

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 290 OF 2018

BETWEEN

NATIONAL HOUSING CORPORATION.....APPLICANT

VERSUS

HERKIN BUILDERS LIMITED.....1ST RESPONDENT

SUDHIR J. CHAVDA.....2ND RESPONDENT

NATIONAL CONSTRUCTION COUNCIL.....3RD RESPONDENT

7/6/2018 & 19/6/2018

R U L I N G

I.P. KITUSI, J.:

The applicant National Housing Corporation and the first respondent Herkin Builders Limited are parties to a construction contract involving the applicant's Plot No. 44/2 Block B Mwongozo area at Kigamboni Municipality, in Dar es Salaam Region. The contract provides that in case of a dispute arising between the parties the same should be referred to an Adjudicator for determination.

A dispute, it seems, arose and it was referred to an adjudicator who turns out to be the second respondent Sudhir J. Chavda. While proceedings are pending before the said second respondent, the

applicant has sought to invoke the jurisdiction of this court to issue injunctive orders to restrain the adjudicator from proceeding with the adjudication on the ground that the National Construction Council the third respondent which purported to appoint the adjudicator has no such powers under the contract.

The first respondent represented by Mr. Rostam Mbwambo learned advocate has raised two points of preliminary objection, hereafter the (PO) for determination and they are the essence of this ruling. The two points are;

- (i) This honourable Court has no jurisdiction to issue the order sought
- (ii) This honourable court has not been properly moved.

The applicant is represented by Mr. Aloyce Sekule and Mr. John Ignas Laswai learned advocates, while the third respondent is being represented by Mr. Elias Kisamo learned advocate. The second respondent, the adjudicator, appeared and stood in person.

Mr. Mbwambo addressed the two points simultaneously and I think rightly so because I do not see how the same could be separated. They both raise the question whether this court has the jurisdiction to entertain this matter under the provisions cited and/or under the contract. So it is a double edged objection on the basis of which the first respondent invites the court to strike out or dismiss the application.

On the one side it contended that the provisions under which the application has been made are inapplicable and do not move the court. What then are the provisions under which the application has been made? The application is by way of Chamber Summons drawn under Section 2 (3) of the Judicature and Application of Laws Act [Cap. 458 R.E.2002], Section 68 (2), Order XXXVII Rule 2 (1) and Section 95 of the Civil Procedure Code Act, Cap. 33 [R.E. 2002], hereafter the Civil Procedure Code.

In his address in support of the objection Mr. Mbwambo submitted on behalf of the 1st respondent that Sections 68 9e) and 95 of the Civil Procedure Code are supplementary provisions which do not confer any jurisdiction to the court. For this he cited two decisions of this court; **VIP Engineering & Marketing Ltd Vs Independent Power (T) Ltd**, Consolidated Misc. Civil Causes No. 49 and 254 of 2002 DSM Registry (unreported) and; **Kibo Executive Lodge Ltd and Another Vs CRDB Bank Ltd and others**, Commercial Case No. 16 of 2013, High Court Commercial Division (unreported). In the latter case, it is submitted, the Court Cited the case of **TANESCO VS IPTL and 2 Others** [2000] TLR 324 in which the court considering Section 2(2) of the Judicature and Application of Laws Act now Section 2(3) of the same Act concluded that the said provision may not be applied unless there is no provision in the Civil Procedure Code that covers the situation. Section 2(3) of the JALA confers this court with the jurisdiction to apply principles of Common law, doctrine of equity and statutes of general application that were in force on

22nd July 1920. Therefore Mr. Mbwambo's argument is that the condition precedent for applying Sections 68 9e) and 95 of the Civil Procedure Code on the one hand, and S. 2(3) of the JALA on the other have not been fulfilled, it being a prerequisite for one to establish that there is no specific law that covers that particular scenario. That is as far as the statutory bar to jurisdiction is concerned.

On the contractual bar it is specifically provided in the contract that the parties may refer any dispute to an adjudicator whose decision may be challenged through an arbitrator. Mr. Mbwambo submitted that clauses 26, 27 and 28 of the General conditions of contract (GCC) and Clauses 20, 21 and 22 of the Special conditions of contract (SCC) provide for that dispute settlement mechanism. It has been submitted that the issue of the adjudicator's jurisdiction which appears to be the crux of the matter was raised before the said adjudicator and it was concluded by him that he has the jurisdiction. Annextures 6,7,8 and 9 are cited in support of this argument and submitted further that if the applicants were aggrieved they should have challenged the adjudicator by referring the matter to an arbitrator.

In response Mr. Sekule, learned advocate submitted that the cases cited by the first respondent's counsel are irrelevant to the case at hand because in the **Kibo case** for instance the applicant was guilty of not citing the specific rule of Order XXXVII of the CPC unlike in this case where Section 68(e) of CPC has been cited. According to the learned advocate

the court may make any orders under section 68 (e) of the Civil Procedure Code, so the learned counsel submitted, Order XXXVII Rule 2(1) and Section 68 (e) of the Civil Procedure Code give the court the powers to issue an injunction.

On the powers of the adjudicator under the contract Mr. Sekule submitted that he was supposed to be jointly appointed by the parties unlike in this case where the 3rd respondent unilaterally appointed him. He disputed the allegation that the applicants raised the issue of the adjudicator's jurisdiction and that it was overruled. He admitted though that they wrote to the adjudicator to take issue with his jurisdiction. The learned counsel submitted that the applicant could not appear or challenge the adjudicator's decision on the question of jurisdiction because there is no such decision or order.

Back to the enabling provisions Mr. Sekule submitted that the fact that there is no pending case in this court is the reason for the invoking of S. 2 (3) of the JALA and Section 95 of the CPC which gives the court inherent powers.

On his part Mr. Laswai added to Mr. Sekule's submissions by arguing that the applicants did not take part in the proceedings before the adjudicator because they were illegal. The learned counsel submitted that this application seeks for the court to order the 3rd respondent to observe the procedure for appointing an adjudicator.

In rejoinder Mr. Mbwambo submitted that the issue of the adjudicator's jurisdiction was decided on and the applicants are wrong in saying there was no order for them to appeal against. The learned counsel submitted that the adjudicator's decision need not be like that of the court, so the adjudicator's communications Annextures NHC 9 stating that he has jurisdiction amount to a decision, and that the same is in line with Rule 6 (1) of the Adjudication Proceedings Rules of the National Construction Council.

He finally submitted that the applicants have not exhausted the remedies available so they cannot come to court for equitable remedies, and after all, they do not have clean hands.

In dealing with the issue of jurisdiction I have deemed it convenient to start with the second limb which suggests that the court's jurisdiction is barred by the contractual terms stipulating a special mode of dispute settlement. This means that the second limb alleging that the court has not been properly moved only becomes relevant if and when it is resolved in the first place that the applicants had the right to move it.

There is no doubt in this case, that the contracts both general and special provide for a dispute settlement mechanism under clauses 20 of the SCC and 26.1. Of the GCC, by resort to an adjudicator. The applicant's contention is that the adjudicator was illegally appointed thus only this

court has the jurisdiction to intervene raising another point that the applicants cannot challenge the adjudicator's decision regarding his jurisdiction because he did not make one. The contract provides that a party may challenge any decision of the adjudicator by referring it to an arbitrator.

The law is clear on matters that are governed by jurisdictional clauses agreed by the parties and I wish to associate myself with the approach that was taken by my brother Twaib, J in **Afri-Taki Enterprises Co. Ltd V Pacific International Lines (T) Ltd**, Civil Case No. 95 of 2010 High Court, Dar es Salaam District Registry (unreported). Referring to the Kenyan Case of **Friendship Container Manufactures V. Mitchell Cotts (K) Ltd** [2001] 2 EA 338 the learned Judge held that;

"... parties are required to be held to their agreement as regards a jurisdiction clause and the party wishing to depart from this clause must discharge a heavy burden showing strong cause."

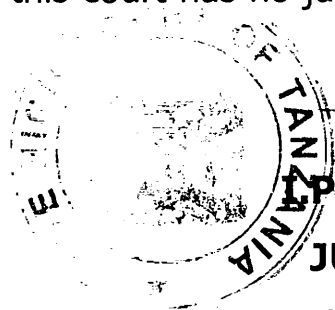
I take the view that the above position emphasises on the principle of sanctity of contract which is applicable in Tanzania. See the case of **Abually Alibhai Azizi V. Bhatia Brothers Ltd** [2000] TLR. 288.

Back to the facts of this case, has the applicants demonstrated any good cause for not challenging the decision of the adjudicator as regards

his jurisdiction? Mr. Sekule's submission that the adjudicator did not make any decision that could be formally challenged has been countered by Mr. Mbwambo submitting that Annexure NHC 7 and NHC 9 amount to decisions. I am afraid I cannot accept Mr. Sekule's proposition because the Communications made by the adjudicator (2nd respondent) vide Annexures NHC 7 and NHC 9 cannot be anything other than decisions. A portion of Annexure NHC 7 9 read;

"Indeed, at this juncture, barring fraud, the Adjudicator (in this Referral myself) is the only person having jurisdiction on the above mater-not the parties, not the Project Manager, not the Arbitrator and not the law court".

With respect I agree with Mr. Mbwambo that the Adjudicator made a decision and it does not become less so for the reason that it aggrieves one of the parties. Consequently and for, the reasons shown it is my conclusion that this court has no jurisdiction over this matter and I strike it out with costs.


J.P. Kitusi
JUDGE
19/6/2018

19/6/2018

Coram	:	Hon. I.P. Kitusi, J	
For the Applicant	:	Mr. Kennedy Sangawe Legal Officer	
For the Respondent	:	1 st	} Absent
For the Respondent	:	2 nd	
For the Respondent	:	3 rd	
CC. Massasi			

Court: Ruling delivered in the absence of the respondents but in the presence of Mr. Kennedy Sangawe the applicant's Legal Officer.

I.P. Kitusi

JUDGE

19/6/2018