IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 87 OF 2023

ADAM MESSER.....1ST PLAINTIFF

WILLIAM SANGIWA.....2ND PLAINTIFF

VERSUS

MIC TANZANIA PUBLIC LIMITED COMPANY

@MIC TANZANIA LIMITED .....DEFENDANT

RULING

Date of last order: 09/10/2023
Date of ruling: 20/10/2023

AGATHO, J.:

This ruling was triggered by a Preliminary Objection (PO) raised by Mr John James Ismail, the defendant's counsel that the suit is incompetent and unmaintainable for the process of registration of the award to turn into an enforceable and executable decree was not completed and hence the compromise agreement purported to be the basis of the suit at hand is unfounded.

Throughout the proceedings the plaintiffs were represented by advocate Lameck Justus Muganyizi, and the defendant enjoyed the legal services of advocate John James Ismail. The PO was heard orally on 09/10/2023.

Briefly, background of the case is that way back in 2002 the parties had arbitration conducted in London. And the arbitration ended in favour of the plaintiffs. The defendant petitioned in this court vide Commercial Case No. 3 of 2003 where she attempted to set aside the arbitration award. However, the petition was dismissed. Disgruntled by that decision she appealed to the CAT in 2004 and 2010 in both occasions she failed. Thereafter the parties entered into compromise agreement in December 2018. Their promises were not performed. Having disappointed with the failure of the defendants to perform her obligation under the compromise agreement, the plaintiffs filed this suit. After having served upon with the plaint the defendant filed her WSD simultaneous with notice of PO to the effect that the suit is incompetent and bad in law for contravening the Arbitration Act the arbitral award to registered and decree be issued.

During hearing of the PO,MrIsmail, defence counsel in support of the PO submitted that the suit is incompetent and bad in law as much as it

contravenes the provisions of the Arbitration Act. He submitted that the suit before this court emanates from arbitration award which was filed before the court as seen on Annexture A4 of the plaint. The award filed before the court was unsuccessfully challenged. That left the award filed before court pending. It was the defendant's submission that the procedures for challenging arbitral award are provided for under Section 68 of and 78 of the Arbitration Act. First the arbitral award has to be filed in court so that it can be recognized as judgment of the court. After that judgment is pronounced, then the next step is to seek enforcement of that judgment and decree. That is what is provided for under Sections 68 and 78 of the Arbitration Act.

Mr. Ismail for the defendant submitted further that the matter before the court indicate that there still is a pending a arbitral award filed before the court. It means the plaintiff initiated a process of enforcing the award. That procedure was left hanging to date. But in a U-turn the plaintiffs are trying to execute the said award through a new suit. It is our submission that, that is contrary to the law. The learned counsel admitted that there was an attempt to compromise an award. But that attempt did not materialize. The parties were supposed to file a compromise deed in court

so that they can vary a decree as the award was registered in court as per annexture A4 of the plaint. But that was not done. The post arbitration proceedings are still pending before this court to date. Whatever the parties have discussed outside the court, cannot supersede the proceedings which are in court. Therefore, it is our submission that filing this suit to enforce an arbitration award is contrary to the law. Therefore, the suit before this court is incompetent. It should be dismissed with costs.

In his reply submission, Mr.Muganyizi, counsel for the plaintiff submitted that the PO must fail for two reasons, first it invites matters of fact.According to him the counsel for the defendant submitted that there is a pending arbitral award for registration before this court. Mr.Muganyizi was of the view that for the court to be sure that such matter exists, and is pending it requires: one, evidence to be brought before this court on the pendency of that matter or the court has to take judicial notice of that pendency. He supported his submission with**Mukisa Biscuit Manufacturing Co Ltd v West End Distributors [1969] 1EA 696** at 701 where it was held that:

> "*the preliminary objection is a form of what used to be a demurrer. It raises a pure point of law which argued on the*

assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. "

Thereafter Mr.Muganyizi turned to the issue of judicial notice. He submitted that this court cannot take judicial notice of the pending matter, and it cannot take evidence to prove the same because that would invalidate the preliminary objection.

The plaintiff's counsel went on reacting that to the defendant's argument that the compromise agreement should have been registered in court. Mr.Muganyizi for the plaintiff opined that the ascertained facts are such that there is no pending matter before this court regarding enforcement of the arbitral award. He also drew a difference between settling when there is a matter and settling of a dispute when there is no pending matter. He submitted that when there is the pending matter a deed of settlement has to recorded in court and consent judgment has to be issued. But when there is no pending matter and there a judgment of the court, it means that the court is functus officio. It has no power to re-open the matter that it has closed. On that basis he suggested that the question of execution of the judgment or decree of the court is optional.

He said that is why Order XXI Rule 9 of the Civil Procedure Code [Cap 33 R.E. 2019] uses the phrase "when the holder of the decree desires to execute it." He concluded this point by submitting that it cannot be said that the plaintiffs were obliged to execute their decree. It was their choice to execute it or not. He added that they are not aware of any law that prohibits the decree holder from compromising. And the defendant has not cited such law.

Having submitted that he turned to the second point that the PO has no correlation with the current proceedings. In Mr.Muganyizi's view the PO raised was an attempt to misdirect the court because the suit at hand is purely based on a breach of contract that came following the decree. He clarified that the plaintiffs are suing under new relationship (compromise agreement) and not the old relationship (the arbitral award). He cited**Batholomayo A. Malisa v Leking'orieLodenanga, Land Appeal No. 28 of 2017 HCT at Arusha** at page 10 where the court opined that the parties should not be allowed to benefit from clever language and tactics that are intended to defeat the end of justice. He argued that the defendant's PO is an attempt to use such clever language and tactics to

defeat justice. He concluded that the PO is devoid of merit and should be dismissed with costs.

In his rejoinderMr Ismail, for defendant reiteratedhis submission in chief. He then rejoined on the allegation that the PO does not comply with the parameters in the **Mukisa Biscuit's case** (supra). Mr Ismail submitted that the PO matches the parameters set in **Mukisa Biscuit'scase** (supra) that the defendant assumes the facts pleaded by the plaintiffs to be correct. To Mr Ismail the PO meets the standards set for the PO. Y

On the allegation that there is no pending matter before this court, the defence counsel said that is awkward because the plaintiff's pleadings and annextures clearly state that there is a matter left unattended before the honourable court. That is found in the paragraph of the plaint referring to annexture A4.

As for citing of Order XXI Rule 9 of the CPC, Mr Ismail opposed it because it is not a provision that guides the recognition and enforcement of arbitral awards. He firmly argued that even if it does, a party cannot execute a decree through institution of a new suit. He also reacted to the submission by the plaintiffs' counsel that the suit arises out of compromise agreement. He wondered, what are they compromising? He suggested that

if it is arbitral award, then they ought to come and register it. Mr Ismail submitted that the award has to be registered and a decree be issued and after that comes enforcement. That is the way to enforce the arbitral award. He also said **Batholomayo's case**(supra) is not applicable as it is distinguishable from the present case. He in the end urged the court to sustain the PO and dismiss the suit with costs.

To dispose the PO, there are three issues to be examined, first, whether there is a pending petition before this court for registration of the arbitral award. And second whether the arbitral award was registered, and a decree was issued. Third, and most important whether the parties can use unregistered arbitral award as basis for compromise agreement. These issues will be of help in disposing the PO.

Before charging further, and as a take-off point the court refers to the views given by Mwambegele J (as he then was) in **Kigoma/Ujiji Municipal Council v Nyakirang'ani Construction Ltd, Misc. Commercial Cause No. 239 of 2015 HCCD at Dar es salaam**. His Lordship at page 12 of the ruling held:

> *That, notwithstanding, a court of law being not a party to such procedure cannot move suo motu to make the order adopting*

or 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 subscribes to the position of Mwambegele J (as he then was) that it is incumbent upon the awardee to move the court to make an order for registration of the award. See **A Castle Corporation (Formerly MILO Construction Company Ltd) v The Registered Trustees of PPF, Misc. Commercial Cause No. 19 0f 2009 HCCD at Dar es salaam.** In the case at hand, the plaintiff apart from annexing the ruling of the court refusing the petition filed against the registration of the arbitral award in her plaint, she failed to annex the court order that the award was registered or the decree for that matter. As it will unfold later this point is relevant because the plaint is based on compromise agreement which turns out to be emanating from the arbitral award. Now, one may ask, can an arbitral award be of significance without it being registered in court and a decree be issued?

This court is of view that an arbitral award becomes meaningful and legally enforceable and executable when it is registered, anda court decree is issued. Without such as decree the arbitral award is non-starter (see the

ruling in **A Castle Corporation's case** (supra) dated 28/04/2023. In the case at hand no decree was issued. The pleadings are silent as to whether the arbitral award was registered. The plaintiff simply cited the ruling that dismissed the petition challenging the registration of the arbitration award (Misc. Commercial Case No.3 of 2004). That was followed by two unsuccessful appeals in the CAT vide Civil Appeal No. 98 of 2003 and Civil Appeal No. 72 of 2010. Surprisingly, the plaintiffs are not telling the court if the arbitral award was registered, and the decree was issued. The plaint is mute on this.

Despite that, the plaintiffs are claiming in their plaint that the suit is based on the compromise agreement whose basis is the arbitral award. That on 28/12/2017 the defendant offered the plaintiffs a compromise agreement following the former's unsuccessful pursuit to set aside the arbitral award. The plaintiffs accepted the said offer on 21/12/2018 and the defendant acknowledged the acceptance on 27/12/2018 via email. That constituted the compromise agreement pleaded on paragraphs 9, 10 and 11 of the plaint.

Against that backdrop, the court is now asked to determine whether the PO has merit or otherwise. But a critical question worth to be posed,

which is the third issue above drawnis what was the basis of the compromise agreement? Is it the arbitral award or there is a court decree. Mr Muganyizi has sought to impress the court by submitting that a party is not forced to execute his decree. Nor is he barred from abandoning his decree and proceed to enter a compromise agreement through which a new relationship arises. And basedon that compromise agreement if there is a breach a party may sue to claim his rights.Unfortunately for counsel Muganyizi if a right upon which one is claiming emanates from a court decree, then there is no way one can abandon it and then establish a new relationship that ought to have stemmed from the decree. Moreso, it is the court's view that the arbitral award cannot be the basis for establishing a compromise agreement unless and until the said arbitral award is registered and a decree is issued. That is because the arbitral award is not automatically enforceable unless it is registered, and decree is issued. It is only after the court decree is issued one can have a luxury of entering into compromise agreement. From the submission of the Mr Muganyizi, it is clear that the basis of the plaintiffs' suit is the compromise agreement that springs from the arbitral award. The court is of considered view that the arbitral award does not give a party a right that can be executed unless it

results into a decree. Consequently, the present suit remains premature until the arbitral award is registered and decree is issued. The arbitral award has not crystallized into an enforceable decree which legally speaking is of a valueas it is can be executed by a decree holder. For that matter, the cited case of **Batholomayo**(supra) is irrelevant in the circumstance of this case.

In light of the foregoing, the PO is found to have merit. It is sustained. The suit lacks legal legs to stand on. Consequently, it is struck out with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 20th Day of October 2023.

U. J. AGATHO

JUDGE

20/10/2023

Court: Rulingwill be delivered today, this 20thOctober 2023 by Hon. Minde, the Deputy Registrar in the presence of the parties.

U. J. AGATHO

JUDGE

20/10/2023