IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 179 OF 2020

RELIANCE INSURANCE COMPANY (T) LTD ..... APPELLANT

VERSUS

CMA CGM SOCIETE ANOYME ..... 1ST RESPONDENT
CMA CGM (TANZANIA) LIMITED ..... 2ND RESPONDENT

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

(Songoro, J.)

dated the 5th day of October, 2016
in
Commercial Case No. 88 of 2016
.....

JUDGMENT OF THE COURT

22nd March & 27th April, 2023

KITUSI, J.A.:

In the course of considering a point of preliminary objection that had been raised by the respondents in Commercial Case No. 88 of 2016, the High Court, Commercial Division (Songoro, J.) struck out that suit on the ground that the court had no jurisdiction. The basis for so holding was that the suit was based on a Bill of Lading in which the parties

covenanted to submit any dispute to a forum known as *Tribunal de Commerce Marsaille,* in exclusion of any other court.

This appeal is against that ruling of the High Court and it raises two grounds. These are: -

1. *That the learned Judge of the High Court of Tanzania erred in law by holding that any dispute involving parties under the bill of lading annexture 1 to the plaint, including their agents, have to be adjudicated upon by the Tribunal of Paris which has exclusive jurisdiction, whereas the clause relied upon under the bill of lading allows the carrier to sue before a court of the place where defendant has a registered office thereby allowing an action to be brought in other jurisdiction other than the Paris Tribunal and for that matter defendants were properly sued in Tanzania.*

2. *That the learned Judge of the High Court of Tanzania erred in law by holding that the court has no jurisdiction to hear the plaintiff's suit whereas the respondents, then defendants, had taken a step and submitted themselves to the jurisdiction of the High Court of Tanzania by filling the written statement of defence and were no longer covered by the exclusion clause.*

Mr. Joseph Rutabingwa, learned advocate made written and oral submissions in support of the appeal, just as did Mr. Bernard Mbakileki, also learned advocate representing the respondents, in contesting the appeal. The appeal raises one main issue of law, that is, whether the High Court of Tanzania has jurisdiction to try a case based on a Bill of Lading in which the parties have stipulated their choice of forum to be in another jurisdiction and in which the defendants have filed a written statement of defence. We are of the view that the two grounds of appeal are two sides of the same coin.

To the extent that it is relevant, the brief background of the matter is that, a company known as R.V Exports Ltd, entered into a contract with the first respondent, owner of a vessel known as MV Bonny, for it to ship to China 3,800 bags of sesame seeds from Dar es Salaam, Tanzania. The appellant was the insurer of the consignment vide Policy No. RIC/061/1/008863/2015 taken under Bill of Lading No. TZ10256920. However, the consignment was short landed by 760 bags, worth USD 45,847.00. After hiring a surveyor whom she paid USD 1,875.00 to verify the loss, the appellant paid the certified amount of USD 45,847.00 to the shipper R. V. Export Ltd. Thereafter, the appellant sued the respondents for recovery of the moneys, under subrogation

rights. That is the suit which was struck out by the High Court for, as stated earlier, want of jurisdiction. Hence this appeal.

Back to the appeal, we have decided to begin with the second ground of appeal. In relation to this ground of appeal, Mr. Rutabingwa submitted that by filing the Written Statement of Defence (WSD), the respondents took a step and submitted themselves to the jurisdiction of the High Court of Tanzania, so they cannot be heard relying on the exclusion clause. On the other hand, Mr. Mbakileki responded by submitting that the argument raised by Mr. Rutabingwa that the filing of WSD by the respondents waived their right to rely on the choice of forum clause, is only relevant in contracts in which the parties agree to refer disputes to an arbitrator. In support of this argument, the learned counsel cited section 6 of the repealed Arbitration Act, Cap 15 R.E 2002, hereafter Cap 15.

We agree with Mr. Mbakileki that the choice of forum clause in the Bill of Lading the subject of these proceedings, is not the same thing as an indication by the parties in their contract that they will refer disputes to an arbitrator. In the latter case, if the defendant does not file a WSD, proceedings may be stayed pending reference to the arbitrator, with prospects of proceedings being resumed before the same court later. If

he files a WSD that amounts to submitting himself to the jurisdiction of the court. That may not be the same fate that awaits a matter in which the parties have made a choice of forum subject of our deliberations in the first ground of appeal. The two scenarios are governed by two different statutes. Thus, the second ground of appeal is dismissed for being misconceived.

Arguing in support of the first ground of appeal, Mr. Rutabingwa first drew our attention to the United Nations Convention on Carriage of Goods by Sea, 1978 (The Hamburg Rules) and pointed out that it was ratified by Tanzania on 26/8/2002 and came into force on 24/2/2004. He argued that by virtue of Article 2 (1) (a) of the Convention, the Hamburg Rules apply to all contracts of carriage by sea between parties of different states if the port of loading is in one of the contracting states.

The learned counsel also drew our attention to our own Carriage of Goods by Sea Act, Cap. 164 R.E. 2002, (the Act) and that it domesticated the Hamburg Rules. Then he proceeded to cite Article 21 (1) (b) (c) of the Hamburg Rules to argue that the High Court of Tanzania has jurisdiction because, he submitted, the said Article provides for actions in either of the three places namely, (1) where the

defendant has the principal place of business, or habitual residence or; (2) where the contract was made, provided the defendant maintains a place of business or branch or agency or; (3) the port of loading or port of discharge. He maintained that two of the three conditions were met in this case because, he submitted, Tanzania is the port of loading and also that the agent of the carrier, the second respondent, has her place of business in Tanzania.

Mr. Rutabingwa considers it absurd that a merchant based in Dar es Salaam, Tanzania, should travel all the way to France to sue a carrier whose agent has an office in Tanzania, over a contract concluded in Tanzania which is also the port of loading. He also challenges the double standard that gives the carrier a leeway to institute a suit in any court even if it is not the chosen forum. He invites us to allow the appeal on the ground that the Bill of Lading relied upon by the respondents is inconsistent with both the Hamburg Rules and the Act. He prayed that we should quash the ruling of the High Court and direct the suit to proceed for hearing.

After referring to the historical background of the law on carriage of goods by sea, Mr. Mbakileki for the respondents submitted in response that section 7 (1) of the Civil Procedure Code (CPC) confers

the High Court with jurisdiction to try all suits except those expressly or impliedly barred. The learned counsel's argument is that the Bill of Lading excludes the jurisdiction of courts other than the *Tribunal de Commerce Marselle* so the High Court cannot be faulted for giving effect to the choice of forum by the parties. He maintained that despite the preferential treatment given to the carriers by the Bill of Lading by giving them the right to institute an action at a place other than the chosen forum, that right is not available to the shipper as the Bill of Lading is clear on that and doing otherwise may amount to violation of the "choice of forum" clause.

The learned counsel has criticized the appellant's counsel for not reproducing the whole of Article 21 (1) (a) (b) (c) and (d) of the Hamburg Rules as by omitting paragraph (d) of that Article, the learned counsel tactically supressed the true import of that provision in order for the appellant's case to carry the day. He submitted that when the whole Article is reproduced, it becomes evident that paragraph (d) of that Article covers the parties' choice of forum, as demonstrated by the Bill of Lading.

Regarding the Hamburg Rules, Mr. Mbakileki disagreed with the appellant's counsel on two grounds. The first is that Article 21 (1) (a- c)

of the Hamburg Rules has wrongly been relied upon as if the sub articles have a cumulative effect, while in fact, they are in alternatives. Secondly, according to Mr. Mbakileki, despite ratification of the Hamburg Rules, they are not applicable in Tanzania until such time as they are domesticated. Conversely, the learned counsel pointed out that the Act, which according to Mr. Rutabingwa has similarities with the Hamburg Rules, is in fact a result of domestication of a different convention altogether, so it has nothing to do with the Hamburg Rules, he argued.

He submitted further that the High Court correctly struck out the suit because it had no jurisdiction, it being barred by section 7 (1) of the CPC owing to the choice of forum clause in the Bill of Lading. He cited the case of **Sunshine Furniture Co. Ltd v. Maersk (China) Shipping Co. Ltd and Another**, Civil Appeal No. 98 of 2016 (unreported) in which the Court upheld an objection similar to the one that was raised by the respondents before the High Court in Commercial Case No. 88 of 2016, from which this appeal originates.

Addressing another point, the learned counsel argued that the points being raised by Mr. Rutabingwa are all new because they were not first determined by the High Court, therefore do not qualify to be looked into by us. In support of that settled principle, the learned

the Court of Appeal Rules, 2009 (the Rules), intimated that he was intending to ask the Court to depart from its earlier decision, which he did not.

In our determination of this matter, it is fundamentally significant that we agree at the outset whether or not the Hamburg Rules are applicable in Tanzania or not. Mr. Mbakileki does not, as alluded to, dispute the fact that the Hamburg Rules have been ratified by Tanzania but has maintained that *"... Tanzania, notwithstanding being a signatory of the Hamburg Rules, 1978, has yet to introduce its obligations by enactment into her domestic legal framework as happened with the* ***International Convention for the Unification of Certain Rules Relating to Bills of Lading (the Brussels Convention), 1924"*** *on the basis of which the then colonial government in Tanganyika enacted into domestic law* ***what still stands today on the Statute Book as Tanzania's Carriage of Goods by Sea Act, Chapter 164 R.E 2002, the application of which does not at all cover the application of the Hamburg Rules, 1978*** *as erroneously asserted by the Appellant".* [emphasis supplied].

With respect, we are tempted to agree with Mr. Mbakileki because the above submissions rhyme with what L. X. Mbunda writes in an

counsel referred us to the same case of **Sunshine Furniture Co. Ltd** (supra).

We shall deal with this latter point instantly before we address the rest of the arguments by the parties. At the outset, we agree with Mr. Mbakileki that this Court only deals with matters that were first brought up before, and considered by the High Court. We recently reaffirmed that position in the case of **Martha Emmanuel Shayo v. Jesca Gordon Karlo & Another**, Civil Application No. 171A/01 of 2021 (unreported). However, we must add, that that principle does not apply to points of law. As indicated at the beginning of this judgment, this appeal raises one point of law which deserves to be considered by the Court. We therefore do not accept Mr. Mbakileki's argument on this point, so we shall proceed with considering the merit of the first ground of appeal.

In a short rejoinder, Mr. Rutabingwa invited us to depart from the position we took in **Sunshine Furniture Co. Ltd** (supra) repeating his view that, the international law on carriage of goods by sea is discriminatory against shippers and absurd. He challenged us to seize this opportunity to right this wrong. Mr. Mbakileki's response to this point was that, the appellant ought to have, in terms of rule 106 (4) of

article titled; **TANZANIA AND INTERNATIONAL CONVENTIONS ON CARRIAGE OF GOODS BY SEA: A HISTORICAL STUDY,** published in the *Journal of Indian Law Institute, October – December 1988* at pages 473: -

> *"It is well known that international conventions/covenants are not binding per se within a sovereign state. International legal obligations only become enforceable by domestic courts if a competent legislature implements them within its institutional jurisdiction. In essence what is enforced by the domestic court is not the international legal obligation per se but the domestic Act of Parliament implementing the obligation".*

We agree with the learned author's illustration that the colonial government enacted the Carriage of Goods by Sea Ordinance 1927, in line with the Hague Rules, 1924 and that this Ordinance was later adopted by the independent government in 1961 before it was subsequently re - enacted as Chapter 164, the Act. We go along with the learned author as well as Mr. Mbakileki on that because even the preamble to the Act supports that argument as it reads: - *"An Act to re-enact the law with respect to the carriage of goods by sea. Ord. No. 6 of*

1927 [1st April 1927]". See also a book titled, **Admiralty and Maritime Law in Tanzania**, Law Africa 2017 by Capt. Ibrahim Mbiu Bendera, at Pg 218-219.

Accordingly, in our view, it is safe to agree with Mr. Mbakileki and hold that the Act stems from the Hague Rules, 1924 subsequently Ordinance No. 6 of 1927, not from the Hamburg Rules as contended by Mr. Rutabingwa. This means that the appellant's argument that the Bill of Lading in this case offends the Act as well as the Hamburg Rules, is not supported by the available literature nor the Act itself. We must dismiss this argument and hold that the Hamburg Rules, though ratified, are not directly applicable in Tanzania because they have not been domesticated.

The respondents' counsel has another arrow to his bow. He has submitted that assuming that the Hamburg Rules were applicable as argued by the appellant's counsel, and if the whole of Article 21, including paragraph (d), of the Hamburg Rules is reproduced, it shows that the contracting parties may choose a forum. Article 21 (1) (a) – (d) provides: -

> *"1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his*

opinion, may institute an action in a court which according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) ***any additional place designated for that purpose in the contract of carriage by sea."*** [emphasis supplied].

In our settled view, what is provided under Article 21 (d) of the Hamburg Rules, empowers the parties to provide their choice of forum in the contract. As submitted by Mr. Mbakileki, even if the Hamburg Rules were applicable, which is not the case, upon our consideration of paragraph (d) of Article 21, which the appellant's counsel chose not to refer to in his submissions, it is clear that the parties can choose a forum

for litigation of their disputes and in this case, they manifested their choice of forum through the Bill of Lading. The appellant cannot be upheld on this argument.

Mr. Rutabingwa has also criticized the choice of forum clause reflected in the Bill of Lading as being absurd biased against the shipper and inconvenient to the parties as earlier shown. He has, as alluded to above, invited us to depart from our decision in **Sunshine Furniture Co. Ltd** (supra) cited by Mr. Mbakileki in arguing that the parties must be held on to their choice of forum.

We begin with the counsel's invitation for us to depart. We need to point out that under rule 106 (4) of the Rules, a party intending to move the Court to depart from its earlier decision must raise that fact and make it as one of the grounds of appeal. Even if that had been complied with, it is our considered view that a party suggesting a departure from our earlier decision, such as Mr. Rutabingwa has done in this case, is naturally, expected to demonstrate the need and justification for us taking a different direction in his favour. Therefore, we agree with Mr. Mbakileki Rule 106 (4) of the Rules has not been complied with but proceed to observe that counsel for the appellant has not placed before us sufficient material to persuade us go along with him. As a result, we

had to go out of our way to seek inspiration from decisions and literature from other jurisdictions, aware that the issue involved in this case, touches on aspects of international law.

We note that in deciding the case of **Sunshine Furniture Co. Ltd** (supra) the Court cited with approval the decision of the Court of Appeal of Kenya in **Carl Rouning v. Societe Navale Chargeurs Delmas Vieljeux**, Civil Appeal No. 16 of 1982 (unreported), which held that the Kenya Carriage of Goods Act does not override the jurisdiction clause in a Bill of Lading. This position was later followed by the same court in **Raytheon Aircraft Credit Corporation, Nac Airways Limited v. Air Alfaraj Limited,** Court of Appeal of Kenya, Civil Application No. 326 of 1998[1998] eKLR citing an earlier case of **United India Insurance Co and Kenindia Insurance Co. v. East African Underwriters (Kenya)** [1982 – 88] IKAR 639, which had held that parties should be held to their agreement unless the plaintiff makes a very strong reason to convince the court otherwise.

Although in England courts appear to exercise discretion whether to disregard choice of forum clauses and proceed with hearing or stay proceedings so as to give effect to the choice of forum clauses, the pendulum still swings in favour of holding the parties on to their

agreement. This is clear from the case of **Jewel Owner Ltd & Another v. Sagaan Developments Trading Ltd** [2012] EWHC 2850 (Comm). The following paragraph demonstrates the position: -

> *" The principles to be applied in order to decide on the one hand whether an exclusive jurisdiction clause should be enforced by an injunction and on the other hand whether the commencement or continuation of foreign proceedings which are not caught by an exclusive jurisdiction clause should be barred by an injunction seem now well settled and have not been the subject of any real disagreement before your Lordships.* ***It is accepted that a contractual exclusive jurisdiction clause ought to be enforced as between the parties to the contract unless there are strong reasons not to do so.*** *Prima facie, parties should be held to their contractual bargain". [Emphasis supplied].*

In the case of **Sunshine Furniture Co. Ltd** (supra), as well as in the course of this appeal before us, counsel for the appellant argued in favour of ignoring the choice of forum clause on the ground that the Bill of Lading was prepared by the ship owners without involving the shippers and that it was inconvenient and discriminatory. Since in the former case these same arguments were raised but rejected, we ask if,

in the circumstances, we have any strong reasons for departing from that decision. With respect, none have been advanced by the appellant's counsel.

In an article titled **CHOICE OF FORUM AND CHOICE OF LAW CLAUSES IN INTERNATIONAL COMMERCIAL AGREEMENTS**, by George A. Zaphiriou, published in the *Maryland Journal of International Law*, Volume 3 article 3, 1978, the author writes that he is not aware of any decision by English courts declining to honour the parties' choice on the ground of inconvenience. He however notes that in Scotland and the United States courts are known to have ruled in favour of a more convenient forum. Obviously, the plaintiff has an uphill task of convincing the court that circumstances warrant a departure from the rule, as demonstrated by the passage below: -

> *"The courts in the United Kingdom will generally refrain from exercising jurisdiction in derogation of a choice of forum clause submitting disputes to the exclusive jurisdiction of a foreign court.* ***They will hold the parties to their bargain, unless it can be proved that trial by the foreign court would, under the circumstances, be inequitable or unjust."*** [emphasis supplied].

From the cases and texts referred to, it is clear that the general rule is in favour of holding the parties to their agreement as regards choice of forum. For an exception to that rule to succeed, the court has to be convinced by strong reasons that there are circumstances that justify such a course. We agree with Prof. Mbunda that the apparent lack of equity is historical. According to the learned author, before the coming into being of the Hague Rules, ship owners were running into a lot of risks such that it discouraged them from investing into that business, which in turn, created shortage of ships. Thus, most of the conventions aimed at establishing a conducive atmosphere for the business of the ship owners, while ensuring that they observed what is referred to as "minimum obligations".

Our own Act could be a reflection of that historical phenomenon because, under the 3rd Schedule, seven out of the nine rules under it, stipulate rights and minimum obligations on the part of the carriers to be embodied in Bills of Lading. Rule 8 imposes express limitations to carriers by providing: -

> *"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection*

with, goods arising from negligence, fault or failure in the duties and obligations provided in this Article or, lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect."

The above is almost similar to rule 6 of Article 111 of the Hague Rules, referred to by Prof. Mbunda in his article. In our view, had the legislature intended to have a similar provision in relation to the choice of forum clauses in bills of lading, it would have enacted a rule to regulate the parties' autonomy in exercising their contractual right in that respect. Since there is no statutory guidance, there is no basis for us holding the choice of forum clause in this case inconvenient, discriminatory or biased, because it is within the law and a manifestation of the choice of the parties. Nor has the appellant made a strong case for us concluding, for instance, that she will not receive a fair trial in France.

Having reflected on the cases and literature above, we turn to the first ground of appeal and conclude it. The thrust of the first ground of appeal is that since the choice of forum clause in the Bill of Lading gives the carrier a choice to sue at a place where the defendant has a registered office, even if it is not at the *Tribunal de Commerce Marseille*,

the High Court should have extended the same right of choice to the appellant and should have clothed itself with jurisdiction. On this, we have sufficiently demonstrated that although the clause appears to be discriminatory, courts have maintained that the parties' choice should be enforced. On this we reiterate the position by reproducing the following paragraph from **Carl Rouning v. Societe Navale Chargeurs Delmas Vieljeux** (supra) also reproduced by the Court in **Sunshine Furniture Co. Ltd** (supra):-

> *"The material choice of forum clause in the bill of lading was willingly accepted by the parties who were aware that the French Legal System might be less advantageous than that of Kenya. In the circumstance, the parties should be held to their mutual undertaking".*

The above view augurs well with the time-tested principle of sanctity of contract. In this case no strong reasons have been shown to convince us to hold otherwise even if it is clear from the Bill of Lading that the appellant does not enjoy the same latitude of choice as the carrier. We cannot interpret the Bill of Lading but for what it says, nor can we make an uninformed revolutionary decision to change the rule. Besides, it is a known principle of statutory interpretation that express

mention of one thing in a statute, excludes the other. See **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd & Others,** Civil Appeal No. 51 of 2016 (unreported). By extension, we apply that principle to the Bill of Lading subject of our decision.

Therefore, we agree with the learned High Court judge but only to the extent shown, that when there is a choice of forum clause in a bill of lading, the court has to enforce that choice made by the parties. That however, does not mean the court's jurisdiction has been ousted by the parties, the same position we took in the unreported case of **Scova Engineering S.p.A and Another v. Mtibwa Sugar Estate Limited and 3 Others**, Civil Appeal No. 133 of 2017. With respect, since the High Court had the requisite jurisdiction, it could not strike out the suit because, save for the choice of forum clause, it had been filed before a competent court, rather it should have stayed it. As we did in the case just cited above, we vacate the High Court order striking out the suit and substitute it with an order staying Commercial Case No. 88 of 2016 pending filing of that suit in the forum chosen by the parties.

In view of our findings in the two grounds of appeal, we dismiss the appeal except for the order vacating the striking out of the suit and

replacing it with the order of stay. Considering the obtaining circumstances and the position we have taken in this appeal, we order parties to bear their own costs.

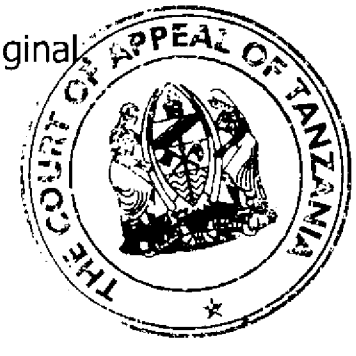
DATED at **DAR ES SALAAM** this 20th day of April, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 27th day of April, 2023 in the presence of Mr. Evodius Rutabingwa, learned counsel for the appellant and Mr. Bernard Mbakileki together with Mr. Victor Mtalula, learned counsels for the respondents, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL