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

CONSOLIDATED COMMERCIAL CAUSE
NO. 4 & NO.9 OF 2020
IN THE MATTER OF ARBITRATION ACT, CAP.15 R.E 2002 OF THE LAWS OF TANZANIA
AND

In the Matter of a Arbitration under the Arbitration Rules of the National Construction Council, 2001 Edition

BETWEEN
THE REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA.....PETITIONER

AND

AFRIQ ENGINEERING & CONSTRUCTION COMPANY LIMITED .....RESPONDENT

RULING

Date of Last Order: 02/09/2020
Date of Judgement: 05/11/2020

NANGELA, J:,

I. BACKGROUND

This is a ruling concerning preliminary points of law raised by both parties in this *Consolidated Petition No.4 & 9 of 2020.* For clarity purpose, let me give a brief background to this Petition. On the 21st of January 2020, one *Engineer Sudhir J. Chavda, Sole Arbitrator,* brought to the attention of the Registrar of this Court, an Arbitral Award which he had handed down in favour of the Respondent on 13th November 2019. The award was to the attention of the

Registrar for the purpose of its filing. The Award was filed in this Court vide *Misc. Commercial Cause No.4 of 2020.*

On the 19th of February 2020, the Petitioner (then appearing as a Respondent to the *Misc. Commercial Cause No.4 of 2020*) appeared in Court and objected to the filing of the Award. Besides, the Petitioner sought for the leave of this Court to file a petition meant to challenge the conversion of the Award into or its registration as an enforceable Decree of this Court. This Court, by way of its ruling in *Misc. Commercial Cause No.4 of 2020,* dated 26th February 2020, made an order that the Award was properly filed and, proceeded to grant leave to the Petitioner to file its Petition, within sixty (60) days from the date when the Award was filed.

On the 23rd day of March, 2020, the Petitioner filed its Petition. It was filed under section 15 (1), (2) and 16 of the Arbitration Act, Cap. 15 [R.E.2019] and Rule 5, 6, 7 and 8 of the *Arbitration Rules, G.N.427 of 1957* as *Misc. Commercial Cause No.9 of 2020.* In that Petition, which was filed with a view of challenging the Award filed vide *Misc. Commercial Cause No.4 of 2020,* the Petitioner herein raised one Preliminary Legal Issue to wit, that:

> "The Award is hopelessly out of time as it was made contrary to Section 4 of the Arbitration Act, Cap.15 R.E 2002, read together with Clause 3 of the 1st Schedule to the Arbitration Act, Cap.15 R.E. 2002.

On the 16th of April 2020, the Respondent herein filed an answer to the Petition. Apart from challenging the Petitioner's preliminary objection as being unprecedented, improper, legally misconceived and, thus, untenable and subject to rejection by the Court, the Respondent also raised three preliminary legal issues in objection to the Petition. The three points of objection are as hereunder, that:

(a) the Petition is wrongly or improperly certified in that the whole of the Award is not attached to the Petition;
(b) the Petition is irregular or improperly verified; and
(c) the Petition is both incomplete and incompetent for not including therein, all

attachments to the Award as filed in this Hon. Court.

On the 2nd day of September 2020, the parties herein appeared before me. The Petitioner was represented by Mr Dennis Malamba and Jacob Shayo, learned Advocates, while Mr Michael J.T. Ngalo, Esq., represented the Respondent. On the material date, Mr Malamba requested this Court to allow the parties to dispose the Preliminary objection against the *Misc. Commercial Cause No.4 of 2020*, by way of filing written submissions. He also prayed that the two records of the matters pending before this Court, *i.e., the Misc. Commercial Cause No.4 of 2020*, and *Misc. Commercial Cause No.9 of 2020*, be consolidated for convenience and expediency of their disposal.

For his part, Mr Ngalo did not object to the prayer to have the two records consolidated. However, he reserved his comments regarding how the Preliminary Objections should be dealt with until after this Court has ruled on the issue of consolidation. This Court, therefore, proceeded and made an order that the two records (i.e., *Misc. Commercial Cause No.4 of 2020*, and *Misc. Commercial Cause No.9 of 2020*) be consolidated to read as *"Consolidated Misc. Commercial Cause No.4 & No.9 of 2020."*

Following the Order of Consolidation, Mr Ngalo proposed to the Court to have the preliminary objections heard and determined concurrently. Mr Malamba was of a different view, preferring the objections he had raised be argued first. This Court, however, preferred Mr Ngalo's proposal and made an Order that the preliminary objections in the *Consolidated Misc. Commercial Cause No.4 & No.9 of 2020*, be disposed by way of written submissions which were to be filed concurrently by the Parties.

The parties duly adhered to the schedule of filing which this Court issued on the 2nd September 2020 and this ruling is, therefore, based on such a background and the submissions filed by the respective parties. I will, therefore, sum up the rival submissions by the learned counsel for the Parties herein in respect of each objection raised by each of them. I will start by looking at the Objection filed by the Petitioner since it was the one filed earlier.

II. THE PETITIONER'S PRELIMINARY OBJECTION

As pointed out earlier, the Petitioner's preliminary objection is to the effects that: *"the Award is hopelessly out of time as it was made contrary to Section 4 of the Arbitration Act, Cap.15 R.E 2002 (now Cap. 15 of 2019), read together with Clause 3 of the 1st Schedule to the Arbitration Act, Cap.15 R.E. 2002 (now Cap. 15 of 2019)."*

Submitting in support of the above objection, Mr Malamba who appears for the Petitioner, contended that, under section 12(1) of the *Arbitration Act, Cap.15 [R.E 2019]*, an arbitrator is entitled to make and sign an award and, thereof notify the parties to the dispute of the delivered award, together with any fees and charges payable. He submitted that, under section 12(2) of the Act, upon request and payment of the requisite fees, charges or costs of filing in respect of the arbitration, an arbitrator is required to cause the award or a signed copy of it, to be filed in the High Court and give notice of such filing to the parties. He also referred to section 12(4) of the Act, and Rule 4 of the GN 427 of 1957 on procedure for filing and the case of *Tanzania Cotton Marketing Board v Cogecot Cotton Co. SA [1997] TLR 165.*

He submitted that, the arbitrator is entitled to manage the proceedings and make an award within the prescribed time in the agreement by the parties and in accordance with the agreed procedures, order, Rules or the applicable laws governing the specific arbitration proceedings. He submitted that, an award made outside the prescribed time is said to be an award without jurisdiction, hence a nullity and unenforceable. Referring to section 4 of the *Arbitration Act, Cap.15 [R.E 2019]* and item 3 of the 1st Schedule to the Act, Mr Malamba submitted that, any submission to arbitration, unless the contrary intention is expressed in the submission, shall be deemed to include the provision of the 1st Schedule.

Item 3 to the 1st Schedule to the Act provides that:

> "The arbitrators shall make their award in writing within three months after entering on the reference, or after having called on to act by notice

> in writing from any party to the submission, or on or before any later day which the arbitrators, in writing signed by them may, from time to time, extend the time for making the award,"

Mr Malamba further cited Items 4 and 5 of the 1st Schedule and submitted that, where there is any enlargement of time, one has to file *Form No. 3* in the 2nd Schedule to Cap.15 and, that, doing so impliedly requires the consent of the parties. He argued that, section 14 of the Arbitration Act, provides for possible enlargement of time by the Court from time to time whether the time for making of the award has lapsed or not. He contended that, in respect of the present Award filed in this Court, the three (3) months time for its making expired and no enlargement was made or any attempt for any reference to the Umpire.

Mr Malamba invited this Court to consider the Indian case of *National Small Scale Industries Corporation v V.K. Anihotri & Others AIR 1998,Delhi 12, 1997 (2)* ARBLR 86 Delhi 66 (1997)DLT, where an award was published without there being an enlargement of time and the Supreme Court of India held that:

> "it is very much evident that the arbitrator could not proceed after expiry of four months' time without getting extension of time. If an Umpire is appointed then the Umpire could be requested to enter on reference and to proceed with the arbitration. As the opinion given by the learned Sub-Judge is contrary to the above view, one has no other option but to allow the revision petition. In case the case had extended time under section 28 of the Act and then expected the Arbitrators to act and conduct the arbitration proceedings, the matter would have been different and this revision petition might not have arisen. But not extending the time and by giving impugned opinion, the matter has become complicated."

Reliance was also placed on other persuasive case from India on the similar argument. These include the case of State of *Punjab v Sri Hardyal, 1985 AIR 920, 1985 SCR (3) 649*; *N.Chellappan v Secretary, Kerala Sate Electricity Board, (1975) 1SCC 289*; and *Ravindra Motilal Shah v Chnubhai Chimanlal And (1976) 17 GLR 758.* Finally, Mr Malamba submitted that, in this case time had expired and was

not extended by either the Court or the Arbitrator. As such, he maintained that, an Award was made outside the prescribed time without there being an extension of time is made without jurisdiction. He, therefore, prayed for the dismissal of this matter with costs to the Petitioner, arguing that the Court has no jurisdiction to entertain the Award filed before it.

On the 23rd day of September 2020, the Respondent filed its reply submission to the preliminary objection filed by the Petitioner. In its submission, the Respondent noted that, while the Petitioner grounded its objection on section 4 of the *Arbitration Act, Cap.15 [R.E. 2002]*, read together with Clause 3 of the 1st schedule to the Act, the wording of the Petitioner's objection did not make mention of or include therein any reference to section 12 (1) and (2) and section 14 of the Act or Rule 4 of the *Arbitration Rules, 1957* and Clause 4 and 5 of the 1st Schedule to the Act. In so doing, it was submitted that, the learned counsel for the Petitioner has directed his mind to a completely a different thing.

Relying on the decision of this Court in the case *Interchem Pharma Limited (In Receivership) and Karen Benjamin Mengi (Administratix of the Estate of the Late Millie Benjamin Mengi & Two Others, Commercial Case No.2 of 2015*, (unreported), the learned counsel for the Respondent submitted that, since the counsel for the Petitioner deviated from the point raised he has acted improperly and irregularly, committing what the Court in the above case labelled as "*professional dishonesty*".

It was the Respondent's further submission that, the act of arguing/raising a preliminary objection without a prior notice being given was also improper since it is the law founded on prudence that preliminary objections should be brought after sufficient notice to avoid taking a party by surprise. It was, therefore, the learned counsel for the Respondent's conclusion on that point that, the Petitioner's reference to and reliance on provisions law other than those alleged to have been contravened, was improper, irregular and has taken the Respondent by surprise and, in any event, the Court should find that the objection has not been argued, and hence, abandoned.

Before I proceed, I find it pertinent that should I tarry for a while on the point raised by the Respondent and resolve it. I note that the Petitioner has made a rejoinder submission on that point. In particular, the Petitioner considers the Respondent's alleged surprises amounting to *"professional dishonesty"* as being baseless or unfounded. The Petitioner contends that, what was done was rather an attempt to canvass on the facts which gave rise to the award, its consequences and their interconnectedness to the objection, since the gist of the Petitioner's objection is limitation of time which emanates from the arbitration process. He submitted that, there was nothing amounting to a *professional dishonesty* on the part of the Petitioner given that, what was stated was within the discussion of the impugned award.

In my view, I do not think it is proper to hold that the Petitioner is "guilty" of *professional dishonesty.* As I look at the submission and the Preliminary objection, I find that the gist of the objection is that the award was made in contravention of section 4 of the *Arbitration Act, Cap.15 R.E 2002,* read together with Clause 3 of the 1st Schedule to the Arbitration Act, Cap.15 R.E. 2002. That is the centre of the entire submissions made by the Petitioner and the rest of the narratives were merely contextual in their nature. Whether they are of any relevance or not, one should not forget that *'this Court's duty includes that of separating the wheat from the chaff.'* As such, it cannot be said that the Petitioner has abandoned the preliminary objection or has not argued it. As it may be observed, from pages 5 to 8 of the Petitioner's written submission, it is clear in these pages that, the Petitioner has focused on expounding on the objection. That finding suffices to resolve and put that point to its resting place.

The Respondent has also made submissions regarding the regularity and/ or propriety of the Petitioner's preliminary objection. In its submission, it has been contended that under the Arbitration Act, a petition is a suit. For that matter, the Respondent argues that, the Petition filed in this Court is out of practice and procedure since, under the *Civil Procedure Code, Cap 33 R.E 2019,* it is improper for a plaint to contain or raise a notice of preliminary objection.

The Respondent contended further that, under the CPC, it is the Defendant who is enjoined to raise, in his or her defence, objections as to the maintainability of a suit filed by a Plaintiff, which notice must be embodied or contained in a written statement of defence (ref. *Order VIII, Rule 2 of the CPC*). Referring this Court to *Order VII rule (1) (a) - (i), of the CPC,* the Respondent contended further that, under those provisions, the law describes or lists down what a Plaint should or should not contain.

Reference was further made to *Order VI rule 3 of the CPC* which gives explanations regarding what a written statement of defence should contain and what it should not. It was argued that, in both provisions, there is no mention of "*notice of preliminary objection*". In view of that, the Respondent argued that, for the reason that Arbitration is a suit, it follows that a petition falls within the ambit of a plaint and, the raising of the preliminary objection in the way it was raised makes the Petition bad in law, irregular, unprecedented, legally misconceived and, consequently, unmaintainable. He urged this Court to reject it.

In response to the Respondent's submission regarding the regularity and/ or propriety of the Petitioner's preliminary objection as summarised herein above, the Petitioner has called upon this Court to disregard it. The Petitioner rejoined that, what the Petitioner filed is a Petition under the Arbitration Act and the Arbitration Rules and, that, at this stage the Court is being asked to determine if it is procedurally and legally compliant. It was submitted that, the Court is not being asked to look for evidence just as it does not do so when it deals with plaint alleged to be defective.

Looking at the above rival submissions, the first question that I need to consider is *whether a Petition filed under the Arbitration Act is akin to a Plaint under the CPC, Cap. 33 R. E 2019.* The Respondent has urged this Court to make a such a finding and reject the petition as being irregular. In my view, the Respondent's position is faulty. I will justify my views on that. In the case of *M.A Kharafi & Sons Limited v National Construction Councils & 2 Others Misc. Commercial Case No. 221 of 2016,* this Court, was called upon to respond to an

issue: *whether a Petition filed under the Arbitration Act, Cap. 15 can be termed as a pleading for it to comply with Order VI Rule 14 of the Code.*

In response to that issue, Sehel J (as she then was) had the following to say, of which I fully associate myself with:

> "My starting point will be to revisit the provisions of Order VI Rule 1 of the Act that defines the term "Pleadings". It reads: "' **Pleadings'** means a Plaint or written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13of Order VIII". The subsequent pleadings refereed under Order VIII rule 13 are set-off; counter claim and reply to the written statement of defence."

The Court observed as follows, that:

> "Petition filed under the provisions of the Arbitration Act, Cap. 15 *is not amongst the pleadings referred under ~ 5 the provisions of the Civil Procedure Act, Cap. 33,* rather, **it is an application.** My standing is further fortified by the by the decision of the Court of Appeal of Tanzania in the case of *Tanzania Cotton Marketing Board Vs Cogecot Cotton Company S.A [2004] T.L.R133* when it stated at page 134the following: **"Counsel who appeared for the appellant before the High court stated categorically: "This is not a suit". That was, indeed, correct and not a slip. A petition under rules 5 and 6 of the Arbitration Rules is an application rather than a suit. Rule 5 states in part" all applications made under the Ordinance shall be made by way of petition".** A petition is therefore the prescribed mode of making an application under the Arbitration Ordinance, and it is common knowledge that other modes are prescribed under other laws. **"It follows then a petition filed under Rule 5 and 6 of the Arbitration Rules in order to set aside or remit an arbitral award is not - a suit but rather it is an application.** Therefore, Order VI Rule 14of the

Act is not applicable to petitions filed under the Arbitration Act." (**Emphasis added**).

The Court in the *M.A Kharafi's case* (supra) dismissed an objection to a petition raised on the ground that it had contravened the Order VI rule 14 of the CPC. Although I am fully aware that in the case of *A-one Products & Bottles Limited v Guanzhou Techlong and Hong Kong Hua Yun Industrial Ltd Misc. Commercial Cause No. 410 of 2017*, Hon. Mruma J held that "*in law, a petition is equated to a suit*", I am more convinced by the decision of this same Court, Sehel, J (as she then was) in the *M.A Kharafi's case* (supra), which has support from the decision of the Court of Appeal in the case of *Tanzania Cotton Marketing Board vs Cogecot Cotton Company S.A [2004] T.L.R133*. That being said, the Respondent's submission regarding the propriety of the objection cannot stand and I hereby dismiss it.

In its written submission, the Respondent has as well questioned whether the Petitioner's preliminary objection is a pure point of law. Reliance was placed on the decisions of the Court of Appeal in *Hezron M. Nyachiya vs Tanzania Union of Industrial and Commercial Workers & Another, Civil Appeal No.79 of 2001(un reported)* and *Mechmar Corporation (Malaysia) Berhard (in Liquidation) vs VIP Engineering and Marketing and 3 Others, Consolidation Civil Applications No.195 and 206 of 2013 (unreported)*. In these two cases, the Court of Appeal held that a preliminary objection calling for further evidence cannot be regarded as a preliminary objection. The Respondent's submission is to the effect that, looking at the preliminary objection, the same cannot be dealt with without calling for an inquiry to establish when the impugned award was made and when it should have been actually made so as to determine whether the same was made within or outside the prescribed period.

The Respondent argued further that, once evidence is needed, then the point of objection becomes one of mixed law and fact and cannot be determined on the basis of a pure point of law. Besides, it was the Respondent's submission that, even if the Petitioner has raised a plea of time-bar, there are circumstances where such a plea cannot be determined as a pure point of law. On that point, reference

was made to the Court of Appeal Decision in the cases of *Olais Loth (suing as administrator of the estate of the late Loth Kalama vs Moshono Village Council, Civil Appeal No. 95 of 2012 (unreported)* and *Hotel and Lodges (T) Ltd v Attorney General & Another, Civil Appeal No.27 of 2013 (unreported).*

On the other hand, the Respondent held an alternative view that, even if on the face of it the objection seem to be based on a pure point of law, namely the contravention of section 4 of the Arbitration Act, read together with Clause 3 of the 1st Schedule to the Act, that particular provisions do not apply to the matter at hand since the parties had expressed a different intention in their agreement of settling their dispute under the *NCC Rules 2001.*

The Respondent has further submitted that, the objection raised by the Petitioner is misconceived given that; in the ruling of this Court dated 26th February 2020, this Court made a finding that the Sole Arbitrator's Award was properly filed vide the *Misc. Commercial Cause No.4 of 2020.* On that basis, the Respondent submitted that the Petitioner's objection should be overruled because the order cannot be varied or set aside on the basis on that objection. The Respondent argued further that, since the objection is pleaded under *paragraph 26 (o) of the Petition,* it was not proper to raise it again as an objection, hence, the argument that the objection is misconceived.

In its rejoinder submission, the Petitioner has denounced the Respondent's submission regarding whether the objection raised is a point of law. The Petitioner argued that, an issue of limitation of time is a pure issue or point of law. The Petitioner contended further, that, the record is clear, that, whereas the arbitration proceedings commenced on 28th December 2018, the award was rendered on 13th November 2019, which is 350 days at the proceedings commenced.

I have looked at the rival submissions regarding the issue whether the preliminary objection befits a so-called *"preliminary objection"*. In the eyes of the Petitioner it does but in the Respondent's view, the objection is one of mixed facts and law. Besides, the Respondent has argued that the Petitioner's objection is misconceived given the ruling issued by this Court on 26th February

2020 to the effect that the Sole Arbitrator's Award was properly filed vide the *Misc. Commercial Cause No.4 of 2020.* While it is indeed true that this Court made a finding in the *Misc. Commercial Cause No.4 of 2020* that the award was properly filed in the Court, let me make it clear that this Court did not make any determination regarding whether the award was properly procured within or outside the time. Surely, that was not what this Court was called upon to do and did not go to that extent as it seems to be presumed herein.

Having made such clarifications, it is my view that, the issue regarding whether the preliminary objection befits what in law amounts to a preliminary objection need not detain me. Indeed, as stated by the Respondent, where an objection will entail carrying out a scrutiny or calling for evidence, that is not a pure point of law which qualifies to be regarded as a preliminary objection. The objection which the Petitioner has raised is one that borders both law and facts if you need to establish it. I find the Respondent's objection to be of that nature because, if one needs to establish when the arbitral proceedings commenced and when they were to be ended and whether there was any extension of time or not so as to be able to give a concrete response, such matters are therefore matters that will definitely call for further scrutiny to establish them. As such, when there is such a process, as it was stated in the case of *Olais Loth (supra)*, matters that call for further proof cannot be determined at the preliminary state as a pure point of law.

In view of the above, I hereby overrule the Petitioner's objection and proceed to consider the merits of the objections raised by the Respondent.

III. THE RESPONDENT'S POINTS OF OBJECTION

As I stated earlier herein, the Respondent has raised four points of preliminary objection. The first point is to the effect that the Petition filed by the Respondent is wrongly or improperly certified. To expound on that point, the Respondent submitted that, its gist is that the copy of the Petition served on the Respondent does not contain all the documents that the Sole Arbitrator submitted and filed in this Court vide the *Misc. Commercial Cause No.4 of 2020.* The

learned counsel for the Respondent argued that, the filing of the Award in this Court consisted of three volumes: volume 1- *being the summary of the case, the award and its appendices,* volume 2- *being the Hearing Proceedings, Part-A- the Claimant's Case* and, volume 3- *which contains the Hearing Proceedings, Part-B- the Respondent's Case.* It was argued that, the Respondent attached only the Award (volume 1) while the rest were not. It is for that reasons that the Respondent contends that the Petition is erroneously certified hence rendering it to be incompetent.

To support that submission, the Respondent has placed reliance on the following cases, namely: *Constantine Stephan Kalipeni vs Tarek Hawi Farhat, Misc. Commercial Cause No.7 of 2018, HC, Commercial Division, (unreported), Regional Manager, TANROADS Simiyu vs M/s Nyanguruma Enterprises Co. Ltd, Misc. Commercial Cause No.39 of 2018, HC, Commercial Division, (unreported); M/s Moshi Urban Water Supply & Sanitation (MUWASA) vs M/s Secularms Misc. Commercial Cause No.11 of 2018, HC, Commercial Division, (unreported); East Africa Development Bank v Blueline Enterprises Ltd Misc. Commercial Cause No.142 of 2005, HC, Commercial Division, (unreported)* and *Hon. Attorney General vs Impressa Ing. Fortunato Federichi S.P.A & Another Misc. Commercial Cause No.3 of 2006, HC, Commercial Division, (unreported).*

The thrust in the above decisions were that, contravention of Rule 8 of the *Arbitration Rules, G.N.427 of 1957,* made the Petitions filed to be regarded as incompetent and thus struck out. It was argued that the certification of the award was also done by an advocate who was not acting for or representing the Petitioner, hence in breach of Rule 8.

As regards the second ground of the Respondent's objection, it was contended that the Petition is irregularly or improperly verified. It was argued that, while the Rt. Dr. Dickson Daudi Chilongani verified the paragraphs of the Petition as being "true to the best of [his] own knowledge", the "Affidavit verifying the Petition" is made, sworn to and filed by a different person, namely Denis Malamba, who described himself as an Advocate duly assigned by the Petitioner to handle this matter, hence conversant with the facts.

The Respondent contended that, Mr Malamba, who is representing the Petitioner as its advocate, has put himself in a precarious and embarrassing position or a possibility of becoming a witness and an advocate. It was submitted, therefore, that, the Petition is incurably invalid, irregular and incompetent as it lacks the requisite affidavit and, should be struck out with costs. The learned counsel for the Respondent stated emphatically, that, it is wrong, improper and, or irregular for one and the same Petition to be verified by two different persons and that, the irregularity renders the Petition invalid and or incompetent. Although no case law was referred to in support of the Respondent's submission, the Respondent contended that there is a purpose for requiring a Petition, as one subject of these proceedings, to be verified. It was argued that, that purpose is that of shouldering responsibility on the person verifying as to the accuracy, truthfulness and authenticity of the facts stated in the Petition.

With regard to the final point of objection raised by the Respondent against the Petition, it was argued that, the Petition is incompetent and incomplete for omitting all the *Annexures* to the Award. It was argued that, the Court is hand-capped to hear and determine the Petition for not having before it all the materials or a record of the proceedings which were before the Sole Arbitrator and from which the grounds challenging the Award arise. The Respondent equated the alleged incompleteness of the award as being akin to situations facing the Court of Appeal in many cases, one being the case of *Robert Marko Naibala & Another vs Sakina Paulo Naibala, Civil Application No.11(b) of 2012 (unreported).* In this case, the orders of the Court complained of were not attached to either the notice of motion or the supporting affidavit. It was argued that the same logic applies in this Petition.

Reference was also made to other cases which are: *SGS Society & General de Surveillance S.A & Another v VIP Engineering & Marketing Limited & Another, Civil Appeal No.124 of 2016 (unreported)* and *Britania Biscuits Limited vs National Bank of Commerce Ltd & Another, Civil Application No.195 of 2012 (unreported).* Although the cases are relate to appeals, revision and/or application preferred

before the Court of Appeal, the Respondent argued that the cases are relevant as precedents whose *ratio decidendi* apply even to Petitions. Consequently, the Respondent argued that the point of objection being pursued is a legal one and cannot be overlooked or ignored.

The Petitioner's reply to the above submission is that, all points raised by the Respondent do not fit to be regarded as pure point of law. To support that view, the Petitioner's learned counsel referred to this Court the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696* and *Karata Ernest & Others vs Attorney General, Civil Revision No.10 of 2010, (CAT, unreported)*, regarding what should be the nature of a preliminary objection.

Stated otherwise and briefly, what the Petitioner is submitting is that the preliminary points of law raised by the Respondent are of mixed facts and law. It was argued that, the Court will have to revisit the entire record and its annexures if it isto resolve the first objection or revisit the record to see if the verification was proper. It was further contended, as regards the last point of objection, that, the same is also factual in nature. The Petitioner's learned counsel argued, therefore, that, all these objections call for evidence by digging into the details of the documents filed in the court.

On the other hand, it was the legal counsel for the Petitioner's submission regarding the first ground of objection that, it is incorrect to contend that Rule 8 of the *Arbitration Rules, G.N.427 of 1957* requires that the Petition be accompanied by the Arbitral proceedings as suggested by the Respondent. It was argued that, the Petition was properly verified and complies with the requirements of *Rule 8 of the Arbitration Rules, G.N.427 of 1957.*

What I need to consider, in light of the arguments made by both parties concerning the first preliminary objection is: *whether the Petition filed in this Court is incompliance with the requirements of Rule 8 of the Arbitration Rules, G.N.427 of 1957.* For reference and clarity purposes, let me revisit what the law says concerning the filing of a petition. In principle, Rule 5 of the *Arbitration Rules, G.N.427 of 1957* requires all applications made under the Arbitration Act to "*be made by way of Petition*". It was on that basis that I subscribed to the views

that a Petition filed under the Act cannot be equated to Plaint or a suit. In *Kharafi's case* (supra) this Court stated emphatically that:

> "a petition is therefore the prescribed mode of making an application under the Arbitration Ordinance, and it is common knowledge that other modes are prescribed under other laws. "It follows then a petition filed under Rule 5 and 6 of the Arbitration Rules in order to set aside or remit an arbitral award is not - a suit but rather it is an application."

Rule 8 of the *Arbitration Rules, G.N.427 of 1957* provides that

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

I have considered all the cases which were decided by this Court, and which the Respondent has called upon this Court to emulate and be guided by their holding.

As clearly stated in the case of *Constantine Stephan Kalipeni (supra),* so far there are two different schools of thoughts or positions regarding the issue whether the non-attachment of a certified copy of the submission or award is fatal. In that case the judge held that it was fatal and struck out the Petition. In my view, while I am inclined to follow that position and the rest of the cases that follow it (and not the position stated in the case of *Nextegen Solawazi Limited and Voltalia S.A, France, Commercial Cause No.1 of 2018* (Hon. Sehel, J (as she then was)) to the effect that, the non-compliance with Rule 8 of the Arbitration Rules cannot be held to be fatal), I however find that the cases relied upon are distinguishable. I find it to be so because, whereas in those cases the Petitioners failed to annex the certified copies of the requisite documents, such as the impugned award, in the present Petition, the Petitioner has annexed a certified copy of the award and its annexure.

However, and as it may be noted from the submissions made by the Respondent, what the Respondent has raised in ground one of the objection is that the Petition is erroneously certified hence rendered incompetent simply because, although the filing of the Award in this Court consisted of three volumes, the Respondent

attached only the Award (*volume 1*) while the rest were not. The Respondent contends that the rest of the volumes, which consist of volume 2- *being the Hearing Proceedings, Part-A- the Claimant's Case* and, volume 3- *which contains the Hearing Proceedings, Part-B- the Respondent's Case*, ought to have been annexed to the Petition as well.

Looking at the above submission, I cannot agree to what the Respondent has submitted herein above, especially if one looks at what Rule 8 of the *Arbitration Rules, G.N.427 of 1957* provides. The provision is very clear regarding what needs to be attached and that, if they are not originals but copies, then the same must be certified either by the Petitioner or his advocate to be true.

That being said, the argument that arises here, and, which I find to be pertinent based on the argument made by the Respondent, is that, *the advocate who certified the copies is not the one who is representing the Petitioner.* The issue, therefore, is whether that act in itself is fatal. In the first place, it is a well noted legal position, as it was stated in the case of *SGS Societe Generale De Surveillance SA and Another, Civil Case No.124, 2017, CAT (Unreported),* that, not all procedural mistakes or errors affect a case filed in the Court.

That having been noted, before I address the issue I raised herein above, it may be imperative, perhaps, that, I should ask the question: *what amounts to certification of a document?* That question was respondent to in the English case of *Lombard-Knight (and another) v Rainstorm Pictures Inc* [2014] EWCA Civ 356 when it was dealing with a provision in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (sometimes referred to in short as the "*New York Convention*") which provides that a party relying on the Convention award must produce "*the duly authenticated original award or a duly* ***certified copy of it***" and "*the original arbitration agreement or a duly certified copy of it*" (**emphasis added**).

In that case, the Respondent '*Rainstorm Pictures Inc*' ("**Rainstorm**") had successfully brought arbitral proceedings against the Appellants. The Arbitral tribunal promulgated its award, which the Respondent, through an application the Commercial Court in London, sought for permission to enforce it in the same manner as a judgment or order. Photocopies of the Agreements were attached to

the Claim Form, which contained brief particulars describing the Agreements and was accompanied by a Statement of Truth in the conventional form. Also attached was a copy of the Award, and a separate document, entitled "*Certification of Award*", in which an officer had certified that the copy was a true and correct one.

On 4 September 2012, Eder J made an order granting Rainstorm permission to enforce the Award. However, the Appellant applied to the Court to have the Eder J Order set aside on the ground, *inter alia*, that, the Eder J Order was defective as the Respondent had failed to produce either the original agreements or a certified copy of the same, and so had not complied with section 102(1) of the 1996 Act.

Cooke J, the Judge hearing the application, agreed with the submissions. However, on appeal, the Court of Appeal of England overturned the Order of the lower Court holding that, the Agreements had been properly certified in compliance with the requirements of the law. The Court held further, that, for the purpose of certification as required by the law it was sufficient to say that to the maker of the statement's knowledge and belief it was a true copy.

In that case, the Court had earlier been referred to definitions of "*certified copy*" in both *Black's Law Dictionary, 9th Ed*, and *Jowitt's Dictionary of English Law, 3rd Ed*, which speak of a duplicate or copy of an original document certified as an exact reproduction [usually] by the officer responsible for issuing or keeping the original or by the officer to whose custody the original is entrusted. The Court observed that, the class of those capable of certifying a copy of an original is for present purposes so circumscribed, but it was suggested to the Court that, inherent in the process of "due certification" was a comparison of the copy with the original.

It was further noted, as regards the issue of certification *vis-a-viz* authentication, that:

> "The certification of a copy is the formality by which the copy is attested to be a true copy of the original. The authentication therefore concerns the signature, whilst the certification concerns the document as a whole."

The Court observed, however, that, courts "appear to be quite liberal in accepting that an original award is authenticated or a copy of an award or agreement is certified".

Taking the cue from the above, I am convinced that, although the law says the petition needs to be certified by 'a petitioner's advocate', such a requirement does not mean that if the same is certified by *'another duly qualified advocate'* such an irregularity will amount to a fatal irregularity to the extent of rendering the entire Petition as invalid. In my view, the important factor worth noting from Rule 8 of the Arbitration Rule is, *inter alia*, that requirement of "**certification.**" To me, that should be a point to put weight on as a prime requirement given that, the purpose of certification process is to provide an assurance that the certified copy so produced or tendered is indeed an exact reproduction of the original document. That being said, the Respondent's first preliminary objection is hereby overruled.

As pointed out earlier, the Respondent submits, as regards the second ground of objection, that the Petition is irregularly or improperly verified because, while the *Rt. Dr. Dickson Daudi Chilongani* verified the paragraphs of the Petition as being "true to the best of [his] own knowledge", the "Affidavit verifying the Petition" was made, sworn and filed by the *Petitioner's Advocate Denis Malamba.* It was argued that, the Petitioner's advocate has put himself in a precarious and embarrassing position or a possibility of becoming a witness and an advocate and thus the Petition should be struck out. This Court was not referred to any authority to assist it.

As submitted by the Respondent, the purpose of requiring a Petition to be verified is that of shouldering responsibility on the person verifying as to the accuracy, truthfulness and authenticity of the facts stated in the Petition. A similar position was stated in the case of *ZTE Corporation v Benson Informatics Ltd t/a SMART, Commercial Case No.188 of 2017 (HCComD) (unreported)* Songoro J, (as he then was) held, citing the case of *Kiganga and Associates Gold Mining Co. Ltd v Universal Gold NL [2002] TLR 129,* regarding a petition filed by a Company.

In the instant Petition, however, the issue is that the accompanying affidavit was verified by the Advocate representing the Petitioner and that has been held to be improper. The question that follows, therefore, is: *whether the Advocate representing a Petitioner may swear and verify an affidavit as it was done herein.* The answer to that question seems to be readily available from the case of *Lalago Cotton Ginnery and Oil Mills Co. Ltd v Loans and Advances Realization Trust (LART), Civil Application No.80 of 2002 (unreported).* In that case, the Court of Appeal of Tanzania was of the view that, an advocate can swear and file an affidavit in proceedings in which he appears for his client, provided that he does so, only on matters which are in the advocate's personal knowledge only.

The Court of Appeal's decision in the Lalago's case (supra) was as well referred by this Court (Utamwa, J.,) in the case of ***Hon. Zitto Zuberi Kabwe v The Board of Trustees, Chama cha Demokrasia na Maendeleo and Another Civil Case No.270 of 2013, High Courtof Tanzania, DSM (unreported).*** In that case, the learned Judge had the following to say:

> "My settled view in interpreting the decision in the *Lalago Case* is that, though it is undisputed that our justice system recognises an advocate as an authorised agent of the party he represents in court, the precedent (Lalago's case) did not give a blank cheque authority to an advocate when swearing affidavits for his clients in respect all facts that he had personal knowledge. *The authority is only limited to facts that came into the advocate's personal knowledge by virtue of him acting in such capacity for his client.* That mandate does not extend to substantive evidence for establishing a right or denying liability for his client in any court proceedings. Otherwise, an advocate will be both a witness and a counsel in the same case because; affidavits in law take place of oral evidence ...." (Emphasis added).

Reverting to the issue at hand, and taking into account that an advocate can swear an affidavit in relation to the facts that came to his knowledge by virtue of him acting in such capacity for his client, what needs to be asked is whether the Affidavit filed by Mr Malamba

falls within the permissible limits. Reading from the Rejoinder submission of the Respondent, it is clear that what is at stake is paragraph 3 of Mr Malamba's affidavit and not the entire affidavit. That paragraph is to the effect that he read and understood the paragraphs 1-27 of the Petition and that he verifies the same to be true. Similarly, the verification clause reads as follows:

> "I Denis Malamba, verify that, all what is stated in paragraph 1, 2, 3 and 4 of this affidavit are true to the best of my own knowledge'.

In my view, paragraph 3 of the Affidavit still falls within the limits set out by the Lalago's case (supra) or the *Zitto Kabwe's case* (supra) because, the deponent only verifies what he has observed from the Petition. It is also clear that the petition is itself verified by Dr. Chilongani who can shoulder the responsibility for all what he stated in the Petition. That being said, I also overrule the 2nd ground of objection as being unmeritorious.

The final point, which is also the third ground of objection, is anchored on the issue of incompleteness of the Award. In his submission both in chief and on rejoinder, the learned counsel for the Respondent has argued that, the incompleteness of the documents accompanying the Petition should be equated to what happens to an incompetent appeal, revision when it is filed before the Court of Appeal. In my view, the third ground of objection does not differ much with the first ground and, for that matter, the same treatment which I gave to the first ground of objection will also apply to it. For the same reasoning, therefore, the third ground of objection cannot stand and I hereby proceed to overrule it.

In the upshot, the objections raised by both parties are found to be lacking merits. In view of that, I hereby proceed to make the following orders:

1. That, the preliminary objection raised by the Petitioner against the filing of the award is hereby dismissed.
2. That, the three preliminary objection which were raised by the Respondent against the Petition are equally, hereby dismissed.

3. Each party is to bear its own costs, and
4. Parties are to proceed with the hearing of the Petition.

It is so ordered.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
05 / 11 /2020

Ruling delivered on this 05th day of November 2020 .

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Hon. Magdalena Ntandu,
Deputy Registrar
High Court of the United Republic of Tanzania
(Commercial Division)
05 / 11 /2020