

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
MISC. COMMERCIAL APPL. NO. 36 OF 2022**

(Arising from Commercial Cause No 35 of 2021)

I &M BANK (T) LIMITED .....APPLICANT

VERSUS

BAYVIEW PROPERTIES LIMITED .....1<sup>ST</sup> RESPONDENT  
HEBERT ELIEZER LIWALI .....2<sup>ND</sup> RESPONDENT

Last order: 03<sup>rd</sup> AUGUST 2022

Ruling: 22<sup>nd</sup> SEPTEMBER 2022

**RULING**

**NANGELA, J:.,**

What should a Court do when confronted with a situation where a third party who took no part in the arbitral proceedings feels affected by the Final Arbitral Award and wants to be joined as a party in a petition seeking to challenge the Award? This question, and other issues to follow, will be discussed in this ruling.

On 24<sup>th</sup> March 2022, the Applicant herein filed, under a certificate of urgency, a chamber summons supported by an affidavit affirmed by Mr Abbas Kermalli. The chamber summons was brought under section 68 (e), 95 and Order XXVI Rule 9 of

the Civil Procedure Code, Cap.33 R.E 2019 and any other enabling provision of the law. The Applicant is seeking for orders:

1. That, this Honourable Court be pleased to grant the Applicant /Objector leave to join as a Necessary Party in Commercial Cause No.35 of 2021.
2. That, this Honourable Court be pleased to grant the Applicant/Objector leave to file an Affidavit and submissions thereon with respect to the application for registration and enforcement of the Arbitral award pending in this Honourable Court as Misc. Commercial Cause No.35 of 2021.
3. That, this Honourable Court be pleased to grant any relief(s) as it may deem fit to grant.
4. That, costs of this application be provided for.

After the filing of the necessary pleadings, I set this matter for necessary orders and, on the 29<sup>th</sup> June 2022, the parties appeared before me. On the material date, Mr. Andronicus

Byamungu appeared for the Applicant while Mr Harrison Lokosi and Ms Juliana Rugashumba, learned advocates, appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively. The parties were directed to dispose of the matter by way of written submissions and all complied with the orders of this Court.

In his written submission, Mr Casmir Nkuba, learned advocate for the Applicant submitted that, the Applicant preferred this application after she became aware of the existence of a final arbitral award dated 04<sup>th</sup> April 2020, which was issued by a Sole Arbitrator Hon. Thomas Mihayo (Rtd, Judge) and filed in Court for registration and enforcement. The filing of that award has been contested through Misc. Commercial Cause No.35 of 2021 which is still pending in this same Court.

He submitted that, the Applicant herein is an interested party; and, for that matter, she is seeking to be allowed to be joined in the said Misc. Commercial Cause No.35 of 2021 and be allowed to file an affidavit and submissions thereon, based on the reasons disclosed in the affidavit of Abbas Kermalli, which he prayed to adopt to form part of his submissions.

Mr Nkuba submitted that, the Respondents' dispute which was the trigger of the Arbitral proceedings was based on a Joint Venture Agreement between the two for joint development of landed properties at Plot. No.17 Oyesterbay, Dar-es-Salaam. He contended that, based on the arbitration proceedings, the two Respondents had an agreement regarding the ratio of sharing the costs of construction and the accrued rental income.

According to Mr Nkuba, the 1<sup>st</sup> Respondent was given a long-term lease and was mandated to develop the property by construction of twelve (12) Villars (suit property). As such, being an investor, it was Mr Nkuba's submission that, the 1<sup>st</sup> Respondent sought a financing assistance in the form of a Credit Facility, worth US\$ 1, 150,000.00 from the Applicant.

Mr Nkuba submitted that, the Applicant advanced such a sum and the same was disbursed in March 2014, followed by an additional US\$ 400,000.00 which was granted and disbursed in July 2015 and later, a Term Loan Facility of US\$ 80,000.00 granted and disbursed in May 2017. (Ref. *Annex.IMT-2, IMT-3* and *IMT-5* to the affidavit of Mr Kermalli.).

Mr Nkuba submitted that, much as the origin of the arbitration proceedings is the income generated from the renting of the properties constructed under the Applicant's financing advances, arbitration proceedings like judicial proceedings are intended to determine rights or interests of the parties involved. As regards this matter, he contended that, fairness in it can/could only be meted out if the proceedings were conducted and determined after all parties claiming or having any interest on the property got involved, whether jointly or severally, are heard and/or offered opportunity to be heard.

He charged that, in these respects, the Applicant was never informed by any of the Respondents that a dispute between them had arisen and, that, arbitration had been preferred; consequently, the arbitral proceedings were held and finalised without according the Applicant the right to appear and defend its interest in the property. He contended, as a result, that, the final award passed by the Sole Arbitrator in favour of the 2<sup>nd</sup> Respondent has gravely affected the Applicant's interests on the rental income which is assigned to the Applicant.

It was his submission, in view of the above factual matrix as submitted, that, if not granted the opportunity to appear and oppose the Application for registration and enforcement of the Arbitral Award, the Applicant will be highly prejudiced, taking into account her interest in the suit property.

It was a further submission by Mr Nkuba that, the 1<sup>st</sup> Respondent does not contest the application but the 2<sup>nd</sup> Respondent does contest it. He submitted, however, that, the 2<sup>nd</sup> Respondent does concede that, part of the rental income arising from the leasehold are assigned to the Applicant and, that, the Respondents did not bring to the attention of the Hon. Arbitrator that a third party (the Applicant) had vested interest in the suit property and, thus, the Arbitrator proceeded without hearing the Applicant.

He argued that, unless the Applicant is joined and afforded right to be heard in respect of her grievances arising from the arbitral proceedings and the Award, she will continue to suffer denial of her constitutional right to be heard.

To support his submissions, Mr Nkuba relied on the case of

**Mbeya-Rukwa Autoparts & Transport Ltd vs. Jestina**

**George Mwakyoma** [2003] TLR 251 regarding the issue of right to be heard as a cardinal principal of natural justice.

He also relied on the cases of Civil Application No.200/16 of 2020, CAT, DSM (Unreported), **Abbas Sherally & Another vs. Abdul Fazalboy**, Civil Appl. No.33 of 2002, CAT (unreported) and **Hamis Rajab Dibagula vs Republic** [2004] TLR 181. In view of all those authorities and the submission made before this Court, he urged this Court to grant this application.

As correctly stated by Mr Nkuba, the 1<sup>st</sup> Respondent did not contest this application but the 2<sup>nd</sup> Respondent did file a counter affidavit and has filed written submissions in opposition to the application. In her submission, the 2<sup>nd</sup> Respondent's learned counsel; Ms Madelaine Kimei submitted that, the Applicant was a non-party to the arbitration. It has also been argued that, although section 79 (1) and (2) of the Arbitration Act provides a room for third parties, the Applicant has nowhere relied on these provisions and so does not have a ground upon where to stand.

In support of her submission, Ms Kimei relied on the English decision in the case of **Vale vs. Steinmetz** [2021] EWCA Civ 1087 ("**The Vale Case**") and stated that, except in rare

circumstances, the findings in an arbitral award will not binding on and cannot be relied upon in separate proceedings, between different (but related) parties.

She contended further that, the 2<sup>nd</sup> Respondent agreed to share the rental payments at a ratio of 2:3 and 1:3, hence, the 2<sup>nd</sup> Respondent cannot accept the argument raised by the Applicant's counsel that the 2<sup>nd</sup> Respondent had a duty to plead that it had a loan obligation and facilities maintained with the Applicant bank. It was her contention that, the loan was not for the 2<sup>nd</sup> Respondent but only extended to the 1<sup>st</sup> Respondent and, hence, the Applicant has not established any cause of action against the 2<sup>nd</sup> Respondent.

Ms Kimei submitted further that, to contend that the 2<sup>nd</sup> Respondent had a duty to inform the Applicant or the Sole Arbitrator about the dispute would be an unfair and unduly task because, the 2<sup>nd</sup> Respondent is not privy to any of the loan facilities or the rental assignment/ arrangement between the 1<sup>st</sup> Respondent and the Applicant, and is not even a beneficiary of the loans.



She submitted further that, the only rental income consented to by the 2<sup>nd</sup> Respondent is the income based on the 1<sup>st</sup> Respondent's leased hold share of 2:3 ratio and not the whole share of 3:3 leasehold interest. She contended that, all other loan advances or facilities obtained by the 1<sup>st</sup> Respondent after the first tranche were never disclosed to the 2<sup>nd</sup> Respondent nor did she consent to such additional loan or restructurings.

Ms Kimei submitted that, the Final Award has a binding effect as between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and did not affect the Applicant's claim against the 1<sup>st</sup> Respondent for the rental income of its part of the 2:3 agreed ratio. As such, she contended that, the Arbitrator's award does not affect in any way the Applicant's interests as claimed, a factor the Applicant has not been able to establish. She maintained that, on the basis of the **Vale case** (supra), the Applicant being not a party to the proceedings is not bound by the arbitrator's findings.

As regards the alleged breach of the right to be heard, Ms Kimei was of the view that, no fundamental constitutional right has ever been denied as claimed by the Applicant. She submitted that, the case which is before this Court is of commercial nature

and one which is rooted in an arbitration, which contrast it with litigation, since it is a consensual private affair between the particular parties to the arbitration agreement.

Ms Kimei further sought support from Article 17(5) of the UNCITRAL Arbitration Rules (2010) which allows for joinder of one or more third party persons at the request of any of the parties provided such person is a party to the arbitration agreement. She referred this Court to the holding of Lord Justice Jacob in the Vale Case (supra) where the Court stated that:

“because the determination of arbitrators is itself a private matter it is in its nature not intended to be available to third parties for any purpose. A third party’s rights against one of the parties to an earlier arbitration cannot depend on the happenstance of the availability details of that arbitration in a later arbitration involving that third party.”

Ms Kimei did also place reliance on the case of **PT First Media TBK vs. Astro Nusantara International & Others** [2013] SGA 57 in which the Court was of the view that, a '*forced joinder*' of third parties is:

"a major derogation from the principle of party autonomy [which results in] prejudice to the arbitrating parties..."

Ms Kimei contended that, as regards the case at hand, that is exactly what would have happened if the Applicant were joined in the arbitration proceedings as the 1<sup>st</sup> Respondent made no efforts, despite there being ample opportunity, to seek the consent of the 2<sup>nd</sup> Respondent to add the Applicant to the arbitral proceedings and, so, the ill intents of the 1<sup>st</sup> Respondent are evident as she intended to keep the Creditor in the dark for her own benefit.

Even so, Ms Kimei contended that, the issue of Bank loans was brought to the attention of the Sole Arbitrator at the help of the 2<sup>nd</sup> Respondent and, thus, the Arbitrator was not blind in

regard to the financing arrangements made in the course of developing the property.

It was a further submission by Ms Kimei that, the Applicant's collateral attack on the award is an abuse of process as she seeks to bring new proceedings to the issues already decided in the prior proceedings. She maintained that, the Applicant is not an 'interested party' as alleged since she is not affected by the award.

Ms Kimei contended, as well, that, the Applicant's intention to seek to be allowed to file submission in the Misc. Commercial Cause No.35 of 2021 is unacceptable and there is no justification on the record to justify that the Award was ever obtained by fraud. Reliance was placed on the case of **Westacre Investments Inc. vs. Jugoinport SDPR Holding Co. Ltd** [1998]4 All ER 570, affirmed by the Court of Appeal in **[1999] 3 All ER 864** regarding allegations of fraud in relation to arbitration.

She contended that, by all means the Applicant wants its rights/interests be heard and determined by this Court as means to appeal the final award dated 04<sup>th</sup> April 2020 while the role of this Court is not to review or oversee the award of the contract, on the merits of the decision but only to consider whether the

decision making was regular, legal, procedurally fair and untainted by *mala fides*.

In view of all that, she urged this Court to find that, the Applicant is late to the party and the doors have been shut as the arbitral tribunal is now '*functus officio*'. In a brief rejoinder submission, Mr Nkuba reiterated his submission in chief that, the Applicant is seeking leave to be joined in the proceedings in Commercial Cause No.35 of 2021 as an interested party and for permission to file an affidavit and submission thereon, the ultimate end being to oppose the possible registration and enforcement of the Final Award dated 04<sup>th</sup> April 2021.

Mr Nkuba rejoined further that, under section **74 (1) (b)** of the Arbitration Act, Cap.15 RE 2020, (*which he erroneously cited anyway as it should be section 79(1) (b) of the Act*) the law entitles an Applicant who is an interested person, but who took no part in the proceedings, to apply to the Court for a declaration or other appropriate reliefs.

In his view, even **section 74 (2)** of the Act, (also erroneously cited) does allow an interested party to challenge an award by an application on the basis of the grounds given under

**section 69 and 70** (*erroneously cited though as it should be section 74 and 75 of the Act, Cap.15 R.E 2020*). He contended, therefore, that, the Applicant has acted within the ambits of the law.

In view of the above, Mr Nkuba rejoined, finally, that, all other issues addressed by Ms Kimei befit being dealt with and their better clarification be given or demonstrated in the main case if the Applicant is allowed to join it as a party thereto. He, thus, reiterated his prayers that the application be granted with costs. The issue which needs to be looked at, therefore, is whether the Applicant's prayers are merited or not, taking into account that, the Applicant was not a party to the arbitration.

Primarily, from equity's point of view, it may be argued that, passing of an Award that has the potential to or which directly affects the rights and interests of a third-party without involving such a party to the proceedings will not be just and equitable. In law, and from the acceptable international standards and practice, it is agreed that, arbitration awards, which have direct effects on a third party, cannot be passed.

In her submissions, Ms Kimei has contented, relying on the case of **Vale vs. Steinmetz** [2021] EWCA Civ 1087, that, except in rare circumstances, the findings in an arbitral award will not be binding on, and cannot be relied upon in separate proceedings between, different (but related) parties. In view of that, she has maintained, therefore, that, because the Applicant was not, in the first place, a party to the arbitration, in no way is she bound by the Award.

From a general legal point of view, an arbitration agreement is a contract and can only bind and be invoked by those parties who are party to the agreement. However, it all depends as there are instances or situations, though limited in nature, where third parties, not parties to the original agreement, may be bound by or even benefit from it.

Where, for instance, there is assignment/transfer of contractual rights or cause of action to a third party, the agreement may bind that third party as well. See, for instance, the English case of **"The Jay Bola"** [1997] EWCA Civ 1420).

The basic premise, however, is understood to be that, arbitrators may not draw into the proceedings unwilling third

parties. But if such third parties have a willingness to participate in the proceedings and it is clear that the award will, consequently, and either directly or indirectly affect their interests, then, they are entitled to be given an equal chance for representation of their case.

In our present case, however, the third party even if has shown to be interested, was not interested in the arbitral proceedings and that stage, as Ms Kimei puts it, has passed and the doors have been shut for the arbitrator to do anything post award for being '**functus officio**'.

She contends that, what the Applicant is trying to do amounts to inviting or calling upon this Court to hear and determine her rights/interests as means to appeal the final award dated 04<sup>th</sup> April 2020, a role which this Court cannot assume.

Certainly, the role of this Court in an arbitration petition as the one pending in Court is not that of an appellate Court. That is a settled law. See the case of **Mahawi Enterprises Ltd vs. Serengeti Breweries Ltd**, Misc. Commercial Cause No.09 of 2018 and **Vodacom Tanzania Ltd vs. FST Services Limited, Civil Appeal No.14 of 2016, (CAT) (Unreported)**. In my view,



however, it cannot be argued that the Applicant herein is pursuing that route. I do not think so, taking into account her pleadings and the submissions made by Mr Nkuba.

As Mr Nkuba has correctly stated, arbitration proceedings like judicial proceedings are intended to determine rights or interests of the parties involved. As such, where there are rights or interests of a party, even a third party, which are to be affected, and, as I said, **that other party is interested** to have his or her case heard, a door cannot be closed behind her back.

If the Sole Arbitrator is approached by such an interested third party, he or she will have to welcome such a party and hear his or her case and include his findings in the award.

In this matter, however, the Arbitrator was not invited by any of the parties to join in the Applicant herein, nor was the Applicant aware of the arbitration proceedings, it has been so stated. Does that mean that the Applicant is thus precluded from joining the petition based on the final award?

In his submissions, Mr Nkuba does not see it that way. I think he is right. Our law on arbitration has, somewhat a unique feature in respect of allowing a third party who was not even a

party to the arbitration to contest the award. In particular, section 79 (1) and (2) of the Act, Cap.15 R.E 2020 provides as follows:

"79.-(1) Subject to the Law of Limitation Act, a person who is **an interested party** to arbitral proceedings but who took no part in the proceedings **may apply to court-**  
(a) on questions that-

- (i) whether there is a valid arbitration agreement;
- (ii) whether the arbitral tribunal is properly constituted;
- (iii) what matters shall be submitted to arbitration in accordance with the arbitration agreement; **or**
- (iv) whether there is a contravention of laws and norms; and

**(b) for a declaration or injunction or other appropriate relief.**

(2) The applicant under subsection (1) shall have the same right as a party to the arbitral proceedings to challenge an award by an application under –

(a) section 74 on the ground of lack of substantive jurisdiction in relation to him; or

(b) section 75 on the ground of serious irregularity, within the meaning of that section, affecting him, and section 77(2) shall not apply in his case.”

As it may be noted from the above provision, when a Court is confronted with a situation where a third party took no part in the arbitral proceedings but feels affected by the Final Arbitral Award and wants to be joined as a party in a petition seeking to challenge the Award, the law provides guidance regarding what can be done.

An interested party “to the arbitral proceedings but who took no party in them” may apply to this Court to consider

questions set out in section 79 (1) (i) to (iv) of the Act or apply for **“a declaration or injunction or other appropriate relief.”**

If that application is done, it is clear, under section 79 (2) of the Act, that, the Applicant will be entitled to same rights as those of a party to the arbitral proceedings and, may, therefore, challenge the final award on the basis of grounds based on section 74 and 75 of the Arbitration Act.

In this Application, the Applicant is asking the Court to allow her to be joined in the **Misc. Cause No.35 of 2021** so to raise appropriate challenges to the award. Considering what section 79 (1) and (2) of the Arbitration Act, Cap.15 R.E 2020 provides, I find no reasons why I should not allow the Applicant’s application. The Court will allow that to happen given the architecture of the law.

In view of the above considerations, this Court is satisfied that there are cogent legal basis for allowing the Applicant’s prayers and, thus, the Court makes the following orders:

1. That, the Applicant’s prayer for leave to  
join as a Necessary Party in Commercial  
Cause No.35 of 2021 is hereby granted.

2. That, the Applicant/Objector prayer for leave to file an Affidavit and submissions thereon with respect to the application for registration and enforcement of the Arbitral award pending in this Honourable Court as Misc. Commercial Cause No.35 of 2021, is hereby granted.
3. That, the Applicant's affidavit/answer to the petition and submission thereon are to be filed on or **within 28 days** from this date, i.e., **on or before 21<sup>st</sup> October 2022.**
4. That, the granting of the orders sought and granted herein, is with costs.

**It is so ordered.**

**DATED AT DAR-ES-SALAAM ON THIS  
22<sup>ND</sup> DAY OF SEPTEMBER 2022**



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**DEO JOHN NANGELA  
JUDGE**