IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL CAUSE NO. 51 OF 2020
IN THE MATTER OF ARBITRATION ACT CAP.15 R.E.2019

AND

IN THE MATTER OF ARBITRATION UNDER THE NATIONAL CONSTRUCTION COUNCIL (NCC) & NCC RULES 2001

AND

IN THE MATTER OF ARBITRATION

BETWEEN

CHINA RAILWAYS CONSTRUCTION ENGINEERING GROUP.....CLAIMANT

VERSUS

THE BOARD OF TRUSTEES OF THE NATONAL SOCIAL SECURITY FUND.....RESPONDENT

RULING

Date of Last order: 26/11/2020
Delivery of Ruling: 28/01/2021

NANGELA, J:.,

This ruling arises from a Notice of Preliminary Objections against a Final Arbitral Award filed in this Court on 21st September 2020 by Mr Deogratias Ringia,

the Sole Arbitrator. The Notice filed by the Respondent's learned counsel has raised two points, to wit, that:

1. *The filing of the Award is hopelessly time barred.*
2. *The Award is improperly filed in Court and contravenes the provisions of section 12 (2) of the Arbitration Act, Cap.15 R.E.2019, and Rule 4 of the Arbitration Rules, GN. No. 427 of 1957.*

In view of the above two points of law, the Respondent has urged this Court to dismiss the Award with costs. When the parties appeared in Court on the 26th November 2020, the Claimant enjoyed the legal services of Dr. Frederick Ringo, Learned Counsel, while Ms Meisha Shao, Learned State Attorney and Geoffrey Ngwembe and Ms Grace Mushi, (legal officers of the Respondent), appeared for the Respondent.

On the material date, *i.e., 26/11/2020,* the Learned State Attorney informed this Court that, the Office of the Solicitor General has taken over the conduct of this

matter in Court, for and on behalf of the Respondent. Consequently, she requested the Court to proceed with the hearing of the preliminary objections, and, this Court directed the parties to dispose of the preliminary objections by way of filing written submissions.

In its written submissions, filed on 10th December 2020, the Respondent adopted a two-pronged approach when addressing the first ground of objection, **first**, by stating that the impugned award was delivered out of time, and, **second**, by submitting that, the award was filed outside the prescribed time.

As regard the **first limb**, i.e., the impugned award was made out of time limit as provided for under **section 4, read together with the Item 3 and 4 of the 1st Schedule to the Arbitration Act, Cap.15 R.E.2019**, it was Respondent's submission that, according to section 4 of the Act, unless a contrary intention is expressed, any submission to arbitration shall be deemed to include the provisions set out in the 1st Schedule.

The Respondent contended that, **under item 3 of the 1st Schedule to the Act,** arbitrators are required to render their awards in writing *within three months after entering on the reference* or *after having been called on to act by notice in writing from any party to the submission* or where a written extension of time for making the award is agreed.

The Respondent made a further reference to Items 4 and 5 of the **1st Schedule to the Arbitration Act, Cap.15 R.E.2019**. Item 4 and 5 of the 1st Schedule to the Act provide as follows:

> *"4. If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.*
>
> *5. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the*

umpire, in writing signed by him may, from time to time, extend the time for making the award."

The Respondent's learned counsel submitted, as regards the matter at hand, that, the Sole Arbitrator accepted his appointment on 29th July 2019 and on 30th July 2019 he issued a notice of initial meeting, scheduled to take place on the 2nd of August 2019. However, the Respondent's counsel submitted that, the impugned award was delivered on 4th February 2020, more than six (6) months from the date when the arbitrator had entered on the reference.

In view of that fact, it was the Respondent's contention that, the award was delivered in total contravention of Section 4 of the Act, as read together with Items 3 and 4 of the 1st Schedule to the Arbitration Act, Cap.15 R.E.2019, and the delivery was without jurisdiction.

Referring this Court to an Indian case of **M/S ISPAT Engineering & Foundry v M/s Steel Authority of India (2001) AIR SC 2516**, the learned

State Attorney submitted that, an arbitrator is required to abide to what the parties had agreed to and the law governing particular arbitration.

It was further contended, as one of the essential requirements in arbitration proceedings, that, an arbitrator must ensure that he or she renders his/her decision or award within the stipulated time, failure of which he/she will lack the requisite jurisdiction and, the award if rendered, will be open to challenge and be set aside. The Respondent contended, therefore, that, the award was vulnerable to attack for being improperly procured, especially because the arbitrator did not extend his time of making the award as per the agreement to arbitrate or the law.

According to the Respondent, an award made outside the prescribed time is an award without jurisdiction, and, for that reason, a nullity and unenforceable. The Respondent submitted, in regard to this instant case at hand, that, the prescribed time of three months lapsed without there being any attempt to

refer the matter to an Umpire to have such time extended.

As regards the effects of not doing so, the Respondent referred this Court to the Indian cases of **National Small Scale Industries Corporation v V.K. Agnihotri & Others, 1998 AIR, Delhi, 12** and **State of Punjab vs Sr Hardyal, 1985 AIR 920.** The Respondent contended that, it will not even be proper for the Arbitrator to enlarge time on his/her own without the consent of the parties to the agreement.

In support of the above view, this Court was invited to consider the decision of the Supreme Court of Indian in the case of **N. Chellappan v Secretary, Kerala State Electricity Board, (1975) 1SCC 289** and **Ravindra Motilal Shah v Chinubhai Chimanlal Dalal And, (1976) 17GLR 758.** It was argued that, the two cases discuss a situation under section 28 of the Indian Arbitration Act, 1940 which is to some extent similar to what section 14 of Cap.15 R.E.2019 provides.

The Respondent counsel concluded her submission arguing that, in the case at hand, time expired and, upon expiry, time was not extended by the arbitrator or the court, thus, making the award being one made without jurisdiction and, for that matter, invalid.

This Court was invited to rely on the Court of Appeal decision in the case of **Mvita Construction Company v Tanzania Harbours Authority, Civil Appeal No.94 of 2001** (unreported) and its own decision in the case of **Medical Stores Department v Cool Care Services Limited, Misc. Comm. Cause No.13 of 2020 (unreported).**

Concerning the second limb of argument, it was submitted that, the impugned award was filed outside the time prescribed under the Law of Limitation Act, Cap.89, R.E, 2019. Support for such a submission was anchored on Part III, Item 18 of the Schedule to the Law of Limitation Act. The item reads as follows:

> *"Under the Civil Procedure Code for the filing in court of an award in a suit made*

in any matter referred to arbitration by order of the court, or of an award made in any matter referred to arbitration without the intervention of a court [is] six months."

The Respondent's counsel submitted that, the impugned award filed before this Court by the Sole Arbitrator, is dated 4th of February 2020. It was argued, and, as per the records of the Court, that, the Sole Arbitrator's communication to the Court seeking to have the award filed, was dated 21st September 2020 and, on 24th September 2020, the respective fees in regard to its filing were paid.

The learned State Attorney appearing for the Respondent concluded, therefore, that, the award was filed on the 24th September 2020. That being said, it was argued that, the appropriate question that follows is: *when does time regarding the filing of an award in court starts to run?* The response to that question, according to the Respondent's counsel, is that, time to file the award will start from when the award was issued.

To support the above position, this Court was invited to consider its decision in the cases of **Siemens Limited and Another v Mtibwa Sugar Estate, Misc. Commercial Cause No.247 of 2015** (unreported); **Kigoma Ujiji Municipal Council v Nyakirang'ani Construction Limited, Misc. Commercial Cause No.239 of 2015** (Unreported), and **Bogeta Engineering Limited v Nanyumbu District Council, Misc. Commercial Cause No.9 of 2019** (Unreported).

The Respondent's counsel maintained, therefore, that, looking at the matter at hand, since the impugned award was rendered by the arbitrator without any interference of the Court, it was supposed to have been filed within the period of six months, from the date when it was delivered, on 4th February 2020.

It was the Respondent' conclusion; therefore, that, the filing of the impugned award on the 24th of September 2020, was done outside the prescribed period of six (6) months and, accordingly, should be dismissed with costs.

Concerning the 2nd ground of objection, the Respondent's counsel submitted that, the award was improperly filed in this Court in contravention of section 12 (2) of the Arbitration Act, Cap.15 and Rule 4 of GN No. 427 of 1957. The Respondent relied on the case of **Tanzania Cotton Marketing Board v Cogecot Cotton Company SA [1997] TLR 165**.

From the Respondent's submission, as a matter of mandatory legal requirement under section 12 (2) of the Arbitration Act, Cap.15 and Rule 4 of G.N No. 427 of 1957, the Respondent as a party ought to have been copied and served with the notice for filing the award in court.

The Respondent's lamented, however, that; such provisions were not followed, as the Respondent was not notified by the arbitrator of the filing, and, that, the Respondent was only surprised, having perused the Court records, to find that, the Arbitrator's letter dated 21st September 2020 had been copied to the Respondent, although the Respondent never received it.

It was submitted that, while Rule 4 of the G.N No. 427 of 1957 requires the Arbitrator to forward to the Registrar of the High Court the award within a sealed envelope, with all records of the Arbitration proceedings, the requirement was not adhered to.

It was contended further that, it is not indicated anywhere how the award was delivered to the Registrar of the Court, whether in original or sealed envelope as per Rule 4 of the GN. No. 427 of 1957. To support the contention that the case at hand should be dismissed for contravening section 12(2) of Cap.15 R.E. 2019 and Rule 4 of GN No.427 of 1957, this Court was referred to its decision in the Case of **Standard Chartered Bank (Hong Kong) Ltd v United Republic of Tanzania, Misc. Civil Cause No.31 of 2020 (unreported)**.

It is unfortunate; however, that, a copy of that decision was not availed to the Court or attached in the submission filed by the Respondent. Nevertheless, the Respondent counsel urged this Court to follow the Ruling by Mr Justice Rwizile, J., in that case. It was contended

that, in that case of **Standard Chartered Bank (Hong Kong) (supra)**, having found that the procedures for the filing of an award were not properly followed, the Court dismissed the petition.

Responding to the submissions by the Respondent, Dr. Ringo, the learned counsel for the Claimant/Applicant, urged this Court to dismiss the 1st preliminary objection. He submitted, as regards section 4 of the Arbitration Act, Cap.15 R.E.2019, that, this particular provision merely addresses the irrevocability of submissions of dispute to arbitration without leave of the Court.

As regards, Item 3 of the 1st Schedule to the Arbitration Act, Cap 15, he noted that, the same empowers the arbitrator to extend time to issue an award after lapse of 3 months. He submitted, the original 3 months to complete the arbitration proceedings were the months of August, September and October. However, as he correctly submitted, the issue of extended time was a question of fact, which means it will need some proof.

To that effect, and, relying on a revised schedule of events which has the Arbitrator's '**Orders for Direction**,' attached to his submissions as **Attachment App.1 (a)**, Dr. Ringo contended that, as per such revised schedule of events, the consent to extend the 3 months had been agreed and consented to by the parties and signed by the arbitrator. Besides, he added that, the Respondent never raise an objection therein but complied fully with that arbitrator's order. He also pointed out that, the 2nd and 3rd revised schedule of events were further agreed to and consented by the parties.

He submitted, therefore, that, since both parties had consented to and agreed that all communications be made electronically, and given that no objection was raised by any of the parties despite the **Order for Directions No.3, 4 and 5** which all issued after the initial 3 months period provided for, ("**Liberty to Apply**"), by implication, that constituted a constructive notice and mutual consent of the parties.

Dr. Ringo was therefore of a settled position that, such reliance on the use of electronic communications constitutes good evidence under the Electronic Transactions Act, Cap.442 R.E 2019, which covers admissibility of electronic evidence in criminal or civil proceedings.

According to Dr. Ringo, the above cited **Orders for Direction** by the arbitrator sufficiently met the requirement concerning extension of time which is contained under Item 3 of the 1st Schedule to the Arbitration Act, Cap 15, in the words:

> **"... or on or before any later day to which the arbitrators in writing signed by them may, from time to time, extend the time for making the award."**

As regards the issuance of '*Notices to all Parties*', under section 12(2) of the Arbitration Act, Cap.15, R.E. 2019, Dr. Ringo contended, and submitted proof that, the arbitrator complied with such a requirement as per the letter to the Registrar, which was dated 21st

September 2020, attached also to his submission as **Attachment App.2.**

In furtherance of his submissions, Dr. Ringo contended that, by all standards it ill behoves the Respondent to challenge the award at this Court on the basis of an excess of jurisdiction when it did not raise those points before the arbitrator. He argued that, such an issue ought to have been raised during the arbitration process under Rule 7 of the NCC Rules. Perhaps I should stop here and consider the point which Dr. Ringo has raised concerning the issue of jurisdiction.

In my view, the issue regarding jurisdiction can be raised at any stage in any proceedings, even at the appellate stage, even if it was not considered in the lower court or tribunal. This is a clear position set out authoritatively by the Court of Appeal in the cases of **Consolidated Holding Corporation Ltd v. Rajani Industries Ltd and Bank of Tanzania, Civil Appeal No.2 of 2003, CAT (unreported)** and **M/S Tanzania**

China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters [2006] TLR .70.

In the **M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters (supra),** for instance, the Court of Appeal stated as follows:

> *"The issue of jurisdiction of the court can be raised at any stage even before an appellate court. It is a substantive claim...."*

Similarly, in **Mvita construction Company v Tanzania Harbours Authority, Civil Appeal No.94 of 2001 (unreported),** the Court of Appeal reiterated a similar position holding that:

> *"in arbitration, like in a court of law, want of jurisdiction renders a decision and award a nullity. Also, both in court cases and in arbitration objection to jurisdiction can be raised at any stage of the proceedings. In a civil case objection can be raised even at the final appeal stage and, in an arbitration, objection can be raised even after publication of an*

award. However, in arbitration, a party can waive objection to the jurisdiction of the arbitrator."

That being said, I do not think that it is appropriate to contend, as the learned counsel for the Claimant did, that, the Respondent **should not have raised that issue at this stage** and, in this Court, only because it was not raised before the Arbitrator.

The above view of this Court, however, does not mean that I am making a conclusion or a finding that the arbitrator lacked jurisdiction. I will determine that issue when I address the first preliminary point law.

Having said so, let me proceed and consider the submissions by the Claimant, in response to the 2nd preliminary objection. In his submission, the learned counsel for the Claimant submitted that the Respondent's contention regarding time of filing the award is erroneous. He argued that, the award was conditional, a fact which is well captured under section 17 (2) of the Arbitration Act, Cap.15 RE 2019.

On that note, Dr. Ringo contended that, since page 27 of the award had a condition that the parties should perform certain obligations within 30 days from the date of the award, the filing of the award on the 24th September 2020 was well within time.

The Respondent' learned State Attorney filed a rejoinder submission. However, I see no point of summarizing what was stated in it given that it mostly reiterate what was stated in the Respondent's submission in chief.

From a quick assessment of the preliminary objections and the submissions made by the learned counsel for the parties, therefore, the issue which I am called upon to consider is: **whether the preliminary objections raised by the Respondent are of any merit.**

As regards the first objection, I find that, as correctly submitted by the learned counsel for the Claimant; there was a constructive mutual consent by the parties to extend time to conclude the proceedings. The

Arbitrators **Orders for Directions No.3, 4 and 5**, which were all issued after the initial 3 months period and which provided for, "**Liberty to Apply**", impliedly constituted a constructive notice and mutual consent of the parties as regards time to complete the proceedings.

It is clear that, none of the parties challenged the orders although the liberty to do so was made available to them. The acquiescence to such orders made by the arbitrator meant that the parties were comfortable and, indirectly or constructively and mutually, they consented to the extended time.

Be that as it may, one may as well hold that the Respondent acquiescence constituted a waiver and he cannot turn around at this time.

It is also worth noting, as correctly stated in the Singaporean case of **Republic of India v Vedanta Resources Plc [2020] SGHC,** that, arbitrators are masters of the own procedure. In this instant case, it is clear that, although Item 3 of the 1st Schedule to the Arbitration Act, Cap 15, R.E 2019 requires that an award

be made within three months, the law provides for a leeway which allows the arbitrator to extend such time on or before any later day as he may deem it fit. Once such a move is agreed by the parties and the arbitrator, no party can later decline from it.

In view of that, and looking at the ***Orders for Directions***, which the arbitrator issued in writing, and which were consented to by the parties, as evidenced by the **Attachment App. 1 (a)** to the submissions filed by Dr. Ringo, I find that, such directions fall within the wording of requirement for extension of time under Item 3 that the arbitrator **"...in writing signed by [him] may, from time to time, extend the time for making the award."**

For such a reason, it is my finding that the first objection is devoid of merit and is hereby overruled.

As regards the second limb of the first ground to the objection, I also find it to be lacking merit. I hold so because the award, having been made, was communicated to the parties as evidenced by Attachment

No.2. There was, as such, sufficient compliance with the requirement of the law.

To me, what the learned State Attorney seems to be arguing on behalf of the Respondent is that, the Respondent never received the communication regarding the issuance of the award. Moreover, the Respondent is also saying that it was only after perusing the Court records that the Respondent managed to notice that the letter forwarding the award to the Court was copied to the Respondent, which letter, nevertheless, was never received.

I find that, whether the letter was received by the Respondent or not, that is not an issue of any material significance. I hold so because, **firstly,** if the parties had agreed to the mode of communication (i.e., electronic communication) and the mode agreed to effect communications was correctly employed, then that was not the Claimant's mistake.

Secondly, the award, once duly communicated to the Registrar of the Court by the Arbitrator, is deemed to

have been duly filed. The Respondent will, within 60 days from the date of filing of the award, be required, to either petition to the Court to have it set aside or remitted to the arbitrator. Failure to do that will entitle the Court to proceed and register it for its enforcement as a decree of the Court. The above legal position is well settled and I need not be detained on that.

Thirdly, the Respondent did not even state whether he has suffered any prejudice if at all he only came to learn of the existence of the award in Court. As such, the second limb of the first objection has no merit and I hereby overrule it as well.

Concerning the 2nd Objection, I also find it to be unmeritorious. I hold so because, the award was made subject to fulfilment of certain conditions which each party was expected to fulfil within 30 days of the award. In particular, at page 27 of the award, the arbitrator stated that:

> *"Thus, the contractor should re-enter the site and execute the remaining*

works. Simultaneously, the Respondent should pay the contractor the remaining amount as parties had agreed in writing, witch (sic) agreement resulted into the issuance of Provisional Certificate No.1. That, the parties should perform the said obligations within 30 days from the date of this Final Award is release (sic) to the parities".

With such conditions, it is correct to argue, as the learned counsel for the Claimant asserted, that, the filing of the award was well within time as the counting of the days could not have started before the 30 days within which the parties were called upon to fulfil their obligations. Any party intending to enforce the award would have been caught up with an issue of trying to act pre-maturely.

In view of the above, I find that, the second objection lacks merit as well, and, as correctly stated by the Claimant's learned counsel, the case of **Siemens Limited and Another v Mtibwa Sugar Estate, Misc.**

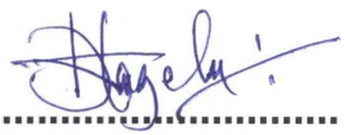
Commercial Cause No.247 of 2015 (unreported) and the like, could have been relevant only if the award was made unconditionally. Since the award was conditionally made, that case, and the rest of cases referred to, will remain distinguishable to the instant case at hand.

In the upshot, this Court settles for the following orders, that:

1. *the two preliminary objections raised by the Respondent are hereby overruled.*
2. *The Respondent should ensure that its petition stating the grounds for challenging the award is filed within the prescribed time failure of which the Court will proceed to enforce the award as a decree of the Court.*
3. *This Court makes no orders as to Costs.*

It is so ordered.

DATED at **DAR-ES-SALAAM** this 28th January, 2021.



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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
28 / 01 /2021

Ruling delivered in the presence of Dr. Fred Ringo, learned counsel for the Claimant and Mr. Hosea, learned State Attorney for the Respondent.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
28 / 01 /2021