

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
SUMBAWANGA DISTRICT REGISTRY
AT SUMBAWANGA

CIVIL APPEAL NO. 7 OF 2020

(Originating from Katavi Resident Magistrate Court Civil Case NO. 6 of 2019)

NSIMBO DISTRICT COUNCIL APPELLANT

VERSUS

JESEPH WILLIAM SUNGA RESPONDENT

Date of last Order: 07/12/2021

Date of Judgment: 11/03/2022

NDUNGURU, J.

The appellant in this case one Nsimbo District Council is appealing against judgment and decree of Katavi Resident Magistrates' court in Civil Case No. 6 of 2019

Before the trial court, the appellant instituted suit against one Joseph Willian Sunga claiming for payment of Tshs. 81,941,040.040 being specific damage, Tshs. 10,000,000/= being general damages, interest at the rate of 8% from the date of filing the suit to the date of judgment, interest of 10% from the date of judgment to the final settlement.

The facts of which led to the suit briefly are that on 31/08/2018 the appellant entered into two agreements with the Respondent of collecting revenue for the appellant. The contract period of both two contracts was ten (10) months commencing from 31st August 2018 to 30th June 2019. That following failure on the part of the responding of fulfilling contractual obligation of correcting and remitting revenue to the appellant; in January 2019 the appellant terminated both contracts. What followed was filing a suit by the appellant for breach of contracts.

Upon trial, the court dismissed the case with costs for being devoid of merits. Being displeased with the dismissal order; the appellant filed this appeal. In her memorandum of appeal, the appellant advanced four grounds of as hereunder:

1. That, the honourable trial court erred in law and fact for holding that the appellant breached the two contracts by terminating the same while it is the respondent who breached the two contracts for failure to pay TZS 81,941,040.00 in accordance with the said contracts.
2. That the honourable trial court erred in law and fact for misconceiving the concepts of breach of contract and termination of contracts.

3. That the honourable trial court erred in law and fact for failure to hold and order that the respondent is required to pay TZS 19,474,300.00 to the appellant in accordance with the evidence adduced by the appellant and upon admission by the respondent.
4. That the honourable trial court erred in law and fact for failure to hold that the respondent failed to prove his counter claim on balance of probabilities.

Before going to the merit of the case, I had time to go through the contracts signed by the parties because they are the essence of this case.

In their agreements, the parties had agreed to refer the disputes arising out of the contracts to arbitration as prescribed in the arbitration clause under the contracts. In the first contract LGA.161/2018/2019/NC/USH//01 (Exhibit P1) clause 15 is the arbitration clause. The clause provides;

15. Pande zinazohusika katika mkataba huu zitapaswa kufuata masharti ya mkataba huu. Endapo kutatokea mgogoro, basi mgogoro huu utatatuliwa kwa njia ya usuluhishi na endapo pande zote mbili zikishindwa kufukia muafaka pande zote zitakaa na kuamua msuluhishi wa mgogoro. Mkataba huu utataliwa na sheria za Jamhuri ya Muungano wa Tanzania.

Gharama za msuluhishi zitalipwa kwa viwango sawa na pande zote mbili katika mkataba huu. "

Further in the second contract LGA.161/2018/2019/NC/USH//03 (Exhibit P2) clause 15 is the arbitration clause. The clause provides;

15. "Pande zinazohusika katika mkataba huu zitapaswa kufuata masharti ya mkataba huu. Endapo kutatokea mgogoro, basi mgogoro huu utatatuliwa kwa njia ya usuluhishi na endapo pande zote mbili zikishindwa kufukia muafaka pande zote zitakaa na kuamua msuluhishi wa mgogoro. Mkataba huu utataliwa na sheria za Jamhuri ya Muungano wa Tanzania. Gharama za msuluhishi zitalipwa kwa viwango sawa na pande zote mbili katika mkataba huu."

Pleadings filed before the trial court do not reveal on whether the case was referred to the arbitration. The pleadings are silent. As stated above, the parties had agreed to refer the disputes arising from out of the contract to arbitration. Under the circumstances, decision of the trial court implied that the parties did not need to go to the arbitration. It finally determined the rights of the parties but circumventing the recourse to arbitration.

The sole issue to be determined is; what is the effect of the decision of the trial court by entertaining the case which was supposed to be referred to the arbitration. Before I resolve it, I find it necessary to explain the nature of arbitration clause in a contract. The true nature and function of an arbitration clause in a contract

was well explained by Lord Macmillan in the case of **Heyman v. Darwins Ltd. (1942) AC 356 at page 375** as follows-

"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 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 regards to the obligation 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 result 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 its enforcement"

The appellant had instituted Civil case No. 6 of 2019 before invoking the arbitration clause in the contract, the trial court tried the case before bringing into play the arbitration clause stipulated into in the contracts. To my view, decision of the trial court barred the parties from going to arbitration. The decision closed the door to arbitration thus rendering provisions in the contract for arbitration meaningless. They were meant to serve a purpose. See **Tanzania Motor Services LTD & Another v. Mehar Singh t/a Thaker Singh**, Civil Appeal No.115 of 2005 CAT (unreported)

In the premises, I hold that the case was prosecuted in a court incompetent to entertain it. It is therefore obvious to me that the instant proceedings a bad tactic. I hereby nullify the judgment and proceedings. Any interested part may refer the matter to the arbitration as arbitration clauses stipulate.

I further order no costs.

Order accordingly.




D. B. NDUNGURU
JUDGE
11/03/2022