IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 247 OF 2015

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

AND

IN THE MATTER OF ARBITRATION

BETWEEN

SIEMENS LIMITED
SIEMENS (PROPRIETARY) LIMITED} ..... PETITIONERS

AND

MTIBWA SUGAR ESTATES ..... RESPONDENT

25th November, 2015 & 18th February, 2016

RULING

MWAMBEGELE, J.:

On 23.10.2015, Dr. Wilbert B. Kapinga, learned counsel for the petitioners filed this petition for and on behalf of the petitioners. Along with the Reply to the Petition, the respondent has raised a preliminary objection against the petition. The preliminary objection has the following two points of objection:

1. The filing of the Award in Court is time barred after being filed after six months from the date it was made contrary to the mandatory provisions of item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002; and, or in the alternative.
2. Copies of the submissions and or the Award annexed to the petition have not been certified by the Petitioner or its Advocate to be true copies contrary to the mandatory provisions of rule 8 of the Arbitration Rules, 1957.

The preliminary objection (henceforth "the PO"), after an agreement of the parties which was blessed by the court on 25.11.2015, was argued by way of written submissions. The parties have filed their respective written submissions timeously.

The respondent argues for the PO in the first point that the Final Award was filed out of the prescribed time. It is submitted that the Final Award which was issued on 13.02.2015, in terms of item 18 of the First Column of the first schedule to Part III of the Law of Limitation Act, ought to have been filed six months after it was given. The six months expired on 12. 08.2015, it is submitted. The Award, it is submitted, having been filed out of time, is incompetently before the court and must be dismissed in terms of section 3 of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (henceforth "the Law of Limitation Act"). The learned counsel cites ***African International Civil Engineering Ltd Vs Manyoni District Council***, Miscellaneous Commercial Application No. 18 of 2008 (unreported) to buttress this proposition. The learned counsel also cites ***Mathew Martin Vs***

Managing Director Kahama Mining Corporation, Civil Case No. 79 of 2006 (unreported) in which, quoting with approval from ***John Cornel Vs A. Grevo (T) Limited*** Civil Case No. 70 of 1998 (HC unreported), held:

> "However unfortunate it may be for petitioners, the Law of Limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into those who get caught in its web."

The learned counsel for the respondent urges this court to follow suit and dismiss the petition with costs.

On the second point, which is argued in the alternative, the respondent's counsel argues that the current copies of the final award and submission annexed to the petition are not certified by the petitioner or its advocate to be true copies thereof contrary to the mandatory provision of rule of the Arbitration Rules, 1957. Failure to do that, it is submitted, makes the application incompetent and bad in law. The respondent's counsel thus argues that the petition should be struck out as was the case in ***East African Development Bank Vs Blue Line Enterprises Ltd*** Miscellaneous Civil Cause No. 142 of 2005 (HC unreported).

Against the PO the applicants' counsel has written a long submission to justify why the provisions of item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act are not applicable. In essence, the learned counsel submits that the act of the arbitrator causing the filing of an award in

court is not an application or proceeding which is subject to the limitation set out in item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act. The operative terms in item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act is that the filing of the award must be in relation to a suit upon which the court may order that the disputed be referred to arbitration or at the choice of the parties and without the intervention of the court, the matter in disputed is referred to arbitration, he argues. In the matter at hand, he further argues, did not arise from a suit as the learned counsel for the respondent seems to suggest.

On the second point, the respondents' counsel concedes that the formality to certify the Submissions and Final Award has not been complied. This defect of form, he submits, is not fatal to itself and to the filed award and makes the petition liable to be struck out and not the drastic measure of dismissal as demanded by counsel for the respondent.

In a rejoinder, the learned counsel for the respondent reiterated the position in the submissions in chief and that the use of the conjunction "or" connotes that only one possibility between the two can be realised. That item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act has provided for the application of the provision "on suit" or "on other matter". The learned counsel argues further in rejoinder that "on other matter" includes a petition.

The learned arguments by both learned counsel have been very reach and have helped me a great deal in composing this ruling. I thank both of them for the good work well done. The ball is now in my court.

I will deal with the second point of objection first. This will not detain me for the learned counsel for the applicants has conceded to the same. The only thing he prayed is that the application will not be the dismissed but struck out. I wish to make it clear that the learned counsel for the respondent has not prayed for dismissal in the second point of the PO. The concession of the second point of the PO makes this suit prone to be struck out.

I would have rested in peace if the foregoing outcome solved the problem before me adequately. As the first point of PO has a harsher outcome if it is upheld, in the interest of justice, I propose to deal with it as well.

The central argument between the parties onto which they have locked horns appears to be whether or not item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act is applicable to the case at hand. Or put differently, whether or not the present petition is an application envisaged in item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act. For ease of reference, let me reproduce the item:

> "Under the Civil Procedure Code for the filing in court of an award in a suit made in any matter referred to arbitration by order of the court, or of an award made in any matter referred to arbitration without the intervention of a court ..... six months"

The learned counsel for the applicants is of the view that the foregoing provisions of the law; that is, item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act is not applicable where there is no suit. On the other hand, the respondent's counsel is of the view that the learned counsel for the applicants has misconceived the provision.

I think the learned counsel for the applicant has indeed misconstrued the import of item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act. I say so because the learned counsel has burnt a lot of fuel challenging the first point of the PO as if the respondent is attacking the filing of the award by the arbitrator which is not the gist of the first point of the PO. On this seemingly wrong premise, the applicants' counsel has extensively submitted (about ¾ of the whole written submission) on what happens when a final award is made and a party wants to enforce it; quoting the oft-cited in cases of this nature the case of ***Cotton Marketing Board Vs Cogecot Cotton Company SA*** [1997] TLR 165.

The substance of the first point of PO is that the Final Award ought to have been filed six months after it was made. The respondent is not challenging the manner in which it was filed. Thus the modus operandi regarding the filing, was apposite. Only that that it is stated the application filed by the applicant should have been made within six months after the award was made as dictated by item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act.

The learned counsel for the applicants reverts to the right track in arguing the PO when he submits that item 18 of the First Column of the first schedule on

Part III of the Law of Limitation Act is only applicable only where there is a suit. However, respectfully, I am not ready to buy this argument. Item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act provides for two scenarios under which it is applicable: "Under the Civil Procedure Code for the filing in court of an award in a suit made in any matter referred to arbitration by order of the court" or "of an award made in any matter referred to arbitration without the intervention of a court". The case at hand falls in the second limb because it emanates from an award which was referred to the court without the intervention of the court.

The use of the conjunction "or" in the item is pregnant with meaning; it plays the disjunctive role. The disjunctive construction of "or" is provided under section of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002 as follows:

> "In relation to a written law passed or made after the commencement of this Act, but subject to section 2 (4), "or", "other" and "otherwise" shall be construed disjunctively and not as implying similarity unless the word "similar" or some other word of like meaning is added."

"Disjunction" is not a term of art; it is an ordinary word defined by Concise Oxford Dictionary (10th Edition) as simply:

> "1. A lack of correspondence or consistency.

2. ... the relation of two distinct alternatives, or a statement expressing this."

In view of the foregoing, I find no misdirection on the part of the respondent in referring the arbitrators request to file the Final Award as an application. It is, in my view, an application subject to the provisions of Item 18 of the First Column of the first schedule on Part III of the Law of Limitation Act.

Having so found, the Final Award ought to have been filed within six months after the cause of action; that it, after its pronouncement. As was stated in the ***Manyoni*** case (supra) a case referred to the court by the learned counsel for the respondent, the item is applicable to cases of this nature. This court (Werema, J.) stated:

> "Item 18 governs applications made under the Civil Procedure Code for 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 intervention of a court.** The period provided in the second column is **six months**."
> [Emphasis not mine].

And on the application of section 3 of the Law of Limitation Act, His Lordship went on:

> "This Petition ... was filed beyond the time prescribed for it under Section 3 of the Law of Limitation Act read with Part III, item 18 of the Schedule to the Act.
> ... No reason was advanced to explain this dilatory and inordinate lapse in filing the award by the Arbitrator. This application should not be struck out but a candidate for dismissal. It is therefore dismissed."

In the instant case the Final Award was issued on 13.02.2015 and the Arbitrator forwarded the same to the Deputy Registrar of this court vide a letter bearing Ref. No. S.197 dated 03.09.2015 and, given the ERV, received on 17.09.2015. The present application was filed on 23.10.2015. All these endeavours were being made when it was already out of time as time within which the Final Award could legally be filed had expired on 12.08.2015; six months after the Final Award was made. Time started to click against the petitioners right on 13.02.2015 when the Final Award was pronounced. The present application having been filed out of time is incompetently before me and thus deserves the wrath of being dismissed in terms of section 3 of the Law of Limitation Act.

In the light of the foregoing discussion on statute and case law, I uphold the first point of the PO.. As the second point of PO has been conceded by Dr. Kapinga, learned counsel for petitioners, I will waste the court's precious time to decide on, for it will not make any difference regarding the outcome. I

consequently proceed to dismiss the application filed by the applicants/petitioners with costs.

Order accordingly.

DATED at DAR ES SALAAM this 18th day of February, 2016.

J. C. M. MWAMBEGELE
JUDGE