IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.71 OF 2011

BETWEEN

VITA GRAINS LTD ---------- PLAINTIFF

VERSUS

PRADEEPKUMAR LALJI GAJJA---------- 1ST DEFENDANT

MINAKSHI PRADEEP GAJJAR ---------- 2ND DEFENDANT

GK FARMS (Registered as a business name

Certificate No. 204357) ---------- 3RD DEFENDANT

RULING

BUKUKU, J

The plaintiff filed the main suit on 6th August, 2011, inter alia claiming from the defendants mandatory and declaratory Orders, injunction, with interest and costs. In their written statement of defence,

the defendants represented by Mr. Walli, have raised three points of preliminary objection namely:-

(i) The plaintiff has no cause of action against the 1st defendant
(ii) The plaint is bad in law;
(iii) That the Honorable Court has no jurisdiction to try the suit between the plaintiff and the 1st defendant.

The preliminary objection is strongly resisted by Ms. A. Kavishe, Advocate for the plaintiff. Parties were ordered to argue the preliminary objection by way of written submissions and a schedule was set down for the filing of the parties' respective submissions, to which both of them complied.

It is worth noting here that, as rightly observed by counsel for the plaintiff, the manner in which the preliminary objection was argued by the counsel for the defendants does not coincide with the manner in which it was initially framed in the written statement of defence. For reasons best known to themselves, the defendants made their main submission in relation to one of the points raised as part of their preliminary objection- to wit, that, this Honorable court has no jurisdiction to try the suit between the plaintiff and the 1st defendant, and then argued in passing, the issue of the plaint being bad in law. Under such circumstances, I will first confine myself on the point of jurisdiction since it fundamental in that, it goes to the very root of the authority of the court.

Now, what facts do we have at hand. The plaintiff and defendants entered into a written Agreement reflected in documents dated 27th July, 2010 and 19th August, 2010 of which time for performance was amended by a letter dated 4th March, 2011 (Collectively referred to as "the Agreement). In this Agreement, included is a clause of which reads as follows:-

"Dispute Resolution

In the event that we have a dispute regarding the terms contained in this agreement, we shall refer the matter to arbitration in Mauritius by a sole arbitrator, whose identity and terms of appointment we shall agree upon and whose costs we shall bear equally".

About 12 months later, they fell apart and the Plaintiff instituted this suit now pending before this court.

Arguing in support of the preliminary objection, Counsel for the defendants submitted that this court is called upon to adjudicate a suit based on an agreement whose terms were plain, clear, and lucid on the means used for dispute resolution as per clause 9 of the agreement dated 27th July, 2010 and therefore, the dispute at hand squarely falls under that arbitration clause (Clause 9 of the Agreement), and therefore, submits that, this Court does not have jurisdiction to entertain this dispute which should have been referred to Arbitration in Mauritius.

The plaintiff on the other hand strongly argues that indeed, the Agreement has an arbitration clause but, an arbitration clause contained in a contract, does not at common law oust the jurisdiction of a Municipal Court, making reference to Chitty on Contract 29th Edition Vol.1 General Principles. Also, citing at length the cases of **New Zealand Insurance Co. Ltd V. Andrew Spyron (1962) EA 74**. Counsel for the plaintiff further argued that, where one of the parties to the Contract which contains a submission to arbitration clause files in a Municipal Court and the other party wishes to have the dispute dealt with by arbitration, the latter party has to apply to the Court by way of a petition under the provisions of Section 6 of the Arbitration Act, Cap 15 R.E 2002 and ask the Court to stay the proceedings commenced before it pending arbitration.

Counsel for plaintiff concluded by submitting that, the preliminary objection should be dismissed because the Court has jurisdiction to determine the present dispute since it has a commercial significance; that the defendant has not petitioned the Court by way of a petition as required by rules of the Arbitration Rules and section 6 of the Arbitration Act, to stay the proceedings, rather the defendants are attempting to stop this Court from proceeding with the present suit by way of a preliminary objection and that, the defendant has filed a written statement of defence and therefore they have been disentitled even to petition the Court under Section 6 of the Arbitration Act, and therefore prays that the preliminary objection should be dismissed with costs.

In a brief rejoinder, Counsel for defendants heavily relied in a very recent Case of **B. v S. (2011) EWHC 691 (Comm)** 29th March, 2011 where the English Courts set aside a freezing order/ injunction and ruled that:

> *"the inclusion of a Scott V. Avery clause in the underlying contract (which provides that the parties must first be dealt with by arbitration before either party go to Court) does exclude the right of the parties to apply to the English Courts for injunction relief in support of arbitration proceedings commenced under the sale contract."*

Counsel for defendant surmised that, the above case clearly indicates and acknowledges an arbitration clause. It is his submission that, the reasons of having an arbitration clause is that, a party has to first establish liability by the agreed dispute resolution before making applications to Court. If this is simply considered a mere coincidence in an agreement giving one party the right to and supported by technicalities of a section in a law to bury the clause so deep that the other party wishing to implement it, has no choice but to definitely make this a land mark decision for years to come and in his view, learned Counsel for the defendants submitted that, this makes the arbitral clause irrelevant and dispensable in accordance to the laws of contract and in the course of difficulties in the modern commercial world.

Counsel for defendants therefore prayed this Court for the attention, appreciation and application of logic and reasoning in a strict legal

interpretation to the arbitration clause, and therefore, the suit be dismissed and uphold the preliminary objection with costs.

Before I proceed, it is worth nothing here that, as rightly observed by counsel for the plaintiff, the manner in which the preliminary objection was argued by Counsel for the defendants does not auger well with the manner in which it was initially framed in the written statement of defence. For reasons best known to themselves, the submissions in support of the preliminary points dwelt more on one point, to wit, that the Honorable court has no jurisdiction to try the suit between the plaintiff and the defendants. Under such circumstances, I will confine myself to what has been submitted.

The issue before me is to determine whether an arbitration clause in the contract can operate to oust jurisdiction of this court. It is not disputed that the parties entered into an agreement by which, among other things, they had subjected themselves to arbitration in the e vent a dispute arose from that agreement. Under such circumstances, can the parties now come before this court to seek remedy? First and foremost, let me state emphatically that, courts would normally respect and give effect to the intentions of the parties to an agreement that in the event of a dispute between them they must go to arbitration.

In this present case, the parties have agreed that should amicable settlement of a dispute or breach fail, the matter would be "referred to and finally settled by arbitration." When the dispute in fact occurred between

the parties, the plaintiff came straight to this court to file a suit without recourse to arbitration as had been agreed. It is now that the defendants, argue that, this Honorable court does not have jurisdiction to entertain this dispute, which should have been referred to arbitration in Mauritius. In filing the suit in court without reference to arbitration, the plaintiff clearly breached clause 9 of the agreement which relates to arbitration. It seems, however, that, such a course as was followed by the plaintiff is anticipated by section 6 of the Arbitration Act Cap 15 of the Laws. For clarity, section 6 of the Arbitration Act is hereby reproduced:

> *"6. Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceeding against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings."*

I have noticed the wording of section 6 of the Arbitration Act that, the interested party may apply for arbitration after the filing of the suit in court but before the written statement is filed. The application can be made at any time after the filing of the suit. There are several reported cases in which a party to a submission went to court without going to arbitration and often the question has been what remedy if any, the other party to the submission could have. In the case of **Motokov V. Auto Garage Limited and Others (1970) EA 249 (HCT)**, a party to a submission to arbitration disregarded the underlying to submit to arbitration and filed a suit straight in court. There was an application for stay under section 6 of the Arbitration Act. The defence was objected to the grant of stay for reasons that the plaintiff had taken *"a step further in the proceedings"* and was therefore debarred from asking a stay.

In the case at hand I am relieved that, both counsels are agreed as to the guiding principles in jurisdiction of the Court in cases in which a contract contains a submission to arbitration clause. If by their contract, parties agreed that in the event of conflict, the dispute should first be referred to arbitration, then, the Court will generally give effect to their intention provided the defendant will have taken no step in the process and is willing and ready for arbitral proceedings but granting or refusing to give an order for stay is within the discretion of the Court which should however be exercised judicially. And, regarding the burden of proof, it is on the opposing party to establish that the effects of the arbitration clause should be departed from. This principle has been amply dealt with **in CC No.211**

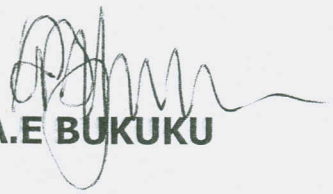
of 2001 Ramada Investment Ltd V. Engen (T) Ltd; Engineers & Builders V. Sugar Development Corporation (1983) TLR 13; Norsad Fund V. Tanzania Investment Bank HC, Civil Case No.36 of 1997 to mention a few.

From the above foregoing, it is my considered opinion that, the only remedy available to the defendants at this juncture lies in section 6 of the Arbitration Act as cited, that is, they were supposed to have applied for stay of the proceedings at the appropriate time instead of taking a step in the proceedings by filing a written statement of defence. As was held in the case of **Motokov v. Auto Garage (supra),** a step in the proceedings means any application to the court for an order in respect of the proceedings. One can move further and hold that, any application to a court for an order in respect of the proceedings can be described as a step in the proceedings.

It is obvious that, in this particular case, the plaintiff has chosen to sue in court instead of pursuing arbitration under the agreement which was equally open to him. The defendants did not apply for stay of the proceedings and for an order for the parties to submit to arbitration as per their agreement. Instead, the defendants filed their written statement of defence which in my view, was *"a step in the proceedings"*. They were supposed to have desisted from taking a step in the proceeding. It seems the defendants preferred to challenge the jurisdiction of this court and to the argument that, the suit was incompetent because of the agreement to

submit to arbitration. Had the defendants applied (in time) for stay of the proceedings on the basis of sanctity of the arbitration clause in the agreement, they might have been granted the prayer as the Court of Appeal of Tanzania has done in the case of **Construction Engineers and Builders Limited V. Sugar Development Corporation (1983) TLR 13.** Under such circumstances, the defendants have debarred themselves.

In the upshot and for the reasons which I have given herein, the preliminary point of objection is dismissed with costs.

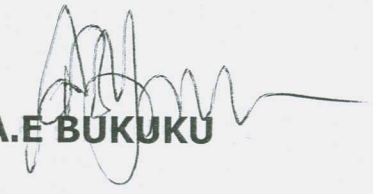


A.E BUKUKU

JUDGE

29 DECEMBER, 2011

Ruling delivered this 29th day of December, 2011 before Ms. Salah, Learned Advocate for the plaintiff and Mr. Shezada Walli, Learned Advocate for the defendants.



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JUDGE

29 DECEMBER, 2011

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