

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 26 OF 2004

MR. BALDEV NORATARAM VARMA....1ST PLAINTIFF
MR. VIKAS VARMA.....2ND PLAINTIFF
NATIONAL FURNISHERS LIMITED.....3RD PLAINTIFF

VERSUS

MR. ROBERT SCHELTENS.....1ST DEFENDANT
MR. DAVID RYAN SCHOLZ.....2ND DEFENDANT

R U L I N G

KIMARO, J.

The plaintiffs are suing on an agreement which was executed by the parties on the 1st January 2003. They are praying for:

- “ (a) *payment of USD 275,000,00;*

- (b) *payment of USD 36,000.00 being the interest that lawfully accrued on the principal sum of USD 1.2 million from 6th January to June 2003 when it was paid;*

- (c) *payment of interest on (a) and (b) at 6% from the date each instalment fell due until full and final payment;*

- (d) *payment of general damages for breach of contract;*

- (e) *interest on the decretal sums at the Court rate from the date of judgment to the date of full and final payment;*
- (f) *costs of the suit inclusive of the court and legal fees with interest thereon a court rate from the date of the suit till full and final payment; and*
- (g) *any other relief the Hon. Court may deem fit and proper to grant.”*

The defendants have filed a petition under Section 3 and 6 of the Arbitration Act (Cap 15) and Rules 5 and 6 of the Arbitration Rules 1957. The petitioners are praying for an order for stay of the proceedings pending reference to Arbitration pursuant to Clause 12 of the agreement upon which the plaintiffs are suing.

The Agreement is annexed to the plaint as Annexure “PLFI.” The petitioners assert that they are ready and willing to do all things necessary for causing the differences between the parties be determined by arbitration in accordance with the agreement.

Clause 12 of the Agreement (Annexure “PLFI” reads:

“ 12. This Agreement is being made on good and mutual understanding of all the parties to it. In event there will arise any dispute or misunderstanding between any or amongst the parties hereto relating to the interpretation

or implementation of this agreement, then such dispute or misunderstanding shall be resolved amicably by the parties themselves failure of which the same shall be referred to two impartial arbitrators each chosen by each party and whose decision shall be final and binding on all the parties involved.”

The Learned Advocates appearing in this petition are Mr. Mponda from Mkono and Company Advocates for the petitioner (Defendants) and Mr. Kamugisha from Muganda & Kamugisha Advocates for the respondents (plaintiffs). They filed written submissions in support of, and in opposing the petition as ordered by this court on 13/07/2004.

Mr. Kamugisha made preliminary observations which in my considered opinion must be disposed off first before going so into the merits or otherwise of the petition.

Mr. Kamugisha made remarks on the amount of fees which the plaintiff paid when the suit was filed. He said the plaintiffs paid T.shs 11,648,335 and this amount excludes legal fees and incidental expenses. Mr. Mponda's response was that this is not a relevant consideration in the determination of the petition. I entirely agree with Mr. Mponda. The Advocates are duty bound to make a thorough research before filing the cases in court. They should not seek sympathy of the court because of the amount of fees paid. Indeed if the amount of fees payable is huge, it is in itself an important factor

for consideration before a final decision is made on whether the case should be filed at the particular or not. In other words it is important to ensure that all the pre requisites are satisfied before the suit is filed in court. The plaintiff is suing on an agreement whose terms are very clear. He should have foreseen the consequences of rushing to court before ensuring that all the pre requisites were met.

Another point raised by Mr. Kamugisha is that the petition was filed prematurely because the petitioners had not made appearance in court before they filed the petition. The court was referred to Section 6 of the Arbitration Ordinance which is the basis of the petition itself. Mr. Kamugisha argued that the filing of the petition before making appearance makes the petition improper, irregular and renders it incompetent. He argued further that although he did not raise the objection on impropriety or irregularity, it is a point of law which can be raised and determined at any time. He cited the case **Anwar Z. Mohamed Vs Said Selemani Masuka** Civil Reference No.18 of 1997 in which the Court of Appeal held that there is no law which precludes a party from raising a new point of law. I entirely agree with Mr. Kamugisha that this is the position in law. A point of law can be raised at any stage of the proceedings and even at the appellate or revisional level.

However, the issue here is whether it was mandatory for the petition for stay of the proceedings to be filed after the petitioner entered appearance.

My considered view is that it was not mandatory. This court takes judicial notice under Section 59 of the Law of Evidence Act, 1967 of the amendments which were made to the Civil Procedure Code 1966 vide Government Notice No.422 of 1994. The amendments reduced the time for the various events which take place in Civil proceedings. The purpose of the amendments was to expedite finalization of civil cases. Admittedly, the amendments did not cover all the areas. As a result, the amendments have brought discrepancies between the provisions which were amended and those which were not amended. This problem will require another go through of the Civil Procedure Code 1966 in order to synchronise the discrepancies currently existing in the law.

The petitioners were served with a summons for filing a written statement of defence. The court records shown that the summons were served on 25/05/2004. The summons required the petitioners/Defendants to file a written statement of defence within 21 days. The case was called for a mention on 28/05/2004. Mr. Kamugisha submittedly correctly that the petitioners/defendants did not enter appearance on that day. The case was set down for another mention on 14/06/2004. On 9th June 2004 the petitioners defendants filed this petition.

Going by sequence of events, that is the summons and the initial notice which was served on the petitioners and the requirement of the law that petitioners/applicants file an application before filing the written statement of defence, I do not see any harm in the

petitioners taking that step before entering appearance I am in full agreement with Mr. Mponda that the sole purpose for requiring the petitioner to enter appearance before filing the petition is to avoid adverse orders against the petitioner before the petition is filed and at the same time to inform the court of the steps intended to be taken before the filing of the written statement. But whether the petition is filed before entering appearance or after entering appearance it makes no difference so long as this step is taken before the filing of the written statement of defence. I do not agree with Mr. Kamugisha that filing a petition before entering appearance makes the petition premature and render it incompetent. I fail to see the rationale in the argument. In the case of **Kassam Ahmed Vs Mohamed Dewshi & Sons Ltd** 1973 LRT No.42 Hon. Justice Onyiuke elaborated on the necessity of the petitioner entering an appearance to prevent judgment being entered against him. He was speaking of a circumstance where the petitioner/defendant was served with summons to appear. In this case the petitioners were served with summons to file written statement of defence. They had to do something before filing the written statement of defence. Arguing that they had to appear before filing the petition does not make sense. Time for filing a written statement of defence is specifically provided for. This period had to be intercepted before it expired. At the same time the petition had to be filed before filing written statement of defence.

Coming to the petition itself. It is conceded that the agreement forming the basis of the suit and the petition contains an arbitration

clause. It is also conceded that the petition was filed before the petitioners filed their written statement of defence to the suit and before taking any step in the proceedings.

Mr. Kamugisha submitted correctly that the issue which has to be determined by this court is whether the petitioners have satisfied the court so as to order stay of all further proceedings arising under Commercial case No.26 of 2004 pending reference to the Arbitration. This court has been referred to the cases of **Construction Engineers and Builders Versus Sugar Development Ltd Corporation** (1983) TLR 13 and **Tanzania Tea Blenders Limited (under Liquidation) Versus Lushoto Tea Company and Another** (Commercial Case No.32 of 2003) unreported, **Motokov V auto Garage Ltd and Others** [1970] EA 249 and **Kassam Ahmed V Mohamed Dewshi & Sons 1973 LRT 42 and others**. The authorities list down factors to be considered by the court before a decision is made on whether the matter should be referred to arbitration:

- “i. It has to consider the precise nature of the dispute which has arisen between the parties.*
- ii. Whether the dispute is one within the terms of the arbitration clause, that is relevant to the terms of the contract binding the parties (in the instance petition the sale agreement).*

- iii. *Whether the matter is one that both the parties agreed to be referred.*
- iv. *Whether the petitioner/applicant has filed the application at anytime after appearance but before filing the written statement of defence or taking any other steps in the proceedings.*
- v. *If the court is of the view that there is no sufficient reason why the matter should not be referred, then it should stay the proceedings and refer the matter to arbitration.*
- vi. *The court should also satisfy itself that the applicant was at the time the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of arbitration.”*

As submitted earlier there is no dispute that the petitioner complied with all the requirements for submitting the petition.

Mr. Kamugisha submitted that the petitioners have not exhibited a good cause and sufficient reasons why this court should order stay of the proceedings because they have breached the contract and they will continue to enjoy the benefit of their breach at the

expenses of the respondents. Mr. Kamugisha continued to submit that the petitioners are not the kind of people who would initiate and prosecute arbitration proceedings and abide by the outcome. The court was referred to the decision of Hon. Justice Mrosso as he then was in the case of **Joseph Mdeo & Four Others Vs John K. Kisoka** High Court Misc. Civil application No.100 of 1991 (unreported).

Mr. Mponda on the other hand submitted that the petitioners/defendants have complied with the law and have proved existence of all the factors sufficient to grant stay of the proceedings and require the parties to submit to arbitration.

As submitted by both Advocates the court's power to order stay and refer the parties to arbitration is discretionary but the discretion must be exercised judicially. There are guiding factors. The factors for consideration have been listed above.

The plaintiff has sued for breach of an agreement which contains an arbitration clause. The agreement requires the parties to submit to arbitration where there is a dispute or a misunderstanding. The petitioners filed the petition in time before taking any step in the proceedings. The petitioners made a statement of their willingness and readiness to do all the things necessary to the proper conduct of the arbitration. Mr. Kamugisha said that they are not the kind of persons who would initiate and prosecute arbitration proceedings and abide by the outcome. With respect to Mr. Kamugisha this reason

is far from convincing. He can initiate the arbitration himself. If he wins there are procedures for the enforcement of the award. In fact this is a step which he ought to have taken before coming to court.

Considering the fact that the parties entered into an agreement and on their own free will, agreed to submit to arbitration in the event of a misunderstanding or a dispute arising between them, and the petitioners have complied with the requirement for the filing of the petition, there is no sufficient reason why the proceedings should not be stayed pending reference to arbitration.

I order that the proceedings be stayed pending reference to arbitration.

N.P.KIMARO,
JUDGE
07/09/2004

Date 10/09/2004

Coram: N.P.Kimaro, Judge

For Petitioners – Mr. Mrema.

For Respondents – Mr. Kamugisha.

Court: Ruling delivered today.

Order: The proceedings are stayed pending reference to arbitration.

I Certify that this is a true and correct
of the original order Judgment Ruling
N.P.KIMARO,
JUDGE
10/09/2004
Registrar Commercial Court Dsm.
Date 10/9/04