

TANZANIA / JUDGMENT

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22 November 2024

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA THE SUB-REGISTRY OF MOSHI AT MOSHI MISCELLANEOUS LAND APPLICATION NO. 30078 OF 2024 IN THE MATTER OF SECTION 16 & SECTION 51 (1) (2) (e), (3) OF THE ARBITRATION ACT 2020, REGULATION 5 & 63 OF ARBITRATION (RULES OF PROCEDURE) REGULATIONS, 2021 GOVERNMENT NOTICE NO. 146 OF 2021 AND IN THE MATTER FOR TEMPORARY INJUNCTION PENDING FINALIZATION OF ARBITRATION PROCEEDINGS COMMENCED ON 22ND NOVEMBER 2024 BETWEEN THOBIAS LEON MOSHI.....PETITIONER VERSUS KILIMANJARO NATIVE COOPERATIVE UNION (1984) LTD.....RESPONDENT

RULING

5th February & 19th March, 2025 A.P. KILIMI, J.: This ruling is in respect to the preliminary objection on point of law raised by the respondent to the effect that this Court has no jurisdiction to determine the matter filed by the petitioner. Before embarking on the merit of the objection, I find it appropriate to narrate albeit briefly, the facts of the matter as discerned from the filed documents in this court. It was on 1st December 2019 the petitioner and the respondent herein being the lessee and lessor executed a lease agreement. Then the petitioner leased an open space not exceeding 2,392 square meters situated at the respondent's headquarters at KNCU Ltd. They agreed the term of the lease to be five years from 1st December 2019 to 30th November 2024. They both agreed the payment of the leased premises for the term of five years be Tanzania Shillings Eighty-six million one hundred twelve thousand only (Tshs 86,112,000/=). Parties further agreed on the conditions for renewal 'tenancy renewal' that the landlord may at the request of the tenant in writing grant to a tenant a lease for further lease term period to commence at the expiration of the term. Moreover, in their agreement they put a clause to the effect that in the event of a dispute both parties shall endeavour to resolve amicably, failing which the dispute shall be referred to the tribunal. It was further alleged that on 11th November 2024, the respondent issued a notice of termination for lease or a notice of non-renewal for the lease agreement giving the petitioner 19 days to vacate the leased premises. Thus, such actions as per the petitioner amount to breach of terms of the lease agreement as the respondent unlawfully refused to extend lease agreement up to 30th June 2026 and has issued a 19 days' notice contrary to clause 7 of their lease agreement which required 30 days' notice. Consequently, the petitioner filed this petition praying for the following orders. First; this Court be pleased to issue temporary injunctive/preservative order(s) restraining the Respondent its servants, agents,

assigns, and whoever will be acting under or through the Respondent from evicting the Petitioner or doing any other act on Plot No. 35B with Certificate of Title No. 15635, Moshi Municipality with its improvements (situated at the Respondent's (KNCU) headquarters particularly between KNCU LTD HQ and National Bank of Commerce pending hearing and determination of arbitration proceedings initiated by the Petitioner on 22nd November 2024. Secondly; this Court be pleased to issue interim order(s) to the parties to maintain status quo ante pending hearing and determination arbitration proceedings initiated by the Petitioner pursuant to clause 9 of the Lease Agreement dated 1st December 2019 between parties herein and third, costs of this application be borne by the Respondent and any other order as this Court may deem fit and just to grant. 3 Upon being served with the petition at hand, the respondent herein vehemently denied the allegations and replied by raising a preliminary point of law that this court has no jurisdiction as alluded above. Disposing the raised Preliminary Objection hereinafter 'objection', parties agreed to dispose it by way of written submissions. In doing so the respondent was represented by Elifuraha Eliudy learned advocate whereas Mr. Ndurumah Keya Majembe learned Advocate represented the petitioner. Submitting in support of the raised objection, Mr. Elifuraha Eliudy submitted that there were no pending Arbitration proceedings and no suit was also pending to be determined. He argued that the court only issues a temporary injunctive order if satisfied that there is serious question to be tried on facts alleged and a probability that the plaintiff will be entitled to the relief prayed. He further maintained that the court interference is necessary to protect the plaintiff from any kind of injury which may be irreparable and if there will be a greater mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the respondent. To support his assertion, the learned counsel referred the decision of Atilio vs. Mbowe, Civil Case 1969 HCD 284. 4 The counsel went on submitting that rule 5(1) and (2) of the Arbitration (Rules of Procedures) Regulations, 2021 Government Notice No. 146 of 2021, hereinafter "Arbitration rules" provides for a party who wishes to commence arbitration proceedings at arbitration centre has to fill in form No. 3. He was of the view that it was expected for the petitioner to provide clear information on a number of disputes, where, when and before who the arbitration proceedings were filed. He further submitted that no copy of proceedings of arbitral tribunal has been annexed to the petition as per rule 63(1)(c) and (d) of GN No. 146 of 2021 for the court to issue a temporary injunction. In upshot, Mr Elihudy prayed for the dismissal of the petition to its entirety with costs as the court lacks jurisdiction to entertain it. Responding to the above, Mr. Majembe argued that this court derived its statutory jurisdiction to entertain the petition at hand under section 51(1)(2)(e)(3) of the Arbitration Act Cap. 15 R.E. 2020 hereinafter "the arbitration act" that the said section empowers the court to receive and issue reliefs in form of temporary injunction. Then the counsel basing on above, maintained that jurisdiction of this court is a creature of a statute and referred the case of Elizabeth Kulwa Kibushi vs. Mariana 5 Mashiri Petro @ Another (Civil Revision No. 2 of 2022) [2022] TZHC 10607 (TANZLII) to bolster his assertion. The learned counsel submitted further that, a serious triable issue was in display in relation to the lease agreement that needed to be determined by arbitration proceedings. He was of the view that the petitioner did initiate the arbitration proceedings by way of Notice that was served to the Respondent through its Managing director on 22nd November 2024 as per annexure TLM-10 attached to the petition. Mr. Majembe added that if the court fails to issue such orders

pending the reference to arbitration proceedings the petitioner stands to suffer irreparable loss which cannot be atoned by way of damages. He referred the decisions of Kato Simon and Another vs Republic Criminal appeal No. 180 of 2017 (unreported) and Maulid Mfaume Farahani vs. Republic, Criminal Appeal No. 530 of 2019 CAT at Dsm. Then the learned counsel asserted that each case must be determined according to its peculiar facts, he urged that that notice to arbitration Annexure TLM-10 served to the Respondent on 22nd November 2024 and attached to the Petition, was sufficient evidence on part of the Petitioner to have initiated 6 arbitration proceedings to be relied by this Court to entertain this application pending reference to arbitration hearing. He invited me to be persuaded by the case of Irene Energy Limited vs. Mohamed Said Nakanga, Misc. Commercial Cause No. 35 of 2019 High Court of Tanzania (Commercial Division) at Dar es Salaam at pages 11 and 12. He further insisted factors enumerated in Atilio vs. Mbowe (supra) does not arise in this matter. The learned counsel for the petitioner further explained that since clause 9 of annexure TLM-1 'the lease agreement' was silent on the choice of forum institution, place, time and or the arbitrator of the parties, the petitioner had no other procedural alternative than to initiate arbitration proceedings by serving the respondent a notice inquiring his willingness to participate in arbitration proceedings prior to filing of the application at hand. He submitted further that those procedures to initiate arbitration proceedings differs from one another depending on the arbitration clauses agreed as some specifically mention the choice of forum institution, place, time and or even arbitrator choice of the parties. 7 The learned counsel was of the view that in the application at hand, there were no requirements that there must be a pending suit for one to apply injunction orders. He backed his assertion with the provision of Section 2 (3) of the Judicature and Applications of Laws Act (JALA) that this court has inherent powers to entertain the application of this nature. He said that the requirement is only for the petitioner to establish a prima facie case, balance of convenience and likelihood of suffering irreparable loss as in line with the decision of Atilio vs. Mbowe (supra). He concluded that under rule 63 of Arbitration rules, giving notice was a compulsory procedure taking into account the nature of the arbitration clause between the parties. Thus, the learned counsel was of the view that this court had jurisdiction to entertain the application at hand. I have considered the rival submissions from both parties and the records available, the issue for determination is whether the raised objection has merits. As alluded above, it is undisputed fact that as per clause 9 of the lease agreement annexed to petition as Annex TML-1, parties agreed the mode of dispute resolution to be Arbitration upon failing to resolve it amicably. The respondent argument is that this court lacks jurisdiction since there was no pending arbitral tribunal proceedings and no 8 any pending suit filed by the petitioner. For ease of reference the agreed arbitration clause by the parties provides as follows; "In event of a dispute both parties shall endeavour to resolve it amicably, failing which, the dispute shall be referred to arbitration" Now according to the law as rightly argued by Mr. Majembe, the powers of this court to order temporary injunction as prayed by the petitioner is provided under section 51(1)(2)(e) and (3) of the Arbitration Act, this provision provides as follows; 51.-(1) Unless otherwise agreed by the parties, the court shall, for the purposes of and in relation to arbitral proceedings, have the same power to make orders on matters provided for under subsection (2).

- (2) The matters referred to under subsection
- (1) shall include; (a)N/A (b)N/A (c)N/A (d)N/A
- (e) The granting of an interim injunction or the appointment of a receiver. 9
- (3) Where the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. [Emphasis is mine] In my interpretation of the above provision, I must say in order to know the tenor and import of the above provision one must read it in a whole. In my view the above provision entails that there must be a party to a filed arbitral proceeding to move this court for the orders sought in this court. Therefore, the next point to be considered is whether there is any arbitral proceeding or any matter commenced at the arbitral tribunal? As argued above Mr. Majembe maintained that the petitioner served to the respondent a notice (Annexure TLM-10) on 22nd November 2024 and urged that the same is sufficient evidence on part of the Petitioner to have initiated arbitration proceedings which should be relied by this Court to entertain this application pending reference to arbitration hearing. 10 Whereas, the respondent's counsel adamantly denied the existence of any arbitral proceedings or any suit commenced by the petitioner in this court. In our law arbitration proceeding is initiated by filing a request for arbitration, the whole process of commencement is provided under part three of Arbitration (Rules of Procedure) Regulations, 2021 Government Notice 146 of 2021 for the ease of reference I find necessary to reproduce rule 5 (1) of these rules hereunder; " 5(1) A person who wishes to commence or institute an arbitration proceeding shall submit a request in writing to that effect to the Centre." According to rule 2 of the procedure define "request for arbitration" to means the request to the Tanzania Arbitration Centre of the Claimant for arbitration. Thus, in my interpretation of the above law, the request for arbitration being a claim is like a plaint in a normal civil case; therefore, it communicates to the court or arbitral tribunal and respondent on what the claimant has been claimed against the respondent. 11 Nonetheless, the law requires arbitral proceeding to commence when the above request reached the respondent, this is provided by section 16 of the Arbitration Act Cap. 15 R.E. 2020 which provides that; "Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which the request for the dispute to be referred to arbitration is received by the other party." [Emphasis is mine] Thus, in view of the above law, one issue appears very important for determination of this matter, which is whether the said request was legally made by the petitioner and communicated to the respondent. As argued by Mr. Majembe about the said notice served to the respondent. I have scanned the said notice (Annexure TLM-10) it does not qualify to be a request for arbitration as envisaged by the law. Suffice to say it does not comply with rule 5 of the Arbitration rules which canvass for commencement of arbitration process. Thus, I am settled no legal notice of Arbitration was served to the respondent. 12 With due respect to the petitioner's learned counsel, I think somehow was misplaced in his research, the case he referred of Irene Energy Limited (supra) at page 11 my learned sister Phillip, J. observed that

the notice served to the respondent contains the details of the dispute between the parties and the reliefs sought by the petitioner. Further parties were already appointed the arbitrator who has already communicated with them. Then she concluded that since the service of notice of arbitration indicates that there is already an arbitrator who is going to preside over the matter, that suffice to demonstrated the commencement of the arbitral proceedings. In this matter the notice said by Mr. Majembe as alluded above neither have those requisites nor connected to any arbitral tribunal, thus this case and other criminal cases cited cannot support his endeavors. Nevertheless, I tried to understand the learned counsel when he argued that this matter has a peculiar circumstance due to the nature of arbitration clause which he commented did not specify various basics, but since there are specific law as alluded above which govern commencement of arbitral proceeding, in my view it is not proper to invoke inherent power of this court as he tried to enunciate hereinabove. 13 In conclusion thereof, since there is no arbitral matter filed by the petitioner, it is risky and unsafe for this court to proceed on the assumption that the court has jurisdiction to adjudicate this matter. Thus, I am satisfied that this court lacks jurisdiction to proceed with this matter. (See Fanuel Mantiri Ng'unda versus Herman Mantiri Ng'unda [1995] TLR 159). On the whole, on account of what I have discussed hereinabove, I find the preliminary objections raised by respondent is meritorious and is accordingly upheld and sustained. In the premises this matter is hereby dismissed as prayed by the respondent. After considering the circumstances of the case, I order each party to bear its own costs. It is so ordered. DATED at MOSHI this 19th day of March, 2025. X JUDGE Signed by: A. P. KILIMI 14 Court; Ruling delivered this 19th day of March, 2025 in the presence of Petitioner, Respondent and his advocate absent. Sgd; A. P. KILIMI JUDGE 19/03/2025 15

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Prepared on 13 October 2026 · Esheria