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

MISC. COMMERCIAL CAUSE NO. 02 OF 2021

BETWEEN

PRESTINE PROPERTIES LIMITED.....PETITIONER

VERSUS

SEYANI BROTHERS & CO. LTD.....RESPONDENT

Last order: 15th September, 2021
Judgment: 15th November, 2021

RULING

NANGELA, J.

This ruling is in respect of a Petition preferred by the Petitioner herein to challenge an award granted in favour of the Respondent on 30th June 2020.

Briefly, the facts of this Petition may be set out as follows: on the 18th day of October, 2011, the parties herein concluded a contract for works worth **TZS 5,449,341,097.00** (VAT inclusive). The date of site possession was the 20th day of October 2011 and the date of completion was 13th December 2012.

However, on 5th January 2013, the parties entered into a supplementary agreement to the main contract and resumed the works thereby introducing to the works the

position of a Project Manager and Project Structural Engineer.

The parties' construction contract was based on the Agreement and Schedule of Conditions of Building Contract (with Quantities), *2000 Edition*, reprinted in 2010 and published by the National Construction Council (NCC). According to clause 40.0 of the Main Contract, the parties had agreed to settle any kind of disputes arising from or connected with their Contract through arbitration after expiry of sixty (60) days from when a notice of intention to commence the process is issued.

Essentially, agreeing on the applicable rules of procedure is essential in order to remove uncertainty and ensure that the proceedings are not only fair, but are perceived to be fair by the parties to the dispute. As such, in their arrangement, the parties agreed to the applicability of the NCC Arbitration Rules 2015, as the applicable rules to any of their dispute.

In the course of time, a dispute arose between the parties. The Respondent alleged to have been evicted from the work site while works were still on progress, and Architect's refusal or failure to determine the extension of time, led to further loss and expenses arising from the contract. As such, in the year 2017, the Respondent submitted a claim to the National Construction Council for Arbitration. After forming a panel of arbitrators a

protracted arbitral proceeding ensued and came to an end when an award was issued on 30th June 2020 in favour of the Respondent.

Aggrieved by the Final Award, and even before its filing in Court, the Petitioner sought to challenged it on the ground that the tribunal lacked substantive jurisdiction, failed to adhere to the agreed procedures, improperly procured the award, alleged irregularities and misconduct and bias on the part of the arbitrators. It is from that background that this Petition was filed in this Court.

Initially, the Petitioner filed this matter under section 15(1) and (2) and section 16 of the Arbitration Act, Cap.15 [R.E 2002] and Rule 5 and 6 of the Arbitration Rules, Cap.15 [R.E 2002]. The filing was made on the 13th day of January 2021. On the 2nd day of August 2021, however, Mr Henry Masaba appeared before me representing the Petitioner. The Respondent was absent and unrepresented.

On the material date, Mr Massaba asked for the leave of the Court to amend the petition so as to make it conform to the requirements of the new law on arbitration, the Arbitration Act, 2020 (Cap.15 R.E 2020). I granted the prayer and scheduled the matter for a mention on the 26th day of August 2021.

On the 26th day of August 2021, Mr Shalom Msaki and Mr Beatus Malima, learned advocates for the Petitioner and Respondent respectively, appeared in Court. They informed the Court that, its previous order dated 2nd day of August 2021 had been fully complied and the Respondent was duly served. They asked for a hearing date and the matter was set for hearing on the 7th day of September 2021.

On the material date, the same advocates appeared before me. Mr Malima had earlier filed a notice of preliminary objection but withdrew it from the Court. Since the parties had filed skeleton arguments, they prayed that their skeleton arguments be adopted by the Court as their submissions and proceed to issue a ruling.

Before I examine the parties' submissions, let me point out that, the amended petition filed in Court on 12th of August 2021, was filed under section 69 (1) (a) and (b), section 70 (1), (2) (a), (b), (c), (d), (e) , (f), (g) and (i) and (3), and section 91 (2), (4) and (5) of the Arbitration Act, No.2 of 2020.

It is worth noting, however, that, the Arbitration Act No.2 of 2020 was subjected to revision and a revised edition of it is the one applicable. This is to be cited as the Arbitration Act, Cap.15 R.E 2020. It is crucial, therefore, to observe such developments because, the Act's Revised Edition 2020, has altered the numbering of

the earlier provisions wherefore; **section 69 currently stands as section 74** while **section 70 reads as section 75** and **section 91 reads as section 96.**

On the basis of the overriding objective principle, however, I will proceed and deal with the Petition as if it was filed in line with the provisions of the Arbitration Act, Cap.15 R.E 2020,(*i.e., that, as if the Present petition was brought under sections 74, 75 as well as section 96 of the Act*). In her Petition, the Petitioner has prayed for the following orders:

1. A declaration that the award is invalid and not enforceable for being tainted with misconduct and having been obtained improperly.
2. An Order setting aside the award with costs.
3. Any other or further relief and /or direction this Court may deem just and appropriate to grant.

The above noted prayers were premised on what the Petitioner alleged to be serious irregularities on the part of the arbitral tribunal, which affected its proceedings and the award itself. The Petitioner has summarized such irregularities under paragraph 22 of the Petition as follows, that:

(i) the honorable tribunal determined matters and

substance which it had no jurisdiction to do so as provided by the Tribunal rules and the law.

(ii) There are procedural irregularities on the appointment of the replacement Arbitrator who had recused himself on account of bias and proceeded to appoint another arbitrator without consulting the Petitioner.

(iii) The honourable tribunal failed to properly frame issues based on the pleadings that were presented by the parties.

(iv) The honourable tribunal called on witnesses who were pleaded as parties in the Arbitration and excluding them as parties to the arbitration.

(v) The honourable tribunal selectively considered documents tendered and ignored contracts made by the parties to vary the construction contract.

(vi) The honourable tribunal illegally refrained to refer questions of law to the Court for interpretation.

Submitting on the issue of substantive jurisdiction, Mr Massaba, submitted that, considering the spirit of

section 69 (1) (a) and (b) and 70 (2) (b) and (c) [**i.e., section 74 (1) (a) and (b) and section 75 (2) (b) and (c) of the Arbitration Act, Cap.15 R.E 2020**], the tribunal acted without jurisdiction and outside the agreed procedures by the parties.

In particular, it was the Petitioner's legal counsel submission that, the tribunal violated **Rule 7.3 (d) of the NCC Rules 2015 Edition**, which governed the conduct of the arbitral proceedings. He referred this Court to paragraph 19 and 20 of the Final Award noting that, the tribunal exercised its powers to appoint a legal expert without affording the parties opportunity to be heard on that issue, hence a fundamental breach of the rules of natural justice.

Mr Massaba referred this Court to Rule 7.2 (a) to (e) of the NCC Rules, 2015 regarding matters for which the arbitrator shall have jurisdiction on. The respective Rule provides as follows:

> "Rule 7.2: The arbitrator shall have jurisdiction to-:
>
> (a) Determine any question as to the validity, extent or continuation in force of any contract between the parties;
>
> (b) Order the correction or amendment of any such contract, and/ of the arbitration agreement, submission or reference, but only to the extent

required to rectify any manifest error, mistake or omission which he determine to be common to all parties.

(c) Determine any question of law arising in the arbitration.

(d) Determine the validity of the arbitration agreement

(e) Determine any question as to the jurisdiction of the arbitrator."

In comparison with the list of issues raised by the arbitral tribunal, at paragraph 39 of the Award, it was the Petitioner's further submission that, such issues were at variance with what Rule, 7.2 (a) to (e) provides. He contended, therefore, that, the issue of eviction of the contractor from the site, and that of extension of time were not subject of the jurisdiction of the tribunal, and, hence, constitutes a clear misconduct manifest in the award.

In response to the first ground, Mr Malima, the Respondent's legal counsel, submitted that the Petitioner's sole reliance on Rule 7 of the NCC Rules is flawed since he omits Clauses 40.1 and 40.4 of the Conditions of Contract, which gives the arbitral tribunal substantive jurisdiction.

In the alternative, Mr Malima contended that, since the issue of substantive jurisdiction was not raised before the arbitral proceedings in terms of sections 33 (1) and

75 (1) (a) (**now sections 35 (1) and 80 (1) (a) of Cap.15 R.E 2020**), the same is time barred and cannot be raised before this Court to challenge a final award.

To support his point, Mr Malima cited **Russel on Arbitration**, para.8-123 at pages 526-527. That learned author stated that:

> "a party who wishes to challenge an award for a serious irregularity should not only act promptly in making his application to the Court, but should also take care not to lose his right to object...to wait until after the publication of the award or indeed continuing to participate in the hearing ... will be fatal to mount section 68 application."

Let me deal with the initial issues raised by the parties herein before I even proceed further. In the case of **Marine Services Co. Ltd vs. M/s Gas Entec Company Ltd, Consolidated Misc. Comm. Cause No.5 & 11 of 2021**, (unreported), **this Court pointed out that:**

> "failure to raise ... an objection at the earliest opportune time, makes one to lose his or her right to object, unless otherwise his or her delay is justified. Unjustified failure will amount to acquiescence."

The above noted position is supported by section 35 (1) and section 80 (1) (a) of the Arbitration Act, Cap.15

R.E 2020. This Court did state, inter alia, that, of itself, a want of jurisdiction is a glaring error on face of record which has the potential of vitiating proceedings and, thereby, rendering everything done by a court or a tribunal a nullity. However, the question which one needs to ask, therefore, is whether the Petitioner is barred from raising that point at this stage.

In my view and having looked at the award and the proceedings of the tribunal, nowhere has it been stated that an issue challenging or objecting to the substantive jurisdiction of the tribunal was raised during the continuance of the arbitral proceedings. As such, by virtue of section 35 (1) and section 80 (1) (a) of the Arbitration Act, Cap.15 R.E 2020, the Petitioner is estopped from raising that issue in this Petition or at this stage.

Closely related to the above discussion, is the Petitioner's issue raised in paragraph 7-9 of the amended Petition in respect of procedural infringement of Rule 7.3 (j) and (d) of the NCC Rules 2015, and the tribunal's appointment of a legal expert without first seeking the consent of the parties.

It is indeed clear to me that, the decision to seek the aid of an expert in law was done ***suo moto*** by the arbitral tribunal under Rule 7.3 of the NCC Rules 2015. In his submission, Mr Massaba has contended that, the

tribunal acted outside its mandate and violated the law as regards the quest for natural justice. However, as I look at the proceedings, I find that, no query was at any time raised by any of the parties to the arbitral proceedings regarding the tribunal's decision to appoint an expert to assist them.

Ordinarily, situations may arise where an arbitral tribunal considers it useful to appoint a legal expert to assist it, for instance, when the tribunal is comprised entirely of non-lawyers or where none of the members of the tribunal is versed with the law chosen by the parties to governing the contract. In this matter at hand, the first scenario occurred and the tribunal saw it necessary to seek an opinion of a legal expert.

Under Rule 7.3 (d) of the NCC Rules, 2015, the rule had a requirement that the parties are to be afforded opportunity to be heard on that issue before the expert was appointed. As I stated earlier, this was not complied with. However, it is also clear from the records that, none of the parties complained or raised the alarms.

In essence, their conduct should be considered as a sufficient ground for attracting the doctrine of estoppel by acquiescence or waiver, taking into account that, they proceeded with the hearing and determination of the dispute without raising any query before the tribunal. As

such, neither of the two parties can be allowed at this stage to raise the alarms.

I hold that view because, as it was once stated by Oliver, L.J., in **Taylor Fashions Ltd. vs. Liverpool Victoria Trustees Co. Ltd. [(Note) [1981] 2 W.L.R.] 576**

> "... estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding."

I do understand that the Petitioner has alleged that by not being given the opportunity to be heard with regard to the appointment of the expert, the parties were denied their right which is part of natural justice. That fact notwithstanding, the parties acquiescence to such a fact and orders made by the arbitrator meant that the parties were comfortable and, indirectly or constructively and mutually, consented to the fact.

Moreover, as rightly submitted by Mr Malima, section 80 (1) (a) to (d) of the Arbitration Act Cap.15 2020, precludes the Petitioner from raising, at this present moment, any objection as to the substantive

jurisdiction of the tribunal, impropriety of the proceedings, failure to comply with arbitration agreement or any provision of the Act or any other irregularity affecting the arbitral tribunal or the proceedings. Essentially, he could have done so if he demonstrates to this Court that he was unable to do so due to lack of knowledge of or could not with reasonable diligence have discovered the grounds of the objection.

On the contrary, however, the learned counsel for the Petitioner has not been able to demonstrate anything of the like nature, since at the tribunal level; the Petitioner was well represented by the same advocate. It is my considered view, therefore, that, the Petitioner's acquiescence constituted a waiver and she cannot turn around at this time to raise that fact as an issue upon which the decision of the tribunal should be faulted. Had she raised it earlier enough and got overruled by the tribunal, that would have been a different story.

The Petitioner's second ground of argument is premised on the appointment of the arbitrators. Reference has been made to section 18 (2) (c) of the Arbitration Act 2020 (**which is now section 20 (2) (c) of Cap.15 R.E 2020**). I note from the submission by the Petitioner's counsel a confusion regarding the current and the previous law, as he seems to be referring also to section 10 of the repealed Act. I will assume, however,

that he meant to be referring to section 20 (1) and (2) of the Arbitration Act, Cap.15 R.E 2020 and I shall proceed from that basis.

In his argument, the Petitioner has contended that, the third arbitrator, Eng. Kimambo, was not appointed at the instance of the Petitioner. The Counsel for the Petitioner has contended that, the panel constituting the arbitral tribunal was constituted in breach of the relevant section. He has even raised the issue of bias at paragraphs 11, 12, 13, 14, 15, 19 and 22 of the Petition. The Respondent has countered that submission by contending that, such issues cannot, by virtue of section 75 (1) (a) to (d) of the Act [**now section 80 (1) (a) to (d) of Cap.15 R.E 2020**] be allowed to stand.

I tend to agree with the Respondent's submission that, since, by virtue of that provision, as already stated herein above, failure to raise such an objection at the earliest opportune time, makes one to lose his or her right to object, unless otherwise his or her delay is justified.

In **Trading Ltd vs. Gill & Duffus SA [2000] 1 Lloyd's Rep. 14,** His Lordship Mr Justice Moore-Bick drew attention to the function of section 73 (1) of the English Arbitration Act 1996 (which is in *pari materia* to section 80 (1) of the Arbitration Act, [Cap.15 R.E 2020] and, noted, that, the section requires a party with

grounds for objection to the jurisdiction or constitution of the arbitral tribunal or to the conduct of the proceedings, to raise his or her objection as soon as he is, or ought reasonably to be aware of it. As such, I cannot entertain the Petitioner's arguments on that ground as well.

The third line of argument by the Petitioner relates to the framing of the issues. Paragraphs 8, 9, 10 and 21 of the Petition and paragraph 3 of the Petitioner' submission refers. To sum them up, it was raised as a ground that, the honourable tribunal failed to properly frame issues based on the pleadings that were presented by the parties.

In his submission, Mr Massaba contended further that, the tribunal framed issues without involvement of the parties, and that, such were framed after the parties' final submissions which were made simultaneously.

Mr Massaba was of the view that, such an approach defies the law, the rules, principles and the purpose of framing issues. He contended further that, the parties were taken by surprise as they had no opportunity to examine each other's submission contrary to the rule of natural justice as the Petitioner was unable to anticipate the matter which she was called upon to answer.

In reply, Mr Malima was of the view that, the complaint that issues were framed based on parties' submissions does not hold as an irregularity falling under

Section 75(2)(c) of the Act, and, that, nowhere was the Petitioner prejudiced if at all that was the case.

Essentially, framing of issues to guide an arbitral tribunal is an important aspect. While arbitrator may not be compelled to frame issues, it is prudent to have a set of issues as key points for consideration or points that would guide determination of the dispute. In his commentary on **International Commercial Arbitration Volume III,** Wolters Kluwer, 2009, Gary Born, has a view that:

> "In connection with establishing a sensible Arbitral procedure, the Tribunal and parties must define the contested issues of law and fact, and devise and efficient, rational means of presenting and deciding them."

A similar view was expressed in **Sahyadri Earth Movers vs. L & T Finance Ltd and Anr.,** 28 March, 2011, Para 9 (x) where the Bombay High Court was of the view that, issues are helpful for the proper and effective trial. In some cases, for instance, the parties to a dispute may mutually frame an issue for the arbitrator to decide prior to the start of the arbitration proceedings. As well, the arbitrator may help them find a statement of the issue that satisfies the curiosity of both sides.

Yet, in other instances, the parties may agree that the arbitrator should frame the issue as part of the written award. However, if that is agreed, one would expect that such issues will closely correspond to issues originally proposed by the parties, either prior to the start of the hearing or as expressed during the arbitration hearing.

As I give a careful look at the Arbitration Act Cap.15 R.E, 2020, one critical point to note, however, is that, the Act is silent concerning whether the Arbitrator is obligated to frame issues in the course of determining the dispute, akin to what a court of law would do, or whether the parties should consent to the issues drawn or get involved in the framing of such issues. That being the case, can an award be set aside simply because the arbitrator failed to draw up issues or drew up issues without involving the parties?

Such an issue was once dealt with by the Indian High Court (Bombay) in the case of **Patel Engineering Co. Ltd. vs. B.T. Patil & Sons Belgaum (Construction) Pvt. Ltd. [MANUIMHl03511 2013]**, where a Single Judge of the Court held that, the Indian Arbitration Act, 1996 Act does not mandate framing of issues. The Court did observe, however, that, although framing of issues would be useful to enable the parties

lead evidence and make submissions, an award cannot be set aside merely on that ground alone.

In view of the above, and taking into account that, an Arbitral Tribunal is not a Court, it is settled that, any lacuna in procedure should not vitiate the Award, unless it is in breach of principle of natural justice, equity, fair play by the aggrieved parties. I do understand that in his submission Mr Massaba has strenuously endeavored to link up the framing of issues with breach of natural justice arguing that the parties were taken by surprise.

However, I cannot buy Mr Massaba's views as well, simply because, I find it to be too far stretched given the fact. In principle, as I stated here above, the Arbitration Act, Cap. 15 R.E 2020, which is the applicable law to this matter, does not oblige an arbitrator to draw up issues or involve the parties in drawing up the issues.

What the law does provide under section 75 (2) (d) of the Arbitration Act, Cap. 15 R.E 2020 is that, where an arbitral tribunal will fail to address all issues that were raised before it, that will constitute an irregularity of a serious nature. Moreover, it is clear to me as well that, it is erroneous to say that the tribunal failed to draw up issues for determination. It did and did tackle each of the issues it had listed to guide the process.

It follows, therefore, that, since what Mr Massaba raised does not fall within that realm of irregularities for

which a decision to set aside the impugned awardwould b be premised, the third ground raised by the Petitioner will likewise fall.

The fourth ground raised by the Petitioner is in respect of the decision of the tribunal to call on witnesses who were pleaded as parties in the Arbitration and excluding them as parties to the arbitration. In his submissions, however, it seems the learned counsel for the Petitioner argued a completely something else, i.e., the issue regarding substantive construction law and section 75 (2) (f) and (i) of the Arbitration Act, Cap. 15 R.E 2020. This should have been his fifth ground.

Section 75 (2) (f) and (i) of the Act, deals with the issues of uncertainty or ambiguity as to the effects of the award and any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitral tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award. Since nothing of that sort was raised in the Petition, it cannot be considered in the submissions since parties are bound by their pleadings. For that reason, I take it that the Petitioner abandoned her fourth ground which she had raised in the Petition.

In any case, even if I was to respond to his submission on the issue of substantive construction law and, that, the entire award is based on wrong principle of

law, that will be a mistake falling under the paradigm of a question of law for which a recourse by way of a case stated under section 76(1) of the Arbitration Act, [Cap.15 R.E 2020] could have been preferred.

As this Court stated in the **Marine Services Co. Ltd (supra) (citing a decision** by the UKSC, in **Lesotho Highlands Development Authority vs. Impregilo SpA and Others** [2006] 1 AC 221:

> "... it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A **mere error of law** will not amount to an excess of power under [the Arbitration Act]."

In that case of **Lesotho Highlands Development Authority** (supra), at paragraph 31, the UK's Supreme Court stated that:

> "..a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in section 69 be appealed unless the parties have excluded that right by agreement."

Due to the reasons stated here above, the fifth ground will as well be dismissed as lacking merits.

The final lap rests on the sixth ground. This ground was to the effect that the honourable tribunal illegally

refrained to refer questions of law to the Court for interpretation.

It is worth noting, however, that, in his submission, Mr Massaba submitted on the issue of arbitral tribunal considering evidence not properly received, referring to paragraphs 14, 15, 16 and 17 of the Petition to support his submission. To beef up his submission, Mr Massaba has as well relied on the decision of the Court of Appeal in the case of **Vodacom Tanzania Limited vs. FTS Services Limited; Civil Appeal No. 14 of 2016 (unreported)** and **D.B Shapriya & Co. Ltd vs. Bish International BV [2003]2 EA 404** and urged this Court to make a finding that, the tribunal is guilty of misconduct constituting serious irregularity.

The learned counsel for the Petitioner also referred this Court to the case of **Kelantan Government vs. Duff Development Co. [1923] A.C 395**, where it was held that, where:

> "it appears by the award that the arbitrator has proceeded illegally – for instance, that he has decided on evidence which was not admissible or on principle of construction which the law does not countenance, then, there is error in law which may be ground for setting aside the award."

I have already pointed out here above, that, the Petitioner has failed to offer submissions in respect of what is listed under paragraph 22 as the sixth ground of the Petition. That ground what to attract my attention regarding whether failure to refer a question of law to the Court amounts to a serious irregularity. Since the learned counsel has not offered submissions on that ground, to me that was tantamount to abandoning his sixth ground as well.

However, as it may be noted in his submission, he has rather submitted on the issue regarding improper receiving of evidence. These are issues pointed out in paragraph 16 and 17 of the Petition. The Respondent has contended that the Petitioner cannot raise such issue which was not raised before the tribunal and contended that the ground is time barred under section 75(2) of the Act [**now section 80(2) of the Arbitration Act, Cap. 15 R.E 2020**]. The Respondent counsel has also argued that, matters of evaluation of evidence are matters exclusive for the tribunal.

Before I respond to that submission I find it apposite to state some guiding principles here. In the first place, it is worth noting that, ordinarily, an Arbitrator is the master of procedure in the Arbitration. Apart from abiding with the requirement to act fairy, the law gives arbitrators a wider avenue of powers to adopt procedures

suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters to be determined. Section 35 (1) (b) and (2) of the Arbitration Act, Cap.15 R.E 2020 provides for all that.

Secondly, it has long been established that, as per Mr Justice Teare in **UMS Holding Ltd & Ors vs. Great Station Properties SA & Anor [2017] EWHC 2398 (Comm) (05 October 2017),** citing Bingham J. in **Zermalt Holdings v Nu-Life Upholstery Repairs (1985) 2 Estates Gazette p.14**, that, as regards arbitral awards:

> "the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

Thirdly, as it was stated by the Court of Appeal in the Vodacom case (supra), that:

> "[A]ny application to the High Court for review of an arbitral award is not an

appeal and, therefore, cannot be disposed of in a form of rehearing."

It means, therefore, that, this Court is precluded from matters related to evaluation of evidence and findings of fact made by the arbitral tribunal. All these observations were also reiterated by this Court in the case of **CATIC International Engineering (T) Ltd vs. University of Dar-es-Salaam, Misc. Comm. Cause No. 1 of 2020 (unreported)**. It is a point made by Courts, therefore, that, considerations pertaining to all arbitration awards must be taken on board in a reasonable and commercial way, expecting that no substantial fault will be found with them.

Having said that, let me respond to the issue of tribunal's improper receiving of evidence as charged by the Petitioner. In the first place, I quite agree with the Respondent's submission that, matters of evaluation of evidence and the like are not part of what constitute serious irregularity under section 75(2) (a) to (i) of the Arbitration Act, Cap.15 R.E 2020.

In the English case of **UMS Holding Ltd & Ors (supra) at para 28**, the Court had the following to say after reviewing various decision regarding situations where the arbitral tribunal ignored or failed to have regard to particular evidence relied upon by one party. The Court stated (in respect of section 68(2) (a) to (i)of

the English Arbitration Act, 1996, which is in *pari materia* to section 75(2)(a) to (i) of Cap.15 R.E 2020) that:

> "A contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties **cannot be the subject matter of an allegation of a serious irregularity within section 68(2)(a) or (d), for several reasons.** First, the tribunal's duty is to decide the essential issues put to it for decision and to give its reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence. Second, the assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in that regard. Third, where a tribunal in its reasons has not referred to a piece of evidence which one party says is crucial the tribunal may have (i) considered it, but regarded it as not determinative, (ii) considered it, but assessed it as coming from an unreliable source, (iii) considered it, but misunderstood it or (iv) overlooked it. There may be other possibilities. Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the

evidence which was before the tribunal and which was relevant to the decision under challenge. Such evidence would include not only documentary evidence but also the transcripts of factual and expert evidence. **Such an enquiry (in addition to being lengthy, as it certainly would be in the present case) would be an impermissible exercise for the court to undertake because it is the tribunal, not the court that assesses the evidence adduced by the parties.** Further, for the court to decide that the tribunal had overlooked certain evidence the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view of the importance, relevance or reliability of the evidence from that of the court and so the required inference cannot be drawn. Fourth, section 68 is concerned with due process. Section 68 is not concerned with whether the tribunal has made the "right" finding of fact, any more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes

> by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact.

With such observations, I find that, the Petitioner's submission that the tribunal received evidence improperly as being without merit and unacceptable as such cannot constitute a serious irregularity contemplated about under section 75 (2) (a) to (i) of the Arbitration Act, Cap. 15 R.E 2020.

Having dealt with all grounds set out by the Petitioner in her Petition, I find that the entire Petition lacks merits and should be dismissed. In the upshot, I hereby dismiss this Petition with costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 15TH NOVEMBER 2021

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DEO JOHN NANGELA
JUDGE