

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. CIVIL APPLICATION NO.09 of 2019

(Arising from Civil Case No.02 of 2019, High Court of Tanzania at Shinyanga)

**IN THE MATTER OF ARBITRATION ACT, CAP. 15 RE 2002 OF THE
LAW OF TANZANIA**

AND

**IN THE MATTER OF AN APPLICATION FOR STAY OF PROCEEDINGS
UNDER SECTION 6 OF THE ARBITRATION ACT CAP.15 RE 2002
BETWEEN**

REGIONAL ADMINISTRATIVE

SECRETARY OF SIMIYU.....1ST PETITIONER

THE ATTORNEY GENERAL.....2ND PETITIONER

VERSUS

YUKO'S ENTERPRISES (E.A) LTD.....RESPONDENT

RULING

30th September & 6th November, 2020

Mdemu, J.;

In this Misc. civil application, the Petitioners moved this court under the provisions of section 6 of the Arbitration Act, Cap. 15 R:E 2002, Rules 5, 6 and 11 of the Arbitration Rules, GN. No. 427 of 1957 and Rule 18 of the 2nd Schedule to the Civil Procedure Code, 1966 seeking from this court for stay of proceedings in Civil Case No. 02 of 2019. The stay is sought for so as to enable parties to settle through arbitration processes as legally required. The application is supported by an affidavit of one Solomon Lwenge, Senior State Attorney for the Applicants.

Brief facts of the case as provided in the Respondent's plaint are to the effect that, the Respondent and the 1st Petitioner entered into several agreements for provision of photographing and printing services of mock examinations for standard seven pupils in 2013 and TSM9 forms for standard seven pupils for 2014 and 2015. The Respondent claimed to have fulfilled his contractual obligation thereby blaming the 1st Petitioner to have not done his party, notwithstanding repeated demanding efforts. The Respondent thus instituted a suit against the Petitioners herein on 25th of April, 2019. It is that suit which gave birth to the current petition.

On 30th September, 2020, the day that was fixed for hearing of this petition, Mr. Solomon Lwenge appeared for the Petitioners and no one appeared for the Respondent. As non appearance was without any justification, consequently, this court granted *ex-parte* hearing order against the Respondent as prayed by the Applicant's counsel.

Submitting in support of the petition, Mr. Lwenge, in nut shell, said that, the contract that the 1st Petitioner entered with the Respondent comprises of a clause that requires parties, in case of any dispute, to exhaust first arbitration procedures before instituting a suit to court. To be specific, Mr. Lwenge referred the court to the special conditions of contract in item 43, part "H" on dispute settlement.

Mr. Lwenge went on submitting that, whenever a dispute between parties occurs, referral should, in the first place, be made to the adjudicator and in the event he fails, the dispute would be referred to

arbitration processes. At this juncture, Mr. Lwenge condemned for Respondent instituting a civil case No. 2/2019 against the Petitioners without first exhausting arbitration processes. On that account, Mr. Lwenge thought, the court should stay proceedings in civil case No. 2/2019 and order the Respondent to refer the matter to the arbitration processes. That was the end of the Petitioner's submission.

I have carefully read the Respondent's plaint in civil case No. 2/2019 together with its annexure, of which, the complained contracts are among them and I have equally duly considered the Petitioner's submissions as well in support of the petition.

The issues for determination on this petition are only two; That is; **one**, whether in the agreements, parties agreed to settle disputes arising out of their contract through arbitral processes before instituting a suit in the first place, **two**, if the first issue is answered in affirmative, then, whether the Respondent properly instituted Civil Case No. 2/2019.

Regarding the first issue, whether parties agreed to settle disputes arising out of their contract amicably before instituting a suit in courts; in the contract, specifically in the special conditions of contract, paragraphs 42 and 43, part "H" on dispute settlement, it is provided, as I quote hereunder: -

"42.1. the parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this contract or its interpretation.

43.1. if any dispute arises between the Employer and the service provider in connection with or arising out of the contract or the provision of the services or after their completion, the matter shall be referred to the Adjudicator within 14 days of the notification of disagreement of one party to the other.

43.2 N/A

43.3. the Adjudicator shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and the Service provider, whatever the decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to the Arbitrator within the above 28 days, the Adjudicator's decision will be final and binding."

The above quoted paragraphs of parties' contract are in conformity with what Mr. Lwenge submitted on dispute settlement between the parties. In essence, the quote responded to the first issue in affirmative that, parties agreed to settle disputes arising out of their contract amicably before instituting a suit to courts of law.

As the first issue has been answered in affirmative, then the second issue, that is, whether the Respondent instituted civil case No. 2/2019 before trying to settle that dispute amicably, has to be determined. The Respondent's plaint giving birth to civil case No. 2/2019 has narrated in detail all what transpired prior to the institution of civil case No. 2/2019. In all those, there is no any paragraph the Respondent ever stated to have first referred that dispute to the adjudicator or the arbitrator before instituting the said civil suit, as per their contract requirement. The record is devoid of any evidence that the respondent ever referred the dispute for arbitral processes.


The need to exhaust special forum provided for in dispute resolution before reference is made to Courts of law was emphasized in **Attorney General Vs. Lohay Akonaay and Joseph Lohay (1995) TLR 80** whereby at page 96 the Court of Appeal observed the following: -

*"Clearly this section is unconstitutional only to the extent that it purports to exclude access to courts. The offending parts may, however, be severed so that the remainder reads 'proceedings may be instituted under this Act in Tribunal having jurisdiction over the area in which the dispute arises.' This would leave the door open for an aggrieved party to seek a remedy in the courts, **although such courts would not normally entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy***

the court that no appropriate remedy is available in the special forum". (emphasis mine)


With such omission, I am compelled to grant this application, as I hereby do, and issue an order for stay of proceedings in civil case No. 2/2019. The Respondent should first seek to resolve the dispute amicably as provided in the special conditions of contract. Each part to bear own costs.

It is so ordered.


Gerson J. Mdemu
JUDGE
06/11/2020

DATED at SHINYANGA this 6th day of November, 2020.




Gerson J. Mdemu
JUDGE
06/11/2020