IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO 34 OF 2019

BETWEEN

AIRTEL TANZANIA LIMITED.....PETITIONER

Versus

KMJ TELECOMMUNICATION LIMITED.....RESPONDENT

Last Order: 21st April, 2020

Date of Ruling: 9th June, 2020

RULING

FIKIRINI, J.

The Airtel Tanzania Limited, hereinafter referred as the petitioner brought this petition under section 15 and 16 of the Arbitration Act, Cap. 15, R.E 2002 read together with Rules 5, 6, 7, and 8 of the Arbitration Rules, GN. No.427 of 1957, against the respondent, seeking the following Court orders:

1. Declaratory order of setting aside part of the award granting KMJ Five Hundred Million for alleged wrongful calling of Bank guarantee.
2. Declaration order of setting aside part of the award ordering an expert adjudication in terms of paragraph 122 of the final award.
3. In the alternative, declaration order remitting part of the award as decided in terms of paragraph (a) and (b) of the arbitral tribunal for reconsideration.

4. Costs of the suit, and
5. Any other reliefs as this Honourable Court may deem fit.

The respondent, KMJ Telecommunication Limited through his advocate urged the Court to dismiss the petition with costs based on the three (3) points of preliminary objection raised namely:

1. That the petitioner's petition is misconceived.
2. That the petitioner's petition is overtaken by events.
3. That the petitioner's petition contains arguments, assertion, assumption, conclusion and opinions.

At the hearing Mr. Yassin Maka for the respondent and Dr. Alex Thomas Nguluma assisted by Mr. Gaspar Nyika, learned advocates for the applicant appeared for their respective parties. Counsels asked for the leave of the Court, to argue the preliminary points of objection by a way of written submission, the request which was granted under the following filing schedule: that the respondent to file their written submission by or on 5th May, 2020; reply written submission by the petitioner by or on 19th May, 2020; and rejoinder if any by or on 26th May, 2020. This was to be followed by this ruling scheduled for 9th June, 2020.

Mr. Maka submitted on the 1st and 2nd grounds of preliminary objection collectively. He submitted that the petitioner's application challenging the award in

Miscellaneous Civil Cause No. 384 of 2017 is misconceived as it has been overtaken by events, as from 07th December 2018 pursuant to section 79 of the Arbitration Act, the Court upon satisfaction, declared the award an enforceable decree, which means pursuant to section 68 (3) of the Arbitration Act, of 2020 (Arbitration Act) at the time when this application was made there were no way the court could interfere with the arbitral award. since as from 07th December 2018 the award was no longer an award but a Court decree.

Mr. Maka, further submitted that, the question which this Court should ask itself was, in case the present application shall be granted as prayed, then what will be the legal status of the decree in Miscellaneous Civil Cause No. 384 of 2017 delivered on 7th December 2018 which was amended on 30th May 2019? The answer would be that this Court's hands shall be tied to again determine what it has already determined and issued a decree upon it. Stressing that the same Court did not have power to confirm, vary and/or set aside the same award in whole or in part. The Court may only choose one remedy as mentioned by the law which was either the case was before it for review or appeal intended to the Court of Appeal.

He further submitted that the fact that this matter was previously before another Judge who determined it fully and issued a decree and currently it was before another Judge of the same Court determining the same issues which the Court has already incorporated fully in its own decree amounted to an abuse of the Court

process. To strengthen his position, he cited the case of **Scolastica Benedict v Martin Benedict (1993) T.L.R 1** and **Hassan Hiari Pagali v Sokoine Maitei Kotemo, Land Case No. 45 of 2017,** in which the Court concluded that once a Court of competent jurisdiction has heard and determine the suit, that Court becomes *functus officio.*"

Finalizing, he submitted that filing again the petition to set aside an award could only be tenable if was made before the Court which issued the decree when the arbitral award was still as it was. Given that once the arbitral aw
registered in Court it becomes a judgment of the Court capable of
which was the case here, hence this application is highly misconceived and overtaken by events, as the dated and signed judgment of the Court cannot be altered as provided under Order XX Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), and consequently this Court becomes *functus officio,* argued by the Counsel.

Coming to the third ground of objection, it was Mr. Maka's submission that paragraph 3(iii), 3(iv), 3(v), 3(vi), 3(vii), 3(xvi), 5, 6.2, 6.5 and 6.7 of the petition were not statements of facts but arguments, opinions and assertion by the petitioner. The petition being a pleading containing statement of facts, was not supposed to contain legal arguments, assertion or opinions. The rules governing petition are similar with the rules governing plaints and affidavits. Supporting his

position, he cited the case **of MMG Gold Limited v Hertz Tanzania Limited, Miscellaneous Commercial Cause No. 118 of 2015 page 7 & 8.**

In examining merits and demerits of this suit, I would wish to start with what transpired during the filing of the written submissions ordered by the Court. The Court order required the petitioner through Mr. Nyika to file their written submission by or on 19th May, 2020. Instead of complying to the date ordered Mr. Nyika filed their written submission on 22nd May, 2020, outside the ordered time and without this Court's leave. Since there was no Court leave sought and granted, the filed submission deserved to be ignored. I will therefore not take into consideration, the reply written submission filed by the petitioner. The rationale behind my stance, are: *one,* Court orders must be obeyed or else the orders will be ineffective and consequently this will breed laxity. On this I am supported by the decision in the case of **NIC (T) Ltd & PSRC v Shengena Ltd, Civil Application No. 20 of 2007, CAT-DSM (unreported)**, where the Court had this to say:

> "*The applicant did not file submission on due date as ordered. Naturally,* ***the court could not be made impotent by a party's inaction. It had to act.....It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case.***"[Emphasis mine]

This is more so considering that it was the petitioner, a party who moved this Court by filing her petition through the assistant of an advocate who apart from bring professional and with expertise is as well as Court officer, who is expected to know the rules of procedure in place. It is therefore expected of petitioner to act accordingly by timely compliance to Court orders.

Two, filing of written submissions is also a mode of prosecution. With the pile up of cases and applications, the Court in its endeavor to clear the clog, written submissions is amongst practical options in use in achieving its goal. In the case of **National Bank of Tanzania (NBC) Ltd v Sao Ligo Holdings and Another, CA, Civil Application No.267 of 2015,** faced with the challenge the Court held that:

> *"The purpose of filing written submission was to speed up administration of substantive justice".*

Although in the decision above focus was on substantive justice, but even dealing with preliminary point of objection and/or compliance to Court orders required the same passion. General speaking in dispensation of justice matters before the Court are to be efficiently, effectively and speedily determined. Underscoring the importance of acting within the prescribed time and avoiding unnecessary delay, the Court of Appeal, in the case **Dr. Ally Shabhay v Tanga Bohora Jamaat [1997] TLR 305,** held that;

> *"Those who come before the courts of law must not show* ***unnecessary delay*** *in doing so* ***they must show great diligence"*** [Emphasis mine]

The petitioner missed that part by failing to observe the time fixed for her to file her written submission.

Furthermore, even if I overlook the delay, which as stated above, I cannot, accept the petitioner written submission to be part of the submission addressing the points of objection raised, yet it will not change anything, given that the petitioner's petition admittedly is in my view overtaken by events. This matter was once before the Court as Miscellaneous Civil Cause No. 384 of 2017. On 7th December 2018 the Court after being satisfied the award was with merit proceeded to record it as an enforceable decree of the Court. After the issuance of the decree, any court of the same jurisdiction automatically became *functus officio*. And from that juncture any aggrieved party can only challenge the decision by way of a review before the same judge, or by revision or an appeal to the Court of appeal.

This position was discussed in the case of **Lala Wino** (supra), and the Court of Appeal held that:

> *"A person aggrieved by the decision of the High Court in the exercise of its original jurisdiction may appeal to the Court of*

Appeal in accordance with the provisions of the Appellate Jurisdiction Act."

The fact that this Court has already dealt with the matter to the extent of confirming the award in Miscellaneous Civil Cause No. 384 of 2017, and issued a decree thereof, the only available remedy is review, which if intended has to be placed before the former Judge who issued a decree in Miscellaneous Civil Cause No. 384 of 2017, or a revision or an appeal has to be preferred before the Court of Appeal, challenging the decree of this Court. To that end, it is without any flicker of doubt that this petition has been overtaken by the events.

The first and second points of objection argued together, are in my view sufficient to dispose of the preliminary points of objection raised.

From the above findings I find the first and second preliminary points of objection that the petition is misconceived and overtaken by events, worth sustaining and proceed to do so. The petition is hereby struck out with costs. It is so ordered.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

P. S. FIKIRINI

JUDGE

9th JUNE, 2020