IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

DAR ES SALAAM.

MISC COMMERCIAL CAUSE NO 35 OF 2019

IN THE MATTER OF ARBITRATION AND IN THE MATTER OF THE ARBITRATION ACT (CAP 15 R.E. 2002)

AND

IN THE MATTER OF SECTION 3 AND SECTION 21 (D) OF THE ARBITRATION ACT (CAP 15 R.E. 2002), RULE 5 OF THE ARBITRATION RULES, GN NO. 427 OF 1957

AND

IN THE MATTER FOR TEMPORARY INJUNCTION PENDING FINALIZATION OF ARBITRATION PROCEEDINGS.

BETWEEN

IRENE ENERGY LIMITED.....PETITIONER

VRS

MOHAMED SAID NAKANGA.....RESPONDENT

RULING

B.K.PHILLIP, J

The petitioner herein lodged this petition under the provisions of Section 3 and 21(d) of the Arbitration Act, Cap 15 (herein after to be referred to as "Cap 15") praying for the following orders;

i. That, this Honourable Court grant temporary injunctive /preservatory orders restraining the Respondent, his agents, licensees or any other person under his authority from carrying on mining operations using the disputed mining license number PML000802SZ and PML005387SZ in respect of the mining area situated at Mkomole Village, Kilwa District, Lindi Region in connection with the Assignment Agreement pending final determination of the arbitration proceedings commenced on 5th November, 2019.

ii. That, the Petitioner be awarded costs of this application.

iii. Any other relief(s) which this Honourable Court may deem just to grant.

A brief background to this application is as follow; In December 2018 the petitioner and the respondent entered into a contract known as the assignment agreement for assignment and transfer of mining licence, whereby the parties agreed that the respondent shall assign and transfer mining licence numbers PML000802SZ and PML005387SZ to the petitioner, for the consideration agreed therein by the parties. The petitioner alleged that it duly executed its responsibilities and made the payments of consideration as agreed, but the respondent did not complete the transfer of the said mining licences contrary to what was agreed. It is further alleged that despite being requested to complete the processes for the transfer of the mining licences, the respondent refused to do so. Consequently, dispute arose between the parties which moved the petitioner to issue a notice of arbitration, since the assignment agreement

at issue has an arbitration clause. A copy of the notice of Arbitration has been attached to the petition as annexture IE -3.The petitioner further averred that the dispute between the parties has not yet being determined by the Arbitrator, but the respondent is going on with the mining activities at the disputed area.

Furthermore, it is alleged that if the respondent will be left to proceed with the mining activities at the disputed area, the petitioner will suffer irreparable loss, since minerals are natural resources and once they are extracted cannot be replaced in anyway.

The respondent filed his reply to the petition in which he refuted the existence of the alleged dispute between the parties and stated that the dispute between the parties was resolved by the District Commissioner of Kilwa where the disputed area is situated. Furthermore, the respondent stated that the petitioner failed to pay the agreed purchase price for the Mining licences at issue, which is USD 70,000,000. Also, he alleged that there is no any pending arbitration proceedings between the parties. Both sides filed the skeleton arguments pursuant of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012.

At the hearing of this petition, the learned advocates Christina Ilumba and Deusdedit Luteja appeared for the petition while the learned Advocate Abdallah Matumla, appeared for the respondent.

Submitting for the petition, the learned Advocate Christina Ilumba, told this Court that she was adopting the submissions made in her skeleton arguments. In her skeleton arguments Ms. Ilumba submitted that this

petition has met all the required conditions for this Court to grant the injunctive orders sought in the petition. She cited the case of **Atilio Vrs Mbowe (1969) HCD 284** in which the Court stipulated the conditions that have to be met by the applicant for the Court to grant any injunctive order, to wit; *the existence of serious questions to be tried on the facts alleged and a probability that the applicant (plaintiff) will be entitled to the relief prayed, that the applicant stands to suffer irreparable loss requiring the Court's intervention before the applicant's legal right is established and that on the balance of convenience the applicant (petitioner) will suffer greater hardship and mischief if the injunction will not be granted.*

The skeleton arguments filed by Ms. Ilumba indicate that there are serious issues that have to be tried by the arbitrator to wit; the alleged breach of the contract entered by the parties and the dispute on the payment of the purchase price of the area in dispute. The respondent in his reply to the petition did not dispute the existence of the contract between the parties, contended Ms Ilumba.

Ms Ilumba further contended that, the pleadings show that there is a dispute pertaining to the execution of the said agreement, since the respondent alleges that the petition did not pay the agreed purchase price while the petitioner's position is that the whole of the agreed consideration for the contract was paid. She also argued that there is great probability that the petitioner will be entitled to the relief prayed in the arbitration proceedings as there are sufficient evidences to show that the respondent is in breach of the contract in question.

As regards the second condition, Ms. Ilumba argued that petitioner will suffer irreparable losses if the respondent will not be restrained from continuing with the mining operations because the minerals will be exhausted. She contended that if the minerals will be exhausted the loss that will be suffered by the petitioner cannot be remedied by compensation in terms of damages as the same cannot be able to cover the loss that will be suffered by the petitioner. To cement her arguments she cited the case of **Philemon Joseph Chacha and Others Vrs South African Airways (Prop) LTD and others (2002) TLR 246** in which the Court held that:-

> *"Injunctions are granted when the Court is satisfied that first, unless immediate action is taken the applicant may suffer irreparable damage and second, denying the temporary injunction in favour of trial may in the end make the main dispute in the case nugatory"*

As regards the third condition, the skeleton arguments indicate that the petitioner stands greater chance to suffer hardship and mischief from withholding the injunction than will be suffered by the respondent. Furthermore, the skeleton arguments reveal that the respondent will not suffer anything if the injunctive order sought is granted because in case the arbitration proceedings will ends up in his favour, the minerals will be there for him to continue with extraction of the same, to the contrary if the arbitration proceedings ends up in favour of the petitioner while the respondent has been left to proceed with extraction of the minerals, the petitioner will be left with nothing as minerals will be exhausted.

In addition to the above, Ms. Ilumba contended that if the injunctive order sought is not granted the minerals will be exhausted and the arbitration proceedings will be rendered nugatory. She contended that under the circumstances of this case, justice demands the injunctive order sought to be granted so as to preserve the subject matter of the arbitration proceedings. To cement her arguments she cited a number of case, among them are the case of **G.K. Hotels and resorts (Pty) and Board of Trustee of the Local Authorities Provident Fund, Misc Civil Cause No.1 of 2008** (unreported) and the case of **Voltalia Portugal and Nexgen Solawazi Limited , Misc Commercial Cause No. 202 of 2018** (unreported) in which the Hon. Mwandambo, J as he then was said the following;

> *I entirely adopt a statement by Werema, J (as he then was) stated in the former decision that once it was clear that there was dispute before arbitration tribunal, the Court has a duty to facilitate the arbitration by making interim conservatory order...."*

In conclusion Ms. Ilumba submitted that this Court has jurisdiction to entertain this application and grant the injunctive order so as to safeguard the subject matter of the Arbitration proceedings.

Submitting in opposition to the petition, Mr. Matumla also started by adopting the contents of his skeleton arguments and proceeded to submit that this Court is not properly moved on the ground that there is wrong citation of the law, because the petition indicates that it is made under the provisions of section 21(D) of Cap 15. He contended that the correct

citation is section 21(d) of Cap 15. Mr. Matumla explained further that wrong citation of the law renders the application incompetent and the same deserves to be dismissed. To cement his argument he cited the case of **Coal East Africa Mining Ltd Vrs Minister for Financial (2016) TLSLR 152** in which the Court held that failure to cite proper and specific citation of the enabling provision of the law renders the application incompetent and the case of **Harishchandra G.N Shelkhe Vrs Cliff Jiwan and two Others, Misc Civil Application No.19/2004, (HC-Mtwara)** (unreported), in which the Court held that citing a wrong provision of the law renders the application incompetent.

Furthermore, Mr. Matumla submitted that there is neither arbitration proceedings nor pending suit in this Court, thus he was of the view that this petition has no legs to stand on. It should be dismissed. He insisted that if this petition is granted the respondent will be condemned unheard as there are no any legal proceedings pending for hearing anywhere.

In rejoinder, Ms. Ilumba submitted that arbitration proceedings commences when the notice of arbitration is served to the respondent. She contended that in this petition the notice of arbitration a copy of which is attached to the petition as annexture "IE 3" was served to the respondent on 5th November 2019, thus the arbitration proceedings have commenced. To cement her arguments she referred this Court to a text books tittled *"Handbook of Arbitration and ADR Practice in Nigeria, by Tinuade Oyekunle and Bayo Ojo, LexisNexis"*, in which the authors at page 93 say that *"Arbitral Proceedings must be deemed to commence on the date on which the notice of arbitration is received by the respondent"* In addition to the

above Ms. Ilumba cited to me *"the UNCITRAL Arbitration Rules"* and *"UNCITRAL Model Law on International Commercial Arbitration 1985 with amendment as adopted in 2006"* which both provide that arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Moreover, Ms. Ilumba submitted that in the instant matter the parties have jointly appointed an arbitrator who has already started communicating with them.

In rejoinder, Mr. Luteja submitted as follows; that there is nothing wrong in the citation of the law under which this application is made. He contended that, the letter ("D") which appears in the citation that is, Section 21 "(D)" appears like that because it is in the title of the petition which is written in capital letters. Furthermore, Mr. Luteja said that, so long as the letter "D" is in bracket, there is nothing wrong. Apart from Section 21(D) which is being challenged by Mr. Matumla, this petition is also made under section 3 of Cap 15, which on its own suffices to move this Court to grant the orders sought in this application, contended Mr. Luteja.

In conclusion of his submission, Mr. Luteja, invited this Court to apply the principle of overriding objective and be please to grant the application. He cited to me the case of Yakob **Magoiga Gichere Vrs Peninah Yusuph, Civil Appeal No 55 of 2017,** (unreported), in which the Court applied the aforesaid principle of overriding objective.

Having analyzed the submissions of the learned advocates, let me start with the issue of citation of the law under which this application is made. On the onset, I wish to state my position that I am inclined to agree with the submission made by Mr. Luteja, that this Court is properly moved and there is nothing wrong with the citation of the laws for the reasons I will state soon hereunder.

I have perused the provisions of Cap 15 and noted that actually, the whole of section 21 of Cap 15, has no any sub section with a capital letter "D". To me, this clears any confusion of the sub section that was cited by the petitioner, since there is only one sub section in section 21 with a letter "d". Had it been that there is section 21(D) and 21 (d), then the concern of Mr. Matumla would make sense. Under the circumstances the petitioner by all purposes and intent meant Section 21 (d) which is the only one in Cap 15. Besides the above, the explanations made by Mr. Luteja on why letter "D" is in upper case instead of lower case ("d") makes sense to me since, it is true that the section is cited in the title of the petition which is in capital letters, so the letter "d" inadvertently was also left in upper case. On top of that, as correctly submitted by Mr. Luteja and on the strength of the decision of this Court in the case of **Hodi (Hotel Management) Company Limited Vrs Jandu Plumbers Limited, Misc. Commercial Application no 15 of 2009,** in which this Court said the following:

> *"Indeed as my learned brother justice Werema had the opportunity to observe albeit in passing in* ***NORCONSULT AS Vs TANZANIA NATIONAL ROADS AGENCY*** *(supra), Section 3 of the Act is* ***"the bedrock on which a process to access to arbitration is based."***

Section 3 of the Act is therefore the very foundation upon which a party wishing to access to arbitration can come to this Court seeking for conservatory or interim measures but only subject to there being a submission of reference to arbitration. Access to Court for interim or conservatory measures has to be preceded by submission of reference to arbitration....".

I am inclined to agree with Mr. Luteja that, the provisions of section 3 on its own is enough to move this Court to entertain this petition. From the foregoing it is the findings of this Court that this petition is in order and the Court is properly moved.

Before I proceed with the determination of the merit of this petition, let me point out that, the conditions for grant of injunctive orders are as articulated by Ms. Ilumba in her submission which I have summarized herein above. I think there is no need of repeating the same. It has to be noted that the conditions for grant of the injunction orders, presupposes that there is a matter filed in Court by the applicant that is pending for determination and in case of an application like the one in hand, made under the Arbitration Act, Cap 15, then there must be a matter between the parties, pending for hearing at the Arbitral Tribunal or before an Arbitrator.

The position of the law is that where there are arbitral proceedings going on, this Court upon application by any of the parties to the arbitral proceedings has discretional powers to grant an injunctive order /interim conservatory order so as to facilitate the arbitration proceedings. This position has been stated by this Court in a number of decisions among

them being the case of **Voltalia Portugal S.A** (supra) and **Norconsult A.S** (supra).

From the foregoing, I find myself compelled to start by making a determination on the rival arguments, on whether or not there are pending arbitration proceedings, since the existence of the arbitration proceedings is the determinant factor on whether I should proceed to consider whether or not the conditions for the grant of the injunctive order sought in this petition have been met.

I have made a critical consideration of the submission made by Ms. Ilumba on the existence of the arbitral proceedings between the parties and am inclined to agree with her that arbitration proceedings commences when the respondent is served with a notice of Arbitration. In fact the service of notice of arbitration indicates that there is already an arbitrator who is going to preside over the matter, that is why the service of the notice of arbitration demonstrates the commencement of the arbitral proceedings. In proving that the arbitration proceedings have commenced, Ms. Ilumba attached to this petition a copy of a document titled ***"Notice of Arbitration between Irene Energy Limited – (Claimant) and Mohamed Said Nakanga- (respondent)"*** the same is dated 4th November 2019. This document which Ms. Ilumba referred to it as the Arbitration Notice, contains the details of the dispute between the parties herein and the reliefs sought by the petitioner herein (Claimant). Ms. Ilumba submitted before this Court that the arbitral proceedings commenced on 5th of November 2019, meaning that the said notice of arbitration was served to the respondent on 5th November 2019. She

submitted further that the parties have already appointed the arbitrator who has already communicated with them. I have read the said notice of arbitration and noted that the same bears a signature, signed on 5th November,2019, which shows that it was served to the respondent on 5th of November 2019. With due respect to Mr. Matumla, his contention that this petition has no legs to stand on is misconceived, since the existence of arbitral proceedings suffices to move this Court to entertain an application like the one in hand. After all, Mr. Matumla did not dispute that the assignment and sale agreement entered into by the parties herein contains an arbitration clause. It is also a fact that there is a dispute between the parties herein, had it been true that the dispute between the parties was settled by District Commissioner as alleged by Mr. Matumla, then the petitioner wouldn't have come to Court. On top of that, the letter from the District Commissioner that is relied upon by Mr. Matumla to support his contentions shows that District Commissioner directed the petitioner to pursue its rights through acceptable legal avenues. That's why, no wonder the petitioner opted to refer the dispute to arbitration as agreed in their contract.

Having said the above, let me proceed to make determinations on whether or not the conditions for granting the injunctive orders sought have been met. As correctly submitted by Ms. Ilumba, there are serious issues to be determined by the arbitrator on the dispute between the parties herein pertaining to the payment of the agreed purchase price and the transfer of the mining licences. I have indicated earlier in this ruling that the respondent alleged that the petitioner failed to pay the agreed purchase

price while the petitioner alleged that it paid all the purchase price, hence the transfer of the mining licenses should be effected.

It is also true that minerals are natural resources which can be exhausted. So, if the respondent will be left to proceed with extraction of the minerals in the area in dispute then, those minerals which are the subject of the arbitral proceedings will be reduced in quantity and can be exhausted too, consequently, the petitioner will suffer irreparable losses and the arbitral proceedings will be rendered nugatory. I am also in agreement with Ms. Ilumba that on the balance of convenience the petitioner is likely to suffer more than the respondent if the injunctive order sought in this petition is not granted. I think, it is also worth pointing out here that Mr. Matumla did not challenge the submissions by Ms. Ilumba on the existence of the conditions for grant of the injunctive order sought in this petition.

From the foregoing, it is the finding of this Court that this petition has merits and the same is hereby granted. Therefore, the Respondent, his agents, licensees or any other person under his authority are restrained from carrying on mining operations using the disputed mining licences number PML000802SZ and PML005387SZ in respect of the mining area situated at Mkomole Village, Kilwa District, Lindi pending final determination of the arbitration proceedings. Each party will bear its own costs.

Dated at Dar es Salaam this day 18th day of February 2020.

B.K. PHILLIP
JUDGE