

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 24 OF 2023

(C/F Civil Case No. 04 of 2022 in the High Court of Tanzania-Moshi Sub-Registry)

UDURU MAKOA AGRICULTURAL AND

MARKETING COOPERATIVE CO-OPERATIVE

SOCIETY LIMITED (UDURU MAKOA AMCOS)APPLICANT

VERSUS

1. MAKOA FARM LIMITED

2. ELIZABETH STEGMAIER

3. DR. LASZLO GEZA PAIZS

..... RESPONDENTS

RULING

Date of Last Order: 24.01.2024

Date of Ruling : 19.03. 2024

MONGELLA, J.

The applicants herein filed this application seeking for stay of Civil Case No. 04 of 2022 pending exhaustion of dispute resolution mechanisms stipulated under the lease agreement signed between the parties in 2014. Upon filing their joint counter affidavit, the respondents raised three points of preliminary objection to wit;

1. That, the application is prematurely filed contrary to **section 13(3) of the Arbitration Act, Act No. 2 of 2020.**
2. That, the application is frivolous and vexatious for being a res judicata contrary to **section 9 of the Civil Procedure Code** [Cap 33 R.E 2019]
3. That, the application is incompetent as the court has been improperly moved contrary to **Regulation 63(1) (a) of Arbitration (Rules of Procedure) Regulations, 2021.**

The preliminary objection was resolved by written submissions with both parties being represented by learned advocates. The respondents were represented by Mr. Emmanuel Kalikenya Chengula and Ms. Salvasia Kimaro and the applicant by Mr. Engelberth Boniphace.

Addressing the 1st point of objection, the counsels for the respondent averred that the application was prematurely brought since the applicant had not filed his written testament of defence (WSD) in Civil Case No. 04. of 2022. He referred the court to paragraph 20 of the applicant's affidavit in which it is shown that the applicant did not file her WSD. In the premises, they had the view that the omission is a contravention of **section 13 (1) and (2) of the Arbitration Act**. They contended that, the applicant ought to have taken appropriate procedural steps to acknowledge the legal proceeding against him.

With regard to non-filing of the WSD, they averred that the approach taken by the applicant of not filing the WSD was the position before the enactment of the current Arbitration Act which repealed and replaced the former Act. That, under the current law, the applicant ought to have filed the WSD and the same would not be used as bar for filing this application for stay of proceedings.

Arguing on the 2nd point of objection, the counsels for the respondent averred that this court has dealt with the issue of arbitration in its ruling based on **Regulation 63(1) of the Arbitration (Rules of Procedure) Regulations, 2021 (GN. 146 of 2021)**. That is, vide **Makoa Farm Limited and 2 others vs. Uduru Makoa Agricultural and Marketing Cooperative Society Limited (Uduru Makoa AMCOS), Civil Case No. 04 of 2022**. They argued further that, the cardinal principle is that the cited position is not applicable to the respondents as they are not cooperative societies nor members of the same nor are they suing on behalf of a cooperative society or its members. In that end, their clients are not subjected to arbitration governed by the Registrar of Cooperative societies.

From the foregoing observation, they had the stance that addressing the same matter is *res judicata* as **per section 9 of the Civil Procedure Code** [Cap. 33 R.E 2019]. They concluded that the court is *functus officio* to determine the matter. Explaining further on the doctrine of *res judicata*, they submitted that the doctrine of *res judicata* is founded in two maxims: one, *Interest reipublicae ut sit finis litium* that there must be an end to litigation and; two, “*Nemo*

debet bis vexari, si constat curiae quod sit pro una et eadem causa” meaning that no man should be twice sued or prosecuted upon one and same set of facts if there has been a final decision by a competent court. The learned counsels supported their arguments with the case of **Pravin Girdhar Chavda vs. Yasmin Nurdin Yusufali** (Civil Appeal 165 of 2019) [2022] TZCA 185 TANZLII whereby the Court of Appeal discussed conditions under **section 9 of Civil Procedure Code**.

With regard to the 3rd point of objection, the counsels for the respondent averred that the applicant improperly moved the court by filing chamber summons and affidavit. Speaking of the right move to be taken, they contended that, the applicant ought to have filed a petition as per **Rule 63(1) (a) of the Arbitration (Rules of Procedure)** GN. No. 146 of 2021. They finalized their submissions in chief by praying for the points of preliminary objection to be sustained and the application be dismissed with costs.

Replying to the respondents' counsels' submission, Mr. Boniphace started by relying on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd.** [1969] EA 696. He averred that according to the respective case; objections can only be raised on pure points of law and not where any fact needs to be ascertained. Further that, objections are argued on assumption that all facts pleaded by a party are correct and the point of objection can dispose the suit.

Replying to the 1st limb of objection, he averred that the same requires the court to ascertain whether the applicant filed his WSD

and thus falling short of the requirements set under **Mukisa Biscuits** (supra). That, **section 13 (3) of the Arbitration Act No. 2 of 2020** by itself calls for evidence to prove that the applicant did take appropriate steps to acknowledge the legal proceedings against him or her. He contended that he had already prayed for extension of time for the applicant to file her WSD. If the same is permitted, the applicant would have complied with **section 13 (3) of the Arbitration Act**. In addition, he argued that in any case the determination of this point of objection would be pre-empting the court's determination of his prayer to file the WSD. He thus prayed for the point of objection to be overruled for lack of qualification as a preliminary point of objection.

On the 2nd point of objection, Mr. Boniphace argued that Civil Case No. 4 of 2022 was never determined on merit. On such premises, he contended that the principle of *res judicata* cannot be applied. He further challenged that the applicant did not make the application **under Regulation 83 of the Cooperative Societies Regulation, 2015**. That, instead, the application is based on the dispute resolution clause found under paragraph 23.5 of the lease agreement made between the parties in 2014. He referred the court to paragraph 9 of the applicant's affidavit.

In addition, he argued that this court, in its Ruling rendered in Civil Case No. 04 of 2022, did not bar the parties from invoking arbitration proceedings under the lease agreement of 2014. He added that since amendment of pleadings ceases the existence of former ones, then even the decisions made prior to the former pleadings

cannot apply to subsequent pleadings. That, due to amendment of the plaint, the Ruling of this court as to clause 23.5 of the lease agreement ceases to exist. That the ruling only referred to application of **Rule 83 of the Cooperative Societies Regulations, 2015**.

Mr. Boniphace found the matter resolved in Civil Case No. 4 of 2022 and the application at hand being two different issues. He contended that the former addressed the applicability of **Regulation 83 of the Cooperative Societies Regulations, 2015** and the later addresses Clause 23.5 of the lease agreement of 2014. In those bases, he saw the case of **Pravin Girdhar Chavda vs. Yasmin Nurdin Yusufali** (supra) distinguished.

Concerning the 3rd point, Mr. Boniphace argued further that the applicant's failure to comply with **Regulation 63(1) of the Arbitration (Rules of Procedure) Regulations, 2021** can be covered under the oxygen principle. He supported his argument with the case of **Elisha Ezron Misigaro vs. Mukalehe Village Council** (Misc. Land Case Application 17 of 2019) [2021] TZHC 2385 (8 March 2021); **Alliance One Tobacco Tanzania Ltd and Another vs. Mwajuma Hamisi and Another** (Misc. Civil Application 803 of 2018) [2020] TZHC 3663 (2 October 2020); and; **Samwel Munsiro vs. Chacha Mwikwabe** (Civil Application 539 of 2019) [2020] TZCA 175 (27 March 2020), all from TANZLII. Considering the jurisdiction of the court, he contended that the omission to comply with the provision did not oust the jurisdiction of this court in granting prayers sought by the applicant.

Arguing further, he submitted that the omission was curable as it was a minor defect in the pleadings. To bolster his contention, he cited the case of **Philip Anania Masasi vs. Returning Officer Njombe North Constituency and Two Others**, Misc. Civil Cause No. 07 of 1995, HC, Songea. He concluded by praying for the court to order the amendment of the application as the omission did not oust the jurisdiction of this court; and for the points of objection to be overruled with costs.

In rejoinder, on the 1st limb of objection, the respondents' counsels started by challenging Mr. Boniphace on the ground that he misinterpreted the meaning behind **Mukisa Biscuit** (supra). They were convinced that the points of objection met the test laid in the said case. They further reiterated their stance that the applicant failed to meet the conditions set under **section 13(3) of the Arbitration Act**, which was filed prior to the applicant filing his WSD. Further, they contended that the assertion by Mr. Boniphace that the applicant had on 23.08.2023 prayed for extension of time to file her WSD served as proof.

Rejoining on the 2nd point of objection, the learned counsels argued that the case of **Pravin Girdhar Chavda** (supra) is applicable to this case as it sets principles of *res judicata*. They insisted that the principle has been violated by the applicant as the question of arbitration was resolved. They averred that this court resolved issues pertaining **Regulation 83 of the Cooperative Societies Regulations, 2015** in its Ruling in Civil Case No. 04 of 2022. In their view, the amendment of the pleadings did not affect the Ruling delivered.

As to the 3rd point of objection, the learned counsels pointed out that the applicants admitted to not complying with **Regulation 63(1) (a) of the Arbitration (Rules of Procedure) Regulations, 2021**. In the premises, they found the cases cited by Mr. Boniphace inapplicable. The counsels further pointed out that the same were mere persuasive authorities and distinguished from the case at hand. That, the said cases addressed issues of wrong citation of the law and defects on verification clause while in this case the applicant completely misled the court wrongly by filing wrong documents. They found the mistake incapable of being cured by the overriding objective.

Arguing on the application of the overriding objective, they further contended that the overriding objective cannot be applied blindly as contemplated by the applicant. They supported their argument with the decision in **Mondorosi Village Council & Others vs. Tanzania Breweries Ltd & Others** (Civil Appeal 66 of 2017) [2018] TZCA 303 (13 December 2018) TANZLII. The counsels maintained their prayer for the respondents' objections to be sustained and the application dismissed with costs.

After objectively considering the rival submissions of both parties, for reasons to unfold in due course, I prefer to start with the 3rd point of objection.

The respondents' 3rd objection pertains the requirement set under **Regulation 63 (1) of the of the Arbitration (Rules of Procedure) Regulations, 2021**. The provision, requires all applications under the

Arbitration Act to be made in form of a petition. I find it pertinent to reproduce the provision for ease of reference:

“**63(1)** Save as is otherwise provided, all applications made under the provisions of the Act or these Regulation shall:

- (a) be made by way of petition and be titled "In the matter of the arbitration and in the matter of the Act" and reference shall be made in the application to the relevant section of the Act;"

It is uncontested that the applicant moved this court by filing a chamber summons under **section 13 (1) and (2) of the Arbitration Act** accompanied by the affidavit of one Saeli Mafue, her chairman. Having being preferred under the **Arbitration Act**, it was imperative for the applicant to comply with the requirements of **Rule 63(1) of the Arbitration (Rules of Procedure) Regulations, 2021**. On his part, Mr. Boniphace does not object the fact that wrong documents have been filed, instead he calls for invocation of the overriding objective to save the matter. In the premises, the nagging question is thus, can the overriding objective be imposed to the circumstances?

I hold the view that the overriding objective cannot be imposed to rectify the anomaly. This is because, **Regulation 63 of the Arbitration (Rules of Procedure) Regulations** is couched in mandatory terms. I find, as emphasized by the apex Court in its diverse decisions, the overriding objective is not meant to disregard mandatory procedures of the law. See; **Mondorosi Village Council & Others vs.**

Tanzania Breweries Ltd & Others (supra); **Njake Enterprises Ltd vs. Blue Rock Ltd & Another** (Civil Appeal 69 of 2017) [2018] TZCA 304 (3 December 2018); **Martin D. Kumalija & Others vs. Iron & Steel Ltd** (Civil Application 70 of 2018) [2019] TZCA; **Hamis Mdida & Another vs. The Registered Trustees of Islamic Foundation** (Civil Application No. 330/11 of 2022) [2023] TZCA 17721 (4 October 2023) and; **Registered Trustees of National Convention for Construction & Reform (NCCR -Mageuzi vs. James Francis Mbatia** (Civil Application No. 512/01 of 2023) [2023] TZCA 17851 (17 November 2023) all from TANZLII.

In **Njake Enterprises Ltd vs. Blue Rock Ltd & Another** (supra), the Court expounded that:

“...the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;

“The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms....”

In **Martin D. Kumalija & Others vs Iron & Steel Ltd** (supra) the Court stated:

“We are aware that the Court is enjoined by the provisions of sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 RE 2018 introduced recently vide the Written Laws

(Miscellaneous Amendments) (No.3) Act, No.8 of 2018 to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the Court."

It ought to be noted that **section 3A and 3B of the Appellant Jurisdiction Act** is *pari materia* to **section 3A and 3B of the Civil Procedure Code** which is applicable in the High Court. Also, both provisions were amended under the **Written Laws (Miscellaneous Amendments) (No.3) Act**, No.8 of 2018. From the above holdings, it is clear that the overriding objective cannot be used to escape mandatory procedural requirements. It was meant to assist the court to fixate on substantive law rather than be tied by minor technicalities. Minor technicalities include wrong citation of law as found in the cases cited by Mr. Boniphace. However, the defects herein are not minor, thus allowing the overriding objective principle to be applied shall amount to aiding the applicant and his counsel to circumvent mandatory procedures of the law.

In **Mohamed Abdallah Nur & Others vs. Hamad Masauni & Others** (Civil Application 436 of 2022) [2022] TZCA 546 (7 September 2022) TANZLII, the Court, noting the possible danger of blindly employing the overriding objective, declined the invitation to apply the same. It observed:

"As to the invitation extended to us by Mr. Limo, the pertinent question would be, what,

then, does the future hold if we were to accept the said invitation. On this, we need to observe at once that, the rules that govern the proceedings of the courts and the long-standing precedents would be facing extinction at some point in time if the courts of law were to disregard them and condone every act of ineptitude by lawyers simply on the flimsy argument that the overriding objective principle which was meant to reduce red tapes on procedural laws was also intended to ameliorate even the downright amateurish works."

Acting on the strength of the above authorities, I decline the invitation by Mr. Boniphace to invoke the overriding objective principle. The 3rd point of objection is therefore sustained. As this point of objection suffices to dispose the matter, I refrain from addressing the rest of objections. The application is hereby struck out with costs.

Dated and delivered at Moshi on this 19th day of March, 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA