

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 99 OF 2012**

**A.C. GOMES (1997) LIMITED.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT (OBJECTOR)**

**THE BOARD OF TRUSTEES OF MARINE PARKS**

**AND RESERVES UNIT.....2<sup>ND</sup> DEFENDANT(OBJECTOR)**

**CONSOLIDATED HOLDING**

**CORPORATION.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Shangwa, J.**

This is a preliminary objection against the hearing of the suit. That is Civil Case No. 99 of 2012. It was raised by the 1<sup>st</sup>

and 2<sup>nd</sup> defendants. It is based on one point of law that the suit is wrongly filed contrary to SS 15 and 16 of the Arbitration Act, Cap. 15 R.E. 2002 and Rules 5 & 6 of the Arbitration Rules and that the same was conclusively determined by the Panel of Arbitrators vide Arbitration Award dated 15<sup>th</sup> June, 2009.

The question to be determined by the court here is simple. It is whether or not the claim by the plaintiff in the suit that it has exclusive rights over the development of Mbudya Island situated in the north of Dar es Salaam was conclusively determined by a Panel of Arbitrators in their award dated 15<sup>th</sup> June, 2009 and if so whether or not this court can entertain the suit on a matter which the Panel of Arbitrators has already conclusively determined.

In order to determine this question, I have found that it is necessary to examine the plaint, the plaintiff's claim before the

Panel of Arbitrators and look at the Award by the Arbitrators. At paragraphs 5 and 6 of the plaint, it is indicated respectively that there was an Agreement between PSRC/CHC (3<sup>rd</sup> defendant) and the plaintiff to sell to the plaintiff outstanding shares of the share capital of Kunduchi Beach Hotel Ltd. for USD 800,000 and that at clauses 4 and 7 of the said Agreement, it was agreed that the plaintiff would undertake to carry out permissible development on Mbudya Island so as to protect the Island from environmental degradation and to make the Island an attractive tourist resort. At paragraph 8 of the plaint, the plaintiff is complaining that in breach of the said Agreement, the Government of the United Republic of Tanzania through the Ministry of Livestock Development and Fisheries vide the Marine Park and Reserve Unit has advertised tender inviting bidders to tender for development of Eco-Lodge or tented camp in Mbudya Island Marine reserve in the north of Dar es Salaam City. At paragraph 11 of the plaint, the plaintiff states that if the tender for development of Mbudya

Island is allowed to proceed, the plaintiff's rights to develop the Island and offer services to tourist visiting the island will be forfeited and will cause irreparable loss.

One of the claim by the plaintiff before the Arbitrators was a claim for special and general damages against PSRC/CHC for breach of Agreement.

In resolving the plaintiff's claim the Panel of Arbitrators composed of D.Z. Lubuva, Chairman, G. M. Kilindu, Co-Arbitrator and KMIM Msibu, Co-Arbitrator addressed itself to clause 7.4 of the Agreement which provides as follows and I quote:

*"C.7.4 The purchase undertakes to carry out the permissible development on Mbudya Island so as to protect it from environment*

*degradation and to make the Island an attractive tourist resort."*

The Panel of Arbitrators also addressed itself to clause 8.3. of the Agreement which provides as follows and I quote:

*"C.8.3 The existing arrangement as regards company's right to offer services to the tourist visiting Mbudya Island will continue and assigned to be enjoyed by the company subject to entering into a specific agreement with the relevant Government Authority."*

After addressing itself to clauses 7.4. and 8.3. of the Agreement, the Arbitrators observed inter-alia as follows and I quote:

*"From our reading of the Agreement ... we can hardly find any express and specific provision in which the claimant was granted exclusive right over Mbudya Island. Undisputably what is crystal clear is the Respondent's undertaking to facilitate the development and use of the Island as a tourist attraction subject to specific agreement by the relevant government authority."*

After so observing, the Panel of Administrators held that under the Agreement, Mbudya Island was not part of Kunduchi Hotel and it dismissed the plaintiff's claim relating to Mbudya Island with costs. The Award by the Panel of Arbitrators has never been challenged in this court.

Mr. Ogunde for the plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' preliminary objection has no merit because the cause of action in the present suit and the issues involved in the present case are different from the ones which were involved in the arbitration Proceedings. He contended that in the present case the plaintiff is challenging invitation to tender for development of ECO-Lodge or tended camp in Mbudya Island by the 2<sup>nd</sup> defendant on ground that the award of tender to any other person will cause disruption to the plaintiff's plan for development of Kunduchi Beach Hotel as such will cause damages and loss to the Plaintiff. That is right to some extent. However, the question as to whether or not the plaintiff has exclusive rights over the development of Mbudya Island as a tourist attraction resort was conclusively resolved by a panel of distinguished Arbitrators in their award dated 15<sup>th</sup> June, 2009.

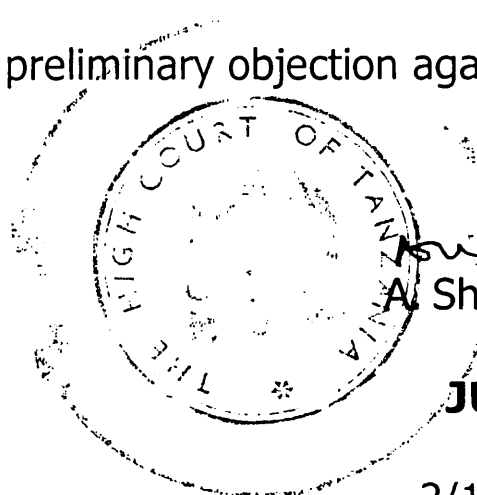
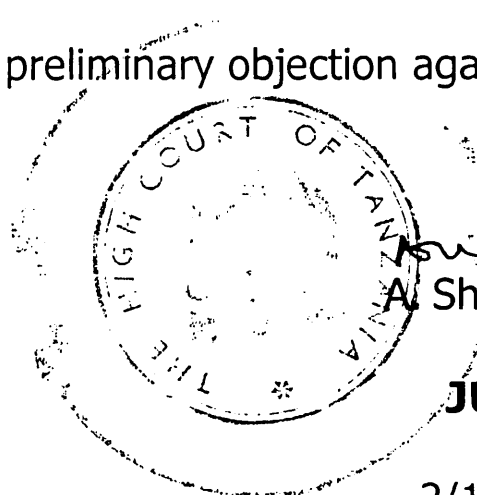
In actual fact, the Panel of Arbitrators was of the considered view that there is nothing in the sale Agreement of Kunduchi Hotel made between the plaintiff and PSRC/CHC which confers exclusive rights on the plaintiff to develop Mbudya Island except the undertaking by the Government to facilitate the development and use of the said Island as a tourist attraction subject to specific Agreement by the relevant authority.

Apart from noting that Mbudya Island is not part of Kunduchi Hotel which was sold by the Government to the plaintiff, the Panel of Arbitrators also noted that there has never been such specific Agreement as above mentioned between the plaintiff and the relevant Government Authority.

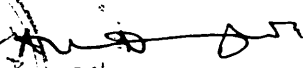


Under such circumstances, by challenging the 2<sup>nd</sup> Respondent's invitation to tender for the development of Mbudya Island by any other person, the plaintiff is re-asserting the right over Mbudya Island which the Panel of distinguished Arbitrators has already determined in the negative.

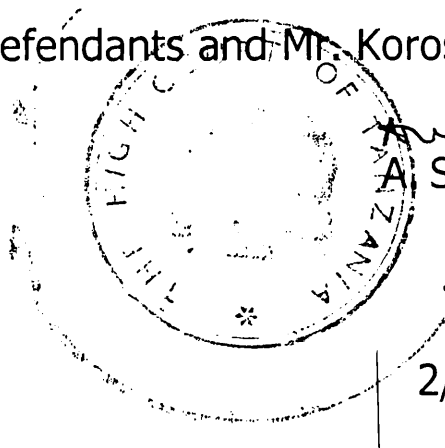
On my part, I agree with the 1<sup>st</sup> and 2<sup>nd</sup> defendants' Attorneys Mr. Mwintasi, Mr. Karim Rashid and Mrs. Kachenche that by implication, entertaining the plaintiff suit is tantamount to re-litigating the matter which has already been determined by the Arbitrators. For this reason, I uphold the 1<sup>st</sup> and 2<sup>nd</sup> defendants' point of preliminary objection against the suit and I dismiss it with costs.

A circular seal of the High Court of Tanzania, featuring a central emblem and the text "THE HIGH COURT OF TANZANIA" around the perimeter.  
  
A. Shangwa  
**JUDGE**  
2/10/2014

Delivered in open court this 2<sup>nd</sup> day of October, 2014 in the presence of Mr. Mwintasi for 1<sup>st</sup> & 2<sup>nd</sup> Defendants and Mr. Ngatui for 3<sup>rd</sup> Defendants and Mr. Koroso for Mr. Ogunde for Plaintiff.



A. Shangwa  
**JUDGE**  
2/10/2014

The seal of the High Court of Tanzania is circular, featuring a central emblem with a scale of justice and a book. The words "THE HIGH COURT OF TANZANIA" are inscribed around the perimeter of the seal.