**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MBAROUK, J.A, MUGASHA, J.A AND MWANGESI, J.A.)**

**CIVIL APPEAL NO. 4 OF 2013**

**LOUIS DREYFULS COMMODITIES TANZANIA LIMITED.....APPELLANT**

**VERSUS**

**ROKO INVESTMENT TANZANIA LIMITED.....RESPONDENT**

**(Appeal from the Ruling of the High Court of Tanzania (Commercial Division) at Dar es Salaam)**

**(Bukuku, J.)**

**dated the 11th day of July, 2012**

**in**

**Miscellaneous Commercial Cause No. 5 of 2012**

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**JUDGMENT OF THE COURT**

19th June & 5th July, 2017

**MWANGESI J.A.:**

The appellant and the respondent are local companies incorporated in Tanzania under the Companies Act, Cap. 212 R.E 2002. Both engage in the business of raw cotton and are members of the Tanzania Cotton Board (TCB). It was alleged by the appellant at the trial court, an averment which was resisted by the respondent that, by an agreement entered between them on the 29thJune 2010, the respondent was to sell to the appellant about 210 metric tons of raw cotton for export. Nevertheless, the

respondent did fail to honor the contract by failing to supply to the appellant raw cotton as agreed. Subsequent tosuch breach of the contract by the respondent, the appellant did submit the dispute before the International Cotton Association Tribunal (ICAT) based at Liverpool in England, a tribunal which it was alleged, the two disputants had submitted themselves in case of any dispute arising out of or in connection with their contract.

The respondent did not enter appearance at the International Tribunal, a thing which made the dispute to be deliberated and determined in his absence. As a result of such deliberation, the International Tribunal did give an award in the favor of the appellant in the sum of USD 444,132.0. Armed with the award, the appellant did lodge an application before the High Court of Tanzania Commercial Division at Dar esSalaam for its registration and ultimately being executed, in terms of the provisions of section 12 of the Arbitration Act, Cap 15 R.E 2002.

Upon the respondent being served with the notice of the application for registration of the award, which was filed by the appellant, he did petition the Court to have the award set aside on the reasons that, it did

not merit getting registered as there had neither been an agreement between it and the appellant for sale of raw cotton as it was alleged by the appellant, nor was there any agreement between them for submission to the International Cotton Association Tribunal based in Liverpool for arbitration in case of any dispute arising out of or in connection to the purported contract.In determining as to whether the award granted by the International Tribunal in favor of the appellant merited to be registered or not,the Court did frame two issues namely,**first,** whether there was a binding contract between the petitioner (appellant) and the respondent in contract No. POO4. **Second,** whether the International Cotton Association Tribunal, had jurisdiction to entertain the dispute between the two (appellant and respondent) and issue an award.

After hearing the evidence from both sides, the Honorable trial Judge did hold that, there was no binding contract between the appellant and the respondent and therefore, the alleged award in favor of the appellant could not be registered for execution. The refusal by the trial court to register the awardwhich was issued by the International Cotton Association Tribunal is what has triggered the current appeal to this Court.

The memorandum of appeal by the appellant is constituted of nine grounds namely; **first,** the learned trial Judge erred in law in setting aside the award on ground that, there was no contract in which the appellant and the respondent agreed to submit all their disputes to arbitration under the International Cotton Association Tribunal Rules. **Second,** that, the learned trial Judge erred in law in interfering with the Arbitrator's findings on the question of jurisdiction. **Third,** that, the learned trial Judge erred in law and fact, and exceeded her jurisdiction in interfering with the Arbitrator's findings that, there existed a contract between the appellant and the respondent submitting all the disputes to arbitration. **Fourth**, that, the learned trial Judge erred in law in holding that, the appellant ought to have applied to the Court for appointment of an Arbitrator following the respondent's failure to appoint one when served with the notice. **Fifth**, that, the learned trial Judge erred in law in holding that, the appellant's failure to apply to the Court for appointment of the respondent's Arbitrator was a gross breach of the procedure and an error on the face of the record. In particular, the learned trial Judge erred in law in holding that, there was no conformity with the arbitration procedure. **Sixth,** that, the learned trial Judge erred in law in holding that, the enforcement of the

award would be against the public policy. **Seventh,** that, the learned trial Judge erred in law and fact in holding that, the Arbitrator's reliance on the letter dated the 3rd February 2011 was an error on the face of the record. **Eighth,** that, the learned trial Judge erred in law and fact, in holding that the Courts can consider other grounds other than those stated in the Arbitration Act under sections 16 and 30 (1) (a). And **ninth,** that, the learned trial Judge erred in law and in fact in holding that, the conditions set under section 30 (1) of the Arbitration Act, were not met by the applicant.

When the appeal was called on for hearing, learned counsel Mr. Gasper Nyika did enter appearance for the appellant whereas, the respondent had the services of Mr. ChachaChambiri learned counsel. In arguing the grounds of appeal wherein he did wholly adopt the written submissions which he had earlier on filed in Court, Mr. Nyika did cluster the grounds of appeal into four whereby, grounds one, two and three were argued together and so were grounds four, six and seven, as well as grounds eight and nine. The fifth ground was argued alone.

It has been the argument of the learned counsel for the appellant in the first group of the grounds of appeal that, even though the agreement dated the 29th June 2010 was not signed by the respondent, still it was a valid contract that did bind both parties to the terms contained therein. Relying on an extract from **Chity on Contracts, 30th Edition Volume 1: General Principles; Sweet and Maxwell: Thomson Reuters** at page 181, he did submit that, a contract need not necessarily be signed by both parties in order to bind them. This is from the fact that, sometimes, acceptance on the part of the *offeree,*may just be inferred from his conduct. And in this particular contract between the appellant and the respondent, on the part of the respondent (*offeree*),the acceptance was inferred by the conduct of the respondent in a letter, which it did write to the Tanzania Cotton Board dated the 03rd February 2011 wherein, he did acknowledge that, he had a contract with the appellant. Under the circumstances, the International Cotton Association Tribunal was justified to hold that, there was a valid and binding contract between the two.

To bolster his argument, the learned counsel for the appellant did rely on the decisionof the Supreme Court of India in the case of **State of Rajasthan VsPuri Construction Company Ltd and Another** (1994) 6

SCC 485, which was quoted in **Agrawal Krishisewa Kendra Vs Hindustan Fertilizer,** Madhya Pradesh High Court 2000. As a result, the learned counsel for the appellant did fault the Honorable trial Judge for interfering with the findings of the Arbitrators from the International Tribunal in regard to the existence of a valid contract and holding that there was one. In so doing, according to the learned counsel, the Honorable trial Judge did exceed her jurisdiction. In any case, he has added, any challenge to the validity of the contract, ought to have been made by the Courts of England under section 32 and 67 of the Arbitration Act of England, which was the applicable law in terms of the contract between the two.

With regard to the other grounds of appeal, all of which essentially hinge on the question of validity of the contract, the learned counsel for the appellant has faulted the Honorable trial Judge in holding that, to register the award of the appellant, would be against the public policy. On this aspect, the Court has been referred to an Indian case of **Renusagar Power Company Vs General Electric;** AIR (1994) SC 860, which was quoted with approval in **Christ for All Nations Vs Apollo Insurance Company Ltd** (2002) 2 EA 366 CCK, in which, three patterns of the

operation of the doctrine of public policy in the field of registration and enforcement of foreign awardswas discussed that an award cannot be registered if, **first,** it is an award which is contrary to the fundamental policy of Indian law that is to say, if it involves violation of the Indian laws or non-compliance with Court's orders. **Second,** the enforcement of the award is contrary to the interests of India. **Third,** the enforcement of the award would be contrary to justice and morality. As the award under discussion did not meet any of the forenamed patterns, nor did it meet the requirements set out under section 30 (1) of the Arbitration Act, Cap 15 R.E 2002, the learned counsel for the appellant did urge this Court to find merit in the appeal by quashing the finding of the trial Court and ordering the award to be registered with costs.

On his part, the learned counsel for the respondent did support the findings of the Honorable trial Judge in all fours. He did argue that, the binding nature of the contract in the instant matter could not be inferred from the correspondence that was made between the respondent and Tanzania Cotton Board, because the Tanzania Cotton Board was not a party to the purported contract. And with regard to the extract from **Chity on Contracts**(supra), which has been relied upon by his learned friend in

his submission, the learned counsel for the respondent has argued that, the same was distinguishable in that, the conduct referred therein was in respect of previous practices by the contracting parties, which was wanting in the circumstances of the case at hand. He has therefore, invited the Court to uphold the findings of the Honorable trial Judge, which was fairly and judiciously reached upon, and the appellant be condemned to bear the costs of this appeal as well as the Court below.

From what could be discerned from the records of the trial Court as well the submissions by the learned counsel for both sides, the bone of contention by the disputants in this appeal is centered on the question of validity of the contract between them. As earlier highlighted above, this was also the core issue during the trial of this matter at the High Court. So the basic issue that stands for our deliberation and determination is whether there was a valid and binding contract between the appellant and the respondent. Our takeoff therefore, is the question as to what is a contract. The general principle about contract is that, it arises because one party makes an offer or proposal and another party accepts that offer. Acceptance of the offer by the *offeree*is what produces *consensus ad*

*idem* that is, the agreement of the parties on the same thing. Under the Law of Contract Act, it has been stated under section 10 that:

> *"All agreements are contracts if they are made by the* ***free consent of parties*** *competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:"*
>
> *[Emphasis added]*

There are stages that have to be passed through before an agreement between two contracting parties can amount to a binding contract. Among those grounds include proposal or offer, which is made by the *offeror* and acceptance that is made by the *offeree.* And according to section 7 of the Act (Law of Contract Act), acceptance of the proposal by the *offeree* has to be clear. In its own words the provision stipulates *inter alia* thus:

> *"In order to convert a proposal into a promise, the* ***acceptance*** *must–*
>
> *(a) be absolute and unqualified;*

*(b) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted; and if the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but if he fails to do so he accepts the* ***acceptance.*** *"*

[*Emphasis added*]

We have supplied emphasis on the term **acceptance** because it is very crucial in the formation of a contract. In the case of **Hotel Travertine Limited and Two Others Vs National Bank of Commerce Limited,** [2006] TLR 133, the mode of acceptance prescribed by the *offeror* to the offer which he did extend to the *offeree* (appellant) was for the *offeree* to sign on the duplicate of the offer and returning it to the *offeror.* However, instead of doing so, the appellant wrote a different letter to the *offeror* signifying his acceptance to the offer. The holding of this Court was to the effect that, the appellant's letter did not constitute

acceptance of the offer because it was not in the mode of acceptance which the *offeror*(respondent) had prescribed in the offer.

With the above requirements in mind, we now turn to look at the contract which is being disputed by the disputants in the instant appeal of which, we reproduce in *ipsissimaverba*as hereunder:

LOUIS DREYFULS COMMODITIES TANZANIA LTD

P. O. BOX 2672, KURASINIPORT ACCESSROAD, TEMEKE, DAR ES SALAAM.

PURCHASE CONTRACT P0004

We have bought from you

DATE: 29/JUNE 2010

SELLER: ROKO INVESTMENTS

P. O. BOX 141 Igunga, Tabora, Tanzania.

QUANTITY: About 210 metric Tons – 1000 Bales.

Plus/Minus 1% variation in weight/quantity allowed

GROWTH/QUALITY: TANZANIA RAW SAWGINNED COTTON

Crop year 2010/2011

Type: 2 – 1 type "Ganny" or better

Staple: 1 – 3/32

Micronaire: 3.5/4.9

Strength GPT; 27.0 Minimum

PRICE: 77.50 USD Cents per lb (Seventy seven point fifty cents)

TERMS: FOT (Free on Truck) Gin

PAYMENT: 98% By TT upon receiving copy of the following documents: 2%balance paid against certified weight in port by controller. Eg WIS, Liverpool, Cargo control.

- Commercial invoice
- Lot by lot weights notes
- Quality certificate from TCB and Lab quality check
- Payment receipt from TCB

DELIVERY: July/August2010 at buyer's option.

ARBITRATION: All disputes relating to this contract will be resolved

Crop year 2010/2011

Type: 2 – 1 type "Ganny" or better

Staple: 1 – 3/32

Micronaire: 3.5/4.9

Strength GPT; 27.0 Minimum

PRICE: 77.50 USD Cents per lb (Seventy seven point fifty cents)

TERMS: FOT (Free on Truck) Gin

PAYMENT: 98% By TT upon receiving copy of the following documents: 2%balance paid against certified weight in port by controller. Eg WIS, Liverpool, Cargo control.

- Commercial invoice
- Lot by lot weights notes
- Quality certificate from TCB and Lab quality check
- Payment receipt from TCB

DELIVERY: July/August2010 at buyer's option.

ARBITRATION: All disputes relating to this contract will be resolved

Througharbitration in accordance with the bylaws of the International Cotton Association Limited. This agreement incorporates the bylaws which set out the Association's arbitration procedure. This arbitration shall be conducted in this Association in Liverpool, England.

SPECIAL TERMS: _

Signed by Louis Commodities Tanzania Ltd.

Not signed by Roko Investment Tanzania Ltd.

What is apparent on the face of the contract quoted above is that, while the *offeror* did sign the offer which he did extend to the *offeree*, the *offeree* in turn did not sign the offer. The subsequent question which does crop is whether there was acceptance in the offer. In response to this question, the learned counsel for the appellant has argued that, even though there was no express acceptance of the offer by the respondent, he was of the firm view that, there was acceptance which was inferred from the conduct of the respondent (*offeree*).To fortify his stance, he has

referred us to an extract in **Chity on Contracts** (supra) at page 181, which reads:

> *"...In such case it may be unreasonable to impose on the offeree an obligation to give notice of his rejection to the offeror especially if the offeror in reliance on his belief that, the goods would be delivered in the same way, had forborne from seeking an alternative supply... The general rule that there can be no acceptance does not mean that, an acceptance always has to be given in so many words. An offer can be accepted by conduct, and this has never been thought to give any difficulty where the conduct takes the form of a positive act."*

The general rule to acceptance of offers as it was hinted earlier on above is that, it has to be express, absolute and unqualified as clearly stipulated under the provision of section 7 of the Law of Contract Act (supra). In the old English case of **Felthouse vs Bindley** (1862) EWHC CP J35, it was stated that:

> *"The more rule is that, silence to a proposal or offer to a contract cannot amount to acceptance"*

The foregoing position notwithstanding, we are in agreement with the learned counsel for the appellant that, there are exceptions to the general rule in that, there are instances when acceptance to an offer can be made by conduct of the *offeree*. Basically, there are two situations where such practice can be applicable. The first situation is that which was discussed in the old English case of **CarlillVs Carbolic Smoke Ball** (1892) EWCA Civ. 1 that, an offer to a contract, can be accepted by conduct of the *offeree*, where the *offeror* has waived in his offer, his right to communication of acceptance. This can happen where the terms of the offer have expressly stipulated that acceptance need not be communicated or where performance of the contract is by way of performing the terms of the offer. The second instance, is the one that was discussed by the House of Lords in the case of **HillasVsArcon Limited** (1931)40 LI L Rep 307 of which its circumstances were almost similar to the one discussed in the extract from **Chity on Contract** (supra), which we have been referred to by the learned counsel for the appellant that, the missing terms in a contract could be read into the contract by reference to the previous contract and the custom of the trade that is, even if there has been no express acceptance of the offer, the custom of the trade or previous course

of business between the contracting parties, may help the Court to imply essential terms which the parties have omitted to state.

When we revert to consider the circumstances of the contract under discussion, we find that the circumstances which have been discussed above not to have been met. **First,** from the wording of the purported contract, there is nowhere in the terms of the offer, where the *offeror* (appellant) did waive his right to communication of acceptance. **Secondly,** there is no any iota of evidence in the proceedings to illustrate that, there was any custom being followed in the transaction intended by the two, nor was there any evidence to signify that, the two had previously been conducting the said business. And, **thirdly,**which we think is of more importance is the fact that, while the conduct inferred in the preceding two situations were in respect of the contracting parties, theconduct which we have been asked to infer in the instant contract, is in respect of a conduct made by the respondent to a third party that is, Tanzania Cotton Board, which was not a privity to the purported contract between the appellant and the respondent.

In the light of what has been canvassed above, it is evident that, acceptance of the offer by the respondent in the case at hand could not be inferred through his conduct.That being the case, we find ourselves constrained to uphold the holding of the Honorable trial Judge that, there was no way in which it could be said that, there was a valid and binding contract between the appellant and the respondent because, the offer extended to the respondent by the appellant was not accepted.

And, even if for the sake of argument, we were to imply in the way we were urged by the learned counsel for the appellant that, there was acceptance by conduct of the respondent to the offer that was extended to him by the appellant for sale of raw cotton, still there was an extra mile to go regarding the choice on the mode of settling their disputes in case they did arise in the course of their business. This was yet another independent contract, which ought to have been freely consented by each of the contracting partiesby submitting himself to the jurisdiction of the International Cotton Association Tribunal. This is from the fact that, arbitration is consensual wherebyparties to a contract are free to choose the law that should govern their contract, and the mode of settlement in case of any dispute arising out of or in connection with their contract.By

any parity of reasoning, it could not have been taken that, acceptance of the offer extended to him by the appellant by conduct, the respondent was *ipso facto* submitting himself to the jurisdiction of the International Tribunal preferred by the appellant.

In that regard, we arepersuaded to acknowledge and subscribe tothe holding of the Court of Appeal of England Civil Division, in**Fiona Trust and Holding Corporation and OthersVs Yuri Privator and Others,** Court of Appeal (Civil Division) [2007], London Case No. 20, which was cited and relied upon by the Honorable trial Judge in her decision that, the intention of the parties as expressed by the parties regarding submission to the jurisdiction is very vital.In line with the foregoing, the decision of the Supreme Court of India in the case of **the State of Rajasthan VsPuri Construction Company Limited** (supra), which was relied upon by Mr. Nyikalearned counsel in his submission is distinguishable from the circumstances of the case at hand. To that end, we are of settled mind that, there was neither a binding contract between the appellant and the respondent for sale of raw cotton, nor was there any, for the two to submit themselves to the jurisdiction of the International Cotton Association Tribunal to resolve their dispute. This leads us to answer the basic issue

that was posed above in the negative that, there was no binding contract between the appellant and the respondent.

And so far as the presence of a valid contract between the appellant and the respondent was a pre-requisite to the purported dispute between them, the International Cotton Association Tribunal did misdirect itself to hold that, there was a binding contract between the two, and thereby, proceeding to cloth itself with the jurisdiction to arbitrate the purported dispute between the two, while there was no agreement between them, to submit themselves to its jurisdiction.In the circumstances, the award that was issued by the International Cotton Association Tribunal dated the 01st August 2011in favor of the appellant at the tune USD 444,132.0, had no bases.

The procedure for registration and enforcement of foreign awards in Tanzania has been stipulated under the Arbitration Act, Cap. 15 R.E. 2002 (the Act). While the provisions of section 30 (1) of the Act enumerates the conditions that have to be met for an award to be registered, section 16 of the same Act gives power to the Courts to set aside an award, which may

seem not to comply with the conditions stated under section 30. In their own words the provisions read *verbatim* thus:

> *"16. Where an arbitrator or Umpire has misconducted himself, or an arbitration or award, has been improperly procured, the Court may set aside the award."*

*"(30) (1) In order that a foreign award may be enforceable under this Part, it must–*

*(a) have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;*

*(b) have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;*

*(c) have been made in conformity with the law governing the arbitration procedure;*

*(d) have become final in the country in which it was made; and*

*(e) have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania,and its enforcement must not be contrary to the public policy or the law of Tanzania."*

In rejecting to register the award presented before it by the appellant, the Honorable trial Judge did invoke her powers under the provisions of section 16 of the Arbitration Act on the reasons that, the conditions under section 30 (1) of the Act were not been met.It was argued by the learned counsel for the appellant that, in so doing, the Honorable trial Judge did exceed her jurisdiction. With due respect to the learned counsel, we are in disagreement with him. There being no valid contract between the appellant and the respondent, and there also being no agreement for the two to submit themselves to the jurisdiction of the International Cotton Association Tribunal, obviously, what was termed by the Tribunal to be an award had no basis and therefore, did not merit to be registered. Indeed the said award was against the provision of section 30 (1) of the Act as the Arbitrator who issued the award did misconduct himself in terms of the provision of section 16 of the Act. If we may borrow the words of the Honorable trial Judge, the Court in registering and enforcing such an award which had been procured under mysterious circumstances, would be tantamount to blessing overt acts of injustice, which is against the public policy of Tanzania. And once it has been held that, there was no binding contract between the appellant and the

respondent, the other grounds of appeal are rendered redundant as they have no basis to stand on.

Consequently, on the basis of what has been canvassed above, we find that the appeal that has been presented by the appellant to challenge the decision of the trial Court is wanting of merit and has to fail. We therefore dismiss it and order that, the respondent will have its costs in this appeal as well as the court below.

Order accordingly.

**DATED** at **DAR ES SALAAM** this 30th day of June, 2017.

M.S. MBAROUK
**JUSTICE OF APPEAL**

S.E.A. MUGASHA
**JUSTICE OF APPEAL**

S.S. MWANGESI
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**