IN THE HIGH COURT OF TANZANIA

[COMMERCIAL DIVISION]

AT DAR ES SALAAM

COMMERCIAL CASE NO. 108 OF 2013

HAMMERS INCORPORATION COMPANYLIMITED	}	PLAINTIFF

VERSUS

THE BOARD OF TRUSTREES OF THE CASHEW NUT DEVELOPMENT TRUST FUND	}	DEFENDANT

RULING

[30.06.2014 & 31.07.2014]

Nyangarika, J

In this matter, I am being called upon by the parties in the above suit to determine two applications. The first application is an informal motion by the defendant for leave to be allowed to file defense. The second one is a formal application filed by the plaintiff for a default judgment.

However, I need to go a little bit back to cull up the facts of this case so as to tie up its history with the instant applications, which is now the subject matter of this ruling.

Happily, the facts are not complex as most of them were in fact not in dispute. I think, they may, in a nut shell, be recited as follows: The above suit was filed on 23.08.2013, but upon being served, the defendant, instead of filing written statement of defense, preferred an application for stay of proceedings. Therefore, the defendant had filed a petition for stay [i.e. Misc. Application No. 141 of 2013] pending arbitration, relying on arbitration clauses under sub-clauses 30, 31 and 32 contained in the 'original contract' executed by the parties on 02.01.2013.

However, the 'original contract' was later repealed and replaced by an "undertaking", which was also executed by the same parties on 25.02.2013. Therefore, the 'undertaking', has, instead, vested this court with non-exclusive jurisdiction to deal with any differences or disputes that may arise in the cause its execution.

The application for stay proceedings [Misc. Application No. 141 of 2013] filed by the defendant was refused by the court on 13.05.2014. But there is also an application filed on 05.11.2013

by the Plaintiff seeking for a default Judgment. In the application for default Judgment, the plaintiff want this court to grant a Judgment in default in its favour because there is no written statement of defense filed by the defendant within the prescribed time.

On the other hand, Mr. Goodluck P. Chuwa and Honourable Taslima, learned counsels, on behalf of the defendant, had made an oral application before me that the application for default judgment should be dismissed with cost and the defendant should be given twenty one (21) statutory days within which to file written statement of defense.

Mr. Goodluck P. Chuwa, while addressing me on some of the points in the informal application, first, argued that, technically, under Section 6 of the Arbitration Act, Cap 15 R.E. 2002, the defendant, apart from entering appearance is not allowed to file any pleadings or take any other steps in the suit save for applying for stay of proceeding.

Secondly, the counsel contended that there is a conflict of laws between Section 22 (1) of High Court (Commercial Division) Procedure Rules, 2012 [GN. No. 250 of 2012] and Section 6 of the

Arbitration Act [Cap. 15 R.E. 2002]. In his view, the counsel argues that such a conflict makes the Arbitration Act, [Cap. 15 R.E 2002], which is an Act of Parliament takes precedence over the Rules, which are normally made by the Chief Justice.

On emphasis, Mr. Nduluma Majembe, addressing the court on the matter, on behalf of the Plaintiff, contended that since there is no defense or witness statements filed by the defendant, this court should enter a default Judgment in favour of the plaintiff as the reasons for dismissal of the petition/application for stay show that there are no sufficient reasons why the written statement of defense and witness statements were not filed within the prescribed time as required by the law.

This ruling is therefore in respect of the different contending views mounted by the counsels. But for better of understanding of the controversy, it is better to quote in extenso the relevant provisions articulated by the learned counsels in support of their respective positions.

Section 6 of Arbitration Act [Cap. 15 R.E. 2002] reads:-

"where a party to a submission to which this party applies, or a person claiming under him, commences, a legal proceedings 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 reasons 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 do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings. [Emphasis mine]

Rule 22 (1) of the High Court of Tanzania [Commercial Division] Procedure Rules, 2012 [GN. No. 250 of 2012] reads:-

"Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 2 of rule 19, within the period of such extension, the court shall upon proof service and on application by the Plaintiff in Form No. 1 set out in the schedule to these rules enter judgment in favour of the Plaintiff".

Having examined these provisions and having heard the counsels debating on the subject, I have come unhappily because while at no time did the defendant' s counsel made a vivid comparison and contrast of these provisions so as to convince this court on the existence of such a conflict.

But for purposes of arguments and the way the matter was argued, Let me, though in a nutshell, have a look at these provisions.

Generally, it is well settled that, in the event, a party to an agreement with a clause to resolve disputes through arbitration decides to abrogate his undertaking and decides to take the dispute to the court, the other party is allowed at law to apply for stay of proceedings with a view to refer the matter to arbitration. This power, as said, is adumbrated under Section 6 of the Arbitration Act [Cap. 15 R.E 2002].

But, that right is qualified, in that, first, the applicant or defendant must not have filed defense or taken any steps in the proceedings.
Second, the applicant or defendant must show to the court that he was at the time when the proceedings were commenced ready and still remains ready and willing to resort to arbitration.

But, if I may also be allowed to add, in embarking to a stay order, the applicant or defendant, must show tendencies of

professionalism and good faith so as to prevent or avoid mischievous or delaying tactics, to stall or make impotent the process of disposal of commercial disputes.

Therefore, the court, may give time lines within which to access to arbitration [Nov Consult A/S versus Tan Roads, Misc. Commercial Application No. 10 of 2008 [HC] [Unreported] [considered].

It is a well settled principle that the Legislature is not expected to pass statutes that govern every conceivable dispute or situation and sometimes the language contained in statutes does not cover every possible situation.

It is also understandable that statutes may be written in broad terms and therefore the judicial opinion must interpret the language of relevant statute according to the facts and circumstances of to each particular case.

Further, regulations or rules passed by an administrative organ also fill in statutory gaps, and occasionally are called on to interpret the regulations or rules as well as statutes.

Though it is said that in a normal suit, court' s jurisdiction causes delay and escalation of costs, and should only play a supportive role in arbitration process, which is the norm in modern arbitral regimes, arbitration does not always possess the power to ensure that it is conducted properly and lead to a fair and just award as it sometimes ends up being challenged in court.

But here, there is no conflicts of statutes and the rules as alleged by the defendants counsels, because, the parties have entered into an 'undertaking' which has repealed and replaced the 'original contract' which was having an 'arbitration clause' .

Therefore, the present 'undertaking' , which is now the subject matter of this suit, deals with repayment of debt and management of the security for the credit facility, where it is clearly provided that any dispute arising out of the 'undertaking' is to be referred to the non-exclusive jurisdiction of the High Courtof Tanzania, Commercial Division.

The 'undertaking' , as said, has repealed and replaced the 'original contract with an arbitration clause with another clause that this court has non-exclusive Jurisdiction' in this dispute.

In other words, the arbitration clauses do not apply in the 'undertaking' agreed by the parties in the circumstances of this case.

Therefore, since both sides on their own choice executed the 'undertaking' which has no arbitration clause and chose on their own a forum to resolve their dispute, there was no contemplation of applying the provision of Section 6 of the Arbitration Act, Cap 15 R.E 2002 as suggested by the defendant' s counsel.

The 'undertaking', therefore, places a duty on this court to guarantee a fair trial by according the parties equal treatment, fair and reasonable opportunity' to present their respective cases.

Therefore, under the 'undertaking', without reverting to arbitration clause, each party was required to state the facts in supporting its claim or defense within the statutory period and submit documents or references to the evidence relied upon during trial within time as prescribed under the Civil Procedure Code, [Cap. 33 R.E 2002] and High Court (Commercial Division) Procedure Rules, 2012 [GN. No. 250 of 2012].

Another point is that failure to cite a specific enabling provision in an application whether formal or informal render such an application fatal and incompetent. This have now become a precedence in all courts as directed by the court of appeal in its various pronouncements and to cite a few are the cases of Fabian Akonnay v. Matias Dawite, Civil Application NO. 11 of 1997[CA-AR] [unreported], NBC v. Sadrudin Meghji, Civil Application NO. 20 of 1997[CA][unreported] and Rukwa Autoparts Limited v. Jestina Mwakyoma, Civil Appeal NO. 45 of 2000[CA][unreported].

Though the Defendant' s counsel did not cite any provision for moving this court for an order for leave to file defense, I think, may be, the counsel have in his mind, the provisions of Section. 14 (1) of Law Limitation Act, 1971 [Cap. 89 R.E 2002], Section 93 and Order 8 rule 1 of Civil Procedure Code,[Cap 33 RE 2002], which might be relevant to move this court, since the statutory period for filing defense appears to have long elapsed.

Therefore, if the defendant' s counsel was of the view that the provisions of rule 1 (2) of order 8 of Civil Procedure Code as well as Section 93 of CPC or Section 14 (1) of the Law of Limitation Act,[Cap 89 RE. 2002], would have applied in their motion, then, they were obliged to cite these provisions, which

mandates this court, within twenty one days of expiration of the prescribed period, to consider granting an extension of time within which to present written statement of defense.

But as said, it is now settled that non-citation of relevant enabling provision of the law, make an application, whether formal or informal, incompetent and bad in law subject to be struck out as in this case. There is a long line or chain of authorities from the court of Appeal, some of which I have cited earlier on to that effect.

But even if, I was to consider to exercise my discretionary powers of extending time within which to file defense, the criterion for such an exercise is on the availability of sufficient reasons to be adduced by the defendant.

The only reason now advanced here by the defendant is that there is a conflict of laws under Section 6 of Arbitration Act[Cap. 15 R.E 2002] and Rules 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012, [GN. No. 250 of 2012], which, I have already ruled that such a conflict does not exist as suggested.

After all, the defendant were represented by able team of two counsels, when an order for stay was refused on 13.05.2014 and it

was not until on 9.06.204, a period of 27 days, when an informal motion was made, which is now the subject matter of this ruling.

I expected the learned counsels for the defendant, to be on the lookout and if necessary to apply for an extension of time to present a defense immediately upon refusal of an order for stay of proceedings.

And if I am allowed to add, for an application of an extension of time within which to file defense to be granted, the defendant is required by law to account for every day of delay beyond the period limited and show reasons, which convincible explain away the delay [See Daud Haga V. Jenitha Ab Don Machafu Civil Reference No. 1 of 2000 [CA] and Daudi Mlenga V. Titus N. Makombe, Civil Application No. 93 of 1998 [CA].

The reason given by the defendant counsels that there was and still is, an application for default judgment filed by the plaintiff on 5.11.2013 pending which prevented from seeking leave to file defense, as they were afraid of circumventing that application, in my view, doesn' t hold water. The reasons for holding this views is that the position that the application is pending in this court has nót changed and had remain the same

throughout up to 9.06.2014 when this informal application was made.

Therefore, had the defendant's counsel waited until the application for default was disposed of, then ,the reasons now advanced would have somehow sounded to be considered by this court?

The position of the law, as I know it, is that , negligence, inordinate delay, an oversight and in action on the part of counsels is not sufficient reasons for extending time and on a number of cases in similar situation, this court and the court of appeal, has underscored that position of the law. I will cite in this case only few of those decisions. These decisions are Shah Herma, Bharmas and Brothers Versus. Santosh Kumar W/O J.A Bhola (1961) E.A. 679 (Eastern Africa), Kighoma Ali Malima Versus Abas Yusuf Mwingamo, Civil Application No. 5 of 1987 (CA) (Unreported), Institute of Finance Management and Simon Manyaki, Civil Application No. 13 of 1967, (CA) (Unreported), Maulidi Juma Versus Abdallah Juma, Civil Application No. 20 of 1988 (CA) [Unreported], Umoja Garage v. National Bank of Commerce, Civil Application NO.26 of 1996[CA][unreported] and Paul Martin v. Bertha Anderson, Civil Application NO.7 of 2005[CA][unreported].

In our case at hand, the defendant has purportedly proceeded to halt the suit by presenting an application for stay of proceeding by following the process prescribed under Section 6 of the Arbitration Act, Cap. 15 RE 2002, but then, for the court to stay on a presumption of arbitration clause, which is nowhere in the 'undertaking' duly executed by the same parties is untenable without a good cause.

The oral motion appears to suggest that the defendant now want to participate in the same proceedings they wanted to be stayed by filing defense on the pretext that there were not allowed by then to present the same or taking any other steps in these proceedings. This clearly demonstrates or shows that it is an afterthought as the defendant may be held to be boiling hot and cold .

It is well understood by counsels that in any matter it is vital for the parties and their counsels to practice professionalism and show good faith to the court as well as respect the timelines set out by the law and the rules for expeditious disposal of Commercial disputes.