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**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC CIVIL APPLICATION NO. 117 OF 2019

(C/F MISC. CIVIL CAUSE NO 14 OF 2019)

IN THE MATTER OF THE ARBITRATION

AND

IN THE MATTER OF THE ARBITRATION ACT, CAP 15

AND

IN THE MATTER FOR PETITION TO SET ASIDE AN ARBITRAL AWARD

BETWEEN

ANGELIQUE INTERNATIONAL LIMITED PETITIONER

AND

EA ELECTRICAL POWER SOLUTION LIMITED RESPONDENT

RULING

23/8/2021& 13/10/2021

MZUNA, J.:

The petitioner Angelique International Limited filed in this court a petition
challenging the registration of the Award as the decree of this court.

The background story is that the respondent filed Civil case No 36 of 2016 before this court against the petitioner. Subsequently thereafter, the petitioner filed Misc. Civil case No 7 of 2017 for stay of the main case pending referral for an arbitration. Indeed, the case was referred there and the award was entered in favour of the respondent. Before, it could be registered, the petitioner preferred this application based on the following grounds:-

- 1) *That the award by the learned arbitrator was improperly procured.*
- 2) *That the Arbitrator misconducted himself.*
- 3) *That the award is invalid following this honourable courts order dismissing Civil Case No. 36 of 2016 which was filed by the respondent.*

During hearing of the petition which proceeded by way of written submissions, the petitioner was represented by Mr. Godfrey Mlacha, learned advocate while the respondent enjoyed the service of Mr. Jamhuri Johnson, also learned advocate.

Three issues are subject for determination:- **First** whether the award was improperly procured; **Second**, whether the arbitrator misconducted himself and; **Third**, whether the award is invalid after the dismissal of civil case No 36/2016.

I propose to start with the third issue relevant for the third ground. It is on validity of the award after the dismissal of Civil Case No. 36 of 2016 which was filed by the respondent.

It is the argument of Mr. Mlacha that the dismissal of the above Civil case, meant that the award was *res judicata* and that such award had no legs to stand alone in absence of the Civil case No. 36/2016. Reference was made to annexure A5, the order which dismissed Civil case No. 36 of 2016.

On his part, Mr Jamhuri, is of the view that, the dismissed case had no any effect with the award as they are not related.



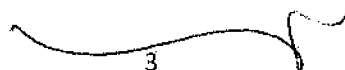
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This point should not detain me. The validity of the award is not based on the presence or absence of the Civil Case No 36/2016. I say so because the arbitration is premised on the contract that parties had entered into not otherwise. More so, the dismissal of the case does not connote that the case had been heard and finally determine such that one can say it is res judicata under section 9 of the Civil Procedure Act, Cap 33 RE 2019. This ground is bound to fail. I dismiss it.

I revert to the second issue. The question to ask is whether the Arbitrator misconducted himself. Submitting on this ground, Mr. Mlacha argued that the arbitrator failed to deal with the matters that were referred to it and he went on to state that it is the respondents claim as per A 3 it is a plaint to which the amount claimed were indicated but the award went beyond the claim made by the respondent. The learned counsel cited the case of **Shah v The Moshi Universal Stores Ltd** [1971] HCD 118 where it was held, among others that, the award must be within the terms of the submission of the parties.

The other misconduct of the arbitrator that was pointed was the act of the arbitrator to commence proceeding prior to the issuance of a notice as a requirement under the arbitration clause (clause 13.3 of annexure A1).

As opposed to that view, Mr. Jamhuri contested this allegation for the reasons that, since the issue of notice was not pleaded then it can not be



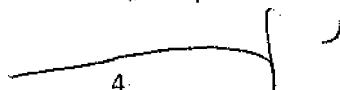
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argued during submissions because arguments in legal proceedings should be confined to the pleadings. The learned counsel cited the case of **Girdhari Lal Vidyarthi v Ram Rakha** [1957] EA 527 which was applied in the case of **National Bank of Commerce Ltd v Somo Contractors Ltd** [2004] T.L.R 430 (HC). The court held that: "*Final submissions must be confined to the pleadings and evidence.*"

He said further in alternative, that all notices were duly issued as per annexure EA 1 to the reply.

The argument that the claim was prematurely filled before the arbitrator in the absence of any reference of the matter to an adjudicator and without informing the petitioner of the intention to refer the matter to arbitration is with due respect without merit. It cannot be said that the arbitrator had misconducted himself because such issues cannot be tabled before this court, ~~instead ought to have been argued there. Actually, parties referred the matter~~ to arbitration pursuant to the terms of their contract. This ground fails as well.

The last point is on legality of the award. The learned counsel challenges the award simply because upon stay of the matter, there was extension of time for an arbitrator to make an award. Three (3) months was issued up to 28th June 2019 there after the case was set for hearing on 26th July 2019. The learned counsel cited rule 8 of the civil Procedure Arbitration Rules, 2nd schedule of the Civil Procedure Code, Cap 33 R. E 2019 to support his


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submission he cited the case of **Nyangau v Nyakwara** [1976-1985] EA 443 and stated that the award was made two months beyond the time extended for the same award to be made.

Mr. Mlacha also stated that as the contract between the parties has a clause to referral the matter to an arbitrator still the pre requisite procedures for instituting the arbitration was not followed and cited the case of **Bahi District Council v M/S Kaguo Business Enterprises Co. Ltd**, Misc. Commercial cause No 18/2012 (unreported) and urged this court not to register and enforce the award since it was procedurally improperly procured for violation of contract that existed between the parties (annexure A-1 to the petition).

The other point which Mr. Mlacha touched is on the aspect that there was no dispute between the parties for the matter to be referred to arbitration. As ~~per Annexure A 2 (the settlement agreement)~~ he stated that there was an amicable settlement of dispute thus there was nothing left to be referred to arbitration.

Contesting the Petition Mr. Jamhuri argued on the first issue that, the Civil case No 36/2016 was only stayed by this court and there was no order to refer the matter to arbitrator by the court. To support his submission he cited the case of **East African Breweries Ltd V GMM Company Ltd** [2002] TLR 12 and stated that the remedy available was for the stay of proceedings and

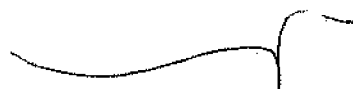
he thus stated that the arbitration was not under the supervision of the court and therefore the Rules are inapplicable since the agreement (annexure A 1 of the petition) had a clause to refer the matter to the arbitration.

On the allegation that there was no dispute to be referred to arbitration he contended that, where a party takes part to an arbitration, they cannot later on come and challenge its validity. Mr Jamhuri replied by stating that where there is an irregularity in the arbitration proceeding it must be objected immediately.

In answering the first issue on whether the award was improperly procured. This court is alive of the function of an arbitration clause in a contract. The clauses set out the obligations which the parties undertake towards each other.

As a matter of fact, after the commencement of the civil case No 36 of 2016 parties moved the court to stay the proceeding so that the matter may be referred to an arbitration as per the wordings of annexure A1 there exists an arbitration clause in the contract between the parties which made it possible for the arbitration to be conducted. It was held in the case of **Bahi District Council V M/S Kaguho Biscuit Enterprises Ltd (supra)** that,

"an agreement between the parties to submit their dispute to arbitration as per the term and condition of contract is binding".



Again, as well submitted by Mr. Jamhuri, the learned counsel, a party who takes part in the arbitration proceeding cannot later on come and challenge its validity. All what the applicant has raised are matters of formalities which ought to have been addressed there. Courts are now premised on substantive justice and not procedural unfairness. I see no prejudice which the applicant has suffered such that the award which was mutually entered into, cannot be registered in court. The allegation that there was amicable settlement or settlement agreement is something which ought to have been addressed to the Arbitrator. To say it at this late hour is just an afterthought. It is intended to delay the justice of the case. No court worth such a name can condone it.

In conclusion therefore, the award is fairly adjudicated by consent of parties. This application stands dismissed with costs.

Oder accordingly.



M. G. MZUNA,

JUDGE.

13/10/2021