IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.75 OF 2010

ENGEN PETROLEUM (T) LIMITED ..... PLAINTIFF

VERSUS

WILFRED LUCAS TARIMO T/A

SANGO PETROL STATION ..... DEFENDANT

Date of last order: 22.07.2011

Date of final submissions: 22.06.2011

Date of ruling: 09.08.2011

RULING

MAKARAMBA, J.:

This is a ruling on a preliminary objection on a point of law the Defendant's Counsel, Mr. A.A. Shayo raised on the 16th day of December 2010 in the written statement of defence against the summary suit the Plaintiff lodged in this Court under Order XXXV of the Civil Procedure Code on the 31st day of August 2010. The preliminary objection is to the effect that:

> ***"The case is premature, incompetent and unmaintenable being in contravention of the terms and conditions laid out in the Marketing Licence Agreement."***

The record shows that the Defendant having been granted leave by this Court to defend the summary suit, on the 29th day of November 2010 lodged its written statement of defence raising therein the above mentioned point of preliminary objection, which by consent of the learned Counsel for the parties was disposed of by way of written submissions and hence this ruling.

In his reply submissions the learned Counsel for the Plaintiff contends that the preliminary objection offends the test in **MUKISA BISCUITS MANUFATURING CO. LTD VS WEST END DISTRIBUTORS (1969) EA 696** for a preliminary objection that it should raise a pure point of law argued on assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained. The Plaintiff's Counsel submits further that the submissions of the Defendant's Counsel in support of the preliminary objection and the annextures thereto, they are to the effect that they require the court to ascertain whether or not an amicable settlement was conducted or whether it failed. In his submissions the Defendant's Counsel outlined in greater detail the many aborted attempts at amicable settlement the parties made at the instance of the Plaintiff but it is the Plaintiff who did not show up. Also in his rejoinder submissions the Defendant's Counsel spent quite a considerable amount of time elaborating on the aborted attempts at amicable settlement of the dispute between the parties and the import of arbitration, which is a process as distinguished from amicable settlement.

I wish to point out here that the gist of the decision in **MUKISA BISCUITS MANUFATURING CO. LTD VS WEST END DISTRIBUTORS**

(1969) EA 696 is to abhor the increasing practice by advocates of raising of points, which should be argued in the normal manner, quite improperly by way of preliminary objections which their Lordships in that case very strongly advocated that it should stop since it has the effect of unnecessarily increasing costs and on occasion confuse the issues. The position taken by their Lordships in that case against preliminary objections comes out very clearly in the words of Newbold at p.710 of that decision as follows:

> ***"... The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection.....The improper raising of points of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop."***

I can only add to this strong sentiment that an improperly raised preliminary objection not only prolongs the proceedings unnecessarily but it wastes not only the precious time of the court but that of the other party as well. Sometimes it can also be used by a party as a delaying tactic. A properly raised preliminary objection in my view saves the precious time of the court and of the parties by avoiding going into the merits of an otherwise meritless, frivolous, scandalous or vexatious matter at the earliest opportune moment in the proceedings. In my considered opinion, on the basis of MUKISA BISCUITS's case, a properly raised preliminary objection is the one which is arises as a pure point of law, argued on the assumption that all the facts pleaded by the other side are correct. If any

fact has to be ascertained or if what is sought is the exercise of judicial discretion, then the raising of a preliminary objection will be improper. The main quality of a preliminary objection is that it consists of a point of law which has been pleaded or arises by clear implication out of the pleadings and which if argued as preliminary objection may dispose off the suit. This in my view, is the reason why even our law as it stands now in this country, a party who is aggrieved by a decision of the court on a interlocutory matter which has the effect of disposing off the suit may appeal to the Court of Appeal against that decision, but not otherwise.

The issue for consideration in the present matter is whether the facts as pleaded or as they arise by clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit. At the centre of the controversy in this matter is the clause on "amicable settlement clause" in the Marketing Licence Agreement the Plaintiff, a limited liability company licensed to carry on the business of importing and selling petroleum products in Tanzania, and the Defendant, a natural person trading as Sango Petrol Station, concluded sometimes in 2008. Under the said Marketing License Agreement the Defendant was appointed a dealer/licensee of the Plaintiff for the purpose of exclusively selling and marketing petroleum products supplied by the Plaintiff at Sango Service Station in Mposhi Municipality. In the said Marketing License Agreement there is a Clause 20 which stipulates as follows:

> ***"Should any dispute arise between the parties in regard the interpretation of, the parties respective rights and obligation in terms of a breach of, any matter arising out of or***

termination of this Agreement, the parties shall meet forthwith at the offices of ENGEN and endavour to resolve the dispute amicably failing which either party may take such further actions as it deem fit."

The main contention of the Defendant's Counsel is that the Plaintiff never complied with the mandatory requirement of Clause 20 in the Marketing Licence Agreement and consequently the suit filed in this Court by the Plaintiff is therefore premature and un-maintenable. The Defendant's Counsel believes very strongly that the only issue that is to be considered by this Court in this matter is whether the parties reached the stage of none resolution of their differences to warrant the plaintiff to file the present suit against the defendant. In his submissions the Defendant's Counsel also makes very lengthy arguments all in an attempt to show that it is the Plaintiff who is solely to blame for not heeding to the several attempts by the Defendant to have the matter settled amicably between the parties, as evinced by the letter of the Defendant's Advocate dated 16/02/2009, which was replied to by the Plaintiff's Advocate in his letter dated 05/03/2009 (Annexture RD collectively) indicating that the parties will hold a settlement meeting in Dar es Salaam, which however at the instance of the Plaintiff, never materialized. In his reply submissions the Plaintiff's Counsel raises some serious doubts on the authenticity of the letter by the Defendant's Counsel and submits at length all in an attempt to show the efforts initiated by the Plaintiff in attempt to ensure that such amicable settlement takes place.

I should point here at the outset that the allegations and counter allegation raised by the Counsel for the parties as to whether or not there

were attempts at amicable settlement by the parties are unascertained facts which require evidence to establish. They cannot therefore be tackled as preliminary point and in any case they cannot conclusively dispose of the matter. This Court given the scanty evidence at its disposal cannot conclude that the facts as pleaded by the other side are correct. In any event even if the facts as pleaded if argued they may not at this stage dispose off the suit.

The Defendant's Counsel quotes a passage from an undisclosed source that:

> ***"where there is a clause in a Agreement stipulating what should be done before a party seeks relief in a court of law any suit instituted before the clause is complied with renders the suit premature and incompetent, and it has to be dismissed with costs."***

The Defendant's Counsel having quoted from the undisclosed source surmises that although Clause 20 in the Marketing Licence Agreement does not mention the word "Arbitration", but it is the same as in a suit, and in his considered view where "arbitration" is enclosed in the Agreement before that arbitration is carried out, the suit has to be dismissed with costs and prayed the same to happen in this suit. The Plaintiff's Counsel, in response having traversed the difference between amicable settlements and arbitration, submits that Clause 20 in the Marketing License Agreement only provides/requires the parties to meet for resolution in case a dispute arises from the interpretation of the agreement or the rights of the parties in the event of a breach and or termination of the Agreement. The

Plaintiff's Counsel submits further that for the prayers in the plaint, which is purely for the payment of outstanding amounts arising from dishonored cheques, the parties were not required to mandatorily meet to resolve the matter amicably under the provisions of Clause 20. Moreover, the Plaintiff's Counsel submits further, the Marketing License Agreement between the parties still subsists, and that in the plaint there is no mention of breach or misunderstanding between the parties arising from such breach or the termination of the Marketing License Agreement. The Plaintiff's Counsel insists that a review of the plaint and the prayers therein indicates that the plaintiff is only claiming for monies due and owing to it arising from dishonoured cheques issued by the Defendant and that there is no claim or prayer for the interpretation of the agreement or termination thereof and as such there was no requirement for arbitration as the Defendant's Counsel would wish this Court to believe. The Plaintiff's Counsel reiterates that time and again courts have stated that a claim for a liquidated sum arising out of the performance of a contract does not amount to a dispute that requires the referral of such to an amicable dispute resolution or even a dispute but without citing any case authority in that regard.

Responding on the likening by the Defendant's Counsel of amicable settlement to arbitration, the Plaintiff's Counsel submits quoting section 6 of the Arbitration Act, Cap.15 R.E. 2002, that the only remedy to a party to a submission, where there is in existence a commenced legal proceedings against any party to the suit in respect of any matter agreed to be referred to arbitration, is to apply to the court to stay the proceedings. The Plaintiff's Counsel submits further that in terms of section 6 of Cap.15, the

application to the court to stay the proceedings has to be made at any time after appearance and before filing a written statement of defence or taking any other step in the proceedings. The Plaintiff's Counsel further submits that however, the Defendant proceeded to file a written statement of defence and then this preliminary objection. Buttressing further the point on the mandatory requirement for a party seeking benefit of the arbitration agreement to apply for stay of the proceedings before filing of the written statement of defence or before taking any steps in the proceedings, the Plaintiff's Counsel cited to this Court the decision in **ASHAK KABANI & ANOTHER VS AYISI MAKATIANI & OTHERS Commercial Case No.265 of 2001** (unreported), a copy of which he availed to this Court, wherein Dr. Justice Bwana (as he then was) drew inspiration from the Indian case of **FOOD CORP OF INDIA VS YADOV ENGINEER CONTRACTORS (1992) AIR (SC) 1307** on this point where it was stated as follows:

> ***"...when a party files a written statement of defence, it discloses its defence, enters into a contest and invites the court to adjudicate upon the dispute. Once the court is invited to adjudicate upon the dispute, there is no question of then enforcing an arbitration agreement by forcing the parties to resort to the forum of their choice as set out in the arbitration agreement."***

The Plaintiff's Counsel surmises that even if the parties were invited to attend an amicable settlement of the matter, the steps taken by the Defendant in the proceedings of filing a written statement of defence amount to the defendant disclosing his defence to the court and therefore

submitting to the jurisdiction of the court. In rejoinder the Defendant's Counsel argues that the issue of arbitration is a new matter and as such it is irrelevant to the issue under consideration and urged this Court to ignore it.

The present matter in my view raises some very interesting issues in so far as the summary procedure is concerned and its relationship to the conduct of amicable settlement without the assistance of the court. The Defendant's Counsel on his part is asking this Court to ascertain whether or not an amicable settlement was conducted or whether it failed. The Defendant's Counsel insists that prior to the filing of this suit, the Plaintiff was mandatorily required under Clause 20 of the Marketing License Agreement to ensure that the parties met and attempted an amicable settlement and thus failure to do so makes the suit premature and incompetent.

As I intimated above and as rightly submitted by the Plaintiff's Counsel, the Court is being called upon to ascertain as to what transpired prior to the institution of this suit. This endeavour, as I said earlier on in this ruling, cannot be pursued as a pure point of law worth being raised by way of preliminary objection. In any event, and as rightly submitted by the Plaintiff's Counsel, the claim in the Plaint being for a liquidated sum of monies due and owing arising from alleged dishonoured cheques issued by the Defendant, does not amount to a dispute between the parties requiring them to meet and resolve. In any event, according to the law currently in vogue in this country, issuing a cheque which is dishonoured amounts to a criminal act. This would have sufficed to dismiss the preliminary objection.

However, there are some other critical issues, which require the undivided attention of this Court.

The Plaintiff's Counsel argues that Clause 20 in the Marketing Licensing Agreement does not oust the jurisdiction of this Court in resolving disputes. In the absence of any specific provision ousting jurisdiction of the court, the court would guard it rather jealously, the Plaintiff's Counsel further adds. This point, in my view, is closely linked to the issue whether parties can by consent agree not to submit to the jurisdiction of the court where there is in existence an arbitration clause. As rightly submitted by the Plaintiff's Counsel, Clause 20 in the Marketing License Agreement only provides for the parties to meet for resolution in case a dispute arises either from the interpretation of the agreement or the rights of the parties in the event of a breach and or termination of the agreement. As the Plaintiff's Counsel rightly submitted the claim is for liquidated sum arising out of the performance of a contract which does amount to a dispute, and therefore does not require reference to an amicable dispute resolution; that the Marketing Licensing Agreement between the parties has not been terminated and therefore still subsists; and that there is no mention in the plaint of any breach or misunderstanding between the parties as far as their rights arising from the breach are concerned. In the event and for the foregoing reasons even if this Court would come to a conclusion that prior amicable settlement of the dispute was mandatory under Clause 20, which for the reasons explained above it is not, the preliminary objection cannot stand.

Let me albeit very briefly touch on the relationship between applying for leave to defend in a summary suit, reference to arbitration and application for stay of legal proceedings before filing written statement of defence or taking any step. The procedure for a summary suit as stipulated under Order XXXV of the Civil Procedure Code is in two stages. First, the defendant upon being served with a copy of the plaint and summons has to apply for leave to appear and defend the suit. This means that it is only after the defendant has applied for and obtained such leave is he to appear and defend the suit by filing a written statement of defence. If this is the case then, as the Plaintiff's Counsel rightly submitted, since the Defendant's Counsel has likened the amicable settlement clause in the Marketing Licensing Agreement to "Arbitration Clause", which the Plaintiff's Counsel strongly objected to, in any case the only remedy available to the Defendant was proceed under the provisions of section 6 of the Arbitration Act by applying to this Court to stay the legal proceedings before filing his written statement of defence. Instead the defendant filed a written statement of defence and raised a preliminary objection therein seeking this Court to uphold it and dismiss the suit as being premature by the Plaintiff not abiding with the mandatory provision in Clause 20 of the Marketing Licensing Agreement to refer the matter to amicable settlement.

Looking at Clause 20 of the Marketing Licensing Agreement, I should say that one cannot seriously and with any vigour argued that that clause outs the jurisdiction of this Court. This is particularly so given that the Defendant having obtained leave to appear and defend the summary suit elected to file a written statement of defence but did not bother to apply

for stay of the proceedings in this very suit which he now claims to have been filed prematurely in view of the existence of a mandatory amicable settlement clause in the Marketing License Agreement. In his rejoinder submissions the Defendant's Counsel strongly objected to this proposal and argues that it is the Plaintiff who ought to have applied to have the suit stayed and not the Defendant. With due respect to the Defendant's Counsel, the law clearly stipulates that where a party to a submission commences a legal proceeding against any other party to the submission, a party to the legal proceeding may at any time after appearance and before filing a written statement of defence apply to have the proceedings stayed. Clearly the law envisaged the person who is to apply for stay of the proceedings to be the person who is under obligation to file a written statement of defence and that is the defendant not the plaintiff who commenced the proceedings. On this score I wish to associate myself fully with the views expressed by this Court in **ASHAK KABANI & ANOTHER VS AYISI MAKATIANI & OTHERS** (unreported) (supra), where the Indian case of **FOOD CORP OF INDIA VS YADOV ENGINEER CONTRACTORS** (supra). In the present suit the Defendant sought and obtained leave to defend a summary suit. The Defendant having lodged its written statement of defence to defend this suit, but without applying for a stay of the proceedings to implement what the Defendant's Counsel presumably thought it resembles an "*arbitration clause*" in Clause 20 of the Marketing Licensing Agreement, cannot be heard to complain that the Plaintiff has breached a mandatory provision and thus this suit be dismissed for having been filed in this Court prematurely.

Let me point out here that the law also envisages the existence of submission and a party to the submission applying for stay of legal proceedings commenced by a party to such submission. In any event in the present case there is no evidence of a submission to arbitration but there is only a clause on amicable settlement prior to submitting to the jurisdiction of the court. In my view amicable settlement is an outcome rather than a process as they may be various processes all aimed at reaching an amicable settlement of a dispute, arbitration being one such process.

It is for the foregoing reasons that the preliminary objection raised by the Defendant crumbles and accordingly it is hereby dismiss it with costs, which costs shall be in the cause. Order accordingly.

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R.V. MAKARAMBA
JUDGE
09/08/2011

Ruling delivered this 9th day of August 2011 in the presence of Mr. Salim Mushi, learned Counsel for the Plaintiff and in the absence of the Defendant.

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R.V. MAKARAMBA
JUDGE
09/08/2011

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