

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

AT DAR ES SALAAM.

CIVIL CASE NO. 128 OF 2023

**MOHAMED RASHID LEMA
@ LEMA MOHAMED RASHID-----PLAINTIFF**

VERSUS

EDWARD BIYOMA-----1ST DEFENDANT

CHINA FACTORY TO HOME COMPANY LTD-----2ND DEFENDANT

RULING

Date of last Order: 19th March, 2024.

Date of Ruling: 19th April, 2024.

A. A. MBAGWA, J.

This is a ruling in respect of the preliminary objections raised by the defendants to wit;

- 1. That this Honorable Court has no jurisdiction to try this matter due to the agreement between parties herein.*
- 2. That this matter has been prematurely brought before this Honourable Court contrary to the agreement between parties herein.*



Briefly, the factual background of the matter goes as follows; The plaintiff herein MOHAMED RASHID LEMA@ LEMA MOHAMED RASHID, a natural person who has described himself as a Managing Director of Mokha Cargo Co. Ltd. by way of a plaint, instituted this suit against the defendants jointly for an order of payment of United States Dollars One Hundred Nine Thousand Seven Hundred Seventy-Seven (USD 109,777) only being the plaintiff's entitlements after a mutual termination of a partnership, among other reliefs. Upon service of the plaint, the defendants filed their joint written statement of defence disputing the plaintiff's claims in the plaint. In addition, the defendants challenged the competency of the suit on two grounds as hereinabove indicated.

On 7th September, 2023, this Court (Hon. Pomo, J) ordered the preliminary objections to be argued by way of written submissions and fixed a schedule for filing the same. The filing schedule was complied accordingly. I thus commend both learned counsel for their industrious submissions for and against the preliminary objections. Nevertheless, I will not reproduce their submissions verbatim to avoid unnecessary lengthy ruling.

A handwritten signature in blue ink, appearing to be 'A. Pomo', is written over a horizontal line. There are some additional scribbles and lines below the signature.

To start with the 1st preliminary objection, Mr. Richard Gerald Limihagati learned Counsel for the defendants pegged the objection on Clause VIII of the said partnership agreement which provides as follows;

"VIII, retreat: partners can freely withdraw from the partnership, in accordance with the partnership opening agreement, in accordance with the principle of Properties, equality, fairness and honesty, the two sides jointly negotiate compensation matters to do a good job of property and debt division and sign a withdrawal agreement. If the transfer of the equity must be transferred to the partners, the third party may not be (if the transfer of the third party is deemed to be an invalid transfer). If the negotiation fails , you can appeal to the china people's court." (Emphasis added)

Mr. Limihagati had it that any claims by the plaintiff ought to be instituted before the China Peoples' Court and not before this Honourable Court as done by the plaintiff. To buttress his submission, the defendants' counsel referred the Court to the decision of **Harold Sekiete Levira & Another**



vs African Banking Corporation Tanzania Limited (Bank Abc), Civil Appeal 46 of 2022, CAT at Dar es Salaam, in which the Court of Appeal stressed on the sanctity of a contract as it binds the parties to the said contract and neither courts nor third party should interpolate or tamper with the terms and conditions therein. He further stressed that, since the parties had agreed on the forum of the court, such an agreement is binding upon the parties. To bolster his position, he cited the case of **Scova Engineering S.P.A & Another vs Mtibwa Estates Ltd & Others**, Civil Appeal 133 of 2017, CAT at Dar es Salaam.

In reply, Mr. Mashaka Ngole learned advocate for the plaintiff strongly opposed the objections saying that they were misconceived and did not meet the tests of being preliminary objections as enunciated in the celebrated case of **Mukisa Biscuit Manufacturing Company Limited v. West End Distributors Limited** (1969) EA 696.

With regard to the 1st preliminary objection, Mr. Ngole submitted that this Court has jurisdiction to entertain the suit. He expounded that clause VIII of the partnership agreement which refers to the China People's Court ought to be interpreted in line with the pleaded cause of action and the reliefs sought by the plaintiff. He further elaborated that the appeal to the China People's Court could only be lodged if negotiations had failed. The



learned counsel submitted that the instant suit arises from a different scenario. He submitted that in this case, the plaintiff and defendants mutually agreed to terminate the said partnership and thereafter made an audit of the income and capital injected by each of the parties as pleaded under paragraphs 7, 8, 9, and 10 of the plaint. As such, according to the plaintiff's counsel, the cited clause only caters to a situation where either party withdraws from the partnership and not under the circumstances of this case. He thus prayed the Court to overrule the 1st preliminary objection.

Pertaining to the 2nd objection, the plaintiff's counsel adamantly submitted that the suit was not premature because clause VII does not apply. He clarified that clause VII relates to disputes which arise out of the operation of the partnership. Mr. Ngole forcefully submitted that the partnership was dissolved and the plaintiff is claiming the money which he injected into the partnership. In a nutshell, it was the counsel's submission that the dispute in this case is not about the operation of the partnership, and for that reason, the provisions of clause VII cannot be invoked. He finally prayed for the Court to overrule the 2nd preliminary objection as well.

In rejoinder, Mr. Limihagati maintained that the preliminary objections raised are pure points of law. He further stressed that the parties are duty



bound by the terms of the partnership agreement including the choice of court as stipulated therein. He thus, implored the Court to uphold the preliminary objection and dismiss the suit with costs.

I have keenly canvassed the rival written submissions and thoroughly scanned the pleadings. To start with, the 1st preliminary objection, I find it pertinent to reproduce the provisions of clause VIII which is the bone of the objection. It provides;

" VIII, retreat: Partners can freely withdraw from the partnership, in accordance with the partnership opening agreement, in accordance with the principles of properties, equality, fairness, and honesty, the two sides jointly negotiate compensation matters to do a good job of property and debt division and sign a withdrawal agreement." If the transfer of the equity must be transferred to the partner, the party may not be transferred (if transfer of the third party is deemed to be an invalid transfer). If negotiation fails, you can appeal to the China People's Court."

Throughout the pleadings and submissions, there is no dispute whatsoever that the parties herein entered into a partnership agreement. It is also common cause that clause VIII of the said partnership agreement



requires the parties to refer the dispute to the China People's Court in the event of disagreement on the termination of the partnership. Whereas the defendants' counsel argued that the jurisdiction of this court is ousted by virtue of clause VIII, Mr. Ngole insists that this court is vested with the requisite jurisdiction to entertain the matter in that the cause of action is not originating from either the breach, withdrawal or termination of the partnership agreement rather it is for the recovery of US\$ 109,777.

With due respect to the plaintiff's learned counsel, his argument lacks support from the plaintiff's pleadings. At paragraph 4(a) of the plaint, it is pleaded as follows;

"4. That, the Plaintiff claims against the Defendants, jointly is as follows;-

a) For a recovery of the sum of USD 109,777/- from the 1st and 2nd Defendants being the Plaintiff's entitlements after a mutual termination of a Partnership deed".

From the above averment in the plaint, it needs no miracle nor does it require extraordinary intelligence for one to appreciate that the claims in this suit arise from the termination of a partnership whose dispute



settlement mechanism is provided under clause VIII. It is unequivocally clear that the parties agreed to refer the dispute to the China People's Court. It is a cardinal principle of law that the parties are bound to the terms of the agreement which they freely entered. **Scova Engineering S.P.A & Another (supra).**

It is also the settled position of law that where parties agree on the forum to resolve their disputes, such term binds the parties. In the case of **Sunshine Furniture Co. Ltd. v. Maersk (China) Shipping Co. Ltd., Civil Appeal No. 98 of 2016**, CAT at Dar es Salaam, the Court, while deliberating on akin situation, held;

'Where in a bill of lading, the parties express choice of forum of a court, that agreement has always been found to be binding on them'.

Furthermore, section 7 of the Civil Procedure Code recognises agreements that oust the jurisdiction of the Court. It provides;

"7 - (1) subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."



In view thereof, it naturally follows that this Court has no jurisdiction to entertain the present suit. Consequently, I find merits in the 1st preliminary object and I accordingly uphold it.

Now, since the 1st preliminary objection suffices to dispose of the matter, I find it a redundant exercise to delve into the 2nd preliminary objection.

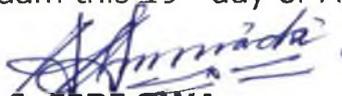
In the upshot, the 1st preliminary objection is meritorious and hence sustained. Consequently, I strike out the suit with costs.

It is so ordered.

Rights of appeal explained.

Dated at Dar es Salaam this 19th day of April, 2024.




A.A. MBAGWA
JUDGE
19/04/2024