IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 95 OF 2022

ORYX ENERGIES TANZANIA LIMITED.....PLAINTIFF

VERSUS

MO ASSURANCE COMPANY LIMITED.....1st DEFENDANT

ENCOD LIMITED ..... 2ND DEFENDANT

RULING

A.A. MBAGWA J.

This is a ruling following a preliminary objection on point of law raised by the 1st defendant's counsel to the effect that the suit is prematurely before this court for want of reference to arbitration.

The plaintiff, ORYX ENERGIES TANZANIA LIMITED instituted the suit against the defendants jointly and severally for the following orders;

1. Payment by the 1st and 2nd defendants jointly and severally of the sums of TZS 390,207,000/=

2. Interest at the rate of 21% per annum on the said sum of TZS 390, 207,000/= from 6th November, 2021 to the date of judgment or sooner payment
3. Interest at the court rate on the judgment amount
4. The defendants jointly and severally pay the costs of this suit.
5. Such further orders and reliefs which this Honourable Court may deem just and equitable to grant.

The basis of the plaintiff's claim is non-payment by the defendants of the petroleum products which the plaintiff supplied to the 2nd defendant, ENCOD LIMITED.

According to the plaint, the plaintiff and 2nd defendant entered into agreement titled 'Wholesale Contract for Supply of Petroleum Products'. The 1st defendant, MO ASSURANCE COMPANY LIMITED stood as a guarantor by issuing a performance bond in favour of the 2nd defendant.

It is the plaintiff's contention that the plaintiff supplied the petroleum products to the 2nd defendant but the latter failed to make payment within fourteen (14) calendar days contrary to the contractual terms. As such, the outstanding payment stood at TZS 390,207,000/= as of 6th November, 2021.

The plaintiff issued formal demand notice to the defendants to remedy the breach but no avail hence she instituted the present suit.

As hinted above, the 1st defendant's counsel one Mr. Peter Mwakabungu raised an objection to the effect that the suit was brought to court contrary to the arbitration clause contained in the agreement (Annexure P1 to the plaint). Consequently, this court scheduled the matter on 14th February, 2023 for the parties to address the court on the preliminary objection.

On the hearing day, the plaintiff was represented by Norah Marah, learned advocate, on the one hand. Mr. Peter Mwakabungu, learned advocate represented the 1st defendant whilst Denis Mwesiga and Cecilia Mrisho appeared for the 2nd defendant, on the other hand.

Submitting in support of the preliminary objection, Mr. Mwakabungu argued that, the suit emanates from the agreement to wit, Wholesale Contract for Supply of Petroleum Products which contains a requirement to refer the matter to arbitration under clause 11 (1), (2), (3) and (5). He lamented that plaintiff ought to refer the matter to arbitration before instituting the suit at hand. The counsel was thus opined that the suit is incompetent and, therefore liable be struck out with costs.

Mr. Mwesiga, on behalf of the 2nd defendant concurred with submission by Mr. Mwakabungu. He, like Mwakabungu, urged the court to strike out the case with costs.

Responding, Ms. Norah Marah, learned counsel for the plaintiff submitted that the 1st defendant is not a party to the principal agreement between the plaintiff and 2nd defendant. She elaborated that the performance bond which binds the 1st defendant should be treated as an independent contract from the wholesale agreement (Annexure P1 to the plaint). Ms. Norah expounded that the performance bond is only applicable to the extent that it relates to clause 4.3 of the principal agreement which addresses issues of recovery measures. She concluded that the above-mentioned clause entitles the plaintiff to institute the proceedings against the defendants.

In the alternative, Ms. Norah submitted that in case this court is pleased to strike out the matter with costs, she prayed the court to order the defendants to pay the plaintiff the costs it incurred pertaining to the counter claim.

I have keenly heard the rival submissions along with a thorough appraisal of the pleadings. From the pleadings as whole, it is common cause that the borne of dispute is failure by the 2nd defendant to pay for the petroleum

products supplied to her on credit by the plaintiff. In other words, the plaintiff is suing the defendants for breach of contract (Wholesale Contract for Supply of Petroleum Products) between the plaintiff and 2nd defendant. In view thereof, the dispute in this suit emanates from the contract between the plaintiff and the 2nd defendant (Annexure P1 to the plaint) which contains arbitration clauses.

Clause 11.3 of the agreement provides;

> *'In the event that it is not possible to resolve the dispute informally within the time period referred to above, the dispute will be referred to and determined by arbitration in terms of the International Chamber of Commerce Rules of Arbitration'.*

Further, clause 11.5 reads;

> *'Save to the extent that this clause provides to the contrary, neither Party shall be entitled to institute any legal proceedings against the other Party in connection with any dispute unless and until such dispute has been submitted to arbitration in terms of this clause and such arbitration proceedings have been concluded'*

In this case there is no gainsaying that the matter was not referred to the arbitration nor did the plaintiff tell the court any circumstances falling under the exception provided under clause 11.5. Further, it is uncontested that the

dispute at hand is in connection to the wholesale contract for supply of petroleum products.

Section 15 (4) of the Arbitration Act No. 2 of 2020 prohibits institution of cases which ought to be referred to arbitration. Although the provision enjoins the court to stay the proceedings pending reference to the arbitration, it has been the practice of this court to strike out cases which are brought to the court in violation of arbitration clause. See **Petrofuel (T) Limited vs Market Insight LTD**, Misc. Commercial Cause No. 07 of 2022, HC (Commercial Division) at Dar es Salaam. This is due to the fact that the court enjoys inherent powers to issue any consequential order which it deems fit and just in accordance with the circumstances of this case. Staying the proceedings inordinately would unnecessarily cause a vicious circle of case backlogs.

That said and done, I uphold the preliminary objection and consequently strike out the case with costs. I have arrived at the decision to order costs because the plaintiff's counsel was initially alerted on the anomaly by the defendant's counsel but she adamantly insisted that the objection was devoid of merits thereby necessitating the hearing and composition of this

ruling. Thus, parties are directed to refer the matter to arbitration as agreed under clause 11 of the contract.

In the upshot, this matter is hereby struck out with costs and the plaintiff should bear the costs.

It is so ordered.

Dated at Dar es Salaam this 17th May, 2023.

A.A. Mbagwa

JUDGE

17/05/2023