

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMM. APPLICATION NO. 4 OF 2007

IN THE MATTER OF ARBITRATION
AND
IN THE MATTER OF AN APPOINTMENT OF ARBITRATOR

BETWEEN

KOBIL TANZANIA LIMITED.....PETITIONER

VERSUS

MARIAM KISANGI t/a MNAFU TRADERS...RESPONDENT

AND

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

R U L I N G

Date of final submission May 4, 2007

Date of ruling on May 21, 2007.

MJASIRI J

Kobil Tanzania Limited has filed a petition against Mariam Kisangi t/a Mnafu Traders under section 8 (1) (a) & (2) of the Arbitration Act Cap. 15 [R.E. 2000] and Rule 5 of the Arbitration Rules Cap 15 [R.E. 2002] asking the court to appoint an arbitrator for the

parties. The petition is supported by the Affidavit of the Principal Officer of the Petitioner.

The Counsel for the Respondent raised the following preliminary objection in the answer to the petition:

“the petition is bad in law, as it does not comply with the mandatory provisions of the arbitration Rules G.N No.427 of 1957 as such it ought to be struck out with costs.”

The preliminary objection proceeded by way of written submissions. Mr. Mbwambo Advocate represented the Petitioner and Mr. Kalolo Advocate represented the Respondent. Mr. Kalolo learned Counsel submitted that rule 8 of the Arbitration Rules was not complied with. Annexures Kobil 1, 2 and 3 attached to the petition were neither originals nor certified copies.

Mr. Kalolo further submitted that even the Annexure copies served to the Respondent were neither original nor verified. Mr. Kalolo relied on the decision of Shangwa J in *East African Development Bank V Blueline Enterprises Ltd*, Miscellaneous Civil Case No.142 of 2005 (unreported). It was held in the above case that the petition is incompetent on the ground that copies of the award annexed to it are not certified by the petitioner or its advocate to be true copies thereof. The Petitioner's failure to do so renders the petition incompetent and bad in law and the petition was struck out.

Counsel for the Petitioner strongly argued in his submission that the certification required under Rule 8 of the Arbitration Rules have been done by way of verifying affidavit. This is why the Petitioner filed a long with the petition an affidavit in support thereof. Paragraph 4 of the said affidavit clearly certifies that all the documents annexed to the petition are genuine and the contents thereof are correct and true. Counsel argued that the affidavit sworn by Patrick Ngungi the principal officer of the Petitioner dated January 29th, 2007 complies with Rule 8 of the Arbitration Rules. Counsel cited the case of *Lotay V Starlit Insurance Brokers Limited* [2003] 2 E.A p.554. The *Lotay* case was related to a verifying affidavit in support of pleadings (Plaints have to be supported by affidavits in Kenya).

In the *Lotay* case it was held that since there is no rule in the Kenyan law providing for specification or direction as to what words exactly constitute verification. The use of the words verify, swear or confirm on oath would suffice and are interchangeable.

Counsel argued that like what the Kenyan court faced, there is no specification or direction in rule 8 of the Arbitration Rules as to what constitutes certification by a Petitioner in the petition. The statement on oath in the affidavit of Patrick Ngungi that the documents annexed to the petition are genuine and their contents are true and correct is sufficient to meet the requirements under Rule 8 and are interchangeable with the word certify envisaged in that Rule.

Counsel for the Respondent further argued that should the court find the affidavit insufficient then the remedy would be to order the Petitioner to bring a certified copy instead of striking out the petition. Counsel cited the provisions of Section 65 (a) and Section 67 (1)f of the Evidence Act Cap 6 [R.E.2002]. Under the Evidence Act if a witness wishes to tender a document which requires certification, the court will adjourn the case to allow the party concerned to have the document certified. The court does not strike out the suit. In view of this the court should allow the Petitioner to have the document certified. Failure to certify a document is a mere procedural irregularity. Rules of procedure are handmaidens of justice and should not be elevated to a fetish.

Counsel cited the decision of Kalegeya J in *Kiganga Associates Gold NL* [2001] 1 EA 134. It was observed by Kalegeya J that a defect in a verification clause to a plaint is just a procedural error the consequence of which is not to have the plaint thrown out. In fact, if the defect is of insignificance it can be ignored.

Counsel, asked the court to dismiss the Respondents preliminary objection with costs.

In his Rejoinder to the Petitioner's submission Mr. Kalolo Counsel for the Respondent submitted the verifying affidavit, verifies the contents of the petition and not the submission. According to Mr. Kalolo the Lotay and the Kiganga cases are not applicable in this matter. A submission is not a plaint or other pleading. Mr. Kalolo cited the

definition provided in Black's Law Dictionary with pronunciations Abridged 5th Edition for the words 'verification' and 'certified copy.'

The Petitioner never certified the submission. Pleadings are verified and not certified. Certification entails comparison between original document and its photocopy by endorsement stamp/seal/signature/date and name of certifier on each and every page of the photocopy. The Petitioner is therefore incompetent and should be struck out with costs.

Rule 8 of the Arbitration Rules provides as under:

"Every petition shall have annexed to it the submission, the award or the special case, to which the petition relates, or a copy of it certified by the Petitioner or his advocate to be a true copy."

According to Black's law dictionary submission is defined as under:

"A contract in which the parties agree to refer their dispute to a third party for resolution."

A certified copy is defined as under:

" A duplicate of an original document certified as an exact reproduction by the officer usually by the officer responsible for issuing or keeping the original."

On looking at the petition filed in court, Annexure KOBIL 1, which contains the Arbitration Agreement has not been certified by the Petitioner or his advocate to be a true copy as provided in Rule 8 of the Arbitration Rules. The requirement under Rule 8 is mandatory.

I am inclined to agree with arguments raised by Mr. Kalolo that the requirements under Rule 8 are different from the requirements under the Kenyan Laws in respect of verifying affidavits in respect of a plaint and verification clauses in pleadings.

The requirement under Rule 8 is not for the Petitioner to file an affidavit to state that the documents annexed to the petition are genuine and their respective contents are correct.

The requirements under Rule 8 are simple and straight forward and there is no reason for non compliance.

In view of what has been stated hereinabove the petition is hereby struck out with costs.

It is so ordered.

Sauda Mjasiri

Judge

May 21, 2007

Delivered in Chambers in the presence of Mr. Mbwambo and Mr. Kalolo Advocates for the Petitioner and Respondent this 21st day of May 2007.

Sgd

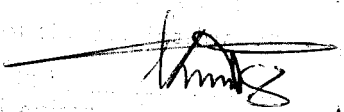
Sauda Mjasiri

Judge

May 21, 2007

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