

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CAUSE NO. 22 OF 2021**

**AND**

**IN THE MATTER OF ARBITRATION ACT**

**AND**

**IN THE MATTER OF ARBITRATION ACT NO. 2, 2020**

**[CAP 15 R.E. 2020]**

**BETWEEN**

**VODACOM TANZANIA PUBLIC COMPANY**

**LIMITED.....PETITIONER**

**VERSUS**

**SHIVACOM TANZANIA LIMITED.....RESPONDENT**

**RULING OF THE COURT**

**K.T.R. MTEULE, J.**

**05/08/2021 & 22/09/2021**

This ruling is in respect of points of law raised by the counsel for the Respondent **Shivacom Tanzania Limited** asking for the stay of proceedings in this Petition pending determination of the **High Court**



**Dar Es Salaam Registry Miscellaneous Civil Applications Number 210 of 2021** filed by **Shivacom Tanzania Limited (The respondent)** against **Vodacom Tanzania Public Company Limited (Vodacom)** (The petitioner) and **Miscellaneous Civil Cause No. 216 of 2021** filed by **Tanil Somaiya as Guarantor against Vodacom.**

The petitioner filed this petition seeking for this court to recognize a second (2<sup>nd</sup> ) partial Arbitral Award issued in **London on 9<sup>th</sup> March 2021** as a binding and enforceable decree of this court in terms of section 78(1) of the **Arbitration Act, 2020**. The arbitration was conducted under the UNICITRAL Arbitration Rules by parties' appointed arbitrators namely Lord Hoffmann Co-Arbitrator, Harry Matovu QC Co-Arbitrator and the Tribunal Chairman Justice Luis Harms. This second partial award came as a continuation of arbitration process which had already issued the first partial award. There is already a third partial award. All these awards have been both filed in this court for registration and recognition.

In reply to this petition, the respondent raised points of law challenging the continuation of the proceeding of this petition on account that it conflicts with two applications filed in the **High Court Dar es Salaam Registry** to challenge the previous two partial awards. The Respondent

named these applications to be **Miscellaneous Civil Applications Number 210 of 2021 and 216 of 2021** filed at Dar es Salaam Registry which involve the “same parties” litigating under the same title of subject matter.” According to the respondent, to proceed with the instant petition with existence of the two Civil applications contravenes section 8 of the Civil Procedure Code, Cap 33 of the 2019 R.E.

This Petition preceded **Miscellaneous Commercial Cause No. 32 of 2021** involving the same parties which is seeking for the Court to recognize the 3<sup>rd</sup> partial award emanating from the same arbitral proceedings. On the date of hearing, the Respondent made a prayer in **Miscellaneous Commercial Cause No. 32 of 2021** asking for the Court to consolidate it with this Petition. Having seen that there some mismatch between this application and **Miscellaneous Commercial Cause No. 32 of 2021** the prayer to consolidate was not allowed hence each application ought to be argued separately. Miscellaneous Commercial Cause No. 32 of 2021 was argued first.

As it was in **Miscellaneous Commercial Cause No. 32 of 2021**, the Respondent had points of Law raised asserting this Petition to be *res subjudice*.

While hearing the points of Law, the parties notified the court that all the submissions made in **Miscellaneous Commercial cause No. 32 of**

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**2021** were similar except some few additional facts which were put forward in this Petition. Parties asked for the court to use those submissions plus the few added facts to decide the points of law raised in this Petition. The court allowed and adopted the submission of Misc. Commercial Cause No 32 of 2021 as part of submissions in this matter with the few added argument. **Mr. Gasper Nyika Advocate** represented the Applicant and **Mr. Ngalo Advocate** appeared for the Respondent.

For purposes of clarity, I will give a brief account of what was submitted in in Misc. Commercial Cause No. 32 of 2021. Mr. Ngalo stated that the High Court Dar es Salaam Registry Misc. Civil Application No. 210 of 2021 was filed under Section 14 of the Law of Limitation Act seeking for extension of time to file a petition to challenge the conduct of arbitral proceedings and 2 partial final awards, one dated 18/11/2019 and the second one dated 9/3/2021.

According to Mr Ngalo, the other applications, High Court Misc. Civil Cause No. 216 of 2021 between Tanil Somaiya (Petitioner) and Vodacom Tanzania Ltd (The respondent) are challenging the arbitral proceedings and resultant award. It is Mr. Ngalo's contention that although Tanil Somaiya is not a party to Misc. Commercial Cause No. 22 & 32 before this court, and was not also a party to Arbitral proceeding between Shivacom and Vodacom, but he filed the petition in his capacity as a guarantor in

favour of Vodacom as he is responsible with paying the money that Shivacom owed to Vodacom deriving his locus from Section 79(1) of the Arbitration Act Cap 15 of 2020 as an interested party.

It is Mr. Ngalo's prayer that since this Petition was filed in this court on 28/5/2021 which is after Misc. Civil Application No. 210 of 2021 and Misc Civil Cause No. 216 of 2021 have been filed in the High Court Dar es Salaam Registry, under Section 8 of the CPC and 95 of the CPC, this petition and the petition in Misc Commercial Cause No 32 be stayed and await the outcome of the two matters in the High Court.

It is Mr. Ngalo's submission that the subject matter of the two applications in the High Court are directly and substantially the same as the one that are requested to be recognized in the two petitions filed herein and requested to be stayed. He contended that the rationale of **Section 8 of the CPC** is to avoid giving of conflicting decisions in matters which are directly and substantially the same. He submitted that since in petition No. 22 and petition No. 32, the petitioner is seeking for this court to recognize the 3<sup>rd</sup> and 2<sup>nd</sup> partial awards which emanate from proceedings which are being challenged in the High court Dar es Salaam registry by the two matters filed therein, there is a likelihood of this court having a decision to enforce the award and another decision from the



High Court Dar es Salaam registry granting the relief against validity of the same awards.

Mr. Ngalo therefore requested this court to stay these proceedings on the strengths of Order XXI and Section 95 which gives inherent power to the court to give order in any matter in the interest of justice.

Mr. Nyika made a reply to Mr. Ngalo's submissions. Unlike Mr. Ngalo who made reference to the two applications while making submissions in Miscellaneous Commercial Cause No 32 of 2021, Mr. Nyika inclined more on **Petition**. He had a different point to make with regards to this application which distinguished it from **Miscellaneous Commercial Cause No. 32 of 2021**. He advanced two points to challenge Mr. Ngalo's submissions.

**Firstly**, it is the submission of Mr. Nyika in skeleton argument in this petition that it is clear from Section 8 of the CPC that for the subjudice doctrine to apply the suit which is sought to be stayed must have been filed after the previously filed suit, meaning the former suit must have been pending in Court or rather the previously instituted suit is pending in the same court in which the subsequent suit is brought.

According to Nyika, the Petitioner filed the present petition in court on 5<sup>th</sup> May 2021 while Miscellaneous Civil Application No. 210 of 2021 and



Miscellaneous Civil Application No. 216 of 2021 were filed in court on 6 May 2021 so the Respondent applications were not pending in Court when this Petition was being filed and therefore the Petition is not *subjudice*.

Mr. Nyika is of the view that the Respondent ought to have resorted to Section 78 (1) of the Arbitration Act which provide remedy to the Respondent to ask for the Court to refuse recognition of the award as already done in the answer to the petition.

**Secondly**, Mr. Nyika's submission is premised on the fact that Mr. Somaiya who is the applicant in Miscellaneous Civil Cause No 216 of 2021 is neither a party to the arbitration agreement nor the arbitral proceedings leading to the award which is sought to be recognized and enforced and not even a party to the Petition. This being the case, according to Mr. Nyika the subjudice rule would not have applied because the parties in the Petition and the application before the High Court are different.

It is Mr. Nyika's submissions that no legal or factual basis that exists for staying this Petition pending the determination of **Miscellaneous Civil Cause No 216 of 2021**.

Having read and analyzed all the submissions made by both parties, one issue need to be considered. This is **whether the issue in Misc. Civil**



**Application No. 210 of 2021 and the petition in Misc. Civil Cause No. 216 of 2021 of the High Court Dar es Salaam Registry is directly and substantially the issue in this petition.**

Equally, the issue to be resolved in this Petition is whether this petition is *subjudice* due to the existence of Misc. Civil Application No. 210 of 2021 and the petition in Misc. Civil Cause No. 216 of 2021 of the High Court Dar es Salaam Registry is directly and substantially the issue in this petition and that the parties are the same.

In the Miscellaneous Commercial Cause No. 32 of 2021, I was guided by the provision of Section 8 of the Civil Procedure Code (CPC) and the analysis done thereof by Hon. Mwambegele J as he then was, in the case **Wengert Windrose Safaris (Tanzania) Limited v Minister for Natural Resources and Tourism & Anor (Misc Commercial Cause No. 89 of 2016) [2016] TZHC ComD 41**. Referring to **Sarkar, Code of Civil Procedure (11<sup>th</sup> Edition) by Sudipto Sarkar and V.R Manoharat p. 93, the Hon. Mwambegele, J** highlighted the following four catchy features in that provision:

1. That the matter in issue in the second suit is also directly and substantially in issue in the first suit;
2. That the parties in the second suit are the same or parties under whom they or any of them claims litigating under the same title;

The issue therefore is whether this Petition is *Subjudice* due to the existence of Miscellaneous Civil Application No. 210 of 2021 and Misc. Civil Cause No. 216 of 2021 in the High Court of Tanzania Dar es Salaam Registry.

I will be guided by the definition given in **Wengert Windrose Safaris (supra)**, by Hon. Mwambegele J on what constitute matter being *subjudice*. One of the ingredients is that parties must be the same in both matters or any of the parties claim litigating on the same subject matter. With Regards to **Misc. Civil Cause No. 216 of 2021**, it is not disputed that Mr. Somaiya was not a party to the Arbitration and he is as well not a party in this petition. He does not feature at all in the History of the matter. This alone, save this matter from being rendered *subjudice* by the existence of Misc. Civil Cause No. 216 of 2021 at the Dar es Salaam Registry.

With regards to Miscellaneous Civil Application No. 210 of 2021, Mnyika contends that the instant Petition came to Court first before the Miscellaneous Civil Application No. 210 of 2021. In the principle, expounded in **Wengert Windrose Safaris (supra)**, what becomes *subjudice* is the matter which is filed later and not the former. This means



that the later filed matter is the one which suffers the consequences of *subjudice* and not the one which was found in existence.

It is not disputed that the Petitioner filed the present petition in court on 5 May 2021 while Miscellaneous Civil Application No. 210 of 2021 was filed in court on 6 May 2021.

In this regard, since Misc. Commercial Cause No 22 came to court before the Miscellaneous Civil Application No. 210 of 2021 I agree with Mr. Nyika that what is to be stopped is the application which came later. From the foregoing, the objection on the points of law raised by the Respondent's counsel with regards to this Petition therefore fails and accordingly overruled. It is so ordered.

Dated at Dar Es Salaam this 22<sup>nd</sup> Day of 2021



**KATARINA T. REVOCATI MTEULE.**

**JUDGE.**

**22/09/2021**

