

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 256 OF 2021

ULTIMATE SECURITY (T) LTD APPELLANT

VERSUS

SIGNON TANZANIA LTD RESPONDENT

***(Appeal from the ruling of the District Court of Kigamboni at
Kigamboni in Civil Case No. 1 of 2021)***

JUDGMENT

14th June & 5th July, 2022

KISANYA, J.:

This is an appeal from the ruling of the District Court of Kigamoni at Kigamboni in Civil Case No. 1 of 2021 in which the appellant sued the respondent claiming for Tshs 25,785,000 which arose from the security service rendered to the respondent.

As gathered from the pleadings, the appellant's claim arose from breach of an agreement for security services entered by the parties on 27th May, 2018. Although the respondent admitted to have entered into an agreement with the appellant, she vehemently disputed the appellant's claims.

Before referring the matter to the mediator, the appellant's counsel was recorded to have addressed the court on the existence of an arbitration clause in the agreement. However, the learned counsels for both parties prayed the suit to proceed in the trial court. In its ruling, the trial court did not agree with them. It held the view that parties were required to refer their dispute to an arbitrator as agreed in the arbitration clause. At the end of the day, the trial court went on dismissing the suit.

Aggrieved, the appellant filed the present appeal. Its appeal is premised on the following grounds of appeal: -

- 1. That the learned trial Magistrate erred in law and fact for ordering that the matter be referred to an Arbitrator while the Respondent had waived his right to refer the matter before the Arbitration.*
- 2. That the learned trial magistrate erred in law and fact by ordering the matter to be referred to Arbitration in suo motto.*
- 3. That the learned trial magistrate erred in law and fact by dismissing the case contrary to the law.*

At the hearing of this appeal, Mr. Elipidius Philemon, learned advocate appeared to represent the appellant whereas, the respondent was advocated by Ms. Neema Richard, learned counsel.

Arguing the first and second grounds altogether, Mr. Philemon submitted that the trial court erred in holding that the matter be referred to an arbitrator. His argument was based on the contention that the appellant had filed her defence thereby, waiving her right of referring the matter to arbitration. The learned counsel cemented his argument by citing section 14(1) of the Arbitration Act, Cap. 15, R.E. 2019. He went on submitting that, the trial court erred in raising the matter *suo, mottu*. He was of the firm view that it is the respondent who was required to notify the Court about the arbitration clause and move the court to have the matter referred to arbitration.

Submitting in support of the third ground, Mr. Philemon faulted the trial court for dismissing the suit. Relying on section 15(1) of the Arbitration Act, the learned counsel argued that the trial court ought to have stayed the proceedings before it pending determination of the arbitration proceedings.

Responding to the first ground of appeal, Ms. Robert submitted that the trial court was enjoined, under section 14 (1) of the Arbitration Act to refer the parties to arbitration because the agreement in question had an arbitration clause. She further submitted that the arbitration clause is a distinct agreement in the agreement as held in the case of **Honda**

Motors Japan and Another vs Quality Motors Ltd, Misc. Commercial Cause No. 25 of 2019 (unreported).

Ms. Robert conceded to the third ground of appeal. She was at one with Mr. Philemon that the trial court ought to have stayed the proceedings before it. Therefore, she urged me to uphold the decision of the trial court which directed the parties to refer the matter to the arbitration.

In his rejoinder, Mr. Philemon reiterated that section 14(1) of the Arbitration Act requires the defendant to apply to have the matter referred for the arbitration and not to file a written statement of defence. He submitted further that despite that arbitration is a separate agreement, the defendant waived the right of referring the matter to arbitration when she filed the defence. He contended that the case of **Honda Motors Japan** (supra) is distinguishable from the circumstances of this case where the respondent had filed her defence.

I have given a careful consideration to the arguments for and against the appeal. The issue for my determination is whether the appeal is meritorious or otherwise.

It is not disputed that the case filed before the trial court was founded on a breach of contract. It is also not disputed that in terms of

the said contract, parties agreed to refer any dispute arising thereto to the arbitration. Therefore, parties were expected to comply with the terms of contract by referring their dispute for arbitration before resolving to file the same in the trial court. I am fortified by the decision of this Court (Fikirini, J. as she then was) in **Honda Motors Japan** (supra) where it held that: -

"This thus brings this Court to a conclusion that the matter pending before this Court deserved to be handled by referring it to arbitration, first."

It is common ground that the appellant did not refer the dispute for arbitration and that when served with the plaint, the respondent filed its written statement of defence. As stated earlier on, it is the trial court which raised the issue of referring the matter to the arbitration.

On the foregoing, the first issue from the first and second grounds is whether the court may, on its own motion, refer the parties to arbitration. In their respective submission the learned counsel for both parties referred me to section 14(1) of the Arbitration Act which stipulates:-

"14. -(1) A court, before which an action is brought in a matter which is the subject of an arbitration agreement shall, where a party to the arbitration agreement or any person claiming through or under

him, so applies not later than the date of submitting his first statement of claim on the substance of the dispute, and notwithstanding any judgment, decree or order of the superior court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.”

Flowing from the above provision, it is clear that the court has mandate to refer parties to arbitration. However, that power is not absolute. It is exercised subject to the conditions specified thereto. One of the conditions is to the effect that the party to the arbitration agreement or any person claiming under the said party must have moved the court to refer the parties to arbitration. As that is not enough, the application is required to be filed before the date of submitting the first statement of claim on the substance of the dispute filed in the court. Thereafter, the court must be satisfied that there is a valid arbitration agreement.

In the present case, the respondent did not move the trial court to refer the appellant and respondent to arbitration. That being the case, I am of the view that, the learned trial magistrate misinterpreted section 14(1) of the Arbitration Act by holding that it empowers the court to refer the parties to arbitration

The second issue is whether parties can be referred to arbitration if the respondent has filed his defence. This issue should not detain us. The starting point is section 14(1) of the Arbitration Act which required the adverse party to apply to refer the matter to arbitration before filing his defence to the claim. As rightly argued by Mr. Philemon, the law is also settled that upon lodging his or her written statement of defence, the adverse party signifies that he or she is ready to litigate the matter thereby losing his or her right to have the matter referred to arbitration. See for instance the decision of the Court of Appeal in the case of **Trade Union Congress of Tanzania (TUCTA) vs, Engineering Systems Consultants Ltd and Two Others**, Civil Appeal No. 51 of 2016 (unreported) in which the Court of Appeal underscored that: -

"We agree with both the learned judge and the respondent's counsel in that, after filing of the written statement of defence, the appellant lost the right to refer the matter to an arbitrator because that signified the preparedness to resort to court. The Fact that the appellant denied the existence of the contract worsened matters because it removed the very basis for going to an arbitrator."

Being guided by the above position, I hold that the respondent consented to proceed with adjudication of the case filed at the trial court

when it filed its written statement of defence instead of moving the trial court to refer the matter to the arbitrator and or stay the court proceedings under section 15(1) of the Arbitration Act.

In light of the above findings, I find merit in the first and second grounds of appeal. Now, that the first and second grounds are meritorious, I find it not necessary to address the third ground of appeal.

In the upshot and for the reasons stated, the appeal is found meritorious and allowed. As a result, the ruling and drawn order of the trial court are hereby quashed and set aside. The case file is remitted to the trial court to proceed where it ended before the ruling which gave rise to this appeal. Given the circumstances of this case, I make no order as to costs.

DATED at DAR ES SALAAM this 5th day of July, 2022.



S.E. Kisanya
JUDGE
05/07/2022