

TANZANIA / JUDGMENT

YOKTAN NYONDWI V

COURT
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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM MISCELLANEOUS
APPLICATION NO. 25926 OF 2024 YOKTAN NYONDWI.....
APPLICANT VERSUS AIRSWIFT CONSULTING TANZANIA LIMITED.....1ST RESPNDENT
EAST AFRICAN CRUDE OIL PIPELINE (EACOP)LIMITED.....2ND
RESPONDENT

RULING

Date of last Order:6/11/2024 Date of Ruling: 15/11/2024 B. E. K. Mganga, J. Brief facts of this application are that, on 20th May 2023, Yoktan Nyondwi, the herein applicant, signed a one year fixed term contract of employment with Airswift Consulting Tanzania Limited, the herein 1st respondent. It was agreed by the parties that, the said contract was starting from 13th March 2023 and was ending on 12th January 2024. In the said contract, applicant was employed as construction management -EACOP Replacement Housing Officer and was working with the 2nd respondent. In Clause 24 of the said contract, the parties agreed that, any dispute including termination, shall be submitted to the Tanzania 1 Institute of Arbitrators(TIArbs) for decision by a single arbitrator appointed by the Tanzania Institute of Arbitrators rules. It happened that, the 1st respondent terminated employment of the applicant, as a result, the latter filed Labour dispute No. CMA/DSM/KIN/508/2023/315/2023 before the Commisison for Mediation and arbitration(CMA) against the respondents. At CMA, the respondents successfully a preliminary objection that, CMA had no jurisdiction based on clause 24 of the contract of emploment between the parties. The arbitrator sustained the preliminary objection and dismissed the dispute for want of jurisdicion. On 16th May 2024, applicant filed the dispute before the Tanzania Institute of Arbitrators(TIArbs) claiming inter-alia unpaid salary, one month salary in lieu of notice, unpaid per diem allowances, repatriation costs, substance costs, subsistence allowance and general damages for unfair labour practices. On 19th August 2024, the sole arbitrator served applicant with an invoice requiring him to pay TZS 12,000,000/= being arbitrators fees and tribunal costs. On 18th September 2024, applicant was reminded by the arbitrator to pay the said amount within seven days and that, failure will result the dispute to be marked as withdrawn. On 27th September 2024, the Tanzania Institute of Arbitrators (TIArbs) 2 marked the dispute as withdrawn due to failure of the applicant to pay the said amount. Based on the foregoing, on 17th october 2024, applicant filed this application seeking the court (i) to order that costs before the Tribunal in the arbitral proceedings at the Tanzania Institute of Arbitrators(TIArbs) be paid by

the 1st and 2nd respondents and (ii) any other relief(s) the court may deem fit and just to grant in the circumstances of this application. In support of the application, applicant filed his affidavit. Each respondent filed the Notice of opposition and the counter affidavit resisting this application. In additional, respondents filed the notice of preliminary objection that, the court has no jurisdiction to determine and grant prayers in this application. This ruling is in respect of the said preliminary objection. Arguing the preliminary objection on behalf of the 1st respondent, Mr. Zacharia Daudi, learned Advocate, submitted that, applicant filed this application under Rule 24(1), (2)(a), (b), (c), (d), (e), (f), 24(3) (a) to (d) 24(11), (b) and (c), 55(1), and (2) of the Labour Court Rules, GN. No. 106 of 2007 and section 93(2) (b), 94(1) and (3) (a)(i), (b)(ii) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019, 3 praying the court to order that respondents should pay costs in Arbitration proceedings conducted in the Tanzania Institute of Arbitrators between the parties. He further submitted that, applicant is seeking the court to exempt him from paying those costs which are remuneration of the arbitrator. Counsel for the 1st respondent further submitted that, the application is not properly before the court and it is in violation of rule 50 of GN. No. 106 of 2007 that prohibits appeal, revision, and review against interlocutory orders because, the order is interlocutory as it did not determine the dispute between the parties before the sole arbitrator to its finality. He also submitted that, the award issued under the Tanzania Arbitration Act are not appealable or subject to revision before this court. To support his submissions, counsel cited the provisions of sections 73 to 75 of the Arbitration Act, Cap. 15 R.E. 2020 which provides that, an aggrieved party must file a petition before the High court to challenge the award. He added that, this court has no power to register arbitral award for enforcement and that, this Court has no jurisdiction over an order issued under arbitration proceedings by the sole arbitrator of the Tanzania Institutes of Arbitrators. With those 4 submissions, counsel for the 1st respondent prayed that, the application be struck out. On the other hand, Mr. Rwekamwa Rweikiza, learned advocate for the 2nd respondent concurred with submissions made on behalf of the 1st respondent that the court has no jurisdiction but on different reasoning. Counsel for the 2nd respondent submitted that, section 93 (2)(b) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] provides that, the word High Court in the Arbitration Act means the Labour Court. Counsel added that, this Court has jurisdiction in relation to matters provided under sections 73 to 75 of the Arbitration Act when applicant is enforcing the award or challenging the award on substantive jurisdiction, or challenging the award on serious irregularity. He went on that, since the matter before the arbitrator was not on the aforementioned, this court has no jurisdiction. He also submitted that, applicant has not come before this court to enforce the award, challenge the award on substantive jurisdiction or serious irregularity hence this court has no jurisdiction to grant the prayers prayed in this application. With those submissions, counsel prayed that the application be dismissed for want of jurisdiction. He added that, the application cannot be struck out because the court has no jurisdiction. 5 Arguing against the preliminary objection, applicant submitted that, he filed this application so that the court may exempt him from paying arbitral costs to the sole arbitrator. He further submitted that, this Court has such jurisdiction under section 93(2)(b) and 94(3)(a)(i) and (b)(ii) of Cap. 366 R.E. 2019(supra) to grant the prayers he has prayed for. With those submissions applicant prayed that the preliminary objection be overruled

and that the court should order the application be heard on merit so that respondents can be ordered to bear costs for the sole arbitrator. In rejoinder, Mr. Daudi for the 1st respondent submitted that, section 68(1) of the Arbitration Act provides that, the arbitral tribunal may issue orders for costs that shall be allocated between the parties. He added that, the said section has no reference to the word “Court” and that it does not give a room for the aggrieved party to seek remedy from the court. In rejoinder, counsel for the 2nd respondent reiterated his submissions in chief that the court has no jurisdiction. I have considered rival submissions of the parties and it is clear from the Notice of Application and submissions made in this application that, applicant has filed this application seeking the court to issue an order exempting him from paying fees payable to the sole arbitrator. The pertinent issue is whether, this court has jurisdiction to issue such

orders.

It was correctly submitted by the applicant and counsel for the 2nd respondent that, in terms of section 93(2)(b) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019], any reference to the High Court in the Arbitration Act shall be interpreted as referring to the Labour Court. The term “Court” in relation to domestic arbitration, is defined under section 4A of the Arbitration Act, No. 2 of 2020 to include the High Court exercising its original jurisdiction or appellate jurisdiction. I have read the provisions of the Arbitration Act, No. 2 of 2020 and it is my view that, this court has no jurisdiction of exempting any party to the arbitration proceedings before the Tanzania Institute of Arbitrators to pay fees payable to the arbitrator. The Court has only jurisdiction to adjust the said fees when one of the parties challenges reasonability of the said fees. My conclusion is fortified by the provisions of section 30 of the Arbitration Act No. 2 of 2020. The said section provides:- “30(1) The parties shall, jointly and severally, be liable to pay the arbitrators any reasonable fees and expenses as are appropriate in the circumstances. 7

- (2) A party who is not satisfied with the reasonability of the fees and expenses to be paid to the arbitrator may, upon notice to the other party and arbitrators, apply to the court consideration and adjustment of such fees and expenses if—
 - (a) the fees and expenses charges exceed the amount agreed upon by the parties;
 - (b) the fees and expenses contain items which were not agreed upon by the parties; or
 - (c) there is significant change of circumstances that lead the change of agreed fees and expenses.
- (3) Where an application is made after any amount has been paid to the arbitrators by way of fees or expenses, the court may order the repayment of the exceeding amount if any, provided that the court shall not make such order unless it is reasonable in the circumstances to order repayment.
- (4) The provisions of subsections (1), (2) and (3) shall have effect subject to any order of the court under section 26(4) or 27(2)(b).

- (5) Nothing in this section shall affect any liability of a party to pay all or any of the costs of the arbitration or any contractual right of an arbitrator to payment of his fees and expenses.
- (6) In this section, references to arbitrators include an arbitrator who has ceased to act and an umpire who has not replaced the other arbitrators.” (Emphasis is mine). In the application at hand, applicant is not challenging reasonability of fees but, he is praying exemption from paying fees. In my view, the prayer by the applicant is not covered under the above quoted provision. 8 I have also read the provisions of section 66 of the Arbitration Act, No. 2 of 2020 and find that, it does also not give jurisdiction to the court to grant the relief prayed by the applicant. the said section reads:- “66(1) Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall, in respect of the fees and expenses of the arbitrators, include such reasonable fees and expenses as are appropriate in the circumstances.
- (2) For the purposes of determining the question as to what reasonable fees and expenses are appropriate in the circumstances, and where a matter is not already before the court on an application under section 65(4), the court may, on application by a party and upon notice to the other party—
- (a) determine the matter; or
- (b) order that the matter be determined by such means and upon such terms as the court may specify.
- (3) Subsection (1) shall have effect to any order of the court under sections 26(4) or 27(2) (b).
- (4) Nothing in this section shall affect the right of the arbitrator to payment of his fees and expenses.” (Emphasis is mine). There is no provision in the Arbitration Act No. 2 of 2020 giving jurisdiction to the court to grant the relief prayed by the applicant in this application. Normally, jurisdiction is a creature of statute hence it cannot be assumed or asurped as it was held in the case of Commissioner General Tanzania Revenue Authority & Another vs Milambo Limited (Civil Appeal 62 of 2022) [2022] TZCA 348 (14 June 2022), Millicom Tanzania Nv vs James Alan Russels Bell & Others (Civil 9 Revision No. 3 of 2017) [2018] TZCA 355 (26 July 2018), National Bank of Commerce Ltd vs National Chicks Corporation Ltd & Others (Civil Appeal 129 of 2015) [2019] TZCA 345 (23 September
- 2019) to mention but a few. In fact, in Milambo’s case (supra) the Court of Appeal held inter-alia that:- “...jurisdiction is a creature of statute and not the dislikes or likes of the parties or mere compelling situations...” That being a settled position of the law, I cannot, in this application, assume jurisdiction of granting exemption of payment of arbitrators fees prayed by the applicant while the same is not provided in the statute. For the foregoing, I hold that this court has no jurisdiction and sustain the preliminary obejection. It was the prayer by counsel for the 1st respondent that I should strike out this application for want of jurisdction. On the other hand, it was the prayer by counsel for the 2nd respondent that, I should dismiss this application for want of jurisdiction. It is my considered view that, since

the court has no jurisdiction, the application cannot be struck out to allow the applicant to file another application on similar ground or prayers before this court. It is my view that, from the above position of the law found in the quoted Court of Appeal decisions, the court can only strike out an application when it has jurisdiction but the same is 10 incompetent. Striking out the application gives a room to a party to file another competent application. In no way, that can be done when the court has no jurisdiction to grant the prayers prayed like the application at hand. The application is liable to be dismissed and not struck out. In the afore conclusion, I am guided by what was held by the Court of Appeal in the case of VIP Engineering and Marketing Ltd v SGS Generale De Surveillance SA and Another, Civil reference No. 32 of 2006; Cyprica Mamboleo Hizza v Eva Kioso and Another, Civil Application No. 3 of 2010 and Said Thomas Mhombe & Another vs Republic (Consolidated Criminal Appeals 469 of 2019) [2019] TZCA 340 (30 September 2019) wherein it was held inter-alia that: - "Striking out" the matter is different from the effect of "dismissing" the matter. The reason for such difference is that in case the matter is struck out, the party may come back to the same court on the same matter whereas in case the matter is dismissed, the party cannot come back on the same matter to the same court." For the foregoing, I hereby dismiss this application for want of jurisdiction. Dated at Dar es Salaam on this 15th November 2024 B. E. K. Mganga JUDGE 11 Ruling delivered on this 15th November 2024 in Chambers in the presence of Yoktan Nyondwi, the Applicant, Laurent Leonard, Advocate for the 1st Respondent and Tumain Michael, Advocate for the 2nd Respondent. B. E. K. Mganga JUDGE 12

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