

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 323 OF 2015

IN THE MATTER OF THE ARBITRATION ACT, CAP 15 R: E  
2002

IN THE MATTER OF AN AMENDED AWARD BY FATMA. A.  
KARUME, SOLE ARBITRATOR DATED 2<sup>ND</sup> OCTOBER, 2015,  
IN ARBITRATION NO. 1 OF 2014

BETWEEN

GEOFIELDS TANZANIA LIMITED.....APPLICANT

*VERSUS*

1. MALIASILI RESOURCES LIMITED  
2. WILLIAM L KAZI  
3. ADRIAN M TAILOR } .....RESPONDENTS

RULING

**Mansoor, J:**

Date of RULING- 27<sup>th</sup> APRIL 2016



The Award was issued by the Sole Arbitrator, Ms. Fatma A Karume dated 2<sup>nd</sup> October 2015 "the Award". The Award has been filed in this Court. The Petitioner filed the Arbitration Petition No. 323 of 2016 under section 16 of the Arbitration Act, Cap 15 R: E 2002, and Rule 5 of the Arbitration Rules G.N No. 427 of 1957 to set aside the said Award.

The Petitioner argues that the Sole Arbitrator has misconducted herself in which she found that the agreement giving rise to the Award has consideration between the 3<sup>rd</sup> respondent and the Petitioner only but she awarded nominal charges of THz 15,000 to the 2<sup>nd</sup> respondent. That the 1<sup>st</sup> Award was issued by the Sole Arbitrator on 31<sup>st</sup> July 2015. The Award condemned the Petitioner to pay costs in percentage. The Respondents' filed an application to correct the award so that the costs are stated in figures, on 1<sup>st</sup> October 2015, the Arbitrator gave a Ruling amending the Award, and changed the Award, she stated as follows at page 7 of the Amended Award of 1<sup>st</sup> October 2015:




7.1 for the reasons set out hereinabove the Sole Arbitrator amends the dispositif of the Award in the manner set out in the amended Dispositif herewith attached as Schedule 1.

7.2 for the sake of clarity, the Sole Arbitrator states that other than the Dispositif part of the Award as set out in paragraph 234 of the Award, which has been amended by Schedule 1, this Ruling does not affect any other part of the Award.

Schedule 1 to the Amended Award reads as follows:

- a. the Claim made by the 1<sup>st</sup> and 3<sup>rd</sup> Claimants is dismissed;
- b. the respondent is liable to pay the 2<sup>nd</sup> Claimant the sum of THz 15,000 forthwith by way of nominal damages;
- c. The respondent is liable to pay the Claimants a total sum of USD 31,965.10 towards the Sole Arbitrator's fees.



d. The Respondent is liable to pay the Claimant a total sum of USD 58,879.18 towards the fees of the Claimant's legal team.

The Petitioner argues that the Sole Arbitrator has corrected the Award itself, and the law does not allow her to do so, she is only allowed to correct the typographical errors, and that it was wrong for the Sole Arbitrator to award nominal damages of THz 15,000 to the 2<sup>nd</sup> respondent while in paragraph 162 at page 56 of the Amended Award, the Sole Arbitrator found that the Agreement has consideration between the 3<sup>rd</sup> respondent and the Petitioner only.

Ground No. 2 for seeking to challenge the Award is that it was wrong for the Sole Arbitrator to Award the 2<sup>nd</sup> respondent a nominal damage of THz 15,000 despite her findings that there was no consideration between the 2<sup>nd</sup> respondents and the Petitioner. It was the holding of the Sole Arbitrator at page 67 paragraph 226 of the Award that 2<sup>nd</sup> respondent has failed to prove that he has suffered damages as a result of Petitioner's breach of the Agreement,



she lacked basis for granting nominal damages to the 2<sup>nd</sup> respondent.

Another ground was that the Sole Arbitrator did not give reasons for ordering costs against the Petitioner in the following manner: 95% of the Sole Arbitrator's fees which is USD 31,965 and 95% towards the fees of the Respondent's legal team which is USD 58,879.18.

The Counsel for the Petitioner argues that under Paragraph 229 at page 67 of the Award the Arbitrator states that Respondents' have not been successful in the Arbitration and generally they are supposed to bear the costs of Arbitration. He said, the Arbitrator decided to act against the general rule and apportioned the costs between the parties. Usually costs of arbitration are borne by the unsuccessful party, but when the Arbitrator decides to apportion such costs between the parties, the Arbitrator must state the reasons for doing so in writing, taking into



account the circumstances of the case. (Section 30 (2) of the Civil Procedure Act, Cap 33 R: E 2002).

The Counsel for the Petitioner argues further that the Arbitrator can apportion costs between the Parties if she determines that such apportionment is reasonable in writing, taking into account the circumstances of the case:

The Counsel argues further that at paragraph 230 of page 67 of the Award, the Arbitrator gave her reasons for apportioning the costs, she said:

*“The Sole Arbitrator finds that this is an arbitration in which the circumstances call for the apportionment of the costs of arbitration. The Sole Arbitrator is alert to the fact that no consideration passed from the 1<sup>st</sup> and 3<sup>rd</sup> Claimants to the respondent and therefore the 1<sup>st</sup> and 3<sup>rd</sup> Claimants could not enforce any rights under the Agreement. It is for this reason that the sole Arbitrator finds that apportionment of cost is just.”*



The Counsel for the Petitioner argues that the Arbitrator should have held that since it was the Claimants, now the Respondents that filed the Arbitral Proceedings against the Claimant and they have failed since she has held that the Claimants could not enforce any right under the Agreement, the sole Arbitrator should have ordered that the Claimants should bear the full costs of the Arbitration or greater portion of it. He argues further that failure of the Arbitrator to determine in writing the reasonableness of condemning the Petitioner to pay 95% of the costs of arbitration is contrary to Section 30(2) of the Civil Procedure Act, thus the order to pay 95% cost of arbitration be set aside.

The Counsel also argues that at page 68 paragraph 233 of the Award the Sole Arbitrator condemned the Petitioner to bear 95% of the Respondents' Legal Fees amounting to USD 58,879.18. The Counsel argues that the Sole Arbitrator has no basis for granting this Award, and she did not give any reasons for granting such an Award. He stated that, there is



no point during the arbitration proceedings that the issue of legal fees was presented to be included in the Award, and that it was wrong to include it in the Amended Award, and that this was a serious misconduct on the part of the Arbitrator. He argued that costs must be taxed where the applicant must present a Bill to the taxation officer as an independent application and costs cannot be awarded in the main Award. That it was pointed out during the arbitral proceedings during cross examination of the 3<sup>rd</sup> Respondent that the Firm of the Sole Arbitrator was acting as the Company secretary to his Company, and that the Sole Arbitrator was asked to recuse herself from the conduct of the arbitral proceedings but she ruled out that she cannot withdraw from the conduct of the matter due to the fact that a junior employee of the firm is acting as the Company Secretary of the 3<sup>rd</sup> Respondent's company, and that the Sole Arbitrator and Counsel Kapinga used to work together at Mkono & Co. Advocates. That this part of the proceedings was not recorded in the proceedings by the Sole Arbitrator. The Counsel states in his written submissions that he





believes that the awarding of costs in the way the Sole Arbitrator did has everything to do with the relationship between the Sole Arbitrator and the 3<sup>rd</sup> Respondent on one hand and the Sole Arbitrator and Counsel Dr. Kapinga.

The Counsel for the Petitioner argues further that, in the arbitration the Respondents lost in their claims, and in the usual manner payments of costs should have been on the losing party, and apportionment of costs on this matter was a misconduct by the Sole Arbitrator.

On the part of the Respondents', the Counsel for the Respondents submitted on ground No. 1 and conceded that awarding of Nominal damages to the 2<sup>nd</sup> respondents was an apparent mistake on the part of the Sole Arbitrator, since the Arbitrator found that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' had no interest in the Land under License (page 44 of the Award). That the Arbitrator also found that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' have no title to the Land under license (page



54 of the Award), therefore , it would not be the case that the 2<sup>nd</sup> Respondents and the Petitioner to have consideration in the Agreement, and that was an apparent typographical error on the Part of the Arbitrator.

On ground No. 2 the Counsel for the Respondents' has argued that it was proper however to grant nominal damages to the 2<sup>nd</sup> Respondents and the basis for doing that is because the 2<sup>nd</sup> respondents had a legal right under the agreement that was breached by the Petitioner and even though no damages were incurred by the 2<sup>nd</sup> respondents, he was still entitled to nominal damages which is what was Awarded by the Sole Arbitrator (page 67 paragraph 227 of the Award.).

On the 3<sup>rd</sup> ground, the counsel stated that the Petitioner was an unsuccessful party in the Arbitration and that the unsuccessful party bears the costs of Arbitration. (Page 67 and 68 of the Award).



The Counsel argues that the errors pointed by the Counsel by the Petitioner are not errors to warrant the setting aside of the Award. That the Arbitrator has given reasons for apportioning the costs between the parties, and that if the Petitioner is disagreeing with the Arbitrators reasoning, it does not make it a misconduct. He stated that the Court can only remit the Award back to the Arbitrator for reconsideration only on three grounds, namely, error on the face of record, mistake and new material evidence. The counsel admitted that there was a typographical error which is a mistake, and such mistake can be corrected by the arbitrator on remission, but there is no ground stated which amounts to misconduct to warrant the setting aside of the Award.

I have carefully considered the submissions by the Counsels for the Petitioner as well as that of the Respondent's Counsel, and I must say that an arbitration award might be set aside on the ground of an error on the face of it when reasons given for the decision, either in the award or in any document



incorporated with it, are based upon a legal proposition which is erroneous. An award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion. In the instant case, the reasons given by the Arbitrator for making the said Award was erroneous and contrary to Section 30 (2) of the Civil Procedure Code. She said in paragraph 229 at page 67 of the Award that, generally, costs of an arbitration are borne by an unsuccessful party, and that Section 30(2) of the Civil Procedure code, directs that any costs shall not follow the events, the Court shall states its reasons in writing. These are arbitral proceedings, and there is no rule on apportionment of costs between parties, although section 30(1) of the Civil Procedure code the Court is given full power and discretion to determine by whom and out of what property and to what extent such costs are to be paid. Since the Sole Arbitrator determined in paragraph 230 of her Award, page 67, that 1st and 3<sup>rd</sup> Claimants (now 1<sup>st</sup> and 3<sup>rd</sup> Respondents') passed no consideration to the Petitioner, thus they could not enforce any rights under the Agreement, this



means that the 1<sup>st</sup> and the 3<sup>rd</sup> respondents are the losing parties, and it is trite law that costs are condemned against the losing party. The reason given under paragraph 230 of arbitrator's Award calls for the costs to be awarded to the losing party and not to apportion the costs to the extent of 95% to the winning party. This is an error apparent on the face of the records. No law was referred on apportionment of the costs and giving the greater portion of the cost to be borne by the winning party, in the said Award. No legal proposition is stated in the said Award which is made basis thereof for granting a greater cost to be borne by the winning party.

The Court has further an inherent power to set aside an award which is bad on its face: either as involving an apparent error in fact or law, or as not complying with the requirements of finality and certainty. The Amended Award by the Sole Arbitrator Ms. Fatma A Karume given on 2<sup>nd</sup> October 2015 is bad on its face as it has given costs based on apparent error of law on apportionment of greater costs to the winning party.



It is trite law that the losing party should pay the 'litigation expenses' relating to any matter. This is nothing but a reiteration of what is stated in law, namely section 30 (1) of the Code of Civil Procedure.

As rightly pointed out by the Counsel for the Petitioner, there was no assessment of the costs by the Taxing Officer therefore the award of such costs is contrary to law.

Relevant provisions of the Code

Section 30 of the Code of Civil Procedure R: E 2002 relates to costs and is extracted below:

"30. Costs. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of and incident to, all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that



the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

- (2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing."

Generally, costs are awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. Costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. Costs must be taxed by the Taxing Officer. These principles apply, in the award of costs,

When Section 30 (2) of the Civil Procedure Code provides for cost to follow the event, it is understood that the costs have to



be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation.

Though award of costs is within the discretion of the court, it is subject to such conditions and limitations, there is no question of exercising inherent power contrary to the specific provisions of the Code.

It should be noted that I did not decide on the allegations of biasness as alleged by the Petitioner, as that is a mere allegations not recorded in the proceedings of the Sole Arbitrator, thus any allegations of recusal of the arbitrator should be addressed before the Arbitrator herself, and a Ruling be given thereof in writing.





Based on the above the Court sees a good cause given by the Petitioner to remit the part of the award on the part of apportionment of costs to the winning party of the arbitration for reconsideration, Section 16 of the Arbitration Act, it is fairly clear that it is open to the Court to see whether there is any cause to remit or set aside the award.

Thus, based on the above, the Award is remitted back to the Arbitrator for reconsideration.

It is so ordered.

DATED at DAR ES SALAAM this 27<sup>th</sup> day of APRIL, 2016

  
**MANSOOR**

**JUDGE**

**27<sup>th</sup> APRIL 2016**

