

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CAUSE NO.19 OF 2022**

**AND IN THE MATTER OF THE ARBITRATION ACT, [CAP 15  
R.E.2020]**

**AND IN THE MATTER OF PETITION BY EMESI (T) LIMITED  
AND MTEMBWE TECHNICAL AND SUPPLIES LIMITED**

**BETWEEN**

**EMESI (T) LIMITED AND MTEMBWE**

**TECHNICAL AND SUPPLIES LIMITED ..... PETITIONER**

**VERSUS**

**YAPI MERKEZI INSAAT**

**SANAYI ANONIM SIRKET ..... 1<sup>ST</sup> RESPONDENT**

**DCB COMMERCIAL BANK PLC ..... 2<sup>ND</sup> RESPONDENT**


**Date of Last Order: 16/06/2022**

**Date of Ruling: 15/07/2022**

**RULING**

**MAGOIGA, J.**

The Petitioner, EMESI (T) LIMITED AND MTEMBWE TECHNICAL AND SUPPLIES LIMITED under the provisions of section 51(2)(e) and (3) of the Arbitration Act, [Cap 15 R.E. 2020], section 2(3) of the Judicature and Application of Laws Act, [Cap 358 R.E.2020] and sections 68 (e) and 95 of



the Civil Procedure Code, [Cap 33 R.E. 2020] is praying for inter parties orders that this court be pleased to give the following orders, namely:-

- a. An order restraining the 2<sup>nd</sup> respondent from satisfying the call by the 1<sup>st</sup> respondent on Performance Bond (Bank Guarantee) No. 21/09/2021 issued on 21<sup>st</sup> September, 2021 in favour of the 1<sup>st</sup> respondent and Advance Payment Guarantee No. 7/10/2021 issued on 7<sup>th</sup> October, 2021 in favour of the 1<sup>st</sup> respondent for and on behalf of the applicant, pending the referral of the dispute between the petitioner and the 1<sup>st</sup> respondent to the Arbitral Tribunal and the constitution of the said Arbitral Tribunal;
- b. Any other order, which this court may deem fit to grant
- c. Costs be provided for.

The instant petition was accompanied by affidavit sworn by THOBIAS MABUGO stating the reasons why this application should be granted as prayed.

Upon being served, the 1<sup>st</sup> respondent filed an answer to the petition stating the reasons why this petition should not be granted and consequently prayed that same be dismissed with costs to the 1<sup>st</sup>



respondent, and/or this court be pleased to make any other order(s) as it shall deem fit and just.

Upon being served, the 2<sup>nd</sup> respondent did not file reply to petition for obvious reasons that she is necessary party.

The petitioner filed reply to 1<sup>st</sup> respondent's answer to petition.

The facts pertaining to this petition as gathered in the pleadings are imperative to be stated. On 12<sup>th</sup> July 2021 the petitioner who is JOINT VENTURE ENTITY signed a sub contract Agreement with the 1<sup>st</sup> respondent for mechanical and electrical works worth USD.300,000.00 subject to issuance of performance bond and advance payment bond in favor of the 1<sup>st</sup> respondent. In the said agreement, among others, it was also agreed that in case of dispute, same was to be resolved through arbitration upon issuance of 30 days notice.


Facts go that a dispute arose on execution of the works and in compliance with the agreement, the petitioner issued 30 days notice and has applied to this court for restrained order against the 2<sup>nd</sup> respondent for satisfying the call by the 1<sup>st</sup> respondent of the bonds until the arbitration proceedings are conducted and concluded between parties, hence, this ruling.



When this petition was called on for hearing inter parties, the petitioner was enjoying the legal services of Mr. Lucky Mghimba, learned advocate, while the 1<sup>st</sup> respondent was represented by Mr. Gerald Nangi and the 2<sup>nd</sup> respondent was represented by Mr. Alex Mgongolwa, learned advocate.

When this petition was called for orders on 10/06/2022, I granted an order maintaining status quo and fixed for hearing on 16/06/2022.

On 16/06/2022 Mr. Mghimba arguing in support of the petition adopted the contents of affidavit in support of the petition and the skeleton arguments and strongly urged this court to grant the restrained order. The learned advocate went on to point out the historical relationship of the parties through subcontract agreement dated 12<sup>th</sup> July 2021, the issuance of the bonds in dispute through the 2<sup>nd</sup> respondent in favour of the 1<sup>st</sup> respondent dated 7<sup>th</sup> October 2021 and 21<sup>st</sup> September, 2021 and issuance of notice of arbitration dated 9<sup>th</sup> May 2022 which are not disputed between parties as exhibited in annexure 1, 2 and 3. However, Mr. Mghimba argued that in the course of execution of the said contract, a dispute arose between the parties and the petitioner has issued a 30 day notice of arbitration as per the agreement, which has bearing to the issuance of the bonds subject of arbitration proceedings.



According to Mr. Mghimba, if no order restraining the 2<sup>nd</sup> respondent is given, the 2<sup>nd</sup> respondent will honour the payment of the bonds and renders the whole arbitration proceedings nugatory and that by so doing, the petitioner will suffer loss and be inconvenienced.

In support of his arguments the learned advocate for the petitioner cited the cases of TOTAL TANZANIA LIMITED vs. ALCHEMIST ENERGY TRADING DMCC & CITI BANK TANZANIA LIMITED, MISC. COMM. APPLICATION NO. 83 OF 2021 (HC) DSM (UNREPORTED) in which the court granted interim relief against the respondent for performance guarantee issued by another bank based on three conditions that; whether there is a bona fide contest between parties, balance of convenience, if the interim order is not granted and protection of the other party from injury. Another case cited was the case of MAGDALENA MAYUNGA vs. EQUITY BANK (TANZANIA) LIMITED, MISC. LAND APPLICATION NO.385 OF 2021 (HC) DSM (UNREPORTED) in which a balance of inconvenience was enough to grant the interim order sought.

On the strength of the above reasons, the learned advocate for the petitioner urged this court to grant interim relief and preserve the parties bonds until the arbitration proceedings are determined between parties.



On the other hand, Mr. Nangi contesting the grant of the orders adopted the contents of the reply to the petition in which they stated that the alleged bonds subject of this petition are independent and not subject to the alleged arbitral proceedings by virtue of the ICC UNIFORM RULES FOR DEMAND GUARANTEE (URDG 758) thus payable on demand and no way can be subjected to arbitral proceedings. Further, Mr. Nangi argued that by their nature, the bonds are unconditional and irrevocable and restraining the 2<sup>nd</sup> respondent will amount to continue breach of subcontract.

Moreover, Mr. Nangi argued that much as no way in the arbitral proceedings the issue of bonds will arise, the petitioner cannot be allowed to pre-empt the enforcement of the bonds by way of injunction.

According to Mr. Nangi, if the petition is granted, the 1<sup>st</sup> respondent will suffer substantial and irreparable loss by paralyzing its business for loss of money due from the bonds, tarnish the image of the 2<sup>nd</sup> respondent in world business banking, cause confusion on payment of bonds practices, sanctity of the contract will be eroded and the 2<sup>nd</sup> respondent will be released from its legal obligations. And that grant of the order will defeat the principle governing grant of injunctions. Lastly and strangely, Mr. Nangi argued that the 1<sup>st</sup> respondent, the world trading system and the banking



industry stand to suffer irreparable loss without explaining how this is possible to the world at large.

Orally arguing the petition, Mr. Nangi sought the refuge to the famous case of ATTILIO vs. MBOWE (1969) HCD 295 on injunctions and strongly urged this court to find and hold that the notorious three conditions of prima facie case, irreparable loss and balance of conveniences are not met in this petition. On advance payment, Mr. Nangi argued that no order can be granted to money already been paid.

On the foregoing reasons, Mr. Nangi urged this court to dismiss this petition with costs.

Mr. Mgongolwa for the 2<sup>nd</sup> respondent did not file reply to the petition for simple reason that he is just an interested part with no side in the dispute. However, as an officer of the court told the court that the alleged bonds cannot be read in isolation of the subcontract and any breach relating to the bonds arises from the contract and not otherwise. On issuance of injunction, the learned advocate for the 2<sup>nd</sup> respondent argued that the whole matter has to be looked at its totality and not in isolation and should be prudential to preserve the bonds for the interest of justice in totality. On



injunction, he argued that is statutory and not equitable as argued by counsel for 1<sup>st</sup> respondent because is governed by Act of parliament in our jurisdiction.

In rejoinder, Mr. Mghimba argued that the whole transaction is tripartite agreement emanating from the petitioner. And the petitioner is named in all bonds, including the advance payment which has to be recalled. According to Mr. Mghimba, the petitioner's rights are protected even under article 15 of the URDG and that under article 34 the applicable law is Law Contract Act, [Cap 345 R.E.2019], so no way the 1<sup>st</sup> respondent can be allowed to benefit from her own wrong. On that note, he reiterated his earlier prayers.

The noble task of this court now is to determine the merits or otherwise of the petition. Having listened and considered the rivaling arguments by both parties' learned advocates, in my view, the issues for determination are two; one is, whether this court by virtue of sections cited in the petition and the agreement entered between parties is clothed with powers to grant an injunction to allow parties go for arbitration where payment bonds are involved as in this petition? Two, whether the petitioner has demonstrated sufficient reasons for the grant of the injunction as prayed.



However, before I go into the details of the issues above, I equally noted that there some of the facts not in dispute between parties and which facts will assist this court in answering the above issues. These are; **one**, there is no dispute that the petitioner and the 1<sup>st</sup> respondent signed sub contract Agreement on 12<sup>th</sup> July 2021 for mechanical and electrical works worth USD.300,000.00. **Two**, there is no dispute that under the above agreement, among others, was conditional precedent that the petitioner through 2<sup>nd</sup> respondent was to issue and actually issued performance bond and advance payment bond on 7<sup>th</sup> October, 2021 and 21<sup>st</sup> September, 2021 respectively of USD.300,000.00 in favour of the 1<sup>st</sup> respondent. **Three**, there is no dispute that a dispute arose between the petitioner and the 1<sup>st</sup> respondent in the performance of the subcontract agreement.

However, back to the instant petition, what is in serious dispute as noted above subject to answers in the first issue is, whether this court by virtue of sections cited in this petition and the agreement entered between parties is clothed with powers to grant an injunction while parties go for arbitration where payment bonds are involved as in this petition?. Mr. Nangi implored this court not grant the injunction sought. Mr. Nangi without citing any specific articles in the Rules(URDG 758) strongly argued



that no way the bonds asked to be preserved by injunction will feature in the arbitration proceedings and that by their nature of independence they cannot be questioned and that this court by granting the injunction will create confusion to the banking industry and world trading system.

Moreover, Mr. Nangi, told the court that, if the injunction is granted, the 1<sup>st</sup> respondent will suffer substantial and irreparable loss by paralyzing its business for loss of money due from the bonds, tarnish the image of the 2<sup>nd</sup> respondent in world business banking, cause confusion on payment of bonds practices, sanctity of the contract will be eroded and the 2<sup>nd</sup> respondent will be released from its legal obligations. Furthermore the learned advocate for the 1<sup>st</sup> respondent argued that grant of the order will defeat the principle governing grant of injunctions. Lastly and strangely, Mr. Nangi argued that the 1<sup>st</sup> respondent, the world trading system and the banking industry stand to suffer irreparable loss without explain how this is possible for the whole banking and the world will suffer loss.

Mr. Mghimba, on the other hand has different view that if injunction is not granted, then, even the arbitral proceedings will be rendered nugatory because these two are inseparable and have bearing to each other.



Having gone through the contract signed between parties, relevant bonds in dispute for its preservation and the law [Cap 15 R.E.2020] and the ICC UNIFORM RULES FOR DEMAND GUARANTEE (URDG 758), I find the arguments by Mr. Nangi devoid of any useful merits in what is before this court as of now. I will explain. **One**, Article 23 of the contract which is **on claims, dispute and governing law** and to be specific articles 23.9 and 23.10 are very clear the extent which the dispute between parties can be entertained by way of arbitration. For easy of reference, the said article provides:-

**23.9 Any dispute arising out of formation, performance, interpretation, nullification, termination, or invalidation of this agreement or arising there from or related thereto in any manner whatsoever, shall first attempt to resolve by giving notice to the other party that is applying under this Article for dispute resolution. If the dispute is not resolved within 30 days following the receipt by notice by the notified party, the dispute shall be settled by arbitration in accordance with Arbitration Act [Cap 15] ...” (Emphasis mine).**



**23.10 Should the contractor enter into arbitration with the Employer or others regarding matters relating to this agreement, the subcontractor shall be bound by the result of the arbitration to the same degree as the contractor.**

The provisions of article 23.9 are clear that one of the issues that can be resolved by way of arbitration is '**performance**', which to my opinion includes the performance bonds and advance payment bonds. So the argument by Mr. Nangi that bonds will not be touched in the arbitration was argued without reading along and between the lines of the said article.

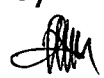
**Two**, further reading the provisions of **article 29.9** was drafted so wide that one cannot say it excluded anything relating to the performance of the contract. In this, the last underlined part of the articles says **or arising there from or related thereto in any manner whatsoever ...** . So in my considered opinion what parties agreed and guided by the sanctity of contract is at variance with the provisions of the RULES [URDG 758] and much as the governing law is the Law of Contract Act,[Cap 345 R.E,2019], then, restraining the call by now will allow the parties to resolve their differences which have direct bearing to the bonds.



**Three,** Much as parties agreed the guarantees are governed by Tanzania laws so the Rules of 758 URDG come into play after subjecting and get clearance under the local laws. Even if we go by the Rules 758 URDG as argued still this court is empowered to preserve the bonds because they are the basis of consideration in the sub contract. Therefore, no way, consideration cannot be avoided because is one of the basic element of contract formation.

**Four,** other points argued by Mr. Nangi will become relevant after arbitration proceedings are concluded and here the petitioner is not raising any defence for nonpayment of the bonds but asking this court to restrain the honouring the bonds by the 2<sup>nd</sup> respondent subject to arbitral proceedings which have, in accordance to our laws, direct consequences thereafter to the bonds.

**Five,** it is uncalled and out of context to argued that anything to do with bonds is untouchable and is against the banking practices. In the case of CRDB BANK PLC vs. UAP COMPANY LIMITED, COMMERCIAL CASE NO. 70 OF 2018 HCCD (DSM) (UNREPORTED) it was held, among others, that subjection of the bonds to rules will come after the clearance governed by the local laws.



**Six,** the arguments by Mr. Nangi that the grant of the injunction will cause the 1<sup>st</sup> respondent to suffer substantial and irreparable loss by paralyzing its business for loss of money due from the bonds, tarnish the image of the 2<sup>nd</sup> respondent in world business banking, cause confusion on payment of bonds practices, sanctity of the contract will be eroded and the 2<sup>nd</sup> respondent will be released from its legal obligations, the order will defeat the principle governing grant of injunctions and the world trading system will be at confusion are argued out of ignorance because no way the bonds were to be issued if there was no relationship between the applicant and the 1<sup>st</sup> respondent who are in dispute now. Such arguments are tenable where there is no dispute and the original contract was performed accordingly. In this petitioner, there is an issue of breach of contract between parties which, no doubt, calls for determination first.

From the foregoing, this court is legally powered to exercise grant of restrained order even where bonds are involved.

This takes me to the 2<sup>nd</sup> issue whether the petitioner has demonstrated sufficient reasons for the grant of the injunction as prayed. Looking at the petition holistically and circumstances of this petition and what parties



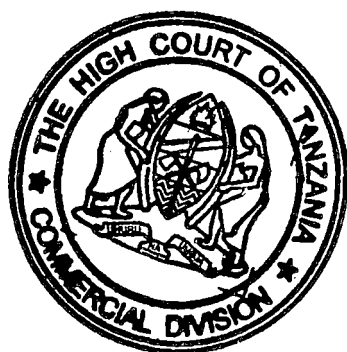
agreed without much ado, I am inclined to grant the order sought for the interest of justice. Giving this order, is not by itself denial of the payment of the bonds but it is prudent that parties resolve their differences in arbitration and thereafter other procedures will continue. But as of now, I restrained the 2<sup>nd</sup> respondent from honouring the bonds till the determination of the arbitral proceedings inter parties.

The reasons, advanced by the learned advocates for 1<sup>st</sup> respondent are rejected for want of legal back up.

That said and done this application is granted with no order as to costs.

It is so ordered.

Dated at Dar es Salaam this 15<sup>th</sup> day of July, 2022.



A handwritten signature in black ink, appearing to read "S.M. Magoiga". The signature is fluid and cursive, extending across the width of the text area.

**S.M. MAGOIGA**

**JUDGE**

**15/07/2022**