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

MISC.COMMERCIAL CAUSE NO.4 OF 2020

IN THE MATTER OF ARBITRATION

And

In the Matter of a Dispute in Connection with or Arising from the Construction of Diocese Building on Plot No.7 Main Cathedral Madukani Area, Dodoma Municipality

And

IN THE MATTER OF SECTION 17 OF ARBITRATION ACT, CAP 15 [R.E.2002]

Between

AFRIQ ENGINEERING & CONSTRUCTION CO. LTD .....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF
THE DIOCESE OF CENTRAL TANGANYIKA .....RESPONDENT

Date of the Last Order,19/02/2020.
Date of the Ruling, 26/02/2020.

RULING

NANGELA, J.:

On 21st January 2020, one Engineer Sudhir J. Chavda, Sole Arbitrator in arbitration proceedings initiated by the parties herein, acting under

Section 12 (2) of the Arbitration Act, Cap.15 [R.E. 2002], brought to the attention of the Registrar of this Court the filing of an Award dated 13th November 2019.

In his letter, the Sole Arbitrator informed the Registrar about Notices given to the parties, in line with the requirements of section 12 (1) of the Act, and that, acting under Section 12 (2) he has caused the award, through the services of Klug Attorneys, to be filed in this Court. The appointed Legal Firm filed the award on 23rd January 2020 vide an exchequer receipt **No. 99036380086**.

Before I delve further into this application, I find it pertinent to summarize the facts surrounding its filing. Briefly stated, the facts regarding this matter are that, on 3rd July 2017, the Claimant, a limited liability company incorporated under the laws of Tanzania, entered into a contract with the Respondent, a religious organization, duly registered under the laws of the United Republic of Tanzania.

The contract, known as *Proposed Construction of Diocese Investment Building on Plot No.7 Main Cathedral Madukani Area, Dodoma Municipality (Now City)*, was for a contract price of **TZS 4,915, 616,655.86** (Four Billion Nine Hundred Fifteen Million Six Hundred

Sixteen Thousand Six Hundred Fifty Five, Eighty Six Cents Only). The Contract was for a duration of twelve (12) months from the commencement date. The Respondent engaged the services of M/S K&M Archplan (T) Ltd as the Lead Consultant for the project and it was agreed that the date for site possession, was agreed to be 3rd July 2017.

However, following the parties' first Site Meeting, the site was handed over to the Claimant on 8th July 2017, this being the commencement date of the project, and it was agreed that, the completion date would be 7th September 2018. According to the contract, the Respondent was required to release an advance payment of **TZS 737,342, 498.00**, being equal to 15% of the contract sum, upon submission of Performance Guarantee and Advance Payment Guarantee. The Claimant is said to have complied with the requirements and furnished, not only the Performance Guarantee and Advance Payment Guarantee, but also the Contractor's All Risks Insurance Policy.

It was alleged that, instead of paying the advanced payment at once as per the contract, the same was paid in parts, the first batch being **TZS 100,000,000/=,** paid on 02nd September 2017, and **TZS**

30,000,000/= paid on of 04th September, 2017. The third batch was for **TZS 300,000,000/=** paid on 06th September 2017.

On 13th October 2017, during the 2nd Site Meeting, the Claimant is said to have raised a finger regarding the partial payments of the advance payment. On 16th October 2017, the last batch of the partial payments, amounting to **TZS 227,342,498.00** was released.

In the course of executing the contracted construction works, things did not go as smoothly as they should since the contract ended up being terminated by the Respondent. The Claimant contested the termination and, invoking an arbitration clause in the contract, the Claimant initiated arbitration proceedings, having notified the Respondent that there was now a dispute between the two that needed to trigger the arbitral process for the sake of obtaining justice.

The arbitral proceedings were thereafter initiated and, the National Construction Council (NCC), appointed one, **Engineer Sudhir J. Chavda,** as the Sole Arbitrator who should hear and determine the dispute between the parties. The proceedings were to be governed by the NCC Arbitration Rules, 2001 Edition.

The Sole Arbitrator heard the parties, received their oral and written evidence and having analyzed 32 issues agreed upon by the parties, handed down his **AWARD** on **13th November 2019** in favour of the Claimant and, **DIRECTED** as follows:

1. A DECLARATION THAT, regardless of other names used in the Contract or elsewhere, the "Respondent" is the "REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA" of P. O. Box 15, Dodoma, Tanzania.
2. THAT, the above named Respondent (i.e. The "*Registered Trustees of the Diocese of Central Tanganyika")* shall pay the Claimant the following sums by date 31st December 2019:

TZS (excl.VAT)

(a) Works executed at the site.....800,000,000.00

(b) Pumping Water.....20,000,000.00

(c) Idle Plant and Machinery.....100,000,000.00

(d) Advance Payment Guarantee Costs +Legal Costs+ interest charges..... ....170,000,000.00

(e) Loss of Profit @15% on contract work unxecuted, i.e., TZS 3,477 m less 800m x 15% =401,550,000/- (rounded-off)..... ..400,000,000.00

(f) Demobilization Costs.....100,000,000.00

(g) Damages (in terms of paras 6.2.4 & 6.3.2 of the Award).....750,000,000.00

(h) Exemplary Damages for Respondent's steps taken as given in para 8.22(d) (herein above) 250,000,000.00

TOTAL TZS (VAT inclusive) 2,590,000,000.00

(Tanzania Shillings Two Billion Five Hundred
And Ninety Million Only VAT inclusive)

3. INTEREST CHARGES

   Should the Respondent delay in settling the above sum, either in whole or in part, out of the above amount totalling TZS 2,590,000,000/-, the amount not settled by date 31st December, 2019 to attract interest charges, computed from 1st January 2020, at a rate of 18% per annum also payable by the Respondent to the Claimant.

4. ORDER that, the Office Bearers of the Respondent, namely Rt Rev. Dr. Dickson Daudi Chilongani, as Chairman of the Board of Trustees and Rev. Canon John Musa Ntando, as the Secretary General, shall expeditiously approach the Prevention and Combating of Corruption Bureau (PCCB) in terms of paras 6.33.8 and 8.22 (e) herein above (i.e., of the Award).

5. THAT, the Respondent bears the full cost of this arbitration and make payment to the National Construction Council in the sum of TZS 61,878,625/= being the VAT-inclusive cost of this arbitration.

6. THAT, the Respondent pays the Claimant a sum of 60,000,000/- towards the Claimant's Cost of arbitration, inclusive of associated legal costs and fees.

7. THAT, the Respondent meets his own costs amounting to TZS 64,383,000/- inclusive of associated legal costs and fees.

On 19th February, 2020, when this matter was placed before the attention of this Court, Mr. George Shayo, assisted by Mr. Adrian Mhina, (learned Advocates) represented the Claimant. Mr. Gabriel Masinga, who was assisted by Mr. Daniel Eliamani (Advocates) represented the Respondent. One, Mr. George Mandepo, a principal officer of the Respondent accompanied the learned advocates representing the Respondent.

Mr. Shayo submitted that the matter before the Court was brought under section 12 (2) of the Arbitration Act, Cap.15 [R.E. 2002] seeking, to register and enforce, in terms of section 17 (1) of the same Act, an arbitral award dated 13th November 2019. He submitted that, as per section 17 of Cap.15 [R.E.2002], this Court has the powers to register and adopt the award as its decree, unless the Court remits or set aside the award. He prayed to have the award registered for purposes of its enforcement.

For his part, Mr. Masinga informed the court that they had just been served with the summons to appear and show cause. However, he was of the view that the award was not properly filed under section 12 (2) of the Arbitration Act, Cap.15 [R.E.2002]. He prayed that the Court

should issue a directive that the award be properly filed and as of now the Court should expunge it from the record.

Mr. Masinga further submitted, in the alternative, that, if this Court makes a finding that the award is properly before it, then, the Respondent prays for 30 days time within which they should file their petition in objections to the award. He submitted that, his prayer for 30 days is based on the fact that the Arbitration Act does not prescribe for the period within which to file such a petition objecting to the registration of an award. He thought 30 days would be sufficient on their part given the voluminous nature of the documents.

In a rejoinder submission, Mr. Adrian, the learned advocate for the Claimant, submitted that section 17 (1) of the Arbitration Act, Cap.15 [R.E. 2002] was very clear and the Claimant has approached the Court seeking to enforce the award. He stated that, the learned counsel for the Respondent has not stated why he thinks section 12 (1) had not been complied with. He argued that, if the Respondent has an objection, then he should have objected by way of filing an application from the day when the award was ready for collection, which is 14th November 2019.

Mr. Adrian submitted that, the learned counsel for the Respondent should not mislead the Court by stating that the Respondent is supposed to file its petition after the award has been filed since that is not the position of the law.

He argued that, the correct position of the law was stated by the High Court (Mandia J., (as he then was) in the case of **East Africa Development Bank vs Blueline Enterprises Ltd, Misc. Civil Cause No.134 of2006 (High Court, DSM) (unreported),** where it was stated that, any petition under the Arbitration Act is an application like any normal application, and has to be filed within 60 days, from the date when the cause of action accrued.

In his view, Mr. Adrian submitted that, the cause of action in this regard accrues from the day when an award is ready for collection, which is 14th November 2019. In that regard, the 60 days ended on 13th January 2020. He argued that the prayers from the Respondent's learned counsel is just a prayer for extension of time and ought to be by way of a petition under Rule 5 of the Arbitration Rules, G.N.427 of 1957. He emphasized that, as per section 17 (1) of the Act, the Court has a

duty to enforce the award as if it were its decree of this Court and nothing else should be entertained.

To strengthen his submission that the 60 day rule applies to the filing of applications, Mr. Adrian referred to this Court the case of **the Bank of Tanzania v Said Marinda and 30 Others, Civil Reference No.3 of 2014, CAT (unreported)**, where the Court of Appeal of Tanzania stated that, all applications whose time limit has not been stated in the law are to be governed by the Law of Limitation Act, Cap.89 [R.E. 2002], in particular the 1st Schedule, Part 3, Column 21. The same should be within 60 days, he emphasized.

In view of the above, Mr. Adrian prayed that, the award be registered and as prayed by the Claimant, and the prayers by the Respondent to be allowed to file its objections, should be rejected since the Respondent is supposed to have filed its petition as per Rule 5, 8 of the Arbitration Rules, G.N.427 of 1957.

Having heard from both counsel, I should state that, initially I had not seen the letter which was sent by the Sole Arbitrator to the Registrar of this Court, but upon looking at the file, I found that, indeed, the letter was sent to the Registrar seeking for the filing of the arbitral award.

I have raised two issues for determination in this matter, taking into account the submissions of the learned counsel for the parties. These are:

(i) Whether this application was properly before this Court in compliance with section 12 (1) of the Arbitration Act, Cap.15, [R.E. 2002].

(ii) If, the first issue is in the affirmative, whether the Respondent's prayer to file its petition for objection to the award is tenable.

Essentially, as regards the first issue, I have no doubt, having looked at the file and the letter sent to the Registrar of this Division of the High Court that the matter before me is properly filed. I am contented by the fact that section 12 (1) and (2) of the Arbitration Act provides as hereunder:

"12. Award to be signed and filed

(1) When the Arbitrators or umpire have made their award, they shall sign it, and shall give notice to the parties of the making and signing thereof, and the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and the award.

(2) The Arbitrators or umpire shall, at the request of any part 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 costs and charges of filing the award, cause the award or 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."

The above section is further supported by Rule 4 of the Arbitration Rules, G.N. 427 of 1957 which provides as follows:

> "Rule 4. Arbitrators or an umpire, requested under the provisions of section [12(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 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 sealed envelope addressed to the Registrar together with a letter, also so addressed, requesting that such award or copy be filed in the court."

As I stated earlier, upon perusal of the file, I am contented that the filing was properly done before this Court and in compliance with Section 12 (1) and (2) of the Act, as well as Rule 4 of the Arbitration Rules, G.N. 427 of 1957. The first issue is therefore responded to affirmatively and the submissions by Mr. Masinga, to the effect that the award was not properly filed in this Court, are without merit, and, I proceed to dismiss them.

Turning to the second issue, as I stated earlier, this issue was based on the first issue being answered in the affirmative. Since the first

issue has been affirmatively answered, the question to address is: whether the Respondent's prayer to file its petition in objection to the award is tenable.

As stated herein above, Mr. Masinga who appeared on behalf of the Respondent, informed this Court that the Respondent had just been served with the summons to appear and show cause why the reliefs sought should. In his submissions he indicated that the Respondent prays to file objection against the registration of the award and was thus praying for time (30 days) within which to do file his petition against the registration and enforcement of the award. He has argued that the thirty (30) days are not provided for but sought at the discretion of this Court since the Act and its Rules are silent on that.

For his part, the learned counsel for the Claimant has vehemently resisted Mr. Masinga's submissions, noting that, it has come belatedly, because, and, referring this Court to the decided cases cited earlier herein above, such submissions ought to have been by way of a petition filed within 60 days from the time when the award was made. He has insisted, thus, that the submissions should be disregarded and this Court should proceed registering the award.

I have given careful considerations to the rival submissions by the learned counsel for the parties herein. I have also read the two cases: **the Bank of Tanzania v Said Marinda and 30 Others, Civil Reference No.3 of 2014, CAT (unreported)**, and the case of **East Africa Development Bank v Blueline Enterprises Ltd, Misc. Civil Cause No.134 of2006 (High Court, DSM) (unreported).**

In essence, I have no problem with the sixty (60) days' rule set out by the Court of Appeal in the case **Bank of Tanzania v Said Marinda and 30 Others, (supra).** The principle enunciated in that case applies to all applications, as stated in the Case. As for the second case, i.e., the **East Africa Development Bank v Blueline Enterprises Ltd** (supra) I have some problems as I find that, the case is distinguishable when one considers the gist of the current application at hand.

In particular, while the current application is based on section 12 (1) and (2) of the Arbitration Act, Cap.15 [R.E. 2002] and Rule 4 of the Arbitration Rules, GN.427 of 1957 (the filing of an award in this Court) (which I dealt with when I resolved the first issue), the case referred to by the learned counsel, i.e., the **East Africa Development Bank v Blueline Enterprises Ltd** (supra), sought to impeach an arbitration

award under section 15 of the Ordinance [now section 16 of the Act] and the 1957 Rules.

In my view, we have not arrived at that stage. Perhaps we will reach at such a stage, if the Respondent's prayer to file a petition to challenge the filing of this award will be allowed. All in all, we cannot conjure what the Respondent's prayers will be. As it is said, one crosses the bridge when he arrives at it. My problem, however, is with the Claimant's view that the Respondent ought to have filed such a petition within sixty (60) days **from the date of the award and not from the date when the award is filed**. This argument by the learned counsel for the Claimant has considerably exercised my mind.

Specifically, I have asked myself: is it correct to say that the sixty (60) days' rule, which, as I stated earlier, I agree, that, it applies to all civil applications, applies, in the circumstances of this petition, **from the time when the award is made?** Does it not apply **from the time when an award is filed in this Court** (as is the case at hand)?

Under the sixty (60) days rule, it was argued by the learned counsel for the Claimant, the Respondent was barred from challenging the award since he ought to have filed his petition **within sixty days from the day of the award** and **cannot do so at this time when it**

is being filed in this Court for registration and enforcement. Is this the correct position of the law?

As I pointed out herein, the Respondent appeared in this Court because of **a summons to appear and show cause** why the reliefs sought in this in the award being filed in this Court should not be granted.

Ordinarily, it is clear that, the filing of an award in this Court, is a legal requirement if at all the award is to have the intended legal effect. Section 12 (1) and (2) as well as section 17 of the Act, and Rule 4 of the Arbitration Rules, 1957 are relevant in that regard. The filing is the next step in the post-arbitration award rendering process which culminates into a binding and enforceable decree, if no successful challenge is mounted against the award (see section 17 of the Arbitration Act).

Taking into account the above provisions, does the challenging of an award come before or after its filing? In my view, the mounting of a challenge to an award can only come, not before the filing but after it is filed in Court. I hold so, because, under section 12 (2) of the Arbitration Act, Cap.15 [R.E.2002], the Arbitrator who is requested to file the award in the Court, is obliged to ensure that a **"NOTICE OF FILING"** is given to all parties. The giving of such **"NOTICE OF FILING"** is mandatory,

and the similar emphasis is seen under Rule 4 of the Arbitration Rules, GN.427 of 1957.

Essentially, the rationale for such an obligation to give notice to the other party, is not far-fetched. The process of dispensing arbitral justice to the parties does not sideline the basic principles of ensuring fairness or observing the rules of natural justice. If no notice of the filing is availed to the Respondent, how would such a Respondent know that the Claimant has taken the next step to enforce the award so as to exercise his rights of challenging it, say by way of either causing it to be remitted to the arbitrator or have it set-aside?

In addition, since an arbitral award is not appealable, (see the Court of Appeal (Ndika, JA) in the case of **Vodacom Tanzania Ltd v FTS Services Ltd, Civil Appeal No.14 of 2016, CAT (unreported)**), the only avenue open to an aggrieved Respondent, once the Claimant proceeds to the next step of having the arbitral award filed and registered (with a view to enforce it as the decree of the Court), is to challenge it by way of a petition as provided for under Rule 5 of the Arbitration Rules, GN.427 OF 1957, so as to have it reviewed by the Court.

It is from that reasoning, therefore, I find, that, the sixty (60) days' rule will run against such a Respondent, not from the day when the award was made, but from the date of filing the award. If there is no objection filed within such days, the Court will proceed to register the award. But, if after the filing, the Respondent files a petition within sixty (60) days, and challenges the enforcement of the award, the Court will determine the merits thereof, and may set aside the award, if the requisite grounds to have it set aside are met, or may remit it to the arbitrator, if it so warrants, or dismiss the Respondent's petition and proceed to adopt the award as its decree.

I find strength to the above reasoning from the Indian case of **O. Mohamed Yusuf Levai Saheb vs S. Hajee Mohammed Hussain Rowther, AIR 1964 Mad 1.** In this case, a full bench of the Court, led by his Lordship, **S. Ramachandra Iyer, C.J.,** had the following to say, (regarding an application to set aside an arbitral award and when a respondent should bring it up):

> "It is also now settled that **an application to set aside an award will be maintainable only after the award comes into Court and not earlier and the time for filing such an application would be reckoned only thereafter.** The decision in *ILR* (1942) Bom 4: (AIR 1942 Born 101), and that of the Supreme Court in *Kumbha Mawji V. Dominion of India*, make this clear. **If, therefore,**

> **an award has been sent to the Court by the arbitrators,** it would be competent for it after following the prescribed procedure, to have it filed. **The plaintiffs/respondents** ... **will, however, have an opportunity to file an appropriate application within the time limited by law to have it set aside if they so desire and if according to them the award is invalid.** The fourth question is answered in the affirmative." (Emphasis added).

As it may be seen from the above excerpt from the Lordships, a Respondent cannot challenge an award that has not been filed in the Court. For, as I stated herein, an award which is yet to be filed in Court is like a judgement of the Court, which no decree has been extracted from it to give it the biting teeth. Such a judgement is still of no potency.

As the Indian case herein above indicates, once the arbitrators (upon request) send the award to the Court after observing the requisite procedure, that award is competently filed in Court and, it is only after such a filing the Respondent can, within the prescribe period of limitation, (in our case sixty (60) days, as per item 21 of Part III of the First Schedule to the Law of Limitation Act, Cap.89, [R.E.2002], file his application to challenge it, if he so wishes.

Considering the discussion made herein above, the answer to the second issue, regarding "*whether the Respondent's prayer to file its petition in objection to the award is tenable*", is in the affirmative.

Accordingly, the submissions by Mr. Adrian, that, the Respondent is time barred from filing a petition to challenge the filing and enforcement of the award, is devoid of merit and is hereby dismissed.

In effect, the Respondent is at liberty, as per the requirements of the law and within the prescribed time limit for filing civil applications, to challenge the filing and enforcement of the award. That, indeed, is in line with the reasons why the Respondent was summoned before this Court. As I stated, earlier, the Respondent was summoned to show cause why the relief sought by the Claimant/Applicant, should not be granted, and, there is an indication from the Respondent, that he intends to file a petition wherein he will show cause why he is challenging enforcement of the arbitral award.

The Respondent's prayer, therefore, is hereby granted and he must file its application within the prescribed time limit of **sixty (60) days from the date when the award was filed in this Court,** failure of which this Court will proceed to adopt the award as its own a decree, in terms of section 17 of the Arbitration Act, Cap.15, [R.E.2002].

Before I sign off, there is another issue which cropped up on 24th February 2020, and which I an forced to consider in this ruling as well. By a letter dated 24th February 2020 addressed to this Court, the learned

counsel for the Claimant informed this Court that, Mr. Masinga, who appeared for the Respondent on 19th February 2020, was unqualified, as per Section 41 (1) and (2) of Cap.341, [R.E. 2002], to enter an appearance before Courts of law and practice as an Advocate, because, his practicing certificate was yet to be renewed.

On 26th February, 2020, a day which I had set for the delivery of this ruling, Mr. Adrian, appeared for the Claimant while the Respondent was represented by Ms. Queen Allen, learned advocate, holding brief for Mr. Masinga. Mr. Masinga was also present in court, though he did not appear as an advocate.

Mr. Adrian reiterated the contents of his letter, informing this Court, that, Mr. Masinga was unqualified to practice as an advocate since, to date, he has not renewed his practicing certificate. The Judiciary electronic system which allows for checking the status of practicing advocates (TAMS) was clear that Mr. Masinga's status was in an inactive mode, meaning that he was not qualified to practice as an advocate for the time being.

Mr. Adrian submitted that this was a serious breach of the law and Mr. Masinga knows the consequences thereof. He consequently prayed that all submissions made by Mr. Masinga on the 19th February

2020 be expunged from the Court proceedings and records. He fortified his argument by referring to me a ruling of this Court in the case of **AUA Industrial Group Ltd v WIA Group Limited, Civil Case No.44 of 2019 (Unreported)**, wherein, **Hon. De Mello, J.,** when faced with a similar situation regarding unqualified advocate, held that even documents prepared by such an advocate were a nullity. He thus submitted that same applies to the submissions made by Mr. Masinga.

Since Mr. Masinga was within the courtroom, I thought that I should not condemn him unheard. I thus asked him why he made an appearance on the 19th February 2020, while well aware that he did not qualify to do so.

Mr. Masinga told this Court that, in his law firm, the person working on the renewal of certificates of other practicing advocates in their firm was Mr. Daniel Eliamani whom he appeared with on the material date. He stated that, on the 19th February 2020, he appeared in Court on presumption that Mr. Eliamani had already paid for the requisite fees online, to have his (Mr. Masinga's) certificate renewed. He said he did not appear with an intention to prejudice any body in the proceedings. That is all from his side.

Since he had no standing in the matter any longer, that was the only thing I needed to hear from him in confirmation of the fact that he was well aware of his status as a practicing advocate.

The new issue which I am called now upon to address, therefore, is as follows:

> *whether the submission made by Mr. Adrian, to the effect that Mr. Masinga's earlier submissions made before me should be expunged from the record and proceedings of this Court dated 19th February 2020, should be upheld by this Court.*

In response to the submissions made by Mr. Adrian about the status of the submissions made by Mr. Massinga on 19th February, 2020, Ms. Queen, who appeared for the Respondent on this day of 26th February 2020, submitted that, the case of **AUA Industrial Group Ltd v WIA Group Limited (supra)**, relied upon by Mr. Adrian was distinguishable because it dealt with documents drawn and filed by unqualified persons while the matter at had was about submissions made in court by an Advocate who turned out to be having no valid certificate to practice. As such, Ms. Queen was of the view that, the case cannot be relied upon to reject Mr. Masinga's earlier made submissions.

In the alternative, Ms. Queen was of the view that, the Respondent should be given time to find another qualified advocate to represent its interests before this Court. Besides, Ms. Queen was of the view that, the issue of Mr. Masinga's practicing certificate was raised by the Claimant's legal counsel at late hours, and, was raised maliciously since the learned counsel could have raised it earlier enough when they appeared before this Court.

For his part, Mr. Adrian stated that, the issue of Mr. Masinga's status was known to them on 24th February2020, and they acted promptly to notify the Court *vide* a letter dated the same day. He thus opposed the allegations that there was any malice in raising the issue of Mr. Masinga's certificate of practice. He reiterated his submissions urging this Court to expunge from its records and proceedings, all submissions made by Mr. Masinga.

I have given due considerations to the submissions made by the learned counsel and have visited the judiciary website as well. Indeed, Mr. Masinga' s practicing certificate has not been renewed to date, even as I prepare this ruling. He therefore appeared before me on the 19th February 2020 while well aware that he was unqualified to do so and was in breach of section 41 and 43 of the Advocates Act, Cap.341,

R.E.2002. In view of that fact, since this was a breach **this Court direct that, the malpractice of Mr. Masinga, as** noted herein, be referred by the Registrar to the relevant body for disciplinary measures. This is important since, legal practice is not just a business. It is a profession with values, ethics, professional responsibility, and, one that calls for those who practice it to be committed to the observance of the highest ideals of justice and ethical conduct.

As regards the issue of expunging Mr. Masinga's submissions from the records and proceedings in respect of this case, I have a different opinion. In my view, Mr. Masinga appeared as a representative of a client (the Respondent) who in *bonafides* hired him knowing that he was a qualified advocate. In view of this, should the sins of Mr. Masinga be allowed to visit the innocent client? I think not. In the interest of justice, the rights of an innocent client need to be secured.

In arriving at such a position, let me borrow a leaf from the decision of the Supreme Court of Kenya in the Case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR,** where the Court stated as follows:

> "While **securing the rights of the client** whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such advocate's obligations under

the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.(**Emphasis added**)

In another Kenyan case, **Republic v Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 others [2016] eKLR,** Mr. Justice Joel Ngugi, while referring to the Supreme Court's decision in **National Bank of Kenya Limited v Anaj Warehousing Limited (supra)** narrowed his views to even look further at a situation where, as in this present application before me, submissions are made by an unqualified advocate. He stated as follows:

"34. ... I believe that the reasoning of the Supreme Court in the **Anaj Warehousing Limited Case** can easily be extended to the situation presented by section 31 of the Advocates Act where **a lawyer instructed by a client who is acting in good faith** draws pleadings and **addresses the court on a matter only for it to be discovered later that the lawyer did not have a practicing certificate.**

35. A claim in law and a course of action belongs to the client and not the advocate. **It is hard to justify, in this era where the Constitution (....) commands the courts to privilege the ideals of substantive justice as opposed to legal formalism, statutory interpretation which bereaves a party of a valid substantive claim because his or her lawyer failed to adhere to a procedural requirement unrelated to the claim in question.** The case would be different, of course, if there is

evidence that the client acted in bad faith or with knowledge of the failure of the lawyer to take out a practicing certificate but still persisted in having the lawyer represent them. No such evidence was presented here. Instead, we have a group of innocent members of the public who instructed a law firm – not even a particular lawyer – to file a claim on their behalf. The law firm so instructed, then, assigned the file to a lawyer in the firm who happened not to have taken a practicing certificate. In my view, to paraphrase the Supreme Court, the fact of this case, and its clear merits lead me to a finding that the pleadings drawn and signed by Mr. Nyanyuki as well as the submissions he made in the two suits are not invalid merely by dint of Mr. Nyanyuki's failure to take out a practicing certificate." **(Emphasis added**).

The dissenting views of the Ghanaian Justice of the Supreme Court, Mr. Justice Yaw Appau, JSC, in the case of **Henry Nuertey Korboe v Francis Amosa [2016] GHASC 45 - (Review Motion No.J7/8/2016)**, may also lend assistance to this Court regarding whether it is appropriate that the Respondent herein, as a client, should suffer for the sins of his advocate who did not renew his practicing license and to no knowledge of the Client.

In that case, the dissenting voice of the judge was to the effect that, the sins of a practitioner, who should be punished under the procedures prescribed under the Advocates Act, should not visit their

clients. The learned judge, though in a dissenting voice, made a point which I think is valid when he said as hereunder:

> "The spirit of the Legal Profession Act is to instill discipline and order in the profession that is why penalties (both civil and criminal), have been prescribed in the law **for members** who breach the Act. The law says that a person without authority under the Act, **which includes a lawyer who has not taken his solicitor's license,** cannot take fees or earn remuneration when they prepare legal documents for innocent clients. In addition, they could suffer other penalties or punishments. The Act considered **these provisions** as those that **could instill discipline in the profession** because when implemented, **they affect members directly. The Act did not consider the nullification of documents already prepared and filed on behalf of an innocent client** or **litigant as punishment for the unqualified lawyer who filed them, because such a decision flies in the face as the unqualified lawyer suffers nothing consequentially**. (**Emphasis added**).

To finalize my discussion, I have had the benefit of looking, as well, at the position in the Republic of Uganda. In Uganda, the High Court of Uganda had a similar view as that held by Justice Appau in the above dissenting opinion, and the Kenyan position referred to earlier.

In the case of **Rita Nantayi v Ali Sekanjako Miscellaneous Application No. 333 Of 2014, (Unreported),** the Hon. Lady Justice Elizabeth Ibanda Nahamya was of the view that:

> A litigant would hardly inquire from an Advocate if the particular Advocate has a valid certificate. This is the business of the Courts and the Law Council. To say that litigants who engage Advocates without practicing certificate do so at their peril is harsh because the majority of our people would not know which Advocate i.e, not entitled to practice. Therefore, documents drawn by an Advocate without a practicing certificate should not be regarded as illegal and invalid simply because the Advocate had no valid practicing certificate when he drew or signed such documents.

I do share the views of the above learned judges, which, to me, are highly persuasive. It is clear to me that the judges in those cited cases called on the overriding principles of equity in reaching at their conclusion. In our jurisdiction, we have as well adopted the similar approach. In particular and in relation to this Court, section 4 of the G.N. 107 of 2019 which amended Rule 4 of this Court's Rules of Procedure requires this Court, to give effect to the overriding objective principle.

I am of the views, therefore, that, the line of thinking adopted from the cases I have referred to and which I find to be highly

persuasive, allows me to hold that, such reasoning applies to the submissions made by Mr. Masinga, though he did not as an Advocate had a valid practicing certificate. His submissions will not be expunged from the record and proceedings dated 19th February 2020.

However, it is important to point out, (as what Mr. Justice Ngugi did in the case of **Republic v Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 others (supra)),** that, this holding does not affect the obligations of Mr. Masinga and his culpability in criminal, or civil/disciplinary proceedings. It is hereby expressly stated that the conduct of Mr. Masinga detestable and unprofessional and I refer this ruling to the relevant body within the Tanganyika Law Society to take the appropriate action against Mr. Masinga. He will be held answerable but the client should not be crucified for the sins of his advocate.

In view of the above, the prayer by Mr. Adrian to have the submissions of Mr. Masinga expunged from the record of these proceedings as of 19th February 2020, is hereby rejected. The submissions will be retained, but Mr. Masinga has to pay for his own sins since the Respondent was not aware of his status and no evidence has

been led before me to indicate that the Respondent was aware of the status as his practicing certificate as an advocate.

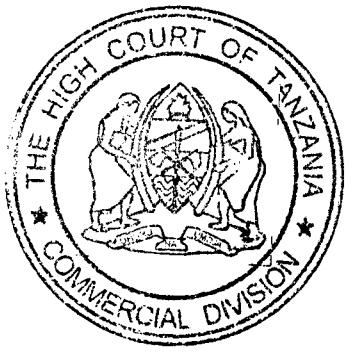
That being said, this Court finally settles for the following Orders:

1. That, the filing of this Award was properly done before this Court as per section 12 (2) of the Arbitration Act, Cap.15, [R.E. 2002] as well as Rule 4 of GN.427 OF1957.

2. That, the Respondent's prayer to file petition in objection to the enforcement of the award filed in this Court is hereby granted and, that, the petition must be filed within sixty (60) days from the date of the filing of this award in this Court.

3. That, by virtue of section 22 (2) (b) of the Advocate's Act, Cap.341, [R.E. 2002] Mr. Masinga stands suspended temporarily, pending a reference to, or disallowance of such suspension by, the High Court. As such, the Registrar of this Court is hereby directed to refer the issue of Mr. Masinga's misconduct, together with this Ruling and the relevant portion of

the proceedings, to the Advocates' Disciplinary Committee for its necessary actions.



I make no order as to costs.

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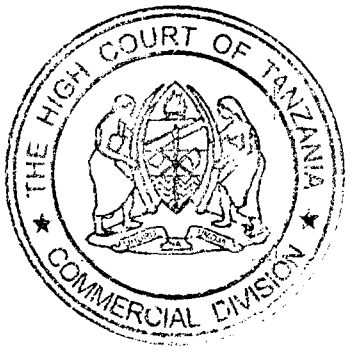
DEO JOHN NANGELA
JUDGE,
HIGH COURT OF TANZANIA
(Commercial Division)
26 / 02 /2020

Ruling delivered on this 26th day of February 2020, in the presence of the Mr. George Shayo and Mr. Adrian Mhina, (Advocates for the Claimant) and Rev. Ms. Mganulwa Masima, Principal Officer representing the Respondent to receive the Ruling in Court.



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DEO JOHN NANGELA
JUDGE,
HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
26/02/2020