IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 48 OF 2016

CHOBO INVESTMENT COMPANY LIMITED ..... APPLICANT

VERSUS

MTI INVESTMENT LIMITED ..... RESPONDENT

15th June & 3rd November, 2016

RULING

MWAMBEGELE, J.:

The present application has been taken under the provisions of section 6 of the Arbitration Act, Cap. 15 of the Revised Edition, 2002 and any other enabling provision of law seeking an order for, *inter alia*, stay of proceedings of Commercial Case No. 24 of 2016. The application has been supported by the affidavit of John Chobo; Managing Director of the applicant company and resisted by the counter-affidavit of Carolyne Jackob Muro, an advocate of this court and courts subordinate hereto except for the Primary Court.

The application was argued on 15.06.2016 during which both parties were represented; the applicant and respondent were advocated by Mr. Sifael Muguli and Ms. Carolyne Muro, both learned counsel respectively. The learned counsel for the parties had earlier filed skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012. Both learned counsel for the parties sought to adopt

the affidavit and counter-affidavit (as the case may be) and their respective skeleton arguments.

Arguing in support of the application, Mr. Muguli, learned counsel submitted that they are praying to have the proceedings in Commercial Case No. 24 of 2016 stayed pending their taking the dispute to arbitration in compliance with the clause in the agreement which requires them to submit themselves to arbitration in case of any dispute between them. That, when they were in the process of referring the matter to arbitration, the respondent had already filed Commercial Case No. 24 of 2016. He added that they also had received Annexture EA 2 to the application telling them that the arbitrators had been appointed. The learned counsel submitted further that they had satisfied the two conditions under section 6 of the Arbitration Act which requires an applicant to show that he was willing to participate in the arbitration at the time of filing the suit and that there is no means of delaying the arbitration process. He added that the process of referring the matter to arbitration has been frustrated by the respondent not replying to their letter of 21.01.2015; Annexture EA3 to the affidavit supporting the application. To buttress his arguments, the learned counsel cited ***IPTL Vs VIP Engineering and Marketing Ltd*** [2004] TLR 372 and ***EA Breweries Ltd Vs GMM Company Ltd*** [2002] TLR 12.

Ms Muro, learned counsel for the respondent strenuously opposed the application. She had one main reason for that opposition; that the respondent made every possible effort to have the dispute between the parties arbitrated pursuant to the Cooperative Agreement between them but that the applicant blocked making it impossible to proceed with arbitration. She submitted that the respondent notified the applicant that it is proceeding

to arbitration to the Tanzania Institute of Arbitrators (TIArbs) and sent the relevant note by courier service but that that notice was never replied. Ms. Muro added that it is not true that they neglected to answer the applicant's letter of 21.01.2016; they replied via email of 25.01.2016 (Annexture D to the counter affidavit).

The learned counsel added that on several occasions they made follow-ups with the applicant's counsel by phone calls and emails without success. She insisted that the applicant has been blocking the arbitration process and cited ***Guest and Chrimes Vs NUWA*** [1998] TLR 135 in which it was held that a party must have shown willingness to have the matter arbitrated. She also cited ***Constructions Engineers Builders Ltd Vs DUCECO*** [1983] TLR 13, ***Tanzania Motor Services Ltd & PSRC Vs Mehar Singh*** Civil Appeal No. 115 of 2005 (unreported) and ***EA Power and Lighting Company Ltd Vs Kilimanjaro Construction Ltd*** [1983] KLC 392 to buttress her arguments.

Ms Muro, learned counsel added that section 6 of the Arbitration Act provides four conditions which must be satisfied before an application of this nature is granted:

i. Willingness and readiness to arbitrate which;

ii. The applicant must not have filed a Written Statement of Defence or must not have taken any step into the proceedings;

iii. Convenience of the parties; and

iv. Reasons to justify refusal to grant stay of proceedings.

She submitted that out of the four conditions above, the applicant has satisfied only one condition; the second. She stressed that the applicant has

not all along been willing and ready to arbitrate, it is no longer convenient for the respondent to continue waiting and that there are no justifiable reasons to grant stay of proceedings and thus prayed that the application be dismissed with costs.

Rejoining, the applicant's counsel reiterated that the applicant had all along been and was still willing to arbitrate only that the letter of 21.01.2016 was not replied. He added that they were not taken on board in the process of choosing arbitrators and that their concerns were not addressed by the respondent rushing the arbitration process.

I have anxiously considered the rival arguments by both learned counsel. Happily, the learned counsel for the parties are at one that there is an arbitration clause in the Cooperative Agreement between them. The same is found at Clause 7 of the Agreement. They are also at one, I think, that the dispute ought to have been referred to arbitration first before a resort could be made to this court. While the applicant's counsel states that his client has all along been ready for arbitration and wrote the respondent a letter to that effect which received no response, the respondent avers that the applicant has been blocking efforts of arbitration and that the letter was responded by email.

I have seen the letter dated 21.01.2016 by the applicant which the applicant's counsel sent the respondent and Ms. Muro, learned counsel acknowledges in her submissions to have received it. I have seen the email of 25.01.2016 which was a reply to the said letter. Mr. Muguli for the applicant maintains that they never received the response to that letter suggesting, I think, that they never received the email without any further detail.

Ms. Muro, learned counsel has also argued with some force that the applicant has been blocking all the efforts by respondent to have the dispute arbitrated as per the arbitration clause in the Agreement. These arguments on this point have been made at paras 4 through to 10 of the skeleton arguments. However, respectfully, I do not think the learned counsel for the respondent has sufficiently explained how the applicant has been blocking the arbitration process.

The only assertion by the respondent on how the applicant blocked the respondent's efforts for arbitration is that no response was ever made to the email of 25.01.2016. Communication by email is one of the modes communication allowed by the Rules of this court. The applicant is well aware of this as the letter the counsel wrote to the respondent's counsel on 31.12.2015 intimated to her that they were advocates for the applicant and asked them to channel their communications through the emails and correspondences shown in that letter. It is surprising therefore why the applicant's counsel claims to have not received any response to their letter of 21.01.2016. However, as there is no proof that the applicant's counsel received the said email and in further view of the fact that the respondent has not sufficiently brought to the fore enough material to verify the applicant's blocking the efforts of having the dispute referred to arbitration, I give the applicant's counsel a benefit of doubt and take that they might have not received the email under discussion. As the applicant is ready for reference of the dispute to arbitration, I think it will all be fair to allow the present application so as to pave way for the process of arbitration.

In the final analysis, this application is allowed. Commercial Case No. 24 of 2016 is stayed pending reference of the dispute between the parties therein; applicant and respondent, to arbitration. No order is made as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 3rd day of November, 2016.

J. C. M. MWAMBEGELE
JUDGE