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

**MISC. COMMERCIAL CASE NO.28 OF 2022**

IN THE MATTER OF ARBITRATION
AND
IN THE MATTER OF ARBITRATION ACT CAP 15 R.E 2020
AND
IN THE MATTER OF ARBITRATION UNDER THE INSTITUTE OF ARBITRATORS (TIArbs) RULES, EDITION 2018

BETWEEN

THE ARAB CONTRACTORS
(OSMAN AHMED OSMAN & CO. ……...1ST PETITIONER

ELSEWEDY ELECTRIC COMPANY ……..2ND PETITIONER
AND
BHARYA ENGINEERING & CONSTRACTING
COMPANY LIMITED (BECCO)……1ST RESPONDENT

LARRISSA LEACH……..2ND RESPONDENT

Date of last Order: 21/09/2022
Ruling of the Court: 04/11/2022

**RULING**

**NANGELA, J.:**

Can an arbitrator be removed by the Court from presiding over on-going arbitral proceedings? This ruling seeks to address that question among others. The ruling arises from a Petition filed by the Petitioners who are an unincorporated Joint Venture

of Arab Contractors and Elsewedy Electric operating as the Joint Venture of the Arab Contractors-Elsewedy Electric, herein referred to as "the Petitioners".

The Petitioners' Petition is premised under section 27 (4) (b), 28 (1) (a), (d) and 96 of the Arbitration Act and they seek for the following reliefs:

(1) That, the Presiding Arbitrator be removed for non-adherence to the basic rules of natural justice and improper conduct of Arbitral proceedings.
(2) That, the matter be heard de novo before a different Arbitrator.
(3) Costs of this Petition.

For a better appreciation of this Petition, I find it apposite to state its facts, albeit briefly. The 1st Respondent herein is an incorporated limited liability entity while the 2nd Respondent is a natural person and the Arbitrator in the dispute between the Petitioners and the 1st Respondent.

On the 08th day of February 2020, the Petitioners entered into an Equipment Rental Agreement (**ERA**) with the 1st Petitioner in which, the former rented some equipment, including trucks from the latter as per the terms of such an agreement. Under Clause 15 of the ERA, the two parties had agreed to a procedure to be followed in resolving any dispute.

The agreed procedure includes arbitration reference to the Tanzania Institute of Arbitrators (**TIArb**) for appointment of a

Single Arbitrator to address the matter, and issue a final and binding decision in respect of that particular dispute.

Sometime in the year 2021, a dispute ensued between the Parties regarding execution of the ERA. The said dispute reached the TIArb for determination whereupon the 2nd Respondent was appointed Sole Arbitrator. The Sole Arbitrator commenced the respective proceedings. However, on the 13th day of June 2022 the Petitioners raised a concern by way of a Notice of Objection against the on-going Arbitral proceedings.

The gist of the matter was that, there was a necessary step in the dispute resolution which was a requisite to the institution of the Arbitral Proceedings which was skipped, and, consequently, rendering the entire proceedings a nullity. When the Notice of Objection was served upon the 2nd Respondent (Sole Arbitrator), the Arbitrator proceeded to overrule it by her letter dated 15th June 2022. The Petitioners alleges that, the overruling of their objection was done without affording them right to be heard as there was no hearing conducted but, that, the 2nd Respondent only cited and relied on the documents submitted by the 1st Respondent, a fact which

raised concerns of impartiality on the part of the Petitioners. When the Petitioners sought for the recusal of the 2nd Respondent from the conduct of the matter on grounds of loss of confidence and impartiality, it is said that the latter refused to do so and proceeded to hear the matters despite several protests and objections from the Petitioners. At the end

of the day, the disagreements and discontents regarding the conduct of the Sole Arbitrator made the Petitioners to file this Petition before this Court on the 04th of August 2022, seeking for this Court's intervention.

On the 09th of August 2022, the 1st and 2nd Respondents filed their separate "Answers to the Petition". In her answer, apart from noting most of the averments in the Petition, the 1st Respondent stated that, the ERA was executed on the 8th February 2020 and an addendum was made on the 10th February 2020. Besides, the 1st Respondent averred that, the trigger of the dispute was the Petitioners' willful breach of the ERA as they had refused to pay invoiced amounts under the Interim Payment Certificate (IPC) No.9 and 10, on the account of another underlying dispute related to another contract (subcontract agreement).

It was as well the averments of the 1st Respondent that, from the initial stage the Petitioners have been frustrating the process by refusal to appoint a Sole Arbitrator pressing for selection of three arbitrators and, that, by raising the "Notice of Objection", the Petitioners were bent to sabotage the arbitral process given the fact that, the parties had agreed that the proceedings be by way of written representation.

In short, the 1st Respondent has denied that there was any breach of the principles of natural justice. As regards the 2nd Respondent's answer to the Petition, it was her averments that, the Petitioners and the 1st Respondent had willingly agreed to

submit to the TIArb for resolution of their dispute. She averred further that, the TIArb was justified to appoint a Sole Arbitrator as per the TIArb Rules, 2018 following failure on the part of the Petitioners and the 1st Respondent to agree on the applicable law and the use of the TIArb Rules Edition 2018.

The 2nd Respondent answer to the Petition was also to the effect that, her refusal to recuse herself from the conduct of the matter was justified and, that, the alleged loss of confidence on her matters based on imaginary and mere apprehension of fears of impartiality and biasness with no valid grounds.

On the 15th of August 2022, the learned counsel representing the parties appeared before this Court. The Petitioners were absent. However, the 1st Respondent enjoyed the services of Mr. Benedict Ishabakaki, learned advocate, while Mr. Haji Litete, learned Advocate as well, appeared for the 2nd Respondent. On the material date, it was agreed that, the hearing of the matter shall proceed by way of written submissions. A schedule of filing was issued and has been duly complied with by all parties.

Submitting in support of the Petition, and after setting a brief background to the dispute, Mr. Frank Kifunda, the learned Advocate appearing for the Petitioners, was of the view that, on the 13th June 2022, in the course of the arbitration proceedings steered by the 2nd Respondent, a notice of objection regarding the jurisdiction was issued.

In his submission, Mr. Kifunda contended that, the gist of the objection was that, a mandatory procedure of mediation by Management Committee between the parties, which was a strict requirement under the ERA (**Annex.J-3)**, was skipped and, that, the 2nd Respondent summarily dismissed the Petitioners' objection based on the 1st Respondent's Statement of the Case and without affording them right to be heard.

He referred to this Court the Notice of Objection raised (**Annex.J-4**) and the subsequent explanations thereto (**Annex.J-5**) arguing that, the illegality of the process itself was sufficient for the 2nd Respondent to have looked into the matter instead of summarily disregarding it.

Referring to **Annex.J-6**, Mr. Kifunda pointed out a further concern raised by Petitioners in the course of the arbitral proceeding regarding lack of impartiality on the part of the 2nd Respondent following her act of dismissing the Petitioners' objection on the basis of the statements submitted by the 1st Respondent without conferring the Petitioners the right to be heard and, further, her subsequent refusal to recuse herself from the conduct of the matter.

Besides, Mr. Kifunda further relied on the yet another concern which the Petitioners had raised before the 2nd Respondent (Sole Arbitrator) regarding the inability by the 1st Respondent to file witness statement as agreed by all parties (as per **Annex.J-7**) which fact as per the Petitioners' view, amounted to failure to prosecute, but the 2nd Respondent

merely disregarded and stated that an affidavit filed should instead be relied upon. On that fact, Mr. Kifunda was of the submission that, the parties' agreed procedure ought to have been adhered to unless a contrary modality is mutually agreed.

Mr. Kifunda submitted that, the prayer by the Petitioners is to have the 2nd Respondent removed from presiding over the matter since her conduct has raised justifiable doubts as to her impartiality as well as failure to properly conduct the proceedings, all of which flouts what section 37(1) (a) of the Arbitration Act, Cap.20 R.E 2020, provides. Relying on section 28(1) (a), (d) and (i) of the same Act, it was the submission of Mr. Kifunda that a party is allowed to apply to the Court for removal of the Arbitrator.

To justify his submissions regarding existence of justifiable doubts regarding impartiality of the 2nd Respondent, Mr. Kifunda relied on the concerns of impartiality raised at multiple instances in the course of the arbitral proceedings citing **Annexure J-6** to the Amended Petition as the evidence to be relied on. To amplify on the justifiable doubts regarding impartiality of the 2nd Respondent, it was Mr. Kifunda's submission that, the proposal by the 2nd Respondent that the 1st Respondent should consider calling additional witnesses to support her case, despite the 1st Respondent's insistence that she had only one witness, painted a picture of sympathy and concern over the 1st Respondent's case.

He contended that, had there been a need to do so, the same should be fronted by the 1st Respondent and not the Arbitrator who is required to be a neutral party and an umpire. To support that submission, reliance was made on the case of **Ally Abdallah Kavai vs. The Republic,** Crim. Appeal No. 159 of 2016 (unreported).

It was Mr. Kifunda's further submission that, the act of summarily overruling of the Petitioner's objection basing on a paragraph in the Statement of the Claim, instead of conferring the parties a right to be heard, and the Sole Arbitrator's further making of assumptions and conclusions on the matter based on the Statement of the Claim presented by the 1st Respondent, all such constituted proof of the alleged bias on the part of the Sole Arbitrator (the 2nd Respondent).

He contended that, in overruling the objection in favour of the 1st Respondent, the Arbitrator merely referred to an annexure from the 1st Respondent which had not even been tendered before the tribunal by a sworn witness, to wrongly overrule the objection by holding that the alleged Mandatory Mediation by Management Committee was conducted and the Committee was not even defined in the Agreement. He maintained a view that, the wrong conclusion was arrived at even without affording the parties right to address her, and, that, by mere reliance on the allegations contained in the Statement of Claim and conclude that the Management

Committee meetings were held, the Sole Arbitrator wrongly re-defined/re-wrote and misconceived the terms of the ERA.

As to the dangers of redefining the terms of the ERA, Mr. Kifunda relied on the English Case of **Arnold vs. Britton and Others** [2015] UKSC 35 which was relied upon by this Court in the case of **M/s Marine Services Co. Ltd vs. M/s Gas Entec Company Ltd,** Consolidated Misc. Commercial Cause No.25 and 11 of 2021. He maintained that, by defining the meaning of the word "Management Committee" using the reference of the 1st Respondent's Statement of Claim, the Sole Arbitrator was re-writing the ERA. He argued that, the Sole Arbitrator had departed from the fundamental doctrine of party autonomy.

Further still, Mr. Kifunda held a view that, the lack of impartiality was echoed by the act of the Sole Arbitrator (2nd Respondent) to disregard all witnesses and proceed with reliance on the documents presented alone, even after concerns were raised regarding the 1st Respondent's non-adherence to the agreed procedure of filing witness statement as per Annex.J-7.

He submitted that, even the proposed way forward was merely a means to accommodate mistakes already done as the Sole Arbitrator ought not to have taken her steps without mutual agreement of both parties. He contended that, there was no any minutes of the meetings that waived the instructions or directive that parties were to file witness statements which were to be used as evidence in chief.

To support his submission, reliance was placed on the decision of this Court in the case of **Kilimanjaro Oil Company Ltd vs. Tanzania Petroleum Development Corporation**, Misc. Commercial Cause No.25 of 2020 where this Court stated that:

> "… Arbitrator has no power apart from what the parties have given him under the arbitration agreement. If he has acted outside the bounds of the Agreement, he has acted without jurisdiction."

To further cement his submission on the point that the Sole Arbitrator has shown a biased posture against the Petitioners, Mr. Kifunda relied on the case of **Halliburton Company vs. Chubb Bermuda Insurance Ltd (formerly known as ACE Bermuda Insurance Ltd)** [2020] UKSC 48, and **Porter vs. Magill** [2001] UKHL 67; [2002] 2AC 357. As regard the concern that the 2nd Respondent failed to properly conduct the proceedings, Mr. Kifunda submitted that, the 2nd Respondent ought not to have merely overruled the objection in a hurried manner as she did without affording the parties their rightful audience.

To support his view, reliance was placed on the case of **Mrs. Fahiria Shanki vs. The Registered Trustees of the Khoja Shia Ithnasheri (MZA) Jamaat**, Civil Appeal No.143 of 2019 where the Court of Appeal was of a view that,

dismission of a preliminary objection on a "*mention*" date without hearing the parties was an illegality.

He also relied on the case of Abbas **Sherrally vs.Abdul Sultan Haji Mohamed Fazalboy,** Civil Appl.No.133 of 2002 (unreported) and **David Nzaligo vs. National Microfinance Bank Plc**, Civil Appeal No.61 of 2016 (unreported). He contended that, the 2nd Respondent's act of calling for a re-hearing of the objection through submissions was even adding salt to the injury.

In view of all such alleged anomalies, he urged this Court to make a finding that the 2nd Respondent not only lacked impartiality but also failed to adhere to the agreed procedures and should, thus, be removed from presiding over the matter which should be taken over by another Arbitrator.

In response to Mr. Kifunda's submission, Mr. Mlwale, the Learned Counsel for the 1st Respondent, was of the view that, the genesis of the dispute is the willful breach of the ERA by the Petitioners as they refused to honour Interim Certificates. He submitted that, at no point did the parties fail to agree on the Sole Arbitrator but rather it was the Petitioners who refused to select the Sole Arbitrator until when the 2nd Respondent was selected and the parties executed a tripartite agreement conferring jurisdiction on her.

Mr. Mlwale submitted that, the raising of a notice of objection was the intention of the Petitioners to frustrate the proceedings on the ground that the Tribunal lacked jurisdiction.

He contended that, the 2nd Respondent never undertook to summarily dismiss the objection but rather, she duly heard the objection twice, in written form and once orally in exercise of her powers under the doctrine of **Kopentenz-Kompetenz**.

He contended that, the purported objection was based on a groundless fact that, the arbitration was being undertaken in disregard of an amicable settlement resolution through a Management Committee. In his view, there is no an ounce of illegality in the process complained of, but rather, such are lies within the Petitioners who attempted to frustrate the proceedings in effort to waste time.

In his submission, Mr. Mlwale contended that, the 2nd Respondent never forced anything with regard to the 1st Respondent's addition of witnesses and heard the Petitioners objections on more than one occasion and made decisions thereon. He denied there being summary rejection of the objection as argued by Mr. Kifunda. He contended, that, the objection raised was argued on the basis of a document which was accepted as true by the Petitioners and whose authenticity was never contested.

In his submission, Mr. Mlwale maintained a view that, the 1st Respondent's Sole Witness's affidavit served as a Witness Statement for Cross-examination by the Petitioners. His view was premised on the fact that, the parties had earlier agreed that their arbitral proceedings were to proceed by way of

"written representation" and all evidences be attached to the written submissions, and then an award was to follow.

However, he contended that, the Petitioners sabotaged the proceedings by raising their complaint on the 29th of April 2022 (**as per Annex.B6-8 collectively**) about infringement of their right to be heard. Mr. Mlwale submitted that, to accommodate the Petitioners, the 2nd Respondent provided a draft schedule of events for an oral hearing. Even so, the 1st Respondent was concerned that, the earlier understanding between the parties was that the matter would be dealt with by way of written representations.

He submitted, however, that, nonetheless, the 2nd Respondent proceeded to call for a joint meeting to obtain a consensus as to the way forward regarding the issue of oral hearing. He contended that, the parties agreed on the issue and that, the 1st Respondent's witness who filed an affidavit was to be subjected to cross-examination and the Petitioners were allowed to file counter-affidavit which was to be subjected as well to a reply by the 1st Respondent.

Mr. Mlwale submitted that, although the Petitioners have indicated that they were to call 5 witnesses, the 1st Respondent affirmed to be calling only one witness whose testimony was to be on the basis of the affidavit and reply affidavit filed in response to the counter affidavit by the Petitioners with attached documents. It was also Mr. Mlwale's submission that, the 2nd Respondent had stated that, should the 1st Respondent

require to have additional number of witness (up to 5 as the Petitioner), that can only be possible by making a formal request and directed that witness statements be filed if there be such additional witnesses. He contended that; the Petitioners never filed the 5 witness statements but filed only one statement **(Annex-B-9)** which was a replicate of the counter-affidavit.

Mr. Mlwale submitted that, the 2nd Respondent proceeded to accord the parties right to present their arguments for and against the objection. Mr. Mlwale submitted that, the gist of the Petitioners' objection was the failure on the part of the 1st Respondent to file a witness statement under the Commercial Court Rules (as amended) as the applicable rules of procedure and that the failure amounted to inability to prosecute.

However, according to Mr. Mlwale, the parties had agreed to the applicable institutional rules and a party cannot just pick the rules of his choice that suits him and allege that the institution's rules were not being adhered to in the proceedings. He submitted that, even the failure on the part of the Petitioner to present the names of his five witnesses and their proceeding to submit on a single witness statement was in breach of the agreed procedure.

He contended, therefore, that, the 2nd Respondent acting under section 34 of the Arbitration Act and Rule 9 of the TIArb Rules 2018 prudently made a right decision that, the hearing

was to proceed as scheduled but the Petitioners persisted that it cannot in the absence of a witness statement by the 1st Respondent, and later demanding the recusal of the 2nd Respondent. He contended as well that, there was not any hint as to impartiality on the part of the 2nd Respondent or any disregard of the doctrine of party autonomy.

Mr. Mlwale argued that, at no time were the terms of the contract redefined by the 2nd Respondent and, for that matter, the case of **Arnod vs. Britton and Others** (supra) and **M/s Marine Services Co. Ltd** (supra) were in applicable. He likewise distinguished the case of **Wah (Aka Aan Tang) & Anor vs Grant** (supra) stating that, Clause 15.3 of the parties Agreement did not define what constitutes a Management Committee to undertake amicable settlement of the dispute.

In siding with the decision of this Court in the case of **Kilimanjaro Oil Company** (supra), Mr. Mlwale submitted that, indeed the arbitrator has not power apart from what the parties have given him. He distinguished all other cases relied upon by the Petitioners as being inapplicable to this matter. He contended, however, that, in this instant matter, the parties did give such powers to the 2nd Respondent and, that, their agreement stated clearly that the rights and obligations of the Arbitrator and the parties shall be set out in the TIArb Rules 2018, of which rule 9 deals with Jurisdiction and powers of the arbitrator.

Relying on the doctrine of *Kompetenz- Kompetenz*, it was Mr. Mlwale's submission that the 2nd Respondent had jurisdiction to determine all issues regarding her jurisdiction as per section 34 of the Arbitration Act and Regulation 28 (1) & (3) of the Arbitration (Rules of Procedure) Regulations 2021 and Rule 9.2.5 of the TIArb Rules 2018, read with Clause (iii) of the Agreement. With all such matters at hand, Mr. Mlwale urged this Court to decline to the prayers to have the Sole Arbitrator removed as there was nothing like bias, actual or apparent on her part.

For her part, the 2nd Respondent filed her submission as well. She submitted that, considering the entire submission of the Petitioners, nowhere has it been proved that the 2nd Respondent acted with bias or failed to properly conduct the proceedings. She submitted that, the parties had mutually and willingly submitted to TIArb and the applicable Rules were the TIArb Rules 2018. She contended that, the outcry which led to the application for her removal, was the fact that she had proposed the 1st Respondent be allowed to add witnesses to prove her case, a fact which was construed as painting a picture of sympathy and concern over her impartiality.

However, the 2nd Respondent was of the view that, the Petitioners' assertions were misconceived. She relied on Section 39(3) of the Arbitration Act, Cap.15 R.E 2020 as well as Rules 9.1, 9.3.10 and 10.1 of the TIArb Rules 2018 which give power over the Arbitrator to direct the procedure necessary for a just,

expeditious, economical and final determination of the matter before the tribunal. She submitted that, on the basis of the above, the 2nd Respondent's proposal that the 1st Respondent may be allowed to add witnesses to obtain further details, was not something done outside the powers of the arbitrator and neither can it constitute biasness.

As regards the ground that the 2nd Respondent was biased when summarily overruled the Petitioners' objection, she was of the view that, the parties were accorded hearing as demonstrated in their submissions that, the 2nd Respondent decided the objection basing on the paragraph in a statement of claim and the letter by the 2nd Respondent (**Annex.J5 to the Petition**).

She submitted further that, the 2nd Respondent had powers under Rules 12.1, 13.1.3 of the TIArb Rules 2018 to use documents submitted by the parties to determine the dispute. Relying on the case of **Mukisa Biscuits vs. West End Distributors Ltd** [1969] EA 696, the 2nd Respondent submitted that, a preliminary objection cannot be valid if it has to be ascertained or if what is sought is exercise of judicial discretion.

In her view, the decision made by the 2nd Respondent was based on the parties' pleadings and the need to uphold the spirit of just, expeditious, economical and final determination of the matter referred to her and in the exercise of her unfettered discretion. Besides, the 2nd Respondent denounced the submission that she re-defined or re-wrote the contract for the

parties arguing that, Rule 9.2 of the TIArb Rules 2018 gives an Arbitrator wide power to act over a matter before him/her.

As regards the issue of disqualification or recusal, the 2nd Respondent placed reliance on the case of **Issack Mwamasika and 2 Others vs. CRDB Bank Ltd**, Civil Appeal No.6 of 2016 and the case of **Dhirajlal Walji Ladwa and 2Others vs. Jistesh Jayantilal Ladwa and Another**, Commercial Cause No.2 of 2020, (unreported) as well as the case of **Laurean G. Rugaumukamu vs. IGP & Another,** Civil Appeal No.13 of 1999.

She submitted that, there must be a real likelihood of bias if a judge is to recuse himself/herself from the conduct of a matter and not otherwise. As such, she submitted that, the Petitioners grounds of bias were imaginary and unreasonable apprehension of fears, hence, not real. On that account, she urged this Court to decline from granting the prayers sought.

The Petitioners have made a very brief rejoinder submission. Theirs was a reiteration of what they stated in their earlier submission in chief, particularly emphasis on the case of **Ally Abdalah Kavai** (supra). They banked on that decision on the ground that the 2nd Respondent does not straight away deny the acts complained of but that, her defense is that she was justified. They submitted that, the incident of proposing additional witness was admitted by the 2nd Respondent as well.

The Petitioners rejoined that, even though the 1st Respondent did not add the number of witnesses as per the

directive of the 2nd Respondent, that did not do away the impression that the 2nd Respondent was attempting to aid the 1st Respondent's case. It was also the Petitioners' rejoinder that, the complained act of hurried dismissal of the objection on the basis of the pleaded fact only was as well not controverted by the 2nd Respondent in her submission.

In their view, a hurried justice is a buried justice and, the 2nd Respondent is bound at all times to observed the principles of natural justice even if she had discretion to enjoy. Consequently, the Petitioners have urged this Court to grant their prayers.

Having summarized the parties' submission, the issue which need to be addressed is whether the Petitioners are entitled to the reliefs sought in this Petition. I will respond to that issue by dealing with each relief which I consider to be the embodiment of the grounds as considered in their submissions which I have hereabove summarized. The first prayer is:

> 'That, the Presiding Arbitrator be removed for non-adherence to the basic rules of natural justice and improper conduct of Arbitral proceedings.'

Ordinarily, Courts do not enjoy the liberty of interfering with arbitral proceedings at will. It is only when there are circumstances of exceptional nature and/or of grave concern that a Court will be permitted to intervene. In the case of **Vodacom Tanzania Public Limited Company vs. Planet**

**Communications Ltd**, Civil Appeal No.43 of 2018, the Court of Appeal made reference to that fact, reproducing what this Court, Sahel, J (as she then was) stated in her judgement regarding Court's interference it was noted, that:

> "The interference of the court must be very minimal so as not to override a valid agreement to arbitrate. … "The power … should only be exercised in exceptional circumstances/ and with caution/ because of the acceptance of the principle that the tribunal should usually (but not always) be the first to determine its own jurisdiction. Even if an applicant establishes that one of its legal or equitable rights had been infringed or that the continuation of the arbitration was vexatious/ oppressive or unconscionable, this may not be sufficient."

Earlier, this Court allowed a temporary injunction to be granted in favor of the Petitioners pending the hearing of this Petition. This Court granted the Petitioners an injunctive order to maintain *status quo* given that, the concerns raised or complaints made before this Court were about the breach of principles of natural justice.

In my view, allegations regarding the breach of principles of natural justice are allegations of grave concern or exceptional

nature as they constitute an illegality. It is a rule, as once expressed by the Court of Appeal in the case of **Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 182, that, where an illegality is alleged, the Court must look at it and seek to have it investigated and rectified. In arbitration, one of the cardinal principles which arbitral tribunals should always seek to adhere to religiously is that which require them to act fairly and impartially. The law places this as a general duty upon the shoulders of the arbitrator. Section 37(1) (a) of the Arbitration Act, Cap.15 R.E 2020, is very much alive to that duty.

Essentially, the duty to act fairly is the first and foremost function of an arbitrator. This calls upon him/her to act in a fair and reasonable manner to both parties. In the course of the arbitration hearings, the arbitrator is not expected show or exhibit favour towards one party more than towards the other and must refrain from doing for one party which he cannot do for the other. Showing undue favours to one party at the cost of the other in matters handled by him/her would be looked upon with suspicion by the Courts.

That position is, indeed, not just held in respect of arbitral tribunals but applies to all adjudicative bodies, including Courts of law. Perhaps what the Court of Appeal stated in the case of **Ally Abdallah Kavai vs. The Republic,** Crim. Appeal No. 159 of 2016 (unreported) will illustrate that fact. In that case, Kimaro J.A (as she then was) held that:

> "It was wrong … the trial court is always neutral, and it has to retain its neutrality all the time. That remark was his sentiments and they impaired the principle of impartiality of the trial judge. The Judge should not at any time have any interest in the matters [he] preside[s] over. [His] role is to do justice to both sides. It is therefore important to retain impartiality from the start of the trial to the conclusion of the same."

When it comes to allegations of breach of natural justice by arbitral tribunals, it was the persuasive holding in the Indian case of **Sh. Balakrishna Pillai vs India Inforline Ltd** (on 29 August, 2012), that:

> "The position of the arbitration is like that of Ceaser's wife who should be above all suspicion. The Courts have continually held that rules of natural justice must be followed by the arbitrators including the principles incorporated in the maxim *audi alterem partem*. Ignorance of the rules of natural justice cannot be defended on the plea that the evidence was inconsequential or

had not affected the mind of the arbitrator or was of a trifling nature."

In the above cited Indian Case of **Sh.Balakrishna Pillai** (supra), the Court did as well make a statement which I find worth reproducing here. It was the view of the Court that:

"It is now well settled that; an arbitrator is not bound by the technical and strict rules of evidence which are founded on fundamental principles of justice and public policy. In proceedings of arbitration, there must be adherence to justice, equity, law and fair play in action. The proceedings must adhere to the principles of natural justice and must be in consonance with practice and procedure which will lead to proper resolution of dispute."

From the above understanding, however, the question that follows is whether the Sole Arbitrator in this particular Petition before me acted in breach of the principles of natural justice. The Petitioners allegations are based on the fact that, the overruling of their objection was done on the basis of documents submitted by the 1st Respondent without affording the Petitioners right to be orally heard as there was no hearing conducted.

Although the Petitioners' allegations seem to be admitted by the Respondents, the Respondents have shielded themselves by the fact that, the parties had earlier agreed to that the matter shall proceed by written representation and, as per the 2nd Respondent's response, the documentation relied on was an undisputed document, a paragraph in the statement of the claim.

It was also contended that, the decision of the 2nd Respondent to overrule the objection by mere looking at the parties' pleadings was meant to uphold the spirit of just, expeditious, economical and final determination of the matter referred to her and in the exercise of her unfettered discretion.

In my view, that cannot be a sound reasoning that would cloud a need to afford a party his or her right to explain or narrate his/her case where that necessity arises. In the Indian case of **Sh. Balakrishina Pillai** (supra), the Court was of the view, which I readily associate with, that:

> "The rule of natural justice requires that parties should be given an opportunity to be heard by the arbitrators, which means whatever material they want to place before the arbitrators should be allowed to be placed."

In **Abbas Sherally & Another v. Abdul S. H. M. Fazalbay,** Civil Application No. 33 of 2002 (unreported) it was held as follows, that: -

> "The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it all be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "

In my view, the right to be heard would as well include the right to be afforded an opportunity to orally expound one's case or one's point of law if that is necessary or where a party so requests. In this instant matter at hand, the Petitioners raised their point of objection but, much as it is said they were given audience, the fact, as readily admitted by the 2nd Respondent, is that, no such audience was not given but, rather, the 2nd Respondent proceeded by only looking at the pleadings or materials placed before the tribunal without much ado.

In my humble views, I do not think that the 2nd Respondent was right in her approach even if she was seeking to uphold the spirit of **just, expeditious, economical and final determination of the matter referred to her and in the exercise of her unfettered discretion**. While I agree

that, arbitral matters need to be heard expeditiously and with a sense of economy and while the arbitrator has right to exercise discretion, such cannot be done at the expense of the justice including natural justice. The determination cannot be just determination if the rules of natural justice are disregarded.

As it is common knowledge, the rules that embody the often called "rules of natural justice" are two: the rule against bias and the right to be heard. Perhaps I should borrow what Marks, J. stated in the Australian case of **Gas & Fuel Corporation of Victoria vs. Wood Hall Ltd & Leonard Pipeline Contractors Ltd** [1978] VR 385 at 396.

In that case, Marks J helpfully distilled the essence of the two pillars of natural justice in the following terms:

> "The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *the nemo judex in causa sua*. The second principle is that the parties must be given adequate notice and opportunity to be heard. This in turn is expressed in the familiar Latin maxim – *audi alteram partem*. In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications.

> One amplification of the first rule is that justice must not only be done but appear to be done; (Lord Hewart, C.J. in *R. v Sussex Justices; ex parte McCarthy*, [1924] 1 K.B. 256 at p 259; [1923] All E.R. Rep. 233). Sub-branches of the second principle are that **each party must be given a fair hearing and a fair opportunity to present its case**. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties." Emphasis added.

In the matter at hand, a decision to overrule the objection ought to have been reached after hearing the parties in full. Any haste approach to it would not be in consonance with what the rules of natural justice demands. As such the 2nd Respondent was in breach for not affording the Petitioners right to have time to be heard regarding the gist of their objection.

The second point was on whether the 2nd Respondent acted with bias when she proposed that the 1st Respondent should add more witness to her case. In his submissions Mr. Kifunda has contended that, by so doing, the 2nd Respondent was trying to salvage the 1st Respondent's case and, therefore, that conduct painted a picture of sympathy and concern over

the 1st Respondent's case and exhibited justifiable doubts regarding impartiality of the 2nd Respondent.

In my view, whether a party calls a witness or no witness at all is not the concern and should not be the concern of a Court or an arbitrator for that matter. The case belongs to the parties and not the Court or the arbitrator. The arbitrator is an adjudicator or an umpire and should not be seen to be siding with only one party or create such an impression. However, as I look at the submissions and the materials laid before me, I do not find that the suggestion given by the Sole Arbitrator was meant to favour the 1st Respondent since it was made in the course of deliberating the possible way forward for both parties. For such reasons, I am not in agreement with what Mr. Kifunda submitted since that alone did not exhibit a reasonable apprehension that there was real likelihood of bias.

Having stated what I have stated hereabove, should I make an order that the matter be heard de novo before a different Arbitrator? As pointed out in the case of **Abbas Sherally & Another** (supra):

> "That right is so basic that a decision which is arrived at in violation of it all be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "

A similar view was expressed by the Court of Appeal in the case of **Mbeya - Rukwa Auto Parts & Transport Limited v. Jestina Mwakyoma,** Civil Appeal No. 45 of 2000 (unreported) and in the case of **Hussen Khan Bhai vs. Kodi Ralph Siara**, Civil Revision No. 25 of 2014 (unreported). Since I have established that there was a breach of natural justice, it follows that, where there has been a violation of natural justice the right course is to order a hearing de novo before a different arbitrator, just as it was prayed by the Petitioners.

In the upshot of the foregoing discussions, this Court settles for the following orders:

1. That, since the 2nd Respondent overruled preliminary the objection raised by the Petitioners without affording them opportunity to be heard, there was indeed a breach of natural justice.
2. That, owing to the fact that there was breach of natural justice, the rightful course is to order a nullification of the proceedings, and this Court does hereby nullify the hearing proceedings, and order, that, same be commenced de novo

before a different arbitrator to be appointed by the TIArb.

3. That, in the circumstance of this matter, each party shall carry its own costs.

**It is so ordered.**

**DATED AT DAR-ES-SALAAM ON THIS 04TH DAY OF NOVEMBER 2022**


.....

DEO JOHN NANGELA

**JUDGE**