

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

MISC. COMMERCIAL CAUSE NO. 188 OF 2016

In the matter of the Arbitration and in the matter of Arbitration Act Cap 15 R.E 2002

BETWEEN

ZAMANI RESORTS LIMITED (T) LTD ----- CLAIMANT

AND

KEMPINSKI HOTELS SA (Switzerland) ----- RESPONDENT

RULING

SONGORO, J

This is a ruling on notice to oppose the filing of Arbitration Award which filed by Mr. Dilip Kesaria Learned Advocate on behalf of Zamani Resorts Limited (T) the claimant.

In notice opposing the filing of Award, the claimant in brief is contesting that, the Award was not filed in a form of petition, necessary documents and exhibits were not filed and no notice of filing was issued to the claimant.

So purported filing of the Award by Arbitrators contravenes provision of Section 12(2) of the Arbitration Act, Cap 15 [R.E. 2002] and Rules 4, 5, 6 and 8 of the Arbitration Rules, GN 427 of 1957

For above stated reasons, the claimant in his objection on the filed the Award, prayed for a court order and declaration that, the filing of the Award is incompetent.

Thus on the 17/10/2016 when both parties appear before the court, Mr. Nyausi Learned Advocate of Kempinski Hotels SA (Switzerland), the Respondent informed the court that, they were served with notice opposing the filing of the Award and are ready to proceed with the hearing. The same prayer was made by Mr. Kesaria Learned Advocate for the claimant.

Keeping in mind that, it is court practice that, preliminary objection must be heard first, the court allowed parties to pursue the objection. So Mr. Dilip Kesaria, Learned Advocate appeared for the Zamani Resorts Limited the claimant and pursue the objection; while Mr. Nyaisa, Learned Advocate appeared for Kempinski Hotels SA the Respondent.

In pursuing notice opposing the filing of the Award, Mr. Kesaria informed the court that, the claimant is opposing the filing of the Award on the ground that, the filing was done contrary to Section 12(2) of the Arbitration Act Cap 15 [R.E. 2002] and Rules 4, 5 6 and 8 of the Arbitration Rules, GN 427 of 1957

Further the Learned Counsel explained that, under the cited Arbitration Rules it is a requirement of law that, the filing of the Award in court has to be by way of the petition which have to be accompanied with minutes of arbitration proceedings, and exhibits which were tendered. The Learned counsel also contested that, a notice of filing an Award has to be issued to the parties.

In his further clarification to the court, the claimant's Counsel pointed that, Rule 4 has to be read together with the current Sections 12(2) of the

Arbitration Act. which statutorily requires that, once the Award is filed in court, the Arbitrator has to issue a notice of filing an Award to the parties.

Commenting and submitting on the letter which purport to file an Award, the Learned Advocate faulted it, and explained that, it purport to refer to Section 12(2) of Arbitration Act, R.E. 2002 and Rule 4 of the Arbitration Rules GN 427 of 1957 but none of Arbitration documents were filed in court in compliance with Rule 4 of the Arbitration Rules.

Also, he faulted the filing of the Award on the ground that, a notice of filing an Award was not issued to the claimant by the Arbitrator as required by law.

The Counsel then firmly submitted that, failure on part of Arbitrators, to file the Award in a form of petition and documents mentioned in Rule 4 of the Arbitration Rules, turns the filing of the Award, to be incompetent. Mr. Kesaria then consistently and persistently insisted that, under Rule 5 of the Arbitration Rules the filing of the Award to be compliant with the law, has to be by a way of petition.

In support his arguments point that, the Award has to be filed by a way application which is in the form of the petition, the claimant`s counsel drew the attention of the court to commentaries made by Mr. Erasm Nyika, a Lecture of the University of Dar es Salaam found in his publication with title of "Enforcement of the Award" where it is stated that, Rule 5 of the Arbitration Rules envisages that, the filing of the Award has to be by a way of petition.

Furthermore, the claimant's counsel drew the attention of the court into several court decisions including a decision in Misc. Civil Cause No 304 of 2003 East African Development Bank versus Blue Line Limited which decided that, in filing an Award the arbitrator also must state whether or not the court has jurisdiction to entertain and enforce the Award.

While relying on the cited case the Learned Claimant Counsel insisted that, strict compliance of Arbitration Rules in filing the Award is mandatory. While on this point the counsel persistently faulted the filing of the Award by Arbitrators and explain that, they did not file a petition as required by law, and filing by letter do not suffice the requirement of the law.

The Counsel then complaint that, although a letter accompanying the Award shows its copy was sent to parties, but the claimant was never served with a copy of the letter. He then indicated that, the claimant knew about the filing of Award after the court directed that, a notice be issued to parties, so that they may appear before the court.

Mr. Kesaria rested his submission by maintaining his objection that, since there has been faults in complying with provisions of Section 12(2) of the Arbitration Act and Rules 4, 5, 6, and 8 of the Arbitration Rules, 1957 he prayed for a court order declaring that, the filing of the Award was improper and incompetent.

In response to the notice opposing the filing of Award, Mr. Godwin Nyaisa Learned Advocate of Kempinski Hotels SA (Switzerland), submitted

that, in Section 12(2) of Arbitration Act, R.E. 2002 and Arbitration Rules GN 427 of 1957 there is no statutory or legal requirement that, the filing of an Award in court has to be by a way of application or petition.

The Counsel then pointed out that, all Arbitrator is required to do under Section 12(2) of Cap 15 and its Rules is just file an Award or cause it to be filed. Then relying on definition of a word "filling" as defined in Black's Law Dictionary the Counsel said it means "just to deliver" a legal document to the court clerk for placement into the court or official record.

Also relying on Collins Dictionary, Respondent's counsel clarified that, the word "filing" is define to means "to place a legal document in public or official record". Relying on definition of the word filing in cited two dictionaries Respondent's Counsel submitted that, the duty of the Arbitrator in filing is just to put in place the Award in public or official record of the court.

The Respondent's Counsel then drew the attention of the court to a decision in the case of Tanzania Cotton Marketing Board Versus Cogecot Cotton Co SA [1997] TLR p 165 which decided that, so long as the filling complies with Section 11(2) of Arbitration Act, which is now is Section 12 (2) of Cap 15, then the filling is proper.

Commenting on commentaries of Mr. Erasmus Nyika referred by Mr. Kesaria, he challenge them that, may not in any way overrule decisions of Court of Appeal on filing of the Award, or vary what is stated in the Written Law.

Respondent's Counsel submitted further that, since an Award was filed together with several boxes containing arbitral proceedings and exhibits and received by the Court Registrar that, constitute the filing of the Award, and the court is required to notify the parties. He maintain in his submissions that, the objection raised is redundant because once an Award is filed in court parties are allowed to challenge it and not to contest the manner an Award was filed.

Responding to the claimant complaint that, was not issued with a notice of filing, he submitted that, they duly served the claimant through his known Post Address as per Section 12(2) of the Arbitration Act, [R.E 2002]. Therefore also the notice was properly issued.

In addition, the Respondent's Counsel submitted that, after all the claimant was even notified by the Court, and there was an advertisement on filing of the Award in newspapers. So a complaint on notice also is improperly made.

Finally, the Respondent's counsel rested his submissions by maintaining that, an Award was properly filed and he prayed for the dismissal of the objection for lack of merit.

In his brief rejoinder, Mr. Kesaria maintained his notice of opposing the filing the Award because a mode of delivery of the Award by letter was not proper and notice to the claimant was not issued. So that, contravene Section 12(2) of the Arbitration Act, [R.E 2002] and Arbitration Rules. He

firmly insisted on his objection that, the filing of the Award contravenes the Arbitration Act and the Rules. He prayed for court order and declaration that, the filing was improper and incompetent.

I having closely examined the claimant notice opposing the filing of the Award, and reply from the respondent and find there is one common ground which both parties agree which is the filing of the Arbitration Award by the Arbitrator in court is governed by Section 12 (2) of the Arbitration Act, Cap 15, and its Rules.

The tug of war and point of departure between the parties is on the manner of filing of the Award. Respondent Counsel claim a mere letter forwarding the Award in court is proper filing ; while claimant counsel insist a mere forwarding letter in filing an Award is not proper there must be a petition annexed with the Award and other documents.

In view of the above cited conflicting positions between the claimant and respondent on filing of the Award I find the key issue for determination on filing of an Award is whether a letter filed by an Advocate claim to have been instructed by the Arbitrators to file an Award in court may suffice legal requirements of Section 12 (2) of the Arbitration Act, Cap 15, and its Rules.

Keeping in mind that, the filing of Arbitration Award is governed by the Section 12 (2) of Arbitration Act Cap 15 and in my view that, is relevant section as far as filing of Arbitration Award is concerned, I opted to perused the section to see what is provided for and then examines the Rules. Thus upon perusal of the text of Section 12 (2) of Cap 15 I find it states as follows;

*The arbitrators or umpire shall, at the request of any party to the submission or **any person claiming under him and upon payment of the fees and charges due in respect of the arbitration** and award and of the cause the award or a signed copy of it, to be filed in the court; and notice of the filing shall be given to the parties by the arbitrators or umpire.*

Thus guided by the words "the Arbitrator or umpire may cause the award or a signed copy to be filed in the court" appearing on third and fourth line of Section 12(2) of Cap 15, it appears to me that, the will of legislature and text of the section require the arbitrator or umpire to file or cause the filing of the Award. The words "filing of the Award in court" used in the section has no ambiguity. And I did not see any word or sentence or paragraph in the said section 12 (2) of Cap 15 which statutorily compels the Arbitrator or umpire to file an Award by way of application or petition as claimant suggest.

Together with that, court finding that, is not the end of the matter because the claimant on objection is also based on arbitration rules and court`s decisions.

Turning to the Rules, I perused Rules 4 of the Arbitration Rules, Government No 427 of 1957, and find it states as follow;

"Arbitrators or an umpire, requested under the provisions of section 11(2) of the Act to cause an award to be filed in the Court, shall forward the award, or a copy certified by them or him to be a true copy, together with the evidence on the reference, the minutes of their proceedings and a copy of each notice given to the parties, by registered post and in a sealed envelope addressed to the Registrar together with a letter, also so addressed, requesting that, such award or copy be filed in the Court".

Guided by words from Rule 4 cited above, I find the Rules stipulates documents which has to accompany an Award at the time of filing which includes evidence on the reference, the minutes of the proceedings and a copy of each notice given to the parties. Mr. Nyaisa for the respondent has indicated to this court that, the above mentioned documents were also filed in court.

Honestly, I did not find any word or sentence or paragraph in Rule 4 cited above which insist that, the mode of filing of the Award by Arbitrator in court has to be by way of application or petition.

Further, I perused Rules 5 of the Arbitration Rules GN 427 of 1957 and find it states on "mode of application" and it states that,

Save as is otherwise provided, all applications made under the Act shall be made by way of petition.

Also in Rule 5 of the Arbitration Act GN 427 of 1957 the court did not find any statutory condition which states that, an Arbitral Award has to be filed in court by arbitrator by a way of application or petition. It appear Rule 5 of GN 427 of 1957 just gives a general statutory guideline that, all applications made under the Act, there shall be made by way of petition.

It is understood that, in the Arbitration process before or after an Award has been filed in court, an arbitrator or a party to Arbitration may need assistance of the court to achieve particular relief or specific order. In the said circumstances then an application may be filed and

Rule 5 of Arbitration Act provides guidance of statutory condition that, application has to be by way of petition.

But statutory instruction that, the filing of an Award in court by arbitrator has to be by a way of application or petition, is missing in Rule 5 and in my view that, was not oversight on the part of the legal draftsmen,

Likewise Rules 6, 7, 8, 9 and 10 of the Arbitration Rules are all silent on the point if the filing an Award in court by Arbitrator has to by way of application or petition. Instead the above mentioned Rules provided guides on what the title of the petition has to be, contents of the petition, Annexures to be attached to the petition, and who should be given notice.

Honestly, to conclude I find from the texts of Rules 4, 5, 6, 7, 8, 9 and 10 they have no statutory instruction that, an Award has to be filed in court by the Arbitrator by a way of the Application or Petition.

Turning on cited case of Tanzania Cotton Marketing Board Versus Cogecot Cotton Company SA [1997] TLR it appears there was a complaint that, the Award was filed by an Advocate rather than the Arbitrator. The complaint was on the filling that was irregular and improper because the Award was delivered by DHL Courier and not by Post as required as required by Rule 4 of the Arbitration Rules.

The Court of Appeal in the cited case, decided that, there is no reason for a restrictive interpretations of the provisions of Section 11(2) currently Section 12(2) of the Arbitration Act. The Court at page 169 then went ahead relying on the commentaries of the Learned Author S.D. Shah in his book Law of Arbitration, 9th Edition p 252 where it was stated that;

"The actual filing by the arbitrator or umpire is not essential, it is sufficient if he cause the award to be filed even if he forwards the award by post to the court there would be sufficient compliance with the provisions of sub section 2 – The act of filing of the award must be his or his behalf".

Next in the said decision the Court of Appeal also stated that, and I quote;

"On the other hand, the matter could be carried even further. As already indicated the Arbitrators –the Liverpool Association Ltd by letter dated 1 March 1996 addressed to the Registrar, High Court Dar Es Salaam forwarded the award for filing. In that, letter the arbitrators in clear terms stated that, they have been requested by the respondent a party to arbitration to cause the filing of the award in court With that, letter all required documents in terms of Rule 4 of the Arbitration Rules were enclosed in a sealed envelope which was forwarded by MS. Mkono & Company Advocates by DHL".

In considering whether or not the Award forwarded by a letter was properly and in accordance with the law the Court at page 171 stated that,

From the wording of the principal legislation Section 11(2) which is now Section 12 (2) and the subsidiary legislation in Rule 4, it is apparent to us that, the subsidiary legislation is more restrictive than the principal legislation.

The court further stated that,

In that, situation it is our view that, Rule 4 should be interpreted widely in order to accord to it more meaningful and practical interpretation which is in line with the spirit behind the enactment of Section 11(2) of the principal legislation. In that, light we are satisfied that, the learned judge correctly came to the conclusion that, the award was forwarded by registered post which would have indicated should also include the DHL. System which was used in this case. The Court of Appeal then said the filing was properly done in terms of the law under Section 11(2) of the Arbitration Ordinance.

Thus in case of Tanzania Cotton Marketing Board Versus Cogecot Cotton Company SA , the Court of Appeal decided that, an award forwarded by DHL System instead of registered post services the filing was said to be properly done in terms of the law under Section 11(2) of the Arbitration Ordinance. I did not find any statement in the cited decision which stated that, an Award has to be filed by a way of Petition or application.

Turning to Misc. Civil Cause No 142 of 2005 of East African Development Bank Versus Blue line Enterprises Ltd decided by Hon. Shangwa J strictly speaking was dealing with the Award filed by the petitioner while in the present objection were are dealing with an Award filed by the Arbitrator. The two courts actions are distinct and use separate procedure.

Likewise in cases of Attorney General Versus Impresa Ing Fortunato Federici S.p.A and Stirling Civil Engineering Limited, **and** East African

Development Bank Versus Blue line Enterprises were both dealing with the manner in which a Petition under the Arbitration Act may be made. Both of them decided that, in the Petition an Award must be annexed to the Petition. Currently we don't have a petition but only an Award which was caused to be filed by Arbitrators.

Admittedly, the Arbitration Act Cap 15 and its rules set separate procedure of filing an award by the Arbitrator and filing of the petition or application. But it has to be understood that Arbitrators in the present proceedings are not Petitioner or Respondent in this matter.

Also attention of the court was drawn to commentaries of Mr. Erasmus Nyika, Lecturer of the University of Dar es Salaam on Enforcement of Award. Unfortunately the copy of the commentaries was not available to the court. But after full consideration of what was submitted by Mr. Kesaria on commentaries, it suffices to say by all standards as far as the filing of the Award is concerned they may not add or subtract anything from what is stated in Section 12 (2) of the Arbitration Act Cap 15

To conclude on the first point of notice of opposing the filing of the Award I find Section 12 (2) of the Arbitration Act and its Rules has no statutory condition that, the Arbitrator in filing an Award has to file it by a way of the application or petition.

It is in this regard I fully subscribe and bound by the legal position stated by the Court of Appeal in the case Tanzania Cotton Marketing Board Versus Cogetcot, Cotton Company (SA) that, Rule 4 should be interpreted widely in order to accord it more meaningful and practical

interpretation which is in line with the spirit behind the enactment of Section 12 (2) of the principal legislation. The section statutory maintains that, the Arbitrator may file or cause the filing of the Award in manner which is convenient to him including filing an Award by letter.

Honestly, I finds if legal argument of Mr. Kesaria is accepted that, the Award has to be file in court by way of application or petition by the Arbitrators that, will defeat the spirit and intention of Section 12 (2) of Arbitration Act, which requires an Arbitrator just to file an Award or cause it to be filed.

If Mr. Kesaria argument that, Award has to be filed by a way of petition is accepted it may pose huge burden and costs to Arbitrators, and drag them into civil litigation and that is not what the law provides.

Moving on the Award filed in court and which is before me, I find the District Registrar received a letter from of Nex Law Advocates informing him that,

they have been instructed by Mr. Michael Hirst, OBE, Mr. Christopher Style QC and Mr. John Blackburn QC (President) (the Arbitrators) to file in this Honourable Court the award dated 16th September, 2015 (the Arbitration Award) and the addendum to the Arbitration Award dated 24th February, 2016 (the Addendum) on behalf of the Arbitrators.

Also Nex Law Advocates stated in their letter that,

Pursuant to the said authorization, we hereby file under section 12(2) of the Arbitration Act R.E.

2002 of the Laws of Tanzania Mainland and Rule 4 of the Arbitration Rules (GN No. 427 of 1957) of Tanzania Mainland, the original Arbitration Award and the Addendum.

So it appear the award was filed by a way of letter to the Registrar as explained above.

Regarding Mr. Kesaria `s complaints that, the Award filed in court was not accompanied with requisite documents and arbitration proceedings and Exhibit that, is a question fact which may not be determined at this preliminary stage. The complaint on filed documents has been raised prematurely because that, point may be ascertained after perusing the Award and filed documents and not yet at that, stage

However it is suffice to say I have seen the DHL box with Volumes of files which was delivered to Commercial Court.

So after full consideration of the words from a letter which reads "they have been instructed by Mr. Michael Hirst, OBE, Mr. Christopher Style QC and Mr. John Blackburn QC (President) (the Arbitrators) to file in this Honourable Court the award dated 16th September, 2015 the court" is satisfied that, the filing of the Award was caused by the Arbitrators and substantially complied with Section 12 (2) of the Arbitration Act, Cap 15.

Turning to the second limb opposing the filing of the Award which is claimant complaint that, they were not served with notice of filing the Award from arbitrator. Again I find this is a question of mixed law and facts which may

not be resolved without finding if the notice was sent or not or was received by the claimant or not.

From the submission from the parties, I noted that, Mr. Nyaisa who was not even speaking on behalf Arbitrators indicated that, a copy of letter forwarding that Award was also copy to the parties including the claimant through their post addresses notifying them on filing of the Award.

I also examined the said letter sent to this court and it indicates to have been copied to Zamani Resort Ltd P.O. Box 3140 Kiwengwa Zanzibar with words " Take note of this filling.

Since the mode of sending a notice was through postal services both contention that, the notice was sent by post, as well as the claimant contention that, was never served with notice may be true if the notice was lost or delay somewhere else. But even if the notice did not reach the claimant it is my view that, alone may not vitiate the fact that, Arbitrator caused the filing of the Award because an Award and documents were received by the District Registrar.

So in the event the claimant was not served with the notice of filing an Award by the Arbitrator, it seems to the appropriate remedy available to the claimant, is to apply to the court for service or re-service of notice of filing of Award.

In the event, claimant has not received a notice of filing an award from the Arbitrator, the Arbitrators are directed to furnish the claimant with the notice. The claimant is also at liberty to apply to be served with notice of filing of an Award if to-date, has not received the notice.

All arguments considered, I find and decide that, the claimant notice of opposing the filing of the Award has no merit and dismiss it. Since the objection was on filing of an Award which was filed by Arbitrators who are not parties, I make no order as to costs.

Dated at Dar es Salaam this 17th November, 2016



H.T.SONGORO
JUDGE

Delivered at Dar es Salaam this 17th November, 2016



H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Kesaria Learned Advocate of the Claimant and Mr. Nyaisa Learned Advocate of the Respondent.