IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL CASE NO. 8 OF 2011
(original International Chamber of Commerce
Arbitration Case No. 15947/VRO)

TANZANIA ELECTRIC SUPPLY CO. LTD. ..... APPLICANT

Versus

DOWANS HOLDINGS SA (COSTA RICA) ..... 1ST RESPONDENT
DOWANS TANZANIA LTD. ..... 2ND RESPONDENT

Date of last submissions: 10/02/2012
Date of Ruling: 20/02/2012

R U L I N G

F. Twaib, J:

On 28th Sept 2011, my brother Judge, Mushi, J., delivered a judgment in which he dismissed a petition filed by the Applicant herein, TANZANIA ELECTRIC SUPPLY CO. LTD. (TANESCO) to set aside the arbitral Award of the International Chamber of Commerce Arbitral Tribunal ("the ICC Tribunal") dated 15th November 2010, in which the Applicant was ordered to pay the Respondents, DOWANS HOLDINGS SA (COSTA RICA) and DOWANS TANZANIA LTD., the sum of **US Dollars 65,812,630.03.** Mushi J. further ordered that, in terms of section 17 of the **Arbitration Act** (Cap 15, R.E. 2002), the ICC'S Final Award filed in this Court be formally registered and should be a decree of the Court and enforceable as such.

Following that judgment, on 4th October 2011, a team of lawyers comprising of Rex Attorneys, Advocates, Prof. Florence Luoga of F.K Law Chambers and Prof. P.J. Kabudi of the Faculty of Law of the University of Dar es Salaam, filed a Notice of Appeal against the said decision in terms of Rule 83 (1) of the **Court of Appeal Rules**, 2009.

On 12th October 2011, the Applicant filed an application for leave to appeal to the Court of Appeal against the said judgment under rules 11 (2) (b) and 47 of the **Tanzania Court of Appeals Rules**, 2009. The next day, it filed an application for stay of execution under section 11 (2) (b), rules 9 and 47 of the said **Rules**. By consent, the latter application has been stood over for determination after, and depending on, the outcome of the preliminary objections raised by the Respondents against the intended appeal and the application for leave to appeal.

Hence, what is before me for determination in this ruling are two issues: The preliminary objection and the application for leave to appeal. The Respondents' point of preliminary objection is to the effect that:

> *"The application is not maintainable since the judgment against which the appeal is being sought is not appealable with or without leave of the Court"*.

By consent, the parties argued the two issues by way of written submissions. Mr. Fungamtama, learned counsel for the Respondents, filed his clients' written submissions, while Rex Attorneys, learned advocates, filed the Applicant's submissions. I shall begin with a discussion on the point of preliminary objection. Consequent upon my decision thereon, it shall be clear that it will not be necessary for me to consider the merits of the application for leave to appeal.

Mr. Fungamtama took off on his submissions by referring to section 5 (1) (c) of the **Appellate Jurisdiction Act**, Cap 141 (R.E. 2002), which empowers this Court to grant leave to appeal to the Court of Appeal against its decisions. He pointed out, however, that it is expressly provided under that subsection that an appeal will not lie where any other written law for the time being in force provides otherwise. Counsel Fungamtama argues that the relevant "other law" for purposes of the Applicant's intended appeal is the **Civil Procedure Code,** Cap 33 (R.E. 2002) ("the CPC"). Section 64 of the CPC stipulates:

> *"Save in so far as is otherwise provided by the Arbitration Act, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule."*

The Second Schedule to the CPC enacts the **Civil Procedure (Arbitration) Rules.** Rule 21 (1) and (2) of the said **Rules** relate to the filing and enforcement of arbitral awards in a matter referred to arbitration without the intervention of a Court. That is the case herein. The rule states as follows:

> *21 (1) Where the Court is satisfied that the matter has been referred to arbitration and that an Award has been made thereon and where no ground such as is mentioned or referred to in rule 14 and 15 is proved, the Court shall order the Award to be filed and shall proceed to pronounce judgment according to the Award.*
>
> *(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the Award.*

Counsel's argument is based on the above provisions. He also referred the Court to the affidavit of Godwin Ngwilimi, Principal Officer of the Applicant, filed in

support of the application for leave to appeal. He submitted that to be entitled to appeal from Mushi J's judgment and decree, the affidavit must have alleged at least one of two things:

1. That the decree was in excess of the Award; or

2. That the decree was not in accordance with the Award.

Looking at Mr. Ngwilimi's affidavit, there is no mention of any of the two things. It would thus appear, and the Applicant also agrees, that the intended appeal by the Applicant does not seek to challenge the decree on any of the two grounds provided by rule 21 (2) of the 2nd Schedule. Instead, as Mr. Fungamtama submitted, the Applicant intends to seek:

> *"…a further opportunity at challenging the ICC Award by substantively appealing against the judgment and decree of Mushi, J and re-opening his determinations on questions of misconduct, error of law on the face of the record and public policy…"*

*The R*espondents' counsel further argued that a right of appeal can only be founded on a statute and any party who seeks to avail himself of the right must strictly comply with the conditions prescribed by statute. Thus, to permit the Applicant to appeal on grounds mentioned in paragraph 4 (i) to (v) of the Affidavit to Mr. Godwin Ngwilimi is, according to counsel:

> *"…to invent something which is not in Rule 21 (2) of the Second Schedule to the Civil Procedure Code and would be tantamount to creating a right of appeal by implication or inference which is patently impermissible in law."*

The Applicant's Counsel submitted that there is no precedent in Tanzania on the issue as to whether a party aggrieved by a judgment and decree of this Court dismissing a Petition for setting aside an arbitral Award and entering judgment

thereon has a right of appeal to the Court of Appeal, with or without leave. However, counsel cited one Kenyan authority and a number of Indian cases which he believes adequately cover the situation.

In Kenya, the provision which appears to be *in pari materia* to ours is Order XLV, Rule 17 (2) of the **Kenya Civil Procedure Rules** (Cap 21). In India, it is section 17 of the old **Indian Arbitration Act,** 1940 and Section 522 of the old **Indian Code of Civil Procedure**, 1882. The Court of Appeal of Kenya in the case of *Ruhara v Kabunga & Another* (1986) KLR 551 held:

> *"A decree that is in excess of or not accordance with an Award on which it is based cannot be allowed to go forth and will have to be subject of a right of appeal. Once, however, an Award survives an application to set aside, there would seem to be no compelling need to provide for an appeal on any ground other that the decree reflecting the judgment was in excess of or not in accordance with the Award."*

Mr. Fungamtama's other Indian authority is that of *Ram Babu v Lakshimi and Others* (1963) AIR All 252 which also dealt with section 17 of the **Indian Arbitration Act,** 1940. The findings of the Court were that while section 17 of the said **Act** provided for appeal, such right is not absolute:

> *"Section 17…places some limitations on this right of appeal….The right is curtailed to the extent that an appeal can be filed only on the grounds mentioned in this clause viz., it is in excess of or not otherwise in accordance with the Award. If such grounds do not exist, the right of appeal, which otherwise exists, is taken away by this clause."*

Counsel also referred the Court to the case of *Ghulam Khan v Muhamad Hassan* (1901) ILR 29 CL 167 and (1902) ILR 29 Cal 167. He also cited a decision of the Judicial Committee of the Privy Council on an appeal from India in *Union of India*

v N.P. Singh (1963) AIR Cal 1, 66 CWN 1074. The Privy Council, which used to be the highest appellate Court for India at the time, as was the case for Tanganyika during British rule, dealt with Section 522 of the then **Indian Code of Civil Procedure**, 1882. That decision was similar to the other cases already discussed. The Respondent's counsel also referred the Court to two other cases to support his contention that the law does not allow an appeal under circumstances such as the present: *State of West Bengal & Ors v Abdul Samad & Ors* AIR 1931 Cal 211; and *Chairman of the Purnea Municipality v Siva Sankar Ram* (1906) ILR 33 Cal 899.

On the strength of the above authorities, Respondents' counsel concluded that Rule 21 (2) of the Second Schedule to the Civil Procedure Code, does not create a right of appeal. The cumulative effect of Rule 21 (2) of the Second Schedule to the **Civil Procedure Code** is, according to counsel, "to place a limitation on an existing right of appeal against an order, decree, judgment, decision and finding of the High Court granted by Section 5 (1) of the **Appellate Jurisdiction Act**, 1979." Hence, in order for the intended appeal to have any chances of success against Mushi J's decision, the Applicant's grounds for seeking leave would have to be within one or both of the requirements of Rule 21 (2) of **Arbitration Rules**. Otherwise, there would be no right of appeal.

Counsel thus prayed that the Application for leave to appeal be dismissed with costs.

Responding to these submissions, Rex Attorneys, learned Advocates for the Applicant, acting through Dr. Alex Nguluma, began with a strongly worded submission to the effect that the Respondents' preliminary objection is legally misconceived. They argued:

"The basis upon which the preliminary objection is premised is fundamentally flawed it being founded on a clear misapprehension of the law applicable to proceedings giving rise to the instant application."

Applicant's counsels do not dispute the statement of the law under section 64 of the **CPC**, but are of the view that the said provisions do not apply to the present proceedings. Their position is that the Respondents' counsel's arguments have failed to distinguish between two procedures pertaining to filing of arbitral awards, namely:

"[T]he filing of an Award by arbitrators under the Arbitration Act Cap 15, and seeking assistance of the Court to give effect to an arbitral Award where none is filed by the Arbitrators in arbitration without the intervention of the Court under the provisions of Rule 20 of the [2nd Schedule to the] CPC."

According to Dr. Nguluma, the two procedures are distinct and independent of each other and the consequences of action taken within each of the two procedures are "not necessarily similar". Counsel gave a background to the present matter, saying that the Respondents had made a reference to the ICC, which issued an Award in their favour. The Applicant then petitioned this Court to set aside the Award. Mushi J dismissed that petition and entered judgment under section 17 of the **Arbitration Act**. Aggrieved, the Applicant now wants to appeal to the Court of Appeal. According to Applicant's counsel, and contrary to the Respondents' counsel's argument, there is no restriction in respect of an appeal against a judgment entered in terms of section 17 of the **Arbitration Act**.

Dr. Nguluma further argued that following the decision in *Tanzania Cotton Marketing Board v Cogecot Cotton Co. SA* [1997] TLR 165, the current practice in Tanzania is that what constitutes the filing of the Award is the receipt of the

Award by the Registrar of the High Court. The Court would then have power to set aside the Award or remit it to the arbitrators under sections 15 and 16 of the **Arbitration Act**. If not set aside or remitted, the Award becomes enforceable as if it were a decree of the Court. Powers to set aside the Award or remit it to the arbitrators is exercisable upon a party to it moving the Court to do so under sections 15 or 16 of the Act. According to the Applicant's counsels, the procedure for such an application is provided for under the **Arbitration Rules**, whose rule 3 provides that the Rules "…shall apply to all awards filed under the [Arbitration] Act."

It is further the view of the Applicant's counsel that the **Arbitration Act** provides for "a definitive procedure" for a party aggrieved by an Award and hence the 2nd Schedule to the CPC does not apply to the present case. Going by Counsels' reasoning on the distinctions they have drawn, it is to be assumed that the procedure they are referring to is the one to be followed in an instance where the arbitrators have filed the Award, as is the case herein. However, a reading of the Arbitration rules made under section 20 (now section 21) of the **Arbitration Act**, would show that the Rules do not provide for any such procedure. Although section 21 (d) of the Arbitration Act gives the High Court powers to make rules "for the general conduct of all proceedings in Court under [the] Act", none of the Rules made under GN 427 of 1957, provide for any procedure for appeals. The question that now falls for consideration is: In the absence of such provisions, what would be the procedure applicable?

Respondent's counsel would suggest that we would then be left to rely on the provisions of the **Second Schedule to the CPC**, which apply by virtue of section 64 of the **CPC**. Section 64 governs "…all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder…" Following that route would take us to the provisions of rule 21 (2) of the 2nd Schedule to the **CPC**, which limit the Applicant's right of appeal as already explained.

Admittedly, the argument by the Respondents' counsel and the authorities he has cited do have a lot of force. I have given due consideration to all those authorities. In the end, however, and with great respect, I am unable to follow any of them. I shall take a different view. However, with even greater respect, I do so not on the strength of the authorities cited by learned counsel for Applicants. As Mr. Fungamtama intimated, the cases cited by the Applicant's counsel, *Blueline Enterprises Ltd. v East African Development Bank,* Civil Application No. 103 of 2003 (unreported) and *East African Development Bank v Blueline Enterprise Ltd.*, HC Misc. Civ. Cause No. 177 of 2007 (unreported) are no authorities for the proposition that the provisions of section 64 and the 2nd Schedule to the **Civil Procedure Code** do not apply to a judgment and decree entered and issued pursuant to section 17 of the **Arbitration Act**. However, with due respect to Mr. Fungamtama, it is incorrect to suggest that the applicable provision will then be rule 21 (2) of the 2nd Schedule to the **Civil Procedure Code**. I will explain.

I am of the settled view that the silence in section 17 of the **Arbitration Act** as to whether an appeal may lie from a judgment and decree entered under it can and should be answered by section 5 (1) of the **Appellate Jurisdiction Act**. However, I do not think that the correct clause is clause (c) of that subsection, relied upon by Applicant's counsels, which is an omnibus provision providing for appeals with leave of this Court or of the Court of Appeal, against "every other decree, order judgment, decision or finding of the High Court". That is not the proper way to go.

As was held in *Blueline Enterprises v EADB*, a decision under section 17 of the **Arbitration Act**, though instituted by way of a petition, is made by this Court in exercise of its original jurisdiction. That said, I think the way to go is through the provisions of clause (vi) of paragraph (b) of subsection (1) of section 5 of the **Appellate Jurisdiction Act**. It provides for appeals to the Court of Appeal against orders made by the High Court under its original jurisdiction **"filing or**

refusing to file an Award in an arbitration without the intervention of the High Court". What Mushi J did in his judgment of 28th September 2011 was to make an order filing the ICC Final Award.

In the face of such clear provisions of our law, I do not need to dwell on a discussion as to whether or not any foreign decision is persuasive or otherwise, or whether for that matter, it can be followed. Neither is it a question of a choice between "persuasive" foreign decisions and binding local authorities, as Counsels have argued. I am of the considered opinion that the case of *Blueline v EADB (supra)*, which has been heavily relied upon by the Respondents in their submissions, is distinguishable.

My reason for taking this position is simply that the issue before the Court of Appeal in that case was not whether the impugned decision of Luanda J. was appealable. It was whether leave to appeal against the said decision was required. It is also clear from the Court of Appeal's decision in that case that the provisions of section 5 (1) (b) (vi) which I have found applicable in matters such as the present, was never brought to the attention of the Court of Appeal. Even though the Court of Appeal cited the said provisions, it never directed its mind to them, since the Court of Appeal found that the same were inapplicable. The case related to an intended appeal from a decision of this Court **made under section 15** of the then **Arbitration Ordinance**, quashing and setting aside proceedings before an Arbitrator. Indeed, the issue before me could not have arisen in that case since the decision sought to be appealed against was not made under **section 17** of the **Arbitration Act** as is presently the case.

In the case before me, Mushi J's decision was made pursuant to section 17. It affirmed the Arbitrators' Award and ordered that the said Award be registered. Such decision is appealable as of right and an intended Appellant may appeal against any point of law or fact. Clearly, the circumstances in *Blueline Enterprises v EADB* were different.

With these findings, the preliminary objection would have no legs to stand on. I would overrule it.

I would also wish to add, by way of *obiter dictum*, that I do not think that the issue of the applicable procedure need be determined as the Applicant's Counsel have put it, i.e., by drawing a distinction between a decision made upon a Petition filed by a party to the arbitration, or upon the filing of an Award by the arbitrators. Section 5 (1) (b) (vi) of the **Appellate Jurisdiction Act** does not permit for such a distinction. So long as the decision is made pursuant to section 17 of the **Arbitration Act**, the same is appealable as of right. In my respectful view, it matters little who initiated the proceedings.

Now, for the application for leave to appeal: Having found, as I have done, that the applicable law is section 5 (1) (b) (vi) of the **Appellate Jurisdiction Act**, under which an intended appellant does not require leave to appeal, the filing of the application for leave to appeal by the Applicant was not necessary. The application is superfluous and I need not consider it. The remedy is to strike it out, which I hereby do.

The final issue now falling for determination is that of costs. My decision to dismiss the Respondents' preliminary objection is based on grounds not specifically cited by the Applicant and I have struck out the application for leave as a consequence of that finding. For these reasons, I order that each party should bear its own costs.

Dated at Dar es Salaam this 20th day of February 2012.

Fauz Twaib

Judge

20th February 2012

Delivered in Court this 20th day of February 2012.

Fauz Twaib

Judge

20th February 2012