IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

CONSOLIDATED MISC. COMM. APPL. NO. 57 & 172 OF 2021

BHARYA ENGINEERING & CONTRACTING COMPANY LIMITED .....APPLICANT

VERSUS

THE ARAB CONTRACTORS T/A AC-EE JOINTVENTURE.....1ST RESPONDENT

ELSEWEDY ELECTRIC T/A AC-EE JOINT VENTURE .....2ND RESPONDENT

STANBIC BANK TANZANIA LIMITED.....3RD RESPONDENT

ORIGINAL

Date of Last Order: 26/11/2021
Date of Ruling: 06 /01/2022

RULING

NANGELA, J:.

The Applicant herein brought two applications before this Court. Both were brought under a certificate of urgency. The much earlier one was Misc. Commercial Application No.57 of 2021 which was filed in Court on the

22nd of October 2021 seeking for orders, (*Ex-arte* and (*Inter partes)* that:

(Ex-parte)

1. 'the 1st and 2nd Respondents, their agents, workmen or assignees and/or any other person working under their instructions, be restrained from fraudulently liquidating and /or cashing the Advance Payment Guarantee Number OG20062TZ0100572 worth of TZS 1,229,959,500/= (TZS One Billion Two Hundred Twenty Nine Nine Million, Nine Hundred Fifty Nine Thousand, Five Hundred Only), dated 9th April 2020 and a Bank7 Performance Guarantee Number OG20062TZ0100573 worth of TZS 409,986,500/= (TZS Four Hundred and Nine Million Nine Hundred Eighty-Six Thousand and Five Hundred Only), dated 9th April 2020, created in favour for performance of a Subcontract Number 7000/SC/000044 dated 22nd February 2020, pending inter

ORIGINAL

partes hearing of this chamber application".

And- ***Interpartes: that:***

2. 'the 1st and 2nd Respondents, their agents, workmen or assignees and/or any other person working under their instructions, be restrained from fraudulently liquidating and /or cashing the Advance Payment Guarantee Number OG20062TZ0100572 worth of TZS 1,229,959,500/= (TZS One Billion Two Hundred Twenty Nine –Nine Million, Nine Hundred Fifty Nine Thousand, Five Hundred Only), dated 9th April 2020 and a Bank Performance Guarantee Number OG20062TZ0100573 worth of TZS 409,986,500/= (TZS Four Hundred and Nine Million Nine Hundred Eighty-Six Thousand and Five Hundred Only), dated 9th April 2020, created in favour for performance of a Subcontract Number 7000/SC/000044 dated 22nd February 2020, pending submission of a request for arbitration proceedings which are

ORIGINAL

to be instituted with the Tanzania Institute of Arbitrators (TIArb)".

3. Any other Order and relief this Court may deem fit and just to grant; and
4. Costs of this application be borne by the 1st and 2nd Respondents.

This earlier application was by way of a chamber summons made under section 2(3) of the Judicature and Application of Laws, Cap.358 R.E 2019, read together with section 95 of the Civil Procedure Code, Cap.33 R.E 2019. As usual, it was supported by an affidavit of one, Sarbjit Singh Bharya. On the date it was called on before the Court, i.e., the 27th of October 2021, the Applicant enjoyed the services of Mr Benedict Ishabakaki and Ms Edith Ntweve, learned Advocate. The Respondents were absent in Court.

There being an *ex-parte* order prayed for with a view to maintain status quo until the application is heard *interpartes*, and having heard submissions from the counsel for the Applicants, I granted the prayer and issued an interim order to that effect. I also scheduled the matter for hearing *interpartes* on the 10th day of November 2021 at 8:30 am.

On the material date, the Applicant was represented by Mr Norbet Mlwale who informed the Court that the

Respondents were duly served. The 1st and 2nd Respondents had already filed their counter affidavits but the 3rd Respondent had not done so.

Since the Respondents were absent on the 10th day of November 2021, this Court made and Order that the matter be disposed of by way of written submissions. A schedule of filing was issued and the same was set for a mention on the 3rd day of December 2021, at 9:00am. Up to the 19th day of November, 2021, the Applicant had already filed her written submissions.

However, the 1st and 2nd Respondents, as well as the 3rd Respondent, were yet to file. Nonetheless, on the 15th day of November, 2021, the Applicant herein filed yet another application No.172 of 2021. This was filed by way of a chamber summons supported by an affidavit of Mr Nobert Mlwale, and under a certificate of utmost extreme urgency.

The second application was filed under Rule 24 (1) of the High Court (Commercial Division) Procedure Rules, G.N. No.250 of 2012 as amended by GN. No. 107 of 2019, and read together with section 95 of the Civil Procedure Code, Cap.33 R.E 2019.

The gist of that second application was, apart from granting orders of costs or any other reliefs deemed necessary, to request this Court, to grant the Applicant

ORIGINAL

leave to amend the Chamber Application in **Misc. Commercial Application No.57 of 2021** (the first application referred to, here above) and grant the interim orders sought there under pending determination of the dispute by arbitration proceedings at the Tanzania Institute of Arbitrators.

On the 19th November 2021, the parties appeared before me. Mr Mlwale represented the Applicant and MS Esther Peter represented the 1st and 2nd Respondents. The 3rd Respondent was absent. When the parties were invited to address the Court, Mr. Mlwale prayed that the two applications (i.e., the Misc. Commercial Application No.57 of 2021 and Misc. Commercial Application No.172 of 2021, be consolidated.

He made that prayer because of developments that had taken shape at the time the first application was still pending in this Court. The developments were that, the Applicant had already commenced arbitral proceedings before the Tanzania Institute of Arbitrators. As regards the second application, he submitted that, much as the Respondents were served, none had filed any counter affidavit.

He submitted that, upon reflection, the Applicant has reckoned that, the prayers sought in the second application will not be tenable and could be readily sought

ORIGINAL

before the arbitrators since the Tanzania Institute of Arbitrators' Rules, 2018 Edition, allows for possible application for interim orders once the parties submit themselves before the institute for arbitration.

With that in mind, Mr Mlwale prayed, that, if the order for consolidation is granted, then the Applicant wishes to withdraw from the Court the "**Consolidated Miscellaneous Commercial Application No.57 and 172 of 2021**" on the fact that, there has been a change of events impacting on these applications. He prayed, however, that, the withdrawal should be with no orders as to costs, as parties will pray for costs in the arbitration already preferred by the parties.

For her part, Ms. Peter was averse with the prayer for no costs, although she readily welcomed the prayer for withdrawal. Her contention was simple. She contended that, in the Misc. Commercial Application No.57 of 2021, the 1st and 2nd Respondents had incurred costs and filed a counter affidavit. As such, she pressed for costs.

In a brief rejoinder submission, Mr Mlwale reiterated his earlier reasoning regarding why costs should be waived. He said that, there is no counter affidavit filed in respect of the Misc. Commercial Application No.172 of 2021. He admitted, however, that, the 1st and 2nd

Respondents filed their counter affidavit in respect of the Misc, Commercial Application No.57 of 2021. He nevertheless reasoned that, since parties are pursuing arbitration currently, and hence, the prayer to have these matters withdrawn from the Court, costs should be waived.

This Court was set to issue its ruling on the 22nd November 2021 at 3.00pm. However, having prepared the ruling but before I proceeded to read it when the parties convened on the said date, Mr. Mlwale came up with a different prayer seeking leave of the Court to vary his earlier submissions and prayer to withdraw the applications from the Court.

Mr. Mlwale submitted that, the reason for his abrupt change of course, is the fact that, the present applications are about protecting the Advance Payment and the Performance Guarantees, and the arbitrator has not powers to act upon them because they are a different creature altogether under the sub-contracting transaction.

He referred this Court to its decision in **Tanch Brothers Const. Company Ltd vs. Amana Bank**, Misc. Commercial Cause No. 28 of 2020 (unreported) and contended that, the subcontract is a separate agreement, and, hence, the arbitrator will not have a mandate to address the guarantees which involves a third party.

ORIGINAL

Besides, and referring to Rule 24 (1) of the High Court (Commercial Division) Procedure Rules, GN.No. 250 of 2012 (as amended by GN 107 of 2019), Mr. Mlwale contended that, the Rule does not provide the extent to which an amendment may be made and, as such, there may not be a creation of a new application all together. He requested this Court if pleased, therefore, to hear the matters on merit.

For her part, Ms Peter asked for time to reflect on the turn of events. I granted her time and the parties convened before me on the 26th November 2021. When the parties convened, Ms Peter told this Court that, the submission by Mr. Mlwale to the effect that the bank guarantee and the performance guarantee are two different agreements from the sub-contract agreement was erroneous.

Ms Peter submitted that, the two originates from the same sub-contract agreement as they are like the terms and conditions (ToC) included in the sub-contract, and she referred to clause 5.4.1 of the sub-contract. She contended that, based on the same sub-contract, clause 12 provides for dispute settlement resolution, the arbitrator being TIArb. As such, she contended that, these are no different contracts which cannot be dealt with by the arbitrator.

ORIGINAL

Referring to the doctrine of competence-competence, she maintained that, TIArb had powers to entertain the matters touching the bank guarantee and performance guarantee as well and make a ruling about them. She contended that, by that doctrine, it is TIArb that should decline jurisdiction and thus, to decide on the undecided is to act prematurely, since the parties' dispute has already been placed in the hands of an arbitrator chosen by the parties, and **Annex.BA 5** to the affidavit in respect of the Misc. Commercial Application No.172 of 2021, is self evident.

Ms Peter contended that, in case of matters touching jurisdiction, those should best be left to the arbitrator to decide. As regards the room to amend pleadings as provided for under Rule 24, Ms Peter contended that, the room given is not free from conditionalities. She referred this Court to Rule 24 (3) of the GN No. 250 of 2012 as amended by GN No. 107 of 2019 and stated that, the Applicant ought to have disclosed what kind of defects he wanted to cure as nothing is noted in the supporting affidavit.

She contended further that, in the affidavit, the applicant has not disclosed facts which qualify for the granting of a *mareva injunction*. She also contended that, for the sake of justice between the parties, the Applicant

has not mentioned how he will be prejudiced. She referred to this Court, the case of **Kilombero Works Safaris Ltd vs. Registered Trustee of Mbomipa**, Civil App. No.273 of 2017. On the basis of such a case and her submissions, she asked this Court to dismiss this application.

In a brief rejoinder, Mr Mlwale admitted that, the Bank and Performance Guarantees arose from the sub-contracting agreement. However, he submitted that, there is a very big difference between the subcontract and the guarantees. He submitted that, the subcontract agreement is between the Applicant and the 1st and 2nd Respondents. However, the guarantees are between tri-partite parties, namely, the Applicant, the Bank and the Respondents.

He contended that, even its execution was done separately and differently from the subcontract agreement. He argued, thereore, that, whereas the subcontract was executed in February 2020, the Guarantees were executed on April 2020 as per **Annex.BECO-5 & 2** in Misc. Commercial Appl. No.57. In view of that, he maintained that Clause 5.4.1 and 12 of the sub-contract agreement are clauses in the sub-contract to which the bank is not a party and has no room or audience before the TIArb.

He maintained a view, therefore, that, the TIArb will not be able to make any meaningful ruling on the guarantees since the Bank involved in the guarantees is not a party to arbitration proceedings before the TIArb. Mr. Mlwale stated further that, if one is to wait until the Arbitrator rules on whether he will have jurisdiction or not, the Applicant will be at risk of standing unsecured and the guarantee may be encashed.

As regards the extent of permitted amendments under Rule 24 (3)(b) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended), Mr. Mlwale submitted that, amendment should aim at advancing real justice. He contended, that, in this application, the changes sought are meant to maintain the status quo. However, he denied the accusations that, the Applicant has failed to disclose any such facts in the affidavit, and, instead, he referred this Court to paragraph 12 of the supporting affidavit of the Applicant and **Annex:BA5**, and paragraphs 13 and 14 of the supporting affidavit in Misc. Comm. Appl. No. 172 of 2021.

He finally pointed out that, the real controversy is the need to issue injunctive orders pending determination of arbitration proceedings and not as the Applicant has framed her prayers earlier, hence the need for such amended version and outcome. Mr. Mlwale distinguished

the case of **Kilombero Works** (supra), noting that the same is irrelevant to this application. Mr. Mlwale stated that, the prayer to dismiss the application should also be ignored because the Respondents have not even filed their counter affidavits.

In view of all that, Mr. Mlwale made alternative prayers that, if pleased, this Court should place the Misc. Commercial Application No.172 of 2021 on a hearing track *inter partes* so that the real questions will be considered and determined or that, the matters be stayed and the status quo maintained pending determination of the arbitral proceedings, as the Respondents will not be prejudiced by such orders if made.

Adding his voice to the Applicant's submissions, Mr. Ishabakaki submitted that, the issue was whether the application pending arbitration and the one on Mareva Injunction are one and the same. He contended that, Mareva Injunction is just a common remedy available to parties before something happens and there is no new case being introduced in the amendments sought.

I have given due considerations to the submissions made by the learned counsel for the parties herein. I must say, in the first place, that, Mr. Mlwale has brought a somewhat confusion in this matter in as far as the prayers he earlier on made, and which I was about to

consider in my ruling, before he came up with a change of mind. However, having given him audience, I do understand his concerns regarding the bank and the performance guarantees.

Looking at the prayers which he made earlier, I find that, it is only the prayer of withdrawal which was affected by his later submissions but the rest still remains intact. I will thus respond to them together with his latter alternative prayers.

From the foregoing discussions, there two issues which I am called upon to consider. The first one is whether I should grant the orders of consolidation sought by the Applicant in respect of the two applications. The second issue is whether I should stay this application and give an order for maintenance of *status quo* till the parties are done with arbitration. In the first place, the prayer to consolidate the applications was a simple prayer and I see no reason why I should not grant it. The two applications should, therefore, be consolidated because there is logic in doing so bearing in mind the developments that have so far taken place.

Concerning the second issue, having heard the parties and since they are now engaged in arbitration proceedings, I will definitely agree with Mr. Mlwale that, a

ORIGINAL

stay of the consolidated application with an order to maintain *status quo* will do justice to the parties.

I hold so because, as correctly argued by Mr. Mlwale, whereas the subcontract agreement is between the Applicant and the 1st and 2nd Respondents, the guarantees are between trio-parties, namely, the Applicant, the Bank and the Respondents. As such, while the arbitrator will be dealing with the Applicant and the 1st and 2nd Respondents, the 3rd Respondent will be left out as he is not privy to the arbitration.

For the reasons as aforesaid, this Court settles for the following orders, to wit, that:

1. The Misc. Commercial Application No.57 of 2021 and Misc. Commercial Application No.172 of 2021 are hereby consolidated to read, Consolidated Misc. Commercial Application No.57 and 172 of 2021.
2. The Consolidated Misc. Commercial Appl. No.57 and 172 of 2021, is hereby stayed pending the determination of the arbitral proceedings between the Applicant and the 1st and 2nd Respondents.
3. Since the Consolidated Misc. Commercial Application No. 57

ORIGINAL

and 172 of 2021 is put on hold for the time being, then, the *status quo* in this matter is to be maintained by all parties until further orders of this Court.

4. In the circumstance, I make no orders as to costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 06th DAY OF JANUARY 2022

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

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DEO JOHN NANGELA
JUDGE

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