

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 74 OF 2022

BETWEEN

EMESI (T) LIMITED AND MTEMBWE

TECHNICAL AND SUPPLIES LIMITED..... APPLICANT

AND

YAPI MERKEZI INSAAT VE SANAYI

ANONIM SIRKET 1st RESPONDENT

DCB COMMERCIAL BANK PLC 2nd RESPONDENT

Date of Last Order: 25th May, 2022

Date of Ruling: 31th May, 2022

RULING

MKEHA, J

On 20th May 2022, the applicant filed the present application. The application is moving the court for issuance of an order restraining the 2nd respondent from satisfying the call by the 1st respondent on Performance Bond (Bank Guarantee) No. 21/09/2021 issued on the 21st September, 2021 in favour of the first respondent; and Advance Payment Guarantee No. 7/10/2021 issued on the 7th October 2021 in favour of the first

respondent, for and on behalf of the applicant, pending the reference of the dispute between the applicant and the first respondent to the Arbitral Tribunal and the constitution of the Arbitral Tribunal. Amongst other provisions of different laws, the present application is made under section 51 (1), 51 (2) (e) and 51 (3) of the Arbitration Act, Chapter 15 Revised Edition of the Laws of Tanzania, 2021 (sic). The application is supported with an affidavit of one Thobias K. Mabugo, Director of the Applicant.

Before commencement of hearing of the application, Mr. Gerald Nangi learned advocate raised a preliminary point of objection regarding competence of the application. According to Mr. Nangi learned advocate, in terms of Regulation 63 (1) (a) of GN No. 146 of 2021, save as is otherwise provided, all applications made under the provisions of the Arbitration Act, 2020 (RE) should be made by way of petition and titled *"In the matter of the arbitration and in the matter of the Act and reference should be made in the application to the relevant section of the Act"*. The learned advocate condemned the applicant for having chosen to move the court by way of a chamber summons while at the same time citing the Arbitration Act as one of the enabling laws to move the court. The learned advocate asked the court to strike out the application for reasons of incompetence.

Mr. Moses Mwitete learned advocate for the applicant submitted in reply that, the application does not fall under the provisions of Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations, 2021. According to the learned advocate, the said Regulation is only applicable for proceedings emanating from ongoing arbitral proceedings or those which have already been determined by an arbitral tribunal. According to the learned advocate, since the applicant is not in possession of submissions minutes or proceedings of the arbitral tribunal, award or the ruling to which the petition relates, in no way can the applicant comply with Rule 63 (1) (a) of GN. No. 146 of 2021.

There was no denial on part of the learned advocate for the applicant that the application indicates to be made under the Arbitration Act. Rule 63 (1) (a) of GN No. 146 is couched in mandatory terms regarding applications made under the Arbitration Act and the Regulations hence, imposing an obligation upon the applicant to comply with the same.

For the foregoing reasons, I hold the objection to be meritorious. The application is struck out for being commenced in a manner contrary to what the law instructs. The applicant is condemned to pay costs to the first respondent.

DATED at DAR ES SALAAM this 31^{Sst} day of May, 2022.




C. P. MKEHA,

JUDGE

31/5/2022

Court: Ruling is delivered in the presence of the parties' learned advocates.




C. P. MKEHA,

JUDGE

31/5/2022