

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL APPLICATION NO. 44 OF 2022

GOLD AFRICA LIMITEDAPPLICANT

VERSUS

REEF GOLD LIMITED1ST RESPONDENT

EB-HANCE COMPANY LIMITED2ND RESPONDENT

MR. ELIAS RWEZAULA BULAYA3RD RESPONDENT

MR. GODFREY STEPHEN BITESIGIRWE.....4TH RESPONDENT

RULING

Date of last order:06/07/2022

Date of ruling:21/07/2023

AGATHO, J.:

This ruling was triggered by Preliminary Objections (POs) raised by the 2nd respondent against the petition. Upon being served with the applicant's petition the 2nd respondent filed a notice of POs and the answer to the petition. The POs are:

1. That this honourable court lacks jurisdiction to entertain and determine the petition.
2. That the petitioner's petition is res-sub judice with Miscellaneous Commercial Application No. 181 of 2021 and Miscellaneous Commercial Application No. 61 of 2022.

The petition was supported by the affidavit deposed by Abdiel Reginald Mengi. The 2nd respondent filed a counter affidavit sworn by Elias Rwezaula Bulaya.

The parties to the petition were represented by learned advocates. The petitioner enjoyed the services of learned counsel, Michael J.T. Ngalo. And while advocate Philemon Mutakyamirwa represented the 2nd respondent, advocate Desiderius Ndibalema represented the 1st, 3rd and 4th respondents. The hearing of the POs was conducted orally.

Turning to the points of preliminary objections (POs). I will not reproduce in verbatim the submission of learned counsel. But where necessary I will refer them. Indeed, the POs raised were two but I have noted that the counsel for the 2nd respondent abandoned the 2nd PO.

In the support of the 1st PO, Mr Mutakyamirwa, the counsel for the 2nd respondent submitted briefly that he does not have much to say rather than adopting his skeleton argument filed in court and the ruling of this court in Misc. Commercial Application No. 224 of 2022 between the same parties and the same facts. The ruling sustained the PO that the court lacks jurisdiction to entertain the any dispute arising from Joint Venture Agreement (JVA). He invited the court to adopt that ruling and strike out the application at hand with costs.

Mr Simon Lyimo, for the applicant, opposed the submission by the 2nd respondent's counsel. He submitted that besides adopting the skeleton argument filed in court by Michael Ngalo, counsel for the applicant he protested the suggestion that the court adopt its ruling in Misc. Commercial Application No. 224 of 2022.

He used the same ruling as a yard stick to make a reply before this court that the same should be disregarded since it is distinguishable from the current petition. According to him in Misc. Commercial Application No. 224 of 2022, there is one applicant Gold Africa Limited, and respondents are three who is EB – Hance Company Limited, Mr Elias Rwezaula Bulaya 2nd respondent and Mr Godfrey Stephen Bitesigirwe as the 3rd respondent while in Misc. Commercial Cause No. 44 of 2022 there is one applicant and four respondents (Reef Gold Limited, EB- Hance, Elias Rwezaula Bulaya, and Godfrey Stephen Bitesigirwe). Thus, declaring that the parties were the same is total misconception of facts.

Responding to another allegation that the issues were the same Mr Lyimo said that is also a misconception of facts. He pointed out that Misc. Application No 224 of 2022 was an application for temporary injunction. And as has been paged out at pages 2-3 of this court's ruling one can see that the prayers sought in that application and one sought in current miscellaneous cause are different. Therefore, one cannot say the issues

are same. He concluded his submission by praying that the ruling in the misc. commercial application No. 224 of 2022 be disregarded as it does not qualify enough to fit in the present petition.

Mr Mutakyamirwa for the 2nd respondent, rejoined that the essence of Misc. Commercial Application No. 224 of 2022 and Misc. Commercial Cause No. 44 of 2022 at page 5 of the court's ruling there are quotation which quoted:

"There is no dispute that application at hand emanates from Misc. Commercial Cause No.44 of 2022 a petition for unfair prejudice. Its genesis is the joint venture agreement between Gold Africa Limited and EB-Hance Company Limited to form a company called Reef Gold Limited, hereinafter referred as JV Company."

In his view the above paragraph clearly answers the parties to the case, facts of the case and issues and where the dispute arises. Therefore, in the views of Mr Mutakyamirwa's it cannot be distinguished from Misc. Commercial Cause No. 44 of 2022. In that regards he concluded that the court has no jurisdiction to entertain this petition.

But before advancing further in determining the PO at hand, it is imperative to state that the PO on jurisdiction was also raised in the Misc. Commercial Application No. 224 of 2022. The latter application emanated from this petition. Since in that Misc. Commercial Application the court ruled that it has no jurisdiction to entertain a matter due to the arbitration clause found in the Joint Venture Agreement (JVA) and considering that the petition is essentially dealing with issues central to the said JVA the arbitration ought to have been the correct route for the parties before coming to this court. It is undisputed that both Misc. Commercial Application No. 224 of 2022 and the present petition are about the JVA issues. Therefore, if the court had no jurisdiction in the Misc. Commercial Application No. 224 of 2022 it goes without saying that it will not have jurisdiction in this petition from which the application originated.

But for sake of clarity, this court will restate what it held in the Misc. Commercial Application No. 224 of 2022. Like in that application in the present petition the PO to be determined is that the court lacks jurisdiction. Truly, jurisdiction is a creature of law. It was held in **Leonard Raphael and Another v R, Criminal Appeal No. 4 of 1992 CAT** (unreported), and in **Makwizu Msuko and Others v R, Criminal Appeal No, 326 of 2007 CAT** (unreported) that a court entertaining a matter without jurisdiction its proceedings and decision become nullity.

There is no dispute the petition at hand is for unfair prejudice. Its genesis is the Joint Venture Agreement (referred to clause 7 of the petition and annexure GAL – 1 to the same petition) between Gold Africa Limited (the petitioner) and EB-Hance Company Limited (the 2nd respondent) to form a joint venture company (JVC) called Reef Gold Limited herein referred as a JV Company. The latter is the 1st Respondent in the petition. Paragraph 11 of the petition referred also to an annexure GAL – 3 Shareholders' Agreement between the applicant and the 2nd respondent. As per clause 17 of the JVA, the JV company had two directors, namely, the late Dr Reginald Abraham Mengi and Mr Elias Bulaya. This is confirmed by the affidavit of Abdiel Reginald Mengi in support of the petition. It states as follows:

"That immediately after its incorporation and as up to 2018 or 2019 the directors of the JV Company were the late Dr Reginald Abraham Mengi and Mr Bulaya."

It is stated in paragraph 25 of the petition that the petitioner appointed Abdiel Reginald Mengi and Benjamin Mengi to be directors of the JV Company. However, the exact date of their appointed as directors is not mentioned. It is equally unclear whether Mr. Bulaya is still a director, or he has ceased to be a director of the JV Company. Nevertheless, be as

it may the petition does not say if Mr Bulaya is not a director of the JV Company. Paragraph 27 of petition alleges that the 2nd and 3rd respondents objected the directorship of Abdiel Mengi and Benjamin Mengi in the JV Company.

Undisputedly, the 2nd respondent is privy to the JVA because the said agreement is between the petitioner and the 2nd respondent. But a key issue for determination is that of jurisdiction, whether this court can entertain the petition at hand. Since the JVA is central to the petition as held in Misc. Commercial Application No. 224 where the court glanced at the said JVA which was annexed as TAB-3 to the affidavit of Abdiel Reginald Mengi, and here in the case at hand annexed as GAL – 1 to the petition. The court perused the annexure GAL – 1, the JVA, which on its clause 14, and clause 12 of annexure GAL – 3, the Shareholders' Agreement between Gold Africa Limited and EB-Hance Company Limited clearly provides for Arbitration. To appreciate the JVA's clause, it is reproduced here:

“In the event of any dispute occurring between the parties arising out of the terms of this Agreement or its interpretation, which cannot be resolved by negotiation, the parties shall submit such dispute for resolution by a

single arbitrator under the rules of the International Court of Arbitration of the International Chamber of Commerce or such other non-judicial dispute resolution procedure as may be mutually agreed, and the decision of such arbitrator shall be final and binding upon both parties, not subject to appeal to courts or any other tribunal. Such arbitration shall be conducted in Paris, or such other venue as agreed by the Parties, applying the laws of England as to contracts except where the subject matter of the dispute clearly dictates the applicability of Tanzanian laws."

The parties' intention is clear. They wanted in case a dispute arises it should be resolved through arbitration.

It is in lieu of the foregoing that I find this court lacking jurisdiction to hear and determine the application at hand. As per **Simon Kichele Chacha v. Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT at Mwanza**, the court is bound to respect sanctity of contract. In absence of proof of any vitiating factor(s) inducing consent of a party, the court should not interfere with what the parties have agreed upon in the contract. The best it can do is to enforce the parties' contract. Since the JVA is the agreement between the petitioner and the 2nd respondent and

provided it contains arbitration clause, and because there is no evidence that arbitration was done, this court is bound to respect and enforce what the parties agreed in the JVA.

Therefore, the first PO is sustained. This court indeed lacks jurisdiction to entertain the present petition. The parties ought to submit themselves to arbitration as per clause 14 of the JVA.

Since the first PO has been sustained, the petition is struck out for want of jurisdiction. The 2nd respondent shall have her costs.

It is so ordered.

DATED at DAR ES SALAAM this 21st Day of July 2023.



U. J. AGATHO

JUDGE

21/07/2023

Date: 21/07/2023

Coram: Hon. U.J. Agatho J

For Applicant: Xavier Maleko (legal officer of the petitioner)

For 1st, 3rd and 4th Respondents: Philemon Mutakywamirwa holding brief of Desidery Ndibalema, Advocate.

For 2nd Respondents: Philemon Mutakyamirwa, Advocate

C/Clerk: Beatrice

Court: Ruling delivered today, this 21st July 2023 in the presence of Xavier Maleko (legal officer of the petitioner), Philemon Mutakyamirwa, learned counsel for the 2nd Respondent also holding brief of Advocate Desiderius Ndibalema for the 1st, 3rd and 4th Respondents.



U. J. AGATHO

JUDGE

21/07/2023