IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR –ES-SALAAM

MISC. COMMERCIAL APPLICATION NO. 1 OF 2019

{ARISING FROM COMMERCIAL CASE NO 38 OF 2018)

BOARDNOF TRUSTEES OF PARASTATAL PENSION FUND

..... APPLICANT

VERSUS

ELECTRICS INTERNATIONAL COMPANY LIMITED.....RESPONDENT

Date of Last Order: 13/02/2020.
Date of Ruling: 28/02/2020.

RULING.

MAGOIGA, J.

The Applicant, **BOARD OF TRUSTEES OF PARASTATAL PENSION FUND** following the order of the court dated 1st October 2018 by Hon B.K Philip, J in Misc. Commercial Case No. 38 of 2018 striking out an application to set aside the arbitral award, has come to this court again by way of petition, under the provision of Section 14 (1) of the Law of Limitation Act, [Cap 89 R; E 2002], Section 3 of the Arbitration Act (Cap

15 R. E. 2002), Rule 5 of the arbitration Rules G.N No 427 of 1957; Section 2 of the Judicature and Application of Laws [Act Cap 358 R;E 2002],and Section 95 of the Civil Code [Cap 33 R;E 2002] praying for the following Orders;

1. This Court may be pleased to extend time to the petitioner to file petition to set aside the award of sole Arbitrator M.J.A Lukwaro of 11th day of January 2018 issued in favor of respondent .

2. Costs be in the main cause and

3. Any other or further orders this Honorable Court may deem Just and equitable

Upon being served with the instant petition, the respondent filed a reply to petition disputing the grant of the prayers sought in the petition. Simultaneously the learned counsel for respondent by way of preliminary objection challenged the competence of Misc commercial application No 1/2019 on three (3) grounds which are subject of this ruling; that is the instant application is competent for the following grounds, namely:-

(1) That the Applicant having preferred Civil Appeal No 249/2018 against the decision of this Honorable Court before Hon B. K. Philip J, dated 1st October 2018 substantially on the same matter

this honorable court lacks Jurisdiction to determine this application.

(2) The present application is not an application under the arbitration Act [CAP 15 R; E 2002] but it is for extension of time. It has wrongly been preferred by way of a petition.

(3) The application for extension of time to refile a petition to challenge the award, while the court already issued an order to enforce the said award "as a decree" is legally misconceived.

The facts of this application are that, the petitioner and the respondent, entered into two agreements on 6thNovember 2008 for construction of food court block for the College of Informatics and Virtual Sciences for Dodoma University and construction of IT Laboratory and office block. The parties agreed mechanism for solving their dispute, in case one arises, and the place of arbitration. That in the course of performing the contract, the petitioner defaulted to make good payments for costs of additional steel structure after the contract was fully executed .This state of affairs, after several communications in vain, forced the respondent to refer the matter for arbitration and on 2nd February 2018, Mr. Mtango J.A Lukwaro filed in this court a final award between the petitioner and respondent who were

respondent and claimant respectively before him as a sole Arbitrator. The fact goes further that upon being notified that the award has been lodged in this court, the petitioner lodged a petition in Misc commercial cause no 38/2018 which was struck out on 1st October 2018 by Hon B.K Philip, J. Thereafter an award was registered and ready to be enforced as a decree in Misc commercial cause 15/2018. Being dissatisfied with that order, the petitioner filed appeal No 249/2018 in the Court of Appeal to challenge that decision. At the same time, he has come to this court armed with the instant petition seeking the extension of time to file petition to set aside the award of sole Arbitrator following the struck out of Misc commercial case no 38/2018. Upon being served with the petition, the learned counsel for respondent raised preliminary objections against the competency of the instant petition, the subject of this ruling.

On 19/11/2019 when this matter was called before me, I ordered the preliminary objections to be argued by way of written submissions. The counsel for parties complied with the scheduled order of filing written submissions for and against, paving way for this ruling. Let me record my thanks for their industrious input on this matter. I honestly commend them for their brilliant arguments made.

The petitioner has throughout this proceedings been enjoying the legal services of Dr. Rugemeleza .A.K.Nshala, learned advocate; and on the other adversary part, the respondent has been enjoying the legal services of Mr. Samson Edward Mbamba, learned advocate.

Submitting in support of preliminary objections, the learned counsel for respondent contended that he will argue objections number one and three together while the second point of objection will be argued separately.

The learned counsel for respondent submitted that, this court has no jurisdiction to determine the instant application as there is a pending appeal against Misc Commercial case No 15/2018 which is a twin to Misc. Commercial case No 38/2018 the subject of this ruling. The main legal concern of the learned counsel, therefore, is that, if the Court of Appeal declines to fault the order of this court in Misc commercial case 15/2018 and on the other hand this court grants extension of time to file a petition, the effect will lead to chaos in the administration of justice. To cement his stance, the learned counsel referred this court to several decisions of this court and the Court of Appeal; in particular, in the case of **Sylvester Lwegira Bandio & another vs. NBC Ltd Civil appeal no 29 of 2010 and Arcado Ntagazwa (Unreported) DSM (CAT)** in which the Court of

Appeal took judicial notice of the record of the court regarding the existence of the appeal in Court of Appeal but the trial court proceeded with the matter and it was held that, that was not proper and irregular for the trial court to proceed with hearing of the suit after a notice has been filed in the Court of Appeal.

The learned counsel emphasized in his submissions that this court is not seized with jurisdiction of a matter once a notice of appeal is filed in the Court of Appeal. Therefore, the learned counsel urged this court on the same principle not to entertain the instant application. He, therefore, prayed to this court to strike out with costs the instant application for reasons advanced above.

On the other hand, the learned counsel for petitioner submitted in reply that the court has jurisdiction to entertain this petition. According to him, the fact that there is Civil Appeal No 249 of 2018 in the Court of Appeal against the decision of this court is misconceived or is deliberately advanced to mislead this court, against the truth that there were two separate applications to the same judge; one was for registration of an award which was Misc Commercial case No 15/2018, and the second application was Misc Application No 38/2018 which was for setting aside

arbitral award. According to him, although the above mentioned applications were before the same Judge, they were having different intention and seeking different orders; more so parties were different in these applications as petitioner was a respondent and respondent was a petitioner. Moreover the learned counsel went on to submit that there is no appeal concerning the ruling derived on 1st October 2018 by Hon B.K Philip on Misc commercial case 38/2018 which is the subject of this application. He argued that the petitioner was aggrieved with the order in Misc Commercial case No 15/2018 in which the court ordered that the award be registered and be enforced and appealed to Court of Appeal and not Misc Commercial No 38/2018 which aimed to set aside the award.

According to the learned counsel for petitioner, the objection raised and argued was pre-maturely advanced for no application to set aside the arbitration award has ever been determined as the two applications were difference in nature and effect. On that note, the learned counsel for petitioner invited this court to dismiss the instant preliminary objection with costs for being unmerited.

Having considered the rival arguments on this point by the learned counsel for parties' respective stance, this court is of the considered opinion the

preliminary objection raised has merits. The reasons am taking this stance are not far to fetch. **One,** the arbitral award dated 11th day of January 2018, which the petitioner wants to challenge is the one that has been registered and this court has ordered the same to proceed with execution. The fact that the appellant has filed an appeal no 249 of 2018, which fact is not in dispute inter parties' from their respective submission makes this court to be ousted with jurisdiction to entertain the instant petition. The argument by the learned counsel for petitioner that no application has never been determined as such he is entitled to file one, is rejected for being misconceived and with no legal back up. **Second,** as correctly pointed out by the learned counsel for respondent, the intended appeal is aimed at challenging the registration and enforcement of the arbitral award, which is the subject of pending appeal. On that note, the petitioner underrated the effect of filing the notice of appeal to the Court of Appeal and the appeal pending before the Court of Appeal. The institution of the appeal in the Court of Appeal and simultaneously instituting the instant application by petitioner is tantamount to the petitioner driving two horses at ago. This is unacceptable and irregular.

On the above reasons, I find the instant application is incompetent for the reason that this court is not seized with jurisdiction to entertain this petition.

This ground suffices to dispose of this petition but of interest, this court find it equally imperative to discuss not for academic purpose but given the nature of the second limb of objection which is to the effect that the present application is not an application under the Arbitration Act, but rather under the Law of Limitation Act,[Cap 89 R.E.2002] worthy of determination. The learned counsel argued that the petition which has been made by way of petition is for extension of time to file petition to challenge the award, the relevant provision is section 14 (1) of the Law of Limitation Act, [Cap 89 R; E 2002]. According to the learned counsel for respondent, the instant application is not among the applications which are to be made by way of petition and therefore deviation from the prescribed way for bringing application to court is not curable. It was further argument of the learned counsel for respondent that a person who challenges an election petition cannot file plaint or a person who applies for review cannot file a chamber summons in place of memorandum of review. According to learned counsel for respondent, the provisions of Rule 5 of

G.N.427 of 1957 of the Arbitration Rules, is not among the petition to be preferred by way of petition. His reason is that under the Act and the Rules no provision provides for extension of time and as such the relevant provision is section 14 (1) of [Cap 89 R.E 2002]. The learned counsel urged this court to agree with him that since the instant petition was not preferred under the Arbitration Act or the Rules, then same was to be preferred by of chamber summons and affidavit. He urged the court to strike out the application basing on the reasons advanced hereinabove.

On the other hand, the learned counsel for petitioner in reply to the second ground of preliminary objection argued that the allegation that the application being an application for extension of time was wrongly preferred by way of petition is misconceived. According to him, section 14(1) of the Law of Limitation Act gives the court discretionary powers to extend time but it does not provide for procedural aspect on how the court is to be moved. In addition to that, he submitted that there is no dispute that the application before this court is in respect of arbitration process and that it is for extension of time for applicant to exercise its rights under the Arbitration Act, particularly, Section 16 of the Arbitration Act (Cap 15 R;E 2002),and therefore the application must be guided by Arbitration Act and

its Rules. To cement his point he cited the case of **East Africa Development Bank vs Blueline Enterprises Limited Misc Civil Cause No 142 of 2005(HC) DSM (Unreported)** in which it was held that Rule 5 of the Arbitration Rules makes it mandatory all application under Arbitration Act shall be made by way of petition.

The learned counsel argued further that section 14 (1) of the Law of Limitation Act does not provide that application for extension of time should be made by chamber summons but it is just an empowering provision and the procedure to be adopted will depend on the subject matter. On that note the learned counsel for petitioner invited this court to find no merits in this limb of objection.

In rejoinder the learned counsel for respondent stood to his guns and submitted further in rejoinder that the decision in the case of **East African Development Bank v. Blueline Enterprises Limited (**supra) was given per incurium and strongly urged this court not to follow it for it is not binding.

Having considered the rival arguments of the respective learned counsel for parties' stances, I must admit this point has painstakingly disturbed my mind a great deal. I have equally taken my time to read through the

judgement by learned brother Shangwa, judge (as he then was) with a very great keen mind and am constrained to say boldly that the decision of the learned Judge Shangwa was correct and intact as what was at stake before him was an application for stay of execution of the arbitral award by way of chamber summons, hence his decision that by preferring by way of chamber summons was wrong is correct. While in our instant petition is for extension of time to file a petition to set aside the award, which has been preferred under the provisions of section 14 (1) of the LLA read together with section 3 of Arbitration Act, Rule 5 and the provisions of the CPC, [Cap 33 R.E. 2002].

There is no dispute that what is in dispute is the arbitration award that the petitioner is trying to halt out of time. The petitioner has preferred by way of petition for extension of time to prefer petition to setting aside the award by citing the provisions of section 14 (1) along with other provisions of the Arbitration Act [Cap 89 R.E 2002]. However, deep down the road and upon second serious thought this point would not detain this court much. The petition to my opinion is improper for the several reasons. **First,** the issue at this stage is not arbitral award but is for an order for extension of time to come back to the Arbitration Act, hence the petitioner

needs an extension of time which the enabling provision is section 14(1) of [Cap 89 R.E.2002]. The petitioner citing section 3 and Rule 5 of the Arbitration Act, do not make it mandatory that the mode of application must be by way of petition. For easy of reference Rule 5 of the Arbitral Rules provides as follows:-

Rule 5- Save as is otherwise provided, all application under the Act shall be made by way of petition.

Now the immediate question is, was this application made under the Arbitration Act [Cap 15 R.E 2002] or under the Law of Limitation Act, [Cap 89 R.E 2002]? There is no dispute that no provision under the Arbitration Act or in the Rules which deals with the extension of time, but the only provision which empower the court to grant an extension is section 14 (1) of [Cap 89 R.E 2002]. The other cited provisions under the Arbitration Act do not specifically deal with the issue at hand of extension of time and as such irrelevant. The subject matter of the dispute on arbitration will come in once extension is granted and it is by then when a an application by way of petition has to be preferred.

Another reason is that Rule 6 provides that under the Act there can be petitions, affidavits and other proceedings depending on the nature of the

prayers and same can be supported even by affidavit. For easy of reference the said Rule provides as follows:-

Rule 6- All petitions, affidavits and other proceedings under the Act shall be entitled "In the matter of Arbitration and in the matter of the Act and reference shall be made in the application to the relevant section of the Act.

Therefore, Rule 6 requires that **all petitions, 'affidavits and other proceedings'** to be titled that **"In the matter of Arbitration"**. The mentioning of the word **"affidavits"** to my opinion shows that depending on the nature of the prayer, application can be referred by way of chamber summons; and the instant application is an example of such applications. Here the issue is an extension of time and not arbitral award as argued by the learned counsel for petitioner. The learned counsel for petitioner ought to be more and extra careful the sequences of events before reaching to the core of the business at issue.

The arguments by learned counsel for petitioner, for the above reasons are less than convincing and are hereby rejected for want of legal back up.

On the totality of the above reasons the second limb of objection is hereby sustained parity with first limb of objection for the reasons stated

hereinabove. That said and done, the instant petition is hereby struck out with costs for being incompetent to extent explained.

It is so ordered.

Dated at Dar es Salaam this 28th day of February 2020.

S.M. MAGOIGA
JUDGE
28/02/2020.