

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC CIVIL APPLICATION NO. 638 OF 2022**

*(Arising from Misc. Cause No 572 of 2021)*

**NMB BANK PLC.....1<sup>st</sup> APPLICANT**

**UPANGA JOINT VENTURE COMPANY .....2<sup>nd</sup> APPLICANT**

**VERSUS**

**NYUMBA YA SANAA & CULTURE LTD .....RESPONDENT**

**RULING**

27<sup>th</sup> January & 24<sup>th</sup> February 2023

**MKWIZU,J:**

This is a ruling with respect to a point of objection raised against an application for a stay of proceedings pending arbitration brought under section 15(1) of the Arbitration Act, (Cap 15 R: E 2020) and section 95 of the Civil Procedure Code, (Cap 33 R: E 2019). The brief background facts of the matter go thus: The respondent has on 8/11/20121 filed a petition in this registry under the provisions of section 233(1) and (3) (d) of the Companies Act registered as Miscellaneous Civil Cause No. 572 of 2021 between **NYUMBA YA SANAA & CULTURE LIMITED** versus **UPANGA JOINT VENTURE COMPANY LIMITED** and **NMB BANK PLC** subsequent to which the applicants filed an application for the stay of the proceedings pending arbitration proceedings between the parties. The respondent came with an objection to the effect that:

*"The application before the honourable court is incompetent and not legally tenable for total transgression or violation of*

*the provisions of section 13(3) ( sic) of the Arbitration Act, 2020.”*

By the leave of the Court, the preliminary objection was disposed of by way of written submissions. The defendant was represented by Mafuru Mafuru advocate while the plaintiff was represented by Antipas Lakam from Vertex Law Chambers.

Submitting in support of the preliminary objection, respondent counsel said, application for a stay of proceedings pending arbitration is only allowed where the applicant has taken appropriate procedural steps to acknowledge the legal proceedings in the main claim. He referred the court to the cases of **DRTC Trading Company Limited & Another Vs Juma Masoud**, Misc. Civil Cause No 379 of 2017 HC ( Unreported) where an issue as to what constitutes necessary steps was discussed.

Mr. Mafuru contended further that, the main petition was filed in court on 8<sup>th</sup> November 2021 but to date, none of the applicants has taken any necessary steps to answer the substantive claim and therefore are barred by the Arbitration Act to file this application. He blamed the Applicant's counsel for ascending to the old position of the law under section 6 of the Arbitration Act, Cap 15 where the application of this nature was to be filed before filing a written statement of defence or taking any other step in the main proceedings.

In another hand, the Applicants counsel submitted that section 14(1) &(3) of the Arbitration Act, (Cap 15 R: E 2020) allows the Court to refer parties to arbitration, even without an application as long as there is an arbitration clause in the parties agreement and a filed claim on the substance of the dispute. And that the same section allows parties to commence arbitration

proceedings at any stage regardless of any pending legal proceedings. He cited to the court the decision in **Tanzania Breweries Limited & 2 Others Vs Oscar Shelukindo & 12 others**, Misc. Civil Application No. 6 of 2018, HC of Dar es Salaam (2008)(unreported)

He stressed that, the applicants have in fact taken necessary steps towards acknowledging the substantive claim by filing an application for a stay of the petition so that the parties can go for arbitration and resolve the dispute. He was of the view that the provision cited by the respondent counsel does not compel the applicants to file a defence before making an application to refer the matter for arbitration. He relied on the case of **Jovet Tanzania Limited Vs Bavaria N.V**, Civil Appeal No. 207/2018, CAT(unreported) where the taking of necessary steps was defined to mean:

*"Taking any step in the proceedings must be confined to taking steps in the proceedings for the resolution of the substantial dispute in the suit".*

He urged the court to find the preliminary objection without merit.

In his short rejoinder, Mr Mafuru stated section 14(1) of the Arbitration Act Cap 15, R: E 2020 cited by the applicant's counsel deals with the commencement of arbitral proceedings and not as explained by the applicant's counsel. To him, section 13(3) of the Arbitration Act, Cap 15 R: E 2020 is couched in mandatory terms suggesting mandatory compliance.

I have considered the point of law raised, the rival submissions by the parties and the laws applicable under the circumstances of this case. It is evident that the application for the stay of proceedings was brought under

section 15 of the Act in which the conditions for the filing of such an application are embodied including the requirement for acknowledging the main claim by the applicant, the theme of the preliminary objection subject of this ruling.

It seems however that respondent counsel mi applied the law, instead of citing section 15 (1) of the Arbitration Act RE 2020, he premised his preliminary point on section 13 (1) of the act, the law that existed before the revised edition dated 30<sup>th</sup> December 2020. Based on that reality, this court will confine itself to the requirement of section 15(3) on which both the challenged application and the preliminary objection are created. Section 15 is very clear. It states:

*15.-(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, apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*

*(2) An application under subsection (1) may be made notwithstanding that the matter is to be referred to arbitration after the exhaustion of other dispute resolution procedures.*

*(3) A person shall not make an application under this section unless he has **taken appropriate procedural steps to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim.** (Emphasis added)*

My holistic readings of the above provisions find that to file an application for a stay of the proceedings pending arbitration, three conditions must co-exist. **One**, Parties must have an arbitration clause in their agreement; **two**, there must be in existence, filed legal proceedings against the applicant and **lastly**, the applicant must have first acknowledged or filed an answer to the main claim.

The objection, in this case, is in relation to the last condition. Fortunately, the Parties' counsel agrees on the legal position above. They only differ on what amounts to "*taking necessary steps*". The applicant's counsel has invited the court to find that the filing of the application for a stay of the proceedings amounts to taking the envisaged necessary steps in acknowledging the main claim. I am not persuaded by this argument, to accept the proposition would be to make the whole essence of subsection 3 of section 15 redundant. The subsection is very clear and needs no logical construction to bring to one's knowledge the intention of the legislature. It requires a party wishing to stay legal proceedings to first take appropriate procedural steps to acknowledge the legal claim against him or answer the substantive claims.

The pertinent question remains to be what amounts to the taking necessary steps. Giving explanation to this question, Hon Kitusi J (as he then was) in **DRTC Trading Company Limited & Another Vs Juma Masoud**, citing with approval the case of **Capital Trust Investment Ltd V Radio Design TJ AB and Others**(2001) 3ALL ER page 756 said

*"...taking other steps should be a clear indication of one's preparedness to proceed in the proceedings".*

This definition is in my view still relevant today though with a different viewpoint, currently to demonstrate a prima facie existence of a dispute between the parties that may be subject to arbitration.

Insisting on the competence of the application, Respondent's counsel said, section 14(1) of the arbitration Act, allows parties to commence arbitration regardless of any pending dispute. I agree, but the powers provided for under section 14 (1) are not without limitations as suggested by the applicant's counsel. The requirement of answering the main claim before making an application in favour of arbitration is conveyed by the last sentence in the said provision which among other things sets timelines for the making of the said application. The section reads:

*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. (Emphasis added)*

The catching phrase here is "***not later than the date of submitting his first statement of claim on the substance of the dispute***". Thus, even if we were to go by the above provision, still the applicant would not have evaded the need to acknowledge the main claim before filing this application.

As hinted above, the applicant's application was instituted prior to compliance with the above mandatory provisions of the law. This alone makes the application incompetent, liable to be struck out. The preliminary objection is thus sustained leading to the striking out of the application for being incompetent. Costs to follow the events.

Order accordingly

**DATED at DAR ES SALAAM this 24th day of FEBRUARY 2023.**



**E.Y. MKWIZU**

**JUDGE**

**24/02/2013**

