

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL CASE NO. 221 OF 2016

IN THE MATTER OF ARBITRATION ACT, CAP. 15

AND

IN THE MATTER OF ARBITRATION

BETWEEN

M.A KHARAFI & SONS LIMITED

.....

PETITIONER

AND

NATIONAL CONSTRUCTION COUNCILS

.....

1st RESPONDENT

QS SHAIBU S. LIKUMBO

.....

2nd RESPONDENT

SANASI CONSTRUCTION

.....

3rd RESPONDENT

RULING

Date of the Last Order: 21/04/2017

Date of the Ruling 03/05/2017

SEHEL, J.

This is a ruling on preliminary objections raised by the 2nd and 3rd respondents against the petitioner's petition for removal of the 2nd

respondent as arbitrator and for nullification of the arbitral proceedings due to allegation of misconduct by the 2nd respondent.

The preliminary objections are:

1. The Court has not been properly moved;
2. The petition is defective for contravening Order VI Rule 14 of the Civil Procedure Code, Cap.33;
3. The matter is defective for being overtaken by event;
4. The petition is filed out of time.

At the hearing of the preliminary objections, Mr. Shadrack, learned advocate who was assisted by Mr. Mlaki, learned advocate appeared to argue the objections raised by the 2nd and 3rd respondents while Mr. Mayenga, learned advocate assisted by Ms. Erasmus, learned advocate appeared to defend the objections and Mr. Kisamu, learned advocate appeared to represent 1st respondent.

For the 1st objection, it was submitted that the petition was made under Section 18 of the Act which deals with misconduct of

the arbitrator. That since the present petition has no allegation of misconduct then the petitioner has wrongly invoked the provisions of Section 18 of the Act. Mr. Mayenga strongly rebutted the objection that it does not squarely fit as preliminary objection since it requires further evidence from the parties to prove as to whether there is misconduct or not.


Mr. Shadrack insisted that the law is clear and the pleadings do not show any misconduct as the objection raised has merit.

I do not think I have to dwell much on this point of objection. It has been repeatedly echoed by the Court of Appeal of Tanzania that preliminary objection shall purely consists of a point of law which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit and that it cannot be raised if any fact has to be ascertained (See the case of **Hezron M. Nyachia Vs. Tanzania Union of Industrial and Commercial Workers and Another, Civil Appeal No. 79 of 2001** (Unreported)).

Applying this principle to the matter at hand, as succinctly submitted by Mr. Shadrack the allegation of misconduct cannot be

adequately answered by simply looking at the pleadings. It requires further and better particulars from the petitioner to establish allegation of misconduct. In that respect, the first objection raised has no merit and I proceed to dismiss it.

Another attack which Mr. Shadrack had was the failure for the advocate to sign the petition which he said was contrary to Order VI Rule 14 of the Civil Procedure Act, Cap.33. He supported his submission by citing the High Court decision in the case of **State Trading Corporation Employees Saving and Credit Society Ltd Vs. Levina David Maro and Another, Land Case No. 91 of 2006** where Rugazia, J (as he then was) held non-compliance with Order VI Rule 14 of the Civil Procedure Code which is mandatory renders the plaint defective and should be struck out. It was replied by Mr. Mayenga that petition is not a pleading as such the objection has no merit and even the cited authority is distinguishable. In the alternative, it was argued that the petition was duly signed by the counsel as there is a signature of the drawer.



Mr. Shadrack re-joined by submitting that the provision of the Code defines pleadings to mean all documents that initiates the suit. To him since the petition is a document initiating the suit then it is also a pleading as such it falls under Order VI Rule 14 of the Code.

The issue here is whether a Petition filed under the Arbitration Act, Cap. 15 can be termed as a pleading for it to comply with Order VI Rule 14 of the Code. My starting point will be to revisit the provisions of Order VI Rule 1 of the Act that defines the term "Pleadings". It reads:

"'Pleadings' means a plaint or written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII".

The subsequent pleadings refereed under Order VIII rule 13 are set-off; counter claim and reply to the written statement of defence.

It follows then that Petition filed under the provisions of the Arbitration Act, Cap. 15 is not amongst the pleadings referred under

the provisions of the Civil Procedure Act, Cap. 33 rather it is an application. My standing is further fortified by the by the decision of the Court of Appeal of Tanzania in the case of **Tanzania Cotton Marketing Board Vs Cogecot Cotton Company S.A** [2004] T.L.R 133 when it stated at page 134 the following:

"Counsel who appeared for the appellant before the High court stated categorically: "This is not a suit". That was, indeed, correct and not a slip. A petition under rules 5 and 6 of the Arbitration Rules is an application rather than a suit. Rule 5 states in part ".....all applications made under the Ordinance shall be made by way of petition". A petition is therefore the prescribed mode of making an application under the Arbitration Ordinance, and it is common knowledge that other modes are prescribed under other laws."

It follows then a petition filed under Rule 5 and 6 of the Arbitration Rules in order to set aside or remit an arbitral award is not a suit but rather it is an application. Therefore, Order VI Rule 14 of the Act is not applicable to petitions filed under the Arbitration Act. I

therefore find this preliminary point of objection to have no merit and I proceed to dismiss it.

Mr. Shadrack submitted for the third objection that since the proceedings at the Tribunal are at the stage of hearing then the present matter is overtaken by events. It was replied that since the objection raised requires proof to establish that it is at the stage of hearing then the objection does not qualify as preliminary objection. He further submitted that given the fact that the final award is not yet rendered then the matter cannot be said that it is overtaken by events. Counsel Shadrack insisted that the matter is at the hearing stage.

As I stated herein, a preliminary objection is in the nature of a pure point of law not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Such an objection must be argued without reference to evidence. For this Court to determine whether the petition is overtaken by events or not it will require evidence to establish it. In that respect, I totally agree with

the counsel for the petitioner that the objection raised is not a pure point of law. I thus proceed to dismiss it.

Lastly, it was argued by counsel Shadrack that as the interim award was issued on 22nd day of July, 2016 and the present petition was filed on 23rd day of September, 2016 then it was filed out of sixty (60) days prescribed by the law. It was conceded by counsel Mayenga that the interim award was issued on 22nd day of July, 2016 and the petition was filed on 23rd day of September, 2016. However, he said, the interim award was availed to them on 25th day of July, 2016 as shown in annexure KRF-16 attached to the petition. Therefore, he argued in terms of Section 19 (4) of the Law of Limitation Act, Cap. 89 the time of obtaining a copy of Award is excluded in computation of time. To him therefore the petition was filed in time. This contention is highly disputed by the counsel for the respondent in his re-joinder. He said the annexure KRF-16 has nothing to do with the interim award as it does not indicate that the interim award was forwarded to the petitioner.

From the submission of both parties it is acknowledged that the interim award was issued on 22nd July, 2016 and the present petition was filed on 23rd September, 2016. Further it is acknowledged that the limitation period is sixty days.

The controversy here is when the sixty days starts to run. Is it from 25th July, 2016 when the petitioner is alleging to have been availed with the award or from 23rd July, 2016 when the interim award was delivered. As I said, the petitioner referred this Court to annexure KRF-16 which is attached to the Petition. The annexure is contested by the Counsel for the respondent that it speaks nothing of the interim award. I had time to go through annexure KRF-16 and noted that it was received by the counsel for the petitioner on 25th July, 2016 at 1457Hours. The said annexure KRF-16 is dated 22nd July, 2016 the day when the interim award was issued and in it a summary of the interim award is stated. In either case, the present objection cannot be termed as pure point of law as it is mixed with facts as to when the award was received and with law. Therefore, the issue cannot be disposed of as a pure point of law rather it is mixed with both points

of law and fact. As such, I proceed to dismiss the point for being not a pure point of law as it requires examination of affidavit and annexures attached to the petition.

In the result, the preliminary objections are without merit and are accordingly overruled with costs. The petition is to proceed to the hearing.

DATED at Dar es Salaam this 3rd day of May, 2017.

A handwritten signature in blue ink, consisting of several loops and a final flourish.

B.M.A Sehel

JUDGE

3rd day of May, 2017