IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA SUB-REGISTRY)

AT SONGEA

MISC. CIVIL APPLICATION REF: NO. 20231127000087505

SONGEA MUNICIPAL COUNCIL .....1ST APPLICANT

HON. ATTORNEY GENERAL.....2ND APPLICANT

VERSUS

LUKOLO COMPANY LIMITED.....RESPONDENT

RULING

Dated: 24th April & 13th June, 2024

KARAYEMAHA, J.

This application has been taken at the instance of the applicants who were disgruntled by the adjudicator's decision entered in favour of the respondent. The 1st applicant was part of the agreement entered between her and the respondent on 21/3/2015 in respect of construction relating to rehabilitation of roads to Asphalt concrete standard (8.6km). In case the relationship turned acerbic, the dispute settlement mechanism was a two-tire mechanism commencing with adjudication. A dissatisfied party was required to refer the matter to an Arbitrator. The question that will be answered in the due course when the Arbitrators' doors would be knocked.

The contention by the applicants is that when a dispute arose between parties, the same was referred to an Adjudicator before the

National Construction Council. The Adjudicator presided over the matter and delivered the decision on 11/5/2019 in favour of the respondent. Apparently, the decision was delivered without the applicants' knowledge but after efforts and follow-ups they obtained the copy on 18/11/2019. Realising that the 1st applicant was aggrieved, she referred the matter to the Arbitration conforming to the conditions of the contract.

The applicants' consternation is that, the respondent refused to take part to the arbitration proceedings and referred the matter to the Court of Law. The alleged omissions are considered to constitute a enormous breach of the agreement which set forth the mode of dispute settlement.

Feeling profoundly affronted by the respondent's path, the applicants have resorted to filing this application urging this court to stay proceedings in Civil Case No. 4 of 2023 pending a referral of the dispute to arbitration.

The application has been preferred under the provisions of sections 15(1), (2), (3) and (4) of the Arbitration Act, Cap. 15 R.E. 2020 (hereinafter the Arbitration Act), Order XLIII and section 95 of the Civil Procedure Code [Cap. 33 R.E. 2019] (hereinafter the CPC). Accompanying the application is the affidavit of Rehema Mtulya, learned

State Attorney from the Office of the Attorney General, in which the grounds for the prayer sought are pleaded. The application is also accompanied by assorted documents, including a copy of the Adjudicators' decision and a copy of a contract.

The application has encountered a formidable challenge from the respondent. Through a counter-affidavit, sworn by Burton Nsemwa, the applicants' contentions have been played down. The deponent of the counter-affidavit is valiantly opposed to the contention that the applicant took a step to initiate the arbitration process. While maintaining so, it has taken the view that the application ought not to see the light of the day as it was taken by an event due to the fact that preferring the dispute arbitration is time barred.

Disposal of the appeal was ordered to proceed by way of written submissions consistent with a schedule which was drawn. Whereas the applicant enjoyed the able legal services of Rehema Mtulya, learned State Attorney, the respondent was represented by Dr. Fredrick Ringo, learned Advocate.

Before I delve into the details or respond to that real question, let me deal with the points of law raised by the respondent in her reply submission.

The first point is that the application incurably defective. Respondent contends that the applicant's application contravenes section 14(2) of the Arbitration Act for not attaching to the affidavit in support of the application the original or duly certified arbitration agreement. Unfortunately, the applicants did not respond to this point of law.

Significantly, the law, that is, section 14(2) of the Arbitration Act mandatorily requires the application to be accompanied by the original arbitration agreement or a dully certified copy. The provision says it all that:

> *"(2) The application referred to in subsection (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof."*

In the current application, I agree with the respondent that the attached decision of the Arbitrator is neither an original copy nor a duly certified copy.

This defect is curable under the overriding objective. Courts have been imposed with a duty to uphold this objective whose root source is Article 107(2)(e) of the Constitution of United Republic of Tanzania, 1977 which provides *inter alia* that the court should not be bound by Technicalities in administration of justice. More-so, the court should

employ all available means to dispose disputes justly and timely. Of curse, the overriding objectives cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case. My assessment of the contravention inclines me to hold that the contravention does not go to the root of the matter.

The second point of law is that this court was not properly moved. The respondent submitted that citation of the law was incomplete. Her perception is that the applicants based their application on section 15(1)(2)(3) and (4) of the Arbitration Act but no rule or provisions under Order XLIII of the CPC was provided.

The applicants have bitterly opposed this argument on the ground that both provisions of the law have the same purposes. In order to appreciate their import, I find it apt to reproduce the two provisions for ease of reference. Section 15(1)(2)(3) and (4) of the Arbitration Act provides that:

> *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 step to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim.

(4) The court shall, except where it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, grant a stay on any application brought before it."

Order XLIII Rule 1 (i) of the CPC depicts that:

"Subject to any general or special direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy or District Registrar of the High Court in any proceeding before the High Court-

(i) to stay execution, restore property, discharge judgment-debtors and require and take security under Order XXI, rule 24."

Examination of the provisions of section 15(1)(2)(3) and (4) of the convey a message *and* guidance. It is clear that a party to an arbitration agreement against whom legal proceedings are filed in court 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. In the light of the foregoing illustration, it is enough for the applicant to cite that provision only because the court is brought into attention on what it is moved to do.

In the same vein, Order XLIII Rule 1(i) of the CPC talks about the Powers of Registrars. I am of the considered view that, whereas Order XLIII is inapplicable to the matter at hand, citing section 15(1)(2)(3) and (4) of the Arbitration Act only suffices to move the court to grant prayers sought in the chamber summons. Failure to cite the former, as the applicants have contended, has no substantial impact to the life of the application before this court.

In addition, assuming that the court was not properly moved, this court is not mandated to strike out the application but order rectification. This is in strictest compliancy with the overriding objectives. It is crucially important to note that failure to cite one of the enabling provisions does not render the whole application defective.

Let me now turn to the specifics. The thrust of the applicants' application, affidavit and submission is that they are praying for an order staying the proceedings in civil Case No. 4 of 2023 to allow parties resort

to the agreed mechanism of resolving their dispute. Their intention is to refer the adjudicator's decision to the arbitration mechanism of resolving the dispute. They referred this court to Clause 27 and 28 of the General Conditions of the Contract (GCC).

In her counter affidavit, the respondent deposed that the applicants did not refer the matter to the Arbitral Tribunal within the required 28 days stipulated in the contract thus making the referral to arbitration time barred. Henceforth, the arbitration agreement became inoperative and incapable of being performed. This court was therefore invited to determine in terms of section 15(4) of the Arbitration Act that the arbitration is both inoperative and incapable of being performed thus decline from granting the application for stay of execution. Contextually, the respondent is vesting this court with jurisdiction to determine whether the reference of the dispute to the arbitrator is time barred.

On my side, the starting point is that, the High Court and Court of Appeal have, in their several decisions, strictly insisted on observance of sanctity of contracts. It settled law that the role of the court in the circumstances is to enforce the terms of the contract and not to re-draft or order otherwise as against the freely agreed clauses of the contract. To cite some few examples, in the case of **Philipo Joseph Lukonde v.**

Faraji Ally Saidi, Civil Appeal No. 74 of 2019, the court of appeal promulgated that;

> ***Where parties have freely entered into binding agreements, neither courts nor parties to the agreement, should not interpolate anything or interfere with the terms and conditions therein, even where binding agreements were made by lay people.*** *This was brought out very lucidly in MICHJRA V. GESIMA POWER MILLS LTD [2004] eKLR where the Court of Appeal of Kenya discussed the construction of agreement for the sale of land which the trial court had found as matters of fact that the contract was "home-made" and contained several contradictory clauses framed in unusual terms. The Court of Appeal of Kenya advised against tampering with concluded agreements and to give effect to the intention of the parties as can be discoverable from their agreement:*
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> *"...That fact does not give room to this Court to tamper with the agreement. As Apollo, J.A. said in SHAH V. SH AH (1988)1 KLR 289 at page 292 paragraph 35, in Respect of an agreement drawn by laymen: One must bear in mind that this agreement was drawn up by laymen. They did not use any legal language and the court can only Interpret the sense of their agreement and not interpolate it with any technical legal concept.* ***If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties."*** [Emphasis added].

Moreover, the court of appeal in the case **of Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 had these to say:

> *"It is settled law that parties are bound by the agreement they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in* ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** *[2000] TLR 288 at page 289 thus: The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement".*

The message conveyed by the cited authorities is that strictly speaking, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute.

In the instant case, parties entered into construction agreements with adjudication and arbitration dispute clause as gathered in clause 27 and 28 of the GCC. Clause 27 provides that:

"If the contractor believes that a decision taken by the project manager was either outside the authority given to the project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the project manager's decision."

Clause 28.1 states that:

'The adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute."

Sub clause 2 of clause 28 depicts that:

"The adjudicator shall be paid by the hour at the rate specified in the Tender Data Sheet and Special Conditions of Contract, together with reimbursable expenses of the types specified in the Special Conditions of Contract, and the cost shall be divided equally between the employer and the Contractor, whatever decision is reached by the adjudicator. Either party may refer a decision of the adjudicator to an arbitrator within 28 days of the adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the adjudicator's decision will be final and binding."

Subclause 3 of clause 28 depicts that:

"The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and, in the place, shown in the Special Condition of Contract."

Lastly, clause 62 of the GCC provides for circumstances under which breach can be gathered, thence terminated by either party.

An articulate construction of the contract enlightens that the parties' rights and disputes settlement mechanism are managed by the free entered contract by them herein. In the absence of any amendment of the agreed terms, the parties herein are still bound by the terms of the contract, including reference of dispute to adjudication and arbitration.

Furthermore, parties agreed that the arbitration shall be conducted in accordance with rules, regulations and laws of the United Republic of Tanzania.

Now, the vexing question is which option parties ought to have taken following the adjudicator's decision which is final and binding to the parties, in case of breach. As stated above, the parties agreed to be governed by the rules, regulations and laws of the United Republic of Tanzania. These laws include the Tanzania Arbitration Act, Cap 15 R.E 2020 and its rules, the Regulations such as the National Construction Council (Adjudication procedural Rules, 2017) and Tanzania Institute of Arbitrators (Adjudication General Conditions and Procedural) Rules, 2021 Edition. As pointed out by my brother Justice Marata, in **Bogeta**

Engineering Limited v. Kampala International University Dar es Salaam Constituent College @ Kampala International University @ Kampala International University Limited, Civil Case No. 226 of 2018 all these laws are all silent on the procedure to be taken in challenging it, legal status of the adjudicator's decision and whether it can be enforced as an arbitral award. In view thereof, there is no other law in Tanzania which provides for status and procedure to be taken against the adjudicator's decision which is final and binding.

I again subscribe to the dictum in **Bogeta Engineering Limited** (supra) that legally, the adjudicator is created for the purposes of settling small differences between the parties during execution of the contract. The rationale behind is to promote quickest disposition of differences during execution of contract as opposed to arbitration which usually takes longer to come to an end.

The contract allows parties to the same to assail the adjudicator's decision through arbitration. In my view, whether the applicant delayed or not to refer the matter to the arbitrator, parties are still bound by the agreement. This view makes me differ with Dr. Ringo on the perception that the mere fact that the applicant failed to refer the matter to the arbitrator within 28days of the adjudicator's decision automatically

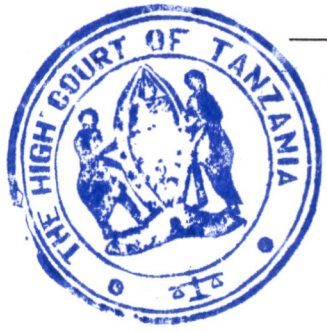
empowered this court to deal with the issue of limitation of time. This issue, in my considered view, has its own mode and manner of dealing with it. I take that view on the premises that the arbitrator has to conduct a hearing on the issue of time limitation and give a decision. It may appear that the applicants have good reasons for delay. This court is not an avenue to look into any reason and or not extend time but to look into the application for stay of civil proceedings currently pending in this application.

In this application, the applicants are eager to have the mechanism of resolving a dispute by first invoking the intervention of the arbitrator before engaging this Court. I find force in their argument because that is what the contract demands. Reasons objecting grant of the prayers in the chamber summons are good but, in my view, they are misplaced.

Consequently, in view of this court findings this application is hereby granted meaning that Civil case No. 4 of 2023 is hereby stayed to pave way for the arbitration process to take place. Costs to be in the due course.

It is so ruled.

DATED at **SONGEA** this 13th day of June, 2024



J. M. KARAYEMAHA
JUDGE