

TANZANIA / JUDGMENT

east african development bank vs blueline enterprises ltd 2006 tzhc 74 29 june 2006

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TZHCDECIDED
29 June 2006

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IN THE HIGH COURT OF TANZANIA AT PAR ES SALAAM MISC. CIVIL CAUSE NO. 142 OF 2005
EAST AFRICAN DEVELOPMENT BANK . . . PETITIONER Versus BLUELINE ENTERPRISES
LTD..... RESPONDENT

RULING

Shanawa, 3. On 22/9/2005, learned counsel for the Petitioner DR. Alex Nguluma and Mrs. Victoria Makani filed a petition for setting aside the Arbitration Award by Prof. A.T.H. Mwakyusa dated 31/8/2005 and for a declaration that arbitration proceedings have failed and the court should take up the matter in dispute for full determination. About one month later, on 19/10/2005, they filed an application for stay of execution of the award by the said Arbitrator pending 2 the final determination of the applicant's petition filed in this court. On 28/11/2005, Prof. Mgongo Fimbo filed two notices of preliminary objection. One is against the petition and another one is against the application. The one against the petition reads that the petition is incompetent and bad in law and should be struck out with costs on the ground that copies of the submission and the award annexed to the petition are not certified by the petitioner or its Advocate to be true copies thereof contrary to the mandatory provisions of the Arbitration Rules, 1957 Rule 8. The one against the application reads that the chamber application is incompetent and bad in law and should be struck out with costs on the following points of law:

- (a) It was not given under the hand of the Registrar and the Seal o f the court.
- (b) The application is not by way of petition contrary to mandatory provisions o f the Arbitration Rules, 1957 Rule 5.
- (c) The applicant has failed or neglected to annex to the said application the submission contrary to the mandatory provisions of Arbitration Rules, 1957 Rule 8.
- (d) The copy o f award annexed to the application is not certified by the applicant or its advocate contrary to the mandatory provisions o f the Arbitration Rules, 1957 Rule 8.

(e) There is no prior suit filed in this court between parties to the present application contrary to the 4 mandatory provisions of Order XXI Rule 27 of the Civil Procedure Code upon which the present application is filed. Another point of objection to the application is that the affidavit accompanying it is incurably defective and should be struck out on the ground that paragraphs 3, 4, 5, 6 and 7 contain extraneous matters by way of objection, prayer, legal arguments and conclusions. The first point to be considered by this court is whether or not the petition is incompetent and bad in law. Prof. Fimbo for the respondent submitted inter-alia that the petition is incompetent on ground that copies of the award annexed to it are not certified by the petitioner or its Advocate to be true copies thereof. In his submission, he relied on Rule 8 of the Arbitration Rules, 1957 Cap. 15 RE

2002. The said rule provides as follows: 5 "Rule 8 Every petition shall have annexed to it the submission, the award or the special case to which the petition relates or a copy of it certified by the petitioner or his advocate to be a true copy." Learned counsel for the petitioner DR. Alex Nguluma and Mrs. Victoria Makani conceded that the award annexed to their petition is not certified by the petitioner or its advocate but they contended that the petition like a plaint is a stand alone document. They submitted that the petition filed in court is complete in form and content as per Rules, 5, 6, 7 and 9 of the Arbitration Ordinance and that therefore is competent. They further submitted that the applicant's failure to certify the award is not fatal because it does not affect the grounds, merits or substance of the petition as a pleading. 6 In my opinion, the award filed in court by the petitioner is part and parcel of the petition. I say so because this document is supposed to be annexed to the petition. Certainly, a petition filed without it would be incomplete. Rule 8 of the Arbitration Rules, 1957 GN 427 clearly states that the award has to be annexed to the petition and in cases where its copy is annexed to the petition it has to be certified by the petitioner or his advocate to be a true copy. In this case that was not done. I agree with Prof. Fimbo that the petitioner's failure to do so renders the petition incompetent and bad in law. For this reason, I uphold the respondent's point of preliminary objection against the petition. The second point to be considered by this court is whether or not the application for stay of execution of the award by Prof. A.T.H. Mwakyusa dated 31/8/2005 is incompetent and bad in law. Prof. Fimbo for the respondent 7 submitted inter-alia that the application was not given under the hand of the Registrar and the Seal of the court and that it is not by way of petition contrary to mandatory provisions of the Arbitration Rules, 1957 Rule 5. Learned counsel for the petitioner DR. Alex Nguluma and Mrs. Victoria Makani conceded also that the chamber summons is not signed by the Registrar and has no seal of this court. However, they contended that the respondent's counsel is not supposed to raise this objection because he is the one who accepted the chamber summons from the court clerk which is not signed by the Registrar and stamped with the court seal and acted on it without such signature and seal. They said that this chamber summons was not served on counsel for the respondent by them. On how the application under the Arbitration Ordinance is supposed to be filed, learned counsel for the petitioner conceded also that under Rule 5 of the Arbitration Rules, 8 1957, it is provided that all applications under the

Arbitration Ordinance Cap. 15 have to be made by way of a petition. However, they argued that the chamber application is made under the provisions of Order XXI, Rule 27, Order XLIII, Rule 2 and SS 64 and 95 of the Civil Procedure Code 1966 and is not made under the substantive provisions of the Ordinance. They further contended that since an award once filed becomes a decree of the court, execution proceedings relating to execution of such awards should be governed by the Civil Procedure Code 1966 and not the Arbitration Ordinance. In my view, it was a duty of the court clerk to make sure that the chamber summons in issue is signed by the Registrar and Stamped with the Seal of the court before serving it on counsel for the respondent. I agree with learned counsel for the petitioner that although their chamber summons is not in conformity with the provisions of 9 Order V, Rule 2 of the Civil Procedure Code, 1966 they should not stand to be blamed. The real question to be determined here is whether or not the petitioner's application was properly brought in court. In my opinion, it was not properly brought. First of all, it is not correct for counsel for the petitioner to say that the application is not made under the substantive provisions of the Arbitration Ordinance. I say so because apart from being shown in the petitioner's chamber summons that the application is brought under the provisions of the Civil Procedure Code which are mentioned therein, it is also shown that the application is brought under Section 16 of the Arbitration Ordinance Cap. 15. Apart from that, the application is entitled thus: "IN THE MATTER OF THE ARBITRATION ORDINANCE AND IN THE MATTER OF ARBITRATION" just in accordance with the provisions of Rule 6 of the Arbitration Rules, 1957 GN 427. It is not 10 correct as well for counsel for the petitioner to argue that the current proceedings relate to the execution of the award. They relate to an application for stay of its execution. This means that counsel for the petitioner's arguments on this point are self contradictory. At any rate, it is next to impossible to argue against the Rule. Thus, Rule 5 of the Arbitration Rules, 1957 ought to have been followed by bringing the application by way of petition. This rule is mandatory. Concerning the affidavit which was challenged as defective, learned counsel for the respondent did not make any submission or arguments on it. I construe his omission to do so as having abandoned his objection against it. For the aforesaid reasons, I as well uphold the respondent's preliminary objection against the application. 11 In the final analysis, I strike out the petition as well as the application with costs. A. Shangwa JUDGE 29/6/2006 Delivered in open court this 29th day of June, 2006. A. Shangwa JUDGE 29/6/2006

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