IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 205 OF 2022

LEO DEVELOPERS LTD ..... PLAINTIFF

VERSUS

B.H. LADWA ..... DEFENDANT

RULING

21st & 22nd August, 2023

I.C. MUGETA, J.

The defendant prays for stay of the proceedings pending reference of the dispute to arbitration. The application was made orally by counsel for the defendant, Mr. Nehemiah Nkoko, learned advocate. He intimated to the court the intention to raise that matter for court's determination when PW1 completed to give evidence. However, the actual application was made after PW2 testified and the plaintiff closed her case.

Mr. Baranaba Luguwa, learned counsel for the plaintiff has resisted the prayer for several reasons. **Firstly,** that the application is belatedly made after filing the written statement of defence. **Secondly,** that there is no formal application before the court and **thirdly,** that the document which has the arbitration clause is not part of the contract because it was not

signed by the parties and **lastly,** that no party has issued a notice to refer the dispute to arbitration as required by the arbitration clause.

There is no dispute that clause 40 of the Agreement and Schedule of Conditions of Building Contract which is part of the contract between the parties per paragraph 2(a) of the contract provides for the requirement to refer any dispute arising out of the contract to arbitration. However, as a matter of fact, and as argued by Mr. Luguwa, the said agreement and schedule was not signed by the parties. This notwithstanding, it is my view that the same is binding between the parties because its terms were executed. The execution of its terms by both parties is equivalent to signing. Further, Section 10 (3) (a) of the Arbitration Act recognizes unsigned agreements. Therefore, the contract between the parties is subject to arbitration in case a dispute arises.

The question of notice to the other party is two faceted. **Firstly,** is notice to the other party of the intention to refer the dispute to arbitration before court proceedings and **secondly,** is notice of intention to apply for stay of proceedings where a suit has already been filed. The former condition is provided under clause 40.1 and 2 of the Agreement Schedule while the

later is a matter of law stipulated under section 15 (1) of the Arbitration Act [Cap 15 RE 2020] (the Act) which reads:

> *"A party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counter claim 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 the matter".* [Emphasis is mine]

In this case, the party applying for stay has never given notice to the other party before or after these proceedings. Proceedings cannot be referred to arbitration by order of the court where such notice has never been issued.

I have read the Act, the power of parties to refer the dispute to arbitration where there is arbitration agreement is provided under section 14(1). It reads:

> *"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 appiies not later that 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 is mine]

Conditions for the stay are under section 15 of the Act. The most relevant part for the purpose of this ruling is section 15(3) which reads:

"A person shall not make an application under this section unless he has taken appropriate procedural step to acknowledge the legal proceedings against him or ***has taken any step in those proceedings to answer the substantive claim****".* [Emphasis is mine]

In my considered opinion the phrase "so applies not later than the date of submitting his first statement on the substance of the dispute" in section 14(1) refers to the filing of Written Statement of Defence (WSD) or a counter claim. If this is the case, then an application for stay pending reference of the dispute to arbitration cannot be done after filing the WSD as argued by Mr. Luguwa. This has been the position of the law as states in the case of **Union Congress of Tanzania (TUCTA) vs. Engineering Systems Consultants Ltd,** Civil Appeal No. 51 of 2016, Court of Appeal – DSM (unreported) where at page 21 it was held:

"We agree with both the learned Judge and the respondent's counsel in that after filing 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".

In this case, therefore, the defendant waived the right to refer the dispute to arbitration upon filing of the written statement of defence.

For the foregoing, it is my view that, section 14(1) and 15(3) of the Act are somewhat in conflict. The phrases *"unless he has taken appropriate procedural step to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim"* in section 15 (3) presupposes that the stay order is subject to the filing of the written statement of defence. It is upon the Hon. the Attorney General to ensure the provisions of section 14 and 15 of the Act are in sync.

Further, the application was made after the plaintiff had marshaled her evidence. I am settled in my mind that, referring a dispute to arbitration under a situation like that can enable the defendant to take advantage of the evidence already disclosed by the plaintiff. Such arbitration proceedings cannot be termed to be fair.

Mr. Nkoko's argument that under paragraph 1 of the 2nd schedule to the CPC a reference can be made any time before judgment is untenable. That

paragraph applies where the parties are in agreement which is not the case here.

Mr. Luguwa also complained that the application of this nature ought to be formal. However, this is not a condition under the Act. Since oral applications are permissible under Order XLIII Rule 2 of the CPC, this application was properly made as it was consented to by the court.

In the event, I hold that the application has no merits. I dismiss it. Costs in the course.

I.C. Mugeta

JUDGE

22/08/2023

Court: Ruling delivered in chambers in the presence of Barnabas Luguwa, learned advocate for the plaintiff and Nehemiah Nkoko, learned advocate for the defendant.

Sgd: I.C. Mugeta

JUDGE

22/08/2023