of time vide the order of this court (Songoro, J.).

I have gone through the entire record of this matter and what I have discovered is quite disturbing. I shall demonstrate. The Arbitration Award was filed in this court for the first time on the 28.10.2014 and assigned a

number as Miscellaneous Commercial Cause No. 277 of 2014. On their first day of appearance; that is on 19.11.2014, the petitioner herein expressed her intention to challenge the award. This Court, (Makaramba, J.) made a scheduling order whereby the petition for that matter was required to be filed by 15.12.2014.

On 15.12.2014, the petition was filed and registered as Miscellaneous Commercial Cause No. 33 of 2014. In an answer thereto, the respondent therein and herein, put up a preliminary objection whose third point was upheld. This point was to the effect that the petition was filed in contravention of rule 8 of the Arbitration Rules, GN 427 of 1957. Accordingly this court (Now Mansoor, J.) struck out the petition.

Surprisingly, and presumably out of sheer ignorance on the part of the petitioner's counsel, an application for extension of time to comply with an order of this court dated 19.11.2014 was filed. This, in my view, was a serious procedural irregularity and a blatant abuse of court process. I am of this view because; the order of Makaramba, J. had been complied with by filing the said petition which was struck out by this court (Mansoor, J.). In essence, the order once complied with, was no longer in force. Or simply put, a previous order made by the court to prompt a certain action cannot survive an order subsequently made in respect of that action. To do so is quite out of order and defies both logic and justice.

Reading from the Ruling of my Sister at the Bench Mansoor, J., it is obvious that the parties had belaboured a mistake that the two matters were different; that is, Miscellaneous Civil Cause No. 277 of 2014 and Miscellaneous Civil Cause No. 333 of 2014. Regularizing their understanding, the learned Judge categorically pointed out that it was as a result of an error committed

at the Registry of opening a different file for the petition while the same was to be within and under Miscellaneous Civil Cause No. 277 of 2014. Justice Mansoor went ahead to straighten the record by making an order that the said Miscellaneous Civil Cause No. 333 of 2014 be instead numbered Miscellaneous Civil Cause No. 277 of 2014.

Strangely the learned counsel for the parties could not make out the essence of that order to the extent that they crafted an application subsequent thereto in order to revive a defunct scheduling order and amend it so as to re-file the demised petition.

On my second thought as to what may have caused this mishap, apparently, I discovered that it may be either, the obvious procedural gap that was left unfilled in this matter which preceded from the counsel's (respondent's) inaction. I shall demonstrate.

Upon the petition seeking to have the award being set aside being struck out, there was nothing, substantially, before the court to bar it from adopting the award as a decree of the court. This is so because, in terms of section 17 (1) of the Arbitration Act, Cap. 15 of the Revised Edition, 2002, unless the Award is set aside or remitted to the arbitrator, once filed and registered, it will be a decree of the court.

To put it in a simplistic way, since the process to challenge the award, as intimated above, is always initiated by an aggrieved party, where the process is unsuccessful, the law, as it is, does not provide for a vacuum or rather span of time wherein an aggrieved party can re-engineer the process. My view is fortified by an order of this court in ***Afriscan Construction Co. Ltd Vs the Ministry of Agriculture, Food security and Cooperatives***, Miscellaneous

Commercial case No. 42 of 2006 (Mruma J.) made on 19.06.2009. In that application, the applicants had filed an award to be enforced as a decree of the Court. The Respondents through the Attorney General had petitioned to challenge the said award and have it set aside. The respondents/applicant raised a preliminary objection which, upon being upheld, the petition was dismissed. Subsequent thereto, the court proceeded with an application to have the arbitral award adopted as decree of the Court. To be precise and to hammer my point home, let me show what transpired on the material date in this case:

> "Mr. Rweyongeza for the applicant:
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> ... my lord the dismissal of the petition paved way for the application of [section] 17 of the Law of Arbitration Act [Cap. 15 R.E2002] which is to the effect that once an award is filed it should be enforced as a decree of the court. We therefore pray that this award be treated as a decree of the court.
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> Mr.Chidowu for the Respondent
>
> [Not applicable]
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> Court:
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> The award having been duly filed in court, and the petition to challenge it having been dismissed on 18/3/2009, now in terms of section 17 (1) of the

> Arbitration Act [Cap. 15 of the Laws, Revised Edition of 2002], I order;
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> Order:
>
> Let the award be treated and enforced as if it were a decree of this Court ..."

Obviously, where there is no challenge against an arbitral award filed in court, and considering that parties had chosen to deal with their problems out of court through arbitration, it is not for the court to refuse or delay to give meaning thereto, in terms of the law on the apprehended re-engineering of the challenging process by either party.

That notwithstanding, a court of law being not a party to such procedure, cannot move *suo motu* to make an order adopting and registering the Award as a decree of the court. Thus, it is upon the relevant party to move the court to make such order as it deems fit. The court, in granting such order, in my considered opinion, will take into consideration various factors including any intention expressed by the opposite party there and then, as well as substantive justice tenets.

Therefore, where a party commits laches, and let the day pass by, the matter always stands at that point of striking out or dismissing the petition challenging the award, until and unless, a prayer to register the same is made or a due process to have it impeached is re-engineered, of course subject to the law of limitation.

In line with the foregoing, what can be said in respect of an application for extension of time to comply with the order of this court of 15.12.2014

(Makaramba, J.) and subsequent order granting the same? At the risk of being challenged for treading on a matter to which this court stands *functus officio*, I am of the considered opinion that it was of no essence, and accordingly, it could not be relied upon to justify any dilatory act, as it was a misconception and calculated to delay and obstruct the course of justice.

All in all, as an old adage goes that once an arrow is shot, it cannot be recalled, and in the light of an unreported decision the Court of Appeal of ***Mohamed Enterprises (T) Limited Vs Masoud Mohamed***, Civil Application No. 33 of 2012, in which the court of appeal reminded judges not to trample upon orders of the same court because the court becomes *functus officio* upon making such order, I cannot disturb the equilibrium as already created by this court through the said application and subsequent order. I will let the bygone be bygone since, in my considered view, no harm was done to justice, as it was left dry and clean by the circumstances. Suffice here to note that the former petition having been struck out, and there being no order as to adoption and declaration of an award as a decree of this Court, and further in the light of section 21 of the Law of Limitation Act, the present petition was properly instituted and well within time.

The totality of the foregoing goes to justify the demise of the 2nd point of objection; it is also overruled.

The third point of preliminary objection will not strain my mind. In my considered view, and on the basis of the yardstick in the famous case of ***Mukisa Biscuit Manufacturing Ltd Vs Westend Distributors*** [1969] EA 696, the same is not a preliminary objection. It must fail too as I explain hereunder.

Apparently, from his submissions, the learned counsel for the respondent, appears to assign evidential value to the said order of this court which allegedly is missing. Thus, an argument that there is no such order attached to the petition to exhibit the grant of extension of time to file petition, indirectly, implores this court to go beyond the pleadings to find out the truth or otherwise of the said averment.

That exercise, as both counsel are aware or ought to be aware, will entail, as contended by counsel for the respondent, not only production of the said order but also its scrutiny. This, in my view, compels hearing the parties and adducing further evidence, a fact which makes this point of inquiry not amenable to preliminary treatment as a point of law.

Eventually therefore, the three point PO raised by the respondent is hereby overruled. It is overruled with costs.

Order accordingly.

DATED at DAR ES SALAAM this 26th day of May, 2016.

J. C. M. MWAMBEGELE
JUDGE