IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 207 OF 2018

JOVET TANZANIA LIMITED ..... APPELLANT

VERSUS

BAVARIA N.V ..... RESPONDENT

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

(Phillip, J.)

dated the 4th day of September, 2018

in

Miscellaneous Commercial Cause No. 183 of 2018

JUDGMENT OF THE COURT

18th July & 14th September, 2022

MWAMBEGELE, J.A.:

This appeal has its origin in the decision of the Commercial Division of the High Court in Miscellaneous Commercial Cause No. 183 of 2018. In that decision, the High Court (Phillip, J.) granted the respondent's application for stay of proceedings in Commercial Case No. 94 of 2018 pending arbitration.

To appreciate the essence of the present appeal, we find it appropriate to lay a brief factual background of this matter. The appellant, Jovet Tanzania Limited, is a limited liability company incorporated under the laws

of Tanzania dealing with, *inter alia*, selling of beverages. The respondent, Bavaria N.V, is a public limited liability company incorporated under the laws of the Netherlands dealing with, *inter alia*, manufacturing, marketing, distribution and sale of alcoholic and non-alcoholic beverages in various countries across the globe. On 17.12.2015, the appellant and respondent renewed an Exclusive Distribution Agreement in which the former was a distributor of the latter's products to be marketed, distributed and sold in Tanzania, Burundi and Rwanda. We shall henceforth refer to the renewed Exclusive Distribution Agreement as the Agreement. The lifespan of the Agreement was agreed to be five years; commencing from 01.01.2016 to 31.12.2020. Article 22 of the Agreement was to the effect that disputes arising out of the Agreement would be resolved in Amsterdam, the Netherlands by the Netherlands Arbitration Institute (Nederlands Arbitrage Instituut). The language of the dispute resolution was chosen to be English.

Amidst the lifespan of the Agreement; on 17.05.2018 to be particular, the respondent issued the appellant with a termination notice under the pretext that the latter did not achieve the minimum volume of stock and was not making due payments timely. The appellant was aggrieved by the notice and sought recourse in the Commercial Division of the High Court by

instituting Commercial Case No. 94 of 2018 seeking, *inter alia*, a declaration that the appellant's failure to achieve the minimum volumes sale, was with justifiable reason and thus the Termination Notice of 15.03.2018 was null and void and an order that the respondent specifically performs the terms and conditions of the Agreement. She thereafter lodged in the same court an application for temporary injunctive orders vide Miscellaneous Commercial Application No. 171 of 2018. Upon being served with the Chamber Summons and affidavit in respect of Miscellaneous Commercial Application No. 171 of 2018, the respondent filed a counter affidavit and a preliminary objection.

When the main suit was placed before the Judge for orders on 01.08.2018, the respondent intimated to the Court that she had no intentions of taking further steps in the proceedings because she was contemplating to refer the dispute to the arbitrator as agreed by the parties in the Agreement and prayed for leave to file an application for stay of proceedings in Commercial Case No. 94 of 2018 pending that process. The court granted the prayer and the respondent lodged Miscellaneous Commercial Cause No. 183 of 2018, the subject of this appeal.

As already stated above, the High Court decided in favour of the respondent. The respondent was allowed to refer the dispute to arbitration within ninety (90) days of the date of the ruling. That decision irritated the appellant. He thus came to this Court seeking to challenge the decision on the following abridged grounds of grievance, namely; that the High Court erred in law and fact in holding; **one**, that the Agreement was not unambiguous for prescribing that all disputes were subject to arbitration while it allowed the respondent to still file suit in normal courts in Tanzania despite the arbitral provision; **two**, that "taking steps in proceedings" as envisaged by section 6 of the Arbitration Act, Cap. 15 (the Arbitration Act), means taking steps in the proceedings that are for the furtherance or disposal of the dispute in the main case, not any other proceedings such as application for maintenance of status quo and the application of injunction; **three**, that the mere fact that the respondent filed a Notice of Preliminary Objection, Counter Affidavit, and defended the oral application for maintenance of status quo ante, did not amount to taking part in the proceedings; **four**, that the respondent was willing and ready to mediate while there was no proof that the respondent had initiated the mediation

process; and **five**, that there were no sufficient reasons to make the High Court refuse to grant the stay of proceedings order.

Having presented the foregoing grounds in the memorandum of appeal, the appellant proceeded to ask the Court to allow the appeal with costs, set aside the order appealed against and order that Commercial Case No. 94 of 2018 be heard on its merits before another Judge with jurisdiction.

At the hearing of the appeal before us, the appellant was represented by Mr. Brayson Shayo, learned advocate and the respondent had the services of Mr. Gerald Nangi, learned advocate, who was assisted by Mr. Brian Mambosho, also learned advocate.

When asked to argue the appeal, Mr. Shayo first abandoned ground four of the five grounds of appeal and was very brief but to the point in arguing the remaining four grounds. In his arguments in support of the appeal, Mr. Shayo argued grounds one and five separately and consolidated the second and third grounds as they were intertwined. The advocate for the appellant's arguments at the hearing of the appeal was, to a great extent, a repetition of the arguments fronted at the hearing of the application in the High Court.

In arguing the first ground of appeal, Mr. Shayo submitted that the arbitral clause, as appearing at p. 37 of the record of appeal, does not qualify to be a submission because it does not provide for an absolute right of the parties to refer the dispute between them to arbitration. He argued that the article gave the respondent an option to go to either arbitration or file a suit in the United Republic of Tanzania. He further argued that for an arbitral clause to amount to a submission, it must provide equal rights to the parties. To bolster up this proposition, the learned counsel referred us to the case of **Construction Engineers and Builders Ltd v. Sugar Development Corporation** [1983] T.L.R 13. He argued further that the alleged arbitral clause contains unfair terms of the Agreement to oust the jurisdiction of the Tanzanian Courts. He contended that clause 22 of the Agreement imposes unfair obligation on one party which was illegal as was held in **Tanzania Motor Services & Presidential Parastatal Sector Reform Commission v. Mehar Singh t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (unreported). Mr. Shayo implored us to find merit in this ground and allow the appeal.

Arguing grounds two and three of appeal, Mr. Shayo submitted that the respondent submitted herself to the jurisdiction of the court because she

took steps in the proceedings of the court in Commercial Case No. 94 of 2018 by objecting to the prayer of maintenance of status quo by filing a counter affidavit and a notice of preliminary objection. He argued further that section 6 of Arbitration Act, was only applicable if the respondent did not take step in the proceedings. To buttress this proposition, the learned counsel referred us to **Independent Power Tanzania Limited v. VIP Engineering and Marketing Limited,** [2004] T.L.R. 372 and **DP Shapriya Yara Tanzania Limited**, Miscellaneous Commercial Cause No. 55 of 2016 (HC unreported). He urged us to find merit in these two grounds.

As regards the fifth ground of appeal, the appellant's counsel argued that there was no good reason to refer that matter to arbitration. To buttress this argument, the appellant's counsel advanced five reasons why: **one,** article 22 did not amount to a submission to arbitration; **two,** the respondent took steps in the proceedings of the court; **three,** the process of arbitration was not convenient to the parties; **four,** the trial court did not consider that the respondent was riding two horses at one time by taking steps in the proceedings of the court and pretending to refer the matter to arbitration; and **five,** the parties had no legal authority to oust the jurisdiction of the courts in Tanzania. He impressed upon us to find this ground meritorious.

Having argued as above, the appellant's counsel implored us to allow the appeal as prayed in the memorandum of appeal with costs.

Responding to the first ground of appeal, Mr. Nangi submitted that before the High Court, it was an application for stay of proceedings pending reference of the matter to arbitration; it was not an application to determine the fairness of article 22 of the Agreement. The Court was thus precluded from deciding a matter which was not decided by the High Court, he argued. The first ground of appeal, he stressed, was thus without merit.

On grounds two and three of the appeal, Mr. Nangi submitted in rebuttal that the two grounds revolved on only one issue; that is, whether, by filing a counter affidavit and a notice of preliminary objection in the application for maintenance of status quo, the respondent took steps in the proceedings of the suit to the extent stated. That did not amount to taking steps in the proceedings of the suit as to take away her right to arbitration, the respondent's counsel argued. He cited a paper by Nuhu Mkumbukwa titled: **Is the Commercial Court Jealous about Arbitration** and **Roussel-Uclaff v. G.D Searle & Co. Limited and D Searle & Co. Limited** [1978] High Court of Justice, Chancery Division to buttress the point

that what the respondent did, did not amount to taking steps in the proceedings. Mr. Nangi thus concluded his argument on this point that by filing a counter affidavit and a notice of preliminary objection, the respondent was not taking steps in the proceedings of the Court in Commercial Case No. 94 of 2018. He thus prayed to have grounds two and three of appeal dismissed.

As for the fifth ground of appeal, Mr. Nangi argued that the High Court considered the gist of this ground as evident at p. 800 of the record of appeal. He argued that the jurisdiction of the court was not ousted, neither was the court looking at the convenience of the parties but sanctity of the agreement between them. He contended that the respondent was not riding two horses at a time but that the whole thing hinged on what the parties had agreed upon. He contended that the fifth ground was also without merit.

Having argued as above, Mr. Nangi beseeched us to dismiss the appeal for want of merits with costs.

In a short rejoinder, Mr. Shayo submitted that it was incumbent upon the High Court to determine that the arbitration clause was not a submission

before determining that the matter should be referred to arbitration. He reiterated that the respondent participated in the proceedings of the court in Commercial Case No. 94 of 2018 and therefore waived her right to refer the matter to arbitration. He reiterated to urge us to allow the appeal with costs.

Having heard the rival arguments by the learned counsel for the parties, we now turn to consider the grounds of appeal. We shall determine the grounds of appeal in the order taken by the counsel. That is, we shall consider grounds two and three together and deal with grounds one and five separately.

In the first ground of appeal, the appellant seeks to assail the High Court for holding that the court is not supposed to step into the shoes of the parties to look into the fairness of the Agreement and for holding that the Agreement between the parties was unambiguous in prescribing that all disputes were subject to arbitration while it allowed the respondent to still file a suit in normal courts in Tanzania despite the arbitral provision. The kernel of the argument brought by counsel for the appellant in support of the first ground of appeal, is that the arbitral clause does not qualify to be a

submission because it does not provide for an absolute right of the parties to refer the dispute between them to arbitration. On the other hand, Mr. Nangi countered that before the High Court, it was an application for stay of proceedings pending reference of the matter to arbitration and not an application to determine the fairness of article 22 of the Agreement. As such, the appellant was barred from raising that issue on appeal. We think Mr. Nangi is right. The issue whether article 22 of the Agreement was unfair was not at all raised, discussed and decided upon in the High Court. As such, the appellate court is precluded from entertaining and making a decision on it. We are fortified in this view by our decision in **Elisa Mosses Msaki v. Yesaya Ngateu Matee** [1990] T.L.R. 90 in which, faced with an identical situation, we held:

> *"This Court will only look into matters which came up in the lower Court and decided; not on which were not raised nor decided by neither the trial Court nor the High Court on appeal".*

In that case the applicant, just like what the appellant has done in the present appeal, pegged his appeal on a matter which the trial court did not consider. We held that that was not legally appropriate. We held so then and still hold so today – see also: **M/S Ilabila Industries Ltd & Two**

Others v. Tanzania Investment Bank & Another, Civil Application No. 179 of 2004, **James Funke Gwagilo v. Attorney General**, Civil Appeal No. 67 of 2001 and **Eshie Mossy Mbaruku v. Bi. Kungwa Rajabu & Another**, Civil Appeal No. 58 of 2013 (all unreported) and **Gandy v. Gaspar Air Charters Ltd.** (1956) 23 EACA 139 and **Melita v. Sailevo Loibanguti** [1998] T.L.R. 120.

In sum of the first ground of appeal, therefore, we find and hold that it was not proper for the appellant to rely on appeal on an issue which was not raised and decided upon by the High Court. As a matter of general principle, this Court will only entertain and decide on matters which came up in the court or courts below and decided upon. We thus find no merit in the first ground of appeal and dismiss it.

We now turn to consider grounds two and three of the appeal. As rightly put by Mr. Nangi, the issue that arise from the two grounds of appeal is whether, by filing a counter affidavit and a notice of preliminary objection in the application for maintenance of status quo, the respondent took steps in the proceedings of the court in commercial Case No. 94 of 2018 thereby waiving her right to arbitration. We have considered the rival arguments of

the learned advocates for the parties on this point. Having so done, we agree with Mr. Nangi that the respondent's acts of filing a counter affidavit and lodging a notice of preliminary objection in the application for maintenance of status quo, did not amount to the respondent taking steps in the proceedings of the court in Commercial Case No. 94 of 2018. As good luck would have it, what amounts to "taking steps in the proceedings of the court" is not a virgin territory; it has been discussed by the courts elsewhere in the commonwealth jurisdiction. In **Food Corporation of India & Another v. Yadav Engineer & Contractor**, 1982 AIR 1302 (accessed through https://indiankanoon.org/doc/1076013/) the Supreme Court of India was called upon to decide what entails taking steps in the proceedings and held:

> *"That some other step must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Each and every step taken in the proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings but the step taken by the party must be such step as would clearly and unmistakably*

indicate an intention on the part of such party to give up the benefit of arbitration agreement and to acquiesce in the proceedings commenced against the party and to get the dispute resolved by the court. A step taken in the suit which would disentitle the party from obtaining stay of proceeding must be such step as would display an unequivocal intention to proceed with the suit and to abandon the benefit of the arbitration agreement or the right to get the dispute resolved by arbitration."

And added:

"Therefore, the expression 'taking any other steps in the proceedings' must be given a narrow meaning in that the step must be taken in the main proceeding of the suit and it must be such step as would clearly and unambiguously manifest the intention to waive the benefit of the arbitration agreement and to acquiesce in the proceedings. Interlocutory proceedings are incidental to the main proceedings.... Such interlocutory proceedings stand independent and aloof of the main dispute between the parties involved in the suit. They are steps taken for facilitating the just and fair disposal of the main dispute. ***When these interlocutory proceedings***

> ***are contested it cannot be said that the party contesting such proceedings has displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it has submitted to the jurisdiction of the court."*** *[emphasis added]*

Likewise, in **Rashtriya Ispat Nigam Limited and Another v. M/S Verma Transport Company**, Appeal (Civil) 3420 of 2006 the Supreme Court of India restated the meaning of the expression in the following terms:

> *"... taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial dispute in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to acquiesce in the suit and to waive the benefit of the arbitration agreement".* (Accessed through https://Indiankanoon.org/doc187956

We subscribe to the standpoint of the law in the foregoing decisions of the Supreme Court of India as the correct position of the law in our jurisdiction as well.

In the case at hand, the respondent filed a counter affidavit and a notice of preliminary objection in the application for maintenance of status quo. Does that amount to the respondent taking steps in the proceedings of Commercial Case No. 94 of 2018 to the extent of forbearing the arbitration clause? We think to answer this question in the affirmative will be too wide a statement. As already seen in the authorities cited above, taking steps in the proceeding entails an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. As far as we can discern from the record before us, the respondent had no intention whatsoever to participate in the proceedings of Commercial Case No. 94 of 2018 and the respondent's counsel stated so in no uncertain terms when he appeared before the Judge for orders on 01.08.2018. We shall let the record proceedings of that date as they appear at p. 845 of the record of appeal paint the picture: the appellant's counsel, Mr. F. Chundu is recorded to have said:

> *"We served the defendants through DHL the documents reached the defendant on 23rd of July 2018. We have not been served with the written statement of defence."*

And Jeremiah Tarimo who appeared for the respondent is recorded as replying:

> *"We have not filed the witness statement of defence. The defendant does not intend to take further steps into the suit, however, we undertake to lodge a petition for stay of proceedings for the matter to be referred to arbitration in the Netherlands as agreed by the parties in the contract. By the leave of this honourable court we intend to file the petition within seven days from today. I pray that this honourable court be pleased to schedule the dates for the reply of our petition."*

The respondent's intention not to participate in Commercial Case No. 94 of 2018, was manifested by deeds by not filing a written statement of defence and by words before the Judge on 01.08.2018 when the suit was called on for orders by stating so in express terms.

On the authority above, we are settled in our mind that the respondent's act of filing a counter affidavit and a preliminary objection in Miscellaneous Commercial Application No. 171 of 2018 which arose from Commercial Case No. 94 of 2018, did not amount to taking steps in the proceedings of the suit as to take away her right to arbitration. The second

and third grounds of appeal are also found without merit and therefore, like the first ground, dismissed.

We now turn to consider ground five of appeal. This ground of appeal will not detain us, for most of the issues on which this ground was pegged have been already resolved above. For instance, the appellant pegged on the fifth ground the arguments that the learned High Court Judge should not have allowed the parties to go to arbitration because; **one**, article 22 of the Agreement did not amount to a submission to arbitration. We have already found and held above that this complaint is misconceived as it was not at issue at the trial, **two**, that the respondent took steps in the proceedings of the court in Commercial Case No. 94 of 2018. We have already found and held above that the respondent's acts of filing a counter affidavit and a notice of preliminary objection in the application for maintenance of status quo, did not amount to taking steps in the proceedings in the suit to the extent of positively and unequivocally intending to proceed with it and to give up the right to have the matter disposed of by arbitration as agreed in the Agreement; and **three** that the trial court did not make any determination on the appellant's complaint that the respondent was riding two horses at one time by taking steps in the proceedings of the court and pretending to

refer the matter to arbitration. We have already discussed above and held that the respondent was legally correct to file an affidavit and preliminary objection in Miscellaneous Commercial Application No. 171 of 2018. As we have stated above, that course of action did not amount to taking steps in the proceedings for resolution of the substantial dispute in the suit. In the same token, we cannot say the respondent was riding two horses at the same time.

The appellant fronted other two arguments in support of the fifth ground of appeal which we have not provided answers above. These arguments are that; **one**, the process of arbitration was not convenient to the parties; and **two**, the parties had no legal authority to oust the jurisdiction of the courts in Tanzania. These we shall address here.

One, the appellant submits in support of the fifth ground of appeal that the process of arbitration was not convenient to the parties. Mr. Nangi for the respondent made an answer to this complaint. He submitted that the Court was not looking at the convenience of the parties but sanctity of the Agreement between them. We respectfully are of the considered view

that he is right. The learned High Court Judge addressed this complaint at p. 840 of the record of appeal. She held:

> *"I am not convinced with the above reasons advanced by the respondent's advocate. I believe when the parties agreed the place of mediation to Amsterdam were aware that in case of any dispute some witnesses might be in Tanzania.... Convenience of one party cannot override the clear and express terms of the agreement. Since the contract clearly shows that the intention of the parties was to have Arbitration in Amsterdam at Netherlands Arbitration Institute, I do not find any sufficient reasons to make this court refuse granting the stay."*

We are in agreement with the learned High Court Judge on this point. The parties had already agreed on how the dispute between them should be resolved. That was final between them and the Court cannot decide otherwise. The appellant cannot now renege and assert that the place of arbitration is not convenient to her. That arbitration clause binds her and survives even after the Agreement is terminated.

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. The principle embedded in the Latin maxim of *pacta sunt servanda* is what is relevant here. This maxim simply means agreements must be kept. In **Scova Engineering S.p.A and Another v. Mtibwa Sugar Estates Limited and Three Others**, Civil Appeal No. 133 of 2017 (unreported), we discussed at some considerable length and cited a plethora cases from within and outside this jurisdiction on whether the jurisdiction of our courts may be ousted. We held that:

> *"... the jurisdiction of the High Court or any court for that matter, having been conferred by statute, is not capable of being ousted by agreement of the parties except by statute in explicit terms".*

In the case at hand, applying the above legal position, the parties having been agreed that disputes arising out of the Agreement would be resolved by a certain forum, they did not mean to oust the jurisdiction of the courts in Tanzania. We are of the considered view that ground five of the memorandum of appeal lacks merit as well. It is dismissed.

In the final analysis, on a full consideration of law on the issues raised in this appeal, we are of the settled view that the learned High Court Judge was quite in the right track to allow the parties to go to arbitration as agreed in the Agreement and stay the proceedings in Commercial Case No. 94 of 2018 pending that process. We find this appeal lacking in merit and dismiss it with costs.

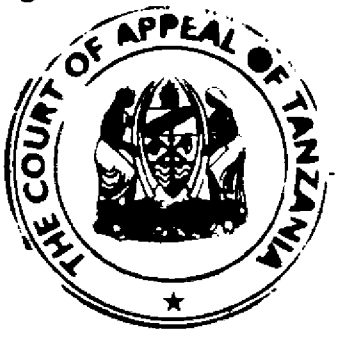
DATED at **DAR ES SALAAM** this 14th day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of September, 2022 in the presence of Mr. Jerry Msamanga, learned counsel for the appellant and Mr. Brian Mambosho, learned counsel for Respondent is hereby certified as a true copy of the original.



A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL