IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 3 OF 2019
(Arising from Misc. Commercial Cause No. 11 of 2018)

IN THE MATTER OF THE ARBITRATION ACT [CAP 15 R.E. 2002]
AND
In the Matter of an Arbitration conducted in the International Court of Arbitration of the International Chamber of Commerce in Arbitration Case No. 22118/TO ("ICC Arbitration")

BETWEEN
YARA TANZANIA LIMITED (as "Claimant") and DB SHAPRIYA & CO LIMITED (as "Respondent" in the ICC Arbitration)

AND
In the Matter of an Intended Petition to challenge the Ex-parte Award granted by the ICC International Court of Arbitration ("ICC Award") in favour of the Claimant

By
DB SHAPRIYA & CO. LIMITED.....PETITIONER
AND
YARA TANZANIA LIMITED.....RESPONDENT

JUDGMENT

K. T. R Mteule, J

31/8/2021 & 2/12/2021

This petition is seeking to set aside the Arbitral Award dated 17th July 2018 emanating from arbitration proceedings in Arbitration Case No. 22118/TO held in the International Chamber of Commerce (ICC). The arbitration proceedings involved the parties but was conducted without the attendance of the Respondent. Being annoyed by the proceedings in the ICC which resulted to the award, the Petitioner filed this petition under Section 16 of The Arbitration Act, No. 2 of 2020 seeking to set aside the foreign arbitral

Award. The petition alleged misdirection in substantive jurisdiction and serious irregularities in the arbitral proceedings.

As a brief background of the matter, the dispute between the parties emanated from a Contract for Engineering, Procurement and Construction of Tanzania Fertilizer Terminal Project at Kurasini. Due to misunderstandings which arose from the construction project, on 29 March 2016, the Petitioner filed Commercial Case No. 37 of 2016. Upon the respondent's application, on 31st March 2016 the court stayed the proceedings for 30 days to allow parties to refer the matter to arbitration as per their terms of agreement. Arbitration proceedings were not opted timely hence this Court ordered for the Commercial Case No. 37 of 2016 to proceed. In response, The Respondent/Defendant sought intervention of the Court of Appeal in reversing the Commercial Court order to allow the suit to proceed and at the same time initiated arbitration proceedings at ICC and obtained an Award without the participation of the Petitioner and without stay of Commercial Case No. 37 of 2016.

On 24th September 2018, in favour of the Petitioner/Plaintiff, this Court delivered a Default Judgment in Commercial Case No. 37 of 2016 and awarded the claims including the balance of the contract price. It is not disputed that it was the same contract which was the subject in the arbitration proceedings in the ICC Tribunal. It is further not in dispute that the Respondent has currently filed another application in this Court seeking for extension of time to set aside the Default Judgment in Misc. Commercial Application No. 57 of 2020. It is the gist of this petition that, due to the

irregularities around the entire arbitral proceedings, the arbitral awards should be set aside. The petition is premised on the following arguments: -

(i) That the High Court of Tanzania (Commercial Division) has already ruled that the arbitration proceedings were illegally initiated while it had already ordered the Commercial Case No. 37 of 2016 to proceed on 19th May 2016;

(ii) That the High Court of Tanzania (Commercial Division) has already entered a Default Decree against the Respondent in Commercial Case No. 37 of 2016 based on the disputes on Contract that was subject of the arbitration Award. Hence, the Award cannot co-exist with the valid Decree of this same Court;

(iii) And in alternative to item (ii) above, that this Honourable Court is functus officio as it had already rejected arbitration proceedings and delivered its Default Decree in Commercial Case No. 37 of 2016 which is subject of the appeal in the Court of Appeal in Civil Appeal No. 245 of 2018 filed by the Respondent;

(iv) That the Award was rendered out of the required time provided under the ICC Arbitration Rules 2012;

(v) That the Award was illegally procured by the Respondent and there was misconduct on part of the Arbitral Tribunal/Arbitrator.

The Respondent filed Answer to the Petition in which substantive arguments of the petitioner were disputed. The Respondent maintained that the matter

in the Commercial Case No 37 of 2016 are different from the matter in the Arbitral tribunal hence the application has no merit.

In arguing this petition, parties filed skeleton arguments which were followed by oral submissions. In the submissions, the petitioner was represented by Mr. Roman S.L. Masumbuko, from Roman Attorneys while the Respondent was represented by Mr. Gasper Nyika Advocate from IMMA Advocates.

Having considered the Petition, the Answer to the petition, the skeleton and the oral submissions, the issue for determination is **whether there has been sufficient ground to set aside the arbitral award or make any other order against it.**

The respondent's submissions were drawn and filed by Mr. Masumbuko who started by stating that **Sections 69 and 70 of the Arbitration Act, No. 2 of 2020** allow setting aside of an Award on grounds of substantive jurisdiction and serious irregularities. He continued to submit on the grounds of the petition one after another.

With regards to the **first** ground of petition, it is submitted by Mr. Masumbuko **that the High Court of Tanzania (Commercial Division) has already ruled that the arbitration proceedings were illegally initiated while it had already ordered the Commercial Case No. 37 of 2016 to proceed on 19th May 2016.** According to him, this ground of petition is based on substantive jurisdiction of the arbitral tribunal hence the court can declare an arbitral award of no effect based on the ground that the

arbitral tribunal did not have substantive jurisdiction. He quoted Section 69(1) of the Arbitration Act, 2020 thus:-

> ***S. 69(1) A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to court-***
>
> ***(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or***
>
> ***(b) for an order declaring an award made by the arbitral tribunal on the merits to be of no effect, in whole or in part, on grounds that the arbitral tribunal did not have substantive jurisdiction.***

Mr. Masumbuko protested that Petitioner did object the jurisdiction of the arbitral tribunal from the first day on the same ground that this Court allowed Commercial Case No. 37 of 2016 to proceed to its finality after parties failed to refer the matter to arbitral tribunal. He is of the view that the jurisdiction of the arbitral tribunal ceased with the order of this Court issued on 19th May 2016. He criticised Respondent's initiation of the arbitral proceedings without the leave of this Court or consent of the Petitioner.

Citing the work of **Redfern and Hunter on International Arbitration, 5th Edition (Oxford University Press, 2009)** page 68, Mr. Masumbuko contended that the fact that there was an arbitration clause did not justify the acts of the Respondent in initiating the arbitration proceedings after this Court had ordered the Commercial Case No. 37 of 2016 to proceed to its finality.

Mr. Masumbuko complained further that the claims submitted to the arbitral tribunal were not notified to the Petitioner who objected to the jurisdiction of

the arbitral tribunal through a letter dated 10th August 2016. In his opinion, the resulting Award was illegal as the tribunal was moved to entertain a dispute which emanated from the Contract that was subject of the Commercial Case No. 37 of 2016.

Mr. Masumbuko quoted page 14 of the Court Ruling of 19th May 2016 and page 9 of the default judgment where the court indicated to be unpleased by the irregular conduct of the respondent in the arbitration proceedings. He further reproduced the following words from the default judgment explaining the chronology of the case and how the proceedings were stayed and how they were ordered to proceed after the Court Order of 19th May 2016. The words are:

> ***"From the chronology of events as narrated above it is evident that on 27th May 2016 when the Defendant filed Miscellaneous Commercial Cause No. 92 of 2016, seeking for an order to stay Commercial Case No. 37 of 2016 an order for stay of proceedings in order to allow parties to submit their dispute which was made on 19th May 2016 in respect of the same matter (i.e. Commercial Case No. 37 of 2016) was still in force. On 15th June 2016, this court (Songoro, J) made an order refusing to issue any further order of staying the suit. In law, after that order, and in terms of Rule 20(1) of the High Court (Commercial Division) Procedure Rules, the Defendant, were under obligation to file their defence. I therefore agree with the plaintiff's counsel that after the decision of this court***

refusing to stay the proceedings in Commercial Case No. 37 of 2016 the Defendant was obliged to file their defence."

According to the applicant, from the above words, the respondent was under the obligation to file defence and not to do anything else to circumvent the court order and the arbitral tribunal had no jurisdiction to entertain any dispute under the contract after the Court Order of 19th May 2016.

The **second** ground of the petition is on **impracticability of the Award to co-exist with the valid Decree of this same Court**. Addressing this ground Mr. Masumbuko submitted that since the effect of registering the ICC Award will turn it into a decree of this Court in favour of the Respondent under **Section 79 of the Arbitration Act, 2020,** then it is illegal for the same court to issue another decree in favour of the Respondent by registering the ICC Award. That by issuing a Default Judgment, this Court declared the rights of the parties in the contract and therefore cannot circumvent its decision by giving rights to the other party through a decree on Award. That there cannot be two decrees giving same rights to opposite parties on the same contract. To cement his argument Mr Masumbuko referred to **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser, Civil Application No. 33 of 2012, CAT at Dar es Salaam** (Unreported) where at page 14 the Court of Appeal had the following to say:-

"So far we concur. We would like, however, to note with considerable apprehension, as to what would be the appropriate procedure to be adopted. We do so bearing in mind that there should be no room open to the High Court and

courts subordinate thereto whereby one judge would enter judgment and draw up a decree in one case (thus bring such a case to finality) only to find another judge of the High Court soon thereafter setting aside the said judgment and decree and substituting therefor with a contrary judgment and decree in a subsequent application. To do so in our considered opinion amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction"

According to Masumbuko, Arbitration emanates from the agreement between parties but that cannot supersede the Judgment or Decree or Order of the Courts and the Parliament never intended to surrender the jurisdiction of Court in Tanzania to arbitral tribunal. He submitted further, that the principle of Sanctity of Contract cannot be used to allow parties to do away with the jurisdiction or circumvent of Judgment of Courts in Tanzania. He cited the case of **East African Breweries Ltd vs. GMM Company Ltd [2002] TLR 12** which ruled that parties cannot agree to exclude the jurisdiction of the Courts. He quoted page 18 to wit:-

"... But could they agree as they did by implication, to exclude the jurisdiction of this Court? Sheridan, C.J. in the case of Theodore Wendt v. Chhaganlal Jiwan and Haridas Munji Trading in partnership under the style of Chhaganial Jiwan and Company (2) said at page 461 that the High Court's jurisdiction 'is not capable of being ousted'. It is my view, therefore, that when it is considered that the defendant in the case now under discussion has a registered place of business

in Tanzania the plaintiff has a right under section 18 of the Civil Procedure Code 1966 to bring suit against the defendant in this High Court because parties were not competent in law to agree to oust the jurisdiction of the Tanzania Courts..."

That the Court went on to observe the following on page 20 to wit:-

"The Court (Georges, C.J.) held that even if there had been a submission to a foreign arbitrator that could not of itself constitute an ouster of jurisdiction of the Court. As regards what constitutes "a step in the proceedings' the Court held that "Any application to a court for an order in respect of the proceedings is 'a step in the proceedings' within the meaning of section 6 of the Arbitration Ordinance Chapter 15"

While considering the above words Mr, Masumbuko is of view that there is no principle of sanctity of contract or arbitral award that can oust the jurisdiction of the Court in Tanzania especially when both parties are nationals or resident companies of Tanzania. He remarked that this application must be granted and the award be set aside with costs.

Alternatively, Maumbuko argued the **third** ground of petition on this **Court being *functus officio.*** He submitted that this Court had already rejected arbitration proceedings and delivered its Default Decree in Commercial Case No. 37 of 2016 which is subject of the appeal in the Court of Appeal in Civil Appeal No. 245 of 2018 filed by the Respondent. He equated this ground to substantive jurisdiction. According to him, the Respondent appealed this

decision to the Court of Appeal in Civil Appeal No. 245 of 2018 citing that they had right to go to arbitration where on 22nd April 2020 the appeal was dismissed on ground that the Respondent should file an application to set aside the Default Judgment. According to Mr Masumbuko the Respondent has not set aside the said Default Judgment to date.

Mr. Masumbuko recollected that the Court also stayed the Misc. Commercial Application No. 48 of 2019 pending the determination of Civil Appeal No. 245 of 2018 on ground that the issues of arbitration were subject of that pending appeal. He submitted that since the Court of Appeal had ruled that the Respondent should file an application to set aside the Default Judgment, this Court is precluded from registering any award as the Default Judgment has not been set aside. He quoted the following words from **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser** (supra) at page 15:-

> ***"Once judgment and decree are issued by a given court, judges (or magistrates) of that court become 'functus officio' in so far as that matter is concerned..."***

In Mr. Masumbuko's view, this Court is functus officio Court cannot register the illegal award unless the Default Judgment is set aside.

As a **fourth** ground the petition is premised on the argument that **the Award was rendered out of the required time provided under the ICC Arbitration Rules 2012.** Under this ground Mr. Masumbuko alleged irregularity in conducting the arbitration proceedings as per Section 70 (1) and (2) of the Arbitration Act, 2020. The time required for the delivery of the

Award is six (6) months as per Article 31(1) of the ICC Arbitration Rules 2017 which provides as follows:-

> ***"The time limit within which the arbitral tribunal must render its final award is six months. Such time shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of the application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2)"***

That the Terms of Reference were approved by the ICC Court on 13th February 2017 and notified to the parties hence the Arbitral Award should have been delivered by 12th August 2017 noting that the Petitioner never participated in the arbitration proceedings and did not sign any document save for the letter which denounced the jurisdiction of the arbitral tribunal out of respect of the Court Orders of the Courts in Tanzania. That there is neither explanation given in the Award as to failure of delivery of the Award timely neither having extension of time allowed by the ICC Court in terms of Article 31(2) of the ICC Rule 2017 before the time of six (6) months had lapsed. Mr. Masumbuko condemned these five (5) months delay after the expiry of required time as totally illegal by own ICC Rules.

As a **fifth** ground of petition, Mr. Masumbuko alleged **illegal procurement of the award by the Respondent and misconduct on part of the**

Arbitral Tribunal/Arbitrator. He argued that the arbitral tribunal was quite aware of the court proceedings in Tanzania as indicated during its partial decision on jurisdiction in its observation on Clause 68.2 of the Award thus:-

> ***"The Arbitral Tribunal is also satisfied that there is no overlap between the dispute which had been instituted by the Respondent before the High Court of Tanzania, despite the arbitration clause entered into between the Parties, and the claim before the Arbitral Tribunal. The claim before the High Court of Tanzania principally relates to whether the Claimant was entitled to call on the Barclays and Commerzbank Guarantees provided by the Respondent under the Contract. The Claimant's claim before the Arbitral Tribunal relates to its claims under the Contract, including alleged negative variations orders, direct purchases and delay damages. It does not include the question on call on the guarantees."***

In contrast, Mr. Masumbuko submit that Commercial Case No. 37 of 2016 included balance of contract price which was awarded in the Default Judgment. He alleged the Arbitral Tribunal, for changing the terms of request without approval of the Petitioner after the procedural order has been signed and Terms of References had been approved by the ICC Court. He cited Clause 89 of the Award which reads as follows:-

> ***"At the hearing in order to avoid any potential overlap with the court proceedings in Tanzania, the Claimant abandoned the relief which sought a declaratory award that the amounts***

claimed could be recovered from the guarantees held by it. Instead it sought a declaratory award framed as follows..."

This is totally illegal and unprocedural, remarked Mr. Masumbuko, as the claims could not be amended during the hearing as the Claimant was required to file fresh claims if it thought that there was overlapping with the claims in courts in Tanzania. He accused the Arbitral Tribunal with biasness in trying to assist the Respondent to circumvent the proceedings in. Commercial Case No. 37 of 2016 by reframing the claims which he called a grave misconduct by the Arbitral Tribunal contrary to **Section 70(2)(a) & (c) of the Arbitration Act, 2020**.

Mr. Masumbuko challenged what he called exorbitant legal fees paid to Mr. Mark Chennells as the lawyer for the Respondent/Claimant who was admitted in during the hearing of the Claimant's case contrary to the ICC Rules which require the representation to be formally filed. Masumbuko contended that although the Arbitral Tribunal came to discover the improper admission of the lawyer and required a Power of Attorney from him as it can be seen on Clause 7 of the Award, this happened after he had fully participated in the proceedings. Masumbuko accused that the lawyer was the link between the arbitral tribunal and the Claimant as he had connections with the arbitrators (Clause 325). He considered award of GBP 68,100 for the three appearances while the law firm that hired him was awarded GBP 244,567.89 (Clause 327) to have no justification, illegally and corruptly procured by the Claimant.

Masumbuko raised accusation of past relationship between the two co-arbitrators and Mr. Mark Channells who was drafted in at hearing stage which in his view, is the reason why the costs awarded to Browne Jacobson were GBP 244,567.89 for only administrative works and GBP 68,100 to Mr. Chennells for legal fees. On this account, Mr. Masumbuko submitted that the ICC Award was illegally procured contrary to **Section 70(2)(g) of the Arbitration Act, 2020** and should be set aside with costs.

On the sixth ground, Mr. Masumbuko argued that the Award is contrary to public policy and law since it has serious procedural irregularity as provided under Section 70 (2) (g) of the Arbitration Act, 2020 which allows the Court to set aside an award obtained by fraud or procured in a manner that is contrary to public policy. He contended that it is against a public policy and law that a person can be subjected to two different forums at the same time. Masumbuko further based this ground on the alleged unjustified huge costs awarded.

Mr. Masumbuko referred to the case of **Arusha Planters & Traders Ltd & Others vs. Euroafrican Bank (T) Ltd, Civil Appeal No. 78 of 2001, CAT at Dar es Salaam** (Unreported), where the Court of Appeal had the following to say at page 15:-

> ***"...Both Dr. Bwana, J. and Katiti, J. were judges of the High Court with similar jurisdiction. Granting such an order would not augur with good administration of justice. Also in similar vein, for a Commercial Division of the High Court to declare a consent settlement recorded by the Main Registry of the High***

Court null and void thereby vacating it as prayed for in prayers (a) and (b), would not augur with good administration of justice as it would give a false impression that a Commercial Division of the High Court can overrule a decision made by the High Court Main Registry."

In Masumbuko's view the intent of the award is to offset the remedies given in the Default Judgment which should not be entertained. He argued that the law requires no person to be subjected into two forums or decisions on the same course or same contract as observed in the case of **Asha Soud Salim vs. Tanzania Housing Bank [1983] TLR 270.**

On the other hand, Nyika Advocate for the respondent opined that the grounds raised in the Petition do not in law warrant this Court refusal to recognize and enforce the award setting aside the award as prayed for by the Petitioner. According to Mr. Nyika, this court does not have jurisdiction to set aside the award in terms of section 69 and 70 of the Arbitration Act because these provisions do not apply where the seat of arbitration is not Mainland Tanzania.

Starting with Jurisdiction, Mr. Nyika contended that Section 69 and 70 under which the Petitioner is seeking to set aside the award allow the Court to inter alia set aside the award for want of substantive jurisdiction on part of the tribunal, but these positions do not apply where the seat of arbitration is not mainland Tanzania. He submitted that Section 5(1) of the Arbitration Act provides that the provisions of the Act shall apply where the seat of

arbitration is in Mainland Tanzania save for the provisions of section 13, 46 and 68 which may apply even where the seat of arbitration is outside Tanzania, or no seat has been designated or determined.

Mr. Nyika submitted further that the seat of arbitration of the award subject of this Petition was London England as per page 14 of the Arbitral awards and clause 20.6 of the General Conditions of Contract (GCC) as amended by the Particular Conditions of Contract. He submitted that this Court does not have jurisdiction to set aside the award based on section 69 and 70 because the two sections do not apply where the seat of arbitration is not Mainland Tanzania.

Responding on the ground that **the High Court of Tanzania (Commercial Division) had already ruled that the arbitration proceedings were illegally initiated while it had already ordered the Commercial Case No. 37 Mr. Nyika** denied existence of such order in that decision of the court. According to Nyika the Court dealt with who had the obligation to submit the dispute subject of Commercial Case No. 37 of 2016 to arbitration and concluded that both parties had the obligation and had since failed to do so. Referring to paragraph 1.5 page 9 of the arbitral award, Nyika stated that the Court did not address itself to the arbitration proceedings subject of this petition because in any event the request to arbitration was made on 15 July 2016 which was well after the Court decision of 19 May 2016. According to him, contrary to the Petitioners understanding the arbitration proceedings being referred to in the default Judgement in the Petition are those which relates to the dispute in Commercial Case No. 37 of 2016 and not the dispute

submitted to arbitration by the Respondent, and which are subject of the award in these proceedings. He averred that the default Judgement did not touch the ICC proceedings at all.

In distinguishing the Commercial Case No. 37 of 2016 from the ICC arbitration, Nyika is of the view that the claim in Commercial Case No. 37 of 2016 related to whether the Petitioner was entitled to call on the Barclays and Commerzbank Guarantees provided by the Petitioner in favor of the Respondent under the contract while the Respondent claim before the Tribunal related to its claims under the contract including the alleged negative variation orders, direct purchases, and delay damages. In his view, the matter before the Tribunal had nothing to do with call of guarantees hence no overlap in the two matters. That this point was considered and decided by the ICC Tribunal in the partial award attached in the Answer to the Petition.

In alternative, Nyika maintained that even if the Commercial Court had ruled that such proceedings were illegal which he disputes, he submits such ruling would not have taken away the tribunal substantive jurisdiction because the tribunals jurisdiction is derived from the submission or agreement. He contended that the Petitioner does not argue in this case that there was no agreement submitting all the disputes to arbitration or that the matters submitted were beyond the scope of the arbitration act. He submits that the Court should take the inspiration from section 32(1) which clearly shows that in determining whether the tribunal has substantive jurisdiction consideration is on only three questions which are whether there is valid arbitration

agreement, whether the arbitral tribunal is properly constituted and whether the matter dealt with are within the scope of matters agreed to be submitted to arbitration. In his view, the Petition does not address the three questions and therefore section 69 or even section 69(3) (c) proposed by the Petitioner has not been satisfied.

As to whether the **High Court of Tanzania (Commercial Division) has already entered a Default Decree against the Respondent in Commercial Case No. 37 of 2016 based on the disputes on Contract that was subject of the arbitration award hence, the Award cannot co-exist with the valid Decree of this same Court,** Mr. Nyika had the following to submit.

He maintained that the subject matter in Commercial Case No. 37 of 2016 is different from the subject matter submitted to ICC arbitration which resulted to the award subject of this Petition. That the claim in Commercial Case No. 37 of 2016 related to whether the Petitioner was entitled to call on the Barclays and Commerzbank Guarantees provided by the Petitioner in favor of the Respondent under the contract while the Respondent claim before the Tribunal related to its claims under the contract including the alleged negative variation orders, direct purchases, and delay damages. That the matter before the Tribunal had nothing to do with call of guarantees and as confirmed by the Tribunal there was no overlap in the two matters. According to Nyika, the award did not deal with the questions as to whether the Respondent was justified to call the guarantees but only dealt with the items separate with what was being claimed in the suit at the Commercial Court.

He challenged the applicability of the case of **Mohamed Enterprises (T) Limited versus Masoud Mohamed Nasse**r cited by the Petitioner contending that in that case a Judge of the High Court set aside a Judgement of a fellow Judge while the decree from the ICC Award will not have the effect of setting aside the default Judgement because the matters dealt with were different.

He similarly confronted the applicability of the case of **East African Breweries Ltd versus GMM Company Ltd (2002**) cited by the Petitioner on the argument that in recognizing and enforcing the arbitral award the Court will not be blessing the party's agreement to take away jurisdiction of the Court because no jurisdiction was taken away. Mr Nyika referred the Court to the decision of the Court of Appeal in ***Scova Engineering S.p. and Another versus Mtibwa Sugar Estates Limited & 3 Others, Civil Appeal No. 133 of 2017, Court of Appeal of Tanzania at Dar es Salaam (Unreported)*** where the need for courts to respect the party's choice of forum in agreements was emphasized.

As to whether this court is *functus officio* Mr. Nyika reiterated that there has never been a decision by this Court rejecting the ICC Arbitration initiated by the Respondent on matters related to its claims under the contract including the alleged negative variation orders, direct purchases, and delay damages. He submits that the court decision of 19 May 2016 and the default Judgement of 30 August 2018 did not at all address or rule on the arbitral proceedings related to the award subject of these proceedings, but it was only in respect of the matters in Commercial Case No. 37 of 2016 which was

whether the Petitioner was entitled to call on the Barclays and Commerzbank Guarantees provided by the Petitioner in favor of the Respondent under the contract. Nyika submitted that the question of ***functus officio*** should not arise at all as the Petitioner has not even stated in which provisions of the Arbitration Act between section 69 and 70 is this ground based.

Responding on the assertion that **the award was rendered out of the required time provided under the ICC Arbitration** Mr. Nyika, referring to part VI of the ICC award at pages 50 to 51, stated that the ICC International Court of Arbitration extended the time for delivering the award until 31 July 2018. He argued that since the Petitioner has not cited any law or rule which shows that the ICC Court could only extend the time for delivering the award before the six months period provided under the article 23(3) or 24(2) then this ground is misconceived. Mr. Nyika further challenged the applicability section 70(2)(c) of the Arbitration Act since the arbitration was conducted in accordance with the procedure agreed by the parties.

A to whether the award was illegally procured by the Respondent and there was misconduct on part of the Arbitral Tribunal/Arbitrator, Mr. Nyika reiterated that the matters dealt with by the arbitral tribunal were different from those dealt with in Commercial Case No. 37 of 2016. In his view, the Petitioners submissions confirms that the tribunal never dealt with the matters before the Court and that Paragraph 89 of the award was a further precaution of avoiding such overlap.

Mr. Nyika denied any amendment of the claim done during the hearing. He submitted that rather the Respondent abandoned a relief which would have created a potential overlap with the court proceedings. The Petitioner has not cited any provision of the ICC Rules which bars a party from abandoning party of a relief.

Submitting against the allegations on unprocedural appearance of Mr. Chennells during the hearing and arbitrators' impartiality and possible corruption, Mr. Nyika contended that these are totally speculative and not supported by any evidence. He urged the Court not to accept evidence from the bar while citing **The Registered Trustees of the Archdiocese of Dar es Salaam versus The Chairman Bunju Village Government, Civil Appeal No. 147 of 2006 Court of Appeal of Tanzania at Dar es salaam (Unreported)** at page 7. He submitted that there is nothing to bring the arbitral award under the ambit of section 702(g) of the Arbitration Act. That is trite law that the standard of proof on allegations of fraud even in civil case is that of beyond reasonable doubt. In Nyika.s view there is no evidence to meet such standard in this case. He cited **Unilever Tea Tanzania Limited versus Thomas Okello Atito, Revision No. 256 of 2019, High Court of Tanzania Labour Division at Dar es Salaam (Unreported) Copy attached** pages 22 and 23.

On the Award being contrary to public policy and law, Mr. Nyika reiterated that there is neither evidence that the award was procured by fraud, corruption and or that the arbitrators lacked impartiality nor evidence that the award was cooked as alleged by the Applicant. In his opinion, the matters dealt with by the arbitral tribunal are different from the matters dealt

with by the Court since the Tribunal did not deal with the question of payment of balance of contract price. That the offset if any was to happen, will not be because the two claims are the same. It is therefore in Mr. Nyika's view that, no question of violation of public policy arises in this case. He questioned the applicability of the case of **Arusha Planters & Traders and Asha Soud Salim** because no Judgement was nullified by the Tribunal or will be nullified by this Court if the award is recognized. Nyika therefore prayed that the Petition to be dismissed with costs.

To answer the framed issue as to **whether there has been sufficient ground to set aside the arbitral award or make any other order against it,** I will address one ground after another as raised in the petition. I will start with the **first** ground which asserted that **the High Court of Tanzania (Commercial Division) has already ruled that the arbitration proceedings were illegally initiated while it had already ordered the Commercial Case No. 37 of 2016 to proceed on 19th May 2016.**

I have gone through the Ruling of the court dated 19th May 2021. What the court ruled was as quoted hereunder: -

> *"In view of the above, and that fact that parties are no longer interested to go for arbitration as per their contract and arbitration clause, the Court finds, that it has no reason to stay the hearing of the Application for temporary injunction and the main suit and it orders that the hearing of the Application is hereby fixed on the 20/5/2016 at 9.00am"*

By plain interpretation, I see no words in the ruling with effects to declare illegal the arbitral proceedings. I agree with Nyika Advocate that, since there were no arbitral proceedings initiated by the time of delivery of that Ruling hence there could be no chance by the court to declare non existing proceedings illegal. This first ground of petition is unfounded.

The **second** is that the **Default Decree against the Respondent in Commercial Case No. 37 of 2016 cannot co-exist with the arbitration Award**. It is not disputed that the effect of registering the award is to render it a decree of the court. Whether the two decrees cannot co exists is what is in issue amongst the parties, Mr. Nyika's argument is that the subject matter in **Commercial Case No. 37 of 2016** is different from the subject matter submitted to ICC arbitration which resulted to the award subject of this Petition.

To resolve this debate, it is pertinent to go through both the default decree and the arbitral award. The default decree awarded to the petitioner the following:

(1) *The Defendant shall refund the Plaintiff USD 450,000.00 which was unlawfully demanded and unlawfully received by the Defendant in Advance Payment Guarantee No. 01/GTEE/0127/13 issued by M/s Barclays Bank (T) Ltd.*

(2) *The Defendant shall refund the Plaintiff USD 1,566,041.00 unlawfully demanded and unlawfully received by the Defendant in Advance Payment Guarantee No. HK DAV 70208378001 issued by M/s Commercial Bank of Hamburg Germany.*

(3) *The defendant shall pay to the Plaintiff USD 1,967,173.74 being the balance of the contract price which was not yet paid to the Plaintiff.*

(4) *The defendant shall pay the interest rate of 3% per annum from the date of filing the suit to the date of judgment and further interest of 1% per annum from the date of judgment to the date of full payment of the decretal sum.*

(5) *The plaintiff is awarded costs of the suit.*

On the other hand, the following was what was awarded to in the Arbitral Tribunal;

"*330.1.Amendments 4 and 5 are valid and enforceable amendments to the contract and are legally binding upon the parties.*

330.2. By Amendments 4 & 5 Claimant and Respondent agreed that Claimant was entitled to delay damages as set out therein.

330.3. That the Claimant is entitled to the outstanding sum of USD726,230 in respect of Delay Damages and is entitled to deduct the same from such sums as may otherwise be due to the Respondent.

330.4. That the Respondent and the Claimant agreed that the Respondent was liable to pay or allow to the Claimant the costs of Direct Payments made by the Claimant on behalf of the Respondent

330.5. That the outstanding payment due to the Claimant in respect of Direct Payments is USD380,541.87.

330.6. That the Claimant is entitled to the outstanding sum of USD380,541.87 in respect of Direct Payments, and is entitled to deduct the same from such sums as may otherwise be due to the Respondent.

330.7. That the Claimant is entitled to recover from the Respondent the cost of the remedial work claimed in respect of Negative Variation Orders in the total sum of USD744,518.21 under Clause 7.6 and Clause 13.

330.8. That the Claimant is entitled to the sum of USD744,518.21 in respect of the Negative Variation Orders and is entitled to deduct the same from such sums as may otherwise be due to the Respondent.

330.9. That the Claimant is entitled to recover from the Respondent the cost of the remedial work claimed in respect of Defects in the total sum of USD190,659.68 under Clause 11.

330.10. That the Claimant is entitled to the sum USD190,659.68 in respect of the Defects and is entitled to deduct the same from such sums as may otherwise be due to Respondent.

330.11. That the Claimant is entitled to the sum of USD112, 221.35 representing 12% Project Management.

330.12. The costs of the Arbitration shall be paid by the Respondent.

330.13. The Respondent shall pay the Claimant forthwith the following amounts in respect of the Claimant's costs claimed in this arbitration:

330.13.1. £244,567.89 being legal fees from Browne Jacobson LLP ("Browne Jacobson")

330.13.2. £68,100 being Mr. Chennells' fees

330.13.3. £10,222.97 being Disbursements (IDRC Venue hire £6,509.71, Transcription Services - E2,692.50, Couriers 481.84, Other disbursements comprising copying/bundle costs and memory sticks - £538.92).

330.13.4 The sum of US$253,000 representing; US$32,370 being the payment of the CC's administrative expenses and US$220,630 being the fees and expenses of the arbitral tribunal paid to the ICC."

I have made a comparison to what was awarded in both the default decree in Commercial Case No 37 of 2016 and the arbitral award as listed above. I have considered the rival argument from Mr. Nyika that the claim in Commercial Case No. 37 of 2016 related to whether the Petitioner was entitled to call on the Barclays and Commerzbank Guarantees provided by the Petitioner in favor of the Respondent under the contract while the Respondent claim before the Tribunal related to its claims under the contract including the alleged negative variation orders, direct purchases, and delay

damages. What I construe from this line of argument is that Mr Nyika is trying to convince the court that the issues framed in the Tribunal distinguished the subject matter from that of Commercial case No. 37 of 2016. I am failing to agree with Nyika. Framing of issues depend on the nature of the arguments before the court. Since each forum proceeded one sided one cannot expect same issues to be framed. In my view, the issues in different forums of proceedings do not change the similarity of the subject matter. What guides framing of issues is the arguments brought before the court.

It is apparent and not in dispute that the arbitration proceedings and the Proceedings in Commercial Case No 37 of 2016 emanate from the same contractual differences from the same contract and the same parties. In my view, if the respondent had to participate in the Commercial case No 37 of 2016 what would have been her defence is what was submitted to the arbitration. Likewise, could the Applicant have participated in the Arbitral Tribunal, she would have presented as a defence what she submitted in Commercial Case No. 37 of 2016. Conducting two proceedings was in law not the best appropriate procedure. The best recourse was to take advantage of Section 6 of the then Arbitration Act, Cap 6, to initiate the proceedings when Commercial Case No 37 of 2016 was stayed for 30 days. In our scenario, it will remain that the subject matter in the Tribunal was the same differences in the contract of construction between same parties which was equally the subject matter in Commercial Case No 37 of 2021. The ultimate effect of the award if registered is to have two conflicting decrees. Two decrees from the

same court on the same subject matter amongst same parties cannot co-exist. It is so held with regard to the 2nd ground of petition.

The **third** ground is based on the assertion that **this Court is *functus officio*** as it had already rejected arbitration proceedings and delivered its Default Decree in Commercial Case No. 37 of 2016 which is subject of the appeal in the Court of Appeal in Civil Appeal No. 245 of 2018 filed by the Respondent. As said earlier, I read the decision which rendered the default decree but I could not find a rejection of the arbitral proceedings. The gist of the decision was the refusal to continue staying the proceedings pending arbitration. I agree with Mr. Nyika that the case of **Mohamed Enterprises** is not relevant as it concerned with a decision from two judges of the High Court. It is a settled position that arbitral tribunal is conferred jurisdiction by the parties through their contract. **(See M/S Marine Services Co. Ltd v M/S Gas Entec Company Ltd (Consolidated Misc Cause No. 25&11/2021) [2021] TZH ComD by Nangela J.).** It is not disputed that there is a clause in the parties' contract which refers to Arbitration disputes arising therefrom. In my view and as rightly submitted by Nyika, it is so apparent that there is no issue of functus officio in this matter. Each forum that is this Court in Commercial Case No. 37 of 2007 and the Arbitral Tribunal rightly did what it did with competent jurisdiction. Nevertheless, it is important to note that reference to Arbitration never oust the jurisdiction of the Courts in Tanzania.

The **fourth** ground is that **the Award was rendered out of the required time provided under the ICC Arbitration Rules 2012.** It is not in

dispute that at part VI of the ICC award at pages 50 to 51, the ICC International Court of Arbitration extended the time for delivering the award until 31 July 2018. In my view, the issue of time was taken care of by the tribunal. Whether in a right way of not, I have view that, this is not an appellate court for arbitral tribunal. This ground is of no merit.

The **fifth** ground is on the alleged **illegal procurement of the award by the Respondent and misconduct on part of the Arbitral Tribunal/Arbitrator.** At this point, Mr. Masumbuko mounted allegations of fraud and corruption against the Respondents. As submitted by Nyika, fraud and corruption are crimes. They need to be proved beyond reasonable doubt before anyone is penalised whether in criminal matters or in civil. Mr. Masumbuko did not have tangible evidence to clear reasonable doubts on this. I as well find this ground unfounded.

The **Sixth** ground centred on the assertion that the arbitral awards is contrary to public policy. According to Mr. Masumbuko, it is against public policy and law that a person can be subjected to two different forums at the same time. Masumbuko further base this ground on the alleged unjustified huge costs awarded in the arbitral award. I agree with Mr. Masumbuko on the point that subjecting a matter in two different forums cannot by all standards be equated to good practice and public policy. This ground has merit.

From the foregoing, it is the finding of this court that only two grounds have been sufficiently founded by the petitioner. It is found that, the arbitral award

cannot co-exist with the decree in Commercial Case No. 37 of 2016 unless it is set aside and this is contrary to public policy. What remains is whether the founded grounds are sufficient to warrant setting aside the arbitral awards or any other order against it. The petitioner's prayer to set aside the arbitral award is based on the provision of Sections 69 and 70 (2) (g) of the Arbitration Act, 2020. Mr. Nyika contended that pursuant to Section 5 of the Arbitration Act this Court does not have jurisdiction to set aside the award based on section 69 and 70 because the two sections do not apply where the seat of arbitration is not Mainland Tanzania. Section 5 of the Arbitration Act provides;

> *"5.-(1) The provisions of this Act shall apply where the seat of the arbitration is in Mainland Tanzania.*
>
> *(2) Notwithstanding subsection (1), the provisions of sections 13 and 68 shall apply even where the seat of the arbitration is outside Mainland Tanzania or no seat has been designated or determined.*
>
> *(3) The powers conferred under section 46 shall apply even where the seat of the arbitration is outside Mainland Tanzania or no seat has been designated or determined,*
>
> *Provided that, the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside Mainland Tanzania or that when designated or determined the seat is likely to be outside the United Republic makes it inappropriate to do so."*

Section 13 provides:-

"13.-(1) A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(2) An application under subsection (1) may be made notwithstanding that the matter is to be referred to arbitration after the exhaustion of other dispute resolution procedures.

(3) A person shall not make an application under this section unless he has taken appropriate procedural step to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim.

(4) The court shall, except where it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, grant a stay on any application brought before it.

(5) Where the court refuses to stay the legal proceedings, any provision in the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter shall be of no effect in relation to those proceedings."

From the above provisions, I agree with Nyika that Section 69 and 70 do not apply for International Arbitral Awards since the Arbitration Act has specifically designated provisions of law which apply in International Arbitration. I have gone through the designated provision; I am satisfied that Section 13 (5) of the Arbitration Act is relevant in the matter at hand.

Since it is not disputed that this Court refused to stay proceedings pending the arbitration and since it is the finding of this Court in this matter that the arbitral award cannot co-exist with the decree of this court emanating from the same arbitrated dispute, I find further that, unless the decree in Commercial Case No. 37 of 2017 is set aside, the Arbitral awards emanating from arbitration proceedings in Arbitration Case No. 22118/TO held in the International Chamber of Commerce (ICC) shall not have a legal force in this court. The petition is allowed to that extent with costs.

Order accordingly.

Dated at Dar es Salaam this 2nd Day of December 2021

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

KATARINA T. REVOCATI MTEULE

JUDGE