

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(Dar es Salaam Sub Registry)

AT DAR ES SALAAM

CIVIL CASE NO. 156 OF 2023

DIAMOND MOTORS LIMITED PLAINTIFF

VERSUS

STC CONSTRUCTION LIMITED 1ST DEFENDANT

ALLAN ABUBAKARI MAKAME 2ND DEFENDANT

RULING

Date of last order: 26.03.2024

Date of ruling: 19.04.2024

NGUNYALE, J.

The plaintiff filed the present Civil Suit No. 156 of 2013 against the two defendants namely STC CONSTRUCTION LIMITED and ALLAN ABUBAKARI MAKAME praying for reliefs under their mutual commercial arrangements of Hire Purchase Agreement. The defendants filed their joint written statement of defence and subsequently on 13th September 2023 they filed a joint notice of preliminary objection on point of law that; **one**, the court lacks jurisdiction to entertain the plaintiff's suit in terms of

clause 19 of the agreement of hire purchase which was an annexure to the plaint **two**, the plaintiff's suit is bad in law for being filed pre – mature.

Guided by normal court practice, the preliminary objection was to be disposed first. The parties opted to argue the same by way of written submission the suggestion which was blessed by the court. The plaintiff was represented by Nazario Michael Buxay, Esq whilst the respondents enjoyed the service of Emmanuel Mbuga, Esq.

It was the objector's submission that the plaintiffs' suit is based on a mutual agreement of hire purchase between the parties. In the said agreement the parties had agreed under clause 19 that in case of any dispute, either party shall submit such a dispute to the arbitration. He cemented that this court lacks jurisdiction to entertain the suit and the suit is pre-maturely filed for failure to comply with the arbitration clause and thereby circumventing the recourse to arbitration. The true nature and function of an arbitration clause was well explained by Lord Macmillan in the English case of **Heyman vs. Darwin's Ltd** (1942) AC 356 at page 375 as quoted by the Court of Appeal of Tanzania in Civil Appeal No. 115 of 2005, **Tanzania Motor Services Ltd and Another versus Mehar Singh t/a Thaker Singh t/a Thaker Singh** (unreported); -

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement."

In the light of the above part of the English case it is clear that the true nature and function of an arbitration clause as explained by Lord Macmillan its enforcement is under the principle of sanctity of contract which position has been adopted and emphasized by the Court of Appeal in its decision in Consolidated Civil Appeal No. 22 & 155 of 2020, **Lulu Victor Kayombo versus Oceanic Bay Limited and Another** (unreported) where at page 11 the Court said; -

*"In Unilever Tanzania Ltd. (supra) at page 16 the court had this to say:
- "Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves... It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

He cited another Court of Appeal decision in Civil Appeal No. 74 of 2019, **Philipo Joseph Lukonde vs. Faraji Ally Said** (unreported) where at page 19 the Court said; -

"If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties..... We take any such deliberate breach of contract very seriously, once parties have dully entered into a contract, they must honour their obligation under the contract. Neither, this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."

Relying on the principle of sanctity of contract, the objector submitted further that, it was wrong for the plaintiff to depart from the terms of the agreement which dictate reference to arbitration. The plaintiff ought to refer the dispute to arbitration upon issuance of 30 days notice of reference of the dispute to the arbitrator. For that reason, this court lacks jurisdiction to hear and determine this dispute between the parties. It is plain and clear from the contract that it was the intention of the parties to submit their dispute to the arbitrator, and not otherwise and therefore this dispute must be resolved through arbitration in terms of the Court of Appeal decision in **Constructive and Builders vs Sugar Development Cooperation** [1983] TLR 13 where it was held that; -

"It is clear... that the parties have agreed to submit all their "dispute or difference arising under the contract to an arbitrator, then the dispute

must go to arbitration unless there is some good reason to justify the court to override the agreement of the parties.”

In finalising his submission, he said that the proceedings are improperly before this court for contravening arbitration clause and therefore, it is submitted that the preliminary objection has merit thus it deserves to be sustained by striking out the plaintiffs’ suit with costs.

The plaintiffs’ Counsel from the outset submitted that the defendant’s preliminary objection has no merit thus the defendants were unable to cite any provision from the **Arbitration Act, 2020** to justify that the court has no jurisdiction. The courts jurisdiction is not ousted by the parties rather by law. The courts jurisdiction can be subjected to various laws/statutes but not the option of the parties as stated in the case of **Shyam Thanki and Others vs. New Palace Hotel** [1972] HCD No. 97.

In the alternative he submitted that the **Arbitration Act, 2020** does not oust or remove the jurisdiction of the court rather the same provides that, if a suit is lodged in a competent court, then the court after an application has been made by either party may stay the proceedings awaiting the arbitration to commence, the option which does not take away or oust the jurisdiction of the court. In this way he prayed to cite section 12 and 13 of the **Arbitration Act** in that regard for the objection to be overruled. The defendant ought to lodge an application for stay of the proceedings

so as the parties can resolve their dispute through arbitration. He invited the court to overrule the objection and to order the suit to continue. He cited the case of **Nandhra Engineering & Construction Co. Ltd vs. Ambiere Real Estates Ltd & Another**, Civil Case No. 70 of 2018 where the court held; -

"Therefore, as argued by Mr. Mwambene, the remedy available to the party aggrieved by a reference of the dispute to an ordinary court is not to terminate the suit by way of preliminary objection. The only remedy available to the defendant is to move the court before which the suit is instituted for an order of stay of suit pending reference to arbitration... based on what I have endeavoured to demonstrate above, and since the defendant has not availed himself to the remedy available under section 13 (1) of the Arbitration Act, I overrule the objection with costs."

He went on to submit that, the intention and the conduct of the defendants is not to resolve this dispute rather to delay justice or block this court from exercising its main function under the constitution which is to resolve the parties' disputes. Thus, it was their submission that the defendant's objection be overruled with costs and the suit to continue for the court to exercise its duty. Suppose either party desire to seek stay of proceeding the move shall be subject to time limit. He concluded by inviting the court to overrule the preliminary objection.

In rejoinder the defendant reiterated his earlier submission insisting that the preliminary objection does not aim to employ delaying tactic, instead

it is a pure point of law on the jurisdiction of this court to try and determine matters which ought to be determined through arbitration. He prayed the court to uphold the preliminary objection because the court lacks jurisdiction.

Having heard the rival submission from the parties, the pertinent issue is to determine whether the suit is competent and properly before the court or not. Guided by law and court practice I will sufficiently determine the suit fairly in order to meet the ends of justice as far as the core function of the court is concerned.

In considering the submission made by the parties, there is no dispute that the hire purchase agreement entered between the parties' avail either party a right to subject the dispute to arbitration forum. The gist of the complaint is that the plaintiff filed the present suit without invoking the arbitration clause as agreed between the parties, does it mean that the court has no jurisdiction? The defendant in reference to the arbitration clause submitted that the court has no jurisdiction to hear and determine the matter the position which was strictly contested by the plaintiff. The plaintiff submitted that non invoking the arbitration clause does not mean that the court has no jurisdiction. The reference to arbitration does not by

any means took away the jurisdiction of the court to hear and determine the case per plaint filed.

Upon a careful consideration of the argument of both sides, I agree with Mr. Nazario that the parties had a clause in their agreement which dictates how to deal with any dispute arising out of their agreement and that, the principle of sanctity of contract must be obeyed. This principle is well encrusted in the case of **Simon Kichele Chacha versus Aveline M. Kilawe**, Civil appeal no. 160 of 2018.

*"It is settled law that parties are **bound by the agreements they freely entered into and this is the cardinal principle of the law of contract**. That is, there should be a sanctity of the contract as lucidly stated in *Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R 288 at page 289* thus: 'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement' With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the Exhibit PI, we are reluctant to accept the appellant's excuse for non-performance of the agreement which he freely entered with sound mind." [emphasis added]*

There is a plethora number of this court and the Court of appeal decision on the principle of sanctity of contract, to mention a few from the apex Court: **Lulu Victor Kayombo (supra), Philipo Joseph Lukonde (supra), Civil Appeal No. 227 Of 2019, Joseph F. Mbwiliza Vs. Kobwa Mohamed Lyeselo Msukuma (Legal**

Representative/Administratrix of the estate of the late Rashid Mohamed Lyeselo) and 2 others and **Jovet Tanzania Limited Vs. Bavaria N. V.**, Civil Appeal No. 207 of 2018. In **Jovet** (supra) the court had this to say:

*Two, that the parties had no legal authority to oust the jurisdiction of the courts in Tanzania. We think the appellant's counsel, we are afraid, has misconceived the point here. **The appellant did not oust the jurisdiction of the Court at all but, rather, sanctity of the Agreement between the parties prevailed.** [emphasis added]*

From the decision above, confidently I support the defendant's view that parties are bound by their agreement, provided that the parties had freely entered into an agreement making a choice of law, forum to take their dispute and language. However, making such choice does not mean that the parties oust the jurisdiction of the court because their relationship is governed by the local laws.

As per the pleadings there is no doubt that the parties had an agreement under clause 19 on the choice of law, language and forum in case of dispute. In this case they agreed to refer the dispute or their difference to arbitration in Dar es salaam in which the laws used will be of Tanzania jurisdiction. In further elaboration it is plain that they will use English language, by filing a suit in ordinary court does not necessarily amounts

to breach of contract as agreed between them depending on the context and the manner of addressing.

I am alive that the parties chose the laws of Tanzania to regulate their relationship and that they chose arbitration to be their forum of resolving their differences, there is no means this matter can be decided without going through the **Arbitration Act, 2020**.

In his submission, Mr. Mbuga referred the court to section 12 and 13 of the **Arbitration Act, 2020** that the defendant instead of objecting the suit for want of jurisdiction they could have applied for stay of the proceedings so that they can go for arbitration. Section 12 of the **Arbitration Act, 2020** clearly provides:

12.-(1) A court, before which an action is brought in a matter which is the subject of an arbitration agreement shall, where a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement of claim on the substance of the dispute, and notwithstanding any judgment, decree or order of the superior court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

Also, section 13 of the Arbitration Act, 2020 provides:

*13.-(1) A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, **apply to the court in which the***

proceedings have been brought to stay the proceedings so far as they concern that matter. [Emphasis added]

Basing on provisions of section 13(1) above, I agree with the Mr. Mbuga that the plaintiff had a remedy to enforce the arbitration clause by making an application to the court staying the proceedings pending arbitration.

This court in **Nandhra Engineering** [supra] had this to say:

*“Therefore, as argued by Mr. Mwambene, the remedy available to the party aggrieved by a reference of the dispute to an ordinary court is not to terminate the suit by way of preliminary objection. **The only remedy available to the defendant is to move the court before which the suit is instituted for an order of stay of suit pending reference to arbitration** based on what I have endeavoured to demonstrate above, and since the defendant has not availed himself to the remedy available under section 13(1) of the Arbitration Act, I overrule the objection with costs.” [emphasis added]*

In the instant case the defendant could not seek the remedy available to him under section 12 and 13 of the Arbitration Act as noted above, he sought to terminate the suit through a preliminary objection which was not a proper remedy to him. Since he avoided to move the court by seeking a proper remedy under the mother law on arbitration means he waived his right of referring the suit to arbitration. His act of filing written statement of defence and a notice of preliminary objection is as good as

he waived his right to refer the suit to arbitration.

In the end result the raised points of objections are devoid of merit they are hereby dismissed, costs to follow the event. Order accordingly.

Dated at Dar es Salaam this 19th day of April, 2024.



D. P. Ngunyale

Judge

Ruling delivered this 19th day of April 2024 in presence of Ms. Antonia Agapit holding brief for Mr. Nazario for Plaintiff also Ms. Antonia Agapit for the defendant.



D. P. Ngunyale

Judge

