IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 17 OF 2019

(Appeal from the Judgment and decree of the District Court of Nyamagana at Nyamagana (Moshi, RM Dated 4th of December, 2017 in DC Civil Case No. 26 of 2016)

ICEA LION GENERAL INSURANCE CO. LTD ..... 1ST APPELLANT

NDEGE INSURANCE BROKERS LTD .... 2ND APPELLANT

VERSUS

FORTUNATUS LWANYANTIKA MASHA ..... RESPONDENT

Date of the last Order: 10/02/2020

Date of Ruling: 25/02/2020

RULING

ISMAIL, J.

This ruling arises from a point of law, raised *suo motu* by the Court. The point of law touches on the jurisdiction or competence of the District Court of Nyamagana at Nyamagana to entertain a matter from which the pending appeal arose. The said court admitted a case, registered as DC Civil Case No. 26 of 2016, which

was instituted by the respondent, for a claim of special and general damages for what the respondent alleged as consequential to the damage suffered following involvement of his vehicle in a road accident. The trial court partially acceded to the respondent's claim, having been convinced that the respondent had proved his case. Consequently, the court ordered that the appellants, with whom the respondent insured his damaged vehicle, pay the sum of TZS. 12 million and TZS. 10 million, being specific and general damages, respectively.

The trial court's decision did not go well with the appellants. Believing that the trial court took a wrong path, legally and factually, the appellants moved to this Court, through a three-ground memorandum of appeal. The appeal was argued by the parties on 17th September, 2019 and the judgment in respect thereof was scheduled for delivery on 19th November, 2019.

To appreciate the reasons behind institution of the matter that bred the appeal to this Court, it is apt that a brief background of the matter be given. The respondent is the owner of a motor vehicle,

Toyota Land cruiser, with registration number TCD 171 EAC, which was insured comprehensively with the 1st respondent, through the 2nd respondent's brokerage services. On 26th May, 2013, the respondent was riding in the said vehicle, from Sengerema to Mwanza. Along the way, the respondent's driver swerved the vehicle off the road with a view to avoiding a pothole which was in the middle of the road. In the process, the vehicle strayed into a ditch where it landed heavily. The immediate visual inspection gave the respondent some comfort that the vehicle was roadworthy and in a normal running condition. They then proceeded with the journey to Mwanza. While in Mwanza, the vehicle developed some technical fault. It refused to ignite, necessitating towing it to the nearest garage where inspection was carried out, followed by a major repair. Subsequent inspection allegedly found that the problem was caused by the accident that had damaged the engine and caused an oil leakage. Cost of repair of the vehicle was quoted at TZS. 19,469,410/=, which sum was negotiated down to TZS. 12,000,000/=, that was paid by the respondent on completion of the repair work. Believing that this damage constituted an insured mishap, the

respondent pressed a claim for indemnification of the sum incurred, but to no avail. As a result of this impasse, the respondent instituted court proceedings which culminated in the decision that is the subject of this appeal. Worthy of a note, is the fact that the said vehicle was insured, vide Policy Number 111/212-3-0199.

At the hearing of the appeal, the appellants were represented by Mr. Alex Banturaki, learned counsel, while the respondent enlisted the services of Messrs Leonard Silvanus, Frank and Ms. Susan, learned advocates.

In the course of composing the judgment on appeal, I came across an issue which required attention of the parties, as it was potentially of a decisive nature. This issue, which skipped the attention of both counsel and the trial court, touches on jurisdiction of the trial court to entertain the trial proceedings in the presence of a clause in the Contract of Insurance (the Policy) to the effect that differences or disagreements by the parties should first be referred to an arbitrator.

The relevant clause is contained in ***Annexure AL 2*** to the plaint. It is ***Clause 10*** which provides as hereunder:

> *"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an Award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."*

The parties were thus called upon the to address the Court on the propriety or otherwise of trial proceedings, in view of the Arbitration Clause which requires the parties to refer their differences to an arbitrator.

Submitting for the respondent, Ms. Martha, learned counsel, submitted that the respondent wrote to the appellant on 12th

October, 2013, informing the latter that an accident had occurred and that a claim was payable. The learned counsel contended that the claim was not disclaimed, meaning that no differences arose between the parties, and that the claim was accepted. Ms. Martha further argued that, after institution of the proceedings in the trial court, the appellants defended the suit. She asserted that hearing of the matter was preceded by a mediation session, slated for 23rd November, 2016. However, the same fell through when the appellants refused to mediate. In the learned counsel's view, this implied that the appellants were not ready for mediation and, therefore, they accepted the liability. While acknowledging that ***section 6*** of the Arbitration Act, Cap. 15 [R.E. 2002] allows a stay of court proceedings to pave way for arbitral proceedings, Ms. Martha raised no objection to the court proceedings. The learned counsel further contended that arbitration would not be possible where parties were not in the best terms to allow for appointment of an arbitrator. She urged the Court to consider these circumstances and uphold the trial court's decision.

Mr. Banturaki was diametrically opposed to the respondent's contention. He held the view that the matter was taken to court pre-maturely, and that whatever else that subsequently happened was a nullity. He contended that there was no attempt to resolve differences that he asserts are still persistent. He argued that differences in this matter lie in the fact that the terms of the contract of insurance were not followed.

Mr. Banturaki further contended that since the Insurance Policy has an arbitration clause, then the provisions of ***section 6*** of Cap. 15 ought to come into play. He held the view that in this case, there was no attempt to go for arbitration. He buttressed his contention by citing the case of ***Construction and Builders v. Sugar Development Corporation*** [1983] TLR 13, in which it was held that if the parties agree to refer the matter to arbitration then the case should start with arbitration. He urged the Court to order the parties to follow the agreement.

In her rejoinder submission, Ms. Martha reiterated what she submitted in chief, maintaining that circumstances of this case were

not conducive for the appointment of an arbitrator. She held, in the alternative that, should it be deemed that arbitration was a prerequisite, the appointment of the arbitrator should be done by the Court.

As stated earlier on, ***Clause 10*** of the Insurance Policy which places the matter in the remit of an arbitrator was not followed. The respondent resorted to a court route. The question is, therefore, whether the Court was clothed with jurisdiction to handle the matter.

It is a trite position that courts and tribunals are under obligation to satisfy themselves on whether they are bestowed with powers to handle matters which are placed before them for hearing and determination. This basic requirement is intended to guard courts and tribunals against possible involvement in matters over which they have no power to determine. Emphasis in respect thereof was showered by the Court of Appeal of Tanzania in ***Fanuel Mantiri Ng'unda v. Herman M. Ng'unda***, Civil Appeal No. 8 of 1995 (unreported). The upper Bench held:

> *"The jurisdiction of any court is basic, it goes to the very root of the authority of the Court to adjudicate upon cases of different*

nature ... the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. ***It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case.***"

See also ***Consolidated Holding Corporation Ltd. V. Rajani Industries Ltd & Bank of Tanzania***, CAT-Civil Appeal No. 2 of 2003 (unreported).

So important is the question of jurisdiction that it can be raised at any stage of the proceedings, even at the appellate stage (see ***M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters*** [2006] TLR 70).

In the present case, the trial court was invited to adjudicate on a claim of damages that arise from the contract of insurance (***Annexure AL 2***) into which a clause on arbitration was inserted. As quoted above, this Clause compelled the parties, in case of any differences, to resort to an arbitration and the manner in which his appointment is done and his mandate have been clearly stated in the said Clause. Effectively, this Clause ousted jurisdiction of the

courts to deal with differences arising from the said contract, until the proposed arbitration remedy is fully exhausted.

The respondent's contention is that there were no differences between the parties, and that the appellants' conduct suggested that they accepted liability. This view is strongly opposed by the appellants' counsel, and I find a lot of plausibility in the latter's argument. The fact that the letter for settlement of the sum was not responded to, favourably or otherwise, or the fact that all efforts to mediate the parties failed, means that there were severe differences between the parties. These differences can be discerned from the arguments that dominated the trial proceedings. The main point of divergence was in respect of whether the vehicle's failure was as a result of the normal technical fault or because of its involvement in the road accident. It took the trial court's intervention to resolve the controversy much to the appellants' dissatisfaction. It is my humble conviction that disputes or differences existed between the parties and, as such, the same ought to have been referred to an arbitrator. In this respect, I fully subscribe to Mr. Banturaki's reasoning as

borrowed from ***Construction and Builders' case***, in which the Court of Appeal held thus:

> *"The Employer and the Contractor in this case by their agreement, which follows closely the standard R.I.B.A. form of contract, have chosen to submit their "disputes or differences" as to the construction of the contract or as to any matter or anything of whatever nature arising thereunder or in connection therewith", to arbitration. On the authorities reviewed above, it seems to us that the operation of the arbitration clause in the contract to which this case relates does not depend on the question whether the dispute that has arisen includes both fact and law or is merely limited to either fact or law.* ***If it is clear .... that the parties have agreed to submit all their "disputes or differences arising "under" the contract to an arbitrator, then the dispute must go to arbitration unless there is some good reason to justify the court to override the agreement of the parties. In the present case we can find no good reason to do so and we are accordingly of the opinion that the learned High Court Judge properly exercised his discretion in ordering a stay of proceedings in this case."***

In arriving at the conclusion, the Court of Appeal took inspiration from the decision in an England case of ***Heyman v. Darwins Ltd.*** [1942] A.C. 356. In this matter, the House of Lords, VISCOUNT SIMON, L.C., put what he considered to be the correct

view of the matter, and it is apposite that the passage be quoted as hereunder:

> *"An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void.* ***But in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of or "with regard to" or "under" the contract, and an arbitration clause which uses those or similar, expressions should be construed accordingly.***"

Emphasis to the foregoing quotation, on the true nature and function of an arbitration clause in a contract, was made by LORD MACMILLAN, who observed:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. ***It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.*** *And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement. Moreover, there is the further significant difference that the courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contract."*

The learned counsel for the respondent acknowledges that ***section 6*** of Cap. 15 requires that court proceedings instituted in non-compliance with the arbitration clause ought to be stayed, and she blames the appellants for not being vigilant in staying the proceedings. I would not consider the appellants' failure to take action as the basis for the respondent's continued pursuit of the

matter before a forum that enjoys no jurisdiction over the matter. Equally hollow and barren, is the respondent's contention that the parties were sharply divided and unable to agree on the choice of the arbitrator. In my view, ***Clause 10*** offers options that should be taken by the parties to address what the respondent cites as impediments in the arbitration process. None of it was pursued.

Before I wind down my analysis on the matter, I wish to insist that what the respondent did was an act of trying to choose convenience over the requirements of the law. Noteworthy, as well, is the fact that jurisdiction is a creature of statutes, and the law prohibits parties from consenting to give jurisdiction to a body that has none. This apt position was stated in ***Shyam Thanki and Others v. New Palace Hotel*** [1972] HCD No. 97, thus:

> *"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."*

What the respondent did was a travesty which, though 'acquiesced' by the appellants, it went against the holding in ***Shyam Thanki's case*** (supra), and I cannot choose any better alternative

than to nullify the proceedings, set aside the judgement and decree of the trial court, and order the parties to abide by the provisions of the Insurance Contract.

Since the matter was raised *suo motu* by the Court, I make no order as to costs.

It is so ordered.

M.K. ISMAIL
JUDGE
25.02.2020