IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 73 OF 2020

WELLWORTH HOTELS & LODGES LIMITED.....1ST APPELLANT
ESMAIL PROPERTIES LIMITED .....2ND APPELLANT
VERSUS
ENTERPRISES (TANZANIA) LIMITED .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Dar es salaam District Registry at Dar es Salaam)

(Mutungi, J.)

Dated the 30th day of November, 2017
in
Civil Case No. 194 of 2012
.....

JUDGMENT OF THE COURT

9th May & 11th August, 2023

WAMBALI, J.A:

Wellworth Hotels and Lodges Limited and Esmail Properties Limited, the first and second appellants in this appeal, were the first and second plaintiffs in Civil Case No. 194 of 2012 which they instituted at the High Court of Tanzania, Dar es Salaam District Registry against defendant, Enterprises (Tanzania) Limited, the respondent herein.

According to the pleadings and the evidence in the record of appeal, on 6th December, 2008, parties entered into a Sale Agreement (the Agreement) in which the appellants bought a property known as Embassy

Hotel located on plot No. 2392/44 and registered under Certificate of Title No. 186008/37 Dar es Salaam at a price of USD 5,560,000. The said Agreement was tendered and admitted at the trial as exhibit P4.

It is further on the record of appeal that during the performance of the Agreement, the appellants alleged that the respondent breached the agreed terms. Particularly, it was alleged that the respondent failed to pay utility bills; namely, electricity and water bills which were among its liabilities stated in the Agreement. More importantly, it was pleaded that, it also came to the knowledge of the first appellant that the respondent failed to pay Tanzania Revenue Authority (TRA) dues which led the Authority to issue Agent Notice to the first appellant. The appellants maintained that despite their verbal and written demands, the respondent did not meet the obligations as agreed in the Agreement. As it was a term of the Agreement (paragraph 16) that whenever a dispute between the parties arose the same would have been solved by negotiation and arbitration, it was alleged that the initiatives of the first appellant to resolve the dispute through arbitration were frustrated by the respondent.

In the circumstances, the appellants lodged the case before the High Court against the respondent as alluded to above. In that case, the appellants claimed for the following reliefs. **First,** declaration that the

respondent had breached the terms of the Agreement. **Two,** the respondent was liable to pay the first appellant damages to the tune of TZS. 12,020,000.00 and USD 136,500.00 and compensation of USD 6,980,625.00 being the loss of income. **Three,** declaration that the amount that had been paid and which remained payable to TRA under the Agency Notice be deducted from the outstanding amount of USD 2,400,000.00 due from the sale price and that the first appellant was entitled to the balance amount which should be paid after the lift of the Agency Notice. **Four,** an order that the collateral given by the second appellant being apartments 1 and 2, on the ground floor and 8 and 9 on the fourth floor located on Plot No. 34 UWT/Maktaba Street, registered under the Certificate of Title No. 186053/56 be returned to her (second appellant) followed by cancellation of the Notice of Deposit and Power of Attorney. **Five,** an order for payment of interest by the respondent at the rate of 22% from the date of the Agency Notice from TRA to the date of filing the suit. **Six,** an order for payment of interest at the commercial rate of 22% per annum on claimed damages from the date of filing of the suit to the date of judgment. **Seven,** an order for payment of interest of 7% per annum on the decretal amount from the date of judgment to the date of final settlement of the decree. **Eight,** an order for payment of general damages to the tune of USD 1,415,000.00 or any other amount

as the court would have determined. **Nineth,** costs and other remedy the court would deem appropriate to grant.

The appellants' claims were strongly resisted by the respondent through the written statement of defence. It is noteworthy that together with the written statement of defence, the respondent raised three preliminary points of objection against the appellants' suit; that it was *res judicata*, pre maturely instituted and defective for being lodged without authorization from the appellants. Nonetheless, on 2nd December, 2016, the trial court overruled all points contained in the preliminary objection.

Basically, in her written statement of defence, the respondent stated that there had never been a breach of the Agreement by her as alleged and maintained that it was the first appellant who was in continuous breach of the Agreement. The allegation was refuted by the appellants through the reply to the written statement of defence.

As it were, after the pleadings were complete and the parties were ready for the trial, the High Court with the agreement of the counsel for the parties framed the following issues. **One,** whether the defendant breached the terms of the Sale Agreement. **Two,** what was the nature and extent of the breach. **Three,** whether the plaintiff suffered any

damage caused by the alleged breach. **Four,** to what relief were the parties entitled.

Both sides had two witnesses who testified at the trial. These were, Steven Athanasy (PW1), Gulam Hussein Ismail (PW2), Paulo Ferdinandes (DW1) and Chief Frank Marealle (DW2). In addition, eighteen and six exhibits were admitted for the appellants and respondent respectively.

At the height of the trial, initially, before she resolved the first issue, the trial judge summarized the evidence for the parties and the counsel's written submissions on record. Later, upon noting the existence of the Arbitration Clause (paragraph 16) in the Agreement, the trial judge struck out the suit for what she stated as the failure by the appellants to exhaust the remedies provided in the respective clause. The suit was not therefore determined on merits.

The decision of the trial court prompted the appellants to lodge the instant appeal through a memorandum of appeal comprising three grounds as hereunder:

> "1. *That the trial judge erred in law and in fact for failure to deliver judgment on merit based on the evidence tendered in court on ground of existence of Arbitration Clause in the Agreement.*

2. *That the trial judge erred in law and fact for failure to allow the parties to address the court on the legality or otherwise of the proceedings after coming across with arbitration clause in the Agreement.*
3. *The learned trial judge erred in law and in fact for not addressing herself to the issues framed and agreed by the parties, in the result, the controversy between the parties rightly or wrongly before the court was left unsolved."*

The appellants thus pray for the following orders:

(a) *To quash the whole judgment and decree of the High Court of Tanzania Dar es Salaam District Registry in Civil Case No. 194 of 2012 and the parties be availed with the right to address the court on the raised issue on Arbitration clause by the lower court suo mottu.*
(b) *The appeal be allowed.*
(c) *Costs of the appeal be provided.*

It is noteworthy that after the respondent was served with the memorandum and record of appeal, in terms of rule 94 of the Tanzania Court of Appeal Rules, 2009 she lodged a notice of cross appeal comprising four grounds. However, the notice of cross appeal was marked withdrawn by the Court before we commenced the hearing of the appeal upon the prayer of the respondent's counsel which was not

objected to by the appellants' counsel. It is in this regard that we do not deem it appropriate to reproduce the four grounds of the cross appeal herein.

The appellants lodged written submissions and a list of authorities in support of the appeal, which was adopted by their counsel during the hearing of the appeal. The respondent neither lodged the written submission nor a list of authorities. The respondent's counsel therefore made oral submissions during the hearing of the appeal.

At the hearing of the appeal, the appellants were represented by Mr. Henry Sato Massaba, learned advocate and Mr. Shalom Msakyi also learned advocate. On the other side, the respondent had the services of Mr. Peter Kibatala, learned advocate.

We must make it clear that before the hearing commenced, it was agreed by the counsel for the parties and endorsed by the Court that having regard to the judgment of the High Court, the grounds of appeal and the appellants' prayers in the memorandum of appeal, the appeal could be determined based on one ground; that is, "the trial judge erred in law and in fact in raising the issue of arbitration clause *suo mottu* without giving the parties the right to be heard".

Submitting in support of the appeal, Mr. Massaba argued that before the trial, four issues were framed. However, to the parties' surprise, he argued, in composing the judgment, the trial judge, on her own motion, raised an issue pertaining to non- adherence to an arbitration clause in the Agreement between the parties to the suit. He argued further that the trial judge did not touch or address and determine the agreed framed issues. On the contrary, he submitted, she hastily rushed to consider and determine the propriety of the suit amid the existence of an arbitration clause, which was not among the framed issues at the trial. As a result, he stated, the trial judge did not determine the real controversy between the parties and thus she ended in striking out the suit on the alleged failure by the appellants to refer the dispute to the arbitrator.

Mr. Massaba submitted further that it is a principle of law that if the court raises an addition issue, it is required to allow parties to address it and lead evidence on the same. In his submission, failure to do so, like in this case, rendered the proceedings a nullity as the parties were not accorded the right to be heard. To support his contention, he made reference to the decisions of the Court in **The Registered Trustees of Arusha Muslim Union v. The Registered Trustees of National Muslim Council of Tanzania a.k.a. BAKWATA,** Civil Appeal No. 300

of 2017 [2019] TZCA 301: [20 August 2019: TANZLII] and **Wegesa Joseph M. Nyamaisa v. Chacha Muhogo,** Civil Appeal No. 161 of 2016 [2018] TZCA 224: [27 September 2018: TANZLII] in which the decision in the case of **B. 8356 S/Sgt Sylvester S. Nyanda v. Inspector General of Police and Another,** Civil Appeal No. 64 of 2014 [2014] TZCA 215: [28 October 2014: TANZLII] was cited to the effect that:

> *"... it is an elementary principle of determination of disputes between the parties that court of law must limit themselves to issues raised by the parties to the pleadings as to act otherwise might well result in denying the parties right to fair hearing."*

The learned advocate contended that according to the pleadings, the parties had waived their right to refer the dispute to arbitration as the efforts were frustrated by the respondent. In his submission, the appellants were thus entitled to lodge a civil suit before the High Court. To stress his point, he made reference to the decision of the Court in **Mussa Chande Jape v. Moza Mohamed Salim,** Civil Appeal No. 141 of 2018 [2019] TZCA 490: [12 December, 2019: TANZLII]. He therefore, concluded his submission by stating that as the parties were not heard on the raised issue, the judgment and decree in Civil Case No. 194 of 2012 should be quashed and set aside respectively, as the parties had waived

their right to arbitration and thus they cannot be taken to have not exhausted the remedies. In the end, he prayed that the appeal be allowed with costs.

For his part, Mr. Kibatala supported the trial judge judgment on the argument that the issue of arbitration clause was pleaded and during the testimony of PW2, he was cross examined by the respondent's counsel on the matter as stated by the trial judge in her judgment. He added that exhibit P4 which contained an arbitration clause was tendered by the appellants' witness (PW2). Moreover, he stated that exhibit D6 which is the ruling of the High Court (Mwambegele, J. as he then was) in Miscellaneous Land Cause No. 2 of 2010 concerning injunction and appointment of arbitrator was tendered by the respondent clearly indicated that the issue of arbitration had not started and thus the application was dismissed in its entirety with costs. He therefore argued that the matter on the mode of dispute settlement by the parties was properly determined by the trial judge though it was not framed as an issue. He further argued that the appellants' counsel also cross examined DW2 on exhibit D6 as reflected at page 380 of the record of appeal.

Mr. Kibatala argued in the circumstances that, the decisions of the Court in **Mussa Chande Jape v. Moza Mohamed Salim** (supra) was

cited out of context as its facts are distinguishable with this case since there is no evidence that the parties had waived their rights to refer the dispute to arbitration as alleged by the appellants. He contended further that, though the issue of whether the parties exhausted the remedy for the arbitration process as per arbitration clause in exhibit P4 was not framed, parties addressed it in the cause of hearing and thus the trial judge was entitled to make a decision on it. He argued that on a quick glance of the impugned judgment, the language used by the trial judge while introducing the issue of the existence of the arbitration clause might seem to indicate that she raised it *suo mottu* without giving the parties the right to be heard. On the contrary, he stated, the analysis of the evidence made by the trial judge on the matter confirms that it was an issue in which the parties had been granted an opportunity to address the court as reflected at pages 723 – 724 of the record of appeal as per the summary of the evidence and submissions by the parties' counsel. He added that the reasoning at pages 725 and 727 also shows that the issue of arbitration process was an evidential issue. In the end, Mr. Kibatala concluded his submission by urging the Court to dismiss the appeal with costs.

At this juncture, in order to appreciate the substance of our deliberation, we deem it appropriate to reproduce the relevant part of the judgment of the trial judge which led to the striking out of the case thus:

> *"Having summarized as above, I now turn to the first issue on whether the defendant breached the terms of the Sale Agreement. As I was flipping through the contents of the Sale Agreement (Exhibit P4), I came across clause 16 which states as follows and I quote;*
>
> *"**16** – Any dispute, controversy, or claim arising out of or in relation to this Agreement shall be settled amicably through negotiations, failure to which the same shall be referred to arbitration agreeable to both parties. The Arbitrator will make a decision on the basis of evidence and submissions provided by the parties."* [Emphasis mine]
>
> *Having in mind the above, I am of the settled view the plaintiffs appeared to have neglected to comply with Exhibit P4. I have found no record or document indicating the alleged dispute was referred to Arbitration. Very surprisingly the evidence reveals the plaintiffs herein were aware of the said arbitration clause due to the existence of Miscellaneous Land Case No. 2 of 2010 which was filed by the plaintiffs against the defendant in*

the High Court of Tanzania (Land Division) at Dar es Saiaam (Exhibit D.6) but they unsuccessfully prayed for an injunction to prevent the defendant from disposing the apartments No. 8 and 9 on the fourth floor and No. 1 and 2 on the ground floor of Raha Tower Apartments until final determination of the arbitration upon appointment of an arbitrator. The trial Judge found no evidence indicating any arbitration in process. All these indicate the plaintiffs were aware of clause 16 of Exhibit P.4.

Furthermore, in the instant suit even PW2 in his testimony particularly in cross examination admitted to the existence of the said arbitration clause. He testified that when the dispute arose, they notified their lawyer one Chandoo and subsequently Mr. ISHENGOMA of IMMMA but the defendant turned deaf ear to this news. PW2 did not tell the court what happened to the arbitration process after this. It goes without saying that, the entire scenario indicates the parties herein to date have not complied fully with Exhibit P.4 in as far as clause 16 is concerned. That is, there is no evidence to impress upon the court as to whether the matter had subsequently been referred to the arbitrator before instituting the suit.

The cited arbitration clause (clause 16) is loud that any dispute between the parties herein has to be resolved amicably through negotiations but once it fails the matter has to be referred for arbitration in which an agreed arbitrator shall be appointed. In the matter at hand, the parties herein had agreed freely in inserting clauses in Exhibit P.4 which obviously included clause 16 of the same. Therefore, I am of the settled view that parties are bound by the same and this court has no powers to alter or amend them in any manner ...

Having said so, as far as clause 16 of Exhibit P.4 is concerned, I find it inappropriate to entertain the suit on merits since the agreed machinery to resolve the future arising disputes between the parties herein had already been agreed and inserted in the said arbitration clause ....

From the above analysis and legal position, I find the plaintiffs have wrongly instituted their suit herein which is obviously in the unproper forum. In my settled view this is contrary to the arbitration clause in Exhibit P.4. More so, whether there is a breach of the said Sale Agreement as alleged by the plaintiffs or otherwise, if negotiation failed, then it should have been referred to an

arbitrator whose decision should be based on the evidence and submissions provided by the parties herein.

For all purpose and intent, the parties' failure to exhaust all the remedies available in clause 16 of Exhibit P.4 renders the court incompetent to entertain the suit. However, if the plaintiffs still wish to settle the dispute, they have first to comply with clause 16 of Exhibit P.4 to resolve the alleged dispute against the defendant via the arbitration machinery as agreed.

In the event, I hereby strike out the instant suit for the failure by the plaintiffs from exhausting the remedies available in the arbitration clause..."

We also note from the record of appeal that in paragraph 21 of the plaint, the appellant disclosed and pleaded the initial process to resort to arbitration and existence of the arbitration clause in the following terms:

"21. That notwithstanding the presence of an arbitration clause in the Sale Agreement, the Defendant has not shown any willingness to go for arbitration. On the 30th November, 2009 the 1st plaintiff through the services of Brotherhood Attorneys proposed the appointment of an arbitrator to which the Defendant through the services of Chandoo refused to approve the said

appointment stating that there is no dispute between the parties. Once again the 1st plaintiff on the 25th February, 2010 through the services of Marando, Mnyele & Company Advocates issued a notice of arbitration in accordance with the Sale Agreement. However, the defendant has not responded to date.

A letter by the 1st Plaintiff's advocate dated 30th November, 2009, Defendant's advocate dated 22nd December, 2009 and subsequent reminder by the 1st plaintiff's advocates dated 25th February, 2010 showing that they are not ready for arbitration is annexed herewith and is marked MAA – P12 the plaintiffs craves for leave of the Court to refer to the same as part of this plaint."

The said statement was responded by the respondent (defendant) through paragraph 20 as follows:

"20. The contents of paragraph 21 are vehemently disputed and the defendant states that the arbitration clause in the sale agreement is a right to either party and as such, the right cannot be withheld by either party and the Defendant has not done so, in any case the 1st plaintiff has a right to move the appropriate machinery for appointment of an arbitrator."

It is further noted that in paragraph 20 of the reply to the Written Statement of Defence the appellants stated as follows:

> *"20. That the contents of paragraph 20 of the Written Statement of Defence are denied as the Defendant demonstrated unwillingness to arbitrate and the plaintiffs reiterate the content of paragraph 21 of the Plaint."*

From the foregoing, it cannot be disputed that the issue of existence of arbitration clause in exhibit P.4 and the effort made by the appellants to resort to arbitration as agreed were pleaded by the appellants and denied by the respondent as shown above. Indeed, as stated by the trial judge in her judgment, in his testimony during cross examination, PW2, the Chairman of the first appellant admitted to the existence of the arbitration clause and the efforts which were done on their part and alleged that it was the defendant who frustrated the process as reflected at page 339 of the record of appeal. This allegation was however strongly denied by the respondent through paragraph 20 of the written statement of defence.

The crucial matter for our determination thus, is whether the issue of the existence of dispute resolution mechanism contained in the arbitration clause and the importance of adhering to it, was raised *suo*

mottu by the trial judge in the course of composing her judgment without giving the parties the right to be heard.

We are alive to the appellant's argument that the issue of whether the parties were bound to go for arbitration before the lodging the case in court was not part of the issues which were framed by the trial court. Nevertheless, we ask ourselves whether, this fact would have prevented the trial judge to raise it amid the pleadings and the evidence of the parties on record. Notably, in the course of summarizing the evidence of the parties the trial judge made the following observation with regard to the issue of arbitration clause as reflected from pages 723 to 724 of the record of appeal:

> *"It is obvious that there was a dispute between the plaintiffs and the defendant hence the plaintiffs through the Brotherhood Attorney wrote a letter (Exhibit P.17) to the defendant in order to appoint an arbitrator in conformity with the arbitration clause. But the defendant made no response."*

Moreover, at page 725 the following is found:

> *"... DW2 alleged the plaintiffs were the ones who were demanding for arbitration but it was the plaintiffs who have not fulfilled their obligations as per the Agreement ... the fact that the plaintiffs do*

not longer receive bills from TANESCO and DAWASCO speaks volumes."

We are aware that courts of law must limit themselves to the issues raised by the parties in the pleadings and agreed upon as areas of contentions. However, in the present case, it is clear that the issue of the existence of an arbitration clause (paragraph 16 of exhibit P4) was brought in the record through the pleadings by both sides of the case. Indeed, as we have shown above, despite being part of the pleadings, evidence was led by both sides and thus the matter was left to the trial court for decision though it was not among the issues which were specifically framed by the trial court for determination.

In this regard, it cannot be firmly concluded, as claimed by the appellants that the trial judge determined the matter without affording parties the right to be heard. As amply demonstrated through the relevant paragraphs of the record of appeal reproduced above, since the issue concerning the arbitration clause was brought in the trial court's record through pleadings and evidence, we agree with Mr. Kibatala that parties were sufficiently given the right to be heard on the same, and thus the trial judge was entitled to decide on that issue. As such, our thorough scrutiny of the record of appeal bears that according to the conduct of the suit during the trial, the matter was left to the court for decision. It is in

this regard that in **James Funke Gwagilo v. The Attorney General** [2004] T.L.R. 116, the Court stated among others that:

> *"... in order for an issue to be decided it ought to be brought on record and appear from the conduct of the suit to have been left to the court for decision".*

In the circumstances, we are satisfied that though the language used by the trial judge in her judgment indicates that she noted the issue of existence of the arbitration clause while she was "flipping through the contents of the Sale Agreement (Exhibit P. 4)", might suggest that she raised the matter *suo mottu,* the reality is that the issue was born from the parties' pleadings and the evidence on record. It is in this regard that in her reasoning, the trial judge made reference to the evidence of PW2 during cross examination by the respondent's counsel who duly admitted the facts in the pleadings. Thus, while the question whether the parties had exhausted the remedies of resorting to arbitration was not framed as an issue, the existence of the arbitration clause in the Agreement and the desire to resort to arbitration was alleged by the appellants and denied by respondent. In the circumstances, based on the record of appeal, the trial judge was right to resolve it as it was left for the decision of the court after the parties adduced evidence on it as we have demonstrated above.

We are therefore satisfied that the decision of the trial judge did not occasion injustice to the parties in the case as they were duly given the right to be heard. It follows that the decisions of the Court on the issue of denial of the right to be heard relied upon by the appellants' counsel are not applicable in the circumstances of this case. Thus, the ground of appeal is dismissed.

In the result, we find the appeal lacking in merit. Consequently, we dismiss it in its entirety with costs.

DATED at **DAR ES SALAAM** this 9th day of August, 2023

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of August, 2023 in the presence of Mr. Shalom Msakyi, learned counsel for the appellants and Ms. Hadija Aron, learned counsel for the respondent is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL