IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

IN THE MATTER OF THE ARBITRATION

AND IN THE MATTER OF THE ACT

MISC. COMMERCIAL APPLICATION NO. 201 OF 2018

BETWEEN

VISIBLYHEARD- OPENCO.....PETITIONER

AND

TANZANIA TELECOMMUNICATIONS

COMPANY LTD .....RESPONDENT

11/12/2018& 22/01/2019

RULING

MWANDAMBO, J

This ruling seeks to address three points by way of preliminary objections against a petition for an order for the appointment of a sole arbitrator made under section 4 and 8(1) of the Arbitration Act, Cap 15 [R.E 2002](hereinafter referred to as the Act).

In a nutshell, the petitioner who acts through Capt. Audax Kameja, learned Advocate has petitioned this Court for the appointment of Ms.

Madeline C. Kimei as a sole arbitrator of a dispute with the respondent said to have arisen from a contract executed sometime in June, 2015. According to the petitioner, the respondent did not respond to her request for the appointment of an arbitrator of the dispute in terms of the underlying contract and hence the invocation of section 10 of the Act. Believing that the petition is flawed, the respondent invites the Court to strike out the same by way of preliminary objections premised on the following grounds namely:-

1. *That the petitioner has sued a wrong part (sic!)*

2. *That the petitioner has annexed unregistered power of Attorney*

3. *That the petitioner has violated the provisions of Section 10 of the Arbitration Act*

In pursuance of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules) the learned Advocates filed skeleton arguments for and against the preliminary objections. By consent, the learned Advocates dispensed with oral hearing asking the Court to determine the preliminary objections on the basis of their written skeleton arguments. However, upon examination of the respondent's skeleton arguments, I note that the learned Advocate did not address the Court on the second ground contending that the petitioner has annexed an unregistered power of attorney. I would take it that the respondent has abandoned it albeit without any express indication to that effect and so, worth for what it appears to be, I hereby strike it out for want of prosecution. That takes me to the remaining two grounds.

The crux of the arguments by Ms. Asha Waladi learned Advocate for the respondent on the first ground is premised on section 4 of the Tanzania Telecommunication Incorporation Act, No. 12 of 2017. It is the learned Advocate's contention that since the law incorporating Tanzania Telecommunications Company Ltd (the respondent) namely:- Tanzania Telecommunications Incorporation Act, Cap 304 (R.E 2002) was repealed by Act No 12 of 2017 establishing Tanzania Telecommunication Corporation, the respondent is no longer in existence capable of being sued. The learned Advocate argues with considerable force that in the absence of a provision for transfer of liabilities to the new legal entity, the petition has no legs to stand on because it against a non-existing party and so the same should be struck out. However, the learned Advocate did not come out clear to explain who instructed her to defend a non-existing entity.

Capt. Kameja learned Advocate for the petitioner urges the Court to reject the preliminary objection on three points. One, it is the learned Advocate's submission that the point offends the rule requiring full disclosure of the preliminary objection discussed by the Court of Appeal of Tanzania in **James Burchard Rugemalira vs. The Republic and Another**, Criminal Application No. 59/19/ of 2017 (unreported) in that the same is vague thereby depriving the petitioner's right to fully appreciate its nature and prepare a suitable reply. Two, the preliminary objection has not met the test of a preliminary objection which should be on a pure point of law within the rule enunciated by the defunct Court of Appeal for East Africa in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] EA 696. Three, at any rate, suing a wrong party cannot result into striking

out the petition because the Court has power under Order I rule 10(2) of the Civil Procedure Code, Cap 33 [R.E 2002] to strike out the name of a party wrongly joined and substitute him with the name of a party who ought to have been joined.

Having examined the submissions for and against the preliminary objection, I think its determination lies in the second limb of the arguments canvassed by the learned Advocate for the petitioner that is to say; whether the same meets the test made in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** case (supra) relied upon by the learned Advocate for the Petitioner. Before I dispose that point, I propose to pause here and say a word or two in relation to the first limb. Capt. Kameja argues that the objection has not been particularized and so it should be rejected. With respect that argument is misconceived. The respondent has clearly stated that the petitioner has sued a wrong party in the notice of preliminary objections which in my view did not require further particulars. However, the notice did not end there. Full particulars have been disclosed in the reply to the petition which should have informed the petitioner's Advocate the nature of the preliminary objection and prepare to argue the same as it were. Capt. Kameja acknowledges that the decision of the Court of Appeal in **James Burchard Rugemalira vs. The Republic & Another** (supra) was made on the basis of rule 107(3) of the Tanzania Court of Appeal Rules, 2009 which are not applicable to this Court but argues that the decision is of a general application and so it should extend to preliminary objections made in proceedings in the High Court. I am unable to read anything in the ruling

of the Court of Appeal supporting Capt. Kameja's contention other than the fact that the requirements to give particulars apply to criminal matters.

At any rate, even if I was to go along with the learned Advocate I would still not reject the preliminary objection in the same manner the Court of Appeal did in the case relied upon. This is so because rule 4 of the Rules mandates this Court to have regard to the need to achieve substantive justice which is consistent with the overriding objective brought about by Section 3A of the Civil Procedure Code as amended by the *Written Laws (Miscellaneous Amendments (No. 3) Act No. 8 of 2018.* The same is reflected in Section 3A of the Appellate Jurisdiction Act, Cap 141 [R.E. 2002] as amended by the same Act with the sole purpose of facilitating the fast, expeditious, proportionate and affordable resolution of all matters before the courts. That means that the decision relied upon by the learned Advocate would not apply to the circumstances of the case to the extent of striking out the preliminary objection in the manner the Court of Appeal did in that case. Instead, applying its mind to the foregoing the Court would have ordered the respondent to provide particulars of the preliminary objection had it found the same to be lacking. Having so said I will now revert to the second limb.

As submitted by Capt. Kameja and I think rightly so, the determination whether the petitioner has instituted her petition against a wrong party cannot be determined without examining some evidence which removes the point from the realm of preliminary objections within the rules laid down in **Mukisa Biscuit's** case (supra). It should be noted that the same point is a matter of contention in the respondent's answer to the petition and so it

cannot be a pure point of law to be determined as a preliminary objection in the manner canvassed by the respondent's learned Advocate. In the event, I find no hesitation in endorsing the submission by the learned Advocate for the petitioner with the net effect that the so called preliminary objection stands rejected.

The third objection is premised on the application of section 10 of the Act. Ms. Waladi argues forcefully that in so far as the contract did not prescribe how arbitrators will be appointed as well their number, the course open to the parties was to appoint one arbitrator each failing which petition for appointment of a sole arbitrator. From the above the learned Advocate argues that the filing of the petition was premature and the same should be struck out.

Capt. Kameja for his part takes the view that the preliminary objection is premised on an erroneous interpretation of section 10 of the Act and argues that since no number of arbitrators was prescribed under the contract, regard must be had to section 4 of the Act which deals with provisions implied in the submission set out under the first schedule to the Act. One of such implied provisions is reference to a single arbitrator where no other mode is provided. With respect, the learned Advocate for the petitioner is right in his argument. Contrary to the argument by the respondent's learned Advocate, it is crystal clear that the submission under clause 57(b) of the contract provides for settlement of disputes through arbitration in accordance with laws of the client's country. According to the contract, the client is the respondent and so the law applicable is the Arbitration Act which, as seen above, makes an implied provision for

reference to a single arbitrator if no other mode of reference is made as it were. In consequence, the objection lacks merit and the same stands dismissed.

The above said, both objections are hereby overruled. The petitioner is awarded her costs. Order accordingly.

Dated at Dar es Salaam this 22nd day of January 2019

L. J. S. MWANDAMBO,

JUDGE