IN THE HIGH COURT OF TANZANIA
(DARES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO.307 OF 2002
IN THE MATTER OF THE ARBITRATION ORDINANCE CAP.

AND

IN THE MATTER OF ARBITRATION

BETWEEN

BLUE LINE ENTERPRISES LTD.... PETITIONER

AND

EAST AFRICAN DEVELOPMENT BANK... RESPONDENT

RULING

LUANDA, J:

Basically this is an application to set aside an award of the Sole Arbitrator, the late Hon. F.L. Nyalali, the retired Chief Justice.

This Court is clothed with such powers. The same are provided under Section 15 of the Arbitration Ordinance, Cap 15.

The petitioner BLUE LINE Enterprises Limited through their advocate Mr. Mhango inadvertely referred the matter to fall under Section 14 instead of S.15 of the Ordinance. In view of the arguments advanced by both parties, that is not fatal to the application. The respondent the East African Development Bank through

their counsel Dr. Nguluma were much aware of the nature of the application. So wrong citation is not fatal to the proceedings.

Parties to this application were ordered to argue the application by way of writing. Parties dutifully did that. Parties to the application through their respective advocates made thorough research. The cases cited are very useful. I appreciate very much.

Now back to the merits or otherwise of the application.

Briefly the facts of the case as can be gathered from the record is to this effect: By a loan agreement dated 7th March, 1990 the Petition agreed with the Respondent to obtain a loan from the Respondent. A dispute in connection with that agreement arose. In terms of Clause 8.03 of the said agreement that dispute was required to be referred to an arbitration.

The Respondent opposed the appointment of an arbitrator. The matter was referred to this Court for direction. However, the matter was settled and this court endorsed that settlement in that the late Hon. F.L. Nyalali was appointed as the Sole Arbitrator. But in the unlike event namely failure, neglect or refuses to act then one Mr. A.T.H. Mwakyusa of NEDCO would take over. So Mr Mwakyusa is an alternate Arbitrator.

Due to illness, the Sole Arbitrator was unable to dispose of the dispute speedily. Both parties to the dispute complained. The Sole Arbitrator put a

proposal that Hon. Justice Bahati a retired judge to conduct the proceedings in lieu of the Arbitrator. That proposal was rightly rejected as there is no proviso to that effect. The late Hon. Nyalali drew issues and dispatched to the parties. The documents contained both issues not in dispute and those indispute. It go further showing or indicating how the disputed ones are to be resolved. Some were by affidavits and some by way of adducing evidence viva voce. Finally a Schedule of filing the submissions was put in place. That was on 27/6/2002.

On 26/7/2002 the Sole Arbitrator was unable to proceed with the matter; the reason being the Respondent were yet to file their Counter Affidavit. The matter was adjourned to 15th August, 2002. But on 12th August, 2000 the petitioner through their advocate wrote two letters to the Sole Arbitrator applying for adjournment as the main witness one Mr. John Lamba was indisposed and ask for more time to file a reply to the Counter Affidavit. Despite that request the Arbitrator was all out to hear the evidence from the Petitioner's side. Indeed on 29/9/2002 he summoned the parties and informed them that he had all the material required to dispose of the matter and he saw no need to prolong the matter, and that he would prepare his award and deliver to the parties. The Arbitrator did that. On 30/9/2002 he informed parties that the award was ready for collection on payment of fees. The claims were dismissed with costs.

It is this award which is the subject matter of this application.

I have carefully read the written submissions of both learned counsel. Mr. Mhango argued with force that the Sole Arbitrator was wrong in proceeding the way he did as the petitioner was not given an opportunity to reply to the counter affidavit, no oral evidence was adduced and no final submissions were made. In short he said the Petitioner was not given an opportunity of being heard and therefore there was a miscarriage of justice. As earlier observed he cited a number of case. To mention just a few **(See Moran v. Llyods [1983] 2 All ER 200; RV Thames Magistrates'Court exparte Polemi's [1974] 2All ER 1219)**

Dr. Nguluma supported the finding of the Sole Arbitrator. First he cited S.14 and s.15 purporting to come from the Arbitrator Ordinance Cap. 15. On reading between the lines, these sections are from the Civil Procedure Code, 1966 Second Schedule. The Second Schedule to the Civil Procedure Code, 1966 applies when there is a suit pending and the parties agreed that any matter in difference between them shall be referred to arbitration, they may do so by making an application in court so that the same be referred to arbitration.

In our case there is no such thing. Arbitration started ab initio. The Schedule does not apply.

Dr. Nguluma gave a long written submission on these sections. With due respect to Dr. Nguluma he missed the point.

The Sole Arbitrator said he had all materials before him. The materials

were pleadings, affidavit and counter affidavit. He did not say a word about reply to the counter affidavit which was yet to be filed and which is very crucial to the matter. And as to dispensing with calling witnesses the Sole Arbitrator did not give sound and convincing reason. Not only that he did not tackle the issues framed seriatim. And further to that he did not say a word about final submissions. So there is failure on the party of the Sole Arbitrator to hear the parties and failure to accord opportunity the parties present their cases.

In **Moran case** quoted supra, Sir Donaldson said, I quote:

> "A failure to give a party reasonable and proper opportunity to put forward his case and rebut rebuilt that of the opposite party is undoubtedly capable of constituting "misconduct" of the proceedings justifyign the court in setting aside the award..."

I am in agreement with that holding. In sum the application is allowed with costs in that:-

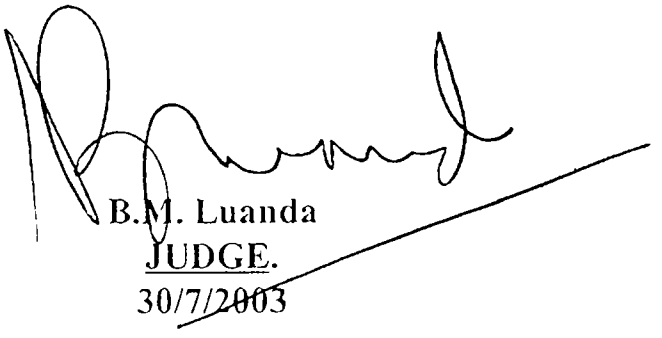
i) The order of 30/9/2002 is hereby quashed and the award set aside; and

ii) I order the proceedings to commence afresh before Mr. Mwakyusa.

It is so ordered.

B.M. Luanda
JUDGE.
30/7/2003

Ruling delivered before Mr. Mhango for Applicant, Dr. Nguluma for the respondent.



B.M. Luanda
JUDGE.
30/7/2003