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

CIVIL CASE NO. 70 OF 2018

NANDHRA ENGINEERING &
CONSTRUCTION CO. LTD.....PLAINTIFF
VERSUS
AMBIERE REAL ESTATES LTD.....1ST DEFENDANT
Y & P ARCHITECTS (T) LTD .....2ND DEFENDANT

RULING

Last order:17/8/2021
Date of Ruling: 17/9/2021

MASABO, J.:-

By a plaint filed in court on 20/4/2018, the plaintiff is suing the defendant for breach of contract. Upon the plaint being served on the defendant, she filed a written statement of defence accompanied by a notice of preliminary objection premised on 4 limbs. When the preliminary objection came for hearing, Mr Obadia Kajungu, learned counsel for the defendant abandoned the three limbs and argued only one limb, to wit: *that the suit is bad in law for being improperly filed in this court contrary to the arbitration clause*.

In brief, the parties had an agreement vide which the plaintiff covenanted to construct a double storey building for the 1st defendant on Plot No. 788 at Shangani West Mtwara, a project which was to proceed under the superintendence of the 2nd defendant. The contract was terminated on 25th April, 2017 after the 1st defendant defaulted payment of the

contractual fees. This suit has been specifically instituted to recover the outstanding payment.

Arguing in support of the preliminary objection, Mr. Kajungu submitted that, the suit contravenes the arbitration clause contained under paragraph 26 of the agreement through which the parties agreed to resolve their dispute amicably through an arbitrator. In support of this point he argued that, under section 28 of the Law of Contract Act [Cap 345 R.E 2019] the parties cannot exclude jurisdiction of the court by consent but, they can agree to refer their dispute to arbitration, a right which the parties herein availed to. Therefore, since they voluntarily agreed to refer their dispute to the arbitrator, the plaintiff is barred from referring the dispute to an ordinary court and in doing so she has breached the arbitration agreement. Mr. Kajungu concluded that, since it is a trite law that when parties have an arbitration agreement they should first submit to an arbitrator, the suit should be struck out.

Mr. Adam Mwambene, learned counsel for the Plaintiff, sternly resisted the preliminary objection arguing that it is devoid of merit as the plaintiff fully complied with the requirement for arbitration but the defendant refused to avail herself to arbitration. He narrated that, on 25th April, 2017 he notified the defendants of the termination of contract and she thereafter submitted the matter to the National Construction Council (NCC) where she successfully paid the required fee and had the arbitration proceedings instituted. The 1st defendant was then summoned through her advocates but she refused to avail herself to arbitration hence this suit as the NCC could not compel the 1st defendant to avail herself to the

arbitration proceedings. Based on this he argued that, the preliminary objection is misconceived as it is the 1st defendant who refused to go to arbitration.

Further, Mr. Mwambene invoked section 6 of the Arbitration Act, Cap 15 RE 2019, and proceeded to submit that where a party to an arbitration commences a legal proceeding, the other party may, after appearing in court and before taking any action, apply for stay of proceedings and the court may, if it is satisfied, order the stay of the proceedings and refer the parties to arbitration. Thus, the remedy available to the 1st defendant was to apply for stay of proceedings before taking any further steps in legal proceedings. He added that, this is in tandem with the provision of Section 64 of the Civil Procedure Code, Cap 33 RE 2019, read in conjunction with the 2nd schedule to the Code which in paragraph 19 states that, when a party to an arbitration agreement institutes a suit, the aggrieved party may apply for stay of the suit and the court may order stay of the suit. Since in the instant case, the 1st defendant has not vailed herself to this opportunity because he cannot have the matter struck out as the remedy available under the law is stay of the proceedings.

In the rejoinder, Mr. Kajungu vehemently argued this court to ignore the narration that the plaintiff took the matter to arbitration but the 1st defendant refused to avail to the proceedings as these matters are not pleaded. They are mere statements from the bar, hence cannot form a basis for a court decision. He also argued that the allegation is inconsistent and misleading as the plaintiff never submitted to arbitration.

He also challenged Mr. Mwambene for misinterpreting the provision of section 6 of the Arbitration Act, Cap 15 RE 2019,

I have carefully and dispassionately considered the supporting and opposing submission. There is only one issue for determination, that is, whether *the matter before this court is incompetent*. As correctly argued by Mr. Kajungu, being free agents, the parties to a contract have a right to choose an arbiter and mode of dispute settlement between them. Where the parties to an agreement exercises this right and prefers to refer their dispute to a tribunal of their own choice, it is a settled law in our jurisdiction that they should be obliged to do so (see **Constructive and Builders Vs Sugar Development Cooperation** [1983] TLR 13; **Shamji and Another v Treasury Registrar- Ministry of Finance, Tanzania and Others,** Miscellaneous Commercial Case No.14 of 2001). In **Construction and Builders v. Sugar Development Corporation** (supra), the court held that:

> If 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."

Reverting to the facts of the instant case, from the pleadings and the submissions made, it is undisputed that the parties herein signed a contract which contains an arbitration clause articulating the means through which they preferred to resolve their dispute and the procedures thereto. The arbitration clause is contained under clause 26 and 27, which reads, respectively that;

> 26. "If the contractor believes that the decision of the project manager was either outside the authority given to the project manager by the contract or that the decision was wrongly taken the decision shall be referred to the adjudication within 14 days of the notification of the Project manager's decision."
>
> *27*. The adjudicator shall give a decision in writing within 28 days of receipt of a notification of a record.

As per the self-explanatory content of these two clauses, there is no dispute that the parties had an undertaking that should a conflict arise between them, it shall be referred to an adjudicator who shall resolve the same within 28 days. Refusal or failure to submit to arbitration and reference of the dispute to an ordinary court does, in the contract law, amount to a breach of contract. The party aggrieved by such breach is not without a remedy. Section 6 of the Arbitration Act, Cap 6 R.E 2019 and item 18 of the 2nd Schedule to the Civil Procedure Code, Cap 33 RE 2019 provided a remedy to the aggrieved party. Section 6 of the Arbitration Act provided thus:

> **6**. Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings 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 or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court, if satisfied that 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.

Item 18 is more of a replica of this provision save that, under this paragraph, the application to stay the suit can be made earliest possible opportunity before or after settlement of the issues. These two provisions have been fairly litigated and it is now a settled principle of law that, the only remedy available to a person aggrieved by the suit is to apply for stay of proceedings through the two provisions above. Therefore, as argued by Mr. Mwambene, the remedy available to the party aggrieved by a reference of the dispute to ana ordinary court is not to terminate the suit by way of preliminary objection. The only remedy available to the defendant is to move the court before which the suit is instituted for an order of stay of the suit pending reference to arbitration.

This has remained to be the position even after the repeal and the replacement of the Arbitration Act, Cap 15 RE 2019 by the Arbitration Act, No.2 of 2020 which in section 13(1) provides that:

> 13.-(1) A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, <u>apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter</u>. [Emphasis added]

Based on what I have endevoured to demonstrate above, and since the defendant has not availed himself to the remedy available under section 13(1) of the Arbitration Act, I overrule the objection with costs.

Dated at Dar es Salaam this 17th day of September 2021.

24/09/2021

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE