

TANZANIA / JUDGMENT

20160809 TZHC Arusha

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA (DISTRICT REGISTRY) AT ARUSHA. MISCELLANEOUS CIVIL APPLIACATION NO. 116 OF 2016 (Original from Civil Case No. 09/2016) ELIMBOTO SIN DA ISINGO PETITIONER VERSUS TANZANIA NATIONAL ROADS AGENCY & 3 OTHERS RESPONDENTS

RULING.

S.M. MAGHIMBI, I: On the 15th day of June, the petitioner Elimboto Sinda Isingo filed a petition against the three respondents praying for:

- (a) An order for stay of court proceedings in Civil Case No. 9 of 2016 in this Honorable Court pending the submission of any dispute to the Arbitration proceedings National Construction Council (NCC);
- (b) Costs of the suit be provided for; and
- (c) Any other relief that this Court may deem fit to grant in favour of the petitioner. 1 For the purpose of grasping the object of this petition and subsequently the objection so raised, the background of the petition was that on 27th day of March, 2013, the 1st Respondent entered into the Contract with the 3rd Respondent for upgrading KIA - Mererani Road, in Manyara Region (26 Km) to Bitumen standard. It is from the said Contract the dispute arose and sometimes in 2016, the 1st Respondent instituted a Civil Case No. 9/2016 in this honorable court suing the 2nd,3rd and 4th Respondents whereby the 3rd Respondent was a party to the governing Contract executed between the 1st Respondent and the 3rd Respondent. Clauses 26,27 and 28 under Section VI - The General Conditions of Contract of the said Contract requires parties to refer disputes to the Adjudicator dully appointed by the National Construction Council (NCC). In accordance with the NCC Rules, Clause 27,3 requires the Arbitration to take place in Dar es salaam. That, the 1st Respondent/Contractor terminated the Contract in contravention of the Arbitration clause and has filed the said suit in contravention of the Clauses set out in the Contract overriding the mutually agreed arbitration Clauses. On the 14/07/2016, while filing his reply to the petition, the 1st respondent, Tanzania National Roads Agency, raised a preliminary point of objection that the petitioner has no locus standi to claim on behalf of the 3rd respondent. It is pertinent to note that since the inception of this petition on the 15/06/2016 to the 14/07/2016 when the

first respondent filed his notice of preliminary objection to the 20/07/2016 when the objection were heard, the petitioner had not appeared in court. The petition having been filed on the 15/06/2016 was scheduled for mention on 17/06/2016 and 2 st subsequently on the 01/07/2016 whereby the representatives of the 1 and 2nd respondent appeared in court but the petitioner was absent. The matter was scheduled for hearing of the preliminary objection on the 20/07/2016 and since the petitioner never showed up in court since she filed the petition, it was a clear indication that he just dumped the petition in court and was never keen to make any follow ups on the matter. The hearing of the objection hence proceeded ex-parte of the petitioner. In his submissions, Mr. Rashid, learned counsel representing the petitioner, submitted that the petitioner being a director of the 3rd respondent has no locus standi to claim on behalf of the 3rd respondent. That the 3rd being a corporate body is capable of suing and be sued in its own name. He argued that according to the principle of corporate legal personality established in the case of Solomon Vs. Solomon, an incorporated entity has a distinct personality and existence from its members. It has a right of not only to sue but also be sued in its own name. Mr. Rashid submitted further that the petitioner has chosen to bring this matter for what he alleges that the 1st respondent has filed a suit Civil Case No. 09/2016 in contravention of the clauses set out in the contract to override the mutually agreed arbitration clauses. That the contract alleged was the contract executed between the 1st respondent and the 3rd respondent and that the petitioner is not privy to such contract and as such has no locus standi to sue on behalf of the 3rd respondent. Further that the alleged wrongs if any, complained of by the petitioner were done to the company which is the 3rd respondent therefore the only party with a locus standi to petition or sue was the 3rd respondent and not the petitioner. 3¹ - Mr. Rashid further submitted that the petitioner is only playing at the back st of the 3rd respondent to lodge his personal claims against the 1 respondent something which is untenable. That the common law principle of locus standi which form part of our laws does not allow of meddlesome interlopers who'd ride on the back of someone without showing any right of theirs which has been breached and the relief they would be entitled to at the end of the litigation as against the party being sued. He supported his submissions by citing the case of Lujuna Shuhi Balonzi Sr vs. The Registered Trustees of CCM, 1996 TLR 203 where his Lordship Samatta JK (as he then was) stated the common law principle that a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with. He argued that in this case the petitioner has no merit and tenable claims against the 1st respondent thus amounting to abuse of court process. Further that the petitioner being a director of the 3rd respondent has no locus standi to claim on behalf of the 3rd respondent. Mr. Rashid submitted further that, assuming, but not conceding, that the petitioner had locus standi to sue the respondent, the 1st respondent in Civil Case No. 09/2016 is not suing on the underlying contract but is suing for the enforcement of the Bank guarantees. He argued that the guarantee is autonomous, separable and separate from the underlying contract of works and it is enforceable on their own terms independently from the rights and obligations created by the underlying contract. He supported this line of argument by citing the case of Edward Owen Engineering Limited Vs. Barclays Bank Int. Ltd a case of

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976. He argued further that the arbitration clause alleged by the petitioner is arising from the underlying contract and not on the contract of guarantee and the first respondent was not suing on the underlying contract but on the contract of guarantee. ML Rashid concluded his submissions by praying that this court dismiss the petition against the first respondent and the petitioner be ordered to pay the costs thereto. I will determine this objection in line with the celebrated case of Mukisa Biscuits Manufacturing Company Limited which is reported in 1969 E.A.L.R page 696. My citation is at page 700 where it was held: ~ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or to refer the dispute to litigation. "(Emphasis is mine). Mr. Rashid's argument is that the petitioner, being the director of the 3rd respondent has no locus standi to sue on behalf of the respondent. But on the records of the pleadings, I have failed to see anywhere in the petition that the petitioner had revealed the fact that he is the Director of the 3rd respondent. He has not explained anywhere as to his relationship with any of the parties which is giving him a right to sue. Hence the argument raised by the 1st respondent was not even necessary as the petitioner has not explained how he derives his right to sue by bringing the current petition. 5 At this point, the relevant case is the case of Godless Jonathan Lema Vs. Mussa Hamisi Mkangaa & 2 others in Civil Appeal No. 47 /2012 (unreported) where the Court explains the locus stand as follows: "first we wish to state that the rule of locus stand/ is governed by common law. The Rule is applicable in our Courts by virtue of section 2(3) of the current Judicature and Application of Laws Act Cap 358 R.E 2002 subject to modification to suit Local conditions" and on page 11 where there is a paragraph saying "in common law in order for one to succeed in an action he must not only establish that his rights or interests were interfered with but must also show the injury he has suffered above the rest" (Emphasis supplied). The same position was also taken in the cases of Gervas Masome Kulwa Vs the Returning Officer, 1996 TLR 320, TUICO Versus Mbeya Cement Company, Limited, in 2005 TLR 41, H.C and 1996 TLR 320 to name a few. As for our case at hand, the petitioner has not shown how his rights or interest have been interfered with or even who he is in relation to this case. As for the substantive objection raised, though not in the same line of argument as the 1st respondents, the objection raised is meritorious and I sustain it. The petitioner has not shown any locus standi to bring this action. Consequently the petition is hereby struck out with costs. 6 Preliminary Objection sustained Dated at Arusha this 29th day of July, 2016 SGD: S.M MAGHIM'BI JUDGE 29/07/2016 Court: Ruling is delivered in Court in the presence of Mr. Mmari, learned Counsel for the Petitioner and Mr. Lyaro, learned counsel for the 2nd respondent and also holding brief for Mr. Saadi for the 1st respondent this 29th day of July, 2016. SGD: S.M. MAGHIMBI JUDGE 29/07/2016 I hereby certify this to be a true copy of the original. A.K. RUMISHA DEPUTY REGISTRAR 09/08/2016 7 ' I

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