

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL CAUSE NO. 32 OF 2021**

**AND
IN THE MATTER OF ARBITRATION ACT
AND
IN THE MATTER OF ARBITRATION ACT NO. 2, 2020
[CAP 15 R.E. 2020]**

BETWEEN
VODACOM TANZANIA PUBLIC COMPANY
LIMITED..... PETITIONER
VERSUS
SHIVACOM TANZANIA LIMITED..... RESPONDENT

RULING OF THE COURT

K.T.R. MTEULE, J.

05/08/2021 & 1/11/2021

This ruling is in respect of points of law raised by the Respondent Shivacom Tanzania Limited asking for the stay of proceedings in this Petition pending determination of the High Court Dar Es Salaam Registry Misc. Civil Applications number 210 of 2021 filed by Shivacom Tanzania Limited (The respondent) against Vodacom Tanzania Public Company Limited (Vodacom) (The petitioner) and Miscellaneous Civil Cause No. 216 of 2021 filed by Tanil Somaiya as Guarantor against Vodacom.



The petitioner filed this petition seeking for this court to recognize a third (3rd) partial arbitral award issued in London on 4th May 2021 as a binding and enforceable decree of this court in terms of section 78(1) of the Arbitration Act, 2020. The arbitration was conducted under the UNICITRAL Arbitration Rules by parties' appointed arbitrators namely Lord Hoffmann Co-Arbitrator, Harry Matovu QC Co-Arbitrator and the Tribunal Chairman Justice Luis Harms. This third partial award came as a continuation of arbitration process which had already issued the first partial award and the second partial award which were both filed in this court.

In reply to this petition, the respondent raised the points of law challenging the continuation of the proceeding of this petition on account that it conflicts with two applications filed in the High Court Dar es Salaam Registry to challenge the previous two partial awards. He named these applications to be **Misc. Civil Applications Number 210 of 2021 and 216 of 2021 filed at Dar es Salaam Registry** which involve the "same parties" litigating under the same title of subject matter." According to the respondent, proceeding with the instant petition with existence of the two Civil applications contravenes **section 8 of the Civil Procedure Code, Cap 33 of the 2019 R.E.**

The point of law was argued orally where **Mr. Gasper Nyika Advocate** represented the Applicant while **Mr. Ngalo advocate** appeared for the respondent.



In his submission, Mr. Ngalo stated that the High Court Dar es Salaam Registry Misc. Civil Application No. 210 of 2021 was filed under **Section 14 of the Law of Limitation Act seeking for extension** of time to file a petition to challenge the conduct of arbitral proceedings and 2 partial final awards, one dated 18/11/2019 and the second one dated 9/3/2021.

According to Mr. Ngalo, the other application, High Court Misc. Civil Cause No. 216 of 2021 between Tanil Somaiya (Petitioner) and Vodacom Tanzania Ltd (The respondent) challenging the arbitral proceedings and resultant award. It is Mr. Ngalo's contention that although Tanil Somaiya is not a party to Misc. Commercial Cause No. 22 & 32 before this court, and was not also a party to Arbitral proceeding between Shivacom and Vodacom, but he filed the petition in his capacity as a guarantor in favour of Vodacom as he is responsible with paying the money that Shivacom owed to Vodacom deriving his locus from Section 79(1) of the Arbitration Act Cap 15 of 2020 as an interested party.

It is Mr. Ngalo's prayer that since this petition was filed in this court on 28/5/2021 which is after Misc. Civil Application No. 210 of 2021 and Misc Civil Cause No. 216 of 2021 have been filed in the High Court Dar es Salaam Registry, under Section 8 of the CPC and section 95 of the CPC this petition be stayed and await the outcome of the two matters in the High Court.

It is Mr. Ngalo's submission that the subject matter of the two applications in the High Court are directly and substantially the same as the one that are requested to be recognized in this petition. He contended that the rationale of

Section 8 of the CPC is to avoid giving of conflicting decisions in matters which are directly and substantially the same. He submitted that since in Petition No. 32 and Petition No. 22 both proceeding before this court the petitioner is seeking for this court to recognize a 3rd partial award which emanates from proceedings which are being challenged in the High court Dar es Salaam registry, by the two matters filed therein there is a likelihood of this court having a decision to enforce the award and another decision from the High Court Dar es Salaam registry granting the relief against the same awards.

Mr. Ngalo therefore requested this court to stay these proceedings on the strengths of Order XXI and Section 95 which gives inherent power to the court to give order in any matter in the interest of justice.

In response to Mr. Ngalo's submission, Mr. Nyika opposed the prayer to stay Misc. Commercial Cause No. 32 of 2021 because **firstly**, the subject matter in Misc. Commercial Cause No. 32 of 2021 is a 3rd partial award dated 4/5/2021 which the petitioner is asking this court to recognize as binding and enforceable expecting either recognition or refusal in terms of Section 78(2) of the Arbitration Act. Mr. Nyika continued to submit that on the other hand, Misc. Civil Application No. 210 of 2021 at the High Court Dar es Salaam registry is asking for extension of time to challenge the arbitral proceedings and the 2 partial awards dated 18/11/2019 and 9/3/2021. According to Nyika, clearly the subject matters are different since in this Misc. Civil Cause No. 32 of 2021 what is asked for is recognition of the 3rd partial award expecting

either recognition or refusal while the respondent's matters in Dar es Salaam High Court registry is for extension of time.

On the other line of argument, Mr. Nyika shall it be found that the subject matters are the same, the grant of extension of time in Application No. 210 of 2021 will not be prejudiced because in terms of Section 78(2) of the Arbitration Act 2020, as the Respondent had opportunity to raise any matter falling in Section 78(2) for this court to refuse to recognize the award which she has already done in the answer to the petition. Mr. Nyika wondered why the respondent is asking for stay.

With regards to High Court Dar es Salaam Registry Misc. Civil Cause No. 216 of 2021 Mr. Nyika responded that, since this matter is not challenging the 3rd partial award the subject matter is therefore different. According to Mr. Nyika, Tanil Somaiya who is the petitioner in Misc. Civil Cause No. 216 of 2021 is not a party to the instant proceedings and therefore Section 8 of the CPC cannot be invoked because parties are different. Mr. Mr. Nyika submitted that the fact that Mr. Tanil Somaiya has right to challenge the proceedings in terms of Section 79(1) of the Arbitration Act does not bring that Misc. Civil Application No. 216 of 2021 to fall in ambit of Section 8 of CPC which is very strict that parties must be the same and subject matter the same.

Mr. Nyika challenged the applicability of Section 95 of the CPC where there is specific provision under Section 8 of the CPC which gives the court power to stay proceedings. He therefore prayed that the two points raised should be overruled and the court to proceed with considering the this petitions.

In rejoinder, Mr. Ngalo submitted that although Misc. Civil Application No. 210 of 2021 High Court Dar es Salaam Registry, does not make reference to the 3rd partial award which is the subject of this petition, in Shivacom the respondent is applying for extension of time to challenge the whole arbitral proceedings in which the 3rd partial awards emanate. He contends that the 3rd partial award was filed on 4/5/2021 while the two applications before the high court had already been filed, that is why it was not covered in those applications. According to Mr. Ngalo, assuming that the extension of time and a petition to challenge these two awards succeeds, the situation will cause a confusion where the proceedings in this petition will certainly prejudice the proceedings in the High Court applications which is not the case for the instant petitioner.

Ngalo refuted the assertion that the subject matters in the competing applications are different, and stated that so long as they emanate from the same proceedings, they are the same.

With regards to the petition in Misc. Civil Cause No. 216 of 2021, Mr. Ngalo admitted that the Applicant therein Mr. Tanil is not a party but he is covered by Section 8 of the CPC because he is a privy to all the proceedings where parties are claiming on the same subject matter. According to Mr. Ngalo, Mr. Tanil has brought the High Court Petition under Section 79 of Arbitration Act as an interested party and that the outcome of this petition has direct bearing



on his High Court petition. Mr. Ngalo prayed that the matter be stayed pending determination of the matters pending in the High Court. That is all.

Having read and analyzed all the submissions made by both parties, one issue needs to be resolved. This is **whether the subject matter in Misc. Civil Application No. 210 of 2021 and the petition in Misc. Civil Cause No. 216 of 2021 both of the High Court Dar es Salaam Registry is directly and substantially the issue in this petition.** This issue fall under the principle of *res sub judice* in the context of Section 8 of the Civil Procedure Code (CPC) which provides:

*“8. No court shall proceed with the trial of any suit in which the matter in issue is also **directly and substantially in issue** in a previously instituted suit **between the same parties**, or **between parties under whom they or any of them claim litigating under the same title** where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed.”*

I got a chance to read and contextualize an analysis done by His Lordship Hon. Mwambegele J as he then was, in the case of **Wengert Windrose Safaris (Tanzania) Limited v Minister for Natural Resources and Tourism & Anor (Misc Commercial Cause No. 89 of 2016) [2016] TZHC ComD 41** in which he expounded the concept embedded in Section 8 of the CPC. Referring to **Sarkar, Code of Civil Procedure (11th Edition) by Sudipto Sarkar and V.R Manoharat P. 93**, the Hon. Mwambegele, J highlighted the following four catchy features in that provision:

1. That the matter in issue in the second suit is also directly and substantially in issue in the first suit;
2. That the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title;
3. That the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit; and
4. That the previously instituted suit is pending

In his skeleton arguments, the Respondent indicated to have a dispute with regards to the actual existence of the pendency of the two High Court applications at the time of filing of this petition. However during the oral submission, he did not submit on this issue. I assumed that Mr. Myika decided to disregard it because in actual sense, the Misc. Civil Cause No 210 of 2021 was filed on 6th May 2021 and Misc. Cause No. 216 was filed on 7th May 2021. This shows that they were pending before the filing of the instant application on 28 May 2021. This is so apparent that while filing the instant application, the High Court applications were pending. Likewise, from the parties submissions, it does not seem to be in dispute that the High Court Dar es Salaam Registry have jurisdiction to grant the relief sought in the two applications.

Therefore, from the conditions set out under Section 8 of the CPC, what remains as opposing points amongst the parties revolve around the subject matter of the two matters in the High Court Dar es Salaam Registry being or



not being directly and substantially in issue in the instant petition and the parties not being the same. The main controversy lies on matter directly and substantially in issue which I will address first.

Starting with Miscellaneous Civil Application No 210 of 2021, this is an application for extension of time to file an application to challenge the conduct of arbitral proceedings and two final partial awards dated 18th November and 9th March 2021 rendered in arbitral proceedings between the parties. Shortly, the gist of that application is extension of time to file an application to challenge the conduct of arbitral proceedings and the two partial awards. On the other hand, the essence of the instant application is recognition of the 3rd partial award emanating from the proceedings intended to be challenged. While Mr. Ngalo contends that what is in the application No 210 is directly and substantially an issue in this application, Mr. Nyika has a different opinion.

The mind knocking question is whether the issue in controversy in the High Court Dar es Salaam Registry is directly and substantially the issue in this application. The answer to this question will be realized by firstly solving the question as to what actually constitute a "matter directly and substantially in issue." Aware of the absence of a definition of "matter directly and substantially in issue" in section 8 of the Civil Procedure Code, Hon. Mwambegele J, in the **Wengert Windrose Safaris (supra)**, taking into account the commonality between Sections 8 and 9 of the CPC resorted to the definition given in Explanation IV of Section 9 which provides:



"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit"

For further elaboration he further referred to the definition given in **Sarkar: Code of Civil Procedure at p 94** and quoted the following words:

"Matter in issue' does not mean any matter in issue in the suit but has reference to the entire subject in controversy."

In the instant situation the applicant is seeking for **extension of time** to file an application to challenge the **conduct of arbitral proceedings** and **two final partial awards** dated 18th November and 9th March 2021. What appears to be the core of the entire subject of controversy as defined supra is the arbitral proceedings which have resulted to 1st and 2nd partial awards already registered and the 3rd partial awards which is sought to be registered. The extension of time is a procedure but the ultimate subject each part intends to controvert is the validity of the arbitral proceedings. While the matters in the high Court attempts to ultimately invalidate the arbitral proceedings, the matter in this court attempts to validate it. In the broad meaning given to matter directly and substantially in issue in the case of **Wengert Windrose Safaris (supra)**, it is apparent that the issue of *res-sub judice* apply in this situation in respect of Miscellaneous Civil Application No. 210 of 2021.



Under this Miscellaneous Civil Application No 210 of 2021 distinct parties is not a disputed issues. It is an issue with regards to Miscellaneous Civil Cause No. 216 of 2021 which is the next matter for consideration.

With regards to the Miscellaneous Civil Cause No. 216 of 2021, the subject matter is limited to the challenging of the first and the second partial awards which are not a subject in this application which concerns the 3rd partial award. I see nothing in common in this applications as seen in Miscellaneous Civil Application No 210 of 2021 where the matter in issue is the arbitral proceedings which is also the matter in issue in the instant application.

Nevertheless, from my finding with regards to Miscellaneous Civil Application No. 210 of 2021, this matter cannot proceed in parallel with that Miscellaneous Civil Application No 210 of 2021 as any decision therefrom may conflict with the instant application.

I therefore stay these proceedings in Miscellaneous Commercial Cause No. 32 of 2021 pending Determination of High Court Dar es salaam Registry Miscellaneous Application No. 2010 of 2021.

Dated at Dar Es Salaam this 1st Day of November 2021




KATARINA T. REVOCATI MTEULE

JUDGE

01/11/2021