IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 12 OF 2015

(Arising from Commercial Case No. 168 of 2014)

IN THE MATTER OF SECTION 6 OF THE ARBITRATION ACT (CAP. 15 R.E. 2001)

AND

IN THE MATTER OF A PETITION TO STAY PROCEEDINGS PENDING REFERENCE TO ARBITRATION

AND

IN THE MATTER OF COMMERCIAL CASE NO. 168 OF 2014

BETWEEN

SYMBION POWER LLC ..... DEFENDANT/PETITIONER

AND

SALEM CONSTRUCTION LIMITED ..... PLAINTIFF/RESPONDENT

1st April & 4th May, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of a preliminary objection raised by Mr. Fungamtama, learned counsel notice of which was filed earlier on. The

objection is in respect of a petition filed by Symbion Power LLC against Salem Construction Limited.

To have a better understanding of the genesis of the objection, the background material facts of the matter may be relevant. They go thus: M/S Salem Construction Limited, through K. M. Fungamtama learned counsel filed in this court Commercial Case No. 168 of 2014 against Symbion Power LLC praying for the following orders:

a) A declaration that the Defendant breached the Service Agreement;
b) An order against the Defendant to pay the Plaintiff US $ 466,482.73 being principal outstanding payment for work done;
c) An Order against the Defendant to pay the Plaintiff US $ 87,414.44 being interest on delayed payment;
d) An order against the Defendant to pay the Plaintiff US $ 50,000.00 being compensation for costs incurred for legal services in pursuit of the claim;
e) An order against the Defendant to pay the Plaintiff interest on decretal sum at Court's rate of 12% per annum from the date of institution of the suit until payment in full;
f) An order that the Defendant pay the Plaintiff costs of and incidental to this suit; and

g) An order that the Defendant should pay the Plaintiff interest on costs at the Court's rate 12% per annum from the date of judgment until payment in full.

The suit was filed on 29.12.2014. On 26.01.2015, the defendant, through a law firm going by the name Asyla Attorneys, filed a petition under the provisions of section 6 of the Arbitration Act, Cap. 15 of the Revised Edition, 2002 praying for, *inter alia*, stay of the said Commercial Case No. 168of 2014.

The plaintiff, through Mr. Fungamtama, learned counsel has filed a four-point preliminary objection against the petition, namely:

a) The Honourable Court lacks the requisite jurisdiction to entertain and determine the application;
b) The petition is incompetent in that it offends the provisions of section 6 of the Arbitration Act [Cap. 15 R.E 2002];
c) The petition is bad in law in that it offends the mandatory provisions of Rule 6 of the Arbitration Rules [Cap. 15 R.E 2002] [Subsidiary Legislation] and refers to nonexistent proceedings; and
d) The petition is bad in law in that it offends the mandatory provisions of Rule 8 of the Arbitration Rules [Cap. 15 R.E 2002] [Subsidiary Legislation].

On the dictates of Procedure, I had to hear first the Preliminary Objection. The preliminary objection was argued before me on 01.04.2015 during which the petitioner was represented by Mr. Lusiu; learned advocate and the respondent had the services of Mr. Fungamtama; learned advocate. This oral hearing was preceded by both learned counsel filing their respective skeleton arguments three days before the date set for the oral hearing as required by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

At the oral hearing both learned counsel for the parties prayed to adopt their respective skeleton arguments which I had ample time to read through before hearing them *viva voce*. They only prayed to and indeed amplified them.

I must confess here that I was impressed by the arguments as well as the vigour, industry and zeal with which both counsel argued for their respective positions. Indeed their submissions are long and windy. For the purpose of not diluting the flavour of their arguments, I will, albeit briefly, endeavour as much as possible to recite them.

Amplifying the skeleton arguments, Mr. Fungamtama, learned counsel for the respondent Salem Construction Limited, was the first to submit. On the first point of objection, he contended that the petition show a wrong title of the Court because it is titled "IN THE HIGH COURT OF

TANZANIA DAR ES SALAAM REGISTRY". According to him, since this is a Commercial Division of the High Court, it is distinct from the Dar es Salaam Registry and therefore, the Petition is before a wrong forum and therefore incompetent for want of jurisdiction. To buttress his contention he cited to me the court of appeal decision of ***the D.P.P Vs ACP Abdallah Zombe*** Criminal Appeal No. 254 of 2009 (unreported).

At this juncture, the learned counsel entered a caveat against any attempts to have the said error amended by the counsel for the petitioner. He stated that the petitioner should not be heard to argue that the mistake was an accidental slip or human error and equally the question of amendment cannot arise because it would have otherwise been sought at earliest stage. To this, he referred me to an unreported decision of the Court Of Appeal in the case of ***Chama Cha Walimu Tanzania Vs the Attorney General,*** Civil Appeal No. 151 of 2008 wherein the court heard that it is the duty of a party and not of the court to correct its documents and or pleadings relied on.

On the second ground of objection, his contention, mainly, is that the petition has been filed in contravention of section 6 o the Arbitration Act, Cap. 15 of the Revised Edition, 2002 in that it has been filed before appearance. He contends that the petition is not maintainable for being premature.

As for the third ground, the learned counsel contends in the main that the petition is incompetent for being brought under wrong title contrary to Rule 6 of the Arbitration Rules, 1957. According to him, the petition is not in the prescribed title of "In the Matter of Arbitration and In the Matter of the Act" and further that it shows that the matter is in respect of Commercial case No. 168 of 214 which is nonexistent. To this he referred me to the case of ***Mohamed Sango and 20 others Vs R***, Criminal Appeal No. 23 of 2012 cited in the ***Zombe*** case where the court struck out the appeal for citing the wrong number of the case.

On the fourth ground, the contention is that the petition violates rule 8 which is couched in mandatory terms. Expounding the defects in that respect, the learned counsel states that the rule requires a petition to be annexed with an award and or a copy of submission certified by the advocate to be a true copy of it, but contrary to that, the annexture purporting to be a submission is neither signed nor certified by the advocate as required by the law.

Surmising, he puts that the cumulative effects of the highlighted shortcomings render the petition fatally defective and warrants striking it out in its entirety. The learned counsel invited me to do so with costs.

Mr. Lusiu, learned counsel responding to the first ground of objection states that rule 5A of the High Court Registries Rules, 1999 made under the Judicature and Application of Laws Act, Cap. 358 of the Revised

Edition, 2002 which established this court states that there shall be a commercial division of the High Court within Dares Salaam Registry. According to him, the petition is actually within the Dar es Salaam Registry, and further that, in terms of rule 5A, the proper name of this court ought to have been "The High Court, Dar es Salaam Registry - Commercial Division". He maintains that the jurisdiction of the Court cannot be taken away by mere citation of the case and therefore the mere omission of the word "Commercial Division" is not fatal as it does not go to the root of the case. He is of the view that the court ought to look at the document as a whole which discloses that it refers to Commercial Case No. 168 of 2014. To this, he referred me to the case of ***Integrated Cotton Field Ltd Vs CRDB Bank Ltd & another***, Commercial Case No. 66 of 2011 (Unreported) as well as ***GAPOIL Tanzania Ltd Vs TRA and 2 others***, Civil Appeal No. 9 of 2009 (unreported) and further that under section 97 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002, this court has inherent powers to order amendment.

On the second ground, his response is that the Arbitration Act, was enacted in 1931 whereas the Civil Procedure Code was enacted in 1966 and that the latter requires a party who has received a summons to file a defence or any responsive pleadings within 21 days. He stated that the petition therefore was filed in compliance with the initial notice served to the petitioner on the 30.12.2014 which was a lawful order of this court requiring him to comply by filing responsive pleading.

He maintains that section 6 of the Arbitration Act is not in conformity with the current rules of procedure which require the defendant to file a defence or other responsive pleadings within 21 days. He states that the petitioner could therefore not wait until lapse of the 21 days or until appearance but had to file the petition in compliance with the lawful order of this curt because otherwise it could have been regarded as a default on his part.

As to the third ground of objection, he states that rule 6 of the Arbitration Rules must be read together with rule 3 which requires the rules to apply to all awards filed under the Act. He argues that the said rule 3 presupposes that there is an award issued, but currently there is no award. He maintains further that the required title itself of "In the matter of the Arbitration" further shows that the requirement is not applicable in the current petition because the word "the" semantically refers to something known as opposed to the word "an" or "a" and therefore, semantically, the connotation is that there was arbitration. Surmising on this take, he submits that the requirement as to the title of the petition is not applicable to the present petition because the matter is still at its preliminary stages.

On the fourth ground, he states that submission is a clause within the agreements between the parties. He maintains that annextures SP2 and SP3 are the agreements between the parties in this petition and

therefore they suffice to be submissions. To fortify his argument, he refers to rule 3 of the Arbitration Rules and submits that this ground of objection cannot be argued at this stage because the rules are applicable to awards filed under the Act.

Mr. Fungamtama in his rejoinder, basically, reiterates his submissions in chief. His additions were brief and rightly put in my view, to the effect that the Dar es Salaam Registry has three divisions namely Commercial, Labour and Land, and therefore the forum of instituting the matter must be determined by the proper citation of the division. He maintains that jurisdiction is determined by the citation of the court and not of the parties and therefore the cases referred by the counsel for the petitioner are all distinguishable from the case at hand. As to the second ground he is of the view that since the proceedings under the Arbitration Act are governed by the said Act and the rules made thereunder and therefore the submissions relying on the Civil Procedure Code are mere conjecture. On the third ground, he maintains that the award was filed on the strength of rule 5 of the Arbitration Rules, which direct the mode of applications and further that rule 6 clearly talks of all petitions, affidavits and proceedings under the Act and therefore since the petition is made under the Act it cannot avoid the application of these rules. As to the fourth ground, he submits that even if for academic purposes the said annextures SP2 and SP3 are to be regarded as submissions, yet they are not certified by the parties which act is fatal. He finally insists that the petition should be struck out with costs.

As already intimated, I have keenly and enthusiastically heard the contending submissions of these trained minds. I am called to determine the competency or otherwise of the petition before me. In my considered opinion the objections are specifically premised on two angles; one, being on the potency of this court, and two, the competency of the petition itself. Mr. Fungatama forcefully submitted on the said two throngs so that upon either of the two, the petition should be discontinued at this early stage.

As a matter of practice, which is now well settled, the question touching on the jurisdiction of this court ranks number one on the checklist before I can embark on any other matter in this petition. I am enjoined so to do by the observation made by the Court Appeal in several of its decisions. One such decision is ***Fanuel Mantiri Ngu'nda Vs Herman M. Ngu'nda & Others*** , Civil Appeal No. 8 of 1995 (Unreported), which was quoted by the very same highest Court of record in the ***Abdallah Zombe*** Case (Supra). Other cases in this basket are ***Amani Malewo Vs Diocese of Mbeya (R.C)*** Civil Appeal No. 22 of 2013 ***Richard Julius Rukambura Vs Issack N. Mwakajila & Another*** Civil Appeal No. 3 of 2004, ***Michael Leseni Kweka Vs John Eiiiafe,*** Civil Appeal No. 51 of 1997 ***Faustine G. Kiwia & Another Vs Scoiastica Paulo,*** Civil Appeal No. 24 of 2000 and ***Nicomedes Kajungu & 1374 Others Vs Bulyankulu Gold Mine (T) LTD*** Civil Appeal No. 110 of 2008 (all unreported), to mention but a few. In ***Nicomedes Kajungu*** (supra)

the Court of Appeal, speaking through Othman, J. A (now Chief Justice of Tanzania), held:

> "... it is the duty of the Court to satisfy itself that it is properly seized or vested with the requisite jurisdiction to hear and determine a matter. **It is a well settled principle that a question of jurisdiction ... goes to the root of determination** – see ***Michael Leseni Kweka V. John Eiliafe***, Civil Appeal No. 51 of 1997 (CA) (unreported)". **A challenge of jurisdiction is also a question of competence**".
> (Emphasis supplied).

I must however, onset, proceed with caution as persuasively alerted by an observation made by Sir Charles Newbold, P., in the case of ***Nanjibhai Prabhudas & Co Ltd Vs Standard Bank Ltd*** [1968] 1 EA 670, at 682 (the Court of Appeal judgment starts at 680) that mere procedural defects should not be regarded as vitiating the competency of the court to determine that matter on its merits unless such defects touch in the fundamental of the case or prejudices the other party.

Coming to the point *in limine*, the main contention is that this court lacks jurisdiction because the name describing the court in which this

matter is currently being pursued is wrong. Counsel for the petitioner on the other hand is of the view that that is not fatal, because basing on Rule 5A of the High Court Registries Rules, 1984 which establishes this Court, the name is proper as it is provided that "there shall be the High Court commercial Division within Dar es Salaam Registry. The counsel was even audacious as to challenge further the description of this court currently in fashion and suggesting that it ought to have been known and named "High court, Dar es Salaam Registry - Commercial Division" The counsel, on the strength of the ***Integrated Cotton Field Ltd*** case (supra) maintains that otherwise, the jurisdiction of the court cannot be taken away by improper citation of the name of the court.

By way of rejoinder on this take, counsel for respondent maintains that there is a difference between description of the parties and description of the court since it is the latter that gives the court jurisdiction to entertain the matter and not the former. It is his argument that the cases cited by the learned counsel for the petitioner are distinguishable as he has cited firstly the decisions of this court which were dealing with improper citation of the parties not the court and invited me to disregard all submissions made in that respect.

To me, no matter how convincing the arguments might have been, the bone of contention in this take is neither a discovery nor an invention of the learned counsel. As they are witnesses to this, on several occasions, this court and the Court of Appeal as well have had occasions

to deal with the question of description of parties and the courts as well as the case numbers.

At his juncture, and to set a base for regular understanding, I must state here that the term "Court" is a noun. (See Black's Law Dictionary, 8th Edition at page 400). Therefore, in my considered opinion, any word, phrase or sentence pre-modifying or post-modifying it, is just a description mainly for the purpose of showing either its territory or location (say; High court of Tanzania at Dar es Salaam or at Mwanza), or its place or level in the judiciary hierarchy (say Primary Court, District/RM's Court, High Court, or Court of Appeal) and or its division (say; Land, Labour, or Commercial). My proposition is exemplified by my brother Manento PJ who, presiding over ***CF. R. Lwanyantika Vs the Attorney General***, Civil Case No. 131 of 2001 (Unreported), upheld the preliminary objection and ordered the case which had been filed in the High Court at Dar Salaam Registry to be transferred to the High Court, Mwanza registry in conformity with section 18 (c) of the CPC.

In my considered view, the description indicates the powers of a particular Court either hierarchically, territorially, or even subject-wise as the case may be. My view is further logically fortified by the fact that names are and have long been held to be the main source of identity, and with identity, one is able to identify and define the mandate of the name holder and determine whether it is an appropriate forum. Hence,

it follows that a wrong description of an identity can result in taking away the jurisdiction of the name holder.

That being the stance and further, in the light of ***Abdalah Zombe*** (Supra), and the authorities referred therein by the Justices of Appeal, it is not hard to agree with Mr.Fungamtama learned counsel for the respondent, that indeed, misdescription of parties is different from misdescription of the court. Following the said decision of the Court of Appeal, I must hasten to add here, that proper description of the court as shown above is not for cosmetic purpose and neither is it for style or fashion. It is rather a rule which must be strictly adhered to, since failure to do so may lead to rendering the proceedings incompetent and thereby taking away the jurisdiction of that particular court in which they are pursued. This consequence can be deciphered from the observations by the Court of Appeal in ***Abdalah Zombe*** at page 5 of the unreported ruling where it was observed:

> "In a plethora of decisions by this Court, since its inception in 1979, it has been religiously held, consistent with settled law, that where no such notice of appeal is lodged at all, or **if lodged in the wrong registry** ... there is no competent appeal ..."
> [Emphasis supplied].

The Court went on to elaborate at pp 5 - 7 that the appeals have invariably been struck out for, *inter alia*, having cited wrong titles of trial or appellate judges and showing wrong titles of court. I am alive to the fact that the Court was making reference to appeals but I have not doubt in my mind that the principle extends to situations like the one in the present case. I thus find and hold that improper description of the court in which the proceedings are being pursued renders such proceedings improper as well as vitiating the jurisdiction of that particular court.

The counsel for the petitioner has, at another angle, put that the title cited in the petition is not wrong because this court is established by the High Court Registries Rules within the Dar es Salaam Registry. With due respect to the learned counsel, the question as to whether the High Court Commercial Division is within Dar es Salaam Registry so as to warrant it being described in the style and manner he suggests does not arise for two simple reasons. One, rule 5A of the High Court Registries rules has been now revoked by rule 76 (1) of, and replaced by, rule 5 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. For easy reference, rule 76 (1) provides:

> "(1) Rules 5A, 5B and 5C of the High Court Registry (sic) Rules are hereby revoked.
> (2) Notwithstanding sub-rule (1), any proceedings, orders, decision or anything

lawfully made or done under the revoked rules shall continue and be deemed to have been made under these Rules."

And rule 5 (1) re-establishes this court in the following terms:

> "There shall be a Commercial Division of the High court of Tanzania vested with both original and appellate jurisdiction over commercial cases".

Therefore, as rightly put by Mr. Fungamtama, learned counsel, since there are three divisions of the High court in our jurisdiction, the proper forum should be determined by proper citation of a particular forum where the matter is pursued.

Two, as I intimated earlier on, the learned counsel cannot claim to be inventors nor discoverers of the proper names of the court and or propriety of the same. Thus, the learned counsel for the petitioner cannot be heard now suggesting a new name purportedly through correction more so at this stage so as to bend the situation and save his day. As he might be aware, this court has, since its inception, been described as the High Court (Commercial Division) at Dar es Salaam, or Mwanza, or Arusha, as the case may be. It will remain so until further notice, order or directive of the Chief Justice or legislators as the case

may be. Hence, any purported description which is not in the manner known conventionally will be in essence vitiating the proceedings and the jurisdiction of this court. It is for these reasons that I uphold the first ground of the preliminary objection.

The foregoing would have sufficed to dispose of the matter. However, for completeness of this ruling, I feel compelled to make some observations regarding some of the arguments put up by the learned counsel for the petitioner. Firstly, of particular concern is an argument that the filing of this petition has been at the instance of the initial notice issued by this court, that it was in compliance with the rules of the Civil Procedure Code and failure to file the petition would have been regarded as default. Secondly is the argument that the arbitration rules and particularly Rule 6 are not applicable to this petition.

In my considered opinion, the line of reasoning adopted by the learned counsel is rather an attempt to lay the blame either on the procedural rules or on this court for issuing the initial notice. I say so because, the purpose of the initial notice as the name depicts, is to notify the concerned parties of what is before the court against them. It remains a notice and not otherwise no matter how crafted. Thus, by all purposes and intent, and assuming, for purposes of argument, that it was a lawful order of this court, still it cannot be said to override the clear provisions of the law governing arbitration of disputes.

This brings me to the second concern regarding the argument that rule 6 of the Arbitration Rules is not applicable for the reason that rule 3 thereof requires that the rules be applicable to awards. Firstly, I must admit that it is hard to comprehend the learned counsel's purpose of putting up this argument. I say so because, if the rules were not applicable to the petition as he tends to suggest, it is obvious that such an interpretation is rather homicidal to the petition, as it would apparently seem to have been preferred under a wrong provision of the law. It is thus rather a contradictory and an absurd interpretation of the statute.

I must state here that the law of arbitration insofar as submissions of a dispute to arbitration are concerned is that once a petition always a petition, regardless of whether there is an award or not. This is because, a submission to arbitration, it being "sacrosanct", the courts of law are not allowed to interfere save where parties seek its intervention either to compel them to respect their submission vide an order of staying the instituted proceedings or looking into the propriety of the results thereof vide setting the award aside. Courts of law can therefore do no more in respect of the submissions unless moved by the parties - See ***KBL Enterprises Limited Vs CDI Cotton Distributors Inc.***, Miscellaneous Commercial Cause No. 26 of 2011 and ***Labio Farm S.A Vs Yong Shung Construction Co. Limited***, Misc. Civil Application No. 202 of 2013, both unreported decisions of this court.

Therefore, the process of seeking court's intervention for either of the two purposes is initiated, in terms of section 6 of the Arbitration Act, and Rules 5 of the rules made thereunder, by way of a petition. This is lucidly so because, whereas in terms of section 6, a party ready and willing to submit to arbitration, may "apply" to the court to have the proceedings instituted in disregard of the submission stayed, rule 5 of the rules thereof requires that all applications shall be made by way of petition. The present matter before me, indisputably, seeks to move this court to intervene and have the proceedings instituted by the respondent halted. Without a flicker of doubt, the petition must be one envisaged by section 6 of the Arbitration Act and therefore within the purview of Rule 5 of the rules thereof.

Therefore, the interpretation adopted by the learned counsel for the petitioner is untenable. Further, as to his semantic interpolations of the title provided by the law, they have no place here. The learned counsel must be aware that the canons of statutory interpretation abhor interpretations that result into absurdity. This is obviously so because, it being the law, there is no room to challenge it, more so at this stage and in the manner proposed by the learned counsel so as to shelter himself from the stony rain.

The above notwithstanding, and having observed so in respect of the application of the said rules, I wish to point out, in agreement with

counsel for the respondent, that the petition was doomed for violating rule 8 of the said rules. It is provided there under that:

> "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 its advocate to be a true copy."

Inasmuch as the said Annextures SP2 and SP3 contain the said submissions, being copies, they should have been certified by the party to show that they are true copies of the original. That has not been done, which is a clear violation of the said rule compliance of which is mandatory. This court (Nyangarika, J.) presiding over ***Ametan Contractors Limited Vs Nautiiius Limited***, Miscellaneous Commercial Cause No. 13 of 2013 (Unreported), struck out a petition for, *inter alia*, the same fault of contravening the said rule. With due respect, none of the arguments fronted by counsel for the petitioner in this respect gave me any cogent reason to depart from that decision.

All being said and done, and having satisfied myself that the defects in this petition are not mere procedural but so substantive as to vitiate the jurisdiction of this court as well as the competency of the petition itself, let me, in the end of it all, declare my acceptance of the invitation extended to me by Mr. Fungamtama, learned counsel for the

respondent of striking out this petition. I will without hesitation, proceed to do so with costs. It is so ordered.

DATED at DAR ES SALAAM this 4th day of May, 2015.

J. C. M. MWAMBEGELE
JUDGE