IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 4015 OF 2024

IN THE MATTER OF ARBITRATION ACT, 2020

AND

IN THE MATTER OF ARBITRATION

BETWEEN

ORYX ENERGIES TANZANIA LIMITED

*(Formerly known as **ORYX OIL COMPANY LIMITED**)* ..... **1st PETITIONER**

ORYX ENERGIES SA ..... **2nd PETITIONER**

VERSUS

OILCOM TANZANIA LIMITED ..... **RESPONDENT**

RULING.

S.M. MAGHIMBI, J:

On the 28th day of February, 2024, the petitioners filed this petition under the provisions of Section 74(1) (b) and 75(1) & (2) (a)(b)(c)(d)(g) (h) and (i); 3(a) (b) and (c) of the Arbitration Act, 2020 and Regulation 63(1)(a) of

the Arbitration (Rules of Procedure) Regulations, 2021. The Petitioners are moving the court for:

1. Declaration that the final award be of no effect in whole;
2. Declaration that, the final award be set aside in whole;
3. Alternatively, remit the final award for reconsideration and determination by arbitral tribunal constituted of newly appointed members;
4. Costs of this petition; and
5. Any other relief (s) as this Court may deem appropriate.

On the 02nd day of April, 2024; while filing her reply to the petition, the first respondent filed along with it a notice of Preliminary Objection on point of law that:

1. The petition is bad in law for being sub-judice and an abuse of the Court's process; and
2. The Petition is time-barred for having been filed out of the mandatory 28 days from the date of award and without exhausting the arbitral process of review.

It was the respondent's prayer that the Petition be struck out with costs. On the 17th day of April, 2024 when the petition came for necessary orders,

Mr. Laizer, learned Counsel for the respondent made a prayer; which was not objected by Mr. Mbwambo, learned advocate representing the petitioners; The prayer was for amendment of their points of objection in view of the extent that another petition opposing the recognition and enforcement of the award to wit; Misc. Civil Cause No. 1017/2024 having been determined on the 12th day of April, 2024; their first point of preliminary objection was to the effect that the current petition is bad in law for being *sub-judice* ceases to have relevancy. As such, he prayed to substitute the word "*Sub judice*" which appears in the first point of preliminary objection with the word *"Res Judicata"*. Having so amended the point of objection, this court ordered the disposal of the preliminary objections to be by way of written submissions. All parties adhered to the schedule of submissions hence this ruling.

In his submissions to support the first point of objection, Mr. Laizer submitted that following the delivery of this Court's ruling on the 12th day of April 2024 in Miscellaneous Civil Cause No. 1017 of 2024 [Arising from Misc. Civil Cause No. 27821 of 2023] between Oryx Energies Tanzania Limited (Formerly known as Oryx Oil Company Limited) & Oryx Energies SA versus Oilcom Tanzania Limited ("The Previous Petition"), this Petition is res-

judicata and an abuse of the Court's process. Elaborating on what Res Judicata is, he pointed out that Section 9 of the Civil Procedure Code Cap. 33 [R.E. 2019] bars the Courts on mandatory terms from trying any suit or issue in which the matter directly and substantially in issue has been in a former suit between the same parties or between parties under whom they or any of them claim to litigate under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court. He supported his submissions by citing the case of **George Shambwe Vs. Tanzania Italian Petroleum Co. Ltd [1995] TLR 20**, where this Court had underlined the scope, rationale and criteria used to determine whether a suit was *res judicata* when it held as follows;

> *"For res judicata to apply not only must it be shown that the matter directly and substantially in issue in the contemplated suit is the same as that involved in a former suit between the same parties but also it must be shown that the matter was finally heard and determined by a competent court".*

He further cited the case of **Peniel Lotta Vs. Gabriel Tanaki and others [2003] TLR 312**, the Court of Appeal of Tanzania (at Arusha) where the Court elaborated five conditions barring a subsequent suit where it held:

> *"The scheme of S.9 therefore, contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit (ii) the former suit must have been between the same parties or privies claiming under them (iii) the parties must have litigated under the same title in the former suit (iv) the court which decided the former suit must have been competent to try the subsequent suit and (v) the matter in issue must have been heard and finally decided in the former suit."*

His argument is that in this Miscellaneous Civil Application No.4015 of 2024, the issues are substantially the same in the previous petition particularly pointing to the grounds of complaint articulated under paragraphs 23, 24, 31, 32, 33, 34, 35(a), 35(b), 35(c), 35(d), 35(e), 35(f), 35(g), 35(h), 35(i), 35(j), 35(k)(i)(e), 35(k)(ii)(a), 35(k)(ii)(b), 35(k)(ii)(d) and 35(l) in this petition, which he argued to be substantially the same with

grounds of complaint pleaded under paragraphs 23, 24, 29(i), 29(ii), 29(iii), 29(iv), 29(v), 29(vi), 29(vii), 30, 31, 35 and 36 in the previous petition. His conclusion was that the issues in the present Petition are directly and substantially the same as the issues in the previous petition, which issues have already been determined by this Court on the 12th day of April 2024.

I will determine the nits and grits of Mr. Laizer's grounds of contention while determining this objection. At this point, I will proceed to consider Dr. Tenga, Mr. Mbwambo and Mr. Nangis' joint written submissions in reply. I must state at the onset that in reply submissions, the learned Counsels for the petitioners did not deny the fact that the underlying facts in both the petitions are the same, their only defence was that the sections of the Act that the two petitions are premised were different. To be more precise, it was their submission at page 14 of their submission that:

> *Madam Judge, yes,* ***the underlying facts are the same but the grounds upon which the applications were made and the way to present the arguments in support are different and have a different purpose*** *(once again the reliefs sought do not lead to the same results). Yet, they cannot be said to make the Misc. Civil Cause No. 4015 of 2024 res judicata Misc. Civil Cause No. 1017 of 2024. Narration at the hearing would definitely be different in view of the nature of*

the grounds/issues and the law applicable as well as the reliefs sought."

In replying to the first point of objection with regard to the issue of *res judicata*, the Counsel for the petitioners jointly submitted that Misc. Civil Cause No. 1017 of 2024 is made under Sections 65. -(2), 73. -(3), 83. -(2)(v) of the Act and Regulation 63. -(1)(a), (b), (c), (d) &(e) of the Regulations while Petition in Misc. Civil Cause No. 4015 of 2024 is made under Sections 74(1) (b) and 75(1) & (2)(a), (b), (c), (d), (g), (h) and (i) of the Act, and Regulation 63(1)(a) of the Regulations. They argued, the fact that the two matters are made under different provisions of the law by itself demonstrates that subject matter in the two matters is different therefore Section 9 of the CPC does not apply.

The petitioners submitted further that when one looks at the grounds/issues they are different as the grounds/issues in respect of the former matter, Misc. Civil Cause No. 1017 of 2024 are prescribed under Sections 65. -(2), 73. -(3), 83. -(2)(v) of the Act. On the other hand, they argued that, grounds or issues in Misc. Civil Cause No. 4015 of 2024 are prescribed under Sections 74(1) (b) and 75(1) & (2)(a), (b), (c), (d), (g), (h) and (i) of the Act which is yet another demonstration that the issues/grounds in the two matters are all different.

The petitioners went on submitting that what is even more important is the reliefs sought in the two matters. That in Misc. Civil Cause No. 1017 of 2024 the reliefs sought are completely different from those sought in Misc. Civil Cause No. 4015 of 2024 and the final determination of issues results into granting or refusing to grant the reliefs sought. They elaborated that in Misc. Civil Cause No. 1017 of 2024 the Petitioners asked the court to refuse to recognize and enforce the Final Award which is different from the reliefs sought in Misc. Civil Cause No. 4015 of 2024, which its aim is to annul the Final Award or remit it for reconsideration on the merits, thus resulting in a different award from the previous one.

Justifying, the independence nature of the two petitions, they submitted that a petition or application like Misc. Civil Cause No. 1017 of 2024 seeking for an order to refuse to recognize an award is an independent proceeding regulated by a separate provision of the Act. The grounds in support of such an application are specifically prescribed under sections 73 and 83 of the Act and are substantially, prescribed in section 83 of the Act. On the other hand, they submitted, a petition or application like Misc. Civil Cause No. 4015 of 2024 seeking an order of the court to set aside and or remit the award is equally an independent application regulated by a

different provision of the Act. The grounds in support of the applications of this nature are well prescribed in sections 74 and 75 of the Act, but are substantially, prescribed in section 75 of the Act. Their argument was that by any stretch of interpretation and or interpolation of sections 83 and 75 of the Act, these two provisions do not supplement each other, neither can they be read together as they are different and independent with different objectives and the proceedings under them achieve different results. Further that any suggestion that proceedings under the provisions of section 83 and those under 75 can be res sub judice or res judicata is a desperate proposition.

The petitioners went on submitting that although the parties are the same, the court that tried Misc. Civil Cause No. 1017 of 2024 is competent to try Misc. Civil Cause No. 4015 of 2024 and the issue of substantive jurisdiction which is prescribed in both section 73(2) of the Act under which Misc. Civil Cause No. 1017 of 2024 was made as well as in sections 74(1) and 75(2)(b) of the Act under which Misc. Civil Cause No. 4015 of 2024 is made.; the resemblances cannot attract the principle of res-judicata in the two proceedings. To support their argument, they cited the decision by the Court of Appeal for **Eastern Africa in the case of Jadva Karean Vs.**

Herman Singth Bhogal 20 [E.A.C.A.] 74 while construing the phrase as provided in section 6 of the Kenyan Civil Procedure Ordinance Cap. 5 which is identical with section 9 of the CPC, the court states at page 76 thus;

> *"the Authorities are clear that the matter in issue in section 6 of the Ordinance does not mean any matter in issue in the suit but has reference to the entire subject in controversy; it is not sufficient that one or some issues are common. The subject of the of the subsequent suit must be covered by the previous instituted suit not vice versa."*

They further cited Mulla's Code of Civil Procedure where it is stated at page 40-41 while discussing the provisions of Indian Code of Civil Procedure which are in *pari materia* with section 9 of the CPC postulated that:

> *"It is not enough to constitute a matter res judicata that it was in issue in the former suit. It is further necessary that it must have been in issue directly and substantially in issue in a suit…"*

The petitioners then submitted that much as the above referred authorities do not relate to petitions filed in Misc. Civil Cause No. 1017 of 2024 and Misc. Civil Cause No. 4015 of 2024, respectively they are relevant to the extent that it is a law that, the fact that some issues are common is

not sufficient for the principle of res judicata to apply which is exactly what can be said in the instant two matters. The Counsel beseeched this court to draw inspiration from these authorities and find that there is no res judicata and dismiss this preliminary objection with costs.

Having considered the submissions of all parties, my determination will be categorized into two, in the first limb I will determine whether the current petition is res judicata of the previous petition in line with the principles laid down in the cited case of **Peniel Lotta Vs. Gabriel Tanaki & Others (supra).** On the second part, I will determine whether this current petition is an abuse of court process.

Starting with whether the matter beforehand is *res judicata* of the previous petition, the first principle in determining whether a matter is *res judicata* of the previous suit is to see whether the said matter is directly and substantially in issue in the subsequent suit as has been directly and substantially in issue in the former suit. Mr. Laizer has pointed out that if one takes an objective look on the grounds of complaint on the two Petitions, will certainly establish that the grounds of complaints in this petition are substantially the same as grounds of complaints raised and deliberated upon by this Court in the previous petition. In a more elaborative itemization, he

pointed out that the ground established in para 23 of the current petition complaining of the Tribunal's decision to strike out the Petitioners' expert report and expunging the Petitioners" additional list of documents was also raised and pleaded under paragraph 23 in Miscellaneous Civil Cause No.1017 of 2024, and that ground 24 in this petition is blaming the Tribunal's decision to direct parties to file final submissions on 30th October, 2023, thereby preventing definitely the Petitioners from bringing a proper defence regarding the extravagant and unjustified claim for damages made by the Respondent, which is raised and pleaded under paragraph 24 in this petition, the same was also raised and pleaded under paragraph 24 in the previous petition.

In the previous petition which is reported as **Oryx Energies Tanzania Limited (Formerly known as Oryx Oil Company Limited) & Another vs Oilcom Tanzania Limited (Misc. Civil Cause No. 1017 of 2024) [2024] TZHC 1567 (12 April 2024)**; the petitioner raised an issue that their expert report and expunging the Petitioners" additional list of documents was prejudicial. This is noted at page 48 of the Ruling of this court in the previous petition where it reads:

On the seventh ground, that, the Petitioners were unable to present their case before the Arbitral Tribunal, the Petitioners' grievance is the manner in which the Tribunal conducted the arbitral proceedings and arrived at its Final Award. In particular, it is submitted that the Petitioners were unable to present their case before the Arbitral Tribunal because the tribunal expunged the Petitioners' expert witness' statement, one Juliette Fortin. That the Tribunal also expunged the Petitioners' additional list of documents/exhibits to be relied upon (Annexure Oryx 13 to the Petition). That indeed, this Tribunal's decision deprived and ultimately prejudiced the Petitioners to be able to present their case before the Arbitral Tribunal.

At page 53 of the same decision, it was also observed:

"Their conclusion was that all the above is evidence that Petitioners were unfairly and unjustly deprived of their essential right to present their case which is sufficient ground to refuse recognition and enforcement of the Final Award."

It is obvious that the complaint in para 24 herein was also raised in para 24 of the previous petition and in so determining the issue, this court held:

> *"It is apparent that in this ground,* ***the petitioners are challenging what they termed as tribunal's decision that expunged the Petitioners' expert witness' statement, one Juliette Fortin and the Petitioners' additional list of documents/exhibits to be relied upon*** *(Annexure Oryx 13 to the Petition). Their argument was that the move denied Petitioners right to fully present their quantum arguments making the Respondent successful in almost all of 59 of its claims and won substantial damages as a result (as it was awarded USD 152 million), while Petitioners' arguments on quantum would likely have, at least, greatly reduced the amount awarded. In a nutshell, the petitioners are challenging the quantum of damages awarded through the window of the expunged records of Juliette Fortin. As said above the powers of this court to what has been analyzed by the Tribunal in length and which is not manifested on the face of records is limited. Since this is not appeal, I cannot*

dive deep to challenge the reasoning of the Tribunal in the quantum of damage that is to be awarded or why a certain action which was reasoned and reached was taken. By doing so, I will be acting as the first appellate court by wearing the shoes of the Tribunal, re-hear the case and ascertain the evidence to the decision reached and the quantum of damages that was awarded. That power, as per the cited authorities above, I do not have. That being the case, the ground is also dismissed for lacking merits."

On that observation, I am in agreement with the respondent that the ground had already been raised and determined in the previous petition cited above.

On the complaint against the Arbitral Tribunal's lack of substantive jurisdiction raised and pleaded under paragraphs 31 and 39 in this petition, Mr. Laizer argued that the same was also raised and pleaded under paragraphs 29(i) and 31 in previous petition, Miscellaneous Civil Cause No. 1017 of 2024. Looking at the Ruling in the previous petition, at 17, this court held:

"Having so made the above findings, I will now determine the first ground of petition, ***that the Arbitral Tribunal lacked substantive jurisdiction to make the award****."*

Looking at the current petition at para 31, the petitioners have pleaded that they are still determined to challenge the award hence this petition challenging the substantive jurisdiction and serious irregularities affecting the Arbitral Tribunal, Proceedings and the final award that has caused substantial injustice to the petitioners. Therefore indeed, the issue of substantive jurisdiction was raised in the previous petition.

The next issue as pointed out by Mr. Laizer for the respondent was the complaint regarding the alleged non-accreditation of Prof. Mussa Assad and Justice Engera Kileo (rtd) raised and pleaded under paragraph 32 in this petition which was also raised and pleaded under paragraph 30 in the previous petition. Again, at page 24 this court observed:

The second limb on the ground of jurisdiction was that the Arbitral Tribunal was composed of arbitrators who were not accredited. In this second limb, the Petitioners complained that the Arbitral Tribunal was composed of arbitrators (Hon. Justice Engera Kileo (RTD) and Prof. Mussa Assad) who are not duly

accredited arbitrators as required by law. They based their argument on the accreditation requirement of the arbitrators as prescribed under the provisions of the Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021, Government Notice No. 147 of 2021 (the Practitioners Accreditation Regulations) as well as the Act and the Regulations.

The issue under para 32 of this petition is on the same ground that the arbitrators appointed by the Respondent and the Chairperson were not accredited arbitrators making the final award with no effect. This with respect is the same issue that was raised and noted at page 24 of the Ruling in the previous petition hence already determined by this same court. In determining the issue, the court was cautious and observed from page 39-41:

On my part, before I go into determining the substance of the raised points of objection, I will first determine whether I am mandated to do, that is going deep and scrutinize the validity of the documents of arbitration with regard to their accreditation. As pointed out by the respondent to which I am bound by the cited decisions of the Court of Appeal in the case of Prestine Properties Limited Vs. Seyani Brothers & Co. Limited; it is

undisputed as per the records, having bounced in this court in challenging the impartiality of one of the arbitrators, the petitioners went back to the Arbitral Tribunal and proceeded with hearing of the matter to finality. It has not been revealed in any of the records of the Arbitral Tribunal or by the petitioners in their submissions, that there was ever an attempt to challenge the competence of the arbitrators with regard to their accreditation. Actually, if I may emphasize, since the presence of one of the arbitrators in the panel irked the petitioners, they could have used the opportunity, while challenging his impartiality, to also challenge his accreditation. Failure to do at that stage can safely be concluded that by raising this ground, the petitioners are playing a trial and error to derail the process of arbitration at this stage of its registration/recognition and enforcement.

Further to the above, looking at the manner in which the ground is crafted and argued by the petitioner, it entails my calling for the records, summoning the Registrar and scrutinizing the evidence as well as analyzing the signatures of the panel members. The question is whether as a court where the award is brought for recognition and enforcement, I do have the mandate to do all that the respondent is moving the court to do? The answer to this is found in the cited case of Vodacom Tanzania Ltd vs Fts Services Ltd (Civil Appeal 14 of 2016) 2019

TZCA 514 (27 December 2019) whereby the court held at page 15 of its judgment that:

> *"We hasten to say that any application to the High Court for review of an arbitral award is not an appeal, therefore, cannot be disposed of in a form of a rehearing. That position has been taken in numerous cases including a decision by the Supreme Court of Canada in City of Vancouver v. Brandram-Henderson of B.C. Ltd [1960] S.C.R 539 at page 41 555, which we approve, where it was stated, as per Locke, J., that: - 'This is not an appeal from the award and the proceedings upon a motion such as this, are not in the nature of a rehearing, as was the case in Cedar Rapid v. Lacoste…. "This fact is noted in that portion of the judgment of the Judicial Committee in the second appeal in that matter. We cannot in the present proceedings weigh the evidence or interfere with the award on any such ground as that it is against the weight of the evidence."*

Guided by the principle set above, I must operate in a manner appreciating the fact that arbitration proceedings are conclusive in their own parameters that they were conducted and determined. The powers of courts in cases where the award is tabled for registration, recognition and enforcement are only limited to the extent of determining whether there was any error on the face of the award in regard to the issue raised. In other words, any issue raised in the petition to challenge the award

must be an issue or error manifest on the face of records of the award and not one requiring lengthy submissions and arguments to reach its finding.

There is also a complain by the petitioners at para 33 of the petition where the petitioners are challenging the time within which the award was made, which according to the petitioners, the final award to be enforced was made on 20th November, 2023 which is outside the time set by the law. The argument is that the same was pleaded in the previous petition under para 30 and 31.

My close scrutiny of the ground is that indeed the issue was raised in the previous petition and the same determined by the court in the ruling dated 12th April, 2024 under page 19 of the Ruling which noted:

The petitioners then submitted that as per the above provision, arbitrators are required to make the award within three (3) months from the date they entered into reference and or after having called on to act by notice in writing from any party to the submission. That looking at Annexures ORYX- 2, 4, 5 and 6 to the Petition, the arbitrators entered into the reference sometime on 15th December 2020 when the then two arbitrators, Hon. Vincent Lyimo and Hon. Dr. Fauz Twaib appointed Prof. Ameritus Nicholas N. N. Nditi as a third and chairman of the Arbitral Tribunal. The final award was apparently, rendered on 30th

November, 2023, almost three years down the line. Their argument was that from 15th December 2020, when the Arbitral Tribunal entered into the reference, the prescribed three months lapsed on 15th March, 2021 and that since then, the Arbitral Tribunal ceased to have mandate or jurisdiction to determine the matter. They went on submitting that according to the provisions of Regulation 64(a) cited above, arbitrators are allowed to extend the time for making the award in writing from time to time. Apparently, they argued, looking at Arbitral Procedural Orders Numbers 1- 10 in Annexure ORYX-3 to the Petition and or any other records, no such time was extended by the Arbitral Tribunal. Citing the decision of this court in Miscellaneous Commercial Cause No. 07 of 2022, Voltalia Portugal S.A Vs. Nextgen Solawazi Limited, High Court of Tanzania, Commercial Division at Dar es Salaam (unreported), their conclusion was that in the absence of an extended time, the Arbitral Tribunal ceased to have mandate or jurisdiction to determine the dispute before it on 15th March, 2021.

The petitioners backed their submissions on the requirement to make the award within three months under Regulation 64(a) of the Regulations with the word "shall" used in Regulation 64(a) which denotes mandatoriness of the requirement, failure of which renders the final award made without jurisdiction, a nullity. The petitioners further invited the court to draw inference from other jurisdictions in determining this point.

I therefore agree with the respondent that all the complaint against the Tribunal's alleged failure to act fairly and impartially by denying the Petitioners reasonable opportunity of putting their case and dealing with that of the Respondent as a result of expunging the Petitioners' expert report raised and pleaded under paragraph 35(a); the complaint against the Tribunal's alleged failure to act fairly and impartially by denying the Petitioners reasonable opportunity of putting their case and dealing with that of the Respondent after refusing the Petitioners' leave to call a local expert to prove the quantum of damages raised and pleaded under paragraphs 35(b), 35(c), 35(d) and 35(e) and the complaint against proceeding with the arbitration hearing and ultimately reaching the Final Award while the impartiality of one of the Tribunal's members was still being questioned in the Court of Appeal raised and pleaded under paragraph 35(f).

There is also a complaint against the alleged Tribunal's failure to conduct proceedings in accordance with procedures agreed by the parties by adopting strict rules of evidence raised and pleaded under paragraph 35(g) in Miscellaneous Civil Application No.4015 of 2024, which was also raised and pleaded under paragraph 29(ii) in Miscellaneous Civil Cause No.1017 of 2024; so was the complaint regarding the Tribunal exceeding its

powers to conduct proceedings in accordance with TIArb Rules without alleged consent from the parties raised and pleaded under paragraph 35(h) in this petition which was also raised and pleaded under paragraph 29(ii) in Miscellaneous Civil Cause No.1017 of 2024.

The complaint regarding the alleged Tribunal's failure to deal with issues raised before it such as counterclaims, other than misrepresentation raised and pleaded under paragraphs 35(i) in Miscellaneous Civil Application No.4015 of 2024, was also raised and pleaded under paragraphs 24 and 29(vii) in Miscellaneous Civil Cause No.1017 of 2024 and elaborated under paragraphs 3.58, 3.59 of the Petitioners' written submissions and paragraphs 6, 7 and 8 of the Petitioners' rejoinder submissions;

Again as elaborated earlier, all the complaints on the Tribunal's alleged failure to deal with the issue of loss of income in line with the Respondent's audited financial statements raised and pleaded under paragraph 35(j) it was also raised and pleaded under paragraphs 23 and 24 in Miscellaneous Civil Cause No.1017 of 2024, so was the complaint regarding the awarded amount of USD 152 million and that no reason was given on the method of calculation to come up with the rate of 60% of the fixed costs and 30% of the profit margin and further award of USD 20 million than the one claimed

raised and pleaded under paragraphs 35(k)(i)(e), 35(k)(ii) (a), 35(k) (ii) (b) and 35(k)(ii)(d) in Miscellaneous Civil Application No.4015 of 2024, were also raised and pleaded under paragraph 24 in Miscellaneous Civil Cause No.1017 of 2024 and the court at page 59 refused to interfere with the substantive findings of the Arbitral Tribunal for fear to play the role of the first appellate court and re-analyzing the evidence when it held:

> *"In a nutshell, the petitioners are challenging the quantum of damages awarded through the window of the expunged records of Juliette Fortin. As said above the powers of this court to what has been analyzed by the Tribunal in length and which is not manifested on the face of records is limited. Since this is not appeal, I cannot dive deep to challenge the reasoning of the Tribunal in the quantum of damage that is to be awarded or why a certain action which was reasoned and reached was taken. By doing so, I will be acting as the first appellate court by wearing the shoes of the Tribunal, re-hear the case and ascertain the evidence to the decision reached and the quantum of damages that was awarded. That power, as per the cited authorities*

above, I do not have. That being the case, the ground is also dismissed for lacking merits."

On the complaint at para 35(i) that the Final Award has been obtained in a manner alleged contrary to the public policy by denying a fair hearing and right to be heard to the Petitioners raised the same was also raised and pleaded under paragraph 29(v) in the previous petition.

I must admit that I subscribe to the principle that is set in the case cited by the petitioners, the decision of the Court of Appeal for Eastern Africa in the case of **Jadva Karean Vs. Herman Singth Bhogal 20 [E.A.C.A.] 74** that it is not sufficient that one or some issues are common, the subject of the subsequent suit must be covered by the previous instituted suit not vice versa. I further subscribe to **Mulla's Code of Civil Procedure** that it is not enough to constitute a matter res judicata that it was in issue in the former suit, it is also necessary that it must have been in issue directly and substantially in issue in a suit. However, with respect to the learned Senior Counsels, the issues outlined above were directly and substantially in issue in the previous petition and have been thoroughly determined by this court. The fact that the language is changed or the section of the law cited are different, does not change the fact that those matters are directly and

substantially in issue and founded on the same fact such that even if the section of the law that moves the court is different, the line of argument remains the same, so does the reasoning of the court and the principles based in making the decision as I had elaborated earlier on.

Having so made the above observations and findings, I find that the first principle to determine whether the matter is res judicata, to wit; the matter be directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit. In this case, the substantive matters in issue are contained in para 31-36 of the petition were also directly and substantially at issue in the previous petition and have so been determined by this court via **Oryx Energies Tanzania Limited (Formerly known as Oryx Oil Company Limited) & Another vs Oilcom Tanzania Limited (Misc. Civil Cause No. 1017 of 2024) [2024] TZHC 1567 (12 April 2024).**

The second test is whether the former suit have been between the same parties or privies claiming under them and the third test is that the parties must have litigated under the same title in the former suit. The two grounds will be discussed together and the test is positive, the former petition and the current petition have been between the same parties and

obviously so, the parties litigated under the same title. The fourth test is whether the court which decided the former suit was competent to try the subsequent suit. That is undisputedly so since under the Arbitration Act, this Court is the one with jurisdiction to determine the petition challenging recognition and enforcement of the award and it is the same court that has determined the previous petition. It is also undisputed that the matter in issue has been heard and finally decided in the previous petition.

In conclusion therefore, having made the above observations and findings, I am satisfied that the matter before me is *res judicata* of a previously determined Petition in Misc. Civil Cause No. 1017 of 2024 in a ruling dated 12th April, 2024.

The next limb is whether the petition beforehand is an abuse of court process. It was the respondent's submission that continuing to entertain it would constitute an abuse of the Court's process on a matter that is clearly made with the sole intention of delaying the court's process while at the same time unduly wasting the Court's valuable time. The respondent emphasized that the current frivolous Petition is nothing but an abuse of the Court's process and solely intends to delay the resolution of the dispute

between the parties, consequently undermining the integrity and effectiveness of arbitration.

Mr. Laizer went on submitting that the Courts are enjoined to ensure that they protect themselves from any possible abuse of their powers or procedures in the conduct of proceedings. They must, as a matter of implicit obligation, guard against the actions of unscrupulous parties who turn the courts into a theatre for endless, repetitive and frivolous litigations and actions, which are known as an abuse of the Court process. He cited the case of **JV Tangerm Construction Co. Limited and Technocombine Construction Limited versus Tanzania Ports Authority and Another** (Commercial 117 of 2015) 2021 TZHCComD 3362 (1 October 2021). (at page 13). He further cited page 15 of the same decision where the court held:

> *"It is settled law that a litigant has no right to pursue paripasua two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position*

clearly, plainly and without tricks. In humble view, the two processes are in law not available to the petitioners. The petitioners cannot lawfully file this petition and seek similar reliefs relying on substantially the same grounds as the application referred to above. The pursuit of the second, that is this petition constitutes and amounts to abuse of court or legal process."

In defining what an abuse of court process is, Mr. Laizer cited the same decision of JV Tangrem (Supra) which at page 13 cited with approval the decision of the High Court of Kenya (Constitutional & Human Rights Division) in the case of Graham Rioba Sagwe & 2 Others v. Fina Bank Limited & 2 Others, Petition No. 82 of 2016 where on page 15 of the said decision, the High Court, quoted the said decision which that came up with the most comprehensive definition and circumstances under which abuse of court process may arise when the Court held:

"The concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation.

However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation that may give rise to an abuse of court process are indeed inexhaustive; it involves situations where the process of the Court has not been resorted fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations;

Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issue or multiplicity of actions on the same matter between the same parties even where there exists a right to begin action.

Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

Where an application for an adjournment is sought by a party to an action to bring an application to Court for leave to raise issue of fact already decided by Court below.

Where there is no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

Where two actions are commenced, the second asking for relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent."

His argument was that as it can be established from the Court's record, the current Petition is yet another legal process whereby the Petitioners are

seeking to object to the registration and recognition of the same arbitral award on more or less the same grounds. That the current Petition is an abuse of the Court's process and a desperate attempt to exhaust, irritate, annoy and frustrate the registration and recognition of the arbitral award. He emphasized that a litigant is required to bring out his whole case and not to file a series of suits based on the same cause of action, facts and issues and also involving the same parties, citing the case of **Zuhura Yusuph V. Juma Saidi [1969] HCD No.193**, where the Court held thus: -

> *"A Plaintiff cannot in the ordinary course of things be permitted to file a series of suits in respect of the same cause of action. Not only will this be an abuse of the process of the Court, but it might preclude a judgment debtor from ever freezing himself from his obligations…"*

Coming to the case at hand, Mr. Laizer submitted that the matters in the case beforehand are substantially the same as in Miscellaneous Civil Cause No. 1017 of 2024 between the same parties. That both Petitions are founded on the Final Award rendered by the Arbitral Tribunal on 30th November 2023; the parties in both Petitions are also the same. He argued that since the Petitioners were required to bring out their whole case in

Miscellaneous Civil Cause No. 1017 of 2024, they cannot, in law, be allowed to file another Petition in relation to the same cause of action. He supported this line of argument by citing the case of **Alibhai Vs. Fidahussein & Co. Ltd and Others, (1969) HCD No.270**, where the Court held: -

> *"Parties in litigation are required to bring forward their whole case and are not permitted, except under special circumstances, to open the same subject of litigation in respect matters which might have been brought as part of the subject matter in contest (in the earlier case) but which was not brought forward through negligence, inadvertence or even accident"*

He related that the above legal principles apply to the facts of this case as well arguing that the Petitioners were required to present all their objections to the subject matter in Miscellaneous Civil Cause No. 1017 of 2024. That they chose to play a delaying tactics game, and no special circumstances justifying their actions, have been demonstrated. To that end, he submitted that this Court is functus officio to entertain the Petition since the matters raised therein have already been decided in Miscellaneous Civil Cause No. 1017 of 2024. His conclusion was that as the Court has already issued its final decision on the related issues, it no longer has jurisdiction or

authority to alter its judgment or reconsider the resolved issues through another Petition. That to proceed further with this Petition would not only disregard the finality of the Court's earlier decisions but also misuse judicial resources, thereby further exemplifying the abuse of the Court's process.

In reply, the petitioners' Counsels submitted that the Arbitration Act provides for a right to any party aggrieved by the Final Award to challenge the Award under sections 74 and 75 of the Act. Further that the Act also allows a party against which an arbitral award is being sought to be recognized and enforced to ask the court to refuse recognition and enforcement under sections 73 and 83 of the Act, which remedies are exactly what the Petitioners are trying seek in this court. Their argument was that the Respondent's complaint that by exercising their rights under the law the Petitioners are abusing the court process is to say the least, yet another desperate move.

Commenting on the cited decisions both on res judicata and abuse of court process, the petitioners' reply submission was that the decisions are all irrelevant in the nature and circumstances of this case, and sometimes not even helpful for the purpose of support Respondent's position. The basis of their submission is that the decisions dealt with a completely different

scenarios and none the cases referred involved petitions made under sections 74/75 and 73/83 of the Act. They elaborated that in **Peniel Lotta Vs. Gabriel Tanaki and others [2003] TLR 312**, the Court dealt with land law and with very specific questions of whether parties were the same from one case to the other. Further that in **JV Tangerm Construction Co. Limited and Techno combine Construction Limited Vs. Tanzania Ports Authority and Another,** the Court explained that the threshold to prove abuse of process is very high and that the fact that there is a previous judgment on the same issue does "not have the effect of preventing the plaintiff from taking any further action", provided that it is not an irregular action. On those submissions, the petitioners urged the court to ignore this ground.

In determining this line of argument raised, I find it necessary that from what the case laws cited have defined, I elaborate what an abuse of court process is. An abuse of process can Simply be defined as an improper use of legal process when a person alleged to be in abuse of court process misused his/her right of access to the courts. It does not necessarily need an illegal process, the litigation need not be illegal, but it is the multiplicity of unnecessary proceedings and processes which could have come under

one litigation that defines an abuse. The person who abuses court process is only interested in accomplishing some improper purpose that is collateral to the proper object of the process that is legally before the court, the purpose which may delay, offend or obstruct the ends of justice. Some elements of abuse of court process may be traced where a party opens the same subject of litigation in respect of matters which could have been brought as part of the same subject matter in contest under one litigation. It does not matter whether the omission is by negligence, inadvertence or even accident, the fact that the same subject matter in contest could be brought under one litigation and were not, but instead are brought in multiple litigation, amount to an abuse of court process (see the cited case of **Alibhai Vs. Fidahussein & Co. Ltd and Others** cited above). The question is whether the meaning of abuse of court process fits the circumstances of this case.

It was Mr. Laizer's submission that, the current Petition is yet another legal process whereby the Petitioners are seeking to object to the registration and recognition of the same arbitral award on more or less the same grounds as the previous petition arguing that the current Petition is an abuse of the

Court's process and a desperate attempt to exhaust, irritate, annoy and frustrate the registration and recognition of the arbitral award.

On their part, the Petitioners' Counsel argued that the Respondent's complaint that by exercising their rights under the law the Petitioners are abusing the court process is to say the least, yet another desperate move. They differentiated the two petitions on the ground that the Arbitration Act provides for a right to any party aggrieved by the Final Award to challenge the Award under sections 74 and 75 of the Act and also allows a party against which an arbitral award is being sought to be recognized and enforced to ask the court to refuse recognition and enforcement under sections 73 and 83 of the Act, which remedies are exactly what the Petitioners are trying seek in this court.

Much as I agree with the Petitioners' argument that Section 74 of the Act allows a party to challenge an award on ground of substantive jurisdiction while Section 75 allows a party to challenge the award on the ground of serious irregularity affecting the arbitral tribunal, the proceedings or the award, but is nowhere in the same where it is expressly provided that the two litigations must come in separate petitions. Since, as it is shown above, most of the fact that were determined in the previous petition are

substantially and directly in issue in this petition, it is a clear implication that the two petitions could have been brought and determined together. I have noted the petitioners' argument that the orders sought are different, however, that does not justify multiple litigations since several causes of action can be brought under one litigation. An example would be a suit for recovery of property under mortgage in an overdraft facility. The causes of action may include breach of contract, fraud in obtaining the mortgaged property of recovery of ownership of the mortgaged property. The argument could be that breach of contract and recovery of ownership are provided for under different laws, however, these issues are ordinarily brought under one suit.

The underlying importance is that the facts that will be directly and substantially in issue to establish the multiple cause of actions will be the same. Our case at hand is of no exception, although, as argued by the petitioners, the challenge of the award is premised under different sections of the Act, this, in my strong view, did not justify a filing of multiple litigations moving the same court to determine same facts substantially at issue on separate provisions of the law.

In the cited case of **Zuhura Yusuph Vs. Juma Saidi [1969] HCD No. 193**, the Court emphasized that a Plaintiff cannot in the ordinary course of things be permitted to file a series of suits in respect of the same cause of action. It is a dictate of law and justice that litigations must come to an end, hence the danger of allowing multiple litigations over the same issues or causes of action might indeed preclude an opposite party from ever being discharged from his obligation or a decree holder from enjoying the fruits of his decree. Since I have already determined that the current petition is *res judicata* of the previous petition, the current petition also fits in the definition of abuse of process in the cited decision of the High Court of Kenya (Constitutional & Human Rights Division) in the case of **Graham Rioba Sagwe & 2 Others,** as it has clear case of instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issue hence an abuse of court process.

On those findings, I find the petition before me to be both an abuse of Court process and *res judicata*. Since the first point of preliminary objection suffices to dispose this matter, I need not dwell on the second point of objection as it will serve no purpose. Having so found that the petition before

me is *res judicata* of the previous petition Misc. Civil Cause No. 1017/2024 this petition is hereby dismissed with costs.

Dated at Dar-es-salaam this 03rd day of May, 2024.

S. M. MAGIMBI

JUDGE