

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO.7 OF 2018

(Arising from Commercial Case No.133 of 2018)

**IN THE MATTER OF SECTION 6 OF THE ARBITRATION ACT CAP. 15
R.E. 2002**

**AND IN THE MATTER OF A PETITION FOR STAY OF PROCEEDINGS
PENDING ARBITRATION**

BETWEEN

CONSTANTINE STEPHEN KALIPENIPETITIONER

VERSUS

TAREK HANI FARHATRESPONDENT

RULING

B.K. PHILLIP, J

The petitioner herein is a defendant in Commercial Case No 133 of 2018, that was lodged in this court by the respondent in October 2018. Upon being served with the plaint, the petitioner lodged this petition praying for stay of the proceedings in the aforesaid Commercial Case No.133 of 2018 pending Arbitration. This petition is made under the provisions of section 6 of the Arbitration Act Cap 15, R.E 2002.

The respondent has raised a point of Preliminary objection that the petition is hopelessly defective as the annexure thereto is neither original nor certified. The learned Advocates Diana Mawalla Nyiti and Frank Mwalongo appeared for the petitioner and respondent respectively. Both counsels filed skeleton arguments under the provisions of Rule 64 of the High Court (Commercial Division) procedure Rules, 2012.

In his submission the learned advocate Mwalongo, adopted the contents of his skeleton arguments and proceeded to submit that there is unbreakable chain of authorities in support of the legal position that a petition accompanied with a copy of a submission that is not satisfied is incompetent .In his skeleton arguments Mr. Mwalongo submitted that the non –compliance of the provisions of rule 8 of the Arbitration Rules GN No. 427 of 1957 which states that is fatal. It renders the petition incompetent.

For easy of understanding the provisions of rule 8 of the Arbitration Rules GN No. 427 of 1957 provides as follows;

"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"

Mr. Mwalongo contended that in the petition at hand the copy of the agreement which is attached to the petition is not certified as required under rule 8 of the Arbitration Rules GN No. 427 of 1957 . Mr. Mwalongo referred this court to the following cases; **Symbion Power LLC Versus Salem Construction Limited Misc Commercial Cause No 12 of 2015**

(unreported) , in which Hon Mwambegele J, as he then was, held that failure to attach a certified copy of a submission in a application for stay of proceedings is fatal, **CRDB Bank PLC Vrs Sycon Builders Misc. Commercial Cause No 65 of 2018** (unreported) , In which I held that the failure to comply with the requirements stipulate in rule 8 of the arbitration rules GN No. 427 of 1957 is fatal as the provision of rule 8 is couched in mandatory manner and **Elifaraja Leonardo Tummion and Asile Sleyum and 4 others, Commercial case No. 66 of 2014**, in which Hon. Songoro, J. as he then was held that suit was incompetent for failure to submit certified copies of power of Attorney as required under Order III, Rule 6(2) of the Civil Procedure Code ,Cap 33 R.E 2002 .

In rebuttal, the learned advocate Ms. Mawalla, adopted the contents of her skeleton arguments filed in court in which she submitted that rule 8 is supposed to be interpreted using the Golden rule of interpretation. She referred this Court to the case of **N.I.T.LTD Vs Mahoharan 2005 (3) KLT 1025**, in which the court in elaborating section 8(2) of the Arbitration and Conciliation Act said that, the requirement of section 8 (2) for the production of the Original arbitration agreement or dully certified copy thereof is only to ensure that there is an arbitration clause and to ascertain whether the Arbitrator is named and other allied matters. Other cases referred to this court by the Ms. Mawala are ; **Natarajan Vs Manger , Southern 2006 (4) Arblr 149 Kerala, Manoj Makkar Vrs SMT Neeru Bal Revision No.7707 of 2009**,in which the courts held that failure to attach certified copy of the submission is not fatal if it is already there before the court or it is not disputed and the case of **Nextegen Solawazi**

limited and Voltalia S.A ,France ,Commercial cause No 1 of 2018 (unreported) in which Hon Sehel ,J as she was then while deciding a preliminary objection regarding the non-compliance of the provisions of Rule 8 of Arbitration Rules, GN No. 427 of 1957 said the following;

"Secondly, as I said, in the present petition, the parties are not disputing that there is a submission. Therefore, the non compliance of rule 8 of the Arbitration Rules should not be considered mechanically. It must be interpreted purposely. The purpose as I said is for the court to be satisfied that there is the submission clause between the parties. The submission clause itself is not disputed therefore with all intent and purpose the non compliance of rule 8 of the Arbitration Rules cannot be held to be fatal".

Ms. Mawalla contended that failure to file the original or certified copy of the lease agreement is not fatal , unless its existence or authenticity is disputed by the respondent.

Having analyzed the rival arguments of the learned advocates appearing in this petition, it is my settled view that the issue to be determined by this court is only one that is, whether or not the failure to annex to the petition original or certified copy of the submission is fatal. Authorities submitted by the advocates , and here I am referring to the decisions of this court show that so far there are two different positions. The decision of this court in the case of **Nextegen Solawazi** (Supra) holds a view that if the parties are not in dispute concerning the existence of the agreement to arbitration the failure to annex a certified copy of the same, is not fatal, on

the other hand the decisions of this court in the case of **Symbion Power LLc** (supra) and **CRDB Bank PLC** (Supra) hold a view that failure to annex a certified copy of the agreement /submission as provided in rule 8 of the Arbitration Rules, GN No. 427 of 1957 is fatal. I have taken into consideration the decision of this court in the case of **Nextegen Solawazi** (supra), however, I still hold the view that failure to comply with the requirement of rule 8 of the Arbitration Rule GN No. 427 of 1957 is fatal, since the requirement in that rule is couched in a mandatory way. It has to be noted that, a petition is filed first, then follows the reply to the petition which shows whether or not there is a dispute on the existence of the agreement to Arbitration, therefore the petitioner is not in a position to know that there is no dispute on the existence of the agreement before the reply to the petition is filed, so I am of a settled legal opinion that it is imperative that the petitioner has to annex either original or certified copy of the agreement as required under Rule 8 of the Arbitration rules GN No. 427 of 1957, to enable the court to ascertain the existence of the agreement/submission ,and the extent of the submission.

From the foregoing, I hereby strike out this application with costs.

Dated at Dar es Salaam this 23rd Day of April 2019




B.K. PHILLIP
JUDGE