

TANZANIA / JUDGMENT

20110906 TZHC Dar es Salaam

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TZHCDECIDED
6 September 2011

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_IN THE HI-GH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM MISC. CIVIL APPLICATION NO 8 OF 2011 IN THE MATTER OF ARBITRATION ACT, CAP 15-R.E 2002 AND In the matter of an application for registration of Arbitral Award No. 15947 /VRO (The" ICC Award") AND In the matter of an Intended Petition to Challenge the Registration of the "ICC Award" granted by the ICC International Court of Arbitration. BETWEEN LEGAL AND HUMAN RIGHTS CENTRE (LHRC) 1 sr PETITIONER/INTERESTED PARTY LAWYERS ENVIRONMENT ACTION TEAM (LEAT) ... 2ND PETITIONER/INTERESTED PARTY SIKIKA COMPANY UMITEE (SCL) 3RD PETITIONER/INTERESTED PARTY TIMOTHY ALVIN KAHOHU 4TH PETITIONER/INTERESTED PARTY AND DOWANS TANZANIA LIMITED (TANZANIA) 1ST RESPONDENT DOWANS HOLDINGS SA (COSTA RICA) 2ND RESPONDENT TANZANIA ELECTRIC SUPPLY LIMITED JRD RESPONDENT Date of Last Orders 27 /07/2011 Date of Final Submissions 10/08/2011 Date of Ruling 06/09/2011 RULING ON PRELIMINARY OBJECTIONS 1 ,, Mushi, J.. This is a ruling in respect of preliminary objections on points of law raised by the 1st and 2nd and 3rd Respondents against the four Petitioners/Interested parties. For the purposes of this ruling, the salient facts which constitute the background to these preliminary objections may be as briefly and simply stated as follow: The RICHMOND/DOWANS/TANESCO saga, began in June, 2006, when the country was faced with a serious crisis in electricity supply, due to shortage of rains, which depleted the water in the reservoir dams, hence, leading to the curtailment of electricity supply (Since the Country is still wholly dependant on hydroelectric power supply). It was decided, therefore, that this emergency should be remedied by the purchase of temporary power to help Tanzania Electric Supply Company (TANESCO) maintain a sufficient supply of power for the country's national grid. TANESCO (3 rd Respondent), which is a public corporation, wholly owned by the Government of the United Republic of Tanzania, is responsible for the generation, supply, and distribution of electricity through the 2 . grid to the country. The Government of Tanzania (GOT) instructed TANESCO to initiate and implement the necessary measures for the purchase of the temporary power. International bidders were asked to submit offers to meet this emergency. Out of the bidders, a company known as RICHMOND DEVELOPMENT COMPANY LLC (REDVO), won the tender. On 23 rd of June, 2006 a Power - Off Take Agreement (POA), was entered into between TANESCO and the said RDEVCO, whereby RDEVCO was required, by the said contract, to construct, install, commission and operate a gas based electricity generating plant for a period of

24 months. In brief, the RDEVCO was required to supply generators to provide 100 Megawatts of Electricity, at a cost of Tshs. 172 billion, for a period of 24 months. According to the POA {The Agreement}, the Richmond Development Company was required to start generating electricity within a period of 150 days, from the date of signing the said Agreement. Incidentally, up to and until December 2006, the said RDEVCO had failed to fulfill their part of the Agreement, despite the fact that TANESCO fulfilled its part of the Agreement. What happened is that the generators that 3 were to be supplied and installed by the RDEVCO failed to arrive on time, and when they did, they did not work as required. The hard and bitter facts are that RDEVCO had neither significant assets or employees, or previous experience required to perform the POA, nor monies with which to purchase the required plant. Thus, unable to perform the POA, RDEVCO {unaware of TANESCO}, On 14th October, 2006, entered into a secret assignment of its contractual rights and obligations to a company known as DOWANS HOLDINGS SA {COSTA RICA}. On 4th December, 2006, the said Dowans Holdings SA {Costa Rica}, wrote to TANESCO, seeking for the retrospective consent of the Agreement. Initially, the request was categorically rejected by TANESCO. However, later on TANESCO gave in, and consented the assignment, on the 9th of December, 2006, in terms of clause 15.2 of the POA. Subsequently, DOWANS Holdings SA (Costa Rica), assigned the POA to DOWANS TANZANIA LTD. On 23rd of December, 2006, the transfer of the POA was completed when the DOWANS TANZANIA Ltd and TANESCO signed an Indemnification Agreement. In brief, from the 22nd of December, 2006, The DOWANS TANZANIA Ltd took over the rights and obligations of the RDEVCO, under the POA. The DOWANS Tanzania Ltd (2nd Respondent), successfully began operating the plant from 23rd January, 2007, and continued to do so for approximately 18 months, until when it was informed by TANESCO, on 30th June, 2008, that the Agreement (POA) was void ab initio (null and void), --

- and TANESCO expressed its intention to terminate the POA, and accordingly, DOWANS Tanzania Ltd was told that the plant should be de-commissioned by 1st August, 2008. The events leading to the de-commissioning of the plant and the subsequent termination of the POA were initiated by the allegations made by some Members of the Parliament of the United Republic of Tanzania, backed with the loud outcries and Public demonstrations from the Human Rights Activists (including the Petitioners/Interested parties), who claimed that the POA was improperly obtained, thus, the Agreement should be determined. Eventually, giving in to these political demands, in November, 2007, a Parliamentary Select Committee was formed in order to investigate the matters relating to and incidental to the POA between TANESCO and the said Richmond Development Company. The Parliamentary select committee, amongst its several findings, recommended that TANESCO should terminate the Contract between TANESCO and The DOWANS, on the grounds that the POA was illegally obtained. TANESCO sought to have a second and independent legal opinion before taking any action following the recommendation by the Parliamentary select Committee. Therefore, on 8th May, 2008, TANESCO engaged the legal services of one of the highly reputable law firm in the country. On 26th May, 2008, the said Law firm Submitted its legal opinion to TANESCO, which, surprisingly, agreed with the recommendation of the Parliamentary select Committee, in that, the law firm found that the POA was illegal and

therefore, not enforceable under the laws of Tanzania, and subsequently the said law firm was of the opinion that the electricity plant should be de-commissioned for lack of a valid and lawful contract between TANESCO and the DOWANS. Thus, following the said legal opinion and advice, on 30th June, 2008, TANESCO informed the DOWANS that the plant should be de-commissioned, as from the 1st of August, 2008. Following the decision reached by TANESCO, the DOWANS wrote a letter to TANESCO, alleging material breach of the POA, and indicated its desire to challenge the termination of the same. Hence, on 14th November, 2008, the DOWANS filed a request for arbitration against TANESCO before the International Chamber of Commerce (the ICC), in accordance with the relevant provisions of the POA, whereby the Parties had agreed to refer any dispute that might arise between them to the ICC. The POA contains, (at clause 14.2,) a provision for settlement of Disputes, in the following terms:- Arbitration. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof shall be finally settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (The "ICC Rules"). It is further stipulated that:- a) The arbitration shall be conducted in Dar es salaam .. 7

- b) The arbitration agreement in this section shall be governed and construed in accordance with the Laws of Tanzania.
- c)
- d)
- e) The decision of the arbitrators shall be final and binding upon the Parties, and shall not be subject to appeal. Either party may petition to enter judgment upon the arbitration award. At the request of either of the parties, the arbitrator shall cause such arbitration award to be filed with the High Court of Tanzania.
- f) The parties waive any right to challenge or contest the validity or enforceability of this arbitration agreement or any arbitration proceeding or award brought in 8 --=,---,,-----=-- .. conformity with this section, including any objection based . on venue or inconvenient forum. Having submitted a request for arbitration to the ICC, the arbitration proceedings commenced on 20th of November, 2008. Both parties were duly represented by counsels of their choice. The COWANS claimed before the ICC Arbitral Tribunal that, there existed a disput~. between - - - - -
- - - - - . - TANESCO and the COWANS, arising out of the de-commissioning of the Plant in the midst of the Contract term. Hence, The COWANS sought reliefs, including the following:-
- 1. Past unpaid payments for power generated for the period between January, 2007 to 11th August, 2008.
- 11. Payments for the balance of the POA's terms,

111. Damages for wrongful termination of the POA for a period of 24 months; 1v. And other special damages by reason of the wrongful termination of the POA for the loss suffered; and
- v. Of course, the costs. 9 . On 15th of November,-- 2010, The ICC - Arbitral Tribunal delivered its final award. However, on 13th December, 2010 the Arbitral Tribunal made an Addendum to the Award. In brief, the ICC found, amongst other things, that TANESCO was in breach in of the Power off Take Agreement (POA), and further held that The DOWANS (1st and 2nd Respondents), were entitled to damages to the tune of US Dollars 65, 812,630.22, resulting from the said_ unilateral termination of the power generation contract. On 6th of January, 2011, one Ms Victoria Orlowski, counsel for the Secretariat of the ICC International Court of Arbitration, informed the Registrar of the High Court (vide letter Ref. No. 15947 /VRO), that parties to the Arbitration have requested that the Arbitral Tribunal cause the Final Award to be filed with the High Court of Tanzania pursuant to sect 12 of the Arbitration Act (Cap 15 RE 2002). Accordingly, the originals of the Final Award (dated 15th of November, 2010) and the Addendum to the Final Award (dated 13th of December, 2010) were duly sent to the Registrar, High Court, Dar es salaam. On 24 th of January, 2011, one Mr. K.M. Fungamtama, Esquire (vide his letter, Ref. KMF/Dowans/1 /11), informed the 10 Registrar, High court, that he was acting for the DOWANS-, and that upon their instructions, he was requesting for the Registration of the ICC'S Final Award. Thus, a Misc Civil Application, No. 08/2011, was duly filed for this matter, in order to obtain a decree, in terms of sect 17 of the Arbitration Act, for the purposes of the execution of the Final Award. The filling of the application attract~_d ___ sever:aL • ... Petitioners· -seeking to block both the said registration and the subsequent payment of the damages awarded by the ICC's Final Award. At least five petitioners, including TAN ESCO (3 rd Respondent), filed petitions seeking to challenge the validity of the ICC's Final Award, therefore, praying this court for an order for setting aside, and/ or remitting the same to the Arbitrators for re-consideration, in terms of sect 15 and 16 of the Arbitration Act (Cap 15 R.E 2002}. The first three (3) Petitioners/Interested parties in this application, include the so-called Human Rights Activists (popularly known in Kiswahili as - WANA HARAKAT!), including - The Legal and Human Rights Centre {LHRC). The Lawyers Environmental Action Team (LEAT). The Sikika 11 Company (SC)~ these being the 1st and the 2nd and the 3rd Petitioner/Interested Parties, respectively. The 4th Petitioner/Interested party is an individual, by the name of TIMONTHY AL VIN KAHOHOO {who prefers to be referred to as - "an enlightened Citizen of Tanzania" The first three Petitioners/Interested parties have filed a joint petition, however, supported by the affidavits of their respective Executive Directors. One Francis Kiliani Kiwanga, has sworn an affidavit on behalf of the 1st Petitioner/Interested Party. At para. 1 of the affidavit it is stated that, he, Mr. Kiwanga, is the Executive Director of the said LRHC. At para 2 of the affidavit, Mr. Kiwanga states that the LRHC is a body corporate and a civil society organization registered under the law of Tanzania, its mission being the promotion and protection of Human Rights and Good Governance in Tanzania. Thus, at para 3 of the affidavit, Mr. Kiwanga states that, the 1st Petitioner/Interested Party, on behalf of its members, beneficiaries and members of the Public at large, are not satisfied with the ICC's Final Award which imposes liability to the 3rd

Respondent to pay The DOWANS the amount of US\$ 123,223,270.98. 12 Mr. Emmanuel Siniforian Massawe, took up the affidavit on behalf of the 2nd Petitioner/Interested Party. Mr. Massawe states at para 1 of the Affidavit that he is the Executive Director of the LEAT. At para 2 of the Affidavit, Mr. Massawe deposes that the LEAT is a body corporate and a civil society organization, registered under laws of Tanzania, its mission being the promotion and protection of Socio - economic rights and good-governance in Tanzania. And like the 1st Petitioner/Interested Party, Mr. Massawe states at para 3, on behalf of its members, beneficiaries and the Public at large, are not satisfied with the ICC's Final Award. The Executive Director for the 3rd Petitioner/Interested Party, one Mr. Irerei Boniphace Kiria, states at para 2 of the Affidavit that the Sikika Company Limited (SCL), is a body corporate and a Civil Society organization registered under the laws of Tanzania, its mission being the promotion and protection of the Socio - economic rights and good governance in Tanzania. Mr. Kiria, joined issues with the other Interested Parties, that on behalf of its members, beneficiaries and members of the Public at large are not satisfied with the Final Award issued by the ICC's in favour of The DOWANS. 13 · The Joint Petition, by the 1st and 2nd and 3rd ' Petitioner/Interested Parties, was made under the provisions of the sect. 16 and 30 (I) (e) of the Arbitration Act (Cap 15 R.E. 2002), and Section 95, 75 (2) and order XXI, R. 57 and R. 58, and Rule 14 (c) 2nd Schedule of the Civil Procedure (Cap 33 R.E 2002), and sect. 2 (3) the Judicature and Application of Laws Act (Cap 358 RE 2002), and Article 27 (I) and (2) of the Constitution of the United Republic of Tanzania (Cap 2 R.E 2002), and all other enabling provisions of the laws. At para 5 of their joint Petition, the 1st and 2nd and 3rd Petitioners/ Interested Parties contend that they, being Interested Parties, on their own behalf and on behalf of their members, beneficiaries and members of the Public at large, are not satisfied with ICC's Final Award, which has imposed liability on the 3rd Respondent (TAN ESCO) to pay the 1st and 2nd Respondents (the DOWANS) damages to the amount of US Dollars 123,223,270.98, on the following grounds:-

- 6) That, TANESCO, being a public corporation and wholly owned by the peoples' Government of Tanzania (GOT), is run by monies (funds) generated from its services and partly from Tanzania Tax payers. 14
- 7) that, there is- no legally binding contract between the DOWANS and TANESCO that could result a dispute at the ICC and consequently the Final Award to be registered by the High Court.
- 8) that, under the governing Laws of Tanzania, both the contract and the Arbitral award are void, as they are tainted with illegalities.
- 9) ·..... that, under the Laws of Tanzania, Richmond Development Company LLC had no legal capacity to enter into a Power off-Take Agreement (POA) with the Government of Tanzania or by TANESCO on its behalf that can be enforced.

- 10) ... that, in the absence of a valid contract between Richmond Development Company LLC, and TANESCO, the purported assignment to the COWANS, which brought about the Final Award was, therefore, Void ab initio, and cannot be adopted or enforced as a decree of the High Court.
- 11) that, the purported agreement between Richmond Development Company LLC and TANESCO lacks the consent of the latter. 15
- 12) that, the application for registration of the ICC's Final Award should not be granted because it emanated from an invalid and void contract between the Richmond Development Company LLC, and the 3rd Respondent (TANESCO), as it was improperly procured, hence illegal and against public policy. The Joint Petition by the 1st, 2nd and the 3rd Petitioners/ Interested Parties, was drawn and filed gratis by Dr. Mvungi, of the South Law Chambers (Advocates). The 4th Petitioner/Interested Party, is an individual, one TIMONTHY ALVIN KAHOHU. According to his Petition and the contents of his affidavit in support of his Petition, Mr. Kahohu States that, he is a Tanzania, and a long and experienced journalist since 1996, petitioning as an interested party, against the application made by the DOWANS, for the registration of the ICC's Final Award, which compel TANESCO to pay the DOWANS the amount of sum stated therein, by way of Damages for the termination of the contract between the DOWANS and TANESCO. Mr. KAHOHU's Petition is made under the provisions of law, more or less similar to those made by the Joint Petition, by the 1st and 2nd and the 3rd Petitioners/Interested Parties. Like the three Petitioners, Mr. KAHOHU has prayed this court for reliefs, including the following:-
 1. That the court should not register the ICC's Final Award, dated 15th of November, 2010, in case No. ICC 15947 /VRO,
 2. That this court should declare that the ICC's Final Award, No. 15947 /VRO, was improperly procured, Responding to the Petitions by the 1st, 2nd, 3rd and 4th, the Respondents raised several preliminary objections on points of law. Firstly, Replying the Joint Petition by the 1st and 2nd and 3rd Petitioner/Interested parties, Mr. K. N. Fungamamtana, learned Attorney, on behalf of the DOWANS, raised four (4) grounds of Preliminary objections, including the following:-
 1. That, the Petitioners have no locus standi to issue and serve the joint petitioners;
 2. That, the joint Petition has been filed without adopting the procedure for the institution of proceedings in a representative capacity; that the Joint Petition is based in law for non-compliance with the mandatory requirements prescribed by Rule 8 of the Arbitration Rules (Cap 15 Subsidiary Legislation, R.E 2002); and 1v. That, the 2nd Respondent is improperly joined. Mr. Fungamamtana, on behalf of the 1st and 2nd Respondents, also raised two preliminary objections on points of law against the Petition filed by Mr. KAHOHU (The 4th Petitioner/Interested Party, which include the following:-
 1. That the Petitioner has no locus standi to issue and serve the Petition,

11. That the Petition is bad in law for non-compliance with the mandatory requirements provided by Rule 8 of the Arbitration Rules (Cap 15, Subsidiary Legislation, R.E 2002). Accordingly, Mr. Fungamtama prayed this court the following reliefs, namely:-
 - a) To Dismiss /struck out the Petitions by the 1st , 2nd, 3rd and 4th Petitioners/Interested Parties in their entity;
 - b) The name of the 2nd Respondent be strike out (in respect of the Joint Petition), and 18 -c)- Cos-ts--o-f--ond-ineieen-t-al to thepr:eeeeEiings; The 3rd Respondent (TANESCO}, was represented by the Rex Attorneys. Replying to the joint petition filed by the 1st and 2nd and 3rd Petitioners/Interested Parties, the 3rd Respondent likewise raised two grounds of preliminary objections, namely:-
 1. That the Petitioners have no cause of action/locus standi against the 3rd Respondent and that
11. In the alternative, the 3rd Respondent was wrongly joined in the Petition. The 3rd Respondent, raised similar grounds of preliminary objections in respect to the Petition filed by the 4th Petition/Interested Party (Mr. KAHOH}. Accordingly, counsel for the 3 rd Respondent prayed the court that the Petition against the 3rd Respondent be struck out/or the name of the 3rd Respondent be struck out and of the. Petition, with costs. The preliminary objections were argued by way of written submissions. A scheduling order for the filling of the written submissions by counsels was made and agreed upon. Learned counsels endeavored to comply with the schedule, except Dr. Mvungi, who represented the 1st and 19 • 2 nd and- 3rd Petitionersflnt-eres-ted Parties. Upon Dr. Mvungi's. plea for an apology (which was granted), the court had to extend to Mr. Fungamtama an extra period of time for filling his rejoinder to Dr Mvungi's submissions. A look at the preliminary objection raised by Respondents, it is quite obvious that some of them apply to both petitions. Take, for instance, the objection that the Petitioners/Interested Parties have no locos standi, or have no cause of action raised by the Respondents. These objections feature in both Petitions. It is my decided opinion that, this particular preliminary objection, is the central one for the disposal of these preliminary objections proceedings. That being the case, therefore, I will discuss it first. Submitting on this ground of objections, MR. Fungamtama briefly argued that the four Petitioners or Interested parties were • not parties to the arbitration agreement between the 1st Respondent and the 3rd Respondent, nor the arbitration itself. Mr. Fungamtama further argued that the Arbitration Act contemplates that only the parties to an arbitration agreement and the subsequent award may approach the court for relief arising out of any given arbitration pursuant to the Arbitration Act. 20 M-R; FuFlgeimtorno insisted that- the Arbitration- -Act--does not anticipate or allow for any third party or a stranger to intervene for the purpose of obtaining any relief. Mr. Fungamtama further argued that, it was incumbent upon the Petitioners/Interested Parties to show how the ICC's Final Award interferes with their rights. Mr. Fungamtama concluded his argument submitting that, since the Petitioners were not parties to the arbitration agreement and the arbitration itself, the right to challenge the ICC's Final Award within the narrow ambit of

Sect. 15 of the Arbitration Act, is not available to them simply for lack of privity of contract. Counsel for the 3rd Respondent (TANESCO), made more or less similar submission, on the same ground of objections, in respect to the 4th Petition by Mr. Kahoho. The Counsel submitted that the Petition against TANESCO is bad in law for want of cause of action and misjoinder of parties. He further submitted that the 4th Petitioner/Interested Party, has not asserted any right to take action he has taken against the 3rd Respondent, neither has he stated in his petition whether the 3rd Respondent is a necessary or proper party to the Petition for the reliefs sought. The learned counsel 21 insisted that the 4th Petitioner/Interested Party -s. imfdly. lacks the locus standi to institute the Petition against the 3rd Respondent. Both Counsels for the Respondents heavily relied upon the decision in the case of LUJUNA SHUBI BALLONZI (Senior) Vs. REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI (1996) T.L.R. 203, for the necessity of showing in the pleadings facts which give a party (person) the right to bring a matter before the court of law. In this decision, Samatta, JK (as he was then), eloquently made the following observations (at page 208):- " In this Country, "locus standi" is governed by the Common Law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court courts do not have power to determine issues of general interest.... They can only accord protection to interests which are regarded as being entitled to legal recognition to maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference with or deprivation of, a right or interest which the law takes cognizance of... since courts will protect only enforceable interests, nebulous or shadowy interests do not suffice for the purpose of suing or making an application ... "(emphasis added) Having made that submission, both counsels for the Respondents, prayed the court to dismiss/struck out the two 23 ' ... Petitions, on grounds -that the Petitioners/Interested Parties-, being strangers to the arbitration proceedings, have failed to establish that they are entitled to bring their Petitions before the court for non-disclosure of a cause of action/locus standi. In response to the submissions made by counsels for the Respondents, in a summary, Dr. Mvungi, (and to some extent, the 4th Petitioners/Interested Party, Mr. Kahoho), submitted as follows: First, both Dr. Mvungi and Mr. Kahoho. conceded the fact that, the Petitioners/Interested Parties were not parties to the Arbitration Agreement between the DOWANS Tanzania Ltd and TANESCO, nor, indeed, the arbitration itself. However, Dr. Mvungi and Mr. Kahoho contended that the Petitioner/Interested Parties have a locus standi pursuant to the provisions of sect. 30 (1) (e) of the Arbitration Act and Order XXI, Rule 57 of the Civil Procedure Code. The argument is that, the referred provisions of the Arbitration Act and the Civil Procedure Code, do anticipate a 3rd party who was not a party to a suit or to arbitration proceedings. For the convenience of these objections, the provisions of Order XXI Rule 57 provide as follows:- 24 " (JJ---- where -any- -e-laim- -is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector and in all other respects, as if he was

a party to the suit, provided " Dr. Mvungi maintained that there is always an interest implied in the 3rd party who is the tax payer/consumer; hence, a "locus standi" is inherited in every tax payer /consumer. Dr. Mvungi argued that, the Government, and for that matter, TANESCO access funds through taxes and electricity premium paid by the citizens of Tanzania. Dr. Mvungi submitted that, on submitting that, anything that will impose a liability upon the Government and/or TANESCO, touches upon the interests of a citizen, and for that matter the Petitioners. He further insisted that TANESCO, being a statutory corporation and not a private company, has a duty to abide by the interests and rights of the peoples of Tanzania. Both Dr. Mvungi and Mr. Kahoho further asserted that the "orthodox common law" position regarding locus standi, has long since changed. Dr. Mvungi and Mr. Kahoho, in support to this view, have relied upon the decision in the famous case of Rev. Mtikila Vs. Attorney General (1995) T.L.R (HC), whereby the late Lugakingira, J. stated, inter alia, that:- " .. the orthodox common Law position regarding "locus standi" no longer holds good in the context of constitutional litigation in that the notion of sufficient personal interest over and above the interest of the general public interest has more to do with private law rather than public law; in the matter of public interest litigation the courts will not deny standing to genuine "bona fide" litigant even where he has no personal interest in the matter; In the circumstance of Tanzania, if a public spirited individual springs up in search of the court's intervention against litigation or actions that pervert the constitution, the courts, as guardian and trustee of the constitution, must grant him a standing; The principles of public interest litigation are expressed in the constitution of Tanzania by vesting in every person the capacity of an individual by virtue of Articles 1-2---to 24 of the constitution, and the capacity of a member of the community by virtue of Article 25 of the Constitution, thereby equipping the individual with double standing to sue." Still submitting on the issues of locus standi/cause of action, Dr. Mvungi maintained that the matter at hand is not a constitutional litigation, but rather, it is a public interest litigation. That being the position, therefore, insisted Dr. Mvungi, Locus Standi is available to every member of the Public, including the Petitioners, who are Citizens of this country. Dr. Mvungi further claimed that the Petitioners are not acting in a representative capacity because they have locus standi of their own in this matter, first, as citizens of Tanzania, and secondly, as both tax payers and consumers of TANESCO electricity. Dr. Mvungi further claimed that, both positions vest upon the Petitioners, separately, the requisite locus standi/cause action in this Petition, for that was the objective for the registration of the Petitioner organizations, in order to pursue and promote and protect the legal and Human rights of their members, and the public at large. Both Dr. Mvungi and Mr. Kahoho pushed their arguments further, and maintained that, in as long as the 1st and 2nd Respondents (The DOWANS) are treading upon the public interests (or public rights) of the citizens, the court cannot deny locus standi to the genuine bonafide petitioners even if they had no initial personal interest in the matter. Dr. Mvungi further held that, denying locus standi to the Petitioners/Interested Parties in the matter at hand on the flimsy grounds that the Petitioners/Interested Parties have no personal interest is already bad law, as it was stated in the case of Rev. Mtikila V.A.G (Supra). On the submission that usually the Attorney General is

the guardian of public Interests/rights, Dr. Mvungi Claimed that position/fact does not mean that other members of the Public have no locus standi, because the Attorney General stands on their behalf. He concluded saying that, giving locus to one person does not imply that no other person can enjoy the same. Well, let me start this discussion by saying that, the issue of cause of action or rather, locos standi, should not drag us 29

. into -- unnecessarily -- one ---- -vain 0co0emic-/hypot-hetical dialogue. We all- know only too well (including Dr. Mvungi), that, it is an established general rule in civil matters that for any party to institute proceedings against another for a relief he must show by his pleadings that he has a cause of action entitling him to the reliefs sought. In Tanzania, the leading authority for this proposition is found in the decision in the case of LUJUNA SHUBI BALLOZI (supra), in which, Samatta, J.K. (as he then was), eloquently stated that proposition. (The relevant part of the proposition has already been quoted earlier on, I need not repeat it). Indeed, earlier on, in the case of John Byombalirwa Vs. Agency Maritime International (Tanzania) Limited (1993) T.L.R.I, the Court of Appeal defined the term cause of action, to mean, the essential facts which it is necessary for the Plaintiff to prove before he can succeed in the suit. The Black's Law Dictionary, 8th Edition, by Bryon A. Garner, defines "cause of action" to mean- "A group of operative facts giving rise to one or more basis for suing; a factual situation that entitles one person to obtain remedy in court from another person ... " 30 Besides, the definiti0n has been well propounded_ by . several learned Authors on pleadings 1n Civil Procedure. One such eminent author is Edwin E. Bryant, who, in his leading treatise, The Law of Pleading Under the codes of Civil Procedure, 2nd ed 1899, at pg 170; states that:- " .. what is a "cause of action"? it may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of fact may be-

- a) A primary right of the Plaintiff actually violated by the Defendant: or
- b) The threatened violation of such right, which violation the Plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction: or
- c) It may be that there are doubts as to some duty or 31 right or- th~- -right be G-louded-- by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property " A look at the observations made by Samatta J. K. (as he then was), in the case of Lujuna Shubi Ballonzi (supra), it is quite obvious that his lordships' observations comply with the foregoing definitions of the cause of action. I am satisfied that, the term "cause of action" mean that- a bundle of essential facts which it is necessary for the Plaintiff to prove before he can succeed in the suit. Subjecting the above definitions to the two petitions by the Petitioners/Interested Parties, I am inclined to agree with the learned counsels for the Respondents that the Petitioners/Interested Parties have not succeeded to establish the essential facts necessary for them to obtain the reliefs sought in their Petitions. 32 The Petit-ioners/Interested · Part-ies., relying on the decision in the case of Rev. Christopher Mtikila's Case (supra), are of the belief that there is a

public right or legal interest in the matter at hand which gives them the cause of action/ locus standi to bring their petitions against the Respondents, on the ground that the 3rd Respondent (TANESCO) is a public corporation owned by the Government and run partly by public funds and tax payers. For that reason, the Petitioners/Interested Parties have cited the provisions of sect. 30 (I) (e) of the Arbitration Act and Article 27 of the Constitution of the United Republic of Tanzania. With profound respect to the Petitioners/Interested Parties (especially, Dr. Mvungi), am inclined to agree with Mr. Fungamtama that those provisions cannot give them the cause of action/locus standi they so desire in order to bring the said Petitions before this court. For the convenience of these objection proceedings, Article 27 (1) of the constitution provides that:- "27 (1) Every person has the duty to protect the natural resources of the United Republic, and to respect another person's property ... " Again, with respect to the Petitioners/Interested Parties, they cannot utilize the provisions Article 27 of the constitution for the simple reason that procedures for the institution of actions for breach of the constitution, are specifically provided for, by the provisions of sect. 4, 5 and 6

- (a) (f) of the Basic Rights and Duties Enforcement Act (Cap. R.E 2002). Both Dr. Mvungi and Mr. Kahoho have also invoked the provisions of sect. 30 (1) (e) of the Arbitration Act, which provide the right to challenge a foreign arbitral award on the ground that the award is contrary to Public Policy and Public Interest. Again with profound respect to the Petitioners/Interested Parties, they cannot invoke the provisions of sect 30 (I) (e) of the Arbitration Act in order to confer them the required locus standi. The provisions of sect. 30 (I) (e) provides that:- "30 (I) ... In order that a foreign award may be enforceable under this part, it must-
- (a)
- (b) ~ ..
- (c)
- (d)
- (e) have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania, and its enforcement must not be contrary to the public policy or the law of Tanzania (emphasis supplied). The ICC's Final Award at hand is governed by the laws of Tanzania (Clause 14 (2) of the POA), and therefore, it is not a foreign award as contemplated by sect 30 (I) of the Arbitration Act. Besides, the application of the provisions of sect. 28 (2) of the Arbitration Act, which provides that:- "... 28 (2) this part (Part IV) shall not apply for any award made on an Arbitration agreement governed by the Law of Tanzania." (emphasis supplied). Both Dr. Mvungi and Mr. Kahoho purported to disqualify the case of Lujuna Shubi Bakonzi (supra) in favour of the Rev. Mtikila's case (supra). With respect to the Petitioners, it is enough to state that, the case of Rev. Mtikila dealt with the issue of locus standi in the context of Constitutional litigation, at large, but not

on matters founded on contract/arbitration agreement. Moreover, let me inform the Petitioners/Interested Parties, the decision of the case of Rev. Mtikila did not abolish the requirement to show a bundle of essential facts which it is necessary for the Petitioners to show that they are entitled to bring the matter before the court. From the decision in the Lujuna shubi 36

- s-anonzi's -cas-e~ it is -cleEx t-hat whether- -Gr not a_ right _ ot __ interest is one of public in nature or otherwise, it must be clearly pleaded, and it is not a matter to be perceived impliedly. Thus, the issue is not about one having personal or public interest, but rather, it is about the disclosure in the Petition of the material facts that give the Petitioners a right or interest in the matter which the law takes cognizance. Dr. Mvungi also submitted that, the Petition at hand is not a Constitutional litigation but rather, a public interest litigation, hence the locus standi is available impliedly to every member of public who is a Citizen of this country. It is not in dispute that the ICC's Final Award was a consequence of disputes arising out of a private contract negotiated between the DOWANS holdings SA (Costa Rica) and TANESCO. The determination of the matter followed a mutually agreed dispute resolution provisions (by way of an arbitration). It ,s also a fact (conceded by the Petitioners/Interested Parties), that neither the Petitioners nor members of the public, at large, were parties to the Power off-Take Agreement (POA). It is a fact, therefore, this is not a constitutional litigation, neither is it a public interest litigation. It is_ a matter based on an agreement/contract between 37
- two parties~ vested- with the neces5ory legal capacities to_ contract. Again, the Petitioners/Interested Parties called in aid of the provisions of Order XXI Rule 57 of the Civil Procedure Code. As we have seen earlier on, the provisions deal with the adjudication of claims preferred to property attached in execution of a decree and of objections to the attachment of such property raised by the party to the suit, or his representative or a third party. Again, with respect, these provisions are not applicable in this matter, for the fact that, the instant matter does not deal with any question relating to right, title or the property attached between parties to the arbitration proceedings or otherwise. It is a fact that the matter at hand concerns ·the registration and the enforcement of a Final Award, which The DOWANS obtained from the ICC. Hence, these provisions do not confer the Petitioners/Interested Parties any cause of action or the locus standi they so long for. Bet ore I end the discussion on the issue of locus standi and the cause of action, let me, briefly, make the following observation that, Dr. Mvunig submitted that the principle (on locus standi) propounded 1n the case of Lujuna Shubi 38 · ·sullonzi ·(199-6J, --is- -now· a '-~bad law" in the light of the decision in the case of Rev. Mtikila (1995}. With respect, I am afraid I do not share that opinion with Dr. Mvungi, taking into consideration that, first, both decisions were made by this court (High Court), and secondly, the Lujuna Shubi Ballonzi case was decided later than the case of Rev. Mtikila. According to the doctrine of precedent (Staredecis), it cannot rightly be said that the decision of the Mtikila case has overruled the decision in the case of Lujuna Shubi Ballonzi. At best it can be explained that, the principle enunciated in the Lujuna Ballonzi case signify a departure of the court (High Court} from, or modification of its

earlier findings made in the case of Rev. Mtikila, which was decided earlier on. For that matter, as it has been stated earlier on, the decision in the Rev. Mtikila case, does not confer the Petitioners/Interested Parties any cause of action/locus standi in the matter at hand. Now, having observed that, let me end this issue by saying that, an examination of the two Petitions filed by the Petitioners/Interested Parties, I am satisfied the same do not disclose any facts (cause of action) or the right necessary for the Petitioners to succeed for the reliefs sought in the 39 -petitions against the Respondents. -Indeed, let me just say that, bare and wild assertions of the existence of a cause of action/locus standi, does not by itself vest any right or interest to the Petitioners/ Interested Parties. Accordingly, the Petitioners/ Interested Parties, having failed to satisfy this court that they are vested with the cause of action/locus standi to issue and serve the Petitions against the Respondents, it is the finding of this court that, the 1st objection raised by Mr. Fungamtama against the 1st and 2nd and 3rd and 4th Petitioners/Interested Parties, is hereby allowed. Likewise, it is also the finding of this court that the two objections raised by the 3rd Respondent (TANESCO), against the 4th Petitioners/Interested Party (Mr. Kahoho) are equally allowed. Under normal circumstances, once the 1st preliminary objection raised by the Respondents against the four Petitioners has been upheld, it may not be necessary for this court to proceed with the examination of the merits or otherwise of the other remaining points of objections. However, I have decided to examine, briefly, the 4th preliminary objection raised by Mr. Fungamtama, against the four (4) Petitioners/Interested Parties, just in case I am held to be wrong on the first ground. In his 4th preliminary objection, Mr. Fungamtama claimed that both the Joint Petition (by the 1st and 2nd and 3rd } Petitioners/Interested Parties, and the Petition of the 4th Petitioner/Interested Party, (Mr. Kahoho), are bad in law for non-compliance with the mandatory requirements provided by Rule 8 of the Arbitration Rules (Cap 15, Subsidiary Legislation). This Rule, as we know, provides the procedure in which petitions seeking any kind of relief should be presented before the court. Rule 8 provides that:- "8 Every Petition shall have annexed to it the submission, the award or the special case, to which the Petition relates, or a copy of it certified by the Petitioner or his advocate to be a true copy" (Emphasis Supplied). Mr. Fungamtama contended that the Petitioners have not annexed, either the submission or the award to their Petitions, hence, this non-compliance with Rule 8 of the Arbitration Rules is letel, hence the Petitions should be struck out. Responding to this objection, Dr. Mvungi submitted that, the Petitioners have attached affidavits of the Executive Directors of the 1st and 2nd and 3rd Interested Human Rights Organizations, to support the Joint Petition, and the relevant photocopy pages of the ICC Award. In as far as Dr. Mvungi is concerned, these documents are just about enough. The 4th Petitioner/Interested Party, Mr. Kahoho, did not, as a matter of fact, respond to the 4th objection. He simply claimed that, " ... my answer to the 4th point against this petition, is negative". Of course, in simple terms, Mr. Kahoho did not "comprehend" the contents of the 4th preliminary objection. Well, without indulging ourselves into unnecessary academic dialogue (purported to have been raised by Dr. Mvungi), it is sufficient to say the following: The term "submission", as defined by sect. 2 of the Arbitration Act, means:- "a written agreement to submit present or future differences to Arbitration, -

whether an Arbitrator - is named therein or not." The purpose of the submission and the award is to enable the court to ascertain that the Petition is within the scope of the Arbitration agreement or the arbitration itself, or of matters in issue between the parties, or whether the award interferes with the rights of strangers, such as the Petitioners in this matter. It is enough to state that the compliance with the provisions of Rule 8 is mandatory. That is to say, the display of the submission or the award to the Petition is important and essential to show that the court has jurisdiction to do what it is asked to do. Failure to attach the submission or the award to the Petition, is certainly fatal. (See Misc. Civil Cause No. 32 of 2003, Dev. Bank Vs. Blue Line Enterprises Ltd). It is enough to state that, the Petitioners did not comply with the mandatory provisions of Rule 8. The 1st and 2nd and 3rd Petitioners/ Interested Parties did not attach, either the required submission or the Final Award. The affidavits appended to the Petition are not the documents envisaged in Rule 8. Indeed, the "Annex ILS. 1", is a mere compilation of uncertified pieces of paper and newspaper cuttings, which do not satisfy the requirements of Rule 8. Likewise it is the same so for the 4th Petitioner/Interested Party. There is not, even a single attachment made, except a photocopy of the front page of the "The East African News Paper", which is titled - "who really owns COWANS". Certainly, this is not in compliance with Rule 8 of the Arbitration Act. In brief, it's enough to state that, in the absence of the submission and award annexed to the two Petitions, I hold that the Petitions are incompetent, and accordingly I hereby allow the 4th preliminary objection raised by Mr. Fungamtama. Now, for the sake of completeness, let me, briefly, look at the 2nd preliminary objection, raised by Mr. Fungamtama, against the 1st and 2nd and 3rd Petitioners/Interested Parties. In this objection, the claim is that the Joint Petition has been filed without adopting the procedure for the institution of proceedings in a representative capacity. According to para. 5 of the Joint Petition, the Petitioners/Interested Parties asserted that they have filed the Petition as interested Parties on their own behalf and on behalf of their members, beneficiaries and members of the public at large. Mr. Fungamtama submitted that, in filing any representative legal proceedings, the permission of the court is mandatory, under the provisions of Order I Rule 8 (I) of the Civil Procedure Code. That being the position, therefore, Mr. Fungamtama raised two issues, namely; first, whether the Petitioners obtained the court's permission to file the Petition on behalf of their members and the public at large, having the same interest in the matter at hand, and, secondly, whether the requisite notice was given to the Parties who the Petitioners purported to represent. In response to the issue raised by Mr. Fungamtama, in his submissions, Dr. Mvungi claimed that "... the Petitioners are not acting in a representative capacity, since they have locus standi of their own in this matter as citizens first, and as Tax payers consumers in the second ..." It is unacceptable and it is professionally unethical, that the Petitioners should run away from their own pleadings contained in para 5 of the joint Petition. It is an accepted practice that formal written statements made in the pleadings do form a guide around which matters in dispute revolve throughout the proceedings. That is to say, the respective matters for discussion of the Parties can only be considered in the light of and on the basis of the formal written statements, which act as fetters or chains upon them, binding and circumscribing them

closely and strictly to their cases as pleaded. That being the position therefore, it is an aversion for the Petitioners now to turn around, claiming in their submissions that they are no longer acting in representative capacity! This claim is not only unacceptable but this court condemns it in the strongest language available. Be it as it may, even if the petitioners had intended to institute representative proceedings, still they were required to abide by the procedure laid down in order I Rule 8 11} of the Civil Procedure Code. The conformity with that procedure is mandatory, even as it was so emphasized by this court, in the decision of the case of Lujuna shubi Ballonzi (supra), wherein his Lordships, Samatta, J.K. (as he was then} emphatically insisted that:- " .. .A person cannot seek to advance the claims of a group of persons without adopting the procedure laid down in Rule 8 of order I of the code. He cannot, as the Respondent in this case now 46

. -- -before- me -has purported- to do-, instituted a representative suit without first obtaining leave of the court to bring such suit. When such suit is instituted without that leave, it must be struck out for being incompetent in law. Common interest litigation can be conducted only in accordance with the provisions of Order I, Rule 8 of the code. As already remarked, failure to comply with those mandatory provisions is fatal to any such suit or application. This is, in law, a sufficient ground for striking out the Respondent's purported representative suit". (emphasis supplied) It is not disputed that the Petitioners have purported to lodge their Joint Petition on behalf of undisclosed beneficiaries and members of the public without first 47 ., obtainin~- leave-- of this court, which; in the--light of the provision of Rule 8 of Order I of the Civil Procedure Code, is fatal to their Petition. Accordingly, even on this ground, the 2nd preliminary objection raised by the Respondents is allowed. Before I end this, rather a long ruling, let me, albeit briefly, make some observations on the submission by Mr. Fungamtama that the Attorney-General, as being the guardian of public rights and interests. It is to be re-called that, Dr. Mvungi responded to this submission saying that, "even if it is acceptable that the Attorney General is a guardian of public interests and rights, however, that does not mean that other members of the Public have no locus standi, because the Attorney General stands on their behalf.. " Let me, briefly, state that I am inclined to agree with Mr. Fungamtama that, public rights and interests envisaged in the provisions of sect. 30 (I) (e) of the Arbitration Act (and indeed, in other laws of the country), are best asserted and 48 guarded by- the offiGe-ocf. the Attorney--General. In the case of Lujuna Shubi Ballonzi {supra), his lordship, Samatta, J. K {as he then was), observed that:- " .. .it is principle of the law of this country that public rights can only be asserted in civil action by the Attorney-General, as the guardian of the public interests." In the said Lujuna Ballonzi case, his Lordship, Samatta, J.K. {as he then was), cited with approval the decision in the English case, Attorney General (MC whirter) Vs. Independent Broadcasting Anthony (1973) 1 ALL ER 689, where in Lord Denning, MR. Stated {at pg. 696), that:- " .. .It is settled in our constitution law that in matters which concern the public at large the Attorney General is the Guardian of public interest it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external 49 'fl --_-- .pressure.from whatever quarter it· may come. As the guardian of the public interest, the Attorney- General has a special

duty in_ regard to the enforcement the law". This court agrees with the principle stated above, that in this country, like in all countries governed by the common law principles and doctrines, public rights and interests are asserted and guarded through the office of the Attorney- General. That being the position, therefore, the petitioners have no right to Petition and assert on the matters, within the exclusive jurisdiction of the Attorney - General. Just by way of information, let me assure the Petitioners/Interested Parties that, the 3rd Respondent {TANESCO}, being aggrieved by the ICC's Final Arbitral Award, has also filed a Petition in this court to challenge the validity of the same Award. And in that Petition the Attorney-General has joined the contingent of quite competent attorneys, {Rex Attorneys} representing the TANESCO. I believe that, the Attorney General joined the TANESCO attorneys, with the 50 view of· seein~J- to ·it thet· -the- ~ublic · rights---e:1nd· interests envisaged in the ICC's Award, ore well asserted and guarded according to public policy and the lows of Tanzania. Now having said that, I om satisfied that on the strength - of the submissions made by the counsels for the 1st and 2 nd and 3rd Respondents, in relation to the preliminary objection on points of law against the Joint Petition by the 1st and 2nd and 3rd Petitioners/Interested Parties, and against the Petition by the 4th Petitioner, and for the reasons I have endeavored to demonstrate in this ruling, I om satisfied that the Petitioners have not succeeded showing that they have the right and/or interest {cause of action/locus standi} to issue and serve the Petitions against the Respondents. Accordingly, both petitions ore struck out, with costs. It is so ordered. ---·----- .E. -- /JUDGE ""}~~ . . ,,, .f{' 51 Ruling delivered this 6th day of September, 2011, in the presence o.f the counsels · for both sides, and the 4th Petitioner, Mr. Kahoho. i I i ii I M f I ' ' 52 ____ - --- _jiiii ihiai~

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Prepared on 25 October 2026 · Esheria