

TANZANIA / JUDGMENT

# cordura ltd vs mikumi wilderness camp ltd 2023 tzhccomd 132 5 may 2023

COURT  
TZHCCOMDDECIDED  
5 May 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT  
PAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 57 OF 2022 IN THE MATTER OF  
ARBITRATION AND IN THE MATTER OF THE ARBITRATION ACT [CAP 15 R.E. 2020] AND IN  
THE MATTER OF ARBITRATION (RULES AND PROCEDURE) REGULATIONS G.N. NO. 146 OF 2021  
AND IN THE MATTER OF ARBITRATION BETWEEN CORDURA  
LIMITED..... PETITIONER VERSUS MIKUMI WILDERNESS  
CAMP LIMITED..... RESPONDENT

## RULING

Date of last order: 21/03/2023 Date of ruling: 05/05/2023 AGATHO, J.: This ruling was prompted by the preliminary objections raised by the respondent against the petition preferred to this court by the petitioner. The preliminary objections were as follows: i

1. That the current petition and the whole of the arbitral process are hopelessly time barred in terms of paragraph 12.3 of the Agreement (COR-1) submitting the parties to Arbitration, sections 14, 15 and paragraphs (b) and (c) of the Schedule to the Arbitration Act [Cap 15 R.E. 2020], thus denying this honourable court requisite jurisdiction to entertain and determine this matter.
2. That the honourable court lacks requisite jurisdiction to entertain and determine this petition in terms of section 26 (l)(a)(b)(d) and section 46 of the Arbitration Act [Cap 15 of 2020].
3. That the petition is pre-mature and unmaintainable in terms of section 46(4)(5) of the Arbitration Act [Cap 15 of 2020].
4. That the current petition is time barred in terms of Regulation 20(2) and 24 (1) of Arbitration (Rules and Procedure) Regulations, G.N. No 146 Of 2021.

5. That the current petition is fatally defective and thus unmaintainable for contravening mandatory requirements under Regulation 63 (l)(e) of the Arbitration (Rules of Procedure) Regulations, G.N. No. 146 of 2021 for failure to specify persons 2 affected by the petition or upon whom notices are required to be given.
6. The petition is fatally defective for being preferred on a non-existing law, that is Arbitration Act, Cap 15, R.E. 2020.
7. That the petition is fatally defective non-joinder of necessary party Mr. Salim Juma Mushi.
8. That the petition is incurably defective for not being supported by the verifying affidavit. In this matter, the petitioner was represented by Daudi Ramadhani, learned counsel from Rex Advocates, and the respondent enjoyed the legal services of Claudio Msando, advocate from Msando Law Office. The hearing of the Preliminary Objections (POs) was conducted by way of written submissions. To begin with, I categorized the POs into two categories, first, the POs that were abandoned, and second, those I found to have merit. The first category of POs include: 2, 3, and 6 that on 21/03/2023 the respondent agreed to drop them. Regarding 8th PO the court ordered the petitioner to file the affidavit verifying the petition. As for the second category that entails 1, 4, 5 and 7 these were heard. 3 As starting point, the 1st PO will be examined. The gist of that PO is that the petition and the whole of the arbitral process are time barred in terms of paragraph 12.3 of the Agreement submitting parties to arbitration. Briefly, I do not find this PO to have any substance for a simple reason that in paragraph 12.3 of the parties' agreement set 90 days for arbitration to be completed. However, there is a phrase "if possible." It thus says the arbitration should be completed "if possible, within 90 days." The use of the phrase "if possible", it means the parties knew that there are instances where it may be impossible to complete the arbitration process within 90 days. Again, to call for evidence to show that there was possibility of completing the arbitration within 90 days that will be contrary to the principle laid down in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 that PO should not require evidence beyond the pleadings. However, the other limb of the PO on limitation of time is to the effect that the arbitration proceedings are time barred. That is worth scrutiny. The clause 12.3 of annexure COR-1 (the agreement) the task of appointing the third arbitrator (umpire) was to be done by the two arbitrators appointed by the parties. If they fail within 14 days then the chairman of the Tanganyika Law Society for the time being 4 was authorized to appoint the umpire. This was not done, and 14 days lapsed. Therefore, there was contravention to the agreement of the parties. And the time set the appointment of the umpire lapsed. I find this objection to have substance. In *Simon Kichele Chacha v Aveline M. Ki I a we*, Civil Appeal No. 160 of 2018 CAT the CAT emphasized on necessity to uphold the sanctity of contract. The court should not interfere with the parties' agreement. In the present case there were vitiating factors that induced the consent of the parties to agree with the terms of their agreement (annexture COR-1 to the petition). Therefore, and since clause 12.3 of COR-1 is a term in the said agreement the parties are bound to the terms they have agreed upon. The umpire has not been appointed beyond the 14 days set in the contract, hence the arbitration

is unprocedural and irregular. The first PO is thus partly overruled and partly sustained. Along with the 1st PO is the 4th PO that the current petition is time barred in terms of Regulation 20(2) and 24 (1) of Arbitration (Rules and Procedure) Regulations, G.N. No 146 of 2021. I agree with the respondent that the petition is time barred because the umpire was supposed to be appointed by the parties within 14 days where they fail then the centre 5 (chairman of TLS) should appoint the said umpire. This was not done. Hence Regulation 20(2) and 24(1) of the Arbitration (Rules and Procedures) Regulations G.N. No. 146 of 2021 were contravened. I decline to support the petitioner's view that the objection is misplaced as it has nothing to do with the appointment of the umpire. In fact, the epitome of the petition is the failure to appoint the umpire along with the alleged misconduct and lack of accreditation of Mr Salimu Juma Mushi, the arbitrator appointed by the respondent. Another PO is the 7th, that the petition is bad for non-joinder of necessary party, Mr. Salimu Juma Mushi (co-arbitrator selected by the respondent). The test as to whether a party is a necessary party or otherwise is whether no effective decree can be issued in the absence of that party. For clarity on the issue of criteria as to who is a necessary party and its legal implication see the cases of Ngerengere Estate Company Limited v Edina William Sitta, Civil Appeal No. 209 of 2016 CAT, and Abdullatif Mohamed Hamis v Yusuf Osman and Another, Civil Revision No.6 of 2007 CAT. See also the HCT ruling in Stanslaus Masunga Nkola & 2 Others v The Board of Directors, Nyarugusu 6 Mine Company Limited & Others, Misc. Civil Cause No. 1 of 2021 HCT Mwanza District Registry at pages 16-18. In the case at hand, we ask whether an effective decree cannot be issued without impleading Salimu Juma Mushi as claimed by the respondent. Looking at the pleadings especially the petition, it is loaded with allegations that Mr Salimu Juma Mushi has been delaying the arbitration proceedings, he has also been practicing as an arbitrator without being registered and accredited. He has been biased in favour of the respondent. He made communications with the respondents regarding the case without involving the petitioner. I am aware that the suit cannot be defeated for non-joinder of a party. That is the principle found in Order I Rule 10 of the Civil Procedure Code [Cap 33 R.E. 2019]. The import of that provision is that the court has discretion either on application by either party or on its own to join a party or remove a party improperly joined in order to enable it (the court) to effectually and completely adjudicate upon and settle all the questions involved in the suit. However, the implication of non-joinder of a party may be fatal or not fatal depending on the context of a case. The yardstick is whether there can be an executable decree in the absence of the non- 7 joined party. If the decree may be executed in his absence the non-joinder of that party is not fatal. However, in my view Mr Salimu Juma Mushi is a necessary party because the allegations are directed towards him, and he is the one to execute some of the orders the court will give, for instance, the issue of practicing without being accredited. Thus, his non-joinder is fatal. While it is not disputed that the court has discretion to join a party to the suit, the discretion has to be exercised judiciously. I feel obliged to clarify the principle of overriding objective because the petitioner brought it in her submission. I do not entirely disagree with what was held in Coseke Tanzania Limited v The Board of Trustees of the Public Service Social Security Fund & Another Commercial Case No. 143 of 2019, HCCD at Dar es salaam

(unreported) where the court ordered amendment of the plaint instead of striking it out due to high filing fees paid and interest of justice. In my view, a party cannot use the doctrine of overriding objective as a shield in disregard to the established principles or clear provision of the law. Therefore, it is not the law that in every instance where one claims overriding objective the court will blindly uphold that principle. In the present case arbitration has not been completed, and the 8 non-joinder of Mr Salimu Juma Mushi is fatal because the orders that will be given may not be executed in his absence. To be precise the petitioner seeks inter alia revocation of Mr Salimu Juma Mushi as arbitrator appointed by the respondent. The PO on non-joinder of the necessary party is associated with the infringement of that party's right to be heard. Since I held that the necessary party is Mr Salimu Juma Mushi and the respondent is worried that Mr Mushi will be condemned unheard on the allegations contained in the petition. As rightly submitted by the respondent to large extent the petition contains allegations that point towards Mr Salimu Juma Mushi. Without impleading him in the petition there is risk of him being condemned unheard. The right to be heard is a constitutional right in Tanzania and is one of the principles under the rules of natural justice. The case of Mbeya - Rukwa Auto Parts & Transport Limited v Jestina Mwakyoma, Civil Appeal No. 45 of 2000 CAT (unreported) echoed the principle that the decision arrived at in violation of the right to be heard is nullity. Similar view was held in this court's ruling in the Arab Contractors (Osman Ahmed Osman & Co.) and Another v Bharya Engineering & Constructing Company Limited (BECCO) and Another, Mi sc. 9 Commercial Case No. 28 of 2022, HCCD at Dar es salaam (unreported). Indeed, in the present case, the allegation of practicing without accreditation is a serious one that may be answered by Mr Salimu Juma Mushi himself. Nobody is in a better position to explain this than him. Neither the petitioner nor the respondent can respond to such allegation than Mr Salimu Juma Mushi, himself. Regarding the 5th PO, that the current petition is fatally defective and thus unmaintainable for contravening mandatory requirements under Regulation 63 (l)(e) of the Arbitration (Rules of Procedure) Regulations, G.N. No. 146 of 2021 for failure to specify persons affected by the petition or upon whom notices are required to be given. To certain extent I concur with the petitioner that this PO is ineffectual because it is either linked with the 7th PO on non-joinder of party. Moreover, the petitioner sued the respondent who by implication is the one that will be affected by the petition. Therefore, I find the 5th PO to be without merit. I overrule it. In the end preliminary objections (on the non-joinder of necessary party, contravention of the right to be heard, and time of limitation for appointing the umpire as set out in the contract clause 12.3) are sustained. io These shortfalls render the petition before this court incompetent. Consequently, it is struck out. Since the irregularities observed were partly contributed by both parties, each party shall bear its costs. It is so ordered. DATED at DABJESSALAAM this 5th day of May, 2023. A UWM yip. agatho 3UDGE 05/05/2023 Court: Ruling to be delivered today, this 5th May 2023 by Hon. Minde, Deputy Registrar in the presence of the parties. | U. J. AGATHO ' JUDGE Mff 05/05/2023 li

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