

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 93 OF 2017

**IN THE MATTER OF SECTION 6 OF ARBITRATION ACT [CAP.15
R.E.2002]**

**IN THE MATTER OF A PETITION TO STAY PROCEEDINGS
PENDING ARBITRATION**

BETWEEN

AGGREKO INTERNATIONAL PROJECTS LIMITED.....PETITIONER

VERSUS

M/S ELECTRICAL ENGINEERING LIMITED.....RESPONDENT

RULING

19 April & 22 May, 2018

DYANSOBERA, J.:

This is a petition for stay of proceedings filed by the petitioner, the Aggreko International Projects Limited on 12th September, 2017. It has been filed under section 6 of the Arbitration Act [Cap.15 R.E.2002] and is supported by an affidavit of Munir Ladak, the Principal Officer of the petitioner. Essentially, the petitioner seeks the following orders:

- i. That the Honourable court be pleased to make an order staying the proceedings in Civil Case No. 55 of 2015 in the High Court of Tanzania, Dar es Salaam District Registry pending reference of the dispute to the arbitration by the parties.
- ii. That the respondent be condemned to pay costs of the proceedings in this application
- iii. Such other order(s) be made as the court shall deem fit and just.

The petition has been resisted by the respondent M/s Electrical Engineering Limited who has filed a reply to the petition.

At the hearing of the petition, Mr. Brian Mambosho, learned counsel stood for the petitioner while the respondent was represented by Mr. Paul Kalomo, learned advocate.

Supporting the petition, Counsel for the petitioner at first made reference to section 2 of the Arbitration Act which defines what submission means. He said that section 6 of the said Act under which this petition has been filed gives power to court to stay proceedings. He asserted that they have submitted an agreement between the petitioner and respondent on which under clause 18 of the agreement the parties agreed to the matter to be referred to arbitration whenever a dispute arises between them. He told the court that the

requirements outlined under section 6 are three. First that the subject matter of the suit must be within the arbitration matter of the clause. Second, that the party applying for stay must have not taken any step in the proceedings by filing a written statement of defence and third, that the party applying for stay has to show that he is ready and willing to refer the matter to arbitration at the time when the suit has been filed. Counsel for the petition pointed out that these principles have been satisfied by the petitioner. He explained that the subject matter of the suit is within the arbitration matter, No written statement of defence has been filed and the petitioner is ready and willing to refer the matter to the arbitration. In support of this argument, counsel referred this court to the following case laws.

1. East Africa Breweries Ltd v. GMM Co. Ltd, Civil Case no. 67 of 1999 reported in [1999] TLR 12 (HC).
2. The Board of Trustees of the Cashewnut Industries Development Fund v. Hammer Incorporation Co. Ltd, Misc. Commercial Application No. 165 of 2013
3. The Hon. Attorney General, the Chief of Defence Forces, Commercial Case No. 120 of 2014 (HC).

He contended that the suit has disputed the meaning of the agreement and the breaching *pacta sunt servanda* principle. It was his view that the agreement being a mutual understanding both parties

had agreed that whenever there is a difference or any such a dispute which will arise out of the contract such dispute should be settled by way of arbitration. That the same cardinal principal is found under section 37 of the Law of Contract Act. He further contended that the only way to enforce the provisions of the contract cannot be remedied by damages as when the party breaches its obligation the other party can seek in court for damages. He said that the remedy in this case is by enforcing what was agreed upon. Counsel for the petitioner relied on the case of **Bulyankulu Goldmine Ltd v. Durban Hotels Ltd**, Misc. Commercial Case No. 122 of 2016 at p. 6 . He told this court that the enforcement has been given by this court under section 6 of the Act. It is prayed for the petitioner that this court be pleased to stay the proceedings and refer the matter to arbitration.

Replying to the submission, counsel for respondent admitting that there is an arbitration clause in the signed agreement between the parties and that matters pertaining to arbitration are covered under section 6 of the Act, he, however, pointed out that the matter started long ago in 2015 and the provisions of section 6 should not be misconceived as they do not oust the jurisdiction of the local courts to hear and determine the matters. He said that section 6 of the Act should be read together with section 18 of the Civil Procedure Code. Counsel for the respondent pointed out that the petitioner has a registered business in Tanzania, and therefore, the essence of taking

the matter to arbitration as envisaged under section 6 of the Act and the clause signed by the parties cannot be taken for granted as there must be sufficient ground to refer the matter for arbitration in the United Kingdom. He referred this court to the case of Guest and Cherries Ltd, a Court of Appeal decision reported in [1998] TLR which dismissed the decision of the High Court holding that the same can be entertained by local court emphasising that the court must be satisfied that the opting party for arbitration was ready and willing to do all the necessary things to arbitrate. Counsel for the respondent pointed out that the dispute began a number of years ago before filing this case and lawyers for the respondent issued demand notice dated 20th day of January, 2015 and received by the petitioner on 21st Jan. 2015 and the respondent responded on 10th February, 2015 but the question of arbitration was left out. Counsel for the respondent pointed further submitted that the issue of jurisdiction is one of law and not a wish of the parties and that this position was emphasised by the court in the case of **East African Breweries and Co. Ltd** in which the issue of parties to the contract ousting the jurisdiction of the court was discussed. Counsel for the respondent is of the view that the petitioner is employing the delaying tactics wasting time of the court and trying to strangle the rights of the respondent.

In a rejoinder, counsel for the petitioner said that section 18 of the CPC is a general law dealing with civil proceedings instituted in

local courts while Arbitration Act deals with arbitration which has given powers of the court to deal with matters of arbitration. He said that whether the petitioner has a registered office in Tanzania, it has nothing to do with what the parties agreed upon in the contract. As to the cited case of the Court of Appeal, counsel argued that in that case the defendant admitted the claim which means that there was nothing to refer to arbitration. He further contended that though the High Court has jurisdiction the issue is what forum did the parties chose.

I have with circumspection, considered the petition and the submissions proffered by learned advocates.

Section 6 of the Arbitration Act (Cap 15) under which the petition is filed provides:

6. Where a party to a submission to which this Part applies) or a person claiming under him commences a legal proceeding against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may at any time after appearance and before filing a written statement of defence or taking any other steps in the proceeding apply to the court to stay the proceedings and the court if satisfied there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced,

and still remains, ready and willing, to do all things necessary for the proper conduct of the arbitration may make an order staying the proceedings. "

From these provisions and decided cases, the position seems to be that parties who wish to invoke the provisions of the Arbitration Act [Cap. 15 [R.E.2002], section 6 in particular must establish the following, to the satisfaction of the court.

- i. There must be a submission as defined under section 2 of the said Act- that is a written agreement between the parties to submit present and future disputes and/or differences to arbitration
- ii. That the questions in dispute are covered by the agreement and that such questions should therefore be referred to the arbitration
- iii. That the petitioner is one covered by the reference to the arbitration clause in the agreement and so is the respondent.
- iv. That the petitioner has not taken steps that are in contravention of the procedural requirements as outlined under section 6 of Cap. 15 that are no further steps have been taken after entering appearance. Such steps include the filing of a written statement of defence, or the taking of other steps in the proceedings.
- v. That the petitioner is willing and ready to arbitrate
- vi. That there are no sufficient reasons before the court to make it refuse granting the stay.

Counsel for the petitioner has submitted to the effect that these conditions have been complied with. Counsel for the respondent though does not dispute this fact and contends that the matters pertaining to arbitration are covered under section 6 of the Act he, however, explained that section 6 should not be misconceived as it does not oust the jurisdiction of the local courts to hear and determine such matters asserting that the said provision should be read together with section 18 of the Civil Procedure Code and that the reference to arbitration in such circumstances should not be taken for granted but the court must be satisfied that the petitioner is ready and willing to do all necessary to arbitrate. He submitted that the conduct of the petitioner does not show the said readiness and willingness on part of the petitioner to arbitrate. He reasoned that after the service of notice and response from the petitioner, the question of arbitration was left out. Besides, counsel for the respondent pointed out that although parties to the arbitration were free to choose the law that would apply in the event of the dispute and refer the dispute to arbitration, they were not competent in law to agree to oust the jurisdiction of the Tanzanian courts. Counsel for the respondent relied on the case of East African Breweries v. GMM Co. Ltd.

It is trite that where parties to a contract accept to be bound by the reference to arbitration clause, then courts would normally give effect to that undertaking unless there are prevailing circumstances which makes the court refuse to stay the proceedings. The stay of proceedings in order to refer the matter to

arbitration is in the discretion of the court and the court is not bound by the contents of the submission. It has to take into account as well the six points indicated above.

According to the petition, it is clear that the parties, in their agreement under paragraph 18, undertook to refer any dispute to arbitration in London.

The burden lies on the opposing party to establish that the effects of the arbitration clause should be departed from. This principle was well elucidated in various cases including the following:

- 1. Ramada Investment Ltd v. Engen (T) Ltd; Commercial case No. 221` of 2001**
- 2. Engineers and Builders v. Sugar Development Corporation [19983] TLR 13**
- 3. Norsad Fund v. Tanzania Investment Bank HC, Civil Case No. 3 of 1997**

According to the submissions, the respondent has not discharged the burden.

For the reasons stated above, I grant the petition and stay the proceedings in Civil Case No. 55 of 2015 pending the parties' reference of their dispute to the arbitration. The hearing of the suit to resume on 20th September, 2018.

Owing to the nature of the petition which intends to stay the proceedings already commenced by the respondent and the conduct of

the petitioner who has brought the petition rather belatedly, the petitioner is condemned costs of this petition.

Order accordingly.



W. P. Dyansobera

JUDGE

22. 5. 2018

Delivered at Dar es Salaam this 22nd day of May, 2018 in the presence of Mr. Brian Mambosho, learned counsel for the respondent and in the absence of the applicant.



W. P. Dyansobera

JUDGE