IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

MISC. CIVIL CAUSE NO.3 OF 2020

(C/F High Court Civil Case No. 3/2010)

IN THE MATTER OF THE ARBITRATION ACT CHAPTER 15 OF THE LAWS R.E 2002

AND

IN THE MATTER OF DECISION OF THE SOLE ARBITRATOR DATED THE 25TH DAY OF NOVEMBER, 2019 AND NOTIFIED/RELEASED TO THE PARTIES ON THE 17TH DAY OF JANUARY,2020

BETWEEN

M/S JANDU PLUMBERS LIMITED .....PETITIONER

AND

M/S HODI (HOTEL MANAGEMENT)

COMPANY LIMITED.....RESPONDENT

PETITION AGAINST AWARD DATED 25TH NOVEMBER, 2019 BUT NOTIFIED/RELEASED TO THE PARTIES ON THE 17TH DAY OF JANUARY, 2020

(Under section 14,15 and 16 of the Arbitration Act, Chapter 15 R.E 2002 and Section 64 of the Civil Procedure Code, Chapter 33, Revised Edition, 2002)

JUDGMENT

16/4/2021 & 20/08/2021

GWAE, J

In this petition, moving provisions of law being sections, 14, 15 and 16 of the Arbitration Act, Chapter 15, Revised Edition, 2002 and section 64

of the Civil Procedure Code, Cap 33 Revised Edition, 2019, I am asked to ascertain if the arbitration award dated 25th November 2019 and released to the parties on the 17th January 2020 qualifies for being set aside by the court and consequently, issuance of the following orders; for selection of a new arbitrator or alternatively, the court to consider and vary the award issued by advocate **Mtango Jotham Andrea Lukwaro**, a sole arbitrator, may his soul rest in eternal peace, which was to the effect that, the court be pleased to remit back to a new arbitrator who shall make a fresh award on the evidence available on record, any other order or directions as the court may deem fit to grant and costs of the petition be provided for.

Initially, the petitioner instituted a civil case registered as Civil Case No. 3 of 2010 in the court claiming against the respondent for breach of contract necessitating the petitioner's termination of the contract on refurbishment of Mount Meru Hotel, she however claimed to be paid for the works done by her and breach of contract. The trial of the petitioner's suit was stayed by the court (Massengi, J) pending arbitration as sought by the respondent and pursuant to the parties' agreement dated 18th December 2007. The petitioner sought several reliefs before the arbitrator and the respondent denied the petitioner's claims and set her counter claim against the petitioner.

Before commencement of the arbitration, there was interlocutory applications that were made by the petitioner and rulings thereof particularly, jurisdiction of the arbitrator contractual requirement of conducting mediation before arbitration and that foreign lawyers before the sole arbitrator, immediately before arbitration started, there were 27 issues framed. The Petitioner summoned a total of six witnesses whereas the respondent was able to call three witnesses. Finally, the sole arbitrator procured the award by making the following orders; the petitioner's claims were entirely dismissed with costs, the petitioner was found to have been fully paid for the works done under the West Works Contract and that the petitioner was in breach of the contract between itself and by failing to promptly leave or vacate the respondent's site thereby preventing the respondent from replacing him with a new contractor for completion of the works in time.

Whereas the respondent's counter claims were accordingly awarded against the petitioner as follows, Payment of USS$ 130,333.44 being fees the respondent was compelled to pay for restructuring the loans advanced to him, US$ 424,577.20 being interest that the respondent was compelled to pay on the loan, payment of interests, payment of US$ 169,938.39

being the sum overpaid to the petitioner by the respondent and costs of the counter claim. Seemingly, the petitioner was aggrieved by the procured award in favour of the respondent. Thus, this petition.

According to the petitioner, the award is tainted with mis-conducts on the part of the arbitrator and that, it is consisted of errors apparent on the face of the award on the following eighteen (18) grounds;

1. That, the learned sole arbitrator erred in law by failing to observe and direct that the admission of the foreign practitioners was contrary to the provision of section 8 (1) (a) (ii) of the Advocates Act, Chapter 341 Revised Edition, 2002
2. That, the sole arbitrator by failing to rule on whether or not the foreign practitioner could practice in Tanzania without Business Licenses
3. That, the sole arbitrator wrongly assumed jurisdiction in a matter in which the condition precedent to arbitration had not been fulfilled to wit; there was no reasoned decision made by the mediator which would have been a basis for a submission to the arbitrator
4. That, the sole arbitrator wrongly ruled that the dispute over labour only contract was not merged into the dispute under Wet Works Contract thereby improperly procuring the award and therefore erred by failing to exercise jurisdiction on the labour only contract
5. That, the sole arbitrator wrongly ruled that the respondent upon incorporation never ratified prior contracts entered into prior to its

incorporation on the 8th day of June 2007 thereby making errors apparent on the record and improperly procuring the award

6. That, the sole arbitrator wrongly ruled that, the Memorandum of the commitment to progress the Mount Meru Hotel Project dated 29th day of May 2007 was a valid document binding upon the Petitioner, thereby improperly procuring the award
7. That, the sole arbitrator misconducted himself in holding that the petitioner had signed a Waiver over a lien in respect of the site instead of a Waiver on lien over the works
8. That, the sole arbitrator wrongly ruled that, the Petitioner's claims for specific damages under paragraph 21 of the statement of the claim arose during the labour only contract thereby misconducting himself and thereby improperly procuring the award
9. That, the sole arbitrator misconducted himself in failing to consider any of the claims by the Petitioner or at all and in failing to rule on the said claims
10. That, in deciding that the petitioner was entitled to hold unto the site after termination of the Wet Works Contract on 7th November 2008, the sole arbitrator misconducted himself in invoking clause 16.3 of thew FIDIC Conditions instead of clause 16.2 and 16.4 which clauses were applicable in the obtaining facts
11. That, the sole arbitrator misconducted himself and committed an error apparent on the face of the record by holding that, the Petitioner breached the Wet Works Contract.
12. That, the sole arbitrator misconducted himself and thereby committing an error apparent on the face of the record in failing to hold that as of 27th November 2009 the respondent and the new contractor M/S Holtan Limited were not in position to start the

Project of rehabilitating and refurbishing the Mount Meru Hotel, consequently, no damages were suffered as a result of the Petitioner's decision to hold unto the site up to 9th June 2009

13. That, the sole arbitrator erred in holding that the Valuation by Alfred Roman of M/S Romani Architects and Mr. Amendous Chacky of Matawana Architects were conducted by independent and impartial personnel

14. That, the sole arbitrator made an error on the face of the record in holding that, the purported report by M/S SiVEST was a competent report worth judicial consideration and thereby improperly procuring the award

15. That, the sole arbitrator misconducted himself in purporting to hold to hold that, the respondent had overpaid the Petitioner without even considering the Petitioner's claims or at all

16. That, the sole arbitrator made an error of the law and facts on the face of the record by holding that the respondent never undertook to pay the Petitioner for claims under the Labour only contract thereby improperly procuring the award

17. That, the sole arbitrator grossly erred in holding that according to valuation by M/S Romani Architects and Matawala Architects the value of the Works done by the Petitioner under the Wet Works Contract were valued at a sum of $ 316,789 [29] instead of 542, 138 [55]

18. That, the sole arbitrator clearly committed an error on the face of the record thereby wrongly procuring the award by failing to hold that the respondent having ratified the contracts entered into prior to the Wet Works and on account of the instructions by

the respondent Director further she (the respondent) was liable for the sub-contractors' claims.

The respondent, On the other hand, , through his answer to the petitioner's petition, canvassed a preliminary objection on three points of law however the same was overruled vide the ruling of this court dated 25th August 2020.

Regarding the petitioner's complaints herein above, the respondent's counsel was of the opinion that, the above complaints do not constitute errors apparent on the face of the impugned award nor do they demonstrate misconduct on the part of the arbitrator. He further stated that, the respondent never ratified the said negotiated contract nor was he aware of the execution of Labour Only Contract. In his opinion, this petition thus constitutes, impermissible re-litigation. Finally, the respondent prays for an order dismissing the petition and the petitioner be condemned in costs.

In his reply to the respondent's answer to the petition reiterated what is contained in his grounds for the revision. However, he added that after the Original Labour only contract had been negotiated the respondent upon incorporation ratified the negotiated contract and took over the same

that, there is error on the part of the arbitrator in allowing or entertaining foreign practitioners to practice in Tanzania and that there was no ruling that he delivered on whether the private advocates based in United States of America could practice in Tanzania without business licence or at all. He further stated that, failures by the sole arbitrator to consider material facts or and evidence and his wrong holdings in the award constitute improperly procured award, therefore subject to the court's intervention.

When the petition was called on for hearing before me, the petitioner and respondent who had legal services from their respective advocates, namely; **Mr. Elvaison E. Maro** from M/S Maro and Company Advocates and **Dr. Wilbert B. Kapinga** from Bowmans' Tanzania respectively, sought and obtained leave of the court to dispose of the matter by way of written submission These advocates who appeared before me are those the ones who appeared during arbitration save the USA's lawyers. Written submissions were ultimately filed in court. I shall determine one ground after another and when necessary I may combine two or more petitioner's grounds in my determination of this petition.

As to the 1st and 2nd ground for the sought order setting aside the arbitral award which read; **that, the learned sole arbitrator erred in law**

by failing to observe and direct that the admission of the foreign practitioners was contrary to the provision of section 8 (1) (a) (ii) of the Advocates Act, Chapter 341 Revised Edition, 2002 and **that, the sole arbitrator by failing to rule on whether or not the foreign practitioner could practice in Tanzania without Business Licenses contrary to section 3 (1) (a) of the Business Licensing Act Cap 208 R. E 2002.**

Embarking on the 1st and 2nd ground of the petitioner's complaints, briefly, the counsel submitted that it was incorrect for the arbitrator to hold, in his award, that he was informed by one Dr. E. Kapinga that the respondent successfully filed an application to the Chief Justice of the Judiciary of the United Republic of Tanzania seeking special licence for the three advocates from the United States of America and that, thereafter Arbitrator wrongly went on holding that, Dr. Kapinga presented to him evidence on the requisite fees allegedly paid for the grant of the special licence.

According to the petitioner's counsel, the arbitrator's holding is not supported by the records and are not part of the arbitral proceedings, furthermore, the counsel argued that, the purported presentation of documents (CJ's permit and court's fees receipt) by Dr. Kapinga was done in the absence of the petitioner's advocates, thus, the petitioner had not

participated in the proceedings when Dr, Kapinga purportedly justified the practice of foreign advocates. More so, according to the learned counsel for the petitioner, the said presentation of documentary evidence remains mere assertion since no document that was left with the learned arbitrator. The petitioner's counsel also submitted that, the arbitrator's ruling on the petitioner's objection on the question of business license for the foreign advocates was left unresolved to date. He thus urged that this court to consider it to be unusual omission as an error apparent on the face of the record sufficing to justify the court to set aside the award.

The petitioner's counsel argued that the advocates from USA were barred from practicing in the United Republic of Tanzania in terms of section 41 (1) of the Advocate Act (supra) as they are unqualified persons unless designated by the Tanzania Minister as per section 8 (1) (a) (ii) of the Act. He cemented his arguments by citing a decision of the Court of Appeal of Tanzania in **Edson Mbogoro vs. Dr. Emmanuel John Nchimbi & AG,** Civil Appeal No. 140 of 2006 (unreported).

The learned counsel further argued that, the arbitrator committed an error apparent to his ruling delivered on the 18th July 2018 as he neither ruled on the question of business license by the foreign practitioners as

provided under section 10 (2) (a) the Business Licensing Act Chapter 208 Revised Edition, 2002. Similarly, the counsel argued that petitioner had not been heard on this aspect, thus constitutes hearing without deciding which is an affront to the rules of natural justice.

In his response to the 1st and 2nd petitioner's complaints as rightly termed by the respondent's counsel as ground on jurisdictional issue, the counsel firstly raised a concern that, the court is not entitled to examine the record of the arbitration proceedings. Alternatively, the counsel argued that, the American Lawyers were granted special licence vide a letter of the Deputy Registrar of the High Court dated 13th April 2015 and that the petitioners were duly notified of such grant and that, the requisite fees were paid and the payments receipts were copied to the petitioner's advocate one **Bundala,** He then urged this court to make a reference to the case of **Vodacom Tanzania Limited v. FIS services Limited**, Civil Appeal No. 14 of 2016 (unreported-CAT)

As to the complaint on business license, the respondent's reiterated that the court is not entitled to examine the arbitration record however he argued that the arbitrator was right in holding that the Chief Justice of the United Republic of Tanzania (CJ) has power to grant Special License to

persons who are not in the advocates' roll or not holders of practicing certificates or business licenses (unqualified persons).

In his final submission, the petitioner's advocate did not dispute the issuance of the special license however he said the same to have been issued after the PO was raised as the PO had been canvassed since 2014 and parties had filed their written submissions as far as Her PO is concern. He also reiterated that, the arbitrator did not rule on, whether the foreign practitioners would be allowed to practice without business license as required by the Business Licencing Act (supra) and that admission given to the USA lawyers did not extinguish the requirement provided for under section 3 (1) (a) and 10 (1) (2) of the Act, thus, denial of the right to be heard.

Having considered, the parties' submissions as well as the ruling delivered by the sole arbitrator on the 18th July 2018, I am of the following views, **firstly,** that, generally courts are not entitled to examine the record of the arbitration proceedings however where jurisdictional issue or right to be heard are raised as in the instant petition, the court has therefore to examine the arbitration proceedings especially the ruling in question incorporated in the award since the same goes to the root of the matter

particularly when jurisdiction of the arbitrator or a certain representative is questioned or where there is alleged breach of rules of natural justice. Taking home my finding, perhaps I would be guided by a decision of the Supreme Court of Canada in **City of Saint John v. Irving Oil Co. Ltd** (1966) SCR approved by the Court of Appeal of Tanzania in **Vodacom's case** (supra) at page 28 where it was stated that there may, where it is permissible to examine the evidence of the arbitration proceedings.

Secondly, that, the petitioner could not in law file petition of this nature or any other application contesting the ruling on preliminary objection since an order (s) emanating from it were mere interlocutory orders which were to wait for final award and above all that the ruling is plainly encompassed in the impugned arbitral award.

Thirdly, that, the petition is for setting aside an arbitral award on the ground that, the admission of USA's lawyers was contrary to our law however when I carefully look at the ruling of the arbitrator and documents annexed in the respondent's written submission, I have certainly found that there were three (3) foreign lawyers namely; **Mr. Robert Wallace, Ms. Elizabert Sadza** and **Ms. Callyson Grove** who were admitted as they were given Special License by the CJ vide the letter of the Senior Deputy

Registrar (Nkya-SDR) dated 13th April 2015. Thus, provisions of section 8 of the Advocates Act (supra) were literally complied with.

Nevertheless, as correctly argued by the petitioner's advocate, the said grant of Special Licence by the CJ, would not be considered without involving the parties and their respective advocates since the parties' written submission for and against the raised preliminary objection based on two points of law, to wit; **objection no. 1**, "whether it was proper to proceed with hearing of the arbitration when the dispute between the parties had not been referred to a mediator for his/ her opinion" and **objection no. 2,** whether the lawyers from the United States of America could represent the Respondent without first seeking and obtaining Special Licence for the Chief Justice. I am holding so simply because it is as argued by the petitioner's advocate that, the parties' written submissions in regard to the PO were concluded by September 2014 whereas the Special Licenses were obtained and issued on 25th April 2015.

If completeness of the written submission by the parties in respect of the PO, the arbitrator came to be furnished with new information accompanied with necessary documents before his delivery of his ruling, that should be made known to both parties. It is against the rule of natural

justice to take an adverse action against a party without affording him or her an opportunity of being heard. This position has been consistently stressed by our courts for instance in the case of **VIP Engineering and Marketing Limited and Others vs. City Bank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported), the Court of Appeal stated inter alia that;

> "The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Courts on numerous decisions. The right is so basic that a decision which is arrived at in violation of it would be nullified...."

The Court of Appeal had also stressed the requirement of affording other party to a court's or tribunal proceeding an opportunity of being heard in **Chadha and Company Advocates vs. Arunnaben Chhita Mistry** & 2 Others, Civil Appeal No. 23 of 2013 (unreported) by stating that;

> "The right to be heard when one's right are being determined by any authority leave alone the court of justice, is both elementary and fundamental, its flagrant violation will of necessity lead to the nullification of the decision arrived at in breach of it"

(See article 13 (6) (a) of the Constitution of the United Republic of Tanzania.

Basing on the principles of natural justice, constitutional right to be heard and numerous judicial precedents including those cited above, I am therefore legally made to adhere to the established principle that, right to be heard is a basic right exercisable by any person by virtue of his being a human being. Therefore, If the Special License and payment of necessary fees were made in conformity with the law yet the same were made after the PO had been raised and argued. Question that follows, is it proper to consider evidence or documents filed after PO has been raised by either party in a proceeding and argued by the parties? The answer is very obvious '**No**'. I think error has clearly been shown since the arbitrator was to give his ruling and make a proper order pursuant to the law instead of considering other pieces of documents which were obtained and filed after PO has been canvassed by the respondent taking into consideration that the said USA's lawyers had already drafted and filed pleadings (respondent's points of defence and counter claim presented for filing on the 30th June 2014) prior to PO and even after the PO had been raised, the

said lawyers argued the PO while their jurisdiction was questioned by the claimant now petitioner.

Filing written submission is, in law, equated to entering appearance and arguing a case. This position of the law was rightly emphasized by this court sitting at Dar es Salaam in the case of **Hidaya Zuberi vs. Bongwe Mbwana** PC. Civil No. 98 of 2003 where it was held;

> "The practice of filing submission is equivalent to schedule for hearing. Therefore, failure to file submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant's consequence of failure to file written submission are similar to those of failure to appear and prosecute or defend as the case may".

Act of the foreign lawyers of filing written submission against the PO while their jurisdiction to enter appearance was seriously questioned, was not legally justified since by doing so it amounted to entering appearance and argued the preliminary objection before seeking and obtaining the requisite Special Licence from the CJ.

I am however aware that there is an interim award/ ruling issued by the arbitrator regarding the PO though not dated where he stayed proceeding pending compliance with terms and conditions as set by Clause

20:2, settlement of dispute and issue of jurisdiction to foreign lawyers was vividly deferred till and when the parties comply with the steps stipulated under Clause 20:2 including mediation but the arbitrator after compliance of Clause 20:2 would not be justified to entertain other pieces of evidence while the PO was already argued by both parties

I have also noted that the arbitrator in his ruling did rule on "whether the lawyers from USA could represent the respondent in arbitration proceedings without obtaining a Special Licence from the Chief Justice (CJ)" however he did not decide on the objection raised by the petitioner's advocate (Mr. Bundala) in the course of his written submission on whether the foreign practitioners would practice without business licence as stipulated under section 3 (1) (a) of the Business Licensing Act Cap 208 Revised Edition, 2002 and the same was according replied by the respondent who was of the opinion that, the mischief is correctable. The learned arbitrator in my view, was not justified to completely omit deciding on the issue which was accordingly argued by the parties or he was not allowed to entertain attachment of documents or any oral submission by the respondent or his advocate in absence of other parties as by doing so it violates the principle of natural justice particularly the right to be heard. In

these situations, I am judicially inclined to adhere to the decision in **Rashid Moledina & Co. (Mombasa) Ltd and others vs. Hoima Ginners Ltd** (supra) where it was held that, the court will be slow to interfere with an award procured by way of arbitration but the court will do so whenever this becomes necessary in the interest of justice and will act if it shown.

Worse still, the preliminary objection raised by the petitioner was argued by the foreign practitioners as rightly argued by the petitioner and depicted in their submission in response to the claimant's preliminary objection as earlier explained as well as their response to the petitioner's claims accompanied by the counter claim (See the drawees of the Respondent's points of defence and counter claim filed on the 3rd September 2014). The acts of the USA's lawyers to draft and file written submission against the PO and their subsequent appearance before the arbitrator, were in my view, not justified unless there was ruling **allowing correctable measures to be taken and when so taken**, both parties would have an audience to the arbitrator and **not act** of entertaining Dr. kapinga, the learned counsel for the respondent without the presence of the petitioner or his advocates or both.

Equally, a failure by the arbitrator to decide on the matter argued by the parties is meritoriously raised and founded as the ruling delivered by the arbitrator is silent on the aspect of the said objection. In **Rashid Moledina & Co. (Mombasa) Ltd and others vs. Hoima Ginners Ltd** (1967) EA 645 where it was held;

> "A good reason for setting aside the award would obviously be, as is set in section 12 misconduct of the arbitrator or the improper procuring of the award.....another good reason is where an error of law is apparent on the face of the record"

Approving the above decision, the Court of Appeal of Tanzania when dealing with the similar situation in the case of **Vodacom Tanzania Limited v. FIS services Limited** (supra), had these to say;

> "We are highly persuaded by the above position being a construction of the provisions of the Kenyan Law which are in pari-material with section 16 of the Act, Thus, the power to set aside an award, as we explained earlier, is not limited to an arbitrator's personal misconduct but to cases involving errors manifest on the face of the award.....We need not to reiterate that the said power is exercisable in cases of misconduct of the arbitrator or improper procuring of the award or where there is an error on the face of the award"

Since 1st and 2nd grounds are all about the ruling of the arbitrator which in my view is vividly encompassed in the award in respect of the

petitioner's objections as to the appearance of USA's Lawyers during arbitration proceedings before him (arbitrator) which goes to jurisdictional issue of the said USA's lawyers and the unresolved issue of Business Licence argued by the parties, as complained by the petitioner, occasioned a denial of right to be heard, both errors are apparent on the said ruling which also affects the subsequently procured award, the 1st and 2 ground of this petition are hereby upheld.

I should now move to the **3rd** ground, notably; **that, the sole arbitrator wrongly assumed jurisdiction in a matter in which the condition precedent to arbitration had not been fulfilled to wit; there was no reasoned decision made by the mediator which would have been a basis for a submission to the arbitrator.**

Arguing on the third ground herein, the counsel submitted that, in terms of procedure, when a dispute is called before an arbitrator, it must be directed that, the dispute must go to a mediator before commencement of arbitration proceedings. The mediator shall be supposed to render his opinion which will bind the parties and if the parties or a party is dissatisfied then arbitration shall proceed. According to the leaned counsel for the petitioner, in this dispute the mediator never rendered or forwarded his written opinion to either the parties or to the sole arbitrator. Thus,

according to him, the arbitrator wrongly assumed jurisdiction to entertain the arbitration proceedings as there was no mediator's written opinion pursuant to Clause 20.6 under authority of a contract entered on the 18th December 2007 the said contract was based on the Edition (1999) of International Federation and consulting Engineers (FIDIC). To buttress his submission in respect of this ground, the petitioner's advocate cited the case of **Posta Bank v. Patty Interplan Ltd**, Miscellaneous Civil Cause No. 5 of 2012 (unreported), where this court had these to say;

> "In my view the circumstances in the cited case are similar to those pertaining to the present case. The arbitrator's power or authority in the present petition was not automatic. He could only have such jurisdiction upon getting a reference from an adjudicator".

It was therefore, the opinion of the counsel for the petitioner that, the arbitrator clearly erred in assuming jurisdiction which he did not have in the absence of the mediator's written opinion.

In his reply to the 3rd ground, the respondent's counsel argued that the FIDIC conditions of the contract at Clause 20.2 and 20.6 were specifically and explicitly deleted from the sole contract between the parties instead there was an addition of clause 20.2, a settlement of

dispute clause which was not requiring a reasoned decision from the mediator but simply requires him to give his opinion in writing. He then urged this court to make a reference to **R-1**.

Alternatively, he argued that the mediator's opinion was waived by the petitioner's conduct of not raising his concern as to any infirmity regarding the mediator's opinion. The respondent's counsel added that the counsel for the petitioner has raised the same issue after lapse of 2½ years. He finally argued in this ground that, it was the petitioner who moved the arbitrator into arbitration proceedings after the mediation had failed by writing a letter to the arbitrator requesting him to commence arbitration proceeding, he then urged this court to make a reference to petitioner's letter dated 25th April 2018, **R-4**

In his final / rejoinder submission, the petitioner's advocate hotly argued that the issue of jurisdiction can be raised by either party or court at any time be it during arbitration or any stage including on appeal. He further submitted that either of the FIDIC Conditions, the mediator was supposed to give a written opinion Admittedly, the counsel added that the cited or referred petitioner's letter (R-4) did not induce the arbitrator to conduct the proceedings without the mediator's opinion or at all.

Having briefly summarized the parties' arguments on the 3rd ground for the petition, I now turn to its determination. It is undisputed fact that, Mr. Bundala, the learned counsel for the petitioner wrote a letter to the arbitrator dated 25th April 2015 (R-4) as rightly argued by Dr. Kapinga and that there was no written opinion by the mediator. Therefore, the petitioner's complaint in this issue is found not contested. That, being the position, I will therefore ascertain if the written opinion by mediator to the arbitrator was a mandatory requirement before the mediator's assumed his arbitration role. In order to be confident in determining this ground, I feel obliged to look carefully at the wordings of conditions of contract (R1) at clause 20: 2 on claims, disputes and settlement which read and I quote;

> "Should the parties fail to reach such settlement within a further period of fourteen day, the matter may, within further period of fourteen days be referred by either party without legal representation for opinion to a mediator selected by and agreed on by the parties. The Mediator shall, within a period of twenty-eight days of the written representation of the parties give **his opinion in writing** and furnish the employer and the contractor each with a copy thereof... The said opinion shall be final and binding on the parties unless either party within fourteen days of receipt thereof disputes the same by written notice to other (emphasis supplied)".

In our matter, if the written opinion was prepared and submitted to the sole arbitrator and copies of the same were furnished to the parties, either party would have asserted to that effect or exhibited it by attaching the same in her respective pleadings or written submission. It follows therefore, there was no written opinion by the mediator.

Looking at the wordings of the quoted clause, it is certainly clear that, the clause herein couches to a mandatory requirement as to giving opinion in writing by the mediator so selected and agreed on by the parties or appointed by the body as stipulated in the parties' contract (R1). The contractual requirement on the part of the mediator, in my view, could not be dispensed with a mere letter (R-4) addressed to the arbitrator by the petitioner requesting him (arbitrator) to commence arbitration proceedings neither the mediator would give a mere oral statement that, the mediation had failed (See case **of Allarakhia vs. Aga Khan** (1968) EA 613, a case cited by the petitioner's advocate).

In view of the absence of the written opinion by the mediator, I therefore hold the view as was correctly held by this court in the case of **Posta Bank v. Patty Interplan Ltd** (supra) though in present case the reference had already been made by this court (**Massengi, J**) while in the

former case the reference was not made by an adjudicator. And whereas in the instant matter, the opinion in writing by the mediator was mandatory requirement as was the case for reference by the adjudicator in the former case.

Therefore, in my considered opinion, the arbitrator, would not assume jurisdiction unless and until he accordingly reversed the mediator's opinion nor could he assume jurisdiction on the ground that the parties conferred him with jurisdiction via a mere letter addressed to him by the petitioner or the parties' mutual consent (See a decision in **Allarakhia v. Aga Khan** (supra) unless conditions in the FIDIC entitle them to vary such terms and conditions. The contention by the respondent's advocate that, the arbitrator assumed jurisdiction after the petitioner's letter is therefore baseless.

In the contention by the respondent's counsel that, failure by the petitioner to raise her concern after lapse of more than a period of two years. From outset it has no unfounded, I am of such view simply because the issue of jurisdiction is paramount, it follows therefore, the same can be raised at any time be it by the parties or by a court provided the court entertained the parties to address it on that anomaly noted by it suo

motto. This legal position was authoritatively decided by the Court of Appeal of Tanzania in **Peter Ng'homango vs. Attorney General,** Civil Appeal, No. 114 of 2011 (unreported) whose judgment was delivered on the 1st March 2012 where it was held;

> "We are alive to the fact that the **issue of jurisdiction can be raised at any time**. However, with respect we think there was a need for the parties to be given the opportunity to address the court on that point of law (Emphasis mine)"

In our instant petition, the petitioner has not only raised the issue of jurisdiction of the arbitrator for the first time in this petition but also in the 1st point of objection as depicted herein above, the objection which caused the arbitration proceedings to be stayed pending compliance with contractual necessary steps (See interim award). Considering the fact that, the mediator was contractually required to prepare and furnish copies of a written opinion to the parties. As earlier intimated. It follows therefore the arbitrator lacked jurisdiction to entertain the matter for the intended arbitration. The 3rd ground is therefore allowed since the issue of jurisdiction is the fundamental issue as correctly observed by the arbitrator in his interim award when he noted that and I quote his holding herein under;

> "As matters stand, I lack jurisdiction to hear and determine the dispute until such time when the parties will have complied fully with all stages required before the dispute is submitted to arbitration".

Since the sole arbitrator lacked the requisite jurisdiction to proceed with arbitration for lack of written opinion from the mediator as clearly stipulated in the clause 20:2 of the parties' contract, therefore, it is my increasingly view, that even the subsequent arbitration proceedings and procured award thereof are thus a nullity. I would like to subscribe the writings of his lordship, the late **Chipeta J**,) in his book 'Civil Procedure in Tanzania Students' Manual Revised Edition stated and I quote;

> "Question of jurisdiction is not merely one of form. It is fundamental. Any trial conducted by a court with no jurisdiction to try the same will be declared a nullity on appeal or revision".

Basing on the findings above on the grounds which glaringly hint on the jurisdictional issues either on the part of the USA's Lawyers or that of the sole arbitrator or both, I am therefore not allowed to proceed being curtailed with determination of other grounds for the petition since the arbitration and arbitral award was procured by the arbitrator who acted without jurisdiction, more so, the foreign legal practitioners had no jurisdiction in either drafting the documents

as legal practitioners specifically when the PO had already been raised to their status of appearance before the arbitrator unless they were principal officers of the respondent or parties which is not the case here and conduct of the sole arbitrator for his failure to involve the petitioner or his advocate or both when new facts were presented to him before he delivered his ruling namely; Securing or being furnished with Special License and receipts for the payment of fees. In my considered opinion, going further determining other grounds for the petition while the arbitration proceedings and the impugned award were assumed by the sole arbitrator without the requisite jurisdiction is compared to a dealing with nothing but a nullity. Similarly, this court cannot consider or vary the award since the matter was prematurely referred to arbitration. Equally, this court cannot assume the role of the arbitrator in absence of the sufficient documents / evidence even if it was eligible.

Nevertheless, as my eyes were not closed, considering that I keenly looked at the award before I started determining the above issues (1st issue to 3rd issues above), at this juncture and underscoring the reasons that I have explained above, as of now, it suffices to hold that, the manner the framed issues were dealt with and decided by the arbitrator inevitably calls for an interference by the court especially when I keenly looked at the determination of

issue framed by the arbitrator, I have come up with an observation that, provisions of Clause 16 of the FIDIC conditions were not accumulatively nsidered and construed by the arbitrator, an omission which, in my view, onstitutes an error apparent on the procured award. This mischief is found in the petitioner's complaints on the ground **(iv)** and ground (**v**) herein however for the reasons explained above, I would wish to rest my decision with that brief observation.

That said and done, the petitioner's petition succeeds, the arbitration proceedings and its award are set aside. The matter shall be expeditiously re-arbitrated by an arbitrator duly selected with and agreed on by the parties and the arbitrator so selected or appointed by the body shall assume his role after proper mediation procedures having been observed as per the parties' contract under Clause 20:2. As greatly, the errors were not on the part of the parties, I refrain from making an order directing the costs of this petition to be borne by the respondent.

It is so ordered.

THE HIGH COURT OF TANZANIA

M. R. GWAE
JUDGE
20/08/2021