

TANZANIA / JUDGMENT

regional manager tanroads simiyu vs ms nyanguruma enterprises co ltd 2019 tzhccomd 123 21 february 2019

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TZHCCOMDDECIDED
21 February 2019

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IN THE HIGH COURT OF TANZANIA COMERCIAL DIVISION AT PAR ES SALAAM
MISC.COMMERCIAL CAUSE NO. 39 OF 201ft (Original Misc Commercial Cause No. 203 of 2017)
REGIONAL MANAGER TANROADS-SIMIYU.....PETITIONER VERSUS M/S NYANGURUMA
ENTERPRISES CO. LTD..... RESPONDENT

RULING

B.K. PHILLIP, J. Before me is a petition lodged by the petitioner herein under the provisions of section 16 of the Arbitration Act Cap 15, R.E 2002, Rule 5,6,7,8,9 and 10 of the Arbitration Rules,1957,GN. No 427 of 1957 and paragraph 18 of part III of the Schedule to the Law of Limitation Act, 1971, Cap 89, R.E 2002. A brief background to this petition is that the petition and the applicant signed a contract for major repairs of Ngasamo and Malili Bridges along Nyamshimo -Dutwa unpaved regional Roads for a contract sum of Tshs 260,548,000:=-. The contract was for a period of 180 days. In the course of the implementation of the contract disputes arose, consequently the disputes were referred to Arbitration. Through the National Construction Council procedures, QS, Shaibu Salimu Likumbo was appointed as an i Arbitrator of the disputes between the petitioner and respondent. In the arbitration proceedings the respondent claims were as follows;

- a. An order for immediate release of Tshs. 26,054,800/= held by the respondent (the petitioner herein) as performance guarantee based on the following reasons;
 - i. The claimed sum was wrongly deducted from interim payment certificate No. 1 as the Guarantee was already given by TANROADS - Mwanza a sister institution. ii. The works meant to be guaranteed for its performance have either being completed and part of it have been curtailed by the respondent (the petitioner herein) himself.
- b. Payment of interests on withheld amount of money (Tshs. 26,054,800/=) at 23% per annum, from the date it was supposed to be paid to the date of release of Award.

- c. Payment of Tshs. 24,477,750/= for work done and release of retention money on Malili bridge.
- d. Payment of interests on delayed payment on Malili Bridge at 23% per annum, from the date it was supposed to be paid to the date of release of Award.
- e. Payment of Tshs. 60,408,300/= for work done including loss of profit after stopping and curtailing contract at Ngasamo bridge.
- f. Payment of interests on delayed payment on Ngasamo bridge at 23% per annum, from the date it was supposed to be paid to the date of release of Award. 2
- g. Payment of interests by the respondent (the respondent herein) at 18% VAT per annum for the sum to be awarded to the claimant from the date of Award to the date of actual payment.
- h. Payment of Tshs. 180,000,000.00 being compensation for loss of business occasioned by copying the alleged termination to an authorized person.
- i. Payment of to pay for the costs related to the Arbitration.
- j. Any other relief to the Claimant, which the arbitrator deems fit and reasonable. On 26th January 2017, the Arbitrator QS Shaibu Salimu Likumbo, delivered his final award in which the respondent was awarded the sum of Tshs. 21,598,731.25, Tshs. 24,920,800.00 and Tshs. 17,781,000.00 being unpaid works for Malili Bridge, Ngasamo bridge and costs awarded respectively making a total payment of Tshs. 90,355,331.25 (VAT Exclusive). Upon being served with a notice to appear in court following the filing of the award in this court by the Arbitrator, the petitioner lodged this petition praying for the following orders;
 - (a) An order dismissing the purported filing of the arbitral award made and published on 26th January, 2017.
 - (b) An order setting aside the award dated 26th January, 2017 for being improperly procured and on account of the Arbitrator's misconducts. 3
 - (c) Payment of costs of this petition.
 - (d) Any other orders as the court may deem fit and just. The petitioner stated that the final award is tainted with incurable and fatal misconducts made by the arbitrator and contains errors on the face of the record. It is further stated that the arbitrator's final award is inappropriate due to the arbitrator's failure to comply with and abide to the mandatory rules pertaining to arbitration procedures by proceeding with arbitration against the petitioner who has no corporate personality to be sued. That the arbitration proceedings were wrongly entertained without the arbitration agreement, neither the request for arbitration nor notification of Arbitration was annexed thereto. Other broad areas of complaints in the petition were;

- i) That the arbitrator failed to comply with the substantive law and procedure rules, for instance the petitioner alleged that the arbitrator failed to comply with the mandatory requirements provided in Multi-tier Arbitration clauses as provided under clauses 27.1, 28.1.2 and 3 of the General Conditions of Contract read together with the special Conditions of the contract works. ii) That the arbitrator failed to analyze properly the evidence adduced, consequently the award granted to the respondent was against the weight of evidence presented before him. On the other hand the respondent contended that the petitioner consented to arbitration proceedings by the sole arbitrator SQ Shaibu Salimu Likumbo 4 and that there was no any misconduct by the arbitrator shown by the petitioner in this petition to warrant setting aside the award. Generally, the respondent is in agreement with procedure adopted by the arbitrator in the hearing of the complaint, analysis and evaluation of evidence as well as the award granted to the respondent. The respondent invited this court to dismiss the petition with costs. It has to be noted that, the court of law cannot entertain any matter unless it is properly moved and the matter before it is competent to be entertained, that is, it has to be in compliance with the relevant laws. At the hearing of this petition upon perusal of the court's records and the proceedings in this petition, this court suo motto raised a concern on whether the petitioner complied with the requirements in Rule 8 of the Arbitration Rules, 1957, GN NO 427 of 1957 (hereinafter to be referred to as the GN No. 427/1957). Rule 8 of GN No.427/1957, provides as follows; '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 is mine) Responding to the court's concerned aforesaid, the petitioner's advocate Mr. Kenan Komba, conceded that the submission and the award or certified copy of it by the petitioner or his advocate to be a true copy have not been annexed to the petition as required under the provisions of Rule 8 of GN.No.427/1957. He referred this court to a list of additional documents that were filed by the petitioner on 13th November, 2018 which includes a 5 certified copy of the award only. Mr. Komba further submitted that the failure to annex the submission and the award or certified copies of the same is not fatal as the arbitrator had already filed in court the original award, so the court can safely make reference to the documents filed by the Arbitrator. When called upon to respond to Mr. Komba's submission, the respondent's advocate, Mr. Omary Ngatanda submitted that since the petitioner's advocate has conceded that the provisions of rule 8 of GN. No 427/1957 have not being complied with, then this petition deserves to be strike out. He urged this court to ignore the additional documents since the same were filed belatedly without leave of the Court. Mr. Omary insisted that the said additional documents cannot form part of the petition since they were filed separately. It is not in dispute that the requirements of Rule 8 of GN.No.427/1957 are mandatory as the word used is 'Shall'. Mr. Kenan Komba requested this court to refer to the documents filed by the arbitrator since the original award is annexed thereto and the additional documents which he filed on 13th November, 2018. With due respect to the learned Advocate, Mr. Komba, the application filed by the arbitrator for the award to be enforced as a court decree is not part of this petition and the documents filed therein cannot be used as a substitute for the annexures stipulated under rule 8 of GN. No.

427/1957 to be annexed to the petition. It has to be noted that the documents filed by the Arbitrator are for the purpose of moving the court to enforce the award as a court decree, while this 6 by the petitioner for the purpose of moving this court to set aside the award. The arbitrator files the award or certified copy of it in court under the section 12(2) of the Arbitration Act, Cap 15, R.E.2002, while the petition to challenge an award is filed under the provisions of GN. No. 427/1957, whose annexures are clearly stipulated in Rule 8 of 427/1957, these are the submission, award or the special case to which the petition relates, or copy of it certified by the petitioner or his advocate to be true copy. From the foregoing it is evident that the procedure for filing the final award is different from the procedure for challenging the award, likewise even the manner of certification of the annexures involved in the two processes are different. It is my settled view that this court cannot refer to the documents filed by the arbitrator to cure the defects in this petition as prayed by Mr. Komba. As regards the additional documents filed on 13th November, 2018 by Mr. Komba, the same were wrongly filed without leave of the court after pleadings were complete and the petition set for hearing, thus the respondent had no opportunity to respond to them in his reply. Therefore, I cannot take them into consideration in this ruling. It is imperative for parties to a case to file documents timely in accordance with the law and procedure rules. The procedure rules are there purposely to prevent chaos in the processes of filing the pleadings and enabling smooth administration of justices. Having analyzed the arguments raised by Mr. Komba, I am of a settled view that this petition is incompetent as it contravenes the provisions of Rule 8 of GN. No. 427/1957 as aforesaid. In the case of Kobil Tanzania Limited Vrs Mariam Kisangi t/a Mnafu Traders, Hon. Mjasiri, J as she then was, had this to say on the failure to comply with Rule 8 of GN. No. 427/1957; 'On looking at the petition filed in court, Annexure KOBIL 1, which contains the Arbitration Agreement has not been certified by the petitioner or his advocate to be a true copy as provided in rule 8 of the Arbitration Rules. The requirement under Rule 8 is mandatory. I am inclined to agree with arguments raised by Mr. Kaioio that the requirements under Rule 8 are different from the requirements under the Kenyan Laws in respect of verifying affidavits in respect of a plaintiff and verification clauses in pleadings. The requirement under Rule 8 is not for the Petitioner to file an affidavit to state that the documents annexed to the petition are genuine and their respective contents are correct. The requirement under Rule 8 are simple and straightforward and there is no reason for non compliance. In view of what has been stated hereinabove the petition is hereby struck out with costs' The position of the law is that failure to annex the submission or award or a copy of it certified by the petitioner or his advocate to be a true copy is fatal, [see the following cases, The Hon Attorneys General vrs Hermanus Philippinus Steyn, Misc Civil Cause No 11 of 2010 (unreported), Kigoma Ujiji Municipal Council Vrs Nyakirang'ani Construction Limited, Misc Commercial Cause No. 333 of 2014 8 (unreported), CRDB Bank PLC vrs Sycon Builders, Misc Commercial Application No. 65 of 2018 (unreported)] Since Mr. Komba conceded that the requirements of rule 8 of GN. No. 427/1957 were not complied with, I hereby strike out this petition. I give no order as to costs since this petition has been struck out on the ground raised by the court suo motto. Dated at Dar Es Salaam this 21st day of February 2019 B.K. PHILLIP JUDGE 9

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