

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 102 OF 2017**

**NATIONAL FOOD RESERVE AGENCY (NFRA)..... PETITIONER  
VERSUS  
RUBUYE AGROBUSINESS COMPANY LIMITED.....RESPONDENT**

**RULING**

Date of Last Order: 16/04/2024

Date of Ruling: 17/04/2024

**MKEHA, J:**

On 4<sup>th</sup> April 2017 the petitioner filed this matter in court for the following orders:

1. An order compelling the respondent to submit to arbitration;
2. That, this Honourable Court be pleased to appoint an arbitrator who would have the like powers to act in the arbitration and make an award as if he had been appointed by consent of all parties and
3. Costs.

The genesis of this matter according to the petition is that, the parties herein executed a Lease Agreement on 1<sup>st</sup> February 2016. The said Lease Agreement contained an "Arbitration Clause". The Arbitration Clause was to the effect that in case of dispute between the parties then it would be referred to arbitration in accordance with the laws of Tanzania, Arbitration Act [Cap. 15 R.E. 2002]. When the dispute arose, the respondent was unwilling to propose an arbitrator, hence this petition.

The Petition was brought under section 8 (2) of the Arbitration Act [Cap. 15 R.E. 2002], Rules 5 and 10 of the Arbitration Rules, as well as section 2(3) of the Judicature and Application of Laws Act, [Cap. 358, R.E. 2002]. In line with this Petition, on 12<sup>th</sup> February, 2018 this court referred the parties herein to arbitration and appointed Hon. Retired Justice Mihayo to be the Arbitrator thereto. Further, this court stayed the proceedings in this matter pending final Arbitral proceedings.

In view of challenging the appointment of the said Arbitrator, the respondent lodged a Notice of Appeal before the Court of Appeal of Tanzania on 26<sup>th</sup> February 2018. For the reasons of the said Notice of Appeal and rejection by the respondent, the appointed Arbitrator (Hon. Retired Justice Mihayo) withdrew from the conduct of the arbitration via a

letter dated 10<sup>th</sup> April, 2018. However, on 27<sup>th</sup> September, 2022 the said Notice of Appeal was struck out for the Respondent's failure to institute the actual appeal. Following the striking out of the Notice of Appeal, the Petitioner moved this court through a letter dated 16<sup>th</sup> November 2023 requesting revival of this matter. For unknown reasons, this letter was not timely brought to the attention of the court.

When the court became aware of the said letter, the matter was scheduled for directives on 16<sup>th</sup> April, 2014. Whereas the Petitioner was represented by Ms. Neisha Shao and Mr Karoli Chami learned State Attorneys, the respondent was absent, despite being aware that the matter had been fixed to come up on that day for directions.

Submitting for the Petitioner, Ms. Shao learned State Attorney prayed for this court to issue directives and rule upon Hon. Mihayo's letter of withdrawal in the arbitral proceedings after the striking out of the notice of appeal on 27<sup>th</sup> September 2022. The learned State Attorney was aware that the current Arbitration Act has no specific provision for the court's powers to appoint arbitrators as it was under the previous Arbitration Act. According to the learned advocate, the said powers are now vested within the Centre. Nevertheless, the learned State Attorney urged the court to

invoke its inherent powers under section 95 of the Civil Procedure Code so as to appoint an arbitrator if the withdrawal of His Lordship Retired Justice Mihayo, would be blessed.

From the records of this matter, it appears that, the appointment of the Arbitrator referred to hereinabove, was effected under section 8 of the Arbitration Act, Cap. 15 R.E. 2002. The said law is no longer in existence as it was repealed by the Arbitration Act [Cap.15, R.E. 2020].

As earlier on stated hereinabove, upon appointment of the Arbitrator the proceedings in this matter were stayed. The stay order is still intact to date. That means this matter is still pending in this court. Therefore, the paramount question is what is the status of the said proceedings under the current Arbitration Act?

Section 96 (4) of the Arbitration Act [Cap. 15 R.E. 2020] provides an answer to the question. The said provision of the law is to the effect that, any proceedings pending shall proceed in light of the current Act. That being the position, it is obvious that, pendency of this matter in court is subject to the provisions of the current Arbitration Act [Cap. 15 R.E. 2020].

The determinative issue is whether this matter is maintainable under the current Arbitration Act [Cap. 15 R.E. 2020]. It is apparent that, from the Arbitration Clause stated hereinabove, no arbitrator was proposed by the parties and upon occurrence of the dispute the respondent was not cooperative to appoint one. Under the repealed Arbitration Act, particularly section 8 (1) (a) this could be remedied by the court's powers to step in upon receipt of an application and appoint an arbitrator for the parties. However, such powers are no longer available under the current Arbitration Act. The said powers are now vested within the Centre under section 22 of the Arbitration Act. According to section 3 of the Arbitration Act, the word Centre is defined as the Tanzania Arbitration Centre established under section 82 and not the High Court.

Therefore, it is obvious that, this court is no longer vested with powers to appoint an arbitrator under the current Arbitration Act as it used to be under section 8 of the former Act. The only possibility for the court is to refer the parties to arbitration. Under the current arbitration law, this can only be done if there is a pending suit before the court and one of the parties to that suit requests for arbitration which is the subject of an arbitration clause. This position is well provided under section 14(1) of the

current Arbitration Act. However, that is not the case in the instant application as there is no pending suit between the parties before this court. That being said, the issue is answered in the negative. As such, this application is struck out for being unmaintainable in law with no orders as to costs.

Dated at DAR ES SALAAM this 17<sup>th</sup> day of APRIL 2024.



  
**C.P.MKEHA**

**JUDGE**

**17/04/2024**

**Court:** Ruling is delivered in the presence of Ms. Neisha Shao learned State Attorney for the Petitioner.



  
**C.P.MKEHA**

**JUDGE**

**17/04/2024**