

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KILEO, J. A. AND KIMARO, J. A)

CIVIL APPEAL NO 25 OF 2006

ALNOOR SHARIFF JAMAL.....APPELLANT

VERSUS

BAHADUR EBRAHIM SHAMJI.....RESPONDENT

**(Appeal from the Ruling and Order of the High Court (Commercial
Division) at Dar es Salaam**

(Dr. Bwana, J.)

Dated the 11th day of November 2005

In

Civil Application No.17 of 2005)

JUDGMENT OF THE COURT

2 November & 4 December, 2007

KILEO, J. A. :

The parties in this case were business partners for many years dating as far back as 1986. They entered into several joint venture projects that involved, *inter alia*, the acquisition of interests and shareholding in several companies incorporated in Tanzania, Kenya and Uganda. In or about 1992 disputes arose between the parties. The disputes resulted in the filing of several suits in courts of law in the United Kingdom, Kenya and Uganda. Subsequent to the filing of the disputes in the courts,

the parties agreed to refer the disputes to arbitration, which was done by Ameer Esmail, a Sole Arbitrator. The Sole Arbitrator made an Award by which the present appellant was not comfortable with. He then filed a petition in the Commercial Division of the High Court seeking extension of time within which to file a petition to set aside the Award of the Sole Arbitrator.

The grounds for seeking extension of time were listed as:-

- 1) That the petitioner was under disability in that he was outside the country.
- 2) That the petitioner was laboring under a *bonafide* mistake in that he was advised by persons of competent skill whom he as a layman unknowledgeable in the niceties of the law believed.
- 3) That the award involves a substantial amount of money and a petition to set it aside stands overwhelming chances of success and therefore it is in the interests of justice that time be extended.

The petition in the High Court was argued by way of written submissions after which a decision was made. For the sake of clarity we find it appropriate to reproduce at length part of the decision of the High Court. The learned trial judge stated as follows in paragraphs 4, 5 and 6 of his decision:

“4. I have considered all the issues raised in the pleadings, including the series of applications that have been filed. I do concur with the

contents of para 22 (*supra*). Before me now is an application to file a petition out of time. Several reasons have been advanced in support therefore. The application is strenuously resisted by the Respondent. Equally convincing reasons have been advanced why leave should not be granted.

5. Through all the above, there runs a single thread and that is, extension of time within which the US 4m/- should be paid. I am convinced that since the quantum is not disputed, then the only issue is the period within which that sum should be paid. I am of the considered view that the series of applications and an attempt to set aside the Award is but an effort to have more time on the part of the petitioner to settle the uncontroverted sum.

6. It is my strongly held view that considering all the issues involved in this suit this is a fit case to invoke the provisions of Art. 107 A and 107 B of the Constitution of the United Republic of Tanzania (Act 3 of 2000 concerning substantive justice); the inherent powers of this court (section 95 of the Civil Procedure Code, 1966); and the provisions of section 14 (1) and (2) of Cap 15. The latter provisions state:

“14 (1) The court may from time to time, remit the award to the reconsideration of the arbitrators or umpire.

(2) where an award is remitted, the arbitrators or umpire shall unless the court otherwise directs, make a fresh award within three months after the date of the order remitting the award.”

Therefore invoking the foregoing provisions, I do order the Award be remitted to AMEER ESMAIL the Sole Arbitrator, to reconsider the issue of time within which the petitioner should pay to the Respondent the sum of US\$ 4m/-. He should reconsider enlarging

the time from the current ninety days. The said Sole Arbitrator should then file in this court his new Award (reflecting the new time frame) within three months from the date hereof. Each party to bear its costs of this suit. It is accordingly ordered.

Dr. S. J. Bwana

JUDGE

11/11/2005"

Being aggrieved by the above decision, the appellant has come to this Court. At the hearing of the appeal he was represented by Mr. George Kilindu, learned advocate. The defendant was represented by Mr. Tom Nyanduga, learned advocate who was assisted by Mr. Godson Nyange, learned advocate.

The memorandum of appeal consists of nine grounds. We will begin our discourse of the matter before us by looking at the first ground. On this ground, it is submitted that **the Honorable judge erred in law and fact in not making a specific order relating to the petition that was before him to wit a petition for extension of time within which to file a petition to set aside an Award.**

Arguing on the above ground, Mr. Kilindu submitted that since the matter before the judge was simply a petition for extension

of time to set aside an Award issued by the Sole Arbitrator, the judge was bound to make a decision on that matter-i. e. the request for extension of time. Mr. Kilindu contended that the judge fell into serious error when, instead of determining the particular petition before him he issued a ruling ordering the Award to be remitted to the Arbitrator, which was not a matter before him. Referring to **Sandhu v. Noble Builders (U) & Another** (2005) 2. E.A. 272 and Order XX Rules 4 & 5 of the Civil Procedure Code, 1966 the learned counsel argued that a court has a duty to determine an issue before it one way or the other. Mr. Kilindu referred to two other cases in support of his argument:

Kukal Properties Development Ltd v. Maloo and Others
(1990-1994) E.A.281

N.I.C. & Another v. Sekulu Construction Company- (1986)
TLR 157.

Responding to the arguments advanced by Mr. Kilindu on the first ground, Mr. Nyanduga submitted that what this Court should be looking at is firstly, whether the High Court used its inherent powers correctly, and secondly, whether a petition had been filed in court. The learned counsel argued that since the matter before the court was an arbitration one, then the judge was not limited to rules of procedure under the Civil Procedure Code but rather that the Arbitration Ordinance was

the applicable legislation. The learned counsel further argued that the honorable judge rightly exercised the court's inherent powers in remitting the award to the Arbitrator.

In remitting the Award to the Sole Arbitrator the trial judge purported to act under the provisions of Article 107 A (2) (e) of the Constitution and section 95 of the Civil Procedure Code. Article 107 A (2) (e) states as follows:

(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani:

a).....

b).....

c).....

d).....

e) Kutenda haki bila ya kufungwa kupita na masharti ya kifundi yanayoweza kukwamisha haki kutendeka.

That can be roughly translated in English as follows:

(2) In the determination of civil and criminal matters according to law, the courts shall have regard to the following principles, that is to say:

(a).....

(b).....

(c).....

(d).....

(e) *administering justice without being constrained unduly by technical requirements, which are capable of preventing justice from being done.*

Section 95 of the Civil Procedure Code provides as follows:

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

While we agree that courts have inherent powers to see to it that the ends of justice are met, and that the process of the court is not abused, we are however convinced that it was not the intention of the legislature by the enactment of Article 107 A (2) (e) of the Constitution and section 95 of the Civil Procedure Code to do away with the basic principles of handling matters brought before the courts. One of the basic principles is the duty of the court to determine one way or another an issue brought before it. This is the principle which finds expression in rule 4 of Order XX of the Civil Procedure Code, 1966. The rule states as follows with regard to contents of a judgment:

“A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.”

Though the rule refers to judgments, the principle therein is applicable in any type of decision in a court following the hearing of a matter. Among the cases cited by counsel for the appellant is the case of **Kukal Properties Development Ltd v Maloo and others** – (1990-1994) E. A. 281 which we find to be relevant to the case before us. The Court of Appeal of Kenya in this case had an opportunity to discuss the effect of failure by a judge to decide on issues framed. The Court's holding, with which we are in complete agreement, was to the following effect:

“A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure.”

In the present case the matter before the High Court was a petition for extension of time within which to file an application to set aside the Award of the Sole arbitrator. The question that the trial judge was obliged to resolve is whether there was sufficient ground for granting the extension of time sought. With due respect to the learned judge, we think that he abandoned what was before him and embarked on something that had not, as yet, been asked of him. We appreciate that the High Court has powers in terms of section 15 Of the Arbitration Act, Cap 15 to remit the Award to the reconsideration of the arbitrators or umpire. We are however of the settled mind that

the power to remit an Award for reconsideration can only be made by the court if it has been properly moved for that purpose by a petition. In the present case there was no such petition before the High Court, the only petition before it was the one for extension of time within which to file a petition to set aside the Award of the Sole Arbitrator. Moreover, the argument that the judge was empowered to use the court's inherent powers to remit the Award for reconsideration does not hold water because as we have already said earlier, the use of inherent powers is not intended to do away with basic principles governing court proceedings.

In the light of the above considerations we find that the trial judge made a fatal error in failing to make a specific order relating to the petition that was before him which was a petition for extension of time within which to file a petition to set aside an Award.

Our determination of ground one in the memorandum of appeal disposes of the appeal. Once we have found that the matter that was before the trial judge for consideration was not determined, then it follows that we have no base for continuing to address ourselves with the rest of the grounds, most of which are concerned with the merits of a matter that had not yet been tabled before the trial judge.

In the result, we allow the appeal with costs. We quash the ruling of the High Court and set aside the order to remit the Award to the sole Arbitrator for reconsideration. We further order that the case be remitted to the High Court for it to proceed with determination, according to law, of the petition for extension of time within which to set aside the Award of the Sole Arbitrator.

Dated at DAR ES SALAAM this 22nd Day of November, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

I.P. KITUSI
DEPUTY REGISTRAR