

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 297 OF 2018

FIRST ASSURANCE CO. LTD..... APPLICANT

VERSUS

MAKETE DISTRICT COUNCIL1ST RESPONDENT

ANUBE BUSINESS CO.LTD.....2ND RESPONDENT

CERERINUS B. RWEYONGEZA.....3RD RESPONDENT

Date of last Order: 21/02/2020

Date of Ruling: 29/05/2020

J U D G E M E N T

MGONYA, J.

When the pleadings of both sides were filed and the matter was due for hearing, Mr. Mbuga, learned Advocate prayed for the matter to be heard by way of written submissionS of which the Court granted the prayer.

The Petitioner in his written submissions in support of the Petition seeking to set aside an Award of the Arbitral Tribunal stated that among other provisions of the law, the Petition is premised under section ***16 of the Arbitration Act, Cap. 15 [R. E. 2002]***. The Award arose out of the dispute submitted to

Arbitration pursuant to the order of this Honourable Court issued by Madame Munis J. on 13th June, 2017 vide **Misc. Civil Application No. 663 of 2016 see page 8 – 9 of the Misc. Civil Cause No. 156 of 2018**, of the Award filed by the Arbitration before this court.

It is the averments of the Petitioner that, reading the Award submitted for recording with view of issuances of decree, pursuant to **Misc. Civil Cause No. 156 of 2018**, one will quickly note that, Exhibit P2, performance bond is only key document made the Petitioner to be part to this dispute but unfortunately, the said document was declared by the Tribunal to be incompetent to be relied upon. Therefore, its terms and conditions stipulated therein were not subject of enforcement by the Tribunal as the Petitioner presented his defence.

Furthermore, the Tribunal went further on and created its own implied terms. However, it was also ruled that, the aforesaid implied terms were not complied by the 1st Respondent. Despite of the above observations, the Tribunal proceeded to hold the Petitioner responsible for breach of the contract. (Copy of the award is attached in the petition as annexure LA – 5). It is on that basis, the petitioner opt to prefer this Petition, seeking to set aside the Award **under**

section 16 of the Arbitration Act. Cap 15 of [R. E. 2002],
on the ground of misconduct committed by the Tribunal.

The Petitioner claimed two legal documents are crux of the dispute between the parties herein and the same were admitted by the Tribunal, as Exhibit P1 which is the copy of the Agreement titled:

“Mkataba wa Uwakala wa Ukusanyaji Ushuru wa mazao Tarafa za Matamba, Ikuwa, Magoma, Bulongwa, Lupalila na Ukwama”.

It is the Petitioners’ assertion that this Agreement was signed between the 1st and 2nd Respondent herein and that the Petitioner did not sign the same; and Exhibit P 2 is the performance Bond entitled as **Policy No.15/07/001443/06**, signed between the Petitioner and 3rd Respondent, and that the 1st Respondent did not signed the same.

However, as to the above two exhibits, the Petitioner submitted that, vide the said agreement, 2nd Respondent was required by the 1st Respondent to collect produce cess in the various localities within the jurisdiction assigned with paramount condition that the sum of **Tshs. 48,000,000/=** need to be remitted to 1st Respondent monthly. Further, in securing monthly collection and as the matter of agreement, performance bond was issued by the Petition subject to the

conditions therein, including paying premium by the 2nd Respondent.

It is the Petitioner's assertion that in our jurisdiction, the law recognizes that parties are allowed to refer their differences to the Arbitrator of the own choice and the only instrument which gives power to the Arbitrator or Tribunal is the agreement entered between the said parties in dispute prior to the occurrence of the differences. Furthermore, **section 16 of the Arbitration Act, Cap. 15 [R. E. 2002]** provide avenue to challenge the Arbitral award and the only grounds legally accepted should be based on "**misconduct**" committed by the arbitrator in the course of determining the dispute. Therefore, in view of the above, then intervention by the Court is not only justified but also necessary.

The Petitioner states that, the petition before this Honourable Court is premised on three irregularities committed by the Arbitrator in the course of determining the dispute and these are well stated in the paragraph 13 of the ***petition (1) Denial of right to be heard on the new issues raised, (2) Arbitrator act outside of his jurisdiction, and (3) Arbitrator committing errors of law apparent on the face of the award.***

It was the Petitioners view that the Arbitral Tribunal misconducted itself in dealing with the issue of the validity of the Performance Bond (Exhibit P2) which is the fundamental document connecting the Petitioner and Respondents in the case without affording Petitioner the right to be heard on crucial documents which define its right in the case and therefore breaching one of the principle of natural justice.

Further, the Petitioner's Counsel revealed that, as the matter of the procedures, before commencing hearing, the Tribunal examined the pleadings filed together with the witness statements hence framed issues for determination where five issues were framed and recorded for determination of the dispute as follows:

- (i) Whether the 1st Respondent (2nd Respondent herein) remitted less amount of money as the monthly revenue collecting of produce cess to the Claimant, (1st Respondent herein) contrary to the agency contract between the parties entered into on 31/07/2015 and if so, how much cess and worth how much sum of money;***
- (ii) If the 1st Respondent remitted less amount of money as the monthly revenue collecting of***

produce cess to the claimant contrary to the said agency contract between the parties, whether the 1st Respondent had a lawful excuse/defence for remitting the full amount;

(iii) Whether the 2nd Respondent issued a performance bond in respect of the contract which is subject of the present dispute;

(iv) In case issue No. 3 is decided in the affirmative, whether there is any party to the present arbitration who has complied with the terms of enforcement of the bond so as to be entitled to anything out of it; and

(v) To what reliefs are the parties entitled?

The tribunal dealing with disputes which is now subject of this application, had more advantage in framing the issues in controversial between the parties as compared to ordinary courts of law. Petitioner's Counsel submitted that the reason is that, apart from examining the pleadings filed by the parties, but also witness statements were already filed.

It was in the Petitioners submission that as in the course of composing the award, another issue out of the framed issues regarding whether the performance bond is the valid

document with the view of 1st Respondent to enforce terms and conditions to recover from the Petitioner emerged. Cementing this point, Petitioner quoted the passage on the same as bellow:

*"I have followed up the contending argument on this aspect I have noted however, that while making the respective arguments neither part has taken time to persuade me why I should judge the right of the claimant to recover from the 2nd Respondent on the basis of what is contained in the performance bond **was the performance bond a competent document to provide the terms and conditions of recovery by the claimant from the 2nd Respondent on the sum guaranteed?** I see this to be an indispensable question to answer before tackling the issue of compliance with the same or otherwise ... I now proceed to determine **whether the terms that the 2nd Respondent (Petitioner) complains were not complied with qualified to be terms of the contract. whether the terms of performance bond were the terms of contract between the claimant and the 2nd Respondent."***

It is further the Petitioner's concern that parties to the dispute were never invited to address the above issue and there is no dispute that the said issue, was raised by the Arbitrator at the time of composing judgement.

It was the contention of the Petitioner that the Tribunal is not bound by the strict ordinary rules of the court procedures. However, tribunal may import provisions of the civil procedure to cover the situation where necessary, such as importing **Order XIV Rule 5 (1) of the Civil Procedure Code** which allows him to frame additional issue.

It is the Petitioner's firm submission that great violation was committed by the Tribunal dealing with the validity of the performance bond, the document which was very important for the Petitioner in his daily business of insurance and he was not given opportunity to defend the same.

In reply to the Petitioner's submission, Counsel for the 1st Respondent averred that, the Petition before the court is a petitioners delay tactics to deny the Government to recover its revenue for betterment of the people of Makete District Council. It is the Counsel for the 1st Respondent submission that the trial Tribunal did not raised any new issues, neither exceed its jurisdiction with respect to the issue of limitation of time for Petitioner to be liable as it is stipulated in Performance

Bond and that there was no error of law apparent on the face of Award.

It is the submission of the 1st Respondents Counsel that the Performance Bond set a time limitation for the Petitioner to be liable, as quoted below:

"Any suit under this bond must be instituted before expiration of one year of the insurance of completion"

The 1st Respondent's Counsel declared that it successfully filed the Arbitration No. A01 of 2017 on 30th June, 2017 in the Arbitration tribunal which was within one year from the completion date of Bond. However, before filing the suit in the Arbitration, the 1st Respondent filed a Civil Case No. 118 of 2016 in the High Court of Tanzania at Dar es Salaam District Registry on 16th June, 2016 before Madame Judge Mruke who delivered her Ruling on 31st August, 2016. Following the Appointment of the Arbitrator by the High Court in Misc. Civil Case No. 662 of 2016 where Hon. Munisi, J. by then issued an order of Appointment of Arbitrator on **13th June, 2017**. Thereafter the 1st Respondent filed an **Arbitration Case No. 10A of 2017 on 30th June, 2017**.

It is the assertion of Mr. Godfrey for the 1st Respondent that, there was no delay and the matter was filed within one

year after the expiration of the bond period as it stipulated the insurance contract/policy.

Further in regards to the right to be heard, the Petitioner was given a chance to be heard and one witness was brought **DW4, Bosco James Bugali** as evidenced on pages **625 – 627** of the Award; and the Validity of the Performance Bond was discussed in length throughout the Arbitration proceedings.

It is the 1st Respondents Counsel concern that the Petitioner has alleged that he Arbitrator raised new issues in course of composing the Award and failed to call the parties to submit. He averred that, the alleged new issues are not new but they are facts which are contained in the pleadings, cross examinations of witnesses of the both parties and were argued by the parties after the performance bond has been admitted in evidence.

Further, that, the purported new issues are no new issues but are the evaluation and analysis of the Document, Performance Bond which was admitted by the Tribunal and discussed by the parties.

It is the 1st Respondents' Counsel submission that there were no error on the face of the Award as alleged by the Petitioner, and that the Arbitrator properly discussed the

performance bond and its validity. Further, there was no error in using the Law of Limitation and that the Arbitrator did not declare the Performance Bond incompetent as the matter of Performance Bond was referred to the Arbitrator for consideration and decision.

It was the 1st Respondents Counsel submission that the Arbitrator acted within his jurisdiction in accordance to the, Performance Bond for it was referred to in Arbitration for decision.

Moreover, submitting on the issue of error of law being apparent on the face of record, it is the 1st Respondent's concern that the Arbitrator did not declare that the Performance Bond was not a competent document to be relied on in any page of the proceedings. And such declarations if they were at all made, they did not form part of the decision of the Award as it was just an *Orbita Dicta*.

Having submitted, the 1st Respondent's Counsel prays the Petition be dismissed with costs and the Arbitral Award be registered.

Having gone through the rival submission of the parties and the relevant authorities, at this juncture, I proceed in determining the Petition.

It is the Petitioners view that the proceeding at the Arbitral Tribunal are flaunted by acts of the Arbitrator that flaunt the outcome of the award and hence he seeks before this court for an order to set aside the Arbitral Award. It is the Petitioners concern on three aspects be used to set aside the Award:

- i) Denial of the right to be heard on new issues raised;
- ii) Arbitrator acts outside of his jurisdiction; and
- iii) Arbitrator committing errors on face of record.

On the first concern, the Petitioner states that there was misconduct by the Arbitrator on raising new issues and not subjecting the same to be submitted upon by the parties. It is my concern to find in the records the issues that were raised at the Arbitral Tribunal and for ease of reference the same appear as hereunder:

(i) the 1st Respondent (2nd Respondent herein) remitted less amount of money as the monthly revenue collecting of produce cess to the Claimant, (1st Respondent herein) contrary to the agency contract between the parties entered into on 31/07/2015 and if

so, how much cess and worth how much sum of money.

(ii) If the 1st Respondent remitted less amount of money as the monthly revenue collecting of produce cess to the claimant contrary to the said agency contract between the parties, whether the 1st Respondent had a lawful excuse/defence for remitting the full amount.

(iii) Whether the 2nd Respondent issued a performance bond in respect of the contract which is subject of the present dispute.

(iv) In case issue No. 3 is decided in the affirmative, whether there is any party to the present arbitration who has complied with the terms of enforcement of the bond so as to be entitled to anything out of it.

(v) To what reliefs are the parties entitled?

It is however in the records of the award from the Arbitral Tribunal at page 66 - 67 that the issues after evidence was adduced were answered each according to the evidence in the records. **Frankly, I find no addition issue out of these 5 issues in the records.**

In the records it is the same 5 issues that were raised during hearing at the Tribunal and is the same 5 issues that formed the bases of the decision of the Arbitral Award. The Petitioner Statement that the Arbitrator made misconduct by raising new issues holds no water for the same was not proved. What is referred to as new issues by the petitioners were matters of fact that as per the records raised by the averments of the Counsel for the 2nd Respondent and needed to be clarified at that juncture and were never used in determining or reaching the decision of the Tribunal Award.

I am aware that this Court is only vested with powers to set aside a Tribunal Award when there is misconduct or the Award was improperly procured, as per ***S. 16 of the Arbitration award Cap. 15 [R. E. 2002]***, currently under ***S. 69 (3) (c) Act No. 2 of 2020 as amended***. From the submissions of the Petitioner, this is not our case in the circumstance of what transpired at the Tribunal. The right to be heard lamented on by the Petitioner is misleading since whatever transpired within the limits of the Performance Bond were testified upon as it appears in records and the award by **DW 4 one Bosco J. Bugali**, hence the right to be heard upon matters arising from the performance bond was granted.

Secondly, is the Petitioner's concern that the Arbitrator acted out of his jurisdiction. In this aspect, the Petitioner states

that the Arbitrator holding the Petitioner liable is not known and that the document that made the Petitioner part to this case was declared invalid. However the Tribunal further created its own implied terms upon the performance bond on matters of notifying the Petitioner of the breach by the 2nd Respondent herein.

Having taken great concern of the above averments, I had to go thoroughly go through the documents in the records regarding this matter. I have taken note of clause 8 in the contract between the 1st Respondent and the 2nd Respondent herein. That the insurer will also be held liable when the agent breaches the contract by failure to pay the amount of money agreed upon by the parties to the Contract.

Therefore, it is not in their records or elsewhere that the Petitioner is in dispute of being the 2nd Respondents' insurer and being astonished as to how the Petitioner became party to this suit. May I clear the Petitioners' doubt that the above explains as to how being a party to this suit came about.

Therefore since it was a term in their contract as it appears under item 19 that any dispute arising from their contract will subject to meetings of the parties and an Arbitrator as well. Having said the above, I find that **the Arbitrator had jurisdiction over the matter.**

Lastly, on the errors of law apparent on face of the Award by the Arbitrator, it was in the circumstance that the Petitioner averred that the Tribunal misdirected itself for not being knowledgeable of how a Performance Bond operates and further complicated the same by comparing the performance bond with a mortgage deed. Together with these complications as reiterated by the Petitioner, he went further into questioning the time limitation of the Performance Bond. The Petitioner argues that time limit should be in the bond itself and not to opt using time Limitation Act.

Having gone through the Performance Bond, it stated time limitation to be "***one year from the date of issuance of the Certificate for Completion***". It is within this time that any suit could be filed. The Performance Bond was signed ***04th August 2015*** to ***31st August 2016*** and the matter to the tribunal was filed on ***30th June 2017*** which in accordance to the record **is within one year** as stipulated by the Performance Bond and **thus being within time limit of the Performance Bond.**

It is my firm view that the Petitioner failed to prove the reasons for the court to set aside the award. It is only when there is misconduct by the Arbitrator or where the Award has improperly been procured that this Court can set aside the Award; the same have not been proved by the Petitioner. **In**

the event therefore, find the concerns of the Petitioner without merits.

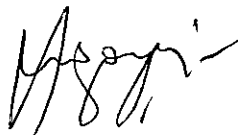
This Application is dismissed with costs.

It is so ordered.



**L. E. MGONYA
JUDGE
29/05/2020**

Court: Judgment delivered before Hon. Kisongo, Hon. Deputy Registrar in chambers in the Absence of both parties and Ms. Janet RMA, this 29th day of May, 2020.



**L. E. MGONYA
JUDGE
29/05/2020**