IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

DC CIVIL APPEAL NO. 23 OF 2020

(Originating from the District Court of Mbeya, Miscellaneous Civil Application No. 10 of 2020)

Jonas Joshua Bushambali .....APPELLANT

VERSUS

Equity For Tanzania Ltd (EFTA) ....RESPONDENT

JUDGEMENT

Date of last Order: 02.11.2021

Date of Judgment: 21.02.2022

Ebrahim, J.

This is an appeal from the decision of the District Court of Mbeya at Mbeya where the Appellant herein was the Respondent in an application filed by the Respondent in this appeal. The genesis of this appeal is the execution of a financial leasing agreement where the Respondent leased to the Appellant semi auto PET Blowing Machine, High Pressure Air Compressor, Lower Pressure Air Compressor, Air Dryer, Air Receiving Tank, Air Cooling Chiller and 330ml blowing mold. The

lease agreement was entered on 14.04.2016 and it was for the duration of 36 months where the Appellant was required to pay monthly rental installments of Tzs. 2,568,041/-. The forementioned leased equipment also served as collateral.

In the course of execution of the lease agreement, the Appellant herein defaulted in payment whereby the Respondent opted to make an application for repossession under the provisions of **section 134(4)(b) of the Financial Leasing Act, 5 of 2008, CAP 417 RE 2019.** In determining the application, the trial court granted the application on the basis that much as there was clause in the agreement requiring parties to refer their disputes to arbitration, the terms of the contract had no power to oust the jurisdiction of the court. The trial court contended further that there is no dispute between the parties because the respondent does not dispute that he has not paid the whole amount.

Aggrieved the appellant preferred the instant appeal raising four grounds of appeal as follows:

1. That the trial magistrate erred both in law and fact by entertaining a suit to which it has no jurisdiction to try it.

2. That the trial court erred in law and fact when entertaining miscellaneous suit without having the main suit.
3. That the trial court issued a ruling in contradiction to the previous ruling in Civil Case No. 36 of 2019 involving the same parties despite of being aware of the presence of the former ruling.
4. That the trial court erred in both law and fact for failure to analyze the right of appellant for the contribution he had made to repay the loan.

The appeal was disposed of by way of written submission. The Appellant was represented by advocate Ezekiel Mwampaka whilst the Respondent preferred the services of Alex Job.

Appellant's counsel abandoned the 4th ground of appeal and argued on the 1st, 2nd and 3rd grounds of appeal. On the1st ground of appeal, he premised his argument on the lack of jurisdiction of the trial Court on the basis that under **Clause 14 of the Financial Lease Agreement**, parties are required to refer any dispute to arbitration hence ousting the jurisdiction of the normal court. He further referred **to section 7 of the Civil Procedure Code, Cap 33 RE 2019** which oust the jurisdiction of the court on a suit

which is expressly or impliedly barred. He cited the case of **Sunshine Furnitures Co. Ltd Vs Maersk (China) Shipping Co. Ltd & Another**, Commercial Case No. 113 of 2015, HC of Tanzania at Dar Es Salaam, p10 to substantiate his argument.

Arguing the second ground of objection, counsel for the Appellant submitted that it was wrong for the trial court to entertain the application which he termed as interlocutory that does not determine the right of parties without having the main suit. He referred the court to the case of **University of Dar Es Salaam Vs. Sylvester Cyprian & 20 Others** [1998] TLR 175 and the case of **Simon Kiles Samwel V Mairo Marwa Wansago (t/a Mairo Filing Station)**, Civil Revision No. 8 of 2020 (HC- Musoma).

On the 3rd ground of appeal, he faulted the trial court for issuing an order in contradiction of the previous ruling of the same court in Civil Case No. 36 of 2019. He finally prayed for the appeal to be allowed with costs.

In rebuttal, Counsel for the Respondent submitted on the 1st and 2nd grounds of appeal together that the contention that the trial court had no jurisdiction and that there was supposed to be a main suit are misconceived because the Respondent filed a civil

application for repossession under the **Financial Leasing Act, Cap 417 RE 2019**. He explained that the Appellant was benefitting from his own wrong doing an act which is censored by law in terms of **section 8 read together with section 4(2) of CAP 417**. He referred to the case of **Sylvester Chacha Korosso Vs Africarriers Limited**, Civil Appeal No. 63 of 2019 (HC). As for the issue of jurisdiction, he submitted that the trial court was vested with jurisdiction to try the matter in terms of **section 13(4)(b) of the Financial Leasing Act** as the Respondent only applied for repossession of his own leased machines where the lessee has failed to honour his obligation but also upon expiry of the lease agreement. He distinguished the cited case of **Sunshine Furniture Co. Ltd Vs Maersk (China)** (supra) by the Appellant that the circumstances are not the same as section 7 of the CPC is a general application which does not apply where there is a specific statute i.e., **Financial Leasing Act**. As for the cases of **University of Dar Es Salaam Vs Silvester Cyprian &210 Others (Supra)** and the case of **Simon Kiles Samwel (supra)**, he distinguished them for being about interlocutory application, which is not the case in the instant matter.

As for the 3rd ground of appeal he contended that the Appellant is confusing between the facts of the Civil Case No 36 of 2019 and the Civil Application No. 10 of 2020 where as in the Civil Case, the Appellant had sought relief for breach of contract whilst the Respondent had filed an application for repossession. He prayed for the appeal to be dismissed with costs.

In rejoinder, counsel for the Appellant in citing the case of **E.A. Breweries Ltd Vs GMM Co. Ltd** [2002] TLR12 insisted that parties are bound by the choice they made by choosing the law that would apply in the event of dispute which in this case was arbitration. He further insisted that an application cannot stand alone without being supported by the main suit. As for the 3rd ground, reiterated his earlier submission.

In determining the instant appeal, I shall address the issues in seriatim.

Beginning with the issue of jurisdiction, the bone of contention is hinged on the issue as to whether the trial court had jurisdiction to entertain the matter whilst there was an arbitration clause.

Indeed, I join hands with the principle illustrated in the cited case of **E.A. Breweries Ltd Vs GGM Co. Ltd (supra)** that:

"The Parties to a contract are free to choose the law that would apply in the event of dispute, and that the parties in this case were free to agree that the law that was to govern their distribution agreement was Kenyan law".

Nevertheless, applying the above principle to the instant case, the question arises as to whether the Arbitration Clause in the Financial Lease Agreement would estopp the Respondent from exercising her right of repossession under the law in terms of the agreed terms, conditions, rights, duties and obligations of the said agreement.

Indisputably is the fact that Arbitration clause is preferred in the contracts and agreements so as to avoid litigations where there is a dispute. I have put the entire Lease Agreement by the parties under the scrutiny. Notably are the contents of **Clause 20 under Section A: Specific Conditions** of the agreement which reads:

*"**Lessor's rights upon Lessee non-compliance**: The Lessee shall at all times see to it that all conditions of this Agreement are in all ways fulfilled. If, in the Lessor's opinion, they are at any time not fulfilled, the Lessee has acted in bad faith, **or if there is otherwise an Event of Default** and/or Termination Event, **then the Lessor has option to conduct one or more of the following***

***actions**:(1) agree terms with the Lessee to correct such non-compliance, (2) legally declare the unpaid balance of the whole Repayment Amount plus any Late Payment Charges immediately and fully due and payable without further demand, and/**or (3) repossess the Equipment**. If the equipment is repossessed according to this clause and it is subsequently sold, the Lessor will be entitled to all proceeds from the said sale."* (Emphasis is added].

Applying the above specific condition agreed by the parties in their agreement, it is crystal clear that the obligation of the Lessee to ensure that he does not default in repayment is stipulated and so is the right of the Lessor incase of default. In other words, the agreement has set clear terms of what should be done in terms of default and in this context in-case of undisputed default. Coming to the instant case, the issue of "default" of repayment by the Appellant is undisputed. Furthermore, in reading **Section B: General Conditions** – clause 1 of the Agreement, both parties have expressly subjected themselves to the stipulations of the Agreement within the framework established by the **Financial Leasing Act No.5 of 2008, CAP 417** and accepted that the lease agreement is commercial in nature.

Again, the law i.e., **Section 13(4)(b) of CAP 417** has clearly provided for the rights of the Lessor in case of a default that the

Lessor may seek from the court an order for repossession. That being the position therefore, since the Appellant does not dispute the default and the fact that he has been served with the requisite notice, then the repossession course taken by the Respondent is not barred by Arbitration Clause as parties have already agreed on the action to be taken and bound by the relevant law. Under the circumstances, the Arbitration Clause would be operational on the incidences where parties are seeking other remedies coincidental to the breach e.g., damages, dispute on the unpaid amount, injunction, ownership etc. It is on the same vein though on different parity of reasoning, I agree with the trial Court that the issue of default in the circumstance of this case is not subject of arbitration. Thus, the provisions of **section 7 of CAP 33** do not apply in the circumstance of the instant case and the cited case of **Sunshine Furnitures Co. Ltd Vs Maersk (China) Shipping Co. Ltd & Another (supra)** is distinguishable on the basis that in the cited cases the agreement expressly stated that any dispute on the bill of lading shall be determined by English Court whilst in this case, the Agreement has expressly stated what are the options of the Lessor incase of default which is not a disputed

fact. Accordingly, I dismiss the 1st ground of appeal for being unmeritorious.

Now coming to the 2nd ground of appeal on the issue of entertaining a miscellaneous suit without having a main suit. This ground should not detain me much. I hasten to agree with the Counsel for the Respondent that there is a misconception on part of the Appellant.

Section 5 of the Civil Procedure Code, Cap 33 RE 2019 provides thus:

"5. In the absence of any specific provision to the contrary, nothing in this Code ***shall be deemed to limit or otherwise affect any special form of procedure prescribed by or under any other law for the time being in force***".

In reading the above provision of the law, it clearly provides for other statutory suits and their procedure as so provided under **section 13(4)(b) of Cap 417**. There are other statutory suits that are recognized by law i.e., section 5 of Cap 33 above like suits instituted by way of Originating Summons, Election Petition, Land Applications, Complaints, Matrimonial Applications etc., to name but a few, which are like any other suit in their own prescribe form and procedure under the written law in force. The same applies to

the instant matter where CAP 417 stipulate the form and procedure in leasing agreements where the lessor exercise his/her option to claim for repossession following the default. Therefore, it is a misconception and misinterpretation of the law to term the Civil Application No. 10/2020 filed under ***Section 13(4)(b) of CAP 417*** as an interlocutory application which requires a main a suit for it to stand. If at all it confers right to the Lessor to exercise his option of repossession in case of default of the Lessee. Thus, I also dismiss the 2nd ground of appeal.

The Appellant's complaint on the 3rd ground of appeal is that there is a contradicting ruling with the decision of the same court on the same parties in respect of Civil Case No. 36 of 2016. With respect, the issue on Civil Case No. 36 of 2016 was the refund of all lease rental and seeking the injunction against the Respondent hence sought of reliefs under breach of contract; whilst the instant application is seeking to exercise the option of repossession as provided by law. It is apparent that while Civil Case No. 36 of 2016 was a dispute that required the scrutinization of the terms and conditions, Civil Application No 10 of 2020 was a procedure set by law where a party seeks to repossess leased equipment following

the default. That being said, I also find the 3rd ground to have no merits and I dismiss it.

From the above, I find the appeal to be unmeritorious and I accordingly dismiss it with costs.

Accordingly ordered.

R.A. Ebrahim

Judge

Mbeya

21.02.2022

Date: 21.02.2022

Coram: Hon. Z.D. Laizer – Ag-DR.

Appellant: Present.

For the Appellant: Ms. Tumaini Amenye, Advocate.

Respondent: Absent.

For the Respondent: Mr. Alex Job, Advocate.

B/C: P. Nundwe.

Court: Delivered in the presence of the appellant, appellant's advocate and respondent's advocate.

Sgd: Z.D. Laizer

Ag- Deputy Registrar

21/02/2022

Order: (1) Right of Appeal explained.

Z.D. Laizer

Ag- Deputy Registrar

21/02/2022