IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: LUANDA, J.A., MUSSA, AND J.A. And MUGASHA, J.A.)

CIVIL APPEAL NO. 132 OF 2008

DOMINION OIL AND GAS LIMITED ..... APPELLANT
VERSUS
LOGISTICS (T) LIMITED.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania Dar-essalaam Registry, At Dar-es-salaam)

(Hon. Mwarija, J)

Dated the 7th August, 2008
In
Civil Case No. 86 of 2007

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JUDGMENT OF THE COURT

7th October, 2015 &

MUGASHA, J.A.:

This is an appeal against the refusal by the trial Judge to stay civil case No. 86 of 2007 following lodging of the petition by the appellant to refer the matter for arbitration as per agreement concluded by the parties. The appellant had lodged four grounds of appeal namely:

1. That the High Court Judge erred in law and fact and/or otherwise misdirected himself in holding that there was no evidence in the petition that the Petitioner (Appellant) was willing and ready to refer the dispute to arbitration.
2. That, High Court Judge erred in law and fact in holding that the arbitration clause was not mandatory in the agreement.
3. The trial Judge erred in law and fact in not referring the dispute to arbitration in accordance with express submission in the agreement.
4. The learned High Court Judge erred in dismissing the petition with costs.

The appellant was represented by Mr. Zahran Sinare learned counsel and the respondent had the services of Mr. Gabriel Simon Mnyele learned counsel.

A brief account of the underlying facts is as follows: Parties to this appeal entered into an agreement whereby the appellant appointed the respondent as sub-contractor in respect of 2D Seasemic Survey of Mandawa and Kisangiti PSA Area. In terms of the agreement, the respondent was sub-contracted to supply ancillary services namely,

provision of support vehicles; camping, catering, supply of staff and other related services. Pursuant to the signing of the agreement and probably rendering of services, the appellant refused to pay the respondent the agreed sum which made the respondent to lodge civil case No. 86 of 2007 against the appellant for breach of contract. Subsequently, the appellant lodged a petition seeking to have civil case no 86 of 2007 stayed on ground that, the dispute ought to be referred to arbitration in terms of clause 16 of the sub-contract agreement between the parties.

The respondent objected the petition seeking stay on the following grounds among others; **One;** the petitioner was not willing to refer the matter to arbitration; **Two;** the affidavit of the petitioner falls short of indicating that the petitioner has taken steps to make reference or rather willing to refer the matter to arbitration. **Thirdly;** the arbitration clause is optional because it does not make it mandatory to refer to arbitration the dispute arising between the parties and as such, the respondent/plaintiff has rightly opted not to refer the matter to arbitration and instead has filed a suit.

Refusing stay, the trial Judge dismissed the petition finding that, in the petition, there was no proof of the appellant's willingness and readiness to refer the matter to arbitration and besides, clause 16.3 of the agreement, does not impose mandatory requirement on parties to have the dispute referred to arbitration.

Addressing the 1st ground of appeal, Mr. Sinare submitted that, the trial Court erred to hold that there was no evidence in the petition that the appellant was willing to refer the dispute to arbitration. He argued that; the trial judge did not consider the appellant's rejoinder at page 128 of the Court record to the answer to the petition and respective submission of the appellant at page 133 of the record.

In the 2nd ground of appeal; the appellant is faulting the trial Judge for not holding that reference to arbitration was mandatory. Mr. Sinare submitted that, in the event parties had agreed under clause 16.1 that the Agreement shall be governed and construed in accordance with English Law, then, under clause 16.3 references to arbitration is a mandatory requirement. Thus; according to Mr. Sinare, since parties opted for English law, the trial court ought to have construed reference to arbitration as

mandatory notwithstanding the use of word *"may"*. When asked if under English law the word *"may"* means *"shall"*, he declined but insisted that, in the circumstances of the agreement *"may"* means *"shall"*.

On the 3rd and 4th grounds of appeal, Mr. Sinare urged the Court to allow the appeal with costs considering that, the trial judge erred to stay the suit to have the dispute referred to arbitration.

On the other hand; Mr. Mnyele learned counsel for the respondent, challenging the appeal submitted that, the petitioner did not comply with section 6 of the Arbitration Act, [CAP 15 R.E, 2002] which imposes conditions to be complied with before grant of stay by the trial court. The conditions include, satisfaction to the court that there is need to go to arbitration and the petitioner must show that he is ready and willing to refer the matter to arbitration. According to Mr. Mnyele; stay was correctly refused by the trial Judge because on record no evidence was paraded to substantiate the appellant's willingness and readiness to refer the dispute to arbitration.

He referred us to the case of **NIGERIA PORTS AUTHORITY V CONSTRUZION GENERALI FARSURA (COGEFAR 1971 ALR 44)** whereby the Nigerian Court

interpreted section 13 of the Arbitration Act which is similar to section 6 of the Arbitration Act (supra) in Tanzania where the Court categorically held, the applicant must satisfy court not only that he has commenced proceedings but also, he is willing to conduct arbitration and must file an affidavit to that effect. It is not enough merely to assert that they are ready.

Addressing the 2nd ground of appeal Mr. Mnyele argued that, in terms of clause 16.3 of the agreement, referring a dispute to arbitration is optional and not mandatory. He added that; be it under English law or Tanzanian Law the word *"may"* connotes option. He referred us to section 53 (1) of the Interpretation of Laws Act, [CAP 1 R.E, 2002] which provides that, *"may"* imports discretion and *"shall"* is imperative. He also referred us to the definition in the Black's Law Dictionary where the word *"may" usually is employed to imply permissive, optional or discretional and not mandatory conduct".*

As to the 3rd and 4th grounds of appeal, Mr. Mnyele submitted that, the refusal by the trial Judge to stay the civil case is by law justified and this appeal is without merits. He urged the Court to dismiss the appeal with costs. In rejoinder; Mr. Sinare repeated what he submitted in chief.

In view of the foregoing submissions, the issue is whether clause 16.3 of the agreement imposed mandatory requirements to the parties to refer disputes to arbitration. It is not in dispute that; parties to this appeal entered into a sub-contract agreement for the supply of goods and services where among the clauses included those relating to the governing Ruling law, Disputes and Arbitration which falls under clause 16.1, 16.2 and 16.3.

Clause 16.1 states as follows that:-

> *"The Agreement shall be construed and governed in all respects in accordance with English law.*

Clause 16.3 states as follows:-

> *"If the parties have not settled the dispute by mediation within forty two days (42) days of it being first notified in writing as a matter of disagreement;* ***the dispute may be referred for arbitration in London under the Rules of the International Chamber of Commerce*** *before the board of arbitrators. Each of the parties shall be entitled to appoint one arbitrator and those two shall agree on an independent third arbitrator. In the vent that agreement on the latter cannot be reached, the third arbitrator shall be appointed by the President for the time being of the* ***Institute of Petroleum of the UK****".*

In **K.K. MODI vs. K.N. MODI (1998) 3 SCC 573; BHARAT BHUSHAN BANSAL vs. U.P. SMALL INDUSTRIES CORPORATION LTD. (1999) 2 SCC 166;**

BIHAR STATE MINERAL DEVELOPMENT CORPORATION v. ECON BUILDERS (I) (P) LTD. (2003) 7 SCC 418; and **STATE OF ORISSA vs. DAMODAR DAS (1996) 2 SCC 216**, the Supreme Court of India had the occasion to refer to the attributes or essential elements of an arbitration agreement and held that, a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is ***expressly or impliedly*** spelt out from the clause. Besides; ***the intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement*** and that where there is merely a possibility of the parties agreeing to arbitration in future as contrasted from an obligation to refer disputes to arbitration, ***there is no valid and binding arbitration agreement***.

Furthermore; in **JAGDISHCHANDER vs. RAMESH CHANDER AND ORS (2007) 5 SCC 719** along with the reference of the cases mentioned above, the Supreme Court of India laid fundamental guidelines relating to a valid arbitration agreement as follows:-

1. *Where the clause provides that in the event of disputes arising between the parties, the disputes* ***shall*** *be referred to arbitration, it is an arbitration agreement.* ***But where the clause relating to settlement***

of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement*.*

2. *Mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration****.*** *For example, use of words such as* ***"parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they shall consider settlement by arbitration" in a clause relating to settlement of disputes,*** *indicate that the clause is not intended to be an arbitration agreement.*

3. ***Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise.*** *Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.*

In **ASTRAZENECA UK LTD vs. IBM CORPORATION [2011] EWHA 306** the Technology and Construction Court interpreted "may" as giving rise to an obligation because based on the rest of the document and the commercial context, construing "may" as an option would be incorrect. In the said United Kingdom case, the parties asked the court to determine several issues arising out of termination of a Master Services Agreement. One issue was whether AstraZeneca was obliged to provide IBM with an IT Transfer Plan as part of transferring some or all of the Services (as defined) in the event of termination. The relevant provision stated that: *"AstraZeneca may prepare one or more IT Transfer Plans".* It went on to define the scope of any such Plan and state that it should be reflected in the Exit Plans which IBM was obliged to produce subsequently. Although IBM argued that the deliberate choice of the word " may" in the drafting of that clause, as distinct from "shall" in the rest of the document, showed that preparation of IT Transfer Plan was not intended to be mandatory, the judge saw it rather as giving AstraZeneca discretion to prepare more than one. It was clear from the rest of the document that a plan of this type was necessary to drive the entire transfer process on termination and the scope and extent of a number of the services were dependent on such plan

(or plans) being in place. Construing it otherwise would "flout business common sense".

Considering the IT Transfer Plan "essential" to an orderly exit accordingly, the UK court held that, Astra Zeneca was under an obligation to provide an IT Transfer Plan. However, the court also found that IBM's duties to provide Termination Assistance (as defined) were not conditional on the provision of an IT Transfer Plan, which meant that IBM could not rely on the absence of a plan to excuse it from liability for any failure or delay in complying with these – or its other – obligations under the Master Services Agreement.

The United Kingdom, Nigerian and Indian cases cited which are Commonwealth Jurisdictions have a persuasive value in our jurisdiction. Under section 53 of the Interpretation of Laws Act (supra) the word *"May"* in any written law connotes discretion and *"shall"* is imperative though their use is also dictated by circumstances of each particular case.

Taking an inspiration from the cited cases from United Kingdom, India and section 53 of the Interpretation of Laws Act (supra), it is clear to

us that; the use of word *"May"* in the present case connotes discretion. Looking at clause 16.3, the words "*the dispute may be referred for arbitration*" means a tentative mode of settlement if and when a dispute arises.

The clause contemplates further consent or consensus before reference to arbitration in future. As such; clause 16.3 cannot safely be said to be an arbitration agreement but rather, a leeway for an agreement to enter into arbitration in future. Even if clause 16.3 is read together with clause 16.1 which brings into play the import of English law, still the use of word *"may"* is permissive not imposing a mandatory requirement to automatically refer a dispute to arbitration. In a nutshell; clause 16.3 does not impose a mandatory requirement to parties to refer dispute to arbitration.

What transpired in the agreement under scrutiny is distinguishable from **ASTRAZENECA UK LTD vs. IBM CORPORATION** (supra). In the case at hand, there is nothing in the entire agreement to justify that the effecting or rather execution of the agreement was entirely dependent on clause 16.3 of the agreement which categorically stipulates on foreseen modality of handling future disputes.

We are certain in our minds that; if the drafters of the agreement had intended reference to arbitration to be mandatory then, the agreement ought to have expressly stated so. It is thus in our considered view that; the use of words "*the dispute may be referred to arbitration*" in clause 16.3 was not without any reason. It was merely a permissive clause and not imposition of a mandatory requirement to refer a dispute to arbitration.

It is also worth stating that, as part of the move towards plain English drafting in legal documents, it is sometimes suggested that "shall" should be replaced with "must "in order to remove any doubt that an obligation is being created.

Without prejudice to the above findings; assuming that under the agreement in question it is mandatory to refer disputes to arbitration, then; did the petition substantiate sufficient grounds warranting stay of the suit which takes us to the determination of the second issue. Addressing this issue, the conditions warranting the trial court to stay suit for reference to arbitration are stated under section 6 of the Arbitration Act (supra) that:

> "*Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other*

party to the submission or any person claiming under him in respect of any matter agreed to be referred, ***a party to the legal proceedings*** *may, at any time after appearance and* ***before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings;*** *and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and* ***still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.***"

In the entire petition seeking stay, the appellant did not indicate willingness and readiness to refer the dispute to arbitration. In paragraph 8 of the petition, the appellant merely shifted the blame to the respondent forgetting that he is the one who was seeking stay of the suit and not the respondent. When confronted with respondent's objection to petition, the appellant's response was as evident at page 128 of the record, specifically at paragraph 4.2 that:-

"The Petitioner has been and is still willing to submit itself to arbitration irrespective of such statement in the petition. It is stated further that the fact that the petitioner has brought the petition to enforce a term under the agreement is sufficient proof of its willingness to have the dispute referred to arbitration instead of adjudication through court".

We are persuaded **by NIGERIA PORTS AUTHORITY V CONSTRUZION GENERALI FARSURA (COGEFAR 1971 ALR 44)** whereby the court found that, the grant of stay of suit for reference to arbitration cannot be justified by merely asserting that a party is ready to go to arbitration he must file an affidavit to the same effect. In the case at hand, the appellant did not utilise the opportunity through overt acts/conducts to instigate the trial court to refer the dispute to arbitration because paragraph 4.2 contains a mere allegation with bare assertion not supported by any proof which at any stretch of imagination, could not sufficiently make a Court of law rely on such assertions. Moreover, mere lodging of the petition is not evidence to substantiate willingness and readiness to refer the dispute to arbitration. Besides; there was no affidavit to that effect and at least, the appellant could have lodged copies of for instance, correspondences relating to communication with the arbitrator on the intended reference (if any) of the dispute to arbitration. In that regard; the complaint by Mr. Sinare that the trial Judge disregarded evidence in proof is unfounded. In fact; no evidence was paraded at all to warrant grant of stay by the trial Court. We agree with Mr. Mnyele learned counsel for the respondent that the appellant/petitioner did not meet conditions stipulated under section 6 of

the Arbitration Act (supra) to warrant the grant of stay by the trial court and the refusal was justified.

In view of the aforesaid; we do not find compelling reasons to fault the trial Judge findings in refusing stay. As such; the appeal is dismissed with costs. It is so ordered.

DATED at DAR-ES-SALAAM this day of October, 2015.

B.M. LUANDA
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL